

*Filed November 21, 2001*

**BEFORE THE HEARING BOARD  
OF THE  
ILLINOIS ATTORNEY REGISTRATION  
AND  
DISCIPLINARY COMMISSION**

In the matter of:

**JOHN JOSEPH HYNES,**

**Commission No. 00 CH 51**

Attorney-Respondent,

No. 6181978

**REPORT AND RECOMMENDATION OF THE HEARING BOARD**

The hearing in this matter was held on June 27, 2001 at the offices of the Attorney Registration and Disciplinary Commission, Chicago, Illinois before a panel consisting of David F. Rolewick, Thomas P. Young and Matthew Bonds. Mary T. Robinson, the Administrator, served as counsel for the hearing. The Respondent was represented by William J. Martin and Paul C. Gridelli.

**PLEADINGS**

The Administrator filed a one-count complaint against the Respondent, John Joseph Hynes on September 6, 2000 alleging that he provided a false response to a question on an application for appointment to the office of associate judge. The question asked whether the Respondent's professional conduct or ability had been the subject of comment, favorable or unfavorable in a written opinion by any judge, court or other tribunal. The application provided "yes" and "no" boxes. The Respondent checked the "no" box. The complaint charged that the Respondent's answer was false because his professional conduct had been the subject of comment by the Illinois Appellate Court in two criminal cases he had prosecuted while serving as an Assistant State's Attorney for Cook County, Illinois. The appellate opinions reviewed, among other things, the Respondent's use of peremptory challenges to prospective jurors who were members of racial minorities.

The Respondent was charged with engaging in the following misconduct: conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a)(4) of the Illinois Rules of Professional conduct; conduct which is prejudicial to the administration of justice, in violation of Rule 8.4(a)(5); and conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Supreme Court Rule 771.

In his answer to the complaint, the Respondent admitted many of the factual allegations regarding his prosecution of the two criminal cases which resulted in the appellate court opinions cited by the Administrator, but denied that his professional conduct had been the subject of comment in those opinions. He denied providing a false answer on his application for judicial appointment, denied that he had any reason to know the answer he gave was false and denied all charges of misconduct.

**EVIDENCE**

At the hearing the Administrator called two witnesses, including the Respondent, and introduced fourteen (14) exhibits. The Respondent testified on his own behalf and presented nine additional witnesses.

The Administrator's initial witness provided "context", "background" and "the criminal law on the use of preemptory challenges to exclude minority jurors." Randolph Stone, an attorney with experience in the area of criminal law and who serves as the current director of the Mandell Clinic at the University of Chicago Law School, explained the use of preemptory challenges to "strike" jurors in criminal cases and outlined developments in the past fifteen years with regard to that process. Mr. Stone summarized the 1986 Supreme Court decision in Batson v. Kentucky, 476 U.S. 79 (1986). (Tr. 12, 24-33).

He testified that in Batson the Supreme Court reviewed the use of preemptory challenges to excuse minority jurors in criminal cases and reaffirmed earlier cases which recognized that the Equal Protection Clause forbids a prosecutor to challenge potential jurors solely on account of their race. In a departure from previous authority, which required a defendant to show a systematic pattern of exclusion involving a number of cases over a period of time, the Batson Court stated that a defendant may establish a prima facie case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of preemptory challenges at the defendant's own trial. (Tr. 29-31).

Mr. Stone testified that Batson sets forth a three-step procedure for determining whether discrimination has occurred in a particular case. First, a defendant must establish a prima facie case of discrimination by showing that he is a member of a cognizable racial group and that the prosecutor has exercised preemptory challenges to remove members of the defendant's race from the venire. Second, once a prima facie showing is made, the burden shifts to the prosecutor to come forward with racially neutral reasons for excluding the jurors. Finally, he testified that the trial court would analyze the reasons to determine if they were racially neutral or if they were pretextual. Mr. Stone acknowledged a statement by the Illinois Appellate Court that no supreme court or appellate court has provided a definitive definition as to what is a race-neutral reason for excluding a prospective juror and therefore that determination is left to the discretion of the trial court on a case by case basis. (Tr. 32-33, 40).

Mr. Stone testified that the subsequent Supreme Court decisions, such as Powers v. Ohio, have further defined and explained the principles enunciated in Batson. In Powers v. Ohio, 499 U.S. 400 (1991) he opined, the Supreme Court held that a criminal defendant may object to race-based exclusions of jurors through preemptory challenges whether or not the defendant and the excluded jurors share the same race. Mr. Stone acknowledged that these decisions have spawned a "huge number of law review articles and scholarly debate about the implementation of Batson" and the difficulty of reconciling the character of preemptory challenges with the avoidance of racial discrimination. Mr. Stone stated, however, that cases subsequent to Batson have not questioned the underlying premise that excluding minority members of the venire for racial reasons constitutes racial discrimination. (37-42).

Mr. Stone testified that racial exclusion of prospective jurors has been challenged in numerous cases since the Batson decision but reversals of convictions based on a Batson violation have been fairly rare. He opined that there have been approximately twenty (20) published opinions of the Illinois reviewing courts reversing convictions because of a Batson violation. (Tr. 34-35).

Michael Toomin, a Judge of the Circuit Court of Cook County, Criminal Division, was called as a witness for the Respondent. He testified about the jury selection procedures used by judges and explained the process that occurs when a Batson objection is raised by defense counsel. He explained the procedure is to go to a side bar or the judge's chambers. He explained that the judge has little guidance but the judge must determine if there is a prima facie case. If the judge makes that determination he then must ask the party that challenged the juror to offer a reason why he or she made the challenge. He noted that prosecutors have to respond with race neutral reasons in a matter of minutes. Judge Toomin also testified that he was familiar with the Respondent's reputation in the community for honesty, integrity, truthfulness and veracity, fairness and ethical behavior and the Respondent's reputation as to all these characteristics was "excellent" and "the highest." (Tr. 193-196).

The Respondent testified. Concerning the specific issues raised in the Administrator's complaint, the Respondent stated that he was licensed to practice law in 1982 and began his practice that year as an Assistant State's Attorney in Cook County. He worked in several different divisions within the State's Attorney's office before being transferred to the Gang Prosecutions Unit in 1985. He was appointed supervisor of that unit in 1991 and remained in that

position until 1999. The Respondent stated that a large part of his job entailed attending and speaking at community meetings in minority neighborhoods. At these meetings, he attempted to explain the court system and encourage people to sit on juries. (Tr. 43, 240-245).

The Respondent testified that during his tenure in the gang unit, he represented the State of Illinois in People v. Morales. Edward Morales and Daniel Padilla, both Hispanic, were charged with murder and brought to trial in 1987. During jury selection the Respondent and David Sabatini exercised nine of their peremptory challenges to excuse prospective minority jurors, two of which were Hispanic, five African-American, one Arab and one Pakistani. Defense counsel requested that the court conduct a hearing to determine whether the prosecutors could provide race-neutral explanations for their peremptory challenges. The motion was denied by the trial judge because precedent at that time required that the defendant be a member of the same racial group as the excused venire member. After the motion was denied, the prosecutors challenged an additional two African-American jurors and another Hispanic juror. (Ad. Ex. 12; Tr. 46-49).

The Respondent explained that Mr. Morales was found guilty of murder and appealed his conviction. Although the appeal was dismissed in 1989, it was reinstated at a later date. One of the issues raised before the appellate court was whether Mr. Morales had established a prima facie case of the prosecutors' racially discriminatory use of peremptory challenges to exclude minorities from the jury who heard his case. In People v. Morales, No. 1-88-2812, 278 Ill.App.3d 1137, 699 N.E.2d 608 (1996) (unpublished order under Supreme Court Rule 23) the appellate court recognized that, at the time of his trial in 1987, Mr. Morales was required to show that the prosecutor exercised peremptory challenges to exclude members of his own race. The U.S. Supreme Court's intervening decision in Powers v. Ohio, however, eliminated the "same race" requirement. The appellate court decided, therefore, that Mr. Morales had standing to object to all of the peremptory challenges against minority jurors. The appellate court further held that the evidence established a prima facie case of discrimination by the prosecutors against African-American and Hispanic jurors. The court remanded the case to the trial court with directions to conduct a Batson hearing to determine whether the prosecutors could provide race-neutral explanations sufficient to rebut the prima facie case. (Admin. Ex. 2; Tr. 50, 64-66).

Upon remand to the trial court in 1997, the Respondent explained, the prosecutors provided their reasons for the peremptory challenges made years earlier. The Respondent testified that the reasons he offered, on behalf of the State, were based upon his review of the transcripts of the voir dire examination from the initial trial. The sitting judge, who was not the judge who had conducted the trial, determined that the State provided race neutral reasons for its peremptory challenges and therefore affirmed Mr. Morales's conviction. (Ex. Tr. 13, 14; Tr. 66-69).

The Respondent testified that Mr. Morales appealed that ruling, and on September 30, 1999 the appellate court issued its decision in People v. Morales, 308 Ill.App.3d 162, 719 N.E.2d 261 (1st Dist. 1999). The court found that, as to two of the jurors, the prosecutors failed to provide nonpretextual race-neutral explanations for their challenges. The appellate court reversed the decision of the trial court and remanded the case for a new trial. (Admin. Ex. 3; Tr.92-93).

The Respondent stated that during his assignment to the Gang Prosecutions Unit, he also represented the State of Illinois in its case against Johnny Walls and Charles Byrd. The defendants, both of whom were African-Americans, were brought to trial in 1988 on charges of murder. During voir dire examination of the venire, the Respondent and Thomas Hennelly, on behalf of the State, peremptorily challenged several prospective black jurors. On the defendants' motion for mistrial, the trial judge determined that a prima facie case of racial discrimination had been made. The prosecutors then provided the court with their reasons for excluding the minority jurors. The trial court determined that the challenges were made for trial tactic reasons and pursuant to gut feeling rather than for reasons of race. (Admin. Ex. 4, 11; Tr. 51-58).

The Respondent testified that the defendants were convicted of murder and appealed those convictions. In People v. Walls, 220 Ill.App.3d 564, 581 N.E.2d 264 (1st Dist. 1991) the court reviewed the reasons provided by the prosecutors and determined that the reasons given for challenging the black jurors were pretextual. The court found that the trial court's decision was clearly erroneous in finding that no discriminatory intent remained after the prosecutors proffered their rationale for excluding three of the five black venirepersons. The convictions were reversed and the case remanded for a new trial. (Admin. Ex. 4; Tr. 60-64).

The Respondent testified that in December, 1998, he completed an application for appointment to the office of associate judge. The application requested, among other things, information concerning the applicant's education, experience, community involvement and conduct. Part E of the application, entitled "Professional and Personal Conduct", included question 1(C) 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.)

The Respondent testified that he answered the question "No". Part E also posed questions as to whether the applicant's license or right to practice had ever been denied, revoked or suspended; whether the applicant had ever been formally censured, adjudged or held in contempt or otherwise disciplined by a court; whether the applicant had been the subject of governmental investigations or complaints to the ARDC; whether the applicant had ever pled guilty to or been convicted of a felony or misdemeanor; whether the applicant had ever been a party to, or otherwise personally involved in, any litigation; whether the applicant had failed to file income tax returns; and whether the applicant had filed a statement of economic interests. (Admin. Ex. 1; Tr. 73-79).

The Respondent testified that, at the time he completed his application in December, 1998, he was aware of the appellate court decision in the Walls case and the Rule 23 opinion in the Morales case. He did not list those opinions in response to question 1(C), however, because he believed that the question was directed at ethical or moral conduct. In the Respondent's opinion, neither Walls nor Morales condemned his ethical conduct or commented on his professional conduct. The Respondent acknowledged that his use of peremptory strikes to excuse minority members of a jury was "conduct" that he engaged in as a "professional" but explained that every act reviewed by an appellate court, whether it is an attorney's trial tactics, decisions or actions, falls under the broad rubric of "conduct." (Tr. 79-82).

The Respondent further acknowledged that racial discrimination by a representative of the State is illegal but, in his opinion, neither Walls nor the Rule 23 Morales opinion held that he racially discriminated against anyone. In Walls the court found that the State did not meet its legal standard of articulating reasons for the use of peremptory challenges. The Morales opinion held that the first step in the Batson analysis had been met in that a prima facie case of racial discrimination had been established. (Tr. 82-85).

The Respondent stated that, by not listing the appellate court opinions on his application, he did not intend to deceive anyone or conceal the existence of the cases. He explained that he considered question 1(C) in the context of the other questions in Part E which were directed at sanctionable conduct and discipline. He answered question 1(C) in good faith based on his honest belief that the appellate cases were not responsive to the question. (Tr. 249-257).

The Respondent testified that when he submitted his application, he understood that it would be reviewed by the nominating committee judges and that he would be interviewed by the committee. The Respondent acknowledged that on September 10, 1999 the Chief Judge of the Circuit Court of Cook County certified thirty (30) attorneys, including the Respondent, as candidates for appointment to the office of associate judge. The ballots, sent to the circuit judges on or about September 24, 1999, included a request for return no later than October 8, 1999. (Admin. Ex. 6, 7; Tr. 75, 90-92).

On September 30, 1999, prior to the ballot return date, the appellate court issued its second opinion in People v. Morales. The opinion reviewed the reasons offered by the State for the exclusion of minority jurors and found that the trial judge erred as to two of the nine who were challenged. The appellate court found the reasons given by the prosecutors were pretextual as to these two prospective jurors. The Respondent did not amend his application to include any reference to this new Morales opinion. The application, on its face, did not request that the applicant update the information supplied. (Admin. Ex. 3; Tr. 101-102).

The Respondent affirmed that the results of the election were announced on October 13, 1999 and he took his oath of office on November 1, 1999. On November 5, 1999 the Chicago Tribune reported that, prior to the Respondent's election, the appellate court had reversed a conviction in the Morales case because the Respondent discriminated

against minorities during jury selection. The article further reported that the Respondent failed to disclose the Walls and Morales cases on his application for associate judge. (Admin. Ex. 10; Tr. 93-95).

On the day following publication of the Tribune article, the Respondent testified, he authored a letter to the Justices of the Illinois Supreme Court in which he explained his reasons for not mentioning the Walls and Morales appellate decisions on his application. Concerning the Walls case, the Respondent pointed out that the case was tried less than two years after the Batson decision and a body of law had not yet been developed to give the trial courts and litigants guidelines for the analysis of these questions. Further, the appellate decision did not single out the conduct of the Respondent or his partner as being malicious. As to the Morales opinion, which post-dated his application, the Respondent again noted that the case was tried less than 18 months after the Batson decision and neither he nor his partner was named in the opinion. In the letter, the Respondent took serious exception to the Tribune's characterization of him as a "racist" and provided information concerning his community work with and service to minorities. He concluded his letter with an apology and an assertion that he did not intend to deliberately deceive the Court. (Admin. Ex. 10; Tr. 85, 100-104).

Subsequent to the Tribune article, other news stories reported various reactions to the Respondent's failure to disclose the appellate opinions on his application for associate judge. After the complaint was filed against the Respondent in this matter, he was reassigned to administrative duties. (Tr. 105-106).

Judge Robert C. Buckley, an Illinois Appellate Court Judge since 1978, testified that he authored both appellate court decisions in People v. Morales. He stated that the focus in an appellate case is whether there was trial court error and whether the error deprived a party of a fair trial. As to both Morales decisions, he stated that he did not intend to make an unfavorable comment about Respondent's professional conduct. He stated that "professional misconduct" refers to an action that is outrageous or that violates a moral code, such as baiting a judge into committing an error, hiding witnesses, misstating the record, borrowing money from clients, or committing sexual harassment. Judge Buckley agreed that discrimination against a juror or litigant by a lawyer is wrong but did not believe that any professional misconduct occurred in the Morales case. He stated that the prosecutors must provide race-neutral reasons on the spur of the moment and those reasons only became pretextual when the same race-neutral reasons were not used for another juror. He forcefully denied that he made a finding in either Morales case that the prosecution was guilty of racial discrimination. Judge Buckley characterized as "appalling" an interpretation of the Morales opinion which suggests it is a "written comment on the professional conduct of the attorney that proffers that basis for his striking the juror." (Tr. 118, 123, 127-128, 131-133, 137).

Judge Buckley stated that he read about the complaint against the Respondent in the newspaper and, when he subsequently met the Respondent at a judicial seminar, he told the Respondent that he did not intend to make a derogatory comment about the Respondent's professional conduct. Thereafter, he contacted the Respondent's counsel and informed counsel that he would welcome a subpoena to testify. Judge Buckley acknowledged that a list of opinions in which the trial conduct of a judicial applicant is discussed would be useful information for the judicial nominating committee to review. (Tr. 113-115, 136).

Numerous character witnesses, including several attorneys, a deputy superintendent of police and a circuit court judge testified to the Respondent's excellent reputation for truth, veracity, honesty, integrity and fairness. The Respondent was described by witnesses as being a "straight shooter", "compassionate", "widely respected", and having "excellent judgment". Richard Devine, State's Attorney for Cook County, further noted that the Respondent tackled very difficult cases and did an outstanding job. (Tr. 212-216).

The Respondent's involvement in community programs was attested to by two witnesses. Frances S. Melendez, founder of Mothers Against Gangs, served with the Respondent on former Governor Edgar's Commission on Gangs. She stated that she asked the Respondent to participate in community awareness and education programs relating to gang prevention and as a result the Respondent attended and spoke at numerous community meetings. State's Attorney Devine confirmed that the Respondent was heavily involved in community efforts to work on gang problems and crime prevention. (Tr. 160-166, 216-218).

Andrea Zopp, a former Assistant State's Attorney, worked with the Respondent at the State's Attorney's office. She stated that the Respondent was concerned about the lack of diversity within the gang unit and worked to recruit

minority lawyers. She observed that the Respondent had shown great sensitivity to minority victims and their families. (Tr. 232-234).

Deputy Superintendent Harvey Radney, a thirty-two year veteran of the Chicago Police Department and former commander of the Gang Investigation Section for the Police Department, testified about his close professional relationship with the Respondent and about the Respondent's involvement in community meetings and community activities in high gang crime areas of Chicago. Mr. Radney testified he was well aware of the Respondent's reputation for honesty, integrity, truth and veracity. He testified that he has "never known Jack Hynes to tell [Radney] something he [Hynes] knew not to be true." Radney further testified:

My opinion of it is that Jack Hynes is what I term a straight shooter. He will tell you something the way it is, and that's the way it is. He does not shade issues or try to back-door positions, or anything like that. He is a very straightforward individual. And my opinion of him runs pretty much the same as those that I've talked to about Jack, sharing that same opinion of him.

(Tr. 142-150).

Assistant Public Defender Michael Brennock, an experienced criminal trial defense attorney who has known the Respondent for about 16 years, confirmed the Deputy Police Superintendent's testimony about the Respondent's high reputation for honesty and integrity in the community. Mr. Brennock went on to testify that the Respondent is "one of the fairest fellows that I've encountered over at the State's Attorney in 20 years of doing it, 23 years." (Tr. 151-158).

Attorneys Terry Gillespie and Ronald Safer also testified. Mr. Gillespie is in private practice as a criminal defense attorney in Chicago. Mr. Safer is the former Criminal Chief of the United States Attorney's Office in Chicago. Both are qualified, experienced criminal law practitioners. They both were forceful in their testimony about the Respondent's reputation for truth, veracity, honesty and integrity and his involvement in the communities of Chicago with the highest incidence of gang crimes. (Tr. 170-176, 200, 205-208).

## FINDINGS AND CONCLUSIONS

In attorney disciplinary proceedings the Administrator has the burden of proving the charges of misconduct by clear and convincing evidence. *In re Ingersoll*, 186 Ill.2d 163, 710 N.E.2d 390, 393 (1999). Clear and convincing evidence constitutes a high level of certainty, which is greater than a preponderance of the evidence but less than proof beyond a reasonable doubt. *People v. Williams*, 143 Ill.2d 477, 577 N.E.2d 762 (1991).

The Administrator urges us to find that, by failing to disclose the Morales and Walls opinions on his application for judicial appointment, the Respondent engaged in the following misconduct: dishonesty, fraud, deceit or misrepresentation, conduct which is prejudicial to the administration of justice, and conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute.

As a preliminary matter we briefly address the subject of the Commission's jurisdiction over the present proceedings only because it was a matter addressed by the Administrator. The Respondent did not raise the question. In *In re Witt*, 145 Ill.2d 380, 583 N.E.2d 526 (1991) the Supreme Court stated that judicial robes have no power to shield a judge against discipline for conduct which falls outside of the scope of his or her duties in administering the law. Since the Respondent's completion of the application for judicial appointment preceded his appointment as judge and had no connection with his exercise of his "official duties" as a judge and since the Illinois Constitution requires all judges in Illinois to be licensed attorneys (Ill. Const. 1970, art. VI, § 11), we find that the Attorney Registration and Disciplinary Commission has authority to conduct proceedings in this matter. The Respondent's selection as an associate judge does not bar inquiry into his conduct as a lawyer.

The Administrator suggests that we employ a two-step analysis to determine whether the Respondent engaged in misconduct. First, we must ascertain whether the appellate opinions were of a nature as to properly be identified in response to Question 1(C) on the application. If that question is answered in the affirmative, the second step requires an examination of the Respondent's state of mind to determine whether he purposefully failed to disclose opinions

which he knew were called for by the question.

We agree with the Administrator's analysis and first direct our inquiry into whether the appellate opinions fell within the scope of Question 1(C). That question asked whether the applicant's "professional conduct or ability [has] been the subject of comment, favorable or unfavorable, in a written opinion of any judge, court, or other tribunal."

The Administrator argues that these appellate opinions are responsive to Question 1(C) because the opinions found that the prosecutors engaged in racial discrimination by using peremptory challenges to strike prospective minority jurors. Since racial discrimination is illegal, the finding by the courts were an "unfavorable comment" on the Respondent's conduct. We find to the contrary that the opinions of the appellate court in Walls and Morales do not find that the prosecutors engaged in illegal racial discrimination. The language of the cases is clear but also reinforced by the testimony of Judge Buckley who explained that the appellate court looks for errors by the trial court. The errors by the trial court found in the Walls and the Morales cases were that the trial court failed to properly rule as pretextual the reasons given for challenging minority veniremen and, in Morales I, that the trial court erred in not sustaining the defense's objection claiming discrimination in use of peremptory challenges. If the appellate cases are comments on anyone's professional conduct, they are comments on the professional conduct of the trial judges. The language of these cases is not of such a nature as to cause a reasonable person to conclude that they are unfavorable comments on the professional conduct of the prosecutors. The trial conduct of attorneys and prosecutors in particular is frequently the subject of post-trial proceedings and appeals. The conduct or behavior that is challenged involves an attorney's activities during the trial, his interaction with witnesses and his handling of evidentiary matters. Judge Buckley in his testimony provided specific examples of outrageous conduct that he viewed to be professional misconduct by trial attorneys. It is such conduct when commented on by the appellate court that becomes the subject of a positive response to question 1(C) of the application. Judge Buckley included baiting a judge to committing an error, hiding a witness or misstating the record as examples. Opinions discussing such conduct would not be disclosed in response to other questions on the application. Those questions inquire into specific consequences experienced by the applicant such as sanctions. The opinions that we have in mind that are responsive to Question 1(C) comment directly and unfavorably upon specific described acts. For example, in People v. Piscotti, 136 Ill.3d 420, 483 N.E.2d 363, 380 (1st Dist. 1985), a concurring opinion cited to "prosecutorial transgressions" committed by the Assistant State's Attorney by name. The opinion names the prosecutor and recounts, in part:

[the identified prosecutor] conducted an extensive, highly prejudicial cross-examination of the defendant regarding his friend, Jerome Bokina. During this cross-examination, [the named prosecutor] inferred, in the total absence of any evidentiary support, that the defendant was responsible for Bokina's failure to appear as a State's witness. In addition, [the named prosecutor] repeatedly asked the defendant his opinion of the veracity and credibility of the State's witnesses. This was highly improper. (citation omitted). Assistant State's Attorneys [the named prosecutor] and [the other named prosecutor] in their opening and rebuttal jury arguments infelicitously called the jury's attention to the deceased's surviving family and fiancée. (citation omitted).

The concurrence emphasized that the law "abhors and resoundingly condemns" the practices entered into by the prosecutors. See also People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078, 1084 (1st Dist. 1984) ("The prosecutor's [numerous improper remarks] in this case read like a veritable hornbook of 'do not's.' They were opprobrious and inexcusable, thwarting and wrecking the State's otherwise well-prosecuted and strong case."); People v. Meccia, 275 Ill.App.3d 123, 655 N.E.2d 1113, 1116 (1st Dist. 1995) (assistant state's attorney's improper interrogation of defendant flagrantly disregarded defendant's constitutional rights, was in direct contravention of trial court's directions, constituted egregious misconduct and shocked conscience of the court.)

We have little doubt that anyone reading the full text of the foregoing opinions would conclude that in each case the court comments on the professional conduct of an attorney. The transgressions are specifically identified and the conduct is condemned in such a way as to clearly reflect on the individual attorney's character rather than the trial judge's errors.

Other opinions, however, are not responsive to Question 1(C). We have reviewed cases, both civil and criminal, involving conduct and even as to many of those cases, where an attorney's conduct is specifically at issue, we have

some difficulty determining that those particular opinions fall within the ambit of Question 1(C). Admittedly, in the broadest sense, any action taken by an attorney in the course of a lawsuit is "conduct" and any discussion by a court with respect to a specific action or decision by the trial court is a "comment" directly or indirectly on the attorney's conduct. However, were we to give such an expansive interpretation to Question 1(C), an applicant would be expected to list and describe virtually each and every one of his or her cases that resulted in a written opinion. In the case before us the Respondent testified that he represented the State in approximately 50 jury trials and 300 bench trials. We assume that a considerable number of those cases resulted in written opinions at some stage of the proceeding. We find that the drafters of Question 1(C) did not intend that each such opinion be disclosed.

We find that a reasonable interpretation of the question calls for those opinions in which an attorney's behavior, rather than the trial court's rulings and decisions, has been specifically focused on as an issue and a judgment was rendered in a manner which clearly and unmistakably singled out the attorney's personal character or conduct.

In clear contrast to the cases we have noted above, the court in Walls, after discussing the prosecutors' reasons for asserting peremptory challenges, found that they failed to rebut the prima facie case of racial discrimination as to three of the prospective jurors. The court did not criticize the Assistant State's Attorneys for their failure to satisfy the burden or suggest that any moral or ethical implications resulted from their failure. No findings or comments were made concerning the character of the individual attorneys.

Also, in the Morales Rule 23 opinion, the appellate court did not make a determination on the ultimate issue of racial discrimination but remanded the case so that the trial court could conduct a hearing to determine whether the prosecutors could provide race-neutral explanations to rebut defendant's prima facie case. To the extent the conduct of the prosecutors was discussed, their actions were not criticized as being immoral, unethical or improper. There is no finding the prosecutors engaged in racial discrimination. In the subsequent Morales opinion, the appellate court discussed the prosecutors' proffered reasons for exercising peremptory challenges and found, as did the Walls court, that they had not met their burden of rebutting the prima facie case as to every challenged juror. Although the court did state that "purposeful race discrimination in selection of a jury violates a defendant's right to equal protection" as a principal, the court focused on the error of the trial court in failing to find the reasons given were pretextual as to two of nine challenged minority jurors. The opinion does not focus on the conduct of the prosecutors nor does it find the Respondent's conduct to be racially discriminatory.

Thus, neither the Walls nor the Morales decisions contain any direct condemnation of the Respondent's character or actions nor does either opinion specifically cite him for unprofessional or improper conduct. Rather, the opinions focus upon the action taken by the trial court and whether there was factual support for the trial court's decision. We make this finding without regard to Judge Buckley's testimony, which we consider to be supportive only. The author of both Morales opinions confirmed that his task was to determine whether the trial court erred and whether the error deprived either party of a fair trial. The focus of the opinions and the language used, therefore, distinguish the appellate opinions at issue in this case from those previously cited cases in which courts explicitly recite and condemn the conduct of an attorney. We conclude that the Walls and Morales decisions are not responsive to Question 1(C) of the Respondent's application.

We recognize that there will be disagreement as to the appropriate response to be given to Question 1(C). Our esteemed colleague, we understand, has in good faith concluded that the appellate opinions should have been identified in response to that question. While we respect his decision, we consider that the disagreement in this case suggests a lack of precision in Question 1(C) of the application. If a three member panel, after hearing arguments by both parties and pondering the question at length, is unable to reach a unanimous agreement as to the scope of the question, we cannot fault an applicant for construing the question in a way that differs from the interpretation urged by the Administrator.

Since we have found that the appellate opinions are not responsive to Question 1(C), we do not have to reach the Administrator's second issue whether the Respondent knowingly failed to disclose those opinions. However, we found the Respondent to be an extremely credible witness who was both forthright and candid in his testimony. We are convinced that he was genuinely astonished by the interpretation given to Question 1(C) by the Administrator. We were also impressed with the character witnesses who attested to the Respondent's integrity and truthfulness and to his willingness to take his job and his talents beyond the confines of his office and out into the communities that

are plagued by gang violence. These factors would weigh heavily in our minds were we to proceed to the second step of the analysis, and we would be disinclined to find his testimony on the subject incredible.

We cannot conclude our report and recommendation in this case without comment on the testimony of Mr. Stone. The Respondent's counsel did not object to his testimony and apparently the decision to have him testify was made by the Administrator shortly before the hearing commenced. However, the Administrator introduced the testimony to advise the panel on the law. (Tr. 12). The purpose of the hearing is to adduce evidence regarding facts to permit the panel to determine facts, apply the law and recommend appropriate sanctions. See Supreme Court Rule 753. It is well settled that while opinion testimony by experts may be appropriate to assist the finder of fact in determining facts in complicated factual settings, there is no basis for legal opinion to assist the panel in determining law. LID Associates v. Dolan, 2001 WL 995001, (Ill. App. 1st Dist. August 30, 2001). The opinion testimony of Mr. Stone was inappropriate and objectionable. The factual circumstance under which a prosecutor is required to present race neutral, nonpretextual reasons for challenging a member of a jury venire can easily be presented to the panel through the testimony of an experienced judge, prosecutor or defense attorney. That factual setting was well presented by the testimony of Judge Toomin on behalf of the Respondent.

Because we have found that the Respondent had no duty to disclose the Walls and Morales opinions, we find that he did not engage in any misconduct by failing to list those opinions on his application for judicial appointment. We therefore recommend that the charges against the Respondent, John Joseph Hynes be dismissed.

DATED: November 16, 2001 [Filed November 21, 2001]

David F. Rolewick, Chair, with Thomas P. Young, concurring

MATTHEW BONDS, dissenting. [Filed November 21, 2001]

I respectfully dissent from the findings and recommendation of my fellow panel members. After reviewing Question 1(C) and reflecting upon its language, I conclude that the appellate opinions at issue in this case are responsive to that question and that they should have been disclosed by the Respondent.

I have one prefatory remark. This case is not about determining whether the Respondent is guilty of racial discrimination. The Administrator's complaint does not charge the Respondent with engaging in adverse discriminatory treatment of jurors based upon their race. My conclusions as to misconduct, therefore, should not be extended beyond the specific issue raised in this hearing, that is, whether the Respondent engaged in dishonesty or misrepresentation by failing to disclose opinions which were responsive to the question on the application form.

The Administrator, after reviewing the evidence in these proceedings, has charged that the Respondent, by failing to disclose the Morales and Walls appellate court written opinions in his judicial application, has engaged in the following misconduct: conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 8.4(a) (4); conduct which is prejudicial to the administration of justice, in violation of Rule 8.4(a)(5), and conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Supreme Court Rule 771.

According to these charges, the Respondent should have disclosed this information in Question 1(C) on an application for appointment to the office of associate judge. The question reads as follows: "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."

During the hearing, an array of witnesses were heard, some offering background material concerning the Batson and Powers decisions, their intent, and the courtroom procedures in handling issues arising from them. The remainder were character witnesses for the Respondent, attesting to his reputation for truth, veracity, integrity, and fairness, and his community involvement in minority areas.

The Administrator implied that the Respondent's professional conduct was involved because his profession was that of a lawyer. As an Assistant States Attorney, he served in the capacity of lawyer whenever he represented the State

of Illinois in its prosecution of criminal or civil cases. His behavior in preparing and presenting legal proceedings before judges, juries and courts, and his proffering of peremptory challenges to the seating of jurors would be examples of his professional conduct.

Further, the Administrator argued that the Courts' written opinions did comment on the Respondent's professional conduct because in at least one of them the actions of the lower court's judge and the State were mentioned. The lower court (the judge) was cited for having accepted the State's reasons for peremptory challenges as race neutral. The appellate opinion, instead, found the reasons to be pretextual. When the opinion referred to the State, it was concerned with the reasons offered by the State's lawyers for their peremptory challenges. One of these two lawyers was the Respondent.

The Administrator argued that the correct answer to Question 1(C) should have been "yes" since the Respondent's conduct in offering peremptory challenges that struck prospective minority jurors from the cases had been cited in the appellate courts' written opinions. The appellate courts' findings that the reasons given by the State's attorneys, in effect, were pretextual and that the defendants' prima facie cases had not been rebutted, resulted in the reversal of their convictions and the remanding of their cases to the courts for retrials.

I note, as a preliminary matter, that nowhere in Question 1(C) or in the application in general is there any explanation of or limitations on the terms and phrases used in that question. Further, Question 1(C) was presented to us without information concerning the intent of the drafters of the application. For our purposes, however, we must view the question as it was written. We are not called upon to determine if it is overbroad or poorly phrased. The issue before the panel was simply whether certain specific opinions are responsive to the question. Therefore, applying commonly-accepted meanings to the words used in the question, I read the question as asking for opinions which contain remarks or statements concerning an attorney's behavior or actions taken in his capacity as a lawyer.

In my opinion, the Walls and Morales decisions both comment upon the Respondent's professional conduct. While the ultimate holdings may have emphasized trial court error, the discussion and analysis leading to the end result dealt directly with the Respondent's conduct before the lower court. Both opinions contain a detailed review and assessment of the Respondent's reasons for asserting peremptory challenges to exclude minority jurors.

In People v. Walls, 220 Ill.App. 3d 564, 581 N.E.2d 264 (1991) the Court recites specific actions taken by the State and then evaluates those actions. For example, in relation to one juror, the court notes that the State cited the juror's affiliation with a purported religious organization as a race-neutral reason for challenging the juror. The Court rejected the reason, noting that "the prosecutor never questioned the juror about the organization to determine its true nature (it is the female affiliate of the Freemasons) nor did the prosecutor question that juror or any of the other prospective jurors concerning their religious beliefs." 581 N.E.2d at 271. Similar assessments were made with regard to the State's challenges to other minority jurors and in each instance, the appellate court determined that the State had not provided race-neutral reasons for its actions.

Likewise, in People v. Morales, 308 Ill.App.3d 162, 719 N.E.2d 261 (1999) the Court recounted and assessed the State's reasons for challenging nine individual jurors. As to one juror the Court stated:

If [the juror] expressed concern over the length of time she would be required to spend away from her work obligations during a trial and the State offered this as the reason for its exercise of a peremptory challenge, then it is reasonable to assume other venirepersons with the same hesitations would be challenged. Here, that did not happen. . . . The conclusion that best explains this inconsistent use of peremptory challenges is racial motivation.

719 N.E.2d at 219. As to another juror, the Court noted that "the State's reference to a lack of 'family values' is as baseless as an unfounded claim that postal employees are dishonest and have no respect for the law." Even in the unpublished Morales decision, People v. Morales, No. 1-88-2812, 278 Ill.App.3d 1137, 699 N.E.2d 608 (1996) (unpublished order under Supreme Court Rule 23), the Court found that the evidence established a "pattern" of strikes by the State against African American and Hispanic venire members.

One significant question that arises is what weight should we give to the testimony of Judge Buckley who appeared

for the Respondent. Judge Buckley seems to be a highly respected jurist who testified that it was not his intention to impugn the honesty of the Respondent when he wrote the Morales opinions. Despite this testimony, however, it seems to this panelist that his careless use of phraseology permitted this interpretation, notwithstanding. These opinions along with that of the Walls decision, which presumably he did not write, do in fact impugn the actions of the court and the State (via its attorneys) in using peremptory challenges to excuse minority jurors for, perhaps, pretextual reasons.

The observations and assessments of the appellate courts pertaining to the Respondent's failure to provide race-neutral reasons for challenging jurors are, in my mind, clear examples of comments on his professional conduct. In each opinion, the Respondent's actions are clearly outlined and then the courts' judgment as to each action is stated.

Under the Administrator's calm and skillful questioning, the Respondent readily admitted that he had been aware of the decisions of these courts as expressed in their written opinions. He chose, however, to answer the question with a negative response. His motivation in answering "no" is a mystery and a matter of conjecture. It is entirely subjective in nature and, perhaps, we will never know for sure what was in his mind at the time. Was it a trial strategy to win the case? Did he truly misinterpret the question? Was this an act of purposeful discrimination and/or misrepresentation?

Given the Respondent's admission, however, and having determined that the opinions are responsive to Question 1 (C), I conclude that the Respondent was required to disclose those opinions and breached his obligation by failing to do so. To recognize that the charge against the Respondent has merit, we need only to reflect on the fact that this situation had been reviewed by an Inquiry Board previous to this hearing; that it had been reviewed by the ARDC Administrator and, perhaps, by other members of her legal staff; and that a newspaper reporter had reviewed the primary data and had written articles drawing attention to the Respondent's actions and response to Question 1(C). In contrast to the Respondent, each of them upon review of the matter concluded that the basis for this charge had merit or, at the very least, needed to be reviewed by an ARDC hearing panel.

Notwithstanding my finding as to the Respondent's obligation, I do agree with the majority's assessment of the Respondent's credibility and integrity. At most I would attribute to the Respondent a misrepresentation stemming from his failure to fully and carefully ponder the wording of the question.

Significant, in my opinion, is the effect the Respondent's actions have had on the administration of justice and the reputation of the legal system. Complete disclosure on a judicial application is imperative to the effective evaluation and screening of judicial candidates. Information pertaining to an attorney's professional conduct is critical for the nominating committee's assessment of a candidate's character and his ability to maintain impartiality, particularly in a case such as this one where the information pertains to the Respondent's improper use of peremptory challenges to exclude minorities from two juries. Equally significant is the mere fact of disclosure. Whether or not the substance of the disclosed opinions has any relevance to the committee's determination, the disclosure in itself is an indication of candor and forthrightness, qualities which are also important for assessment.

I believe that the Respondent's failure to make full disclosure on his application, coupled with the subsequent media attention given to his actions, cannot help but impact the administration of justice and diminish the public's confidence in the judicial system. I therefore would find that the Administrator proved by clear and convincing evidence that the Respondent engaged in conduct that is prejudicial to the administration of justice in violation of Rule 8.4(a)(5) and that he engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute in violation of Supreme Court Rule 771.

Having determined that the Respondent engaged in misconduct, I believe that some measure of discipline is appropriate. Like the majority, however, I find the mitigating circumstances in this case to be very compelling. Numerous character witnesses attested to the Respondent's veracity and integrity. Additional evidence indicated that he has spent a considerable amount of time assisting communities plagued by gang-related problems and educating those communities in prevention techniques.

The Administrator urged the panel to recommend a six month suspension and provided cases in support of that sanction. See In re Witt, 145 Ill.2d 380, 583 N.E.2d 526 (1991) (judge failed to disclose a loan, given by an attorney

who appeared before him, on an economic disclosure statement and was suspended for six months); In re Myles, 96 CH 185, M.R. 13506 (1997) (attorney who made a misrepresentation in a bar application to the United States Supreme Court, engaged in neglect and had been previously disciplined was suspended for six months); In re Montalvo, 98 SH 11, M.R. 16865 (2000) (attorney who engaged in fraud by carelessly signing an affidavit containing false statements without reading the affidavit suspended for six months).

In determining the appropriate discipline for this case, one could ask what recommendation to the Supreme Court would:

- a. uphold the principle that one should answer truthfully and accurately the questions posed by this document (with careful thought and consideration);
- b. provide a sanction that would deliver this message to the field without damaging the professional career of a man who, from numerous character witnesses, has a reputation for honesty and integrity; and
- c. support the Administrator in her efforts to discipline the field to uphold the integrity of the legal profession in Illinois to avoid bringing it and the courts into disrepute.

In the view of this hearing panelist, an appropriate decision by the Court should be one which recognizes and supports the principles involved herein by some sort of penalty for this act of misrepresentation. At the same time, however, I believe it should extend mercy to this particular respondent who, according to the many character witnesses, has an excellent reputation for professionalism and integrity, by assignment of a light sanction that recognizes the principles, but does not destroy the career of a good public servant.

A reprimand, I feel, would achieve both objectives, perhaps with a warning that more severe penalties may be assigned in future cases of this sort. I would recommend, therefore, that the Respondent be reprimanded.

Matthew Bonds