IN THE SUPREME COURT OF THE STATE OF OREGON

In re: **Complaint as to the Conduct of** **JAMES C. JAGGER,** **Accused.**	**Case No. 11-103** **SC S061978**

ACCUSED'S PETITION FOR REVIEW AND OPENING BRIEF

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In re: **Complaint as to the Conduct of** **JAMES C. JAGGER,** **Accused.**	**Case No. 11-103** **SC S061978** **PETITION FOR REVIEW**

PURSUANT TO BR 10.5(a) and (b), the Accused petitions the Oregon Supreme Court for review and modification of the trial panel's decision in this case. The Accused seeks review pursuant to BR 10.1 and BR 10.3.

The Accused asks the Court to reverse the trial panel's conclusion that the Accused violated RPC 1.1 and 1.2(c).

The Accused's Opening Brief accompanies this Petition for Review.

DATED this 14th day of March, 2014.

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I. QUESTION PRESENTED ON REVIEW

Did the Bar prove by clear and convincing evidence the Accused violated RPC 1.1 or 1.2(c)?

II. STATEMENT OF FACTS

Mr. Jagger was retained to represent Mr. Fan ("Fan") in March of 2011. (Tr. 24). Mr. Fan was being held in the Lane County Jail on criminal charges of assault and coercion. Mr. Fan was also charged with several counts of contempt for violating a Family Abuse Prevention Act (FAPA) restraining order. (Tr. 24, Ex. 13). All the charges arose from a domestic dispute between Mr. Fan and his girlfriend, Yi Yang ("Yang"). (Ex. 10).

If convicted of the criminal charges, Fan faced possible deportation from the United States. While incarcerated, Fan had no ability to contact his family in China. (Tr. 36, 37).

Based on his conversation with Fan, the Accused concluded there was reason to believe that Fan had not committed the criminal acts alleged. Accordingly, the Accused contacted Yang by telephone, in part to determine whether her testimony was consistent with the police report or whether it was consistent with Fan's version of the events. (Tr. 34-38). Yang told the Accused she was happy to

talk to him and offered to come to his office to discuss the case. (Tr. 41). She volunteered to him that she wanted to assist in obtaining Fan's release from jail. (Tr. 41-43, 45).

Later that day, Yang, without prior appointment, dropped by the Accused's office. (Tr. 47). When she arrived the Accused happened to be on the phone with Fan, who had made a collect call to the Accused from the jail. (Tr. 47-53). The Accused was surprised to see Yang in his office and told her he was on the phone with Fan (Tr. 47, 51, 53-54), and told her she could talk with him if she wanted to, but she did not have to (Tr. 54). She stood up and said she wanted to talk to him, and she picked up the phone and did so (Tr. 54-55, 63-64). The Accused testified that in his opinion Fan was not violating the restraining order because he was not the one initiating the contact; rather, it was Yang who was initiating the contact. (Tr. 55).

Fan was later charged with 10 counts of contempt arising out of the FAPA restraining order (Ex. 13). Count 9 alleged that on or about March 23, 2011, in Lane County, Oregon, Fan wilfully violated the underlying restraining order by contacting or attempting to contact Yang by telephone. Eight of the other counts involved actions on

March 21 or March 22, not involving the Accused. Count 10 alleged that Fan wilfully violated the underlying restraining order by intimidating, molesting, interfering with or menacing Yang or attempting to do so. This was in reference to Count 9.

The court found Fan guilty of Count 9. It found him not guilty of Counts 2, 4 and 10, and the state dismissed Counts 6 and 8. (Ex. 17).

Fan pled guilty to Counts 1, 3, 5 and 7. (Ex. 18). He was sentenced to 30 days in jail on each count in which he was convicted or entered a guilty plea, to be served concurrently. (Ex. 21).

During the hearing in this case, in addition to his own testimony, the Accused presented expert testimony from Donald Diment, an experienced criminal defense attorney and domestic relations practitioner. (Tr. 202). He has also been a Municipal Judge for the City of Eugene since August of 2010. He has handled cases involving restraining orders, including FAPA orders. (Tr. 206). His opinion was that the word "contacting" meant that Fan had to be the actor. He did not think the restraining order prohibited the victim from doing anything. (Tr. 210). In his opinion, the interpretation that the Accused placed on that order was

reasonable. (Tr. 211). He felt that by accepting telephone contact from the victim that Fan would not be violating the provisions of the restraining order because the contact was initiated by Yang. (Tr. 213).

The Accused also called Henry Wonham as a witness. He is a professor of English at the University of Oregon, and has a Ph.D. in English. (Tr. 310). He has been teaching at the University of Oregon for 19 years. (Tr. 311). His interpretation of the restraining order was that the verb "to contact" implied volition and deliberate action on the part of Fan, and distinguished the situation from where contact itself was prohibited as opposed to contacting being prohibited. (Tr. 315).

The Bar called attorney Larry Roloff as a witness. Mr. Roloff had been engaged in criminal defense for 41 years. He testified only that he had never contacted a victim that had a FAPA restraining order. (Tr. 474). The primary reason was because he was afraid he would be put in a position where he might be a witness. (Tr. 475). He testified that he had never seen a claim that the contact was initiated by the victim work as a defense in a contempt proceeding. (Tr. 477). On cross-examination, he admitted that it had been a couple of years since he had last represented someone in a

FAPA proceeding and that he thought the standard of proof in a contempt case was a preponderance of the evidence. (Tr. 477-478). The burden is beyond a reasonable doubt in cases involving confinement as a potential sanction, and by clear and convincing evidence when other forms of remedial sanctions are sought. ORS 33.055(10). He offered no testimony about the conduct of the Accused.

III. ARGUMENT

A. Standard of Proof

The Bar must prove its case by clear and convincing evidence. *In re Cohen*, 316 Or 657, 853 P.2d 286 (1993). To meet this burden, the trial panel must determine that the truth of the facts asserted by the Bar is highly probable. *In re Johnson*, 300 Or 52, 707 P.2d 573 (1985), citing *Supove et al. v. Densmoor et ux.*, 225 Or 365, 372, 358 P.2d 510 (1961).

B. Violation of RPC 1.1

RPC 1.1 provides, in its entirety, as follows:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The trial panel found that:

"There was clear and convincing evidence that the Accused's advice to Fan could not have been the product of

legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

The Accused was not incompetent; in fact, he was likely correct in his actions. (Additionally, he gave no direct advice to Fan, he simply permitted the contact to take place.) In addition to his own testimony, Donald Diment testified that the Accused's interpretation of the FAPA order was correct. The only evidence to the contrary was the un-appealed ruling of the trial judge, and that was in a situation where an appeal, even if successful, would have gained Fan nothing because his sentence was concurrent with, and identical to, other charges he had pled guilty to.

In addition to the testimony, existing case law suggests that the interpretation of the Accused is correct. There are no cases directly on point. However, *State v. Trivitt*, 247 Or 199, 205-206, 268 P.3d 765 (2011) supports a narrow and technical analysis of the language in a FAPA order as opposed to a broad or general one. That is consistent with the general rule that an injunction, which this is a form of, should be framed with objective certainty. *Sanitary Authority v. Pac. Meat Co.*, 226 Or 494, 498, 360 P.2d 634 (1961).

The precise language in the FAPA order (Ex. 9, p. 4) is that:

"Respondent is restrained (prohibited) from:

C. Contacting, or attempting to contact, Petitioner by telephone, including cell phone or text messaging."

The FAPA legislation does not contain a definition of "contact". The prohibition against Fan is not specifically extracted from the statute, but appears to be based upon ORS 107.718(h), which authorizes the issuing court to consider "other relief". Notably, the FAPA order suggests a prohibition of affirmative action by the person being restrained. An "attempt" to contact can only reasonably be read to forbid some affirmative act, and the doctrine of *ejusdem generis* applies here; the general will partake of the same characteristic as the specific examples. *Boyd v. Essin*, 170 Or App 509, 517, 12 P.3d 1003(2000); rev. den. *Ejusdem generis* also applies when ORS 107.718(1)(a) is considered as a whole. It is reproduced in the appendix, but subsection (g), authorizing "other relief", and which the FAPA form order apparently relies upon, is preceded by subsections (a) through (g) that restrain only affirmative actions. Subsection (g) should be construed in the same fashion. The FAPA order here does not prohibit the "victim"

from doing anything. *Rosiles-Flores v. Browning*, 208 Or App 600, 603, 145 P.3d 328 (2006). Could it be seriously contended that a victim could intentionally cause the other party to be held in contempt when the victim initiates the call without the knowledge of the other party, who simply answers the phone? That is where the Bar's contention leads.

When a term is not statutorily defined, as is the case here, it is presumed that it was intended to have its plain, natural and ordinary meaning. *State v. Trivitt*, 247 Or App 199, 205-206, 268 P.3d 765 (2001). The Accused submits that "contact" is not the same as "be in contact with". If the court's intention was to say that, a stroke of the pen would have accomplished it.

Although not directly on point, the case of *Wayt v. Goff*, 153 Or App 349, 353, 956 P.2d 1063 (1998) involved a civil statutory order, under which it is necessary for the petitioner to demonstrate "repeated contacts", ORS 163.735(1)(a). At trial, the petitioner relied upon three contacts. The Court of Appeals reversed the issuance of the stalking order because in one of the instances complained of the petitioner was the one who initiated the contact. 153 Or App at 353.

In addition, the unchallenged testimony of Mr. Diment was that at least one long-time trial judge, Edwin Allen, held the view that if the owner of a restraining order was the one who made contact then the restraining order became void and he would not find contempt in those circumstances. (Tr. 218).

C. Violation of RPC 1.2(c)

This rule provides that:

"A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."

The Panel found:

"The Panel is persuaded that the Accused knew the contact which he assisted was illegal, and ... The Panel finds that the Accused's conduct violated RPC 1.2(c)."

There is not one scintilla of evidence – nothing – to support the conclusion that the Accused was assisting Fan in conduct that he knew was illegal. This charge, in fact, seems to be an alternative charge; the Accused could not logically have been acting both negligently and intentionally, and for the reasons cited above he was neither.

IV. CONCLUSION

The Accused was not guilty of a breach of ethics when he permitted Yang to speak with Fan on his office telephone.

The decision of the Trial Panel should be reversed.

Respectfully submitted,

/s/ John C. Fisher
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Attorney for Accused

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief Length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.02(2)(a)) is 2,557 words without the Appendix and 4,264 including the Appendix.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes, as required by ORAP 5.05(4)(f).

By: /s/ John C. Fisher
John C. Fisher, OSB #771750
Attorney for the Accused

CERTIFICATE OF FILING

I hereby certify that on March 14th, 2014, I filed the original of this ACCUSED'S PETITION FOR REVIEW AND OPENING BRIEF with the Appellate Court Administrator, via the ECF filing system.

By: /s/ John C. Fisher
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Attorney for the Accused

CERTIFICATE OF SERVICE

I hereby certify that on March 14th, 2014, I served ACCUSED'S PETITION FOR REVIEW AND OPENING BRIEF via the Appellate Court ECF on the individual listed below:

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107.718 Restraining order; service of order; request for hearing. (1) When a person files a petition under ORS 107.710, the circuit court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day. Upon a showing that the petitioner has been the victim of abuse committed by the respondent within 180 days preceding the filing of the petition, that there is an imminent danger of further abuse to the petitioner and that the respondent represents a credible threat to the physical safety of the petitioner or the petitioners child, the court shall, if requested by the petitioner, order:

(a) Except as provided in subsection (2) of this section, that temporary custody of the children of the parties be awarded to the petitioner or, at the request of the petitioner, to the respondent, subject to reasonable parenting time rights of the noncustodial parent, which the court shall order, unless such parenting time is not in the best interest of the child;

(b) That the respondent be required to move from the petitioners residence, if in the sole name of the petitioner or if it is jointly owned or rented by the petitioner and the respondent, or if the parties are married to each other;

(c) That the respondent be restrained from entering, or attempting to enter, a reasonable area surrounding the petitioners current or subsequent residence if the respondent is required to move from petitioners residence;

(d) That a peace officer accompany the party who is leaving or has left the parties residence to remove essential personal effects of the party or the partys children, or both, including but not limited to clothing, toiletries, diapers, medications, Social Security cards, birth certificates, identification and tools of the trade;

(e) That the respondent be restrained from intimidating, molesting, interfering with or menacing the petitioner, or attempting to intimidate, molest, interfere with or menace the petitioner;

(f) That the respondent be restrained from intimidating, molesting, interfering with or menacing any children in the custody of the petitioner, or attempting to intimidate, molest, interfere with or menace any children in the custody of the petitioner;

(g) That the respondent be restrained from entering, or attempting to enter, on any premises and a reasonable area surrounding the premises when it appears to the court that such restraint is necessary to prevent the respondent from intimidating, molesting, interfering with or menacing the petitioner or children whose custody is awarded to the petitioner;

(h) Other relief that the court considers necessary to:

(A) Provide for the safety and welfare of the petitioner and the children in the custody of the petitioner, including but not limited to emergency monetary assistance from the respondent; and

(B) Prevent the neglect and protect the safety of any service or therapy animal or any animal kept for personal protection or companionship, but not an animal kept for any business, commercial, agricultural or economic purpose; or

(1) Except as described in subsection (12) of this section or parenting time ordered under this section, that the respondent have no contact with the petitioner in person, by telephone or by mail.

(2) If the court determines that exceptional circumstances exist that affect the custody of a child, the court shall order the parties to appear and provide additional evidence at a hearing to determine temporary custody and resolve other contested issues. Pending the hearing, the court may make any orders regarding the child's residence and the parties contact with the child that the court finds appropriate to provide for the child's welfare and the safety of the parties. The court shall set a hearing time and date as provided in ORS 107.716 (2) and issue a notice of the hearing at the same time the court issues the restraining order.

(3) The courts order under subsection (1) of this section is effective for a period of one year or until the order is withdrawn or amended, or until the order is superseded as provided in ORS 107.722, whichever is sooner.

(4) If respondent is restrained from entering, or attempting to enter, an area surrounding petitioners residence or any other premises, the order restraining respondent shall specifically describe the area.

(5) Imminent danger under this section includes but is not limited to situations in which the respondent has recently threatened petitioner with additional bodily harm.

(6) If the court awards parenting time to a parent who committed abuse, the court shall make adequate provision for the safety of the child and of the petitioner. The order of the court may include, but is not limited to, the following:

(a) That exchange of a child between parents shall occur at a protected location.

(b) That parenting time be supervised by another person or agency.

(c) That the perpetrator of the abuse be required to attend and complete, to the satisfaction of the court, a program of intervention for perpetrators or any other counseling program designated by the court as a condition of the parenting time.

(d) That the perpetrator of the abuse not possess or consume alcohol or controlled substances during the parenting time and for 24 hours preceding the parenting time.

(e) That the perpetrator of the abuse pay all or a portion of the cost of supervised parenting time, and any program designated by the court as a condition of parenting time.

(f) That no overnight parenting time occur.

(7) The State Court Administrator shall prescribe the content and form of the petition, order and related forms for use under ORS 107.700 to 107.735. The clerk of the court shall make available the forms and an instructional brochure explaining the rights set forth under ORS 107.700 to 107.735.

(8) If the court orders relief:

(a) The clerk of the court shall provide without charge the number of certified true copies of the petition and order necessary to provide the petitioner with one copy and to effect service and shall have a true copy of the petition and order delivered to the county sheriff for service upon the respondent, unless the court finds that further service is unnecessary because the respondent appeared in person before the court. In addition and upon request by the petitioner, the clerk shall provide the petitioner, without charge, two exemplified copies of the petition and order.

(b) The county sheriff shall serve the respondent personally unless the petitioner elects to have the respondent served personally by a private party or by a peace officer who is called to the scene of a domestic disturbance at which the respondent is present, and who is able to obtain a copy of the order within a reasonable amount of time. Proof of service shall be made in accordance with ORS 107.720. When the order does not contain the respondents date of birth and service is effected by the sheriff or other peace officer, the sheriff or officer shall verify the respondents date of birth with the respondent and shall record that date on the order or proof of service entered into the Law Enforcement Data System under ORS 107.720.

(c) No filing fee, service fee or hearing fee shall be charged for proceedings seeking only the relief provided under ORS 107.700 to 107.735.

(9) If the county sheriff:

(a) Determines that the order and petition are incomplete, the sheriff shall return the order and petition to the clerk of the court. The clerk of the court shall notify the petitioner, at the address provided by the petitioner, of the error or omission.

(b) After accepting the order and petition, cannot complete service within 10 days, the sheriff shall notify the petitioner, at the address provided by the petitioner, that the documents have not been served. If the petitioner does not respond within 10 days, the sheriff shall hold the order and petition for future service and file a return to the clerk of the court showing that service was not completed.

(10)(a) Within 30 days after a restraining order is served under this section, the respondent therein may request a court hearing upon any relief granted. The hearing request form shall be available from the clerk of the court in the form prescribed by the State Court Administrator.

(b) If the respondent requests a hearing under paragraph (a) of this subsection, the clerk of the court shall notify the petitioner of the date and time of the hearing, and shall supply the petitioner with a copy of the respondents request for a hearing. The petitioner shall give to the clerk of the court information sufficient to allow such notification.

(c) The hearing shall not be limited to the issues raised in the respondents request for hearing form. If the respondent seeks to raise an issue at the hearing not previously raised in the request for hearing form, or if the petitioner seeks relief at the hearing not granted in the original order, the other party shall be entitled to a reasonable continuance for the purpose of preparing a response to the issue.

(11) If the respondent fails to request a hearing within 30 days after a restraining order is served, the restraining order is confirmed by operation of law. The provisions of this section are sufficient to meet the due process requirements of 18 U.S.C. 922(g) in that the respondent received actual notice of the right to request a hearing and the opportunity to participate at the hearing but the respondent failed to exercise those rights.

(12) Service of process or other legal documents upon the petitioner is not a violation of this section if the petitioner is served as provided in ORCP 7 or 9. [1981 c.780 §4; 1983 c.561 §2; 1985 c.629 §4; 1987 c.805 §4; 1989 c.605 §1; 1991 c.303 §2; 1991 c.382 §2; 1991 c.724 §22; 1993 c.375 §2; 1993 c.643 §2; 1995 c.637 §5; 1995 c.794 §1a; 1997 c.607 §1; 1997 c.707 §16; 1997 c.863 §4; 1999 c.617 §2; 1999 c.1052 §§9,9a; 2005 c.536 §2; 2007 c.11 §7; 2009 c.359 §1; 2011 c.274 §1]