

**BEFORE THE
SUPREME COURT OF OHIO**

Columbus Bar Association,	:	
Relator,	:	
	:	
v.	:	Case No. 06-491
	:	Disciplinary Case
Derek Farmer, Esq.	:	
Respondent.	:	

**RELATOR'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO RECONSIDER**

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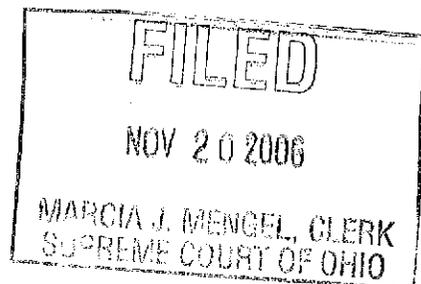
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**RELATOR'S MEMORANDUM IN OPPOSITION TO
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Respondent asks this Court to reconsider and set aside its Opinion and Order entered on November 1, 2006. In support of this exceptional request, he submits three arguments suggesting that the Court has misapprehended the facts and misapplied the law and, in so doing, it has recklessly flung open the platitudinous "floodgates." Resp. Brief p. 4.

Relator would suggest that this Court has misconstrued *neither* fact *nor* law and that it should decline Respondent's invitation to, in effect, rehash sound conclusions based on a clear record. Moreover, the Respondent's vision of a deluge of unintended consequences flowing from the Court's Opinion is pure hyperbole.

Respondent's "Proposition No. 1"

Here, the Respondent implores the Court to revise its determination in this case by announcing an unbending (and presumably retrospective) rule that no convicted person or his or her relatives should be heard in support of charges of unethical conduct against an attorney. This rule, he contends, is required because all such persons (necessarily including most of Respondent's clientele and the supporters thereof) are unworthy of belief in any "swearing match" with an attorney in an ethics case.

S.Ct. Prac. R. XI §2(A), provides that "a motion for reconsideration . . . shall not constitute a reargument of the case . . ." ¹ Despite this unambiguous injunction, the Respondent

¹ Relator was unable to find a great deal of case law interpreting S.Ct. Prac. R. XI, and Respondent has not cited any such cases on this issue. In *DeRolph v. State*, 97 Ohio St.3d 434, 2002-Ohio-6750, the issue of reconsideration of a previously rendered decision was discussed by several of the opinion writers; however, because of the uniqueness and scope of that case, coupled with the strong divergence of views among the Justices, it does not seem to provide guidance for less complicated and momentous cases. Prior to *DeRolph*,

offers this Court, in support of his first proposition, excerpts of his prior Briefs to the Board and to the Court as Resp. Brief Appendices A & B, and points to several of his multitudinous exhibits originally submitted to the Hearing Panel. Respondent, in the apparent belief that the Court overlooked or failed to appreciate his wares on first offering, now reintroduces that product in a different wrapper to the marketplace.

Respondent also implies that the Board and the Court are required to address in writing every issue or fragment of case law thrown into the air by a litigant however immaterial. No such imperative exists, and there is simply no reason for the Court to depart from its general practice of denying reconsideration in order to give Respondent further hearing a previously rejected argument.

In any event, it is clear that the Board explicitly rejected this line of argument when it accepted the Panel's belief in the truth of Teresa Smith's testimony regarding Respondent's statements to the family regarding the insufficiency of a brief previously filed by a public defender and his claim that he would file a better one (when, in fact, he merely plagiarized the prior lawyer's work and claimed it as his own). Findings, p. 21. This Court gave deference to the Panel's assessment of the credibility of this "deeply devout, direct and unguarded witness. . . ." {¶22}.

The impropriety of revisiting already-determined issues notwithstanding, the substance of Respondent's first proposition is fundamentally unsound and unsupported by precedent in attorney discipline cases. Respondent has anchored his contention on law pertaining to a wholly

the Court observed in *State ex rel. Shemo v. Mayfield Heights*, 96 Ohio St.3d 379, 2002-Ohio-4905, that "We have used our reconsideration authority under S.Ct. Prac. R. XI to 'correct decisions which, upon reflection, are deemed to have been made in error.' *Buckeye Community Hope Found. v. Cuyahoga Falls*, 82 Ohio St. 3d 539, 1998-Ohio-189, quoting *State ex rel. Huebner v. West Jefferson* 75 Ohio St, 3d 381, 1995-Ohio-105." {¶5} Relator, of course, contends here that no error has been made that requires correction.

different legal process, the review of post-conviction motions in criminal cases. That strain of law does not inform this matter in any meaningful way.

In this case, the Court is exercising its constitutional power to supervise the legal profession and to discipline those who have not conformed their professional conduct to the Court's Code. In the performance of that obligation, the Court is the final arbiter of what evidence to accept and whose testimony to believe. The Respondent's proposed *per se* disqualification of certain types of testimony would deny the finders of fact the ability to weigh relevant evidence of disciplinary infractions, to juxtapose that evidence against other evidence, and to come to a reasoned conclusion. There is not, and should not be, any such artificial impediment to a full and fair review of all probative evidence.

To give effect to Respondent's proposition would be to give a criminal lawyer immunity from ethical scrutiny regarding any exchange or conduct witnessed only by the lawyer and the client or a member of the client's family. The unsoundness of such a policy is manifest. In Respondent's case, it would mean that nothing he claims to have done – or not to have done – could ever be challenged by an inmate's family member, however credible.

As part of the parade of horrors that, in Respondent's view, will be visited upon practitioners because of the decision in this case is his projection that lawyers will be plagued by “‘my-attorney-promised-me’ grievances from countless numbers of convicted felons.” Brief p. 4. He goes so far as to claim, without citation of law, a *constitutional due process right* of lawyers to not be inconvenienced by having to respond such claims. Surely, this is stretching the concept of due process well beyond the breaking point.

Equally far fetched is Respondent's claim that this and other cases like it feed what “has become an established maxim among the inmates in Ohio penitentiaries that you can ‘get

your money back' by threatening to file a grievance against your lawyer" Brief p. 3. Is he suggesting that the Court should frame its decision so as to somehow stamp out erroneous prison postulations regarding the law? That would seem to Relator to be a monumental project doomed to failure.

Respondent's "Proposition No. 2"

In this part of his argument, the Respondent asks the Court to revise its Opinion so as to fill a void – a void that does not exist. He claims that practitioners need a more focused ("bright") line between the proof required in a civil proceeding regarding fee disputes and disciplinary cases involving fee issues. He says this after having just articulated in his black letter Proposition of Law No. 2 the correct allocation of, and standards for, proof in the two types of cases.

Both the Board and the Court were obviously aware of, and correctly applied, the standard of "clear and convincing" evidence with respect to the evidence on fees in this case. The Board, in its Conclusions of Law regarding Count Two of the Amended Complaint, dismisses several of the charged violations, for lack of "clear and convincing evidence". Findings, {¶ 52}. It did find, however, that Respondent violated DR 2-106(A) [excessive fee] and DR 9-102(B)(3) [failing to account] using the same standard. {¶ 5}. These findings were based on factual determinations that Respondent did not do work he claimed to have done as well as the fact that, when asked by the client and the client's representative to give an accounting for his work, he was unable to do so. {¶ 17-22, 28,29}.

Similarly, this Court very specifically and at some length discussed this issue. Decision, {¶¶ 29-35}. It found clear and convincing evidence that Relator had proven that Respondent did not make an accounting to the Martins for the money he collected from them on behalf of their family member, his client. Having made this determination, the Court went on to

examine the Respondent's contention that he had earned the fees he received even though he did not do the work promised. As the Court observed, Respondent could not support this claim because he lacked records to reconstruct what he had done. While he was not required to keep time contemporaneous time record, he was required to respond "as promptly and reliably as possible" when a client requested an accounting. {¶33}. This he did not do, as was shown by clear and convincing evidence presented by Relator.

The Court did not, as Respondent would have it, shift the burden of proof. It was always Respondent's "burden" to obey the Disciplinary Regulations, including DR 9-102(B)(3). Having been shown by appropriate proof to have failed in that duty, he cannot now claim that the Court has deprived him of due process by changing the rules or prospectively requiring time records (which it explicitly has not done). How he choose to keep himself in compliance with the accounting provision of DR 9-102(B)(3) was his business. If the method he chose in the past was inadequate to insure compliance, *that* was the "gamble" he took.

In respect to this Proposition, the Respondent has found yet another constituency that he believes the Court should consider in deciding whether to revise its Opinion – the legal scholars. The existing decision in this case, he postulates, will feed the "continuing series of academic articles on the decline of the lawyer's trade from a profession to a business" and will be cited as an example of the "curse of the billable hour." Brief, p. 4. Relator submits that, if businesslike accounting for one's services (regardless of the type of case) is at odds with the Respondent's concept of professionalism, something is greatly amiss. If scholars there be that find in the Court's pronouncement here an omen of the "decline" of professional standards, let us all hope that they remain confined to the academia.

Respondent's "Proposition No. 3"

Relator is in something of an awkward position addressing Respondent's argument that, because he succeeded in having Count One of the Amended Complaint dismissed, the costs of this entire disciplinary case should be apportioned between Respondent and Relator. Two general observations need to be made in this regard.

First, Relator's Certified Grievance Committee is established by a local bar association under Gov. Bar R. V§(C) and, as such, operates as an instrumentality of the Court's disciplinary system, along with the Office of Disciplinary Counsel. Although the analogy is not perfect, Relator is to some extent like a prosecuting attorney acting on behalf of the state and charged with presenting the people's side of a case. In that situation, if a defendant is acquitted, costs are not assessed against the prosecutor; nor should they be.

Second, the portion of the costs that were incurred in this case by Relator (for depositions, etc.) were reimbursed by the Court under the provisions of Gov. Bar R. V§(D). Thus, although he may not have been aware of this fact, the Respondent is actually asking the Court to assume the burden of these expenses itself. Although Relator cannot speak on behalf of the Court on this issue, it would seem obvious that this proposition is untenable.

Beyond this, it is not unjust to impose the entire costs of an ethics proceeding on a respondent who has been found guilty of serious breaches of professional standards. The first count of this Amended Complaint was filed based upon what the Certified Grievance Committee collectively concluded was substantial evidence of serious wrongdoing by Respondent. A Probable Cause Panel of the Board then certified the count to the Board. Although the Hearing Panel chose to discount the testimony of the primary witness in this matter and to dismiss that

count, there has been no suggestion that the matter was brought to the attention of the Panel in bad faith.

Should a Certified Grievance Committee be penalized financially for “losing” part or all of a disciplinary case brought in good faith and in furtherance of its duty to the Court, the profession, and the public, obviously there would be a strong disincentive to the bringing of cases for review by the Board and the Court. If it were the case that unfounded matters were plaguing the disciplinary system, this might be thought by some to be an attractive remedy; however, the extremely low percentage of cases dismissed at any level from probable cause on, would suggest that the cases that are being brought are sound and worthy of attention.

CONCLUSION

There is simply no reason to unfold the map that the Court has drawn here to delete or insert provisions suggested in Respondent’s Motion. Reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition was sent by U.S Mail, postage prepaid this 20th day of November, 2006, to Counsel for Respondent:

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