

THE SUPREME COURT OF OHIO

IN RE: )  
CLEVELAND BAR ASSOCIATION ) Appeal from Board of Commissioners  
 ) on Grievances and Discipline of the  
 ) Supreme Court  
Relator )  
 )  
 ) Case No. 06-2260  
CARL GEORGE McMAHON )  
 )  
 )  
Respondent )

---

RESPONDENT'S OBJECTIONS TO RECOMMENDATIONS  
OF THE BOARD OF COMMISSIONERS WITH BRIEF IN SUPPORT

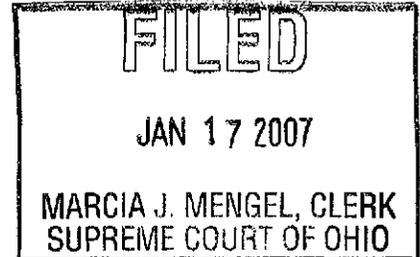
---

THOMAS REPICKY (#0009079) (COUNSEL OF RECORD)  
100 N. Main Street  
350 Stepnorth Building  
Chagrin Falls, Ohio 44022  
(440) 247-3898  
Fax: (440) 247-8903  
[tomrepicky@sbcglobal.net](mailto:tomrepicky@sbcglobal.net)

COUNSEL FOR RESPONDENT

JENNIFER S. ROACH (0074143)  
SAMER M. MUSALLAM (0078472) (COUNSEL OF RECORD)  
Thompson Hine LLP  
3900 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
(216) 566-5500  
Fax: (216) 566-5800  
[Jennifer.Roach@ThompsonHine.com](mailto:Jennifer.Roach@ThompsonHine.com)  
[Samer.Musallam@ThompsonHine.com](mailto:Samer.Musallam@ThompsonHine.com)

COUNSEL FOR RELATOR CLEVELAND BAR ASSOCIATION



THE SUPREME COURT OF OHIO

<b>IN RE:</b>	)	
<b>CLEVELAND BAR ASSOCIATION</b>	)	<b>Case No. 06 -2260</b>
	)	
<b>Relator</b>	)	
	)	
<b>CARL GEORGE McMAHON</b>	)	<b><u>RESPONDENT'S OBJECTIONS TO</u></b>
	)	<b><u>RECOMMENDATIONS OF THE</u></b>
	)	<b><u>BOARD OF COMMISSIONERS</u></b>
<b>Respondent</b>	)	<b><u>WITH BRIEF IN SUPPORT</u></b>

Carl George McMahon, Respondent in the within matter, by and through counsel, hereby objects to the recommendations of the Board of Commissioners and submits his brief in support for consideration by the Supreme Court of Ohio, in addition to the testimony, exhibits, and stipulations previously presented in this case.

Respondent continues to acknowledge his violation of the disciplinary rules by his action. He is genuinely remorseful and repentant for his conduct. Respondent's violations are an aberration in an otherwise spotless 30 years of service as an attorney. Under the circumstances of this case, Respondent respectfully asserts that an equitable resolution of his violations of the disciplinary rules would be a public reprimand. Respondent will summarize the justification for a public reprimand in the attached brief.

## BRIEF

### **I. THE VIOLATIONS OF THE DISCIPLINARY RULES OF THE OHIO CODE OF PROFESSIONAL RESPONSIBILITY.**

#### **A. Respondent admitted to violations of three disciplinary rules.**

Respondent, Carl George McMahon, has admitted violating three disciplinary rules of the Ohio Code of Professional Responsibility as a result of his letter to State Auto Insurance Company dated August 20, 2004. The specific rules admitted to are:

- 1) DR 1-102(A) (4) A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- 2) DR 7-102(A) (5) In his representation of a client, a lawyer shall not... knowingly make a false statement of law or fact; and
- 3) DR 7-102(A)(8) In his representation of a client, a lawyer shall not... knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule.

The Board of Commissioners found that DR 7-102(A)(8) was superfluous and not a violation.

Respondent has always acknowledged that the letter was false and dishonest. McMahon retracted the letter after being confronted by the State Auto adjuster. The letter was never relied on by State Auto nor did it play any role in the settlement of the claim. No injury or damages of any kind resulted from the letter. McMahon also apologized to the State Auto adjuster for his false letter.

The letter in question clearly is not evidence or perjured testimony since it was never submitted as evidence in any court. Not even State Auto contends that the subject letter is evidence. It is on that basis that respondent has not admitted violating either DR 7-102(A) (4)... Knowingly use perjured testimony or false evidence or DR 7-102(A) (6)...Participate in the creation of evidence when he knows or it is obvious that the evidence is false.

Since neither the letter nor the alleged testimony of Marris was ever offered to a court, it does not fall within the parameters of either DR 7-102(A)(4) or DR 7-102(A)(6) which applies only where such false information or document is presented to a tribunal or recorded (i.e. a deed). See, *Cleveland Bar Association v. Kaigler* (1991), 57 Ohio St. 3d 197; *Columbus Bar Assn. v. Moushley*, 96 Ohio St. 3d 461, 2002 Ohio 4850; *Office of Disciplinary Counsel v. Bell* (1984), 15 Ohio St. 3d 118. It should also be noted that Marris alleged “no contest plea”, the “finding of guilty by the court” and her statement accepting fault for the accident would never be admissible for any purpose in a civil proceeding concerning the accident. (See, Ohio Rule of Evidence 410)

## II. SANCTIONS

### A. Respondent’s misconduct warrants a public reprimand rather than a suspension of his license to practice law.

Respondent should be given a public reprimand for his admitted violations of the Disciplinary Rules of the Ohio Code of Professional Responsibility. His conduct in writing the letter is indefensible and a clear violation of the two Disciplinary Rules. In determining the appropriate sanctions, the Ohio Supreme Court has always considered all relevant factors, precedent established by the Ohio Supreme Court and the existence or nonexistence of aggravating or mitigating circumstances.

#### 1. A public reprimand is an appropriate sanction here since there are no aggravating factors.

Relator asserted in their brief that respondent’s conduct constitutes both a 1) dishonest motive and 2) commission of multiple offenses. (BCGD Proc. Reg. 10(B) (1)(b)&(d)). Relator

has failed to prove either of their positions by clear and convincing evidence.

**i. Dishonest Motive**

Relator avers that McMahon fabricated his letter to State Auto to induce a more favorable settlement for his client with State Auto. Although the letter contained false misrepresentations and was dishonest, it was not sent to induce a more favorable settlement for his client. Not even State Auto alleged that the motivation for the letter was for Respondent to obtain more money for his client. In fact, Respondent's letter never even addressed his client's damages and did not even contain a settlement demand. Respondent's client was a fault-free passenger who was guaranteed to recover from one or both of the drivers' insurance companies for her accident damage.

Relator has presented no evidence in this case to support its allegation that for "obvious reasons it was in his client's best interests to obtain a settlement from the other driver's (i.e. Marris') insurance company". Marris, in her handwritten statement to the police, admitted she went straight even though she was in a right-turn only lane, thereby colliding with the other vehicle that had the right of way. Marris was cited for causing the accident. Neither State Auto nor Relator has produced any evidence indicating that State Auto ever had any basis to deny Respondent's claims for his client's injuries, except Marris' refusal to accept fault in her statement to the police. In fact, Marris was 100 percent responsible for the accident which State Auto acknowledged by their entire payment of both claims.

Accordingly, although Respondent's letter clearly contained false information, there is no basis to find, by clear and convincing evidence that his motive was to induce a more favorable settlement for his client or defraud the insurance company. Respondent submitted evidence at the hearing of his depression and grief from his mother's death and his son's serious illness at the

time he wrote the letter. It is apparent that Respondent's despondent and irrational emotional state at the time he wrote the senseless letter was the real impetus behind the letter.

## **ii. Multiple Offenses**

Relator asserts that Respondent's letter constitutes multiple offenses and therefore is an aggravating factor warranting a more severe sanction. Although Respondent admits to multiple violations of the Disciplinary Rules, they do not constitute multiple offenses under Section 10 (B)(1)(d) of the Guidelines for Imposing Lawyer Sanctions.

The only authority advanced by Relator in support of the assertion that multiple offenses occurred is the case of *Office of Disciplinary Counsel v. Bell* (1984) 15 Ohio St. 3d 118. The *Bell* case actually involved four different clients who had been misrepresented in four separate occurrences during various stages of Bell's handling their private adoptions. Respondent was unable to locate any cases where a violation of several disciplinary rules for one client was considered a multiple offense when the lawyer committed only one act. This is clearly not a multiple offense case. Moreover, Relator's allegation that Respondent's conduct "could rise to the level of criminal insurance fraud" is disingenuous based on the facts of this case and not supported by any evidence. Furthermore an allegation of insurance fraud, is clearly not relevant to the issue of whether multiple offenses were committed by Respondent.

## **2. Sufficient mitigating factors exist warranting a public reprimand as Respondent's sanctions.**

Relator acknowledges that numerous mitigating factors exist in this case. These factors should be considered in favor of recommending a less severe sanction. Specifically, Respondent has the following mitigating factors (1) absence of prior disciplinary record (2) timely good faith effort to rectify consequences of misconduct; (3) full and free disclosure to the Disciplinary

Board and cooperative attitude toward proceedings and (4) excellent character and professional reputation.

Respondent did not benefit from his improper conduct nor did he lie to a court or client. Further, no one ever relied on McMahon's misrepresentation. Respondent has demonstrated by his admission and testimony that he is remorseful and acknowledges his misconduct. Finally, this is the only violation in Respondent's over thirty years as an attorney.

**B. Sanctions in similar cases support a public reprimand for Respondent.**

The Ohio Supreme Court has imposed a public reprimand in similar cases, recognizing that all violations of DR 1-102(A)(4) do not justify suspending the attorney's license to practice law. *Disciplinary Counsel v. Fowerbaugh* (1955), 74 Ohio St. 3d 187, 168 N.E.2d 277.

The hearing panel found the following four cases to be relevant in recommending a public reprimand for Respondent. In *Disciplinary Counsel v. Cuckler* 101 Ohio St. 3d 318, 2004 Ohio 784, the Supreme Court approved a public reprimand for a violation of OR 1-102(A)(4). Cuckler misrepresented his status as a licensed attorney in various documents. The Court stated that no one relied on the misrepresentation of Cuckler to their detriment and noted his integrity and remorse along with the limited harm caused by his misconduct.

Likewise, in *Disciplinary Counsel v. Eisenberg* (1989) 81 Ohio St. 3d 295, the Supreme Court adopted the panel's recommendation of a public reprimand. Eisenberg's misconduct was an isolated incident in his career, no one suffered financial loss and there was no intent to defraud when his secretary traced signatures on various probate forms. Also in *Dayton Bar Assn. v. Kenney* (2000), 89 Ohio St. 3d 77, 2000- Ohio 445, the Supreme Court approved a public reprimand for a violation of DR 1-102(A)(4). Attorney Kenney had fraudulently misrepresented the purchase price for the sale of a bar. The Court specifically noted that the

misconduct was an isolated incident and the outcome of her representation would not have changed absent the misconduct.

Further, in *Disciplinary Counsel v. Carroll* 106 Ohio St. 3d 84, 2005 Ohio 3805, the Court stayed a six month suspension for a violation of DR 1-102 (A)(4) based on mitigating factors where Carroll had overbilled a State Board for her timesheets. The mitigating factors included the absence of any prior disciplinary record, full cooperation by the respondent in the investigation and prompt repayment of restitution.

The Ohio Supreme Court has decided several other similar cases where it issued a public reprimand to the violating attorney. In *Disciplinary Counsel v. Agopian*, 112 Ohio St. 3d 103, 2006 Ohio-6510 [violation of DR1-102(A)(4) and DR1-102(A)(6)], Respondent had submitted inaccurate fee bills to the Cuyahoga County Court of Common Pleas for legal services rendered as court appointed counsel to indigent criminal defendants. The court rejected the board's recommendation that a one year stayed suspension be imposed and issued a public reprimand based on the fact that Agopian had no prior disciplinary record, fully cooperated with the disciplinary process, accepted responsibility for his conduct and had an excellent reputation for integrity and professionalism.

Further in *Disciplinary Counsel v. Taft*, 112 Ohio St. 3d 155, 2006- Ohio -6525 [violation of DR1-102(A)(6)] Respondent failed to report gifts that he had received as Governor as required by financial disclosure laws and pled guilty to several criminal misdemeanors for his conduct. The Court issued a public reprimand, weighing the mitigating factors and noting the absence of any aggravating factors. The Court also wrote:

When deciding the appropriate sanctions to impose in a case of professional misconduct, we consider the duties violated, Respondent's mental state, the injury caused, the existence of aggravating or mitigating circumstances, and applicable precedent. *Disciplinary Counsel v. Evans* (2000) 89 Ohio St. 3d 497, 501 733

*NE 2d 609 Disciplinary Counsel v. Runyan 108 Ohio St. 3d 43  
(2006) Ohio -80, 840 NE 2d 623.*

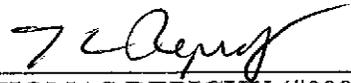
Finally, this Court in *Disciplinary Counsel v. O'Neill, 103 Ohio St. 3d 204, 2004-Ohio 4204, 515 N.E. 2<sup>nd</sup> 286* stated “the purpose of the disciplinary process is not to punish the offender but rather to protect the public.” Respondent McMahon’s conduct here is similar to the foregoing case law and justifies that a public reprimand should be issued to Respondent. McMahon has no prior disciplinary record, cooperated in the investigation, has excellent character and professional reputation, no one suffered financial loss or relied on his misrepresentation and he admitted his misconduct for which he is remorseful.

Since the purpose of sanctions is to protect the public, a public reprimand would shame Respondent for his conduct. It would also sufficiently protect the public from Respondent who has never committed any other misconduct and does not pose a danger to the public. Finally, if Respondent’s license to practice law is suspended, it would cause financial hardship to him and his family. Respondent is the sole provider for his family and his wife works for him as a paralegal.

Respondent requests that this Honorable Court accept the recommendations of a public reprimand made by the Hearing Panel that heard the witness testimony. A public reprimand would be an equitable resolution of Respondent’s violations of the Disciplinary Rules.

WHEREFORE, Respondent, Carl George McMahon, respectfully requests that the Ohio Supreme Court issue a public reprimand to him for his violations of the Disciplinary Rules of the Court of Professional Responsibility.

Respectfully submitted,



**THOMAS REPICKY** (#0009079)

100 N. Main Street

350 Stepnorth Building

Chagrin Falls, Ohio 44022

(440) 247-3898

[tomrepicky@sbcglobal.net](mailto:tomrepicky@sbcglobal.net)

Attorney for Respondent Carl G. McMahon, Esq.

**PROOF OF SERVICE**

I certify that a copy of Respondent's Objections to Findings of Fact and Recommendations of the Board with Brief in Support was mailed to the following via U.S. Mail this 16<sup>th</sup> day of January, 2007:

JENNIFER S. ROACH (0074143)  
SAMER M. MUSALLAM (0078472)  
Thompson Hine LLP  
3900 Key Center  
127 Public Square  
Cleveland, Ohio 44114  
(216) 566-5500  
Fax: (216) 566-5800  
[Jennifer.Roach@ThompsonHine.com](mailto:Jennifer.Roach@ThompsonHine.com)  
[Samer.Musallam@ThompsonHine.com](mailto:Samer.Musallam@ThompsonHine.com)

COUNSEL FOR RELATOR CLEVELAND BAR ASSOCIATION



**THOMAS REPICKY** (#0009079)

100 N. Main Street

350 Stepnorth Building

Chagrin Falls, Ohio 44022

(440) 247-3898

[tomrepicky@sbcglobal.net](mailto:tomrepicky@sbcglobal.net)

Attorney for Respondent Carl G. McMahon, Esq.