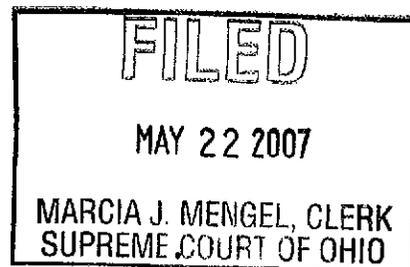


IN THE SUPREME COURT OF OHIO

DAYTON BAR ASSOCIATION, : CASE NO. 2007-0746
:
Relator, :
:
vs. :
:
RICHARD H. ROGERS, :
:
Respondent. :
:

**OBJECTIONS OF RESPONDENT, RICHARD H. ROGERS
TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE**

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MEMORANDUM

I. INTRODUCTION/PROCEDURAL HISTORY

Respondent, Richard H. Rogers, is accused of the following:

1. Violation of Disciplinary Rule 2-106(A): Charging a Clearly Excessive Fee for Legal Services.
2. Violation of Disciplinary Rule 1-102(A)(3): Engaging in the Legal Conduct Involving Moral Turpitude.
3. Violation of Disciplinary Rule 1-102(A)(4): Engaging in Conduct that Involves Dishonesty, Fraud, Deceit and Misrepresentation.
4. Violation of Disciplinary Rule 1-102(A)(b): Engaging in Conduct that Adversely Reflects Upon the Lawyer's Fitness to Practice Law.

The Relator, Dayton Bar Association, filed its Complaint on April 18, 2005. On May 11, 2005, Respondent, Richard H. Rogers, filed his Answer in which he denied each and every allegation that he violated any disciplinary rule cited in Relator's Complaint.

On January 4 and 5, 2007, a hearing on Relator's Complaint commenced before Panel Members Sandra Anderson, Martha Butler and Stephen C. Rodeheffer, Chair. Both parties filed Post-Hearing Briefs.

Pursuant to Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on April 13, 2007 and adopted the Findings of Fact and Conclusions of Law of the Panel. However, the Board then voted to amend the Panel's Sanctions based upon Respondent's prior disciplinary record and recommended that the Respondent, Richard H. Rogers, be suspended from the practice of law in the State of Ohio for a period of 2 years, as opposed to the Panel's recommendation of a 2 year suspension with 1 year of said suspension stayed. On May 3, 2007, the Findings of Fact, Conclusions of Law and

Recommendation of the Board of Commissioners on Grievances and Discipline was certified by this Honorable Court.

The Respondent, Richard H. Rogers, hereby respectfully requests that this Honorable Court reject and/or modify the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners as set forth below. Respondent herein challenges the recommended Sanction as to all Counts, noting specifically that Count 4 was rejected by the Panel, that dealing with Disciplinary Rule 4-102(A)(b): Engaging in Conduct that Adversely Reflects Upon the Lawyer's Fitness to Practice Law.

BACKGROUND

Respondent, Richard H. Rogers, is a 1961 graduate of Miami University and a 1964 Cum Laude graduate of Duke Law School, where he was Editor of the Duke Law Review. He started practicing law in 1964, and then practiced for several years in a corporate capacity with various large firms involving the construction business. Mr. Rogers opened his private practice of law in 1989 in Dayton, Ohio.

In early summer 2000, Mr. and Mrs. Roy Smith came to the Respondent complaining about the exterior of their 5 year old home, which was literally rotting. The exterior had been constructed out of a synthetic stucco composite, whose new technology failed to consider moisture problems. Prior to consulting with the Respondent, the Smiths had already received a \$10,000.00 Class Action law suit award involving the aforementioned product via "EIFS Litigation." However, the construction costs for remedying the problem of the Smiths' home totaled nearly \$50,000.00 and they then sought legal help from the Respondent. After conferring with the Smiths, the Respondent did significant investigation and eventually filed a law suit against multiple defendants including,

but not limited to, the architect, builder, contractor and manufacturer of the product in question after having an Engagement Contract signed by the Smiths on July 13, 2000, which required a \$2,500.00 retainer fee and an hourly rate of \$175.00 per hour. The substance of the Complaint filed on behalf of the Smiths by the Respondent consisted of negligence, as well as violation of Ohio's Consumer Sales Practice Act.

After nearly 14 months of work, the Respondent sought out the services of trial attorney, Ronald Kozar, to assist in the trial of the case pursuing the claim for the Smiths. Respondent remained, and always was, lead counsel for the Smiths. Kozar and the Respondent had collaborated on approximately 18 prior cases. Total fees billed by Mr. Rogers and Kozar came to \$69,772.00. The law suit was subsequently settled for the amount of \$60,000.00 in 2003. In an effort to resolve the matter to the satisfaction of the Smiths, Respondent returned to the Smiths a total of \$18,400.00, or 1/3 of his total fee, while Kozar returned approximately \$850.00. Therefore, the Smiths received a total of \$79,250.00 plus \$10,000.00 via an EIFS Class Action award. Subsequently, a Complaint was made by Attorney Kozar to the Dayton Bar Association's Ethics Committee.

II. RESPONDENT OBJECTS TO THE BOARD'S FINDINGS AND RECOMMENDATION CONCERNING COUNTS 1, 2 AND 3 OF RELATOR'S COMPLAINT

A careful reading of the Panel's Findings of Fact, Conclusions of Law and Recommendation clearly indicates that the Panel failed to consider, or even review, the perpetuation video-tape deposition of expert witness, Attorney Ronald Burdge, which was submitted by agreement of Relator and the Respondent, and which was filed with the Board of Commissioners after the January 5, 2007 hearing. It is beyond Respondent's comprehension that the Board would not even refer to the testimony and expert opinion of Mr. Burdge, who is the only witness to testify that actually reviewed

the entire contents of the Respondent's file and had an extensive history of litigating cases involving the Ohio Consumer Sales Practice Act. It was Burdge who did not find fault with Respondent's use of an expert under the negligence tort theory and who further testified that all the time charged by Rogers was appropriate and not tantamount to conduct involving moral turpitude or charging or collecting an illegal or clearly excessive fee. Mr. Burdge also explained Respondent's "block billing" method and fees for such complex litigation. It is shocking to Respondent and the Respondent's counsel that not one mention of Mr. Burdge is noted in the Panel's 13 page Findings of Fact, Conclusions of Law and Recommendation.

It should be noted that Mr. Kozar, the individual who assisted the Respondent and subsequently testified against Respondent at the hearing, was only involved in the Smiths case after the Respondent had worked for the Smiths for a period of 14 months. Kozar could not, under any circumstances, know what Respondent did prior to his involvement 14 months later. Kozar admitted this in his testimony. The Panel could only use conjecture and suppositions to determine that Respondent did not do what he said he did. That is hardly clear and convincing evidence.

It should be noted that Kozar admitted under oath that he did, in fact, get paid for each and every hour he spent on the case for the Smiths and that he felt that Respondent did not short or cheat him out of one penny. However, Kozar believes that he did work on discovery and that Respondent's "block billing" charges for discovery were bogus, even though he admits he had no idea what Respondent did prior to his involvement 14 months in the case. The Panel simply believed that Respondent's explanation of time billed for discovery was "vague at best" and that since he could not produce drafts of discovery requests, Respondent simply did not do the work. That is untrue, and unfortunately quite deleterious to the Respondent's defense in this case.

The Panel believed that since the Respondent billed almost 6 times more than his co-counsel

(Kozar) for working on a task that was not eventually his primary responsibility, he is somehow guilty of conduct in violation of Disciplinary Rule 2-106(A). However, again, the Panel ignores the fact that this was Respondent's case. He had worked on this case prior to being assisted by Kozar for 14 months, and had explored multiple "discovery" matters; including review of voluminous documents provided by the 4 defendants, industry research and such; not purely drafting interrogatories and deposition questions. The large box of documents containing some of the work performed by Respondent was shown to the Panel, but certainly did not contain 2-3 years of drafts. The Panel appears to expect Respondent to produce those drafts 6-7 years later.

The Panel also concluded that Respondent simply spent too much time consulting with an expert on synthetic stucco installation. (See Paragraph 27 of Panel's Findings of Fact, Conclusions of Law and Recommendation.) It should be made clear that the expert secured by the Respondent months before Kozar's involvement, was a North Carolina firm by the name of BURIC, who had charged \$3,100.00 to the Smiths for its work when it was quite clear that this agent of the BURIC firm was not competent nor prepared to effectively testify on behalf of the Smiths. It was clearly the effort of the Respondent that the \$3,100.00 BURIC bill was never paid and that said costs were never incurred by Mr. and Mrs. Smith. It was essential to the negligence and Consumer Sales Practice Act claim that the Smiths actually have an expert to prove the "defect." While keeping the expert on board, Respondent was able to produce a resolution via four efforts at mediation. His total costs for conferring with the expert was approximately 5.7 hours, \$997.50, and testimony was that it included letters and telephone conferences with the North Carolina firm. Again, the Panel seems to ignore the fact that this was the Respondent's case, and not Kozar's, and the \$997.50 the Smiths paid to Mr. Rogers saved them \$3,100.00. The Panel (at Paragraph 30) mistakenly states that the Smiths paid an additional \$3,000.00 to BURIC. That is simply not the testimony. Even though

Kozar felt that no expert was necessary, it is clear that such an expert would be necessary if the Smiths intended to pursue the consumer sales practice and the negligence claims. This difference of opinion is hardly tantamount to unethical conduct.

After 43 years of legal practice, any suspension, let alone a 2 year suspension at the age of 68 years old, would be nothing less than a fatal blow to Respondent's career. It is unfortunate that the Panel ignored the fact that Respondent gave full and free disclosure to the Disciplinary Board and the Panel, and cooperated throughout the proceedings, although it took longer than 3 years from the date of the Kozar letter to the Dayton Bar Association dated September 19, 2003 to the date of the hearing before the Panel. It should be noted that without the competent and compassionate lawyer which Richard H. Rogers is, the Smiths would have been left with only \$10,000.00 via an EIFS Class Action award and would never have had any money by which to fix their retirement home. It is obvious that the 4 defendants in the underlying case filed by the Smiths were not going to willingly pay any money. Much negotiation, conferencing, mediation and many pleadings had to be filed to effectuate some payment for the Smiths. It is not the Respondent's fault that more time than expected had to be spent on this effort. The Panel seems bent on the fact that Respondent was unable to produce drafts of documents he prepared 6 to 7 years before the hearing date in order to defend the unethical allegations of Mr. Kozar. Respondent's counsel is totally unaware of any attorney that keeps drafts of documents for 6 to 7 years, and failure to do so certainly is not an ethical violation or clear and convincing evidence that an ethical violation occurred. It should not be ignored that Respondent voluntarily returned more than \$6,650.00 to the Smiths prior to the Kozar Complaint, and an additional \$11,750.00 after Kozar's Complaint letter.

Respondent urges this Honorable Court to reject the Findings of Fact and Conclusions of Law insofar as none of the Counts were proven by the Relator by clear and convincing evidence.

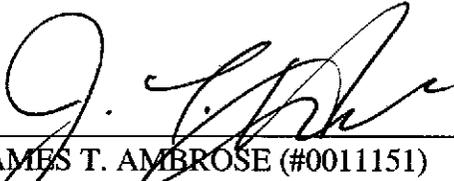
Further, Respondent urges this Honorable Court to reject the Recommendation of the Board of Commissioners with respect to a 2 year suspension and follow its previous and well-reasoned precedents by imposing a sanction of 1 year stayed suspension.

CONCLUSION

For the reasons set forth above, Respondent requests that the Findings of Fact and Conclusions of Law, as well as the Recommendation of the Board of Commissioners on Grievances and Discipline be rejected and modified as set forth above.

Respectfully submitted,

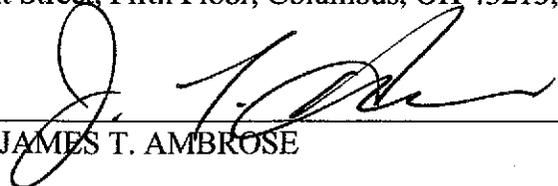
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Counsel for Respondent, Richard H. Rogers

CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing has been forwarded via regular U.S. mail, postage prepaid, to Jeffrey Slyman, Esq., Jeffrey D. Slyman, Esq., Attorney for Relator, 575 South Dixie Drive, Vandalia, OH 45377, and Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, Fifth Floor, Columbus, OH 43215, this 22nd day of May, 2007.



JAMES T. AMBROSE