**BEFORE THE BOARD OF COMMISSIONER**
**ON**
**GRIEVANCES AND DISCIPLINE**
**OF**
**THE SUPREME COURT OF OHIO**

07-1592

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| **In Re:** | : | |
| **Complaint against** | : | **Case No. 06-026** |
| **John William Vogel**<br>**Attorney Reg. No. 0071169** | : | **Findings of Fact,**<br>**Conclusions of Law and** |
| **Respondent** | : | **Recommendation of the**<br>**Board of Commissioners on** |
| **Columbus Bar Association** | : | **Grievances and Discipline of**<br>**the Supreme Court of Ohio** |
| **Relator** | : | |
| | : | |

This matter came on for hearing on June 21 and 22, 2007, before the Honorable Harvey J. Bressler, David E. Tschantz, Esq. and Jeffrey T. Heintz, Esq. Panel Chair, all of whom are duly qualified members of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. None of the Panel members resides in the District from which the Complaint originated. None of the members of the Panel served on the Probable Cause Panel that reviewed the Complaint.

FILED
AUG 23 2007
CLERK OF COURT
SUPREME COURT OF OHIO

**RECOMMENDED FINDINGS OF FACT**
**AND CONCLUSIONS OF LAW**

The Respondent, John William Vogel, Attorney Registration No. 007169, was admitted to practice in Ohio in 1999. The Amended Complaint of the Columbus Bar Association was filed on May 9, 2007, and the Respondent filed a timely answer thereto. Attorney Richard B. Parry, Esq. represented the Respondent. Dennis W. McNamara, Esq., Don Ruben, Esq., Bruce A. Campbell, Esq., and A. Alysha Clous, Esq., represented the Relator. Prior to the hearing,

Relator and Respondent entered into certain Stipulations in connection with the authenticity of certain Exhibits.

In Count I of the Amended Complaint, the Relator makes the following allegations of misconduct: (i) Gov. Bar R. IV § 1 [violating a lawyer's duty to maintain a respectful attitude toward the courts; (ii) DR 1-102(A)(4) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation]; (iii) DR 1-102(A)(5) [engaging in conduct prejudicial to the administration of justice]; (iv) DR 1-102(A)(6) [engaging in conduct that adversely reflects on the lawyer's fitness to practice law]; (v) DR 7-101(A)(1) [intentionally fail to seek the lawful objectives of a client]; (vi) DR 7-101(A)(3) [intentionally prejudice or damage a client during the course of a professional relationship]; (vii) DR 7-106(C)(6) [engaging in undignified or discourteous conduct which is degrading to a tribunal]; (viii) DR 7-107(A) [making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter]; and (ix) DR 8-102(B) [knowingly making a false accusation against a judge or other adjudicatory officer].

In Count II of the Amended Complaint, Relator alleges that prior to February 1, 2007, Respondent violated: (i) Gov. Bar R. IV § 1 [a lawyer's duty to maintain a respectful attitude toward the courts]; (ii) DR 1-102(A)(4) [engaging in conduct involving dishonesty, fraud, deceit or misrepresentation]; and (iii) DR 1-102(A)(5) [engaging in conduct prejudicial to the administration of justice]. Count II also alleges that after February 1, 2007, Respondent violated the following Ohio Rules of Professional Conduct (hereinafter, the "Rules"): (i) Rule 3.6(a) [making an extrajudicial statement that a reasonable person would expect to be disseminated by

means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter]; (ii) Rule 8.4(d) [engaging in conduct that is prejudicial to the administration of justice]; and (iii) Rule 8.4(h) engaging in conduct that adversely reflects on the lawyer's fitness to practice law].[1]

At the hearing, Respondent admitted that, as to Count I, he violated Gov. Bar R. IV § 1, DR 1-102(A)(6), DR 7-106(C)(6), DR 7-107(A) and DR 8-102(B). He denied the remaining allegations of the Amended Complaint.

The evidence in support of Relator's claims is largely a matter of public record. Count I arises out of Respondent's representation of an individual named Bon Jovi Winbush, in connection with a series of armed robbery charges. Winbush, an indigent defendant, originally had appointed counsel in the person of attorney Larry Ezell. Respondent frequently acts as co-counsel with Mr. Ezell, and evidently developed that relationship in connection with the Winbush matter, although the court never formally appointed Respondent, and the terms of his original engagement on behalf of Mr. Winbush are not clear from the record.

After the commencement of Winbush's trial in November 2004, the Franklin County Prosecutor's office discovered the existence of fingerprint evidence which should have been disclosed to the defense, but was not. The assistant prosecutor assigned to the case, Mr. Mann, gave notice of this omission, and then-Judge Jennifer Brunner declared a mistrial.

Thereafter, Respondent filed a motion to suppress the fingerprint evidence, and at the hearing on that motion, on January 18, 2005, he made allegations as to the circumstances of its non-disclosure: "Mr. Mann can take this as an insult. He can take it however he wants to take it, but

[1] Because the events resulting in Count II occurred before and after the effective date of the Rules, Relator has alleged violations of both the Rules and the Code of Professional Responsibility.

whether it is just a status quo of the prosecutor's office, or whether its incompetence, somebody was lying to somebody. I have no way of knowing."

At the same hearing, Judge Brunner observed that Winbush was charged with first and second degree felonies for which Mr. Ezell was ineligible, by rule, to serve as counsel. Judge Brunner also discovered that Respondent was not on the list of eligible appointed counsel (Respondent had previously determined not to take criminal appointments in Franklin County). As a result, Mr. Ezell's appointment was vacated, and Judge Brunner refused, over Respondent's objection, to appoint him to represent Winbush. New counsel, Larry Thomas, was appointed to represent the defendant.[2]

At a subsequent hearing on the matter in February, Respondent accosted Mr. Thomas outside the courtroom, and according to him, behaved in a threatening and intimidating manner. Immediately following this incident, Respondent also attempted to represent Winbush at the hearing in Judge Brunner's court.

Thereafter, having entered into a retainer agreement with Winbush or his family, Respondent filed a notice of appearance on Winbush's behalf, and appeared at a hearing on March 24. At that hearing, Judge Brunner struck Respondent's notice of appearance as having not been served within five days of filing, as required by rule. She also found that Respondent made misrepresentations in connection with the manner in which the notice of appearance had been served. Notwithstanding all this, Winbush and his family made it clear that they preferred to have Respondent represent Winbush with respect to the criminal charges.

At a hearing on April 4, and despite the court's rejection of his notice of appearance, Respondent appeared and disrupted the proceedings by persisting in the notion that he, and

2 It is not clear why these anomalies were not discovered earlier.

not Mr. Thomas, was counsel for Winbush. Ultimately, Judge Brunner said: "Mr. Vogel, you've not entered an appearance with the proper—in this matter, you're not entitled to represent the defendant. And if you don't sit down, I'm going to have you hauled to jail." Respondent extended his wrists as if to be handcuffed and replied: "If that's what you've got to do, ma'am." Judge Brunner found Respondent in contempt, and he was taken into custody and incarcerated. He gave an interview from jail to the Columbus *Dispatch* in which he said "the courtroom gets a little rough and tumble sometimes. A judge has to be able to accept that or pass the robe on to another judge."

Four days later, on April 7, 2005, Judge Brunner had Respondent brought before her for an "absolution" hearing with respect to the contempt, and specifically instructed that he dress in the suit he was wearing at the time he was taken into custody. Respondent testified that he did not receive this instruction, but whether he did or not, he appeared in court in his jail overalls. Rather than bring this omission to the court's attention, Respondent, when asked about his attire, said: "I'm very proud to be wearing the uniform that I am presently wearing, your honor." Nonetheless, Respondent was given an opportunity to apologize for his prior behavior and purge himself of his contempt. He offered to apologize, but only if he were permitted to represent Winbush. He ascribed any irregularities in the notice of appearance filed on behalf of Winbush to typographical errors. After a lengthy colloquy between Respondent and the court, he said "This is an attempt to force this young man [Winbush] to make a plea for ten years for something he did not do. And forgive me, but this is a result of collusion between yourself and the prosecutor's office."

As a result of this remark, Judge Brunner again found Respondent in direct criminal contempt, and sentenced him to 40 days in jail, with credit for the four days that he had

theretofore served. Respondent served the entire remaining 36 days, refusing all opportunity to purge himself of the contempt. Winbush ultimately pleaded guilty, and, in another interview published in the *Dispatch*, confessed to the robberies.

Count II of the Amended Complaint arises out of Respondent's representation, with Mr. Parry as co-counsel, of an individual named Arnold Dee Cremeans in connection with a number of rape and other sexual misconduct charges, the victims of which were allegedly Cremeans's children. The case was assigned to Guy L. Reece II, a distinguished African-American judge of the Franklin County Common Pleas Court, and went to trial in late January and early February, 2007.

During *voir dire*, Respondent referred to Judge Reece as "the man." Respondent rationalized this remark as an attempt by him to ingratiate himself with the panel of prospective jurors. During the trial itself, Respondent repeatedly, and despite cautionary admonitions from the judge, engaged in exaggerated reactions to various witnesses' testimony, and adverse evidentiary rulings. At one point, during a side-bar conference, Respondent, after the judge ruled against him, said: "Judge, you're running a monkey trial, here." Judge Reece let this remark pass. Respondent admits saying this, but denies that it was racially motivated; indeed, he seemed shocked that anyone might conclude otherwise. Instead, he claims he was drawing a comparison to the famous trial of John Thomas Scopes, evidently because of the reputed prosecutorial bias in that case by the trial judge, John Raulston. Relator does not allege, and the Panel does not find, that the remark was racially motivated. Even conceding Respondent's explanation of it, however, it was disgraceful and contumacious.

During the Cremeans trial, Respondent sought, as a tactical matter, to exclude two individuals from the public defender's office from attending the trial, by issuing subpoenas for

them (there was a separation of witnesses in effect). When Respondent's stratagem came to the attention of the two individuals, they notified the prosecutor, who in turn informed the judge. Judge Reece prohibited Respondent from serving the subpoenas, and upon inquiry, Respondent advised him that they had been destroyed. Thereafter, Judge Reece reconsidered and agreed to allow Respondent to subpoena these individuals. When the witnesses were served (by Mr. Parry), it was observed the subpoenas were the very ones Respondent had previously represented had been destroyed. Confronted with this state of affairs, Respondent claimed that he thought he had destroyed them, but found them shortly after being told that he could call the individuals as witnesses, and, rather than re-issuing new subpoenas, served those. The panel has no doubt that Respondent lied to Judge Reece in this situation.

After the conclusion of the trial (Cremeans was acquitted), Judge Reece took up the question of Respondent's conduct and found that, in connection with the subpoenas, Respondent had committed a fraud on the court. He was found in contempt, and sentenced to either two days in jail or a $500 fine. Respondent paid the fine rather than serve another jail sentence for contempt, and filed an appeal, which remains pending. In yet another interview with the *Dispatch*, Respondent characterized his punishment as "nothing more than retaliation on the part of the prosecutors and because of the liars they put on the stand."

The Panel unanimously views the foregoing as clear and convincing evidence of misconduct, and unanimously finds the following findings of fact and conclusions of law:

1. As to Count I of the Amended Complaint, Respondent violated the following provisions of the Code of Professional Responsibility:

(i) Gov. Bar R. IV § 1 [a lawyer's duty to maintain a respectful attitude toward the courts;

(ii) DR 1-102(A)(5) [conduct prejudicial to the administration of justice];

(iii) DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];

(iv) DR 7-106(C)(6) [engaging in undignified or discourteous conduct which is degrading to a tribunal];

(v) DR 8-102(B) [knowingly making a false accusation against a judge or other adjudicatory officer].

2. The Panel unanimously finds that Relator did not, by clear and convincing evidence, prove that Respondent violated: (i) DR 1-102(A)(4) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation]; (ii) DR 7-101(A)(1) [intentionally fail to seek the lawful objectives of a client]; (iii) DR 7-101(A)(3) [intentionally prejudice or damage to a client during the course of a professional relationship]; or (iv) DR 7-107(A) [making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter]. The Panel recommends that these allegations be dismissed.[3]

3. As to Count II of the Amended Complaint, Respondent violated the following provisions of the Code of Professional Responsibility and the Rules of Professional Conduct:

(i) Gov. Bar R. IV § 1 [a lawyer's duty to maintain a respectful attitude toward the courts];

(ii) DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation];

(iii) DR 1-102(A)(5) [engaging in conduct prejudicial to the administration of justice];

(iv) Rule 8.4(d) [engaging in conduct that is prejudicial to the administration of justice]; and

[3] The Panel recommends that the alleged violation of DR 7-107(A) be dismissed notwithstanding Respondent's admission to it. Misconduct must be proven by clear and convincing evidence, and the Panel finds that Respondent's extrajudicial statements, while confrontational and self-aggrandizing, were not such as to have had a substantial likelihood of materially prejudicing an adjudicative proceeding, as required by the Rule.

(v) Rule 8.4(h) engaging in conduct that adversely reflects on the lawyer's fitness to practice law].

The Panel unanimously recommends dismissal of the alleged violation of Rule 3.6(a) [making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter]. Respondent's unprofessional remarks to the media occurred after the conclusion of the trial, and thus could not have had a substantial likelihood of materially prejudicing the matter.

## MITIGATION AND AGGRAVATION

Respondent offers in mitigation that he is a zealous practitioner, who has never before been the subject of disciplinary proceedings. He largely acknowledged and expressed remorse for his misconduct in connection with Count I, although he stresses that his behavior in the Winbush case arose from his strong feelings that the defendant had a right to counsel of his choice. As to Count II, Respondent insists that his conduct was nothing more than enthusiastic, passionate representation. He dismisses the circumstances surrounding the issuance of the subpoenas as a misunderstanding, and his subsequent remarks to the newspaper to having been misquoted.

Respondent has committed multiple offenses, and there is a pattern to his misconduct. Although he has been in practice for eight years, Respondent fails to grasp the notion that dignity and respect must attend the administration of justice. Indeed, Respondent's demeanor and testimony at the hearing suggest that he views his courtroom behavior as the legitimate tactics of a noble defender of the downtrodden. Respondent has been watching too much television; in fact, his antics are boorish and, in the context of the practice of law, reprehensible. Moreover,

his conduct in connection with the subpoenas in the Cremeans matter evidences an off-handed approach to the truth. Clearly, and as he points out, he had no legitimate reason to lie about destroying the subpoenas, yet the Panel unanimously finds that he did so, no doubt because when he originally told Judge Reece that the subpoenas had been destroyed, it never occurred to him that the facts of the matter would ever come to light. When they did, he compounded his misconduct by persisting in the deception. This demonstrates a casualness of character and professionalism that cannot be tolerated in an adversary system that depends heavily on both.[4]

Relator alleges that Respondent failed to cooperate in the disciplinary process, but the Panel does not find such a lack of cooperation as to rise to the level of an aggravating factor in the consideration of sanctions. Relator also alleges that Respondent's behavior stems from a selfish motive, *viz.*, his interest in heightening his profile as a fearless and aggressive criminal defense advocate. The Panel agrees.

Relators argued that Respondent should be suspended for two years, with the last six months stayed, and have cited several cases in support of that proposition. In *Disciplinary Counsel v. Gardner*, 99 Ohio St. 3d 416, 2003-Ohio-4048, the respondent received a six month actual suspension for inflammatory, unwarranted attacks on a court of appeals, made in a brief in support of a motion for reconsideration. While the respondent persistently refused to acknowledge any misconduct, his behavior was nonetheless found to be an isolated incident. In *Disciplinary Counsel v. Baumgartner*, 100 Ohio St. 3d 41, 2003-Ohio-4756, the respondent was disbarred after spending a career disparaging virtually every aspect of the judicial process. As the Supreme Court described her conduct, she:

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[4] In this regard, the Panel notes the distinction between Respondent's fast and loose behavior with respect to the subpoenas, and Mr. Mann's prompt and full disclosure of the embarrassingly tardy discovery of the fingerprint evidence in the Winbush case.

"...engaged in egregiously unprofessional behavior at prehearing conferences including [making] ad hominem accusations against the, panel chair and others...; and refusing to participate in the hearing, disregarding a direct request from the panel chair to be seated at the trial table, and walking out of the hearing.

...Respondent repeated her false accusations against the numerous judges and public officials during the disciplinary process in her personally prepared, signed, and filed motions, affidavits and statements made on the record at the final pre-hearing conference.

...Respondent admitted almost all of the facts but never acknowledged that any of her conduct was even arguably contrary to the ethical standards of Ohio lawyers. In addition, she persistently denied the authority of, the panel, the board and the Ohio Supreme Court to regulate her conduct as a lawyer. *Id* at 48.

Finally, in *Disciplinary Counsel v. LoDico*, 106 Ohio St. 3d 229, 2005-Ohio-4630, the respondent was suspended for 18 months, with the last twelve months of the suspension stayed, for conduct that is similar to the conduct of Respondent herein.

## PANEL RECOMMENDATION

The Panel unanimously finds that Respondent's conduct is significantly more egregious than that involved in *Gardner*, but less egregious than the conduct in *Baumgartner*. Respondent's histrionics, in and out of court, are similar to the misconduct involved in *LoDico*, but overall, Respondent's behavior is more intolerable, inasmuch as he lied to a judge in the course of a trial. It is the unanimous recommendation of the Panel that Respondent be suspended from the practice of law for a period of two years, with the final twelve months of such suspension stayed upon the following conditions:

1. Appointment of a monitor by the Columbus Bar Association and full compliance by Respondent with the terms imposed by such monitor during the period of probation.
2. Respondent shall pay all the costs of these proceedings.

## BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 10, 2007. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, John William Vogel, be suspended for a period of two years with one year of said suspension stayed upon the conditions contained in the panel report. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

**JONATHAN W. MARSHALL, Secretary**
**Board of Commissioners on**
**Grievances and Discipline of**
**The Supreme Court of Ohio**