

BEFORE THE SUPREME COURT OF OHIO

In re:)
)
CLEVELAND METROPOLITAN BAR) **CASE NO. 2008-1205**
ASSOCIATION)
Relator,)
v.)
)
KENNETH PODOR)
)
Respondent.)

**RESPONDENT'S RESPONSE TO RELATOR'S OBJECTIONS TO THE
RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE**

Respondent Kenneth Podor

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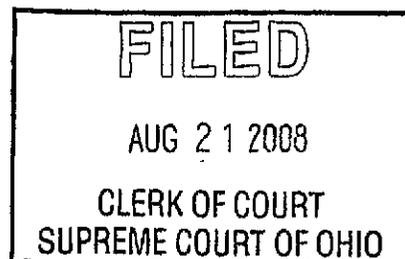


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STATEMENT OF THE CASE

Relator omits a substantial portion of the history of this case. The grievance charges which resulted in the Complaints were made by Respondent's former office manager in a May 12, 2005 letter to the Cuyahoga County Bar Association (CCBA). On June 6, 2005 Respondent was notified of the Grievance.

On April 11, 2006, Respondent received notice that the CCBA had filed the first version of its complaint. On June 9, 2006, the Probable cause panel remanded the complaint to the Relator for details, such as dates, times and persons involved in the allegations against the Respondent.

On or about September 18, 2006 the Relator filed its second version of the complaint which passed probable cause review on October 6, 2006. On April 23, 2007 the Relator filed the third version of the complaint charging six ethics violations and a formal case was opened - almost two years after Stohlmann's complaint letter.

Count six was dismissed upon Respondent's Motion. Relator, after some discovery, dismissed two more counts and added another, leaving four counts that proceeded to hearing. The Panel summarily dismissed Count Four because it was the same as Count Six, originally dismissed by the Chair. Relator dismissed Count Two at trial on its own Motion, leaving two Counts to be decided by the Panel.

Three years after the Stohlmann Complaint letter was filed, the Panel found that Respondent had violated Count One, DR 5-103(B), advancing funds to a pending litigation client. The finding was affirmed by the Board on June 5, 2008. Out of the total of Seven Counts filed against the Respondent, one was dismissed by the Chair of the Panel, three were dismissed

by the Relator before hearing, one was dismissed at hearing, one resulted in a finding of no violation and Relator was found to have violated one ethical rule, advancing a financial assistance to a litigation client. Relator had admitted the relevant facts of this Count in his response to Stohlmann's complaint letter in 2006, in his answers in 2007 and 2008 and again in 2008 in the Stipulations. Respondent never denied the factual allegations necessary for a finding. He did initially deny that such facts constituted a violation because the client was a friend and the funds were advanced by a non-professional corporation for whom the client had worked

The Relator didn't object to the Panel's Finding of Facts and Conclusions of Law, but only objected to the Panel's recommended sanction of a one year suspension, which was stayed provided the Respondent took additional ethics course.

STATEMENT OF FACTS

Respondent adopts the Relator's Statement of Facts with the following changes.

1. For the operative period of time of the Complaint, Respondent discarded files after one year. The files contained no original data or materials and, prior to destroying the files, he offered the files to the clients. There was no requirement to keep such files during the operative time.
2. Carla White was a long time friend of Respondent (Panel's Finding of Facts and Conclusion of Law, ¶10). Respondent had known Carla White for 15 - 20 years (Podor Deposition Pg. 20, L. 25 - Pg. 21 - L 1).
3. Respondent, in causing IMMI to advance the funds to Carla White, acted without dishonest or selfish motive. (Findings of Fact, ¶ 18). Neither he nor IMMI received interest or other consideration for IMMI's advance (Stipulations, ¶ 8).

4. The funds were for living expenses (Findings of Facts, ¶11) and to open a business (Relator's Objections, pg, 2, fn. 3). Repayment of the funds was contingent upon White's ability to repay whether the ability was provided by the personal injury case or other sources of funds. (Stipulations, ¶ 8).
5. Respondent accurately described the transaction in his deposition testimony:

A: IMMI paid Carla White to be in the commercial with the understanding that she would pay it back, if they ever could. She started a muffler business or something with the money.

Q: At the time IMMI loaned money to Carla White?

A: It wasn't a loan. I don't know how you describe it. She was paid for being in a commercial with the understanding that if she ever made any money she would have to pay it back without interest. (Deposition Transcript Pg, 60).

LAW AND ARGUMENT

- a. **Relator's Arguments should be struck because they are based on facts not found by the Panel and Relator did not object to the Panel's finding of facts.**

Relator's argument in the first instance should be struck. Relator admits that it has no objection to the Panel's Findings of Facts and Conclusions of Law, but only objects to the recommended sanction. Relator then attempts to argue from facts the Panel did not find and from conclusions not reached by the Panel. Relator cannot side-door its objections to the Panel's Findings. It cannot first accept the findings and then argue against them. Specifically, Relator argues that

Although not specifically noted [that is, The Panel didn't find], Respondent's [1] duplicity regarding the advancement of funds to his clients subject to repayment upon conclusion of the underlying litigation,

and notwithstanding his [2] *pro forma* acknowledgement that such is “wrong”, [3] demonstrates his lack of remorse and/or the absence of an understanding that his conduct was improper. This [presumably number 3] also constitutes an aggravating factor. (Relator’s Objections, Pg 6) (Emphasis and parenthetical added).

However, as tacitly admitted by the Relator, the Panel, having heard the evidence and observed the witnesses, did not find the Respondent duplicitous, did not find his acknowledgement *pro forma* and did not find that he lacked remorse or misunderstood the wrongfulness of his conduct. The Panel did find (and Relator had no objection to the Panel’s finding):

19. (b) There was submission of false evidence, false statement or other deceptive practices during the disciplinary process in that Respondent was somewhat guarded in his testimony. At his deposition Respondent testified that IMMI was giving Carla White money during her personal injury litigation as payment for appearing in a commercial. At hearing, he admitted that the primary motivation giving her money was to help her out during a difficult time, but he still tried to justify it because of her appearance in the commercial. Although he may have justified in his own mind that he could pay her out of IMMI because she appeared in a television commercial, it was clear to the Panel that he was paying her simply to help her out... Respondent’s reluctance to fully admit his motivation was an aggravating factor. (Finding of Facts, Para 19(b))

Thus, The Panel found that the Respondent was “somewhat guarded” in his testimony (a finding of fact) and that such was a deceptive practice because his deposition testimony on the transaction appeared different from his hearing testimony. The Panel did not find the Respondent was duplicitous-- or that he lacked remorse. The Panel did not find that the Respondent refused to accept responsibility or failed to acknowledge his guilt. It found that the Respondent’s reluctance to fully admit his motivation, not his wrongdoing, constituted an

aggravating factor. The Panel, who actually observed the Respondent, was in the best position to judge Respondent's actual mental state.

The Panel considered all the evidence, observed the Respondent and witness and reached factual findings and conclusion of law. Since Relator has no objection with the findings, it cannot be heard to argue against them.

- b. Relator's objection to the sanction should be overruled because the recommended sanction is appropriate in that the Respondent lacked any malice or self interest in violating the ethics rule and was motivated by an admirable desire to help a friend.**

Relator admits sanctions must be appropriate for the facts of each case. Relator, however, claims that Respondent's conduct warrants an actual suspension. This case simply does not warrant such a severe sanction.

The analysis of the appropriateness of a sanction starts with the underlying offense. In this case the underlying offense, while admittedly an offense, has none of the elements that would warrant aggravation of sanctions.

Specifically, as found by the Panel, the underlying offense was not motivated by any maliciousness or self interest. The Panel found the Respondent caused IMMI to advance the funds to his long time friend and client, Carla White, because she was in need of living expenses and Respondent wanted to help. The advance was repaid without interest or fees from her and her husband's settlement proceeds. The clients were not leveraged into a fee agreement by the transaction¹, the clients still had a significant interest in the case², there was no testimony or

¹ The loan was made after the attorney/client arrangement was reached and Respondent had previously represented Carla. (Finding of Facts, Para 10)

² Carla's case settled for \$159,000. She repaid half of the advance (\$9,900). Her husband's case settled for \$181,000 and he repaid the other half (\$9,900). (Carla and Charles White Disbursement Sheets, CCBA Trial Exhibits A&B; attached as Exhibit A & B))

argument that Respondent obtained improper control of the case or the clients, the clients suffered no injury and the client have never complained.

The Panel, who heard the testimony and observed all the witnesses obviously took the Respondent's *mens rea* into consideration in determining the recommend sanction because the Panel sited his lack of malice and bad motive as a mitigating factor, a finding ignored in the Relator's arguments.

Relator seeks an enhancement of sanctions because of what it perceives as a lack of remorse or duplicity. No such finding exists and the record supports none.

As Relator acknowledges, Respondent has always admitted that he caused IMMI to advance money to Carla White, his friend and client. The undersigned admitted such to Ari Jaffe, the Cuyahoga Bar's Investigator, in his first correspondence to Jaffe . Respondent admitted it in his answers to the initial and Amended Complaints and in the Stipulations. He admitted it under oath at deposition and at hearing. He never equivocated over the substance of an ethical violation. His difficulty was in explaining the transaction in legal terms because the transaction did not arise out of a deal, a commercial transaction or any other transactions easily susceptible to legal categorization. It arose out of their relationship of being long time friends. It arose because one friend was successful and the other injured and in need.

The irony of this case cannot be ignored. Respondent admitted he caused IMMI to advance financial assistance to Carla White, a client and a friend, over three years ago. After an investigation that lasted six months, a review by the Cuyahoga County Bar Panel, discovery that lasted a year, and a full hearing, the Respondent was unremarkably found to have advanced financial assistance to a client payable from a client's case.

Relator now seeks to enhance the sanctions over and above the recommendations of the Panel and the Board because of Respondent's reluctance to fully admit that he was motivated by the eleemosynary desire to help a friend in need (Finding of Facts, ¶ 19(B)). The Panel already enhanced the sanction. Is further enhancement necessary because Respondent's testimony, while guarded, admitted every salient fact necessary for a finding of a violation as did his answers and stipulations?

Relator implies that Respondent first changed his testimony at the hearing. Such is simply not true. A complete reading of Respondent's deposition testimony reveals that he explained the nature of the transaction in his deposition and that such explanation has been consistent since the beginning of the investigation. In his deposition, after having admitted he advanced funds to Carla White in his Answer, Respondent explained the transaction as follows:

A: IMMI paid Carla White to be in the commercial with the understanding that she would pay it back, if they ever could. She started a muffler business or something with the money.

Q: At the time IMMI loaned money to Carla White?

A: It wasn't a loan. I don't know how you describe it. She was paid for being in a commercial with the understanding that if she ever made any money she would have to pay it back without interest.

Q: Did she ever pay the money back?

A: Yes.

Q: Do you know when she paid it back?

A: She paid a check on the disbursement for \$9,900 (Settlement Disbursement) Deposition Transcript Pg, 60, L. 18 - Pg. 61, L. 5).

This testimony must be read in light of the Respondent's admissions in his Answer. He has already admitted he advanced funds to a client and that the funds were in part contingent upon the case settlement or recovery. Relator acknowledged Respondent's admission at page 4 of its Objections³. In that light, his deposition answers are not an attempt to justify, but to

³ "In his answer to the Relator's initial Complaint, Respondent admitted to making loans to a very few friends who happened to be his client. Despite his answer, Respondent testified at

explain what the transaction was in his mind. He was not attempting to defend the ethics charge (the facts of which he had already admitted), but rather simply to explain it.

Such a transaction – pay me back if you can – is not one normally seen in law. It is seen between friends and family. I know many people who have given needy friends and family thousands upon thousands of dollars under exactly the same terms. I have. Some has been repaid and some will never be repaid. At the time, Carla was a friend in need. She needed the funds for prescriptions and living expenses (Finding of Facts, Para 11) because she was disabled from her accident.

I have given needy friends substantial sums of money under exactly the same terms – pay me back if you can. I have done so with no papers or documents. Before this case, I don't know if I would have altered my action if my friend were also a client.

Thus, Respondent, while having a difficult time categorizing the transaction as a loan, admitted all the salient facts for a finding of an ethical violation. He admitted he caused funds to be advanced to a client who was also his friend with an expectation of repayment from the proceeds of the case. In an ethical sense he clearly advanced financial assistance to a client and so admitted in every answer, response and testimony. In a legal sense is it a loan? I frankly don't know. The legal determination, however, is and always has been irrelevant to the ethical issue of whether he “advanced or guaranteed financial assistance.” He has continuously admitted that he advanced financial assistance to the client. He has likewise consistently had difficulty with classifying the transaction legally. The legal characterization of the advance of financial assistance is better left to commercial or tax law and not to ethics. No further enhancement of

deposition that the funds paid to the Whites were not loans (he never so testified) but were compensation for a very brief appearance in a television commercial which only needed to be repaid from the proceeds of the White's personal injury case”. Parenthetical added.

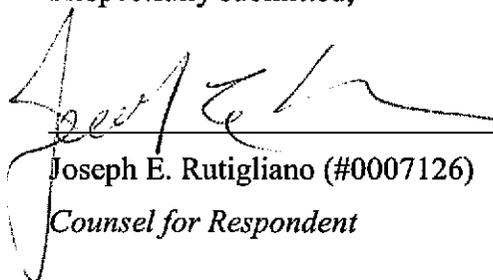
sanctions is warranted because the Respondent was uncertain how to classify a transaction, arising out of friendship, into a legal category.

Finally, Relator recites Respondent's 1995 sanction as an enhancement factor, and it is. Respondent, however, respectfully submits that the age of the prior violation and its dissimilarity to the present matter diminish its enhancement value and that the Panel gave it full consideration in reaching the recommended sanction.

CONCLUSION

For the reasons sated herein Respondent respectfully requests this Court to overrule Relator's objections and impose such sanctions, as it deems appropriate under all the circumstances of the case.

Respectfully submitted,



Joseph E. Rutigliano (#0007126)
Counsel for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Response to Relator's Objections to the Recommendation of the Board of Commissioners on Grievances and Discipline was served upon counsel for the Relator on this 20th day of August 2008.



JOSEPH E. RUTIGLIANO

SSN: _____
DOB: _____

PODOR & ASSOCIATES
33565 Solon Road
Solon, Ohio 44139
(440) 914- 5297

D/L: _____

#1

DISBURSEMENT STATEMENT

Client: Carla White

Date: 7/16/03

SETTLEMENT AMOUNT: \$ 159,000.00

Less Attorney Fees (40 %)
(33 1/3 % if settled prior to suit)
(40% in case of suit thereof)

Podor & Associates \$ 63,600.00
Co-Counsel Name _____ \$ _____
BALANCE \$ 95,400.00

Check # 21035
Check # _____

Subro	Charges & Expenses	Paid To	Amount	Check #
	Bank of Commonwealth	Same	\$ 5,141.69	Check # 21036
	Pre Settlement Funding	Same	\$ 24,000.00	Check # 21037
LOP -	Dr Steunick	Same	\$ 3,916.50	Check # 21038
	DLL Attorney Fees	Same	\$ 12,439.50	Check # 21039
	Dr Steunick	P+A	\$ 500.00	Check #
	Pinkos - Photomone	P+A	\$ 5.30	Check #
	Northwest Physician Services Inc	P+A	\$ 25.00	Check #
	Source Corp	P+A	\$ 125.41	Check #
	University Radiologists	P+A	\$ 16.00	Check #
	Records Deposition Service	P+A	\$ 34.31	Check # #21035
	University Hospital	P+A	\$ 20.00	Check # 52,523.2
	University Hospital	P+A	\$ 24.57	Check #
	University Orthopedic Assoc.	P+A	\$ 25.00	Check #
	University Orthopedic Assoc.	P+A	\$ 500.00	Check #
	University Orthopedics	P+A	\$ 21.00	Check #
	The NCS Group	P+A	\$ 33.00	Check #
	Records Deposition Service	P+A	\$ 126.00	Check #
	Records Deposition Service	P+A	\$ 162.15	Check #
	Records Deposition Service	P+A	\$ 51.00	Check #
	Records Deposition Service	P+A	\$ 46.46	Check #
	Records Deposition Service	P+A	\$ 198.00	Check #

Total Charges and Expenses \$ 42,070.89
 Subtotal \$ _____
 (Funds Remaining in Trust Account- if any) \$ -0-
TOTAL PROCEEDS TO CLIENT \$ 53,329.11

I/WE HEREBY ACKNOWLEDGE RECEIPT FROM PODOR & ASSOCIATES OF THE ABOVE AMOUNT IN FULL AND IN LANCE WITH THE INFORMATION CONTAINED HEREIN AND HEREBY APPROVE OF THE DISTRIBUTION OF FUNDS AS SET FORTH ABOVE. PODOR & ASSOCIATES IS NOT AWARE OF ANY LIENS NOT LISTED ABOVE. CLIENT IS RESPONSIBLE FOR ANY AND ALL MEDICAL EXPENSES AND/OR BILLS NOT LISTED ABOVE. CLIENT MAY ALSO BE RESPONSIBLE FOR SUBROGATION WITH THEIR HEALTH INSURANCE CARRIER.

Signature Carla White
 Signature Paul A. White

Date 7-17-03
 Date 7-17-03

Notes: Notes taken out of trial

SSN: _____
DOB: _____

PODOR & ASSOCIATES
33565 Solon Road
Solon, Ohio 44139
(440) 914- 5297

D/L: _____

DISBURSEMENT STATEMENT

Client: Charles White

Date: 7/16/03

SETTLEMENT AMOUNT: \$ 181,000.00
Less Attorney Fees (40 %) \$ 72,400.00
(33 1/3 % if settled prior to suit)
(40% in case of suit thereof)

Podor & Associates \$ 72,400.00 Check # 24108
Co-Counsel Name _____ \$ _____ Check # _____
BALANCE \$ 108,600.00

Subro	Charges & Expenses	Paid To	Amount	Check #
	Bank of the Commonwealth	Same	\$ 5,130.26	21045
	The Settlement Funding	Same	\$ 24,000.00	21046
LOP -	Dr Stewart	Same	\$ 1,533.55	21047
	Clerk of Court - Filing Fee	PVA	\$ 80.00	
	Lake County Sheriff's Office	PVA	\$ 88.00	
	Sourcecorp	PVA	\$ 525.8	
	Records Deposition Service	PVA	\$ 6.00	
	Clerk of Court - Filing Fee	PVA	\$ 80.00	
	Corilla & Grandillo	PVA	\$ 351.00	
	Corilla & Grandillo	PVA	\$ 50.00	#21048
	Records Deposition Service	PVA	\$ 134.00	32,358.13
	University Hospital	PVA	\$ 124.00	
	Smart Corporation	PVA	\$ 54.44	
	The MCS Group	PVA	\$ 82.01	
	University Orthopedic Associates	PVA	\$ 85.00	
	University Orthopedic Associates	PVA	\$ 28.00	
	University Orthopedic Associates	PVA	\$ 500.00	
	Clerk of Court - Filing Fee	PVA	\$ 80.00	
	Court of Common Pleas	PVA	\$ 18.90	
	Records Deposition Service	PVA	\$ 14.20	
	Records Deposition Service	PVA	\$ 114.00	
	University Orthopedic Associates	PVA	\$ 550.00	
	Total Charges and Expenses		\$ 33,046.60	
	Subtotal		\$ -0-	
	(Funds Remaining in Trust Account- if any)		\$ -0-	
	TOTAL PROCEEDS TO CLIENT		\$ 75,553.40	

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I/WE HEREBY ACKNOWLEDGE RECEIPT FROM PODOR & ASSOCIATES OF THE ABOVE AMOUNT IN ACCORDANCE WITH THE INFORMATION CONTAINED HEREIN AND HEREBY APPROVE OF THE DISTRIBUTION OF FUNDS AS SET FORTH ABOVE. PODOR & ASSOCIATES IS NOT AWARE OF ANY LIENS NOT LISTED ABOVE. CLIENT IS RESPONSIBLE FOR ANY AND ALL MEDICAL EXPENSES AND/OR BILLS NOT LISTED ABOVE. CLIENT MAY ALSO BE RESPONSIBLE FOR SUBROGATION WITH THEIR HEALTH INSURANCE CARRIER.

Signature Charles White
Signature Charles White

Date 7-17-03
Date 7-17-03