

IN THE SUPREME COURT OF OHIO

ORIGINAL

Toledo Bar Association

Relator

vs.

Case No. 2009-1171

John G. Rust

Respondent

ON RESPONDENT'S OBJECTION TO THE RECOMENDATIONS OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE
SUPREME COURT OF OHIO

BRIEF OF RELATOR

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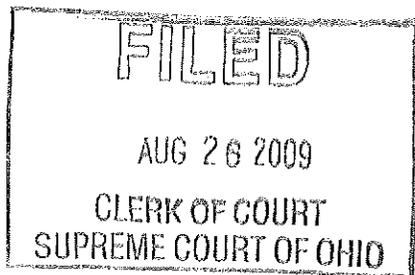


TABLE OF CONTENTS

Table of Authorities.	Page 3
Statement of Facts.	Page 4
Argument.	Page 4
RESPONDENT'S CONDUCT IN FILING A LAWSUIT ON BEHALF OF A PERSON WHO WAS NOT HIS CLIENT VIOLATES ONE OR MORE OF THE RULES OF PROFESSIONAL CONDUCT	Page 4
Conclusion.	Page 8
Certificate.	Page 9

TABLE OF AUTHORITIES

STATUTES:	Page
ORC§ 2113.18	6, 7
CASES:	
<u>Burwell v. Maynard</u> (1970)21 Ohio St. 2d 108	6
<u>Douglas v. Daniel Brothers Coal Co.</u> (1939) 135 Ohio St. 641	5
<u>Toledo Bar Association v. Ritson</u> 94 Ohio St. 3d 411, 2002 Ohio 1047	5
COURT RULES:	
Prof. Cond. R. 1.16(a)(1)	4
Prof. Cond. R. 3.1	4
Prof. Cond. R. 8.4(d)	4
Prof. Cond. R. 8.4(h)	4

Statement of Facts

Relator accepts the facts as found by the Board of Commissioners.

In summary, and stripped of extraneous detail, on March 29, 2007, Respondent John G. "Bulldog" Rust filed a lawsuit purportedly on behalf of Douglas Taylor, administrator of the estate of Irene Tillimon, while he did not in fact represent Taylor or the estate. He had not contacted Taylor at all. He knew that Taylor was not interested in pursuing a wrongful death claim.

Rust actually represented Duane Tillimon, son of Irene, who had previously, and unsuccessfully, sought appointment as executor of Irene's estate. Taylor instructed Rust to dismiss the case. He refused. The suit was ultimately dismissed on a defense motion on August 21, 2007.

Argument

RESPONDENT'S CONDUCT IN FILING A LAWSUIT ON BEHALF OF A PERSON WHO WAS NOT HIS CLIENT VIOLATES ONE OR MORE OF THE RULES OF PROFESSIONAL CONDUCT

The Board found only that Respondent violated Prof. Cond. R. 1.16(a)(1). Relator does not object to this finding, though we believe a more appropriate finding would have been a violation of 8.4(d), conduct prejudicial to the administration of justice, 8.4(h), conduct adversely reflecting on fitness, or 3.1, filing an action with no basis in law or fact. The Board was not persuaded that those allegations were appropriate to these facts. So be it.

The particular rule violated is less important than the principle that a lawyer may not simply take legal action on behalf of someone who is not his client.

In Toledo Bar Association v. Ritson, 94 Ohio St. 3d 411, 2002 Ohio 1047, a lawyer decided that the medical expenses of the decedent in an estate he was handling should have been paid by Worker's Compensation, rather than the decedent's health insurance carrier. He then filed a lawsuit, purportedly on behalf of the health carrier (which he did not represent) against the decedent's former employer, without the knowledge or consent of the carrier. This Court found such actions to be conduct prejudicial to the administration of justice and conduct adversely reflecting on fitness, together with other Rule violations. Relator sees no distinction between the conduct in Ritson and the conduct in the instant case.

Respondent apparently does. Though his objection is a bit difficult to follow, the gravamen appears to be an argument that there is nothing wrong with what Mr. Rust did. Relator respectfully suggests that the objection is typical of Rust's behavior in the underlying case and his view toward the practice of law in general: if facts or law interfere with Rust's pursuit of a claim or defense, they can be ignored, mangled into submission, or destroyed under the sheer weight of repeated filings of incomprehensible paper.

The cases Mr. Rust cites are inapposite. In neither case did a lawyer file a suit in the name of someone who was not his client. Rather in Douglas v. Daniel Brothers Coal Co. (1939) 135 Ohio St. 641, the widow in a wrongful death case filed the action before the statute of limitations ran, and was subsequently appointed as administrator. The issue was whether the subsequent appointment related back to the filing, and the Court held that it did.

Likewise, in Burwell v. Maynard (1970) 21 Ohio St. 2d 108, the issue was whether a claim against a one decedent's estate was barred because no fiduciary for the claimant's

estate had been appointed in time to file such a claim. The Court in Burwell held that, in the particular facts of that case, it was sufficient that the tortfeasor's estate was on notice of the claim.

With all due respect, Mr. Rust's bizarre attempts to salvage a wrongful death claim on behalf of his vexatious litigator client, including his brief filed with this court, reflect adversely on his competence.

Mr. Rust found himself in the following situation: his client, Duane Tillimon (soon to be declared a vexatious litigator) had been rejected by the probate court in his effort to be appointed fiduciary, even though he was the only beneficiary. The record does not tell us why, but it is no stretch to conclude that this was because the court did not find him suitable. Mr. Tillimon apparently made no effort to persuade Taylor, the appointed fiduciary, that his wrongful death claim was valid. He certainly did not provide Taylor with any evidence. Tr., p. 60. Tillimon had filed suit once, but this had been dismissed. Nearly a year elapsed before Tillimon went to Rust.

If Tillimon and Rust had had some evidence of a valid wrongful death claim in March of 2007, ORC § 2113.18 provided a perfect remedy: persuade the probate court that a *prima facie* case could be made, and get a new fiduciary. That was not possible, however. Despite the fact that Irene Tillimon died in January of 2005, no significant evidence of a valid wrongful death claim existed until Dr. Lepkowski executed an affidavit on August 6, 2007, two and a half years after Irene died, and more than four months after the Rust lawsuit was filed.

Lacking a good alternative, Rust charged ahead anyway. He told the world in a public filing that he represented Douglas Taylor, when he knew full well that he did not.

He filed a suit in the name of a non-client, knowing perfectly well that the nominal plaintiff wanted nothing to do with Tillimon's claim.

Rust then tried, in his inimitable fashion, to fix it later, and apparently he is still trying. Many of his efforts are discussed in the Board's decision. There is no need to repeat them here.

Apparently Rust made yet another effort to have Tillimon appointed in June of 2008. Though it is not in the record, Respondent attached as Appendix 3 to his brief in this Court a copy of the June 2008 motion. This was filed months after this disciplinary action was certified. Using ordinary logic, it is difficult to discern how a motion filed by the respondent in an underlying case, after a disciplinary action is pending, might change the import of the conduct that gave rise to the disciplinary claim. It is, however, illustrative of Rust's view of the world, as is the statutory argument raised in Rust's brief.

The language of ORC § 2113.18 is clear enough: the probate court may remove an executor who refuses to file a wrongful death suit, if the court determines that a *prima facie* case can be made. The statute gives the probate court the specific authority to determine whether to replace a fiduciary. Rust takes this language and turns it on its head. The statute says that *prima facie* evidence permits the court to change a fiduciary. Rust argues that any evidence requires the court to do so. He argues, in effect, that the probate court has a mandatory duty to accept his view of the facts, and act accordingly.

While the Board gave little weight to the report of Dr. Chaudhary (Relator's Exhibit 31), Relator submits that the doctor's assessment is telling:

My final conclusion is that Mr. John G. Rust has mild-to-moderate cognitive disorder in which his critical judgment is impaired. Based on my above close

observation, it is my opinion that he should not engage in the practice of law at this stage.

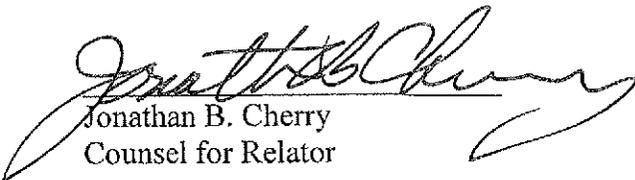
While this stops well short of a finding of mental illness, it is not insignificant. Coupled with specific ethical misconduct, Rust's mental condition should certainly be considered in fashioning a sanction.

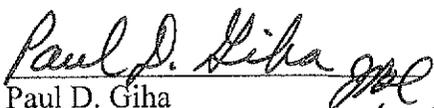
Conclusion

Relator urges the Court to accept the findings of fact of the Board. Relator respectfully suggests, however, that the Board's conclusions as to the specific Rules violated are excessively restrictive, and that the Court should reassess them.

Relator does not object to the sanction recommended by the Board.

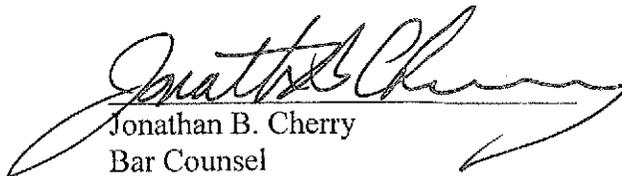

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Certificate

The undersigned certifies that copies of the foregoing Brief of Relator were sent by regular U.S. mail to all counsel of record whose names appear thereon, at the addresses stated hereon, on the 25th day of August, 2009.


Jonathan B. Cherry
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