

ORIGINAL

BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

11-0756

In Re:

:

Complaint against

:

Case No. 09-087

Nicholas Matthew Gallo
Attorney Reg. No. 0083226

Respondent

Disciplinary Counsel

Relator

FILED
MAY 04 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Findings of Fact,
Conclusions of Law and
Recommendation of the
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

:

INTRODUCTION

This matter was heard on January 13, 2011, in Columbus, before a panel consisting of members Walter Reynolds of Dayton, Martha Butler Clark of Columbus, and Judge Beth Whitmore of Akron, Panel Chair (collectively "the Panel"). None of the Panel members resides in the appellate district from which this matter arose or served on the probable cause panel in this case. Relator was represented by Lori Brown and Karen Osmond. Nicholas Gallo, Respondent, was represented by Brent English. Respondent presently resides in Cleveland, Ohio.

PROCEDURAL AND FACTUAL HISTORY

This is a case about mistaken identity and unintended consequences. It involves a newly employed young attorney who, in good faith, followed his employer's instructions until events demonstrated his mistake of fact. Gallo is that attorney. When the error was discovered he took

immediate action to correct his mistake. A more seasoned attorney might have avoided the mistake in the first instance. A more seasoned attorney would have been better able to resist the pressure from his employer that occurred in this case.

On December 7, 2009, Relator filed a complaint for disciplinary action following receipt of a grievance filed by Eugene Lucci. Lucci alleged that Respondent filed a false affidavit and procured a false affidavit from Jeffrey Rymers, the defendant-husband in a divorce case in which Respondent was serving as co-counsel, under the supervision of senior attorneys at the firm of Stafford and Stafford Co., LPA. In the grievance, Lucci alleged that Respondent violated Prof.Cond.R. 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.4(b), 3.5(a)(1), 4.1(a), 8.2(a), 8.4(b)-(d), and 8.4(h). Upon further investigation, Disciplinary Counsel filed a complaint asserting Respondent violated Prof.Cond.R. 8.2(a) and 8.4(c), (d), and (h). Respondent filed a timely answer to the complaint in which he generally denied the allegations and asserted an affirmative defense. The matter was set for hearing in August 2010, but was rescheduled and later heard by the Panel on January 13, 2011.

Respondent received his undergraduate degree from Cleveland State University and graduated from Cleveland-Marshall College of Law in May 2007. He delayed taking the bar examination until February 2008 and was admitted to practice in May 2008. Stip. ¶2. He briefly worked for a sole practitioner in Avon Lake, and then accepted a position in January 2009 with Stafford and Stafford Co., LPA, a small but well-known firm in Cleveland that specializes in domestic relations work. As an entry-level associate, Respondent's work was supervised by seven-year associate Gregory Moore and the firm's founding partner, Joseph Stafford, who had been in practice for over 26 years.

In early June 2009, Stafford asked Respondent to assist him in the divorce proceeding between Amy and Jeffery Rymers. See *Amy L. Rymers v. Jeffery G. Rymers*, Lake County Court of Common Pleas No. 09DR000158. Stip. ¶12. Mrs. Rymers had filed for divorce in March 2009, at which point Mr. Rymers retained Stafford as his counsel. Stip. ¶9. Of particular relevance to the underlying disciplinary proceeding is the fact that, at the time the divorce was filed, Mrs. Rymers was involved in a relationship with Eugene Lucci, a sitting (and at the time, the presiding) judge in the Lake County Court of Common Pleas. Mrs. Rymers and the Rymers' three children had been living with Lucci at his home since September 2008. Stip. ¶8.

Of further note, the initial pretrial conference in the Rymers' divorce proceeding was scheduled to occur in the domestic relations court, which is housed in the Lake County Courthouse directly across the hall from Lucci's judicial suite. Stip. ¶11. Judge Colleen Falkowksi, the domestic relations judge in Lake County, had recused herself from the case and Judge Judith Nicely, a retired judge from a different county, had been appointed to the case in her place. Stip. ¶10. Finally, in order to properly appreciate the chronology of events, it is important to understand that on the morning of the first pretrial conference in the Rymers' divorce, both Respondent and Mr. Rymers were of the mistaken belief that a man they observed standing in the doorway to Lucci's judicial suite was Lucci, when in fact it was Lucci's bailiff, Charles Ashman.

On the morning of June 3, 2009, Respondent arrived at the Lake County Courthouse having reviewed the file with Stafford and Moore beforehand, but having never met any of the parties, opposing counsel, or Lucci. As Respondent waited for Mr. Rymers to arrive in the main hallway outside the domestic relations court, he sat facing Lucci's judicial suite. Mr. Rymers

arrived approximately twenty minutes later, and within seconds, Linda Cooper, counsel for Mrs. Rymers, arrived and greeted Respondent. Respondent and Mr. Rymers then left the main hallway and headed elsewhere to discuss matters related to the hearing, at which point Respondent saw Cooper enter Lucci's judicial suite.

When Respondent and Mr. Rymers returned to the main hallway, Respondent saw Cooper exit Lucci's judicial suite and immediately enter the domestic relations courtroom. Cooper quickly exited the domestic relations courtroom and handed Respondent a copy of a "Motion to Intervene with Attached Memorandum and Pleadings" ("Lucci's motion"). Stip. Ex. 2; Stip. ¶13. Lucci's motion was signed by William McNamara as counsel for the applicant-intervenor, Lucci, and included an affidavit from Lucci in support of the motion. Stip. ¶13. In the motion, Lucci asserted, pursuant to Civ. R. 24, that he was intervening in the Rymers' divorce proceeding in order to: 1) recover approximately \$4,600 that he had loaned to Mr. Rymers to close on the sale of the Rymers' marital home, and in addition, recover the amounts Lucci had been paying to support the Rymers' three children while they were living in his home; and 2) disqualify Stafford from representing Mr. Rymers due to an alleged conflict of interest. Lucci had previously consulted with Stafford when Lucci was involved in his own divorce proceeding and claimed that Stafford was therefore precluded from representing Mr. Rymers in the Rymers' divorce proceeding.

Upon receiving Lucci's motion, Respondent quickly scanned its content, communicated the same to his client, and phoned Stafford and Moore to consult with them as to how to proceed in the matter. While Respondent was in the main hallway on the phone with Stafford, Respondent had his back to the entry into Lucci's judicial suite and Mr. Rymers was facing the

judicial suite. While Respondent was talking to Stafford, Mr. Rymers told him that Lucci had exited his judicial suite and was looking in their direction. Respondent glanced back toward the man standing at the entrance to Lucci's judicial suite and briefly described the man to Stafford over the phone. After hearing Respondent's description, Stafford told Respondent that the description "sound[ed] like Judge Lucci." (Tr. 388) Shortly thereafter the domestic relations court called the Rymers' case and the parties entered the domestic relations courtroom for the pretrial conference.

Upon returning to his office after the pretrial conference, Respondent prepared a memorandum for Stafford and Moore about the events in the main hallway that morning. His memorandum also addressed the substance of the conference, the validity of Lucci's motion, and Mr. Rymers' concerns on all of the foregoing matters.

Respondent, in conjunction with a law clerk at the firm, was directed to prepare a response to Lucci's motion. Moore and Stafford reviewed the document and contributed to its content. On June 17, 2009, Respondent signed and filed a combined motion captioned "Defendant, Jeffery G. Rymer's (sic) Motion to Strike and/or Dismiss Motion to Intervene; or in the alternative, Brief in Opposition to Motion to Intervene," "Motion for Extension of Time to Submit Supplemental Brief in Opposition To Motion to Intervene, et al." and "Motion for Sanctions and Attorney Fees Pursuant to O.R.C. Section 2323.51 and Civil Rule 11" (collectively "Rymers' opposition brief"). Stip. Ex. 3; Stip. ¶15,16.

Generally, Respondent argued in the brief that "Civil Rule 75(B) specifically provides that Civil Rule 24 shall not apply in divorce actions," thereby making Lucci's request improper, and thus Lucci's claims should be the subject of a civil proceeding, not part of the Rymers'

domestic relations case. Additionally, he argued that the one-hour meeting held between Stafford and Lucci while Lucci's divorce was pending did not result in the formation of an attorney-client relationship, nor did it require Stafford be disqualified from representing Mr. Rymers in the Rymers' divorce. Stip. Ex. 3 at p. 4. With respect to the request for an award of attorney fees and the imposition of sanctions, Respondent argued that Lucci violated Rule 1.3 of the Ohio Code of Judicial Conduct by "improperly using his position as presiding Judge to advance his own personal interests, by attempting to insert himself into an action in which he has no legitimate interest[.]" Stip. Ex. 3, p. 20. Respondent further argued that Lucci violated Prof. Cond. R. 3.3 by failing to cite any controlling law in support of his motion and by "engag[ing] in a pattern of harassing and threatening conduct toward the Defendant, [Mr.] Rymers, and *** Stafford; and hav[ing] intimated on numerous occasions these threats, based upon [Lucci's] position as a presiding Judge in the Lake County Court of Common Pleas." Stip. Ex. 3, p. 21; Stip. ¶17. Respondent attached his own affidavit to support the assertions contained in the Rymers' opposition brief, in addition to affidavits from Stafford and Mr. Rymers. Stip. Ex. 3, Ex. 1, 5, and 6; Stip ¶18-20.

Of importance to the underlying disciplinary proceeding, Respondent attested to the following events in support of the motion for sanctions and attorney fees:

"3. *** that [Respondent] observed *** Lucci standing in the hallway outside of his chambers on June 3, 2009, before the pretrial commenced.

"4. *** that [Respondent] observed *** Lucci staring at the Defendant, [Mr.] Rymers, and that Mr. Rymers indicated to [Respondent] that he was intimidated and felt threatened by the presence and conduct of *** Lucci.

“5. *** that [Mr. Rymers] was visibly distraught after *** Lucci stared at Mr. Rymers for a considerable amount of time.” Ex. 6 to Stip. Ex. 3, at ¶¶3-5; Stip. ¶21.

Additionally, Respondent prepared an affidavit for Mr. Rymers which provided, in relevant part:

“6. *** that [Mr. Rymers] fe[el] threatened and intimidated by the conduct of *** Lucci who [was] seeking to intervene in [Mr. Rymers’] domestic relations matter, especially given the fact that *** Lucci [was] the presiding Judge in Lake County, Ohio who [was] involved in a relationship with [Mr. Rymers’] wife.

“7. *** that *** Lucci was present in the hallway outside of his chambers, prior to the pretrial held on June 3, 2009 which is adjacent to where the pretrial in this matter occurred on June 3, 2009.”

“8. *** that *** Lucci was staring at [Mr. Rymers], which made *** [Mr. Rymers] feel threatened and intimidated especially given *** Lucci’s position as a presiding Judge in Lake County, Ohio.” Ex. 5 to Stip. Ex. 3, at ¶¶6-8.

Respondent signed and filed Rymers’ opposition brief on June 17, 2009. For reasons unrelated to the Rymers matter, Respondent resigned from his position at Stafford and Stafford Co., LPA on June 25, 2009. Stip. ¶2.

On July 8, 2009, Lucci filed a grievance with Disciplinary Counsel in which he complained that Respondent had “falsely accused [him] of abusing his official office” by making the assertions found in paragraphs 3-5 of Respondent’s affidavit, quoted above. Stip. Ex. 17, p.2; Stip. ¶22. Lucci’s grievance also stated that Respondent “falsely alleged” that Lucci was present on the date of the pretrial conference, as attested to in paragraphs 7-8 of Mr. Rymers’

affidavit, quoted above. Stip. Ex. 17, p. 2. In his grievance, Lucci claimed that he was “never, at any time *** in the hallway” while Mr. Rymers was in the courthouse and that he had “witnesses and irrefutable, conclusive evidentiary proof that the allegations in [Respondent’s] and [Mr. Rymers’] affidavits [were] lies.” Stip. Ex. 17, p.2.

Respondent corresponded with counsel for Relator in response to its investigation of Lucci’s grievance. Stip. ¶23. Respondent indicated to Relator that he “st[ood] by the documents” he filed in the Rymers’ divorce proceeding, reiterating that he had “observed *** Lucci standing outside of his chambers” the morning of the pretrial conference and that Mr. Rymers “was distraught due to the appearance and conduct of *** Lucci.” Respondent considered Lucci’s grievance to be “without merit,” stating that he “did not lie in the affidavit [he] filed with the Lake County Court of Common Pleas.” Stip. Ex. 18. Upon receipt of further correspondence from Relator, Respondent provided a description of the man he identified as Lucci and indicated where he was standing in the main hallway on June 3, 2009 when he saw Lucci staring at him and his client, Mr. Rymers. Stip. Ex. 20.

Relator filed the underlying disciplinary complaint in early December, and on December 31, 2009, Relator’s counsel advised Respondent that she had secured video recordings from four different cameras located on the second floor of the Lake County Courthouse that recorded the events of June 3, 2009. Stip. ¶25. Respondent received the video recordings from the four cameras on January 14, 2010. Stip. ¶24. On February 1, 2010, Respondent filed a “Motion to Withdraw Erroneous Affidavit and to Strike, Withdraw, and Disregard It” in the Rymers’ divorce proceeding. Stip. ¶30. In his motion, Respondent indicated that “careful review of the[] videotapes [had made it] apparent that the man whom [Respondent] reasonably believed and was

told was *** Lucci, was not, in fact, *** Lucci. Rather, that man was [Lucci's] bailiff who is believed to be Charles W. Ashman." Stip. Ex. 16, p. 9. Therefore, Respondent admitted "that he mistakenly identified *** Lucci as the man" that he had seen come in and out of Lucci's judicial suite several times and had previously indicated in his affidavit was staring at him and his client, Mr. Rymers. Stip. Ex. 16, p. 9. Accordingly, Respondent sought to "correct the record and to withdraw his Affidavit *** since it [was] now clear to him that he mistook *** Lucci's bailiff for *** Lucci." Stip. Ex. 16, p. 9-10.

At the two-day disciplinary hearing in this matter in January 2011, Mr. Rymers, Mrs. Rymers, Ashman, and Lucci testified as witnesses for Relator. Stafford and Moore testified as witnesses for Respondent, and Respondent testified on his own behalf. Relator called McNamara as a rebuttal witness following the presentation of Respondent's case. The video recordings from all four cameras on the second floor of the Lake County Courthouse were admitted into evidence, and portions of the videos were played for the Panel. The recordings clearly indicated that Lucci was not present in the main hallway outside his judicial suite at any point in time when Respondent or Mr. Rymers were present. Stip. Ex. 11-C, 11-D. Further, it is evident from the recordings and Ashman's testimony that Ashman was the man who was repeatedly entering and exiting Lucci's judicial suite on the morning of the pretrial conference and did, in fact, survey the main hallway at various points throughout the morning for ten to fifteen seconds at a time. (Tr. 184-85, 191, 196) Stip. Ex. 11-C, 11-D.

At the hearing, Respondent testified that, since being hired at Stafford and Stafford Co., LPA, he had been to two or three pretrial conferences by himself, none of which were at the Lake County Courthouse. Respondent was aware from his conversations with Stafford and

Moore that Lucci and Mrs. Rymers were involved in a relationship, but Respondent had never met either one of them, nor did he know what either person looked like. Respondent testified that, while waiting in the main hallway between Lucci's judicial suite and the domestic relations court on the morning of the pretrial conference, he saw a man come out of the Lucci's judicial suite on numerous occasions, though he did not know who the man was. Respondent stated that the man "looked at [him] several times." (Tr. 474)

After receiving Lucci's motion and moving down the main hallway away from the courtroom doors, Respondent phoned his office to discuss its contents. While Respondent was on the phone with Stafford, Mr. Rymers, who was facing in the direction of Lucci's judicial suite, but standing approximately 70 feet down the hallway, saw a man exit the suite. Respondent, who had his back to the main hallway, testified that Mr. Rymers' said "there he is" which caused Respondent to turn around. (Tr. 481) At that point, Respondent saw the same man that had been coming in and out of Lucci's judicial suite standing at the door of the suite and "star[ing] at [Respondent] and Mr. Rymers." (Tr. 480-481) Respondent described the man to Stafford over the phone, and Stafford indicated, based on the description, that the man was Lucci. (Tr. 479) Respondent testified that at that point, Mr. Rymers' "face turned bright red, *** he started shuffling his feet, and he was kind of peeking around [Respondent]. *** [H]e was looking at the ground, shoulders slumped[,] *** look[ing] very uncomfortable." (Tr. 481-482) Because the video camera was behind Mr. Rymers it could not record the full measure of Mr. Rymers' emotional reaction to seeing the man Rymers believed to be Lucci enter the hall. The video recordings show Mr. Rymers putting his hands to his head, scratching his head, and adjusting his clothes. Stip. Ex. 11-C. Moreover, because Respondent was facing Mr. Rymers

after Lucci's motion to intervene was given to Respondent, Respondent was in the best position to gauge Mr. Rymers' facial expressions and related emotions.

Respondent admitted that he never specifically asked Mr. Rymers, throughout the exchange that morning or later when preparing Mr. Rymers' affidavit, whether he knew, or had at any point in time had ever met, Lucci. (Tr. 103-105) Respondent stated that he looked up Lucci's picture online, and thought it was consistent with the man he had seen exit Lucci's judicial suite several times that morning, and that it was the same man he had been told was Lucci by Mr. Rymers and Stafford. (Tr. 602-504) Thus, when later questioned by the Relator as to the veracity of his affidavit, he remained committed to his belief that Lucci was, in fact, in the hallway that day staring at him and Mr. Rymers. (Tr. 501-502)

Respondent testified that, after the pretrial conference, he and a law clerk from Stafford's office were assigned to prepare a brief in opposition to Lucci's motion. Respondent was responsible for writing the portion opposing Lucci's request to intervene and the portion alleging misconduct on the part of Lucci, while the law clerk was tasked with opposing the conflict of interest allegations. (Tr. 488-489) Respondent testified that Moore was "very involved" in the drafting of Rymers' opposition brief and "made revisions" to the work Respondent had prepared. (Tr. 493) Specifically, Respondent indicated that he did not write the sentence that accused Lucci and his counsel, McNamara, of "engag[ing] in a pattern of harassing and threatening conduct toward *** [Mr.] Rymers, and *** Stafford; and hav[ing] intimated on numerous occasions these threats, based upon [Lucci's] position as a presiding Judge in the Lake County Court of Common Pleas." (Tr. 494); Stip. Ex. 3, p. 20 Respondent indicated that Moore and Stafford suggested the language, and that Moore authored the entire paragraph in which that

sentence was contained, and also directed Respondent to the portion of the Judicial Code that Lucci was alleged to have violated. (Tr. 494-497)

Respondent acknowledged, however, that having signed the document, he was required to have a good-faith basis for asserting such claims. Moore testified that he “certainly” had a hand in editing the Rymers’ opposition brief and that the work product was treated as “a group project.” (Tr. 428, 439) He likewise testified that he did not have any doubts that the drafting attorneys had satisfied all their ethical obligations before serving and filing the Rymers’ opposition brief. (Tr. 435) Moore was not questioned with any specificity as to whether he authored any part of the brief or affidavits.

Respondent testified that the assertion of a “pattern of harassing and threatening conduct” toward Mr. Rymers was based on: 1) the man believed to be Lucci staring at Mr. Rymers in the main hallway before the pretrial; 2) the filing of a “baseless” motion to intervene under Civ.R. 24, which is expressly prohibited in divorce cases by Civ.R. 75; 3) the receipt of two different communications from McNamara requesting Stafford withdraw as counsel for Mr. Rymers; and 4) the service of Lucci’s motion, which was signed and prepared by McNamara, being effectuated by Cooper in the main hallway outside Lucci’s judicial suite shortly before the initial pretrial conference in the case. (Tr. 84-86)

With respect to the assertion that there was a “pattern of harassing and threatening conduct” toward Stafford, Respondent indicated that the assertion was based on two different communications Stafford had received from McNamara in May 2009, asserting that Stafford needed to withdraw from his representation of Mr. Rymers due to a conflict of interest, followed by McNamara’s filing of an unfounded motion to intervene on behalf of Lucci. (Tr. 87-89)

Respondent testified that based on his “conversations with [] Stafford in regard to the[] two communications [from McNamara,] *** [it was Respondent’s] opinion that they were *** veiled threats.” (Tr. 92) Respondent testified that the combination of the foregoing items also served at the basis for the statement that Lucci had “improperly us[ed] his position as presiding Judge to advance his own personal interests[.]” (Tr. 89) Respondent admitted, however, that he never had a conversation with McNamara about the letters, and was unaware as to whether Stafford had talked to McNamara about them either. (Tr. 97-98)

When Stafford was questioned about the basis for the assertion in the brief that he had been “harass[ed] and threaten[ed],” Stafford testified that he had “a couple phone conversations” with McNamara that were “uncomfortable” for Stafford “because of the nature of the things that were being said by [] McNamara” relative to Stafford’s need to withdraw from the case. (Tr. 363) Stafford further clarified that the two letters, coupled with the representations made to him by McNamara in which McNamara “mischaracterize[ed] what actually occurred [when Stafford had consulted with Lucci on Lucci’s divorce]” were considered by Stafford “to be an outright threat.” (Tr. 374)

McNamara was called as a rebuttal witness for the Relator and testified that the conversation between him and Stafford was not threatening, but that it was clear that the two differed in their opinion as to whether Stafford’s continued representation of Mr. Rymers represented a conflict of interest. McNamara had a “vague recollection” of the call, but remembered that he and Stafford continued to disagree on this point. McNamara acknowledged, though, that the goal of the conversation was to request Stafford withdraw from the Rymers’ case and to “maybe [] do it in a more friendly way.” (Tr. 578) McNamara further clarified at trial

that the only reference he made in any of his communications to Stafford about Lucci's judicial capacity was in response to an assertion from Mr. Rymers' that he intended to raise "the danger of Mrs. Rymers being involved with *** Lucci, who *** is a Common Pleas Judge in Lake County" in the Rymers' custody proceeding because Mr. Rymers was "concerned for the [Rymers'] children's safety if potential transgressors [sought] revenge against a judge." Stip. Ex. 3, Ex. 2, p. 2. Thus, McNamara testified that he did not independently bring the fact that Lucci was a judge into the discussion between him and Stafford, but merely mentioned Lucci's judicial capacity as having been an issue raised by Mr. Rymers. McNamara did not recall telling Stafford during that conversation that he and Lucci were good friends and that McNamara had helped Lucci get elected. (Tr. 580-581)

Mr. Rymers also testified as to the validity of the contents of his affidavit, which was prepared for him by Respondent. To the extent Respondent indicated in the affidavit he prepared that Mr. Rymers felt "intimidated and *** threatened" and became "visibly distraught" upon seeing Lucci that day, Mr. Rymers confirmed that he was, in fact, extremely uncomfortable having to appear in the Lake County Courthouse, particularly across from Lucci's judicial suite, and that he became even more upset after having received Lucci's motion. (Tr. 130-142) Mr. Rymers testified that no one, including Respondent, had coerced him to sign the affidavit, nor was there any discussion or understanding between Mr. Rymers and Respondent that the affidavit exaggerated or in any way misrepresented how Mr. Rymers felt or what he believed to have occurred in the hallway that morning. (Tr. 155-156) Having listened to Mr. Rymers' testimony, the Panel believes that he lacks self-confidence and is susceptible to feeling threatened and overwhelmed by events such as occurred that morning. Consequently, the Panel

is convinced that the reaction attested to in both Respondent and Mr. Rymers' affidavits was an accurate depiction of Mr. Rymers' emotional state that morning. This leads the Panel to conclude that Mr. Rymers was not forced to sign an affidavit reflecting anything other than his true state of mind at the time.

Mr. Rymers explained that, when he arrived at the courthouse on June 3, 2009, he was "scared to death" because Lucci's name was "all over the place." (Tr. 130) Upon learning that Lucci was seeking to intervene in his divorce proceeding, Mr. Rymers described that he was "very upset" and that he needed to be "calmed down" by Respondent because he was "pretty excited about [it]." (Tr. 139-140) He stated that he felt it was improper for Lucci to be intervening in his divorce, and considered Lucci's attempt to do so as an effort to threaten and intimidate him. (Tr. 150-151) Mr. Rymers admitted at the hearing that he did not meet Lucci in person until nearly two weeks after the morning of the pretrial conference, and until that point had only seen pictures of him. (Tr. 132-133) Accordingly, Mr. Rymers "wasn't exactly for sure what [Lucci] looked like *** "but he had an idea." (Tr. 132-133) Mr. Rymers did not specifically recall saying "there's Judge Lucci down there" to Respondent that day, but admitted "he very well could have said it." (Tr. 140) He further testified that, at the time he executed his affidavit, he believed the information contained in it "look[ed] right to [him,]" but acknowledged that upon later reviewing the video recordings from the Lake County Courthouse after the fact, he "could very well have" mistaken someone else for Lucci that day. (Tr. 152-155) He steadfastly denied, however, that he had ever borrowed money from Lucci, as alleged in Lucci's motion. (Tr. 148-150)

Lucci testified that he was aware of the pretrial conference in the Rymers' divorce

proceedings and arrived at his judicial suite with Mrs. Rymers early that day so that “there would be no chance of seeing [Mr.] Rymers or [] Stafford” in the hallway. (Tr. 234) The video recordings corroborated Lucci’s testimony that he was not in the hallway at any point in the morning when Respondent or Mr. Rymers were present. Stip. Ex. 11-B, 11-C, 11-D. Additionally, Lucci testified that he arrived with Mrs. Rymers in time for her go to the clerk’s office to file his motion to intervene. (Tr. 234-237) Lucci testified that he prepared “the bulk of [the motion to intervene] and certainly the affidavits” accompanying it. (Tr. 291) Despite attempting to intervene in the Rymers’ divorce proceeding on the basis of an debt obligation and asserting in the affidavit accompanying Lucci’s motion that he “loaned [Mr. Rymers] (and [Mrs. Rymers]) the sum of \$4,662.92 *** to close on the short sale of their marital home,” Lucci testified at the hearing that he had never seen Mr. Rymers until two weeks after the pretrial conference and further, that he “lent the money to the transaction,” not to Mr. Rymers’ himself. (Tr. 242, 269) Lucci explained that “[c]ircumstantially, you can reasonably infer [Mr. Rymers] knew somebody provided [the necessary funds to close on the Rymers’ marital residence]; and if he looked at the check, it was me.” (Tr. 271) Lucci acknowledged that the trial court subsequently denied his motion noting in its opinion that there were “no facts or law to support [it].” Stip. Ex. 5, p. 2.

Lucci stated he did not make any attempts to talk to Gallo to discuss whether he was mistaken in his identification of Lucci on June 3, 2009, because he felt that Respondent was intentionally lying about the matter. (Tr. 293-294) Lucci stated that, given Respondent’s association with the Stafford law firm and its reputation for employing “the meanest [divorce] lawyer[s],” he was certain that there was “no innocent mistake” made in terms of what was put

forth in the affidavits attached to Rymers' opposition brief. (Tr. 293-296) Lucci based this, in part, on the fact that Stafford knew Lucci had a beard, while it was clear that Ashman, his bailiff, did not, and that Ashman "weighed 60 pounds more than [him and] was six inches taller than [him.]" (Tr. 296-301) The video recording and Ashman's testimony both reflect that Ashman was dressed professionally, wearing a jacket and tie, and had a mustache on the day in question.

Mrs. Rymers testified that she asked Lucci for the money to close on the sale of the Rymers' marital home (Tr. 333) She further testified that, upon receiving the money from Lucci, she never told Mr. Rymers that Lucci was the one providing the money to aid in closing the sale, nor did he ever ask her who provided it. (Tr. 341) She also stated that she has since filed for bankruptcy, discharging any debt she owed to Lucci in relationship to the sale. (Tr. 334)

Respondent testified that since he left Stafford and Stafford Co., LPA, he has been working with his brother doing construction and remodeling work. He has applied for attorney positions but has been unable to secure a position practicing law given the economic climate in northern Ohio. Respondent was born and raised in the Cleveland area and currently resides in Cleveland with his wife and young child.

CONCLUSIONS OF LAW

RULE VIOLATIONS

Relator's complaint alleges violations of Ohio Rules of Professional Conduct 8.2(a) and 8.4(c), (d), and (h). Relator bears the burden of proving these allegations by clear and convincing evidence. "Clear and convincing evidence" is the "measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the

trier of fact a firm belief or conviction as to the facts sought to be established.” *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605, at ¶6.

Prof.Cond.R. 8.2(a) provides that “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.”

In *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, the Supreme Court “adopt[ed] an objective standard to determine whether a lawyer’s statement about a judicial officer is made with knowledge or reckless disregard of its falsity.” *Gardner* at ¶26, quoting Annotated Model Rules of Professional Conduct (4th Ed.1999) 566, Rule 8. The *Gardner* Court went on to explain that the “standard assesses an attorney’s statements in terms of what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances *** [and] focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.” (Internal citations omitted.) *Gardner* at ¶26. The Panel notes that the foregoing does not expressly include age, experience, or length of practice in its definition of an “objective standard” of recklessness. Nor, however, does it exclude such factors. We therefore include these additional factors in our analysis of whether Relator has proven a violation of Prof. Cond. R. 8.2(a) and again later when considering mitigation. We are convinced that Respondent did not knowingly make any false statements. We are not convinced, however, that he was blameless under the circumstances of this case. We believe Respondent was subject to considerable pressure by his supervising attorneys and failed to step back to independently evaluate the developing circumstances. He could have, and should have, taken independent steps

to confirm the identity of the man against whom he made such serious allegations. He could have gone back to Lucci's court to observe proceedings and confirm Lucci's identity. However, in his innocence and lack of experience he did not do so. A more experienced attorney would have taken that extra precaution. A more experienced attorney would have declined to sign the pleadings which were so heavily influenced by his superiors, leaving that responsibility to the lead attorneys. But Respondent was not experienced and the lead attorneys' names were not placed on the pleadings. Notwithstanding our understanding of Respondent's employment circumstances and based upon the exhibits, stipulations, and testimony adduced at the hearing, we consider Respondent's conduct -- that is having signed an opposition brief in which he alleged that Lucci had "engaged in a pattern of harassing and threatening conduct" and having attested in an affidavit that Lucci committed certain acts without ever ascertaining that the person Respondent observed was, in fact, Lucci -- to constitute reckless conduct under the objective standard enunciated in *Gardner*. Accordingly, the Panel concludes that Relator has demonstrated by clear and convincing evidence that Respondent has violated Prof. Cond. R. 8.2(a).

In similar fashion, the Panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(d), which states that "[i]t is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." By placing the Rymers' opposition brief and its accompanying affidavits before the domestic relations court in an attempt to direct the manner in which the trial court ruled on Lucci's motion, without having verified or having personal knowledge of the allegations contained in those documents, Respondent engaged in conduct prejudicial to the administration of justice.

Based on the evidence and stipulations of the parties, the Panel does not find, however, clear and convincing evidence that Respondent's conduct violated the following Rules of Professional Conduct:

Prof.Cond.R. 8.4(c) which states that "[i]t is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Prof.Cond.R. 8.4(h) which states that "[i]t is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law."

In this case, there was no evidence that Respondent intentionally or knowingly sought to lie or misrepresent facts to the domestic relations court. Mr. Rymers articulated at the hearing that, at the time Respondent filed the Rymers' opposition brief, he believed Lucci was the person in the main hallway. Respondent further testified that Lucci's presence in the hallway, coupled with questionable allegations in his motion and the past interactions between Stafford and McNamara (acting on Lucci's behalf), left him with the feeling he and his supervising attorneys were being harassed, if not intimidated, by Lucci. Consequently, the Panel does not find that there was any "deliberate effort to deceive" or even "inadvertence or haphazard corner-cutting" committed by Respondent in this regard. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, at ¶ 25-29 (discussing violations of DR 1-102(A)(4), the precursor to Prof.Cond.R. 8.4(c), and comparing degrees of wrongdoing under that rule). See also, *Dayton Bar Assn. v. Wilson*, 127 Ohio St.3d 10, 2010-Ohio-4937, at ¶ 8 (dismissing an alleged violation of Prof.Cond.R. 8.4(c) after concluding the attorney had made an "honest *** mistake" in her accounting records). Thus, the Panel concludes that there was no evidence adduced throughout the disciplinary proceeding to demonstrate, by clear and convincing evidence, that Respondent

possessed the requisite degree of culpability to support a violation of Prof.Cond.R. 8.4(c).

The Panel also concludes that the confluence of factors that gave rise to the conduct at issue in this proceeding is extraordinary and should not serve as an indictment of Respondent's fitness to practice law or support a violation of Prof.Cond.R. 8.4(h). Moreover, it is not apparent to the Panel what "other conduct" (as indicated by the text of the Prof.Cond.R. 8.4(h)) the Relator is relying upon to support this violation, aside from the conduct already identified as a violation of Prof.Cond.R. 8.2(a) and 8.4(d), as outlined above. Without greater precision in the evidence, the Panel is not inclined to rely upon unspecified "other conduct" for the purpose of finding a violation Prof.Cond.R. 8.4(h) by clear and convincing evidence.

Accordingly, the Panel recommends the Board dismiss the alleged violations of Prof.Cond.R. 8.4(c) and 8.4(h).

MITIGATION

The parties did not stipulate to any mitigation in this case. The Panel notes, however, that Respondent has no prior disciplinary record and was cooperative and forthright with the Board and Relator. BCGD Proc. Reg. 10(B)(2)(a) and (d). There was no evidence that Respondent engaged in the foregoing misconduct based on a selfish or dishonest motive, and upon receiving information from Disciplinary Counsel evidencing his mistake, Respondent timely sought to withdraw the affidavit he had filed in the Rymers' divorce proceeding, admitting it was based on his mistaken belief as to whom had exited Lucci's judicial suite on the morning of the Rymers' pretrial hearing. BCGD Proc. Reg. 10(B)(2)(b) and (c).

The Panel recognizes that there were no mental health conditions or substance abuse concerns implicated in this case. BCGD Proc. Reg. 10(B)(2)(g). Respondent did not submit any

character or reputation evidence to the Panel, but Stafford and Moore spoke of Respondent in a positive light throughout the hearing. BCGD Proc. Reg. 10(B)(2)(e). The Panel notes that Respondent is not presently employed in the practice of law, and has pursued other endeavors while the disciplinary proceeding was pending and he was searching for a legal position. BCGD Proc. Reg. 10(B)(2)(f).

It was abundantly clear to the Panel throughout this disciplinary proceeding, that while Respondent was somewhat reckless in his actions, he was hardly the one controlling the moves in the chess match of the Rymers' divorce proceeding. It was clear to the Panel that Respondent had limited legal experience, little understanding of the dynamics of the Rymers' divorce case (having been assigned to it just days before the pretrial conference), was given a motion to intervene on behalf of the judge who was in a relationship with Mrs. Rymers, and whose judicial suite was located across the main hallway from the court in which Respondent was appearing solo for one of the first times in his legal career.

Respondent was then informed by both his client and his supervising attorney, who had been in practice for decades, that Lucci was the person repeatedly entering the main hallway while Respondent and Mr. Rymers awaited their pretrial conference. Subsequently, upon returning to his office, Respondent was instructed to prepare an opposition brief in response to Lucci's motion, which included substantial revisions and additions to it by two experienced, supervising attorneys in Respondent's office, who were familiar with the case and its tangled web of players. Those same attorneys testified at the hearing that they aided in drafting the brief and, based on their experience, viewed the brief as acceptable for filing under the Rules of Professional Conduct. The trial court later concluded that Lucci's motion had no legal or factual

basis, and further, Lucci himself admitted at Respondent's hearing that, despite his affidavit attesting he had loaned money to Mr. Rymers to aid in the sale of his home, he had not met Mr. Rymers at the time he made that statement, and ultimately testified that he had only loaned money "to the transaction," not to Mr. Rymers directly. (Tr. 269) That Respondent now faces disciplinary proceedings based on his limited involvement in the Rymers' divorce proceeding for the events that unfolded in that case leads this Panel to believe that he was more the victim of circumstance than the champion of any course of conduct that led to the filing of a grievance against him.

AGGRAVATION

The parties did not stipulate to any aggravation in this case, nor does the Panel find that any of the factors under consideration would warrant a more severe sanction than recommended by Relator in this case. BCGD Proc. Reg. 10(B)(1)(a)-(i).

RECOMMENDED SANCTION

When imposing sanctions for attorney misconduct, we consider relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, ¶16. Respondent's hearing brief recommended the complaint be dismissed, and at the hearing in this matter, orally requested the same, which the Panel denied. In the alternative, Respondent argued that he should receive a public reprimand, but did not offer any case law in support of that sanction. Relator, on the other hand, has recommended a six-month suspension, none of which would be stayed, based on the authority of *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048.

In *Gardner*, following an unfavorable appellate decision in his client's case, the attorney

at issue filed a vitriolic motion for reconsideration in which he stated the opinion of the court was “so result driven that any fair-minded judge would have been ashamed to attach his/her name to it.” *Gardner* at ¶3. The content of the motion cast the court as “skew[ing] [or] ignor[ing] the facts” and being “blind . . . to basic law and fairness,” going on for paragraphs attacking the integrity of the appellate court itself, and its decision in his client’s case. *Gardner* at ¶4-9. The panel in *Gardner* recommended the sanction suggested by the parties - that Gardner be publicly reprimanded for the foregoing misconduct which the Board adopted. The Supreme Court, however, found that Gardner’s conduct “offen[ded] . . . the integrity and impartiality of the court of appeals and the judicial system” and constituted “[u]nfounded attacks against the integrity of the judiciary” which warranted an actual suspension from the practice of law. *Gardner* at ¶23, 36. Accordingly, the Court suspended Gardner from practice for a period of six months. Unlike Gardner, however, Respondent did not impugn the integrity of the judicial process or attack the impartiality of a judge presiding over a case in which he served as counsel. Consequently, we do not consider *Gardner* authoritative on the sanction to be imposed in this case.

At the hearing, Relator also relied on *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, for support that an attorney should be “sanctioned for making accusations of judicial impropriety that a reasonable attorney would believe are false.” *Pullins* at ¶11, quoting *Gardner* at ¶31. Relator argued that “no reasonable attorney would do what [Respondent] did under all of these circumstances” and that his conduct warrants actual suspension. Again, we consider the facts of *Pullins* to be significantly different from the case at bar. Pullins faced a “seven-count amended complaint *** charg[ing] [him] with numerous

counts of professional misconduct arising from his filing of false and disrespectful statements regarding two judges in affidavits of disqualification, improper use of his notary powers, issuance of subpoenas in a stayed case, accusations that two judges and a prosecutor engaged in ex parte communications about pending cases, and issuance of a subpoena to a judge's wife.” *Pullins* at ¶2. Based on his misconduct, Pullins was suspended indefinitely. *Pullins* at ¶88.

Aside from applying an objective standard to the Respondent’s conduct, we consider the number of violations and the grievous nature of those offenses alleged in *Pullins* to be quite distinguishable from Respondent’s case.

Relator also argued, under *Disciplinary Counsel v. Smith*, 124 Ohio St.3d 49, 2009-Ohio-5960, that “new lawyers are just as accountable as more seasoned professionals for not complying with the Code of Professional Responsibility” and, therefore, Respondent cannot assert as a valid defense in a disciplinary proceeding that he was “following the dictates of his superior.” *Smith* at ¶17. The *Smith* Court, however, did heavily consider in mitigation, that Smith had only been licensed for two years at the time of his violation and that his superior had “primarily controlled the [law] firm’s finances” which resulted in Smith receiving a public reprimand. *Smith* at ¶25, 29. Ironically, Respondent has never blamed his superiors throughout the duration of this disciplinary proceeding. Instead, Respondent has accepted full responsibility for his conduct and has only defended against the conduct by simply stating, he made a mistake in identifying another man as Lucci that morning, and by not verifying for himself that the man was in fact, Lucci.

The Panel is mindful that, “[i]n [a] disciplinary matter, the primary purpose is not to punish an offender; it is to protect the public against members of the bar who are unworthy of the

trust and confidence essential to the relationship of attorney and client; it is to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so to deprive him of his previously acquired privilege to serve as an officer of the court.” *Ohio State Bar Assn. v. Weaver* (1975), 41 Ohio St.2d 97, 100. There is no evidence before the Panel that Respondent is unfit to practice law or that he is a threat to the public should he not be suspended from practice. In turn, we depart from the sanction imposed in *Gardner* because it is clear from that opinion that the Court rejected the agreed upon sanction of a public reprimand because of the nature of the attack against the judiciary; there is no corresponding attack on the court in this case. Instead, we consider the conduct here, in light of the circumstances of the Rymers’ divorce and the fact that Lucci, though a judge, was personally entwined in the matter and proceeded on a questionable basis to further involve himself in the Rymers’ divorce, to be quite different from attacks made against the integrity of judiciary in *Gardner*. Based on that distinction, we decline to impose a similar sanction as was imposed in *Gardner*.

In determining an appropriate sanction, we heed the *Smith* Court’s consideration of an attorney’s inexperience as a substantial factor in mitigation, and conclude that an actual suspension is not warranted in this case. We rely also upon *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, in support for this decision. In that case, when considering the appropriate sanctions to impose on three members of the same firm who engaged in multiple rule violations, including fee-sharing with nonlawyers, aiding unauthorized practice of law, and handling legal matter without adequate preparation, the Supreme Court acknowledged that it is not limited to considering only the mitigating factors set forth in BCGD Proc.Reg. 10(B), but that it "may take into account 'all relevant factors' in determining what sanction to

impose." *Mullaney* at ¶40. The Court then considered that Mullaney had only been licensed to practice law for one year when he committed the foregoing misconduct over a period of months in 2004-2006 after joining a firm with more experienced attorneys, who were part and parcel to the misconduct at issue. In doing so, the Court held that "though [Mullaney was] subject to sanction for his failure to comply with the cited Disciplinary Rules, he was also an inexperienced associate of the . . . firm at the time of his misconduct. As a new attorney, Mullaney devoted many hours trying to assist the clients assigned to him; however, practices in place at the . . . firm necessarily constrained his efforts. For his part in [the misconduct at issue], a public reprimand is appropriate." *Mullaney* at ¶40. The more experienced attorney who was licensed in Ohio, however, received a one year suspension conditionally stayed, and the non-Ohio licensed attorney was enjoined from practicing in Ohio for two years. Much like Mullaney, Respondent was an inexperienced practitioner who was surrounded by seasoned lawyers that he failed to question or challenge. As a rookie playing amongst veterans, the Panel does not feel that Respondent was wholly or solely to blame for the misconduct at issue here.

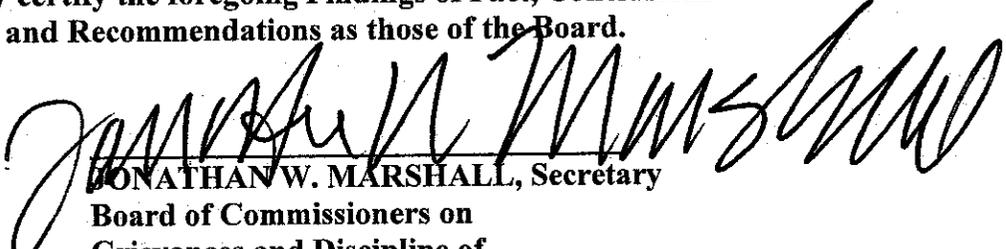
Weighing the mitigating factors against Respondent's conduct at issue, including the fact that Respondent had been licensed as an attorney for just over one year at the time of his misconduct, has fully complied with the disciplinary process, and promptly sought to rectify his reckless conduct by withdrawing his affidavit upon learning he was mistaken, we recommend a public reprimand for the conduct at issue in this case.

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 April 8, 2011. The Board

adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Nicholas Matthew Gallo, be publically reprimanded in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to 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