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IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	
	:	
Relator,	:	
	:	CASE NO. 2011-0295
vs.	:	BOARD NO. 09-059
	:	
Philip Lucas Proctor,	:	
	:	
Respondent.	:	

RELATOR'S ANSWER TO OBJECTIONS AND BRIEF IN SUPPORT OF RESPONDENT,
PHILIP L. PROCTOR, TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF
THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

INTRODUCTION

Now comes relator, Disciplinary Counsel, and submits the following answer to the Objections and Brief in Support of Respondent, Philip L. Proctor, to the Findings, Conclusions and Recommendations of the Board of Commissioners on Grievances and Discipline (the "Board"). Relator has attached the Board's Findings of Fact, Conclusions of Law and Recommendation (the "Findings") hereto as Appendix A. See, S. Ct. Prac. R. 6.2(B)(5)(b).

STATEMENT OF THE CASE AND PRELIMINARY MATTERS

In August 2009, relator, Disciplinary Counsel, filed a single-count complaint alleging professional misconduct against respondent. Respondent filed an answer to the allegations on or about August 24, 2009, and on February 3, 2010, respondent submitted an Amended Answer to the allegations.

During the proceedings on this matter, respondent filed two separate motions to dismiss. The first raised a variety of arguments, including that relator's complaint was unconstitutionally vague and overbroad. The second suggested that relator had a conflict of interest and should be removed from the proceedings.

The panel chair took the first motion under advisement and, after full consideration of respondent's position, denied it at the hearing, finding it "completely without merit." Transcript ("Tr."), p. 39. Looking specifically at respondent's constitutional argument, the panel chair further indicated:

The rules that are at issue here, uh, I do not find to be vague or overly broad. There is a huge difference that is - I find are clearly defined in the rules and law between submitting concerns to a Grievance Committee versus raising the claims such as these in the appellate brief. The procedure does not seem - I'm finding that the procedure does not seem confusing or unclear and that that defeats the claims of vagueness.

Back on the over brevity I find that also has no merit; that it does not take in the protective speech that the Respondent had a right to as a litigant versus an attorney. I'm finding that there is no distinction between the application of the Gardner case to attorneys representing other clients, uh, or as in this case to attorneys representing themselves in litigation. ...

But the Gardner decision is certainly good law. Certain protected - Certainly the right to protected kind of speech under Gardner, uh, that the normal person possess under both the federal constitution, and Gardner dealt with the state constitution, that it clearly held that attorneys are held to a tighter standard when remarks are made in a judicial proceeding as they were here.

Tr., pp. 42-43.

The panel chair denied the second motion to dismiss after counsel for respondent had an opportunity to depose Senior Assistant Disciplinary Counsel Joseph Caligiuri.

Prior to the hearing, the parties entered into significant stipulations, where respondent admitted the factual allegations, admitted violating several disciplinary rules, including Prof.Cond.R. 3.5 (a)(6) and 8.2 (a) and Gov. Bar R. IV (2), and agreed to a six-month stayed suspension as a recommended sanction. Respondent was questioned during the hearing as to whether he wanted to go forward with the matter based on the stipulations and, after consulting with counsel, agreed that he did. Tr., p. 115. Respondent agreed that his actions as stipulated violated the provisions of the Ohio Rules of Professional Conduct echoing the Code of Professional Responsibility rules violated by the respondent in *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425.¹ Respondent unquestionably admitted that the statements he made in the supplemental request for findings and the appellate brief constituted “undignified or discourteous conduct that was degrading to a tribunal” and were statements that “the lawyer knows to be false or [were made] with reckless disregard as to its truth or falsity.” Stipulations, p. 9.

A three-person panel of the Board held a hearing on this matter on November 5, 2010, where the panel accepted the admission of the stipulations and heard the testimony of respondent and a character witness. The Board issued its findings of

¹ In *Gardner*, this Court found that the respondent had violated DR 7-106 (C)(6) [a lawyer shall not engage in undignified or discourteous conduct that is degrading to a tribunal] and DR 8-102(B) [a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer] of the Ohio Code of Professional Responsibility.

fact, conclusions of law and recommendations on February 22, 2011, recommending that respondent be suspended from the practice of law for six months. The panel in its opening statement made it clear to the parties that neither the panel nor the Board were bound by the stipulations or the recommended sanction included in the stipulations and could, if they believed the evidence supported additional findings or another sanction, make such findings and recommendations. Tr., pp. 6 and 7.

STATEMENT OF FACTS

Respondent attached two separate Statement of Facts to his objections as Exhibits A and B.² Many of the factual assertions included therein are contrary to the agreed-upon facts in the stipulations and the facts adopted by the panel, include evidence not offered nor proven during the hearing on this matter, and cite unsworn witness statements wholly contradictory to the statements given by these witnesses during their discovery depositions in this case. Respondent further has recited some of these same assertions in the Statement of Facts within the objections, as if his version of what occurred was undisputed and without any reference to the record from the hearing in this matter; these facts were never introduced at the hearing in any way other than by respondent's self-serving testimony. Respondent did not present any witnesses substantiating his testimony at the hearing.

The allegations in relator's formal complaint against respondent arose out of respondent's representation of Julie Peterman in a civil matter in the Delaware County Court of Common Pleas; Judge W. Duncan Whitney presided over the matter.

² Exhibits A and B, attached to respondent's objections, were the statement of facts respondent included in each of the motions to dismiss filed by respondent and denied by the panel chair.

Julie Peterman v. Dean Stewart, et al., Case No. 02-CVC-08-449. On August 15, 2002, respondent initiated a lawsuit on behalf of Ms. Peterman in the Delaware County Court of Common Pleas. Findings, p. 2. Ms. Peterman's claims stemmed from what she believed was the wrongful disclosure of personal documents in a probate matter in which she was one of several beneficiaries. Stipulations, ¶ 3. Respondent withdrew as counsel for Ms. Peterman on October 24, 2003. Findings, p. 2. On November 13, 2003, Ms. Peterman filed a motion to dismiss her complaint without prejudice, which was granted on November 20, 2003. Stipulations, ¶ 5.

Each of the defendants in the litigation subsequently filed a motion for attorney fees as to Ms. Peterman and respondent. Stipulations, ¶¶ 6 and 7. In November 2005, Judge Whitney granted the motions, ordering respondent and Ms. Peterman to jointly and severally pay attorney fees totaling \$31,995.90. Findings, p. 2. Respondent paid \$26,000 of the judgment. Findings, p. 4.

On December 7, 2005, respondent, on his own behalf, filed a notice of appeal to the Fifth District Court of Appeals, appealing Judge Whitney's November 22, 2005 decision. Stipulations, ¶ 9. The appellate court affirmed Judge Whitney's decision on September 6, 2006. *Id.* Respondent appealed to this Court, which dismissed the appeal as not involving a substantial constitutional question on January 24, 2007. Stipulations, ¶ 10.

On February 2, 2007, respondent filed a Motion of Appellant, Philip L. Proctor, for Reconsideration with the Supreme Court of Ohio. Stipulations, ¶ 13. In the motion, respondent asserted, "[j]ust before this court entered its dismissal entry of January 24, 2006 [sic], Appellant spoke to a local Delaware County attorney, Anthony

M. Heald, who stated that the trial judge had indicated that he had some reservations about his ruling and was thinking about reconsidering and reversing his decision.” Id.

While the appeal was pending with this Court, respondent had contacted Heald, seeking his assistance him with a potential 60(B) motion in the matter. Stipulations, ¶ 12. On March 2, 2007, Heald wrote to respondent regarding the February 2, 2007 pleading. In the letter, Heald explained that the statement respondent had attributed to him in the pleading was not accurate. Stipulations, ¶ 14; Stipulated Exhibit 4. Subsequently, Heald and respondent spoke by telephone regarding the matter; during their conversation, Heald reiterated that the statement was not accurate. Stipulations, ¶ 15.

On May 10, 2007, respondent filed a Motion to Vacate Judgment as to Attorney and Motion for Relief from Judgment with the Delaware County Court of Common Pleas. Stipulations, ¶ 16. Judge Whitney recused himself from the proceeding and transferred the case to Judge Everett Krueger. Findings, p. 2. Judge Krueger overruled the motions on October 9, 2007. Id. Respondent subsequently filed a motion for findings of fact and conclusions of law, which Judge Krueger likewise denied. Id.

On October 18, 2007, respondent filed a Supplemental Request Regarding Motion for Findings of Fact and Conclusion of Law. Findings, p. 2. In the pleading, respondent made multiple false statements, accusing Judge Whitney of bias and having engaged in ex parte communications, which included the following. Findings, p. 2; Stipulated Exhibit 9.

- Judge Whitney was “biased or prejudiced regarding the 60(B) motion and regarding the original litigation” and had “discuss[ed] this matter numerous times off the record and/or it would appear that there have been ex parte communications in this case.”
- Judge Whitney was “apparently aware of this investigation and there were matters relating to that which made for bias or prejudice in the original litigation involving attorney’s fees. It would appear that the social relationship with attorney Vatsures may have contributed to this.”
- Judge Whitney had “apparently gone to great effort to cover this up and/or deny that these things happened.”

Stipulations, ¶ 19; Stipulated Exhibit 9.

On October 22, 2007, respondent filed a Notice of Appeal of Judge Krueger’s decision overruling the motion to vacate and motion for relief from judgment. Findings, p. 3. In his December 10, 2007 appellate brief, respondent again made numerous false statements about Judge Whitney, including the following. Findings, p. 3; Stipulated Exhibit 11.

- “Attorney Heald spoke to Judge Whitney who stated that he was considering reconsidering an [sic] reversing his decision.”
- “Mr. Proctor was informed that Attorney Heald actually had numerous discussions with Judge Whitney off the record.”
- “Judge Whitney’s reaction was shocking, going to great lengths to cover up and deny any off the record communications even though there was evidence that confirmed it.”
- “Judge Whitney and Attorney Vatsures, who both had more than thirty years practice in Delaware County, knew each other well and apparently were friends.”

- “Thus, it would appear that Attorney Vatsures needed a ruling of frivolous conduct to save him from a probable disciplinary complaint. Therefore, not surprisingly, there were apparently off the record and/or ex parte communications with Judge Whitney. Thus the senseless November 22, 2005 Judgment Entry can only be understood when read in the context with these facts demonstrating bias or prejudice.”
- “It would appear that the original trial judge, Judge Whitney, was more concerned with protecting Estate Attorney Vatsures from a disciplinary action than making the appropriate legal review of the case.”
- “Clearly, Judge Whitney’s ex parte communications, knowledge of the disciplinary action against Attorney Vatsures, and desire to avoid a disciplinary complaint for his friend and fellow thirty year veteran of Delaware law practice created bias or prejudice that prevented him from making a fair and impartial review.”
- “[T]he fact that Judge Whitney did not make a ruling for almost two years after the motion had been filed and a year and a half after the hearings seems to indicate that he was hoping that Attorney Vatsures problems would be resolved without the need for him to make such a decision. Also, the large attorney fee judgment considering the relatively small amount of time the case was open probably indicates that Judge Whitney hoped it would get the attention of the Court of Appeals and that he wanted them to bail him out by reversing the decision.”

Stipulations, ¶ 23; Stipulated Exhibit 11.

At the time respondent submitted the supplemental request and the appellate brief, discussed above, respondent was aware that Heald had denied having had a conversation with Judge Whitney regarding the matter and was aware that his statements were false. Findings, p. 3; Stipulations, ¶ 25. Likewise, respondent’s statements regarding Judge Whitney and Vatsures were not based upon a reasonable belief and were therefore reckless. Stipulations, ¶ 26.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

RESPONSE TO OBJECTION NO. 1

RESPONDENT'S TWO MOTIONS TO DISMISS WERE FULLY CONSIDERED BY THE PANEL AND PROPERLY DENIED AND THE BOARD IN ITS ENTIRETY WAS NEITHER REQUIRED TO NOR NEEDED TO REVIEW THE MOTIONS TO DISMISS.

In his first objection, respondent asserts that he believed that the Board in its entirety, rather than merely the panel, would have considered and ruled on the motions to dismiss and that it was improper for the panel to have considered them and denied them. BCGD Proc. Reg. 2(B) clearly empowers the chairman or member of the hearing panel to rule on all motions presented subsequent to the appointment of the hearing panel; nothing in the rule requires or necessitates the full Board's intervention. See, also, Gov. Bar R. V (6)(D)(3) [The panel chair shall rule on all motions and interlocutory matters ...].

The rules specifically contemplate the panel's ability to dismiss a complaint or part of a complaint, without additional consideration by the Board, if the panel determines that the relator has not established clear and convincing evidence of misconduct by a respondent. Gov. Bar R. V (6)(H) provides, "[i]f, at the end of the evidence presented by the relator or of all evidence, a unanimous panel finds that the evidence is insufficient to support a charge or count, the panel may order that the complaint or count be dismissed." Continuing, Gov. Bar R. V (6)(I), indicates "[i]n the alternative, if the hearing panel determines that findings of fact and recommendation for dismissal should be referred to the Board for review and action by the full Board, the panel may submit its findings of fact to the Board and recommend dismissal in the same manner as provided in this rule with respect to public reprimand, probation,

suspension, or disbarment.” The hearing panel, without the approval of the board, has the authority to dismiss a complaint or any part of a complaint against respondent should it wish to do so. Gov. Bar R. V (6)(H).

Additionally, the rules do not require the panel to hold an evidentiary hearing on pending motions prior to ruling on the merits of the motion. In this matter, however, the panel chair provided respondent the opportunity to offer testimony and argument at the hearing that related to his first motion to dismiss prior to denying the motion. Tr., pp. 9 - 38.

Respondent also disputes the panel’s application of *Gardner* in this objection, suggesting that his actions and statements differ from those Gardner made. Respondent’s actions and statements, those facts that he admitted in the stipulations, were exactly the same as those prohibited in *Gardner*. Despite respondent’s intense belief otherwise, the constitutional issues he has raised are insufficient to support his position that this is not a *Gardner* type of case, that he should not be sanctioned or that *Gardner* is inapplicable.

RESPONSE TO OBJECTION NO. 2

CONTRARY TO RESPONDENT'S ASSERTION THAT HIS FIRST MOTION TO DISMISS SHOULD HAVE BEEN GRANTED OR CONSIDERED IN MITIGATION BECAUSE THIS CASE INVOLVED AN ATTORNEY REPORTING POTENTIAL MISCONDUCT OF A JUDGE TO THE APPROPRIATE AUTHORITY AND HE ERRED ON THE SIDE OF REPORTING, THE PANEL PROPERLY DENIED RESPONDENT'S FIRST MOTION TO DISMISS.

RESPONSE TO PROPOSITION OF LAW: THE JUDGMENTAL IMMUNITY DOCTRINE IS INAPPLICABLE, EVEN IF ADOPTED IN OHIO, IN THIS MATTER BECAUSE THE REPORTING RULE CONTAINED IN THE OHIO RULES OF PROFESSIONAL CONDUCT WAS NOT VAGUE.

Respondent's suggests that he was not exercising his right to free speech when he made the statements at issue in the supplemental request and appellate brief, but rather, that he was reporting a potential violation of the Rules of Professional Conduct or the Code of Judicial Conduct by a judge. Although his "forced speech" argument is novel, it is nevertheless specious.

Prof.Cond. R. 8.3 (b) provides that "[a] lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority." Only the Office of Disciplinary Counsel or a certified grievance committee, as sanctioned by the Supreme Court, is capable of investigating allegations of misconduct by a judge. Gov Bar R. V (4)(C); see, also, Gov Bar R. IV (2) and Gov. Bar R. V (2)(A). An "appropriate authority" must be one that is empowered to investigate the allegations brought to its attention; otherwise, the reporting of such misconduct would be meaningless. The appellate court has no authority in Ohio to investigate allegations of misconduct. The language in the rule is clear - neither ambiguous nor uncertain. Relator disagrees entirely with respondent's position.

Contrary to respondent's assertion, relator can find no support for his position that an appellate court would be considered an "appropriate authority." Rather, the cases wholly contradict respondent's position. "It is well-established that 'the Ohio Supreme Court has exclusive jurisdiction to determine violations of attorney disciplinary rules. All grievances involving alleged misconduct by attorneys and judges are to be brought and disposed of in accordance with the provisions of Rule 5 of the Supreme Court Rules for the Government of the Bar of Ohio.'" *State v. Gaines*, Clinton App. No. CA2010-07-010, CA2010-07-011, 2011-Ohio-1475, ¶ 33, quoting *Madison Cty. Bd. Of Commrs. v. Bell*, Madison App. No. CA20055-09-036, 2007-Ohio-1373, ¶ 15. See, also, *Mentor Lagoons, Inc., v. Rubin et al.*, (1987) 31 Ohio St.3d 256, 510 N.E.2d 379. The cases cited by respondent relate not to an appellate court reviewing an allegation of misconduct, but to the filing of an affidavit of bias and prejudice pursuant to R.C. 2701.03 or a motion to recuse.

Respondent's assertion that the rule permits an attorney to report an allegation of misconduct by a judge to the appellate court further circumvents the confidentiality provisions of Gov. Bar R. V (11)(E), requiring all proceedings and documents relating to the investigation of grievances against an attorney or judge to remain confidential unless a complaint has been certified.³ The pleadings filed by respondent were public records filed in two separate courts in this state.

³ In the objections, respondent appears to suggest that he was not only reporting the alleged misconduct of Judge Whitney in the pleadings, but that of attorneys Vatsures and Heald. This assertion is particularly suspect as respondent never initiated a grievance against either attorney, never previously mentioned that he was reporting the conduct of either attorney and certainly did not offer testimony supporting such a statement.

Respondent's reliance on R.Prof.Cond. 3.3 and Advisory Opinion 2007-1 is misplaced. Rule 3.3 does not relate to the reporting of misconduct by a judge, rather, it prohibits an attorney appearing before a tribunal from engaging in dishonest conduct before the tribunal and obligates the attorney to inform the tribunal of the dishonest conduct of others. Additionally, Advisory Opinion 2007-1 specifically indicates that a "lawyer's ethical duty to report professional misconduct under Rule 8.3 is not fulfilled by informing a tribunal." (Emphasis added) Furthermore, the opinion makes clear that, in Ohio, the authority to investigate allegations of misconduct by an attorney or judge rests with Disciplinary Counsel and the certified grievance committees. "A tribunal is not a disciplinary authority empowered to investigate or act upon reports of lawyer misconduct. A tribunal has the authority to supervise members of the bar appearing before it, including the power to disqualify attorneys in specific cases, but that authority is distinct from the exclusive disciplinary authority vested in the Supreme Court of Ohio through its inherent and constitutional powers." *Id.*, p. 4.

Nowhere in the supplemental request or the appellate brief did respondent indicate that he was reporting misconduct of a judge (or anyone else for that matter). Rather, the sole purpose of the supplemental request was to request that findings of fact be made in the underlying litigation and of the appeal was to request that Judge Whitney's decision granting the award of attorney fees against respondent be reversed. *Tr.*, p. 35; Stipulated Exhibits 9 and 11.

Respondent proposes that this Court adopt the Judgmental Immunity Doctrine in this matter. As adopted in other states, the Judgment Immunity Doctrine

essentially provides that “an informed professional judgment made with reasonable care and skill cannot be the basis of a legal malpractice claim. Central to the doctrine is the understanding that an attorney’s judgmental immunity and an attorney’s obligation to exercise reasonable care co-exist such that an attorney’s non-liability for strategic decisions ‘is conditioned upon the attorney acting in good faith and upon an informed judgment after undertaking reasonable research of the relevant legal principles and facts of the given case.’” *Biomet Inc., v. Finnegan Henderson LLP*, (2009) 967 A.2d 662, 666, quoting *Sun Valley Potatoes, Inc., v. Rosholt, Robertson & Tucker*, (1999) 133 Idaho 1, 981 P.2d 236, 240. Even if this Court finds the concept, generally, prudent, the judgmental immunity doctrine would not apply in this matter and does not protect respondent from disciplinary action.

Respondent’s application of the judgmental immunity doctrine parallels the precept of *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-170, 921 N.E.2d 1056. In *Rust*, this Court dismissed a formal complaint against Toledo attorney, John G. Rust, finding that his actions in a wrongful-death litigation “had an arguable basis in law.” *Id.* at 305, 1057. “Because lawyers may advance such claims attempting to extend, modify, or reverse existing law, we hold that respondent committed no ethical impropriety and dismiss the complaint against him.” *Id.* Analyzing Prof.Cond.R. 3.1 and the comments thereto, this Court noted that “[w]hat is required of lawyers, however, is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.” *Id.* at 313, 1063.

The Court declined to accept this same argument in *Disciplinary Counsel v. Ricketts*, 128 Ohio St.3d 271, 2010-Ohio-6240, 943 N.E.2d 981. In the opinion, this Court set forth two reasons why *Rust* was inapplicable.

First, *Rust* does not stand for the proposition that Prof.Cond.R. 3.1 absolves an attorney from all other ethical violations. In *Rust*, the attorney was charged with taking on a representation that would result in an ethical violation; therefore, because there was a good-faith argument that the representation was not a violation, the alleged violation ... was rendered meritless. ...

Second, even if the exception in Prof.Cond.R. 3.1 and DR 7-102 (A)(2) offered some protection for making misrepresentations, respondent's conduct would not fall under the exception. The language of Prof.Cond.R. 3.1 and its predecessor requires that a novel argument be made in good faith. ... Although the rules allow some leeway for legal practice that may test the current boundaries of law, leeway is not given when the intent is to warp the law to make misrepresentations.

Id. at 275, 985-986.

Although respondent has not argued that under *Rust* he should avoid discipline for his statements, *Rust* is inapplicable to the present matter. Respondent admitted that when he filed the two pleadings at issue, the supplemental request for findings of fact and the appellate brief, he did not have a reasonable basis for making the statements he made against Judge Whitney, Heald or Vatsures. Tr., pp. 82 and 83.

RESPONSE TO OBJECTION NO. 3

CONTRARY TO RESPONDENT'S ASSERTION THAT HIS SECOND MOTION TO DISMISS SHOULD HAVE BEEN GRANTED OR AT LEAST CONSIDERED IN MITIGATION BECAUSE RELATOR HAD A CONFLICT OF INTEREST IN THIS CASE HAVING BEEN CONSULTED SEVERAL TIMES BEFORE RESPONDENT MADE THE REPORTING, THE PANEL PROPERLY DENIED RESPONDENT'S SECOND MOTION TO DISMISS.

RESPONSE TO PROPOSITION OF LAW: RELATOR DID NOT HAVE A CONFLICT OF INTEREST IN THIS MATTER THAT PRECLUDED HIM FROM PROSECUTING RESPONDENT FOR VIOLATIONS OF THE OHIO RULES OF PROFESSIONAL CONDUCT AND RESPONDENT WAS IN NO WAY DENIED DUE PROCESS.

Respondent argues that relator had a conflict of interest in this matter because respondent, prior to the time that relator initiated his investigation of Judge W. Duncan Whitney's grievance against respondent, had apparently spoken with Senior Assistant Disciplinary Counsel Joseph Caligiuri on numerous occasions. According to respondent, he sought Caligiuri's advice relating to his obligation to report potential misconduct by the judge. During discovery, respondent deposed Caligiuri, who unequivocally denied advising respondent to make false statements against a judge in a pleading or that it was necessary to report misconduct to an appellate court. Respondent did not call Caligiuri as a witness to testify at the hearing in this matter and the only testimony supporting respondent's position is, therefore, respondent's testimony. At no time after Caligiuri's deposition, did respondent raise the issue of a conflict of interest again.

Relator's office frequently fields telephone calls from attorneys with questions relating to ethical dilemmas and issues. To suggest that relator must be disqualified from any case where a respondent has previously telephoned his office could, potentially, force the disqualification of relator in many matters. More importantly,

respondent offers no evidence, other than the fact that he spoke with relator's office, to support his allegation that relator must be disqualified or has a conflict of interest. The mere fact that Caligiuri spoke with respondent is not sufficient to constitute a conflict of interest.

Even if respondent intended to call Caligiuri as a necessary witness, a conflict of interest warranting relator's disqualification did not exist. Prof.Cond.R. 3.7 (c) provides that "[a] government lawyer participating in a case shall not testify or offer the testimony of another lawyer in the same government agency, except where division (a) applies or where permitted by law." (Emphasis added) At no time did relator intend to offer Caligiuri's testimony in this matter. Even if respondent had chosen to call Caligiuri as a witness, which he did not do, relator could nevertheless have continued to prosecute the case.

Relator does not dispute that respondent had conversations with Caligiuri. Caligiuri recalled speaking with respondent, but had no independent recollection of those telephone conversations. In his complaint, relator alleged that respondent made statements that were either false or with reckless disregard as to their truth or falsity in two documents filed in the *Julie Peterman v. Dean Stewart, et al.* litigation that respondent initiated on Peterman's behalf in the Delaware County Court of Common Pleas. Relator established, and respondent admitted in the stipulations, that he made statements that were either false or reckless in the supplemental request and the appellate brief. Tr., pp. 82 and 83.

Respondent's assertion that the entire investigation in this matter was tainted and the case should have been dismissed is altogether unsupported. In no way was

respondent denied due process in this matter. Respondent filed two answers to the formal complaint, engaged in discovery, submitting requests for and receiving answers to interrogatories on two separate occasions, participated in eight depositions, all but one at respondent's initiation, and negotiated and agreed to significant stipulations in the case. His counsel, on respondent's behalf, acknowledged, in the proceedings, that "[w]e negotiated them. We discussed them. There were e-mails back and forth. Mr. Proctor fully participated in that and approved each and every stipulation as discussed." Tr., p. 48. When respondent appeared to back off of the stipulations, he had an opportunity to discuss the matter with his counsel and again indicated that he would stand by the agreement. Id. at 115.

The matter cited by respondent as support for his position that the case against him should have been dismissed because his due process rights were violated, *Wrightman v. Texas Supreme Court et al.*, (1996) 84 F.3d 188, is distinguishable from this matter and did not even result in the dismissal of the complaint in that matter. Texas attorney, Robert Wrightman, initiated a federal lawsuit seeking declaratory and preliminary injunctive relief against the Texas Supreme Court and the State Bar of Texas following a disciplinary proceeding against Wrightman for making improper statements in court pleadings and letters to the court and opposing counsel. Id. The district court granted the defendants' motion to dismiss on abstention grounds; Wrightman thereafter appealed. Affirming the district court's decision, the United States Court of Appeals stated "[w]hen, however, a state bar acts in bad faith to retaliate against First Amendment protected activity, the courts should not abstain."

Id. at 190. Because Wrightman offered no evidence of bad faith or harassment, abstention by the district court was appropriate. Respondent's jump to the conclusion that *Wrightman* supports his position that this matter must be dismissed is a huge leap. Respondent has been provided every opportunity, consistent with the rules, to raise those challenges, including constitutional challenges, which he wished to raise during these proceedings. He has shown no bad faith or harassment by the relator.

RESPONSE TO OBJECTION NO. 4.

THE BOARD'S RECOMMENDED SANCTION OF A SIX-MONTH SUSPENSION IS APPROPRIATE GIVEN THE CIRCUMSTANCES OF THIS CASE AND WHOLLY CONSISTENT WITH *GARDNER*

RESPONSE TO PROPOSITION OF LAW: *GARDNER* IS FULLY APPLICABLE IN THIS MATTER AS THE FORMAL COMPLAINT AGAINST RESPONDENT WAS NOT BECAUSE HE REPORTED THE CONDUCT OF A JUDGE OR A JUDICIAL OFFICER PURSUANT TO THE OBLIGATION TO REPORT MISCONDUCT RATHER IT WAS ALLEGED AND PROVEN THAT HE INCLUDED STATEMENTS THAT HE KNEW TO BE FALSE OR WITH RECKLESS DISREGARD AS TO THE TRUTH OR FALISITY OF THE STATEMENTS IN PLEADINGS IMPUGNING THE CHARACTER OF A JUDGE AND TARNISHING THE INTEGRITY OF THE LEGAL SYSTEM.

The Supreme Court of Ohio has previously considered attorney discipline matters where there is an underlying tension between the attorney's right to free speech and his obligations to refrain from making improper statements about the judiciary pursuant to the Ohio Rules of Professional Conduct. In *Disciplinary Counsel v. Gardner, supra.*, this Court considered a matter where Mark J. Gardner, a Cleveland, Ohio attorney, had improperly verbally attacked an appellate court panel in a court pleading. In defense of his statements, Gardner argued that his statements were protected free speech under the First Amendment. After analyzing an extensive

history of First Amendment cases where attorneys had raised similar arguments to those raised by Gardner, this Court held that the “First Amendment does not insulate an attorney from professional discipline even for expressing an opinion, during court proceedings ... when the attorney knows that the opinion has no factual basis or is reckless in that regard.” *Id.* at 420, 429. This Court adopted an objective standard to determine whether the attorney made the statement with knowledge or reckless disregard of the falsity of the statement - “‘what a 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.” *Id.* at 422, 431 quoting *Standing Comm. on Discipline, U.S. Dist. Court, Cent. Dist. Of Calif. v. Yagman* (C.A.9 1995), 55 F.3d 1430 at 1437. Continuing:

Though attorneys can play an important role in exposing problems with the judicial system, [* * *] *false* statements impugning the integrity of a judge erode public confidence without serving to publicize problems that justifiably deserve attention. * * * [A]n objective malice standard strikes a constitutionally permissible balance between an attorney’s right to criticize the judiciary and the public’s interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by reasonable factual basis even if they turn out to be mistaken.

Id. at 423, 432. Gardner was suspended from the practice of law for six months.

More recently, Cleveland attorney, Merrie D. Frost, was indefinitely suspended from the practice of law for, among other things, making false accusations against several judges and attorneys. *Disciplinary Counsel v. Frost*, 122 Ohio St.3d 219, 2009-Ohio-2870, 909 N.E.2d 1271. Among these allegations, Frost alleged that a judge had

engaged in an ex parte communication with defense counsel, that a second judge had given “outright blatant special treatment for the defendants” and had “conveniently slowed down the case so that nothing could be decided until after the November election” and that a third judge delayed ruling on a motion for attorney fees because she was “afraid.” *Id.*, pp. 221-222, 1274-1275. Without question, Frost’s conduct was more egregious than that of respondent, however, the Court’s comments relating to the allegations is equally applicable to respondent.

“Respondent’s accusations were baseless. Given the complete lack of substantiation, no reasonable attorney would accept her charges of bias and corruption as true. The imposition of disciplinary measures in this case, therefore, poses no constitutional implications.” *Id.* at 225, 1278. See, also, *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, 940 N.E.2d 952.

Despite respondent’s efforts to direct this Court’s attention elsewhere, *Gardner* and its progeny are not distinguishable from this matter. Respondent made statements that were admittedly false or with reckless disregard as to their truth or falsity in two pleadings filed on his own behalf in the *Julie Peterman v. Dean Stewart, et al.* litigation. Among these statements, respondent alleged that the Judge Whitney had engaged numerous ex parte communications and was “going to great efforts to cover up and deny any off the record communications even though there was evidence that confirmed it”, that Judge Whitney had a social relationship with Vatsures and “was more concerned with protecting Estate Attorney Vatsures from disciplinary action than making the appropriate legal review of the case”, and that Judge Whitney “had apparently gone to great effort to cover this up and/or deny that

these things happened.” Stipulations, ¶¶ 19 and 23. Respondent had no factual basis for his statements, testifying at the hearing as to what others purportedly told him, relying on nothing more than hearsay and speculation. Respondent did not and cannot provide proof to support his statements. Tr., pp. 88, 91-93. A reasonable attorney in like circumstances would not have voiced the allegations raised by respondent against the judge.

Respondent suggests that the three prongs, so to speak, of *Gardner* were not satisfied because the panel or the Board did not review the inquiry respondent may have made prior to making the statements at issue, did not review the record of evidence in the *Peterman* case, and finally, made no review of whether respondent had assumed bias by Judge Whitney. He fails to recognize that such a review was unnecessary - given that respondent had acknowledged and admitted that his statements were false or reckless.

Although relator stipulated to a six-month stayed suspension, relator believes and supports the panel’s reasoning in recommending an actual six-month suspension. The panel eloquently explained:

Even if the relevant case law afforded us sufficient leeway to recommend something less than an actual suspension, upon reflection the panel does not believe the circumstances of this particular case would warrant it. If anything, Respondent’s situation warrants even less leniency than did the circumstances in *Gardner*. First, the serious accusations that Respondent leveled against Judge Whitney, which Respondent now admits were ‘reckless,’ were contained not merely in one court filing, as in *Gardner*, but in two separate filings. In the first, a motion before the trial court, he leveled one set of unfounded charges; and in the second, a brief before the court of appeals, he leveled a different set. Although the parties have not stipulated to any aggravating factors, these

circumstances clearly support a finding that Respondent engaged in a pattern of misconduct and committed multiple offenses. (Citations omitted) Second, in his testimony before the panel, Respondent initially displayed reluctance to stand behind the stipulations that he had signed only days earlier, which included his acknowledgement that his accusations against Judge Whitney ‘were not based on a reasonable belief and therefore were reckless.’ (Stip. 26) For a time during the hearing, Respondent’s testimony and demeanor strongly suggested that, contrary to his stipulations, he still believed that he had some foundation for his accusations against Judge Whitney. ... Even if this does not constitute a full-fledged refusal to acknowledge the wrongful nature of his conduct, ... it at least makes Respondent less deserving of leniency that was the respondent in Gardner, who does not appear to have wavered from his admission of wrongdoing and yet still received an actual six-month suspension.

Findings, p. 6.

Respondent’s conduct was more severe than the conduct of each of the attorney’s in the cases cited by respondent, in particular, *Disciplinary Counsel v. Grimes*, 66 Ohio St.3d 607, 1993-Ohio-125, 614 N.E.2d 740, and *Disciplinary Counsel v. Jackson*, 84 Ohio St.3d 386, 1999-Ohio-485, 704 N.E.2d 246. More similar is respondent’s conduct to that of Gardner, and his conduct is strikingly similar to that of Virginia attorney Jonathon Moseley. *Moseley v. Virginia State Bar*, (2010) 694 S.E.2d 586. Moseley represented his client in a breach of contract action. At the conclusion of the proceeding, the trial court sanctioned both Moseley and his client and ordered them to pay attorney fees for proceeding with an evidentiary hearing despite their knowledge that the matter was required to be arbitrated, filing in excess of 80 pleadings and motions in the case, and engaging in frivolous conduct. Thereafter, the defendant in the original litigation filed a grievance against Moseley

arising out of his conduct in the civil matter. Additionally, Moseley wrote a letter to the arbitration association indicating that the judge presiding over the evidentiary hearing ““was caught engaging in serious misconduct.”” Id. at 588. He also sent an email to associates stating that the decision to award sanctions against him was ““an absurd decision from a whacko judge, whom I believe was bribed.”” Id.

Considering the matter, the Virginia Supreme Court suspended Moseley for six months noting that “Moseley clearly made derogatory statements about the integrity of the judicial officer adjudicating his matters and those statements were made either with knowing falsity or with reckless disregard for their truth or falsity.” Id. at 589.

In recommending a six-month suspension, the panel gave respondent sufficient credit for the mitigating factors in this case, that respondent had no prior disciplinary record, made full and free disclosure to the disciplinary counsel and was cooperative throughout the proceedings, and had been subject to other penalties or sanctions. Findings, p. 4. Furthermore, the panel aptly balanced these factors against the aggravating factors it determined were appropriate - the pattern of misconduct, multiple offenses and failure to fully acknowledge wrongdoing. Findings, p. 6.

CONCLUSION

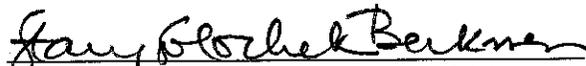
Respondent agreed that the allegations he made against Judge Whitney in the supplemental request for findings and the appellate brief were not based on a reasonable belief and were reckless. Respondent admitted that his conduct violated Prof.Cond.R. 3.5 (a)(6) and 8.2 (a) as well as Gov. Bar R. IV (2). Respondent

acknowledged that his actions warranted a sanction. The panel, after considering the stipulations and hearing the testimony of respondent determined that a greater sanction, a six-month suspension, was warranted. The panel was in the best position to render this determination. Relator respectfully requests that the panel and Board's recommendation be adopted and that respondent be suspended from the practice of law for six months.

Respectfully submitted,



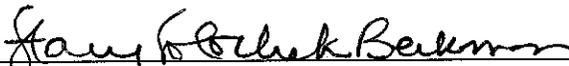
Jonathan E. Coughlan (0026424)
Disciplinary Counsel
Relator



Stacy Solbchek Beckman (0063306)
Assistant Disciplinary Counsel
Counsel of Record
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
Telephone (614) 461-0256
Facsimile (614) 461-7205
jonathan.coughlan@sc.ohio.gov
stacy.beckman@sc.ohio.gov
Counsel for Relator

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RELATOR'S ANSWER TO OBJECTIONS AND BRIEF IN SUPPORT OF RESPONDENT, PHILIP L. PROCTOR, TO THE FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE was served upon counsel for respondent, James S. Adray, Adray & Grna, 709 Madison Avenue, Suite 209, P. O. Box 1686, Toledo, Ohio 43603-1686, and upon Jonathan Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio, 43215, by regular U.S. mail, postage prepaid, this 16th day of May 2011.


Stacy Solochek Beckman
Counsel of Record

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

In Re:	:	
Complaint against	:	Case No. 09-059
Philip Lucas Proctor Attorney Reg. No. 0041956	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

This matter was heard on November 5, 2010, in Columbus, Ohio, before a panel consisting of Keith A. Sommer of Martins Ferry, Paul M. De Marco of Cincinnati and Jana E. Emerick of Lima, Chair. None of the panel members resides in the appellate district from which the complaint arose or served as a member of the probable cause panel that certified this matter to the Board.

Relator was represented by Stacy Solochek Beckman. Respondent was present and was represented by James Adray. The matter was heard by the panel upon agreed stipulations of fact and law, stipulated evidentiary exhibits and the testimony of Respondent, wherein Respondent admitted that his conduct in each of the four counts at issue constituted a violation of the rules of professional conduct. The stipulations of fact and law agreed to by the parties are attached to this report.

FINDINGS OF FACT

Based upon the stipulations of the parties and the evidence presented at the hearing, the panel finds the following facts proven by clear and convincing evidence:

Respondent was admitted to the practice of law in Ohio on November 6, 1989.

In 2002, Respondent filed a lawsuit on behalf of a client, Julie Peterman, in the Court of Common Pleas of Delaware County. In 2003, Respondent withdrew as counsel in the case, and the lawsuit was later dismissed without prejudice upon a pro se motion filed by the plaintiff.

In late 2003, counsel for the defendants in the lawsuit filed a motion for attorney fees from both Julie Peterman and Respondent. Two years after that, in November 2005, Judge W. Duncan Whitney granted the motions for attorneys fees and ordered Respondent and Julie Peterman jointly and severally to pay the defendants \$31,995.90.

In May 2007, Respondent filed a motion to vacate/motion for relief from judgment as to the order to pay attorneys fees. Judge Whitney then recused himself from the matter and transferred the case to Judge Kruger.

On October 9, 2009, Judge Kruger overruled Respondent's motions. Respondent then filed a motion for findings of fact and conclusions of law, which the judge denied.

On October 18, 2007, Respondent filed a supplementary request for findings of fact and conclusions of law. In that supplemental request, Respondent made several statements accusing Judge Whitney of bias, of engaging in ex parte communications with opposing counsel in the case, and of having "gone to great effort to cover this up and/or deny that these things happened."

On October 22, 2007, Respondent filed a notice of appeal of Judge Kruger's decision overruling the motion to vacate and motion for relief from judgment. On December 10, 2007, Respondent filed his appellate brief. In his appellate brief, Respondent again made several lengthy and detailed statements accusing Judge Whitney of bias, misconduct, and a "cover up."

When Respondent filed the supplemental request for findings of fact and conclusions of law, and when Respondent filed his appellate brief, he was aware that his beliefs regarding Judge Whitney were not "reasonable" as defined by law, and the statements about Judge Whitney were therefore recklessly made.

CONCLUSIONS OF LAW

Based upon the stipulations of the parties and the evidence presented at the hearing, the panel unanimously finds by clear and convincing evidence that the conduct of Respondent at issue in this case constitutes a violation of Prof. Cond. R. 3.5(a)(6) [a lawyer shall not engage in undignified or discourteous conduct that is degrading to a tribunal], a violation of Prof. Cond. R. 8.2(a) [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], and a violation of Gov. Bar R. IV(2) [it is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance].

Prior to the hearing, Relator withdrew the charges in the complaint which alleged violations of Prof Cond. R. 8.4(d), Prof. Cond. R. 8.4(h) and Gov. Bar. R. V(11)(E).

RECOMMENDATION

With regard to mitigation under BCGD Proc. Reg. 10(B)(2), the panel has taken into consideration the parties' stipulation that Respondent has no prior disciplinary record, made full and free disclosure to the disciplinary board and displayed a cooperative attitude toward the proceedings, and was subject to other penalties or sanctions related to the actions at issue in this case (i.e., he paid \$26,000 of the nearly \$32,000 judgment for attorneys fees in the underlying litigation). The parties have not stipulated to any aggravating factors.

Additionally, counsel for Respondent indicated to the panel that the judge at issue in this case, Judge Whitney, did not wish to see Respondent suffer harm or a long suspension as a result of Respondent's conduct, and this representation was not contested by Relator.

Joining with Respondent in recommending a stayed, six-month suspension, Relator directed our attention to *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048. As we read the *Gardner* opinion, however, it compels us to recommend that Respondent receive an actual suspension from the practice of law.

The respondent in *Gardner* filed a brief in which he railed against a court as biased and blind to the facts, just as Respondent did in this case. The majority in *Gardner* imposed a six-month actual suspension, stating unequivocally, "Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law." *Id.* at ¶ 36, citing *Disciplinary Counsel v. West* (1999), 85 Ohio St.3d 5, and *Columbus Bar Assn. v. Hartwell* (1988), 35 Ohio St.3d 258.

The question is whether this statement leaves the panel any leeway to accept the parties' joint recommendation that Respondent receive no actual suspension. We conclude it does not. Justice Pfeifer made an observation in *Gardner* that could be applied equally to Respondent in this case: "[T]he disturbing thing about this case ... is that the comments here were not made off-the-cuff in a moment of anger. They were written down, edited, and presumably checked for spelling. The attorney then made copies and filed his motion with the court." *Id.* at ¶ 44. Justice Pfeifer nonetheless argued for a public reprimand, based on the respondent's admission of his mistake. But, as noted, the majority in *Gardner* instead imposed an actual six-month suspension.

Candor requires us to admit that we, too, were initially inclined toward a lesser sanction than actual suspension, especially because Respondent paid such a large monetary sanction stemming from the same case (\$26,000)¹ and because the parties – and apparently also Judge Whitney, whose integrity Respondent impugned – have urged leniency. But based on the unequivocal language used in the majority opinion in *Gardner*, we see no alternative but to recommend an actual suspension of Respondent's license for a period of six months, the exact sanction imposed in *Gardner*.

Even if the relevant case law afforded us sufficient leeway to recommend something less than an actual suspension, upon reflection the panel does not believe the circumstances of this particular case would warrant it. If anything, Respondent's situation warrants even less leniency than did the circumstances present in *Gardner*. First, the serious accusations that Respondent leveled against Judge Whitney, which Respondent

¹ To be clear, Respondent did not receive that attorney fee sanction because of the conduct that constituted the violations at issue, as BCGD Proc. Reg. 10(B)(2)(f) appears to contemplate. Rather, the imposition of that sanction prompted the filings in which he made reckless statements impugning Judge Whitney's integrity, and committing the stipulated violations.

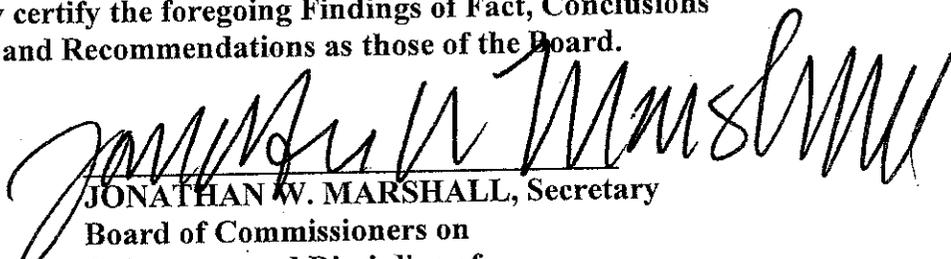
now admits were “reckless,” were contained not merely in one court filing, as in *Gardner*, but in two separate filings. In the first, a motion before the trial court, he leveled one set of unfounded charges; and in the second, a brief before the court of appeals, he leveled a different set. Although the parties have not stipulated to any aggravating factors, these circumstances clearly support a finding that Respondent engaged in a pattern of misconduct and committed multiple offenses. BCGD Proc. Reg. 10(B)(1)(c) and (d). Second, in his testimony before the panel, Respondent initially displayed reluctance to stand behind the stipulations that he had signed only days earlier, which included his acknowledgement that his accusations against Judge Whitney “were not based upon a reasonable belief and therefore were reckless.” (Stip. 26) For a time during the hearing, Respondent’s testimony and demeanor strongly suggested that, contrary to his stipulation, he still believed he had some foundation for his accusations against Judge Whitney. Only after the panel chair halted the hearing to allow him to consult with his counsel did Respondent state on the record that he stood by his stipulation that the charges he had leveled against Judge Whitney were without a reasonable basis and thus reckless. (Tr. 113-115) Even if this does not constitute a full-fledged refusal to acknowledge the wrongful nature of his conduct, under BCGD Proc. Reg. 10(B)(1)(g), it at least makes Respondent less deserving of leniency than was the respondent in *Gardner*, who does not appear to have wavered from his admission of wrongdoing and yet still received an actual six-month suspension.

For the foregoing reasons, the panel must reject the parties’ joint recommendation that Respondent be suspended from the practice of law for six months, with the entire suspension stayed. Instead, it is the recommendation of the panel that Respondent be suspended from the practice of law for six months.

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 February 11, 2011. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Philip Lucas Proctor, be suspended for six months. 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

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

FILED

OCT 28 2010

BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In re:
Philip Lucas Proctor, Esq.
Attorney Reg. No. 0041956
P.O. Box 4803
Newark, OH 43058,

Respondent,

v.

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411,

Relator.

CASE NO. 09-059

AGREED STIPULATIONS
OF FACT AND LAW

AGREED STIPULATIONS OF FACT AND LAW

Relator, Disciplinary Counsel, and respondent, Philip Lucas Proctor, do hereby stipulate to the following facts, violations of the Ohio Rules of Professional Conduct, and recommended sanction as well as to the admission and authenticity of the attached exhibits.

STIPULATED FACTS

1. Respondent, Philip Lucas Proctor, was admitted to the practice of law in the State of Ohio on November 6, 1989. Respondent is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.
2. On August 15, 2002, respondent initiated a complaint for invasion of privacy, abuse of process and intentional infliction of emotional distress on behalf of his

client, Julie Peterman, in the Delaware County Court of Common Pleas. *Julie Peterman v. Dean Stewart, et al.*, Case No. 02-CVC-08-449.

3. Ms. Peterman's claims stemmed from what she believed was the wrongful disclosure of personal documents in a separate probate matter in which she was one of several beneficiaries. *Estate of Josephine Shively*, Delaware County Court of Common Pleas, Probate Division, Case No. 97-0551.
4. On October 15, 2003, respondent filed a motion to withdraw as counsel for Ms. Peterman. The court granted respondent's motion on October 24, 2003.
5. On November 13, 2003, Ms. Peterman, pro se, filed a motion to dismiss her complaint without prejudice. The court granted Ms. Peterman's motion on November 20, 2003.
6. On November 24, 2003, Fred J. Beery, the attorney for one of the defendants in the civil litigation, Dean Stewart, filed a motion for attorney fees as to Julie Peterman or her counsel.
7. On December 4, 2003, Dennis Morrison, the attorney for the other defendant in the civil litigation, the Estate of Josephine Shively, filed its motion for attorney fees as to Julie Peterman. On March 11, 2004, Morrison filed an amended motion for attorney fees seeking fees from Peterman as well as from respondent.
8. On November 22, 2005, almost two years after the motions were filed, Judge W. Duncan Whitney granted the motions for attorney fees and ordered respondent and Ms. Peterman jointly and severally to pay the defendants \$31,995.90.
9. On December 7, 2005, respondent, on his own behalf, filed a notice of appeal to the Fifth District Court of Appeals, appealing Judge Whitney's November 22, 2005

decision. *Julie Peterman v. Dean Stewart, et al.*, Case No. 05 CAE 12 0082. On September 6, 2006, the appellate court affirmed Judge Whitney's decision because Proctor failed to file a complete transcript of the proceedings.

10. Respondent appealed the appellate court decision to the Supreme Court of Ohio, which dismissed the appeal as not involving a substantial, constitutional question on January 24, 2007.
11. While the appeal was pending with the Supreme Court of Ohio, respondent contacted Anthony M. Heald, a Delaware, Ohio attorney, seeking assistance with a potential 60(B) motion in the matter.
12. On January 8, 2007, respondent sent Heald a letter relating to the matter. During his May 24, 2010 deposition, Heald denied having previously seen the January 8, 2007 letter.
13. On February 2, 2007, respondent filed a Motion of Appellant, Philip L. Proctor, for Reconsideration with the Supreme Court of Ohio. In the motion, respondent asserted, "[j]ust before this court entered its dismissal entry of January 24, 2006 [sic], Appellant spoke to a local Delaware County attorney, Anthony M. Heald, who stated that the trial judge had indicated that he had some reservations about his ruling and was thinking about reconsidering and reversing his decision."
14. On March 2, 2007, Heald wrote to respondent regarding the February 2, 2007 pleading. In the letter, Heald explained that the statement respondent had attributed to him was not accurate.
15. Subsequently, Heald and respondent spoke by telephone regarding this matter and Heald reiterated that the statements were not accurate.

16. On May 10, 2007, respondent filed a Motion to Vacate Judgment as to Attorney and Motion for Relief from Judgment with the Delaware County Court of Common Pleas. On May 18, 2007, because of a pending investigative matter, Judge Whitney recused himself from this case and transferred the matter to Judge Everett H. Krueger. Judge Krueger denied respondent's motions on October 9, 2007.
17. On October 15, 2007, respondent filed a Motion for Findings of Fact and Conclusions of Law, which Judge Krueger denied by Order dated October 17, 2007 and which Proctor after he had submitted the pleading referred to in paragraph 18.
18. On October 18, 2007, respondent filed a Supplemental Request Regarding Motion for Findings of Fact and Conclusions of Law with the court.
19. In the supplemental request, respondent made the following statements:
 - (a) Judge Whitney was "biased or prejudiced regarding the 60(B) motion and regarding the original litigation" and had "discuss[ed] this matter numerous times off the record and/or it would appear that there have been ex-parte communications in the case."
 - (b) "Estate Attorneys Vatsures and Morrison were being investigated by the disciplinary counsel during the course of the original hearing."
 - (c) Judge Whitney was "apparently aware of this investigation and there were matters relating to that which made for bias or prejudice in the original litigation regarding attorney's fees. It would appear that the social relationship with attorney Vatsures may have contributed to this."

(d) Judge Whitney had “apparently gone to great effort to cover this up and/or deny that these things happened.”

20. On October 19, 2007, respondent filed a Motion to Stay Pending Appeal and Motion Regarding Record for Appeal. In the second section of this pleading, respondent indicated that the purpose of the Supplemental Request was to make a record for appeal and that he had not received the court’s ruling on the motion for Findings and Recommendations at the time the Supplemental Request was filed.
21. On October 22, 2007, respondent filed a Notice of Appeal with the Fifth District Court of Appeals, appealing Judge Kruger’s decision to deny the motion to vacate judgment and motion for relief from judgment. *Julie Peterman v. Dean Stewart, et al.*, Case No. 07 CAE 10 0054.
22. Respondent filed his appellate brief on December 10, 2007.
23. In the brief, respondent made the following statements:
 - (a) “Attorney Heald spoke to Judge Whitney who stated that he was considering reconsidering an [sic] reversing his decision.”
 - (b) “Mr. Proctor was informed that Attorney Heald actually had numerous discussions with Judge Whitney off the record.”
 - (c) “Judge Whitney’s reaction was shocking, going to great efforts to cover up and deny any off the record communications even though there was evidence that confirmed it.”
 - (d) “Estate Attorney Vatsures had been under investigation by the disciplinary counsel during the course of the original hearing.”

- (e) "Judge Whitney and Attorney Vatsures, who both had more than thirty years practice in Delaware County, knew each other well and apparently were friends."
- (f) "[T]he Estate's list of attorney's fees shows three detailed conversations with Judge Whitney's staff attorney just before the November 10, 2005 hearing where he announced his decision"
- (g) "Thus, it would appear that Attorney Vatsures needed a ruling of frivolous conduct to save him from a probable disciplinary complaint. Therefore, not surprisingly, there were apparently off the record and/or ex parte communications with Judge Whitney. Thus, the senseless November 22, 2005 Judgment Entry can only be understood when read in context with these facts demonstrating bias or prejudice."
- (h) "It would appear that the original trial judge, Judge Whitney, was more concerned with protecting Estate Attorney Vatsures from a disciplinary action than making the appropriate legal review of the case."
- (i) "Clearly, Judge Whitney's ex parte communications, knowledge of the disciplinary action against Attorney Vatsures, and desire to avoid a disciplinary complaint for his friend and fellow thirty year veteran of Delaware law practice created bias or prejudice that prevented him from making a fair and impartial review."
- (j) "[T]he fact that Judge Whitney did not make a ruling for almost two years after the motion had been filed and a year and a half after the hearings seems to indicate that he was hoping that Attorney Vatsures problems would be

resolved without the need for him to make such a decision. Also, the large attorney fee judgment considering the relatively small amount of time the case was open probably indicates that Judge Whitney hoped it would get the attention of the Court of Appeals and that he wanted them to bail him out by reversing the decision.”

24. On May 7, 2008, the appellate court affirmed Judge Krueger’s decision denying the motion to vacate judgment and motion for relief from judgment.
25. When respondent filed the Supplemental Request Regarding Motion for Findings of Fact and the December 10, 2007 appellate brief, respondent was aware that Heald had denied having any ex parte communication with Judge Whitney regarding the *Peterman v. Stewart* matter and that any statements to the contrary were likely untrue. Respondent admits that at this time his belief was no longer “reasonable” as defined by law.
26. Respondent’s statements regarding Judge Whitney and Vatsures were not based upon a reasonable belief and therefore were reckless.
27. Respondent appealed the appellate court’s decision to the Supreme Court of Ohio as well as filed a request to certify conflict with the Court. The Court dismissed the appeal as not involving a substantial, constitutional question on October 15, 2008 and denied the motion to certify conflict on October 1, 2008.
28. Respondent paid the majority of the approximate \$32,000 judgment - paying approximately \$26,000.

STIPULATED EXHIBITS

- Exhibit 1 Docket, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449.
- Exhibit 2 Decision and Entry, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed November 22, 2005.
- Exhibit 3 Motion of Appellant, Philip L. Proctor, for Reconsideration, Supreme Court of Ohio, Case No. 2006-1894, filed February 2, 2007.
- Exhibit 4 Letter from Anthony M. Heald to Philip Proctor dated March 2, 2007.
- Exhibit 5 Motion to Vacate Judgment as to Attorney and Motion for Relief from Judgment, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed May 10, 2007.
- Exhibit 6 Judgment Entry Denying Attorney Philip L. Proctor's Motion to Vacate Judgment and Motion for Relief and Judgment Entry Denying Defendant's Motion for Order Direction Clerk of Courts Not to Accept Any Further Filings by Philip L. Proctor in Case No. 02-CVC-08-449, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed October 9, 2007.
- Exhibit 7 Motion for Findings of Fact and Conclusions of Law, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed October 15, 2007.
- Exhibit 8 Judgment Entry Denying Attorney Proctor's Motion for Findings of Fact and Conclusions of Law, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed October 17, 2007.
- Exhibit 9 Supplemental Request Regarding Motion for Findings of Fact and Conclusion of Law, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed October 18, 2007.
- Exhibit 10 Motion for Stay Pending Appeal and Motion Regarding the Record for Appeal, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Common Pleas, Case No. 02 CVC 08 449, filed October 19, 2007.
- Exhibit 11 Brief of Appellant; Philip L. Proctor, Attorney at Law, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Appeals, Fifth Appellate District, Case No. 07 CAE 10 0054, filed December 10, 2007.

- Exhibit 12 Opinion, *Julie Peterman v. Dean Stewart, et al.*, Delaware County Court of Appeals, Fifth Appellate District, Case No. 07 CAE 10 0054, filed May 7, 2008.
- Exhibit 13 Docket, *Estate of Josephine Shively v. Peterman*, Licking County Court of Common Pleas, Case No. 2005 JD 093233.
- Exhibit 14 Letter from Philip L. Proctor to Anthony Heald dated January 8, 2007 with computer record.
- Exhibit 15 Letter from Philip L. Proctor to Anthony Heald dated March 8, 2007.
- Exhibit 16 Letter from Philip L. Proctor to Anthony Heald dated March 16, 2007.

**STIPULATED VIOLATIONS OF THE OHIO RULES OF PROFESSIONAL CONDUCT AND
STIPULATED SANCTION**

Respondent admits that his conduct violated the Ohio Rules of Professional Conduct, specifically: **Rule 3.5 (a)(6)** [a lawyer shall not engage in undignified or discourteous conduct that is degrading to a tribunal]; and, **Rule 8.2 (a)** [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]. Respondent's conduct further violated **Gov. Bar R. IV (2)** [it is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance].

Relator and respondent agree that respondent should be suspended from the practice of law for six months, with the entire suspension stayed.

ADDITIONAL STIPULATIONS

Relator has withdrawn the following charges alleging violations of Rule 8.4 (d), Rule 8.4 (h) and Gov. Bar R. V (11)(e) by respondent.

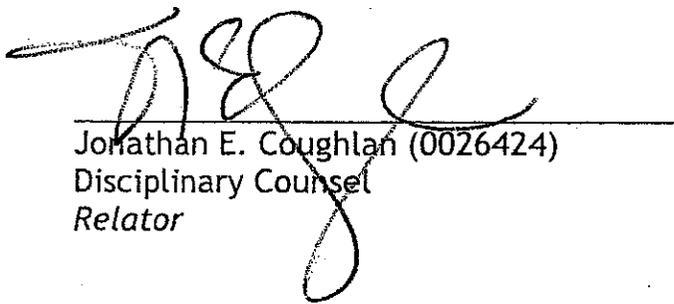
STIPULATED MITIGATING FACTORS

Relator and respondent stipulate that respondent's conduct involved the following mitigating factors as listed in BCGD Proc. Reg. §10(B)(2):

- (a) absence of prior disciplinary record;
- (d) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and,
- (f) imposition of other penalties or sanctions, which includes his payment of the judgment in the amount of \$26,000.

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 29th day of October 2010.



Jonathan E. Coughlan (0026424)
Disciplinary Counsel
Relator

James S. Adray (0023310)
Adray & Grna
709 Madison Avenue, Suite 209
PO Box 1686
Toledo, Ohio 43603-1686
Telephone (419) 241-2000
Facsimile (419) 241-2148
jim@adray-grna.com
Counsel for Respondent



Stacy Solochek Beckman (0063306)
Assistant Disciplinary Counsel
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Telephone (614) 461-0256
Facsimile (614) 461-7205
jonathan.coughlan@sc.ohio.gov
stacy.beckman@sc.ohio.gov
Counsel for Relator

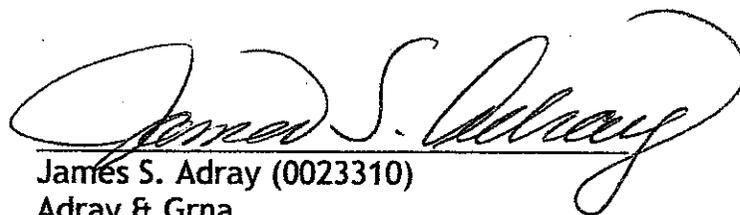


Philip L. Proctor (0041956)
PO Box 4803
Newark, Ohio 43058
Respondent

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 29th day of October 2010.

Jonathan E. Coughlan (0026424)
Disciplinary Counsel
Relator



James S. Adray (0023310)
Adray & Grna
709 Madison Avenue, Suite 209
PO Box 1686
Toledo, Ohio 43603-1686
Telephone (419) 241-2000
Facsimile (419) 241-2148
jim@adray-grna.com
Counsel for Respondent

Stacy Solochek Beckman (0063306)
Assistant Disciplinary Counsel
Office of Disciplinary Counsel of
The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Telephone (614) 461-0256
Facsimile (614) 461-7205
jonathan.coughlan@sc.ohio.gov
stacy.beckman@sc.ohio.gov
Counsel for Relator

Philip L. Proctor (0041956)
PO Box 4803
Newark, Ohio 43058
Respondent