

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

11-1023

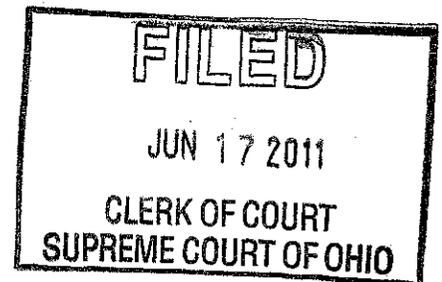
In Re: :
Complaint against : **Case No. 10-093**
Edward Michael DiCato : **Findings of Fact,**
Attorney Reg. No. 0055350 : **Conclusions of Law and**
Respondent : **Recommendation of the**
Akron Bar Association : **Board of Commissioners on**
Relator : **Grievances and Discipline of**
: **the Supreme Court of Ohio**

This matter was referred to Master Commissioner, Judge W. Scott Gwin, on May 9, 2011 by the Secretary of the Board pursuant to Gov. Bar R. V(6)(F)(2) for ruling on Relator's motion for default judgment. Master Commissioner Gwin prepared this report pursuant to Gov. Bar R. V(6)(J).

PROCEDURAL HISTORY

Respondent, Edward Michael DiCato, Ohio Supreme Court Attorney Registration No. 0055350 was admitted to the practice of law in Ohio on November 18, 1991.

On November 23, 2010, Relator, Akron Bar Association, sent notice of intent to file a complaint with the Board. A copy of that complaint was sent to Respondent by regular and certified mail at his business address on November 23, 2010. The certified mailing was accepted by Respondent on November 25, 2010.



After probable cause was certified, the Secretary of the Board attempted service of the complaint by certified mail upon Respondent at his business address. Respondent accepted service on December 9, 2010.

On or about July 22, 2010, August 18, 2010, September 1, 2010 and September 16, 2010, Respondent submitted written responses with attachments to Relator. However, Respondent has never filed an answer to the complaint.

On April 29, 2011, Relator moved for default judgment against Respondent.

Prima facie documentary evidence in support of the allegations made regarding the misconduct of Respondent is set forth in the following:

- 1) Affidavit of Jacqueline M. Forcina, Grievance Director and custodian of the records, Akron Bar Association;
- 2) Affidavit of Sandra E. Maxson, official court reporter authenticating a copy of the transcript of proceedings on Respondent's hearing on contempt citation held July 7, 2010;
- 3) Affidavit of Judge Mary-Margaret Rowlands with authentication of Respondent's letter dated July 1, 2010;
- 4) Certified copy of June 29, 2010 order in Summit County Case No. MS 2010-00-0016 ordering Respondent to appear and show cause;
- 5) Certified copy of magistrate's decision in Summit County Case No. MS 2010-00-0016 holding Respondent in contempt and assessing a fine and jail sentence but suspending the jail sentence under conditions; and

6) Certified copy of July 14, 2010 judgment entry in Summit County Case No. MS 2010-00-0016 affirming and adopting the magistrate's decision holding Respondent in contempt.

FINDINGS OF FACT

Respondent was appointed to represent Ronald Usner who was charged with felony offenses including the offense of having sex with a person under the age of 10. The criminal action against Usner was assigned to Judge Mary Margaret Rowlands of the Summit County Court of Common Pleas.

During a pretrial in the Usner action, Respondent requested Judge Rowlands permit him leave to file a motion to suppress. The court granted his oral motion permitting him until Friday of that week to file his motion.

Respondent did not file the motion by the Friday deadline and was contacted by Dorianne Denard ("Denard"), Judicial Assistant of Judge Rowland's court, inquiring why the motion had not been filed. The assigned prosecutor to the case also contacted Respondent reminding him that the motion had not been filed by the required deadline.

At the next scheduled appearance on the Usner case, Judge Rowlands inquired of Respondent why the motion to suppress had not been filed. Respondent responded by requesting additional time to file the motion. Judge Rowlands suggested that Respondent remove himself from the case and that she appoint a substitute attorney to represent Usner. Respondent agreed to the court's suggestion and Respondent was removed from the case and new counsel was appointed.

Respondent thereafter filed a fee application for compensation for his representation of Usner with Judge Rowlands.

At the time the Usner fee application was pending, Respondent had an additional fee application pending on another matter. In that case the defendant had not signed an affidavit of indigency.

In late June 2010, Respondent contacted Denard inquiring about the two pending fee applications. Respondent was advised regarding the deficiency of an indigency affidavit and told that there was no news to report regarding the pending fee application on the Usner matter.

Respondent called Denard again on June 28, 2010 inquiring about the two pending fee applications. Denard responded she had no new news.

During the course of the conversation with Denard on June 28, 2010, Respondent engaged in a short but verbally abusive conversation with Denard, in which he referred to Judge Rowlands as a "lying, cheating bitch." (Ex. E, p.2)

As a result of Respondent's phone comments to Denard on June 28, 2010, Judge Rowlands issued an order directing Respondent to appear and show cause why he should not be held in contempt of court.

After the show cause order was issued, Respondent sent Judge Rowlands a letter dated July 1, 2010.

On July 7, 2010, in accordance with an order of reference, a hearing was held on the show cause order before Magistrate John Shoemaker.

Thereafter, Magistrate Shoemaker issued his decision finding Respondent in contempt of court, and ordering he pay a \$500 fine and be sentenced to 48 hours in the Summit County Jail. The jail sentence was suspended upon condition that Respondent not repeat such conduct in the future.

On July 14, 2010, without any objection having been filed to the magistrate's decision, Judge Rowlands issued her judgment entry affirming and adopting the magistrate's decision.

No appeal was taken of Judge Rowlands' judgment; the judgment finding Respondent in contempt of court is no longer subject to appeal and constitutes a final order.

In the magistrate's decision as affirmed and adopted by Judge Rowlands the court found Respondent's conduct:

“***is a clear violation of the Ohio Rules of Professional Conduct with specific reference to Rule 3.5(a)(6), ***engage in undignified or discourteous conduct that is degrading to a tribunal ***as well as Rule 8.2(a), ***a lawyer shall not make a statement that the lawyer knows to be false, or with reckless disregard as to the truth or falsity ***concerning the ***integrity of a Judicial Officer.”(Internal quotation marks excluded). (Ex. E)

CONCLUSIONS OF LAW

Respondent's conduct has violated the following Rules of Professional Conduct:

Prof. Cond. R. 3.5(a)(6) [undignified or discourteous conduct that is degrading to a tribunal];

Prof. Cond. R. 8.2(a) [making a statement that a lawyer knows to be false, or with reckless disregard as to the truth or falsity concerning the integrity of a judicial official];

and

Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

The record does not support the violations alleged by Relator that Respondent's conduct in this matter violated Prof. Cond. R. 3.5(a)(1) [seeking to influence a judicial officer, juror, prospective juror or other official by means prohibited by law].

MITIGATING FACTORS

Respondent has no disciplinary record. Respondent did cooperate during the investigation, met with the investigators and provided written responses and documentation outlining his position and defenses. Respondent has indicated, though not substantiated with evidentiary quality materials, that he is receiving Social Security disability benefits for a chronic back condition; and that he was receiving prescriptions for pain medications from his doctor. The prescription information is subsequent to the date of the allegations in this case.

AGGRAVATING FACTORS

Relator argues that Respondent has refused to acknowledge the wrongful nature of his conduct and continues to assert that he was exercising his right to freedom of expression and speech.

RECOMMENDED SANCTION OF RELATOR

Relator recommends Respondent be suspended from the practice of law for a period of two years with reinstatement conditioned upon completion of all CLE requirements, and certification that he is not alcohol or drug dependant by an appropriate independent agency or individual.

RECOMMENDATION OF MASTER COMMISSIONER

In *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, the Supreme Court of Ohio reviewed its cases involving an attorney's accusation of judicial

impropriety. *Pullins* cites several cases of attorneys who impugned the integrity of the judiciary, but received less than Relator's recommended sanction including:

Disciplinary Counsel v. Mills (2001), 93 Ohio St.3d 407 (imposing a public reprimand for a single profanity-laced outburst during which a magistrate believed that the attorney was going to physically assault him); *Disciplinary Counsel v. Grimes* (1993), 66 Ohio St.3d 607 (public reprimand for making inappropriate statements about a judge to a journalist and made additional inappropriate statements to a judge during a hearing; the parties stipulated that the statements were the "result of emotional stresses created by a set of unusual circumstances that are unlikely to recur"); *Disciplinary Counsel v. Jackson* (1999), 84 Ohio St.3d 386 (public reprimand for failing to maintain his composure and using obscenities, vulgar language, and racial epithets during a deposition); *In re Complaint against Harper* (1996), 77 Ohio St.3d 211 (public reprimand for a judge who approved campaign advertisements that diminished public confidence in the judiciary); *Columbus Bar Assn. v. Riebel* (1982), 69 Ohio St.2d 290 (public reprimand for directing offensive and abusive language toward an opposing party on several occasions); and *Cincinnati Bar Assn. v. Gebhart* (1982), 69 Ohio St.2d 287 (public reprimand for making false statements to a court and expressing a discourteous demeanor toward opposing counsel). *Pullins* at ¶84.

After carefully reviewing the evidence, the Master Commissioner finds a violation of Prof. Cond. R. 3.5(a)(6), 8.2(a), and 8.4(h), but does not believe Respondent's conduct illustrates a continuing pattern of misconduct as it relates to Judge Rowlands. Furthermore, Respondent's conduct as alleged herein did not occur in public,

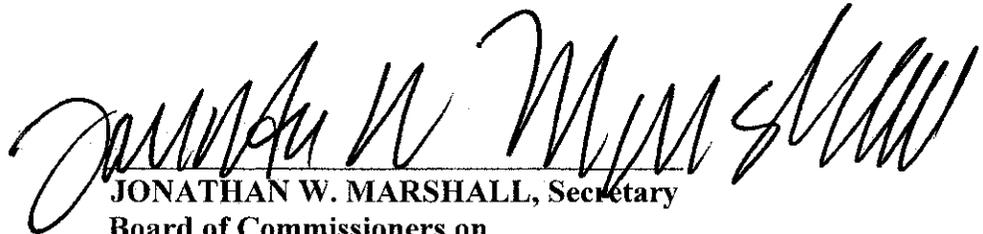
rather his actions occurred during a single telephone conversation with the judge's administrative assistant.

Accordingly, based upon the forgoing, the Master Commissioner believes the appropriate sanction for Respondent's misconduct is a six-month suspension from the practice of law, all stayed on the condition that Respondent engage in no further misconduct.

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 June 9 and 10, 2011. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Master Commissioner and recommends that Respondent, Edward DiCato, be suspended from the practice of law in the State of Ohio for six months with the entire suspension stayed. 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