

ORIGINAL

IN
THE SUPREME COURT OF OHIO

Disciplinary Counsel,
Relator

CASE NO. 2011-0756

Nicholas M. Gallo (0083226)
Respondent

RELATOR'S ANSWER TO
RESPONDENT'S OBJECTIONS
TO THE BOARD OF
COMMISSIONERS' REPORT AND
RECOMMENDATIONS

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

JONATHAN E. COUGHLAN (0026424)
Disciplinary Counsel, Relator

BRENT L. ENGLISH (0022678)
LAW OFFICES OF BRENT L. ENGLISH
M.K. Ferguson Plaza, Suite 470
1500 West Third Street
Cleveland, OH 44113-1422

LORI J. BROWN (0040142)
Chief Assistant Disciplinary Counsel
Co-Counsel for Relator

(216) 78109917
(216) 781-8113 - FAX
Counsel for Respondent

KAREN H. OSMOND (0082202)
Staff Attorney
Co-Counsel for Relator

OFFICE OF DISCIPLINARY COUNSEL
250 Civic Center Dr., Suite 325
Columbus, Ohio 43215
(614) 461-0256
(614) 461-7205 - FAX

NICHOLAS M. GALLO (0083226)
Respondent

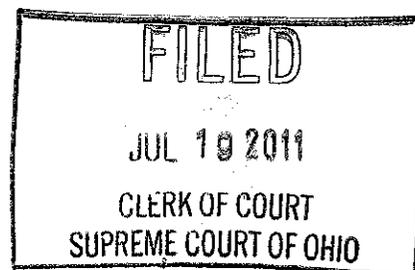


TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE NUMBER</u>
Table of Authorities	iii
Introduction	1
Relevant Facts	2
Relator's Answer to Respondent's Objections	9
A. Respondent Violated Rule 8.2(a)	9
B. Respondent Violated Rule 8.4(d)	24
Conclusion	27
Certificate of Service	28
Report and Recommendations of the Board of Commissioners On Grievances and Discipline	Appendix A

TABLE OF AUTHORITIES

<u>CASE LAW</u>	<u>PAGE NUMBER(S)</u>
<i>Cardiko v. Hasler</i> (1998), 129 Ohio App.3d 539, 718 N.E.2d 496	15
<i>Cleveland Bar Assn. v. Cleary</i> , 93 Ohio St.3d 191, 2001-Ohio-1326, 754 N.E.2d 235	26
<i>Cuyahoga Cty. Bar Assn. v. Hardiman</i> , 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369	26
<i>Disciplinary Counsel v. Baumgartner</i> , 100 Ohio St.3d 41, 2003-Ohio-4756, 796 N.E.2d 495	15
<i>Disciplinary Counsel v. Frost</i> , 122 Ohio St.3d 219, 2009-Ohio-2870, 909 N.E.2d 1271	10, 15
<i>Disciplinary Counsel v. Gardner</i> , 99, Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425	7, 12, 17, 18, 23, 25
<i>Disciplinary Counsel v. Pullins</i> , 127 Ohio St.3d 46, 2010 –Ohio-6241, 940 N.E.2d 952	23
<u>OTHER AUTHORITIES</u>	<u>PAGE NUMBER(S)</u>
DR 7-106(C)	12
DR 8-102(B)	12, 15
Rule 8.2(a)	8, 9, 12, 16, 17, 18, 24, 25, 27
Rule 8.4(c)	8
Rule 8.4(d)	8, 17, 24, 25, 27
Rule 8.4(e)	8
Gov. Bar R.IV(2)	16, 22
S. Ct. Prac. R.6.2(B)(5)(b)	1

Professional Conduct. The board recommended that respondent be publicly reprimanded.

The board's report was certified and a show cause order was issued by this Court. On June 20, 2011, respondent filed objections to the report. Following is relator's answer to those objections.

RELEVANT FACTS

Respondent was admitted to the practice of law in Ohio on May 12, 2008. Stip. 1. For six months, from January 12 to June 25, 2009, respondent was employed as an associate attorney at the Cleveland-based law firm of Stafford & Stafford Co., L.P.A. Report at 2, 7. At Stafford & Stafford, respondent was supervised by seven-year associate Gregory Moore and the firm's founding partner, Joseph G. Stafford. Id. at 2. During his tenure at Stafford & Stafford, respondent provided legal representation to Jeffery Rymers.¹ See, e.g. Stips. 12, 16.

After 15 years of marriage, Jeffery Rymers and Amy Rymers separated on or about July 1, 2007. Stip. 7. See, also Tr. at 325.² In December 2007, Eugene A. Lucci and Amy Rymers began a relationship. Id. at 326.

Lucci is an attorney and since January 6, 2001 he has served as a judge on the Lake County Court of Common Pleas, General Division. Stips. 3, 4. Lucci's courtroom and office suite are located on the second floor of the Lake County Courthouse in Painesville, Ohio. Stip. Exb. 8. See, also, e.g. Tr. at 215-216; 219-221.

¹ Mr. Rymers' first name is serially spelled incorrectly. The correct spelling is Jeffery.

² "Tr." refers to the transcript of the disciplinary hearing before the panel.

Amy Rymers filed a complaint for divorce on March 18, 2009 in the Lake County Court of Common Pleas, Domestic Relations Division. Stip. 9. *Rymers v. Rymers* was assigned to a visiting judge, Hon. Judith A. Nicely. Stip. 10. On April 29, 2009, Joseph G. Stafford entered a notice of appearance on behalf of Jeffery Rymers in *Rymers v. Rymers*. Stip. 9.

In May 2009, on Lucci's behalf, Attorney Walter McNamara communicated with Stafford regarding Eugene Lucci and the *Rymers* divorce. Tr. at 233. McNamara indicated to Stafford that he believed Stafford had a "conflict of interest" and asked Stafford to withdraw from representing Jeffery Rymers. Tr. at 311. See also Stip. Exb. 3, Exb. 2 thereto. McNamara's request was based on the fact that Lucci had consulted with Stafford in early 2008. Tr. at 258. Lucci believed that information he shared with Stafford during their 2008 meeting should result in Stafford's disqualification. Tr. at 232-233; 238-239.

Despite McNamara's efforts, Stafford did not withdraw from representing Jeffery Rymers. See, e.g. Tr. 359-360. On June 3, 2009, through McNamara, Lucci filed a motion to intervene into *Rymers v. Rymers*. Stip. Exb. 2. Lucci asked to intervene so that he could challenge Stafford's representation of Jeffery Rymers and so that he could make a claim for unjust enrichment against Jeffery Rymers.³ Id. See also Tr. at 315. In the motion to intervene, Lucci is referred to as "Mr. Lucci." Id. (emphasis added). Lucci did not ask to intervene "because" he is "a judge." Id.

³ The unjust enrichment claim was based on Lucci's allegation that Jeffery Rymers had been unjustly enriched by financial contributions made to the Rymers family by Lucci. It was Lucci's intention to pursue the motion to disqualify and the civil complaint if he had been permitted to intervene. See, e.g. Tr. at 240.

On the same day that Lucci's motion to intervene was filed, a pretrial conference in the *Rymers* case was held at the Lake County Courthouse. Stip. 11. At Joseph Stafford's direction, respondent attended the June 3rd *Rymers* pretrial conference. Stip. 12.

Respondent met Jeffery Rymers for the first time when Rymers arrived at the courthouse for the June 3, 2009 pretrial. Report at 3-4. While they waited for the pretrial to begin, respondent and Jeffery Rymers walked slowly about or stood together at various places on the second floor of the courthouse. Stip. Exb. 11A-D.⁴ See also Stip. Exbs. 12, 13. Video recordings from June 3, 2009 confirm that Lucci was never present main hallway of the second floor while respondent and/or Jeffery Rymers were in the courthouse. Id. See also Report at 9 and Tr. at 250-252.

On June 17, 2009, two weeks after the pretrial, respondent and Stafford & Stafford, responded to Lucci's motion to intervene by filing a pleading bearing three captions:

- Defendant, Jeffery G. Rymer's (sic) Motion to Strike and/or Dismiss Motion to Intervene; or, in the Alternative, Brief in Opposition to the Motion to Intervene
- Motion for Extension of Time to Submit Supplemental Brief in Opposition to Motion to Intervene et al.
- Motion for Sanctions and Attorney Fees Pursuant to O.R.C. Section 2323.51 and Civil Rule 11

Stip. Exb. 3 (hereinafter the multi-titled document is collectively referred to as the "motion to strike").

⁴ Stip. Exb. 11 is comprised of four video discs lettered A, B, C, and D. The video is from four of the security cameras situated in different locations on the second floor of the Lake County Courthouse. See, e.g. Tr. at 229. Lucci obtained the video footage shortly after June 17, 2009. Id. at 250-252.

Respondent's name and attorney registration number and Joseph Stafford's name and attorney registration number appear on the motion to strike. *Id.* The motion to strike was signed only by respondent. *Id.* and *Stip.* 16.

The motion to strike personally disparaged Lucci and Lucci's motion to intervene. *Stip.* Exb. 3. The motion to strike introduced Lucci's judicial status and accused Lucci of violating the Ohio Code of Judicial Conduct. *Id.* Respondent argued against Lucci's request to intervene, asked for sanctions against Lucci and his attorney, Walter McNamara, and requested an award of attorney fees in favor of Jeffery Rymers. *Id.*

With respect to the request for attorney fees and sanctions, respondent asserted 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[.]" *Id.* at 19-20. Respondent also claimed that Lucci violated Prof. Cond. Rule 3.3 by failing to cite any controlling law in support of the motion to intervene and by "engag[ing] in a pattern of harassing and threatening conduct toward the Defendant, Jeffery Rymers, and Joseph G. 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." *Id.* at 21.

Respondent executed his own affidavit in support of the motion to strike. *Stip.* 18. Respondent's affidavit was attached as Exhibit 6 to the motion to strike. In addition, respondent notarized an affidavit that was executed by Jeffery Rymers. *Tr.* at 83. Jeffery Rymers' affidavit was attached to the motion to strike as Exhibit 5. *Stip.* Exb. 3.

The affidavits of respondent and Jeffery Rymers contain false statements about Eugene Lucci. Respondent's affidavit contains several false accusations. To wit, respondent claimed that he observed Lucci "standing in the hallway outside of his chambers on June 3, 2009 before the pretrial" in *Rymers v. Rymers*. *Id.* at Exb. 6. Respondent also claimed that he observed Lucci "staring at" Jeffery Rymers for "a considerable amount of time" before the June 3, 2009 pretrial. *Id.*

In reality, at no time on June 3, 2009 were respondent and/or Jeffery Rymers within sight of Lucci in the Lake County Courthouse. See, e.g. Tr. at 82. Lucci never stood in a hallway of the courthouse staring at Jeffery Rymers. *Id.* There was no legal or factual basis for respondent to claim that Lucci did anything to "threaten" or "intimidate" Jeffery Rymers on June 3, 2009.

On June 26, 2009, Lucci filed a response to the motion to strike. Stip. Exb. 4.

Inter alia, the reply stated:

Of course, whether or not Mr. Lucci stared or looked at anyone is hardly a matter in this case. However, it is part and parcel of an apparent attempt to not only defend against the Motions to Intervene and for Disqualification, but also to darken the reputation of Mr. Lucci. While all may be fair in litigation and war, this is not only unnecessary but the allegations in the brief and affidavits concerning Mr. Lucci being in the hall and staring at Mr. Rymers are absolutely false and a lie on the part of Mr. Rymers and Attorney Gallo. Thus, Mr. Gallo, himself an attorney, has sworn under oath to an absolutely false set of facts. Mr. Rymers, though not an attorney, has done the same.

Id. at 9.

The June 26th response includes a second affidavit from Lucci. Id. In that affidavit, Judge Lucci stated that he was “never there in the main hallway when Jeffery Rymers was or could have been there.”⁵

On or about July 8, 2009, Lucci submitted a grievance against respondent. Stip. Exb. 17. Lucci’s grievance stated that he had “witnesses and irrefutable, conclusive evidentiary proof that the allegations in [respondent’s] and [Mr. Rymers’] affidavits [were] lies.” Stip. Exb. 17, p. 2. See, also Report at 8. Lucci’s grievance also included a photocopy of his June 26, 2009 affidavit and his response to the motion to strike. Id. Over the next three months, in his responses to the grievance, respondent continued to insist that Lucci was in the hallway staring at Jeffery Rymers on June 3, 2009. Stip. Exb. 18, 20.

It was not until after the formal complaint was certified, that respondent took any remedial action regarding his allegations against Lucci. On February 1, 2010, through his counsel, respondent filed a Motion to Withdraw Erroneous Affidavit and to Strike, Withdraw, and Disregard it in *Rymers v. Rymers*. Stip. Exb. 16.

The board found that respondent “could have, and should have, taken independent steps to confirm the identity of the man against whom he made such serious allegations.” Report at 18-19. The board concluded that under all of the facts and circumstances, respondent acted recklessly under the objective standard announced in *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425.

⁵ An affidavit from Amy Rymers was also attached to Lucci’s response. Amy’s affidavit confirms that Lucci was in his office and that Amy Rymers never saw Lucci in the second floor hallway while Jeffery Rymers was present.

The board also determined that respondent engaged in conduct that was prejudicial to the administration of justice “[b]y 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 [to intervene], without having verified or having personal knowledge of the allegations contained in those documents[.]” Report at 19.

The hearing panel and the board concluded that based upon the foregoing facts, respondent violated Ohio Prof. Cond. 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) and Prof. Cond. Rule 8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).⁶

For his misconduct, the board recommended that respondent be publicly reprimanded. Respondent has filed objections to the board’s conclusions and recommended sanction. Now comes relator and hereby answers respondent’s objections.

⁶ The panel determined that relator did not prove by clear and convincing evidence that respondent violated Prof. Cond. Rule 8.4(c) and Prof. Cond. Rule 8.4(e) and dismissed those violations. Relator has not objected to the board’s conclusions.

RELATOR'S ANSWERS TO RESPONDENT'S OBJECTIONS

A. RESPONDENT VIOLATED RULE 8.2(a)

Respondent recklessly impugned the integrity of Judge Eugene Lucci

The board found clear and convincing evidence that respondent engaged in “reckless conduct” by filing a motion to strike in which he alleged that Judge Lucci “engaged in a pattern of harassing and threatening conduct” and by attesting “in an affidavit that Lucci committed certain acts without ever ascertaining that the person was, in fact, Lucci.” Report at 19. In his first objection, respondent asserts that he did not recklessly impugn Judge Lucci’s integrity.

Respondent’s objections ignore the content and insulting tone of the entire motion to strike. In determining that respondent violated Rule 8.2(a), the board considered the affidavits and the motion to strike and concluded that respondent’s claims about Lucci were reckless due to respondent’s lack of personal knowledge and his lack of diligence. Moreover, it cannot be overlooked that it was the motion to strike that made Lucci’s judicial status an issue.

Respondent endeavors to convince this Court that he is ethically blameless and asserts that he “did enough” to confirm Lucci’s identity before he executed and filed his affidavit and the affidavit of his then-client, Jeffery Rymers. Respondent claims that this should be viewed solely as a case of “mistaken identity” and that because he “in good faith” believed that his affidavit was truthful, he cannot be found to have committed misconduct. This Court should reject respondent’s assertions.

Despite respondent’s efforts to segregate the two, it is crucial to recognize that respondent’s affidavit and the motion to strike are undeniably coexistent. See,

Disciplinary Counsel v. Frost, 122 Ohio St.3d 219, 2009-Ohio-2870, 909 N.E.2d 1271, ¶34 (in evaluating statements made by an attorney about a judge, the focus is on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made). The motion to strike relies upon the affidavits and the affidavits must be read within the context of the motion to strike.

Respondent's affidavit can be read only one way, i.e. that respondent, an attorney at law and counsel for Jeffery Rymers, personally observed Judge Eugene Lucci standing in the courthouse hallway staring at Jeffery Rymers on June 3, 2009. In the motion to strike, respondent relied upon his affidavit to ask the domestic relations court to sanction Lucci because respondent observed Lucci "engaging in a pattern of harassing and threatening conduct" toward Jeffery Rymers. See, e.g. Stip. Exb. 3 at 21. See, also id. at 17. Again relying upon the same false affidavits, respondent asked that Lucci be sanctioned because Lucci was engaging in "inappropriate conduct" and violating "judicial standards." Id. at 21.

Attempting to disavow the board's finding that his false claims about Judge Lucci and publication thereof were "reckless," respondent portrays his affidavit as solely a case of "mistaken identity."⁷ Operating with the benefit of hindsight, respondent asserts that he saw Judge Lucci's bailiff, Charles Ashman, in the hallway on June 3, 2009 and that it was "reasonable" for him to mistake Ashman for Judge Lucci. As explained herein, it is entirely irrelevant that respondent apparently mistook someone else for

⁷ Relator acknowledges that the board described this disciplinary case as "a case about mistaken identity and unintended consequences." Report at 1. The board also found that respondent's "mistake" was reckless.

Lucci. Moreover, there is a stark difference between suffering from a simple case of mistaken identity and swearing under oath that you have seen a sitting judge engage in misconduct.

Respondent's arguments about his "mistake" should be wholly rejected by this Court. First, it was not reasonable for respondent to mistake Ashman for Lucci based upon physical appearance. In June 2009, Ashman was six inches taller and approximately 70 pounds heavier than Lucci. Tr. at 187, 243, 244. Ashman had a mustache; Lucci had the same full beard that he has for 27 years. Id. at 187, 244.

Second, on June 3, 2009, Ashman was in the hallway on occasion but he did not stare at Jeffery Rymers. Tr. at 186. See Stip. Exb. 11 A-D. See, also Stip. Exb. 13. Instead, as part of his bailiff's duties, Ashman periodically walked out of Lucci's office suite and scanned the courthouse hallway looking for counsel in cases set on Lucci's docket for that day. Tr. at 178-184. Ashman never stared at Jeff Rymers and never did anything to harass or threaten Rymers. Id. at 186. As of June 3, 2009, Ashman did not even know respondent or Jeffery Rymers. Id. at 186, 177-178.

Ashman simply walked out of Lucci's office suite and into the hallway. He scanned the hallway looking for those attorneys who had previously checked in for pretrials before Lucci. It was not objectively reasonable for respondent to think that Ashman looked anything like Lucci. Ashman never did anything to harass or intimidate Jeffery Rymers. Respondent's misconduct cannot be excused by a claim of mistaken identity.⁸

⁸ At no time in the courthouse on June 3, 2009 did respondent introduce himself to the person who was allegedly staring at his client nor did respondent ask Ashman for his name.

The seminal case regarding violations of Prof. Cond. Rule 8.2(a) is *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 1003-Ohio-4048, 793 N.E.2d 425.⁹ Finding violations of DR 8-102(B) and DR 7-106(C), this Court rejected Mark Gardner's claims that the United States Constitution insulated him from sanctions for making accusations that the court of appeals had affirmed his client's conviction out of prosecutorial bias and corruption. In *Gardner* and consistent with a majority of other states' courts, this Court adopted "an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or reckless disregard of its falsity." *Id.* at ¶26 (citation omitted). The objective standard:

[a]ssesses an attorney's statements in terms of "what the reasonable attorney, considered in light of all of 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. (emphasis added).

In this case, the board determined that although respondent did not knowingly make false statements about Lucci, he lacked a reasonable factual basis for making the statements. The board concluded that respondent made statements about Judge Lucci with reckless disregard as to their falsity. Report at 18-19. Moreover, respondent's affidavit is false on its face and all of the accusations of judicial impropriety that are based upon that affidavit were made without any reasonable factual basis.

⁹ *Gardner* was decided before February 1, 2007; therefore, all references in *Gardner* are to the Code of Professional Responsibility and DR 8-102(B) (a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer). Prof. Cond. "Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule." Prof. Cond. Rule 8.2(a), Comparison to former Ohio Code of Professional Responsibility.

According to respondent, his “identification” of Lucci was based in part upon a telephone conversation that he had from the courthouse with Joseph Stafford on June 3, 2009. Stafford was not at the Lake County Courthouse on June 3rd; however, respondent claims that during the call, he described the person he saw in the hallway to Stafford. Tr. at 478-479. According to respondent, Stafford said that the person in the hallway was “Judge Lucci.” At the disciplinary hearing, Stafford testified that respondent “may have” called him but he does not recall “the particulars” of talking with respondent on the telephone on June 3, 2009. Tr. at 396. Stafford also claimed to have “no recollection” of any such telephone conversation. Id.¹⁰

Respondent also claims that while he and Jeffery Rymers were standing together in the hallway – some 70-feet from Lucci’s office door – Jeff Rymers told him that “Judge Lucci was standing in the doorway.” Whatever Jeff Rymers said to respondent in the hallway on June 3, 2009 is not as “unequivocal” as respondent would like this Court to believe. At the disciplinary hearing, Rymers testified that he does not remember if he said either “there he is” or “there is Judge Lucci.” Tr. at 168. Moreover, according to Rymers, the first time that he can be certain that he actually saw Lucci was at a baseball game that took place after the June 3rd pretrial.¹¹ Id. at 133.

As noted by the board, in preparing his affidavit for the motion to strike, respondent looked at a photo of Lucci on the internet. In sum, talking to a third person who was not present, relying upon a client who obviously lacked knowledge, and

¹⁰ Asked on cross examination whether he ever told respondent “that’s Judge Lucci,” Stafford gave an unresponsive and rambling answer. See, e.g. Tr. at 397-398. Asked whether he would “take credit” for telling respondent, “that’s Judge Lucci,” Stafford eventually stated that he did not recall making that statement. Id. at 399-402.

looking at a photograph on the internet hardly provided respondent with the “personal knowledge” sufficient to support an affidavit filed as evidence in a domestic relations court.¹² Regardless of his limited years of legal experience, respondent should have known that he did not possess the requisite personal knowledge to swear under oath that Lucci was in the hallway on June 3, 2009.

Arguing against the board’s conclusion that he engaged in “reckless conduct,” respondent relies upon irrelevant events that occurred after the motion to strike was filed. Whether Judge Lucci came into possession of video recordings from June 3, 2009 is irrelevant. Whether Lucci shared those recordings with respondent before he filed his grievance is irrelevant. Likewise, whether respondent mistook Ashman for Judge Lucci is irrelevant.

On the other hand, it is relevant that in an affidavit filed in the *Rymers’* divorce case, respondent swore under oath that Eugene Lucci was in the hallway of the Lake County Courthouse on June 3, 2009 staring at Jeffery Rymers. It is relevant that Lucci was not in the hallway. It is also relevant that Lucci did not stare at Jeffery Rymers. Moreover, it is relevant that respondent wrote a brief in support of a motion to strike and that he claimed in that brief that Judge Lucci’s “staring” served to “threaten and

¹¹ Lucci gave an identical account of seeing Jeffery Rymers for the first time, i.e. at a baseball game two weeks after the June 3, 2009 pretrial. Tr. at 242.

¹² Notably, respondent makes much of Jeff Rymers’ supposedly fragile emotional state yet argues that it was reasonable for him to rely upon an identification ostensibly made by Jeff Rymers while Rymers was at the courthouse. The two arguments are incompatible. Moreover, the fact that Jeff Rymers was “uncomfortable” at the Lake County Courthouse is irrelevant to this disciplinary case. Rymers’ “comfort” or lack thereof was an issue that could have been addressed by his attorney prior to June 3, 2009.

intimidate” Rymers.¹³ As the board determined, respondent did not possess the level of “personal knowledge” sufficient to support an affidavit filed as evidence in the domestic relations court.¹⁴ Report at 18-19.

Respondent’s contention that he had “no reason” to “make false statements about or concerning Judge Lucci” is inconsequential. In affirming the board’s recommendation, the sole consideration for this Court is that respondent made statements about Lucci without a reasonable factual basis for making those statements, considering their nature and the context in which they were made. Under the *Gardner* standard, respondent’s motion to strike and the statements in his affidavit are not “good faith errors of fact.”

The *Gardner* case that is relied upon by the board was followed in *Disciplinary Counsel v. Baumgartner*, 100 Ohio St.3d 41, 2003-Ohio-4756, 796 N.E.2d 495. The *Baumgartner* case is pertinent to the present case given that some of Elsebeth Baumgartner’s violations of DR 8-102(B) were based upon false statements she made about judicial officers in their capacity as Ohio citizens.¹⁵ Likewise, while respondent was not attacking a particular decision or holding set forth by Lucci, he nevertheless made false statements impugning Lucci’s integrity. See also *Frost* at ¶34 (applicable standard is whether there was a reasonable factual basis for making the statements, considering their nature and the context in which they were made).

¹³ Without belaboring the point, an exhaustive review of the video recordings does not show the physical reaction of Jeffery Rymers that respondent claims he saw that morning.

¹⁴ Ohio law requires that statements contained in affidavits be based upon personal knowledge. See, e.g. *Carkido v. Hasler* (1998), 129 Ohio App.3d 539, 718 N.E.2d 496.

¹⁵ In *Baumgartner*, this Court applied the same standard of review that had been announced just weeks before in *Gardner. Baumgartner* at ¶46.

Respondent's efforts to exonerate himself by casting blame upon Judge Lucci should also be rejected by this Court. Respondent claims that Lucci had "an obvious interest" in *Rymers v. Rymers* "as evidenced by this unusual Motion to Intervene;" therefore, it was "reasonable" for respondent to conclude that the man in the hallway was Judge Lucci. This argument is unfounded and actually supports the board's conclusion that respondent did not have a reasonable factual basis for making the statements about Judge Lucci in violation of Rule 8.2(a).

First, Ashman walked out into the hallway well before the motion to intervene was presented to respondent by Attorney Linda Cooper. See, e.g. Stip. Exb. 13 at pps. 3, 11. Second, respondent can only rely upon pure conjecture to conclude that Lucci, a sitting judge, would come out of his chambers and walk into the public hallway in order to stare at Jeffery Rymers. Such conjecture falls well below the *Gardner* standard. Third, respondent's argument also incorrectly presumes that a judge would choose to exit the safety of his chambers in order to walk unescorted in the courthouse while it is open to the public.

Likewise, respondent's efforts to focus on Jeffery Rymers should be rejected. Respondent claims that it was "objectively reasonable" for him to conclude that as of June 3, 2009, Jeff Rymers knew who Lucci was and respondent could therefore, reasonably rely upon Rymers' "identification" of Lucci. On the contrary, the Rules of Professional Conduct and Gov. Bar R.IV(2) require more.¹⁶

¹⁶ Gov. Bar R.IV(2) provides: "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. Judges and Justices, not being wholly free to defend themselves, are peculiarly entitled to receive the support of lawyers against unjust criticism and clamor. Whenever there is proper ground for

Respondent never specifically asked Rymers whether he knew who Lucci was. Tr. at 103-104. Speculation that his client was likely to know what Lucci looked like does not provide a “reasonable factual basis” for making false statements about a judge. See *Gardner* at ¶30.

The statements in respondent’s affidavit that Judge Lucci was in the courthouse hallway staring at Jeffery Rymers are false. Every claim that Lucci “intimidated” or “threatened” Jeffery Rymers by standing in the hallway is an attack impugning the integrity of a judicial officer without any factual basis. Every claim that Lucci “engaged in a pattern of harassing and threatening conduct” attacks the integrity of a judicial officer, is a misrepresentation of the evidence, and is without any factual basis. Rules 8.2(a), 8.2(d), and Gov. Bar R.IV require much, much more from Ohio’s lawyers.

Respondent is Accountable for Statements in the Motion to Strike

The assertions in the second section of respondent’s first objection are not supported by the facts of this case and should be rejected by this Court. Respondent asks this Court to conclude that the board’s finding of a violation of Rule 8.2(a) was based upon only one statement in a 24-page motion to strike. In conjunction with that argument, respondent offers the self-serving claim that he did not actually “write” the offending words. Finally, respondent asserts that by filing an allegedly meritless motion to intervene, Lucci, in essence, made himself a target.

serious complaint of a judicial officer, it is the right and duty of the lawyer to submit a grievance to proper authorities. These charges should be encouraged and the person making them should be protected.”

The motion to strike actually contains significantly more offending language than is discussed in respondent's objection. Although the board directly quoted only one sentence from the motion to strike, the board determined that "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" constituted "reckless conduct under the objective standard announced in *Gardner*" and violated Rule 8.2(a). Report at 19.

The excerpt quoted in the report is inextricably connected to other portions of the motion to strike and must be considered in context of the total motion. See *Gardner* at ¶26. For example, in the section of the motion to strike arguing that Lucci's complaint against Jeffery Rymers should be "denied and dismissed," respondent stated:

Further, as set forth in the Defendant, Jeffery G. Rymers' Affidavit, he is intimidated and threatened by the conduct of the Applicant in this matter, including but not limited to, his threats and his conduct at the most recent pretrial in this matter. This is especially so, given the Applicant's position as a presiding [judge] in the Lake County Court of Common Pleas."

Stip. Exb. 3 at 17. Obviously, the alleged "intimidat[ing] and threaten[ing] conduct * * * at the most recent pretrial" never happened.

Moreover, the language quoted by the board appears in the middle of an argument asking the *Rymers* court to sanction Lucci and McNamara. Collectively, that section of the motion to strike alleges as follows:

A trial court properly awards attorney fees under Civil Rule 11 where the conduct of counsel or filings submitted by counsel is the purpose of delay; or to annoy, harass or maliciously injure the opposing litigant.[] An award of sanctions and

attorney fees is justified where a party or his counsel knowingly lies or makes false or contradictory statements or misrepresentations not supported by evidence.[]
The Ohio Code of Judicial Conduct states the following in pertinent part:

RULE 1.3 Avoiding Abuse of Prestige of Judicial Office
A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

The Applicant is 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, all to the prejudice of the parties. The Applicant's requests are frivolous, have no basis under law or fact, or any good faith argument, in reference to his Motion to Intervene and the materials attached thereto.

* * *

In this matter, the Applicant and his legal counsel have engaged in a pattern of harassing and threatening conduct toward the Defendant, Jeffery G. Rymers, and Joseph G. Stafford; and have intimated on numerous occasions these threats, based upon the Applicant's position as a presiding Judge in the Lake County Court of Common Pleas. The Applicant has filed motions that are not supported under the facts and circumstances of this matter, Ohio law, or any good faith argument. The Applicant's baseless Motion to Intervene has forced the Defendant, Jeffery G. Rymers, to incur increased attorney fees, expenses and litigation costs; and has delayed these proceedings, all to the detriment of the Defendant.

The Applicant fails to cite controlling Ohio law that expressly prohibits the Applicant from intervening in this matter. This failure, whether intentional or otherwise, and the inappropriate conduct of the Applicant and his counsel, must be addressed by this Court. The Defendant, Jeffery G. Rymers, has been adversely affected by the conduct of the Applicant and his counsel, and awards of attorney fees and expenses, and other relief, are warranted in this matter. Further, the Applicant and his counsel have engaged in inappropriate conduct, in violation of ethical and judicial

standards as set forth above. [] The Applicant and his legal counsel should be sanctioned accordingly and required to personally pay the Defendant's legal fees and litigation expenses incurred as a result of the conduct engaged in by the Applicant and his legal counsel.

Stip. Exb. 3 at 19-22 (emphasis added, original emphasis and footnotes omitted). In context, the language quoted in the board's report is but one small passage from a much larger and equally offending body of work.

As noted at the outset of this answer brief, Lucci's motion to intervene does not mention or rely upon his judicial status.¹⁷ Stip. Exb. 2. Lucci did not ask to intervene because he is a judge or the presiding judge. *Id.* There are no "threats" in Lucci's motion to intervene.

The pages of the motion to strike quoted above are a prime example of how respondent made Lucci's judicial status "an issue" in *Rymers v. Rymers*. It is also notable that despite openly accusing Lucci of misconduct four different times in the motion to strike, respondent never filed a grievance against Lucci. Tr. at 101. See, Stip. Exb. 3 at 13, 19, 22 and 23.

According to respondent, he did "the bulk of the work" on the motion to strike. Tr. at 74. Inter alia, respondent worked on the section of the motion "related to the alleged misconduct of Judge Lucci." *Id.* at 489. Notwithstanding the foregoing, respondent claims that a more senior Stafford & Stafford associate, Greg Moore, actually wrote the very phrase quoted by the board.

There is no evidence that respondent asked Moore or Stafford to delete the offending language. Regardless of his age or experience, respondent has a law

license; therefore, ethically, he is 100 percent responsible for the content of a motion to strike that bears his name and signature.

Notably, Moore was unwilling to testify that he, in fact, wrote a specific sentence or section of the motion. On cross-examination, Moore testified:

Q [by relator's counsel]: You agree that you had frequent – or, let me use a better word – you had substantial input into the Motion to Strike?

A [by Moore]: I mean, I had some input in reference to editing certain rules that were being applied and certain arguments that – that were being made. Yeah, I mean, I think we all kind of worked through it as a group project.

Q: If we put a copy of the Motion to Strike in front of you today, would you be able to tell us what words were yours, what editing you did, what commas you put it? Would you be able to tell us that?

A: Not exactly. I mean, word for word, every single word that I – I think the Motion kind of speaks for itself. It's – It's a fairly long Motion, so I don't know if that's something I could identify every single thing I did ... after almost two years.

Tr. at 439-440.

More importantly, before respondent knew that his assertions about Lucci were false, respondent stood by the documents that were filed in the *Rymers* case. See, e.g. Stip. Exb. 18. For example, in his initial response to Lucci's grievance, respondent stated, "[t]he affidavit and other documents I filed in the *Rymers* matter are premised upon my own experience and observations, and those of Jeffery G. Rymers. At no point did I lie or make false statements in any of the documents filed in the Rymers matter." Id. At no point during relator's investigation did respondent suggest that Greg Moore contributed to statements made in "the documents." Id. and Stip. Exb. 20.

¹⁷ In his affidavit that is attached to his motion to intervene, Lucci truthfully identifies himself as a judge.

Moreover, paragraph 13 of the formal complaint against respondent alleges that “[t]he motion to strike filed by respondent falsely alleges that Lucci “and his legal counsel have engaged in a pattern of harassing and threatening conduct toward the Defendant, Jeffery G. Rymers, and Joseph G. Stafford; and have intimated on numerous occasions these threats, based upon the Applicant’s position as a presiding Judge in the Lake County Court of Common Pleas.” After learning that Lucci was not in the hallway staring at Jeff Rymers, respondent filed an answer to the formal complaint. Through counsel, respondent admitted that the foregoing quoted language appears on page 21 of the motion to strike. Respondent then stated, “[f]urther answering, Respondent denies that he falsely made this allegation and states that he made this allegation in good faith based upon information available to him at the time.” See, Complaint and Answer, Case No. 09-087 (emphasis added). Again, respondent did not suggest that someone else wrote the offending language.

Regardless of who penned the phrase quoted by the board, it is undisputed that respondent signed the motion. It is also undisputed that at the time he signed the motion, respondent was an attorney and was acting as counsel for Jeffery Rymers.

Respondent’s assertion that Lucci is to blame should also be rejected by this Court. In essence, respondent asserts that by filing the motion to intervene, Lucci opened himself up to accusations of impropriety. Even if respondent’s argument had any merit – which it does not – there is no exception in the *Gardner* standard for a situation in which a lawyer is allowed to impugn a judge’s integrity because he believes the judge is “asking for it.” See, Gov. Bar R.IV(2).

In *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, 940 N.E.2d 952, Attorney Scott Pullins objected to the board's determination that he violated inter alia, DR 8-102(B), when he revealed that he had filed grievances against Hon. Otho Eyster in an affidavit of disqualification. Pullins argued that he did not commit misconduct because he had a "reasonable factual basis" for filing a grievance and then claimed that he had a "reasonable factual and legal basis" for revealing the existence of his grievances. *Id.* at ¶9.

This Court rejected Pullins' arguments based upon the reasoning announced in *Gardner*. Quoting *Gardner*, the *Pullins* court stated, "We have recognized that ethical rules prohibiting false statements impugning the integrity of judges are necessary 'to preserve public confidence in the fairness and impartiality of our system of justice.'" *Id.* at ¶11 (quoting *Gardner*). Upholding the board's findings of misconduct in *Pullins*, this Court held:

[Pullins'] unfounded and disrespectful statements neither establish that the law is what respondent claims it to be nor present a good-faith argument for an extension, modification, or reversal of existing law. Rather, they call into question the honesty and integrity of a judge and cast the entire judiciary in a bad light.

Id.

As set forth by the board, *Gardner* sets forth "an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or reckless disregard of its falsity." Report at 18 (quoting *Gardner* at ¶26). Nothing about the merits of Lucci's motion to intervene has any bearing upon this Court's determination whether respondent's false statements were reckless.

The futility of respondent's argument can be seen after even a cursory review of the motion to strike. Simply, there was no reason whatever to raise Lucci's judicial status. The arguments contra Lucci's motion to intervene could have been ethically set forth without a single reference to Lucci's judicial status. The board correctly determined that relator presented clear and convincing evidence that respondent made statements with reckless disregard as to their truth or falsity concerning the integrity of a judicial officer in violation of Rule 8.2(a). Accordingly, this Court should overrule respondent's first objection.

B. RESPONDENT VIOLATED RULE 8.4(D)

Ohio Prof. Cond. Rule 8.4(d) states that it is "professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice." The board concluded that respondent violated Rule 8.4(d) "[b]y 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 [to intervene], without having verified or having personal knowledge of the allegations contained in those documents, Respondent engaged in conduct prejudicial to the administration of justice." Report at 19. Respondent contends that the board's conclusion that he violated Rule 8.4(d) is "unsupportable" and "overbroad."

Arguing that the board's conclusion is unsupportable, respondent repeats his claims that he acted in good faith and that this is all a case of "mistaken identity." As set forth in relator's answer to respondent's first objection, respondent's contention that he acted in "good faith" is immaterial. The sole consideration for this Court in affirming the

board's recommendation as to both Rule 8.2(a) and Rule 8.4(d) is that respondent made the statements (sworn and unsworn) about Lucci without a reasonable factual basis, considering their nature and the context in which they were made. As determined by the board, under the *Gardner* standard, the statements in respondent's motion to strike and his affidavit are not "good faith errors of fact."

Respondent's declaration of a "good faith belief" that Judge Lucci was in the hallway is immaterial to this Court's determination whether he violated Rule 8.4(d). As explained *infra*, it is entirely irrelevant that respondent apparently mistook someone else for Lucci. Moreover, there is a stark difference between "mistaken identity" and recklessly asserting that you have seen a sitting judge violate the judicial canons.

As previously set forth, it was not reasonable for respondent to mistake Ashman for Lucci based upon physical appearance. Moreover, although Ashman was in the hallway on occasion, he did not stare at Jeffery Rymers on June 3, 2009. Ashman never stared at Jeff Rymers and never did anything to harass or threaten Rymers.¹⁸

The board's conclusion that respondent violated Rule 8.4(d) by placing the false affidavits and the indecorous motion to strike before the *Rymers* court is discerning and insightful. Respondent wanted Judge Nicely to rely on the claims about Lucci in the motion to strike in deciding whether to allow Lucci to intervene. Tr. at 77, 83.

Respondent wanted Judge Nicely to consider his own claims under oath that Lucci had

¹⁸ Respondent's arguments regarding his alleged "mistake," overlooks several of the crucial reasons that respondent finds himself before this Court. For example, had respondent merely averred that Judge Lucci was "in the hallway," respondent may be able to exonerate himself with a claim that he was "mistaken." On the contrary, respondent and Stafford & Stafford went several steps further by falsely accusing Judge Lucci of "staring at Jeffery Rymers," of "harassing and threatening" Jeffery Rymers, and

been in the courthouse hallway staring at Jeffery Rymers. Id. Respondent clearly wanted Judge Nicely to believe that Lucci was "harassing and threatening" his client. All of those claims turned out to be false.

Contrary to respondent's claim, holding that respondent engaged in conduct that was prejudicial to the administration of justice will not unfairly expand this Court's application of the rule. In *Cleveland Bar Assn. v. Cleary*, 93 Ohio St.3d 191, 2001-Ohio-1326, 754 N.E.2d 235, this Court was asked to define the phrase "prejudicial to the administration of justice." The *Cleary* court stated:

As the Supreme Court of Minnesota has observed, however, DR 1-102(A)(5) is sufficiently well defined because it "do[es] no more than reflect the fundamental principle of professional responsibility that an attorney * * * has a duty to deal fairly with the court and the client." *In re Charges of Unprofessional Conduct Against N.P.* (Minn. 1985), 361 N.W.2d 386, 395; see also, *State v. Nelson* (1972), 210 Kan. 637, 640, 504 P.2d 211, 214 ("It cannot be seriously contended that 'prejudicial' does not sufficiently define the degree of conduct which is expected of an attorney").

Id. at 206.

Two years later, this Court followed *Cleary* in *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369. In *Hardiman*, this Court held that an attorney engages in conduct that is prejudicial to the administration of justice "when he or she breaches his or her professional responsibility to deal fairly with the court and the client." Id. at ¶15 (citing *Cleary*, 93 Ohio St.3d at 206).

Recklessly impugning the integrity of a judicial officer and presenting false accusations to the *Rymers* court was unfair to the *Rymers* court and to Judge Lucci.

of engaging in misconduct. Accordingly, respondent impugned Judge Lucci's integrity in violation of the Ohio Rules of Professional Conduct.

Likewise, respondent's assertion that Lucci "engaged in a pattern of harassing and threatening conduct" was unmerited and violates Rule 8.4(d). Accordingly, this Court should overrule respondent's second objection.

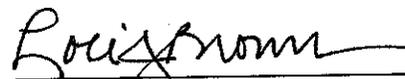
CONCLUSION

This Court should affirm the board's conclusion that respondent violated Ohio Prof. Cond. 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) and Prof. Cond. Rule 8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). For the foregoing violations, respondent should receive a public reprimand.

Respectfully submitted,



Jonathan E. Coughlan (0026424)
Disciplinary Counsel, Relator



Lori J. Brown 0040142
Chief Assistant Disciplinary Counsel
Co-Counsel of Record

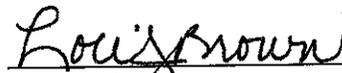


Karen H. Osmond (0082202)
Staff Attorney
Co-Counsel of Record

Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
614.461.0256

CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Brent L. English, Esq., Law Offices of Brent L. English, MK Ferguson Plaza, Suite 470, 1500 W. 3rd Street, Cleveland, OH 44113-1422 and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, Ohio Judicial Center, 5th Floor, 65 S. Front Street, Columbus, OH 43215 this 19th day of July, 2011.



Lori J. Brown
Counsel for Relator

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

In Re:	:	
Complaint against	:	Case No. 09-087
Nicholas Matthew Gallo	:	Findings of Fact,
Attorney Reg. No. 0083226	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
Disciplinary Counsel	:	Grievances and Discipline of
	:	the Supreme Court of Ohio
Relator	:	
	:	

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 Falkowski, 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 pecking 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 as 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[d] 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 to 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

courts 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.

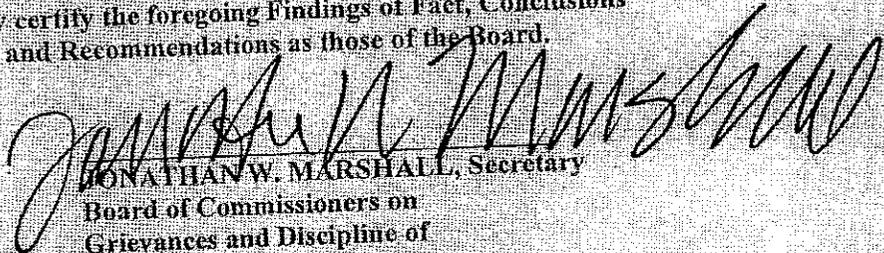
Weighing the mitigating factors against Respondent's conduct at issue, including the fact that Respondent had been licensed as an attorney for just over one year at the time of his misconduct, has fully complied with the disciplinary process, and promptly sought to rectify his reckless conduct by withdrawing 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