

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

Cleveland Metropolitan Bar Association :  
Realtor

**CASE NO. 2011-1049**

Robert J. Berk (0001031) :  
Respondent

**RESPONDENT'S OBJECTIONS TO  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND RECOMMENDATIONS  
OF THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE,  
AND RESPONDENT'S BRIEF IN  
SUPPORT OF OBJECTIONS**

---

**RESPONDENT'S OBJECTIONS TO FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND RECOMMENDATIONS OF  
THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE,  
AND RESPONDENT'S BRIEF IN SUPPORT OF OBJECTIONS**

---

**COUNSEL FOR RELATOR:**

Heather M. Zirke (0074994)  
Cleveland Metropolitan Bar Association  
1301 East Ninth Street, Second Level  
Cleveland, Ohio 44114-1253  
216-539-5971  
216-696-2413 facsimile  
[hzirke@clemetrobar.org](mailto:hzirke@clemetrobar.org)

**COUNSEL FOR RESPONDENT:**

Michael E. Murman (0029076)  
14701 Detroit Avenue, Suite 555  
Lakewood, Ohio 44107  
216-228-6996  
216-226-9011 facsimile  
[murmanlaw@aol.com](mailto:murmanlaw@aol.com)

David O. Simon (0006050)  
1370 Ontario Street  
450 Standard Building  
Cleveland, Ohio 44114  
216-621-6201  
216-575-1405 facsimile  
[dsimon@epiqtrustee.com](mailto:dsimon@epiqtrustee.com)

Edward G. Kagels (0025958)  
14701 Detroit Avenue, Suite 555  
Lakewood, Ohio 44107  
216-228-6996  
216-226-9011 facsimile  
[edkagels@yahoo.com](mailto:edkagels@yahoo.com)

**RECEIVED**  
AUG 05 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

**FILED**  
AUG 05 2011  
CLERK OF COURT  
SUPREME COURT OF OHIO

## TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE NUMBER</u>
Table of Authorities	ii
Respondent's Objections	1
Objection 1	1
RESPONDENT OBJECTS TO THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW THAT RESPONDENT VIOLATED RULE 1.3, OHIO RULES OF PROFESSIONAL CONDUCT, AS CHARGED IN THE COMPLAINT	1
Objection 2	2
RESPONDENT OBJECTS TO THE RECOMMENDATION OF THE BOARD OVERRULING THE PANEL'S RECOMMENDATION THAT ALL TIME OFF BE SUSPENDED.	2
Conclusion	5
Certificate of Service	6

## TABLE OF AUTHORITIES

<b><u>CASE LAW</u></b>	<b><u>PAGE NUMBER(S)</u></b>
<i>Allen Cty Bar Assn v. Brown</i> , 2010-Ohio-580	4
<i>Cincinnati Bar Assn. v Hauck</i> , 2011-Ohio-3281	4
<i>Cincinnati Bar Assn., v. Lawson</i> , 2008-Ohio-3340	5
<i>Cleveland Bar Assn v. Norton</i> , 2007-Ohio-6038	4
<i>Dayton Bar Association v. Corbin</i> , 2006-Ohio-2289	5
<i>Disciplinary Counsel v. Beeler</i> , 2005-Ohio-1143	4
<i>Disciplinary Counsel v. Doellman</i> , 2010-Ohio-5990	3
<i>Disciplinary Counsel v. Fowerbaugh</i> , 199-Ohio-261	4
<i>Disciplinary Counsel v. Rohrer</i> , 2009-Ohio-5930	5
<i>Disciplinary Counsel v. Rooney</i> , 2006-Ohio-4567	4

<b><u>OTHER AUTHORITIES</u></b>	<b><u>PAGE NUMBER(S)</u></b>
Prof. Cond. Rule 1.3	2

IN THE SUPREME COURT OF OHIO

**Cleveland Metropolitan Bar Association:**  
1301 East Ninth Street, Second Level  
Cleveland, Ohio 44114  
**Realtor**

**CASE NO. 2011-1049**

**RESPONDENT'S OBJECTIONS TO  
FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND RECOMMENDATIONS  
OF THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE,  
AND RESPONDENT'S BRIEF IN  
SUPPORT OF OBJECTIONS**

**Robert J. Berk**  
Reg. No. 0001031  
75 Public Square, Second Level  
Cleveland, Ohio 44114  
**Respondent**

---

**RESPONDENT'S OBJECTIONS TO FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND RECOMMENDATIONS OF  
THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE,  
AND RESPONDENT'S BRIEF IN SUPPORT OF OBJECTIONS**

---

**RESPONDENT'S OBJECTIONS**

**Objection No. 1**

**RESPONDENT OBJECTS TO THE BOARD'S FINDINGS OF FACT AND  
CONCLUSIONS OF LAW THAT RESPONDENT VIOLATED RULE 1.3, OHIO  
RULES OF PROFESSIONAL CONDUCT, AS CHARGED IN THE COMPLAINT.**

Relator failed to prove by clear and convincing evidence that respondent's conduct constituted an actionable violation of Rule 1.3. The stipulated facts are that respondent neglected two bodily injury cases filed in common pleas court until the court dismissed them. Thereafter, he took immediate remedial action at his own expense, and without any attempt to hide his negligence or exonerate himself. Tr. at 60:1; 64:1.<sup>1</sup>

Respondent acknowledged that acceptance of the representation of the clients

---

<sup>1</sup> All references to "Tr." are to the transcript of the disciplinary hearing. Page and line references are separated by a colon. The line cited is the first line of the relevant testimony.

involved in the two count complaint ought not to have occurred because he was no longer regularly filing plaintiff injury cases in common pleas court. Tr. at 54:11; 55:1. Nevertheless, he accepted these cases because they were past and loyal clients and because he felt an obligation to serve them. Tr. at 58:7; 59:1.

The circumstances are material because they help explain how the incidents of neglect occurred. Respondent did not give the notices of the calendar events proper attention, so recording the court dates slipped through the administrative cracks of his office procedures; the appointments were not properly noted because they were aberrations, deviations from his current routine of bankruptcy and contract or debtor representation cases that make up most of his practice. Tr. at 54:21; 106:13

The board found a lack of diligence on the part of respondent constituting violations of Rules of Professional Conduct: Prof. Cond. Rule 1.3. They disregarded Comment [3] under Prof. Cond. Rule 1.3 which states in pertinent part: "... The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client."

It is important that the lack of diligence actionable in discipline be distinguished from the lack of diligence that is simply negligence if this rule is to perform as intended; that is, that simple negligence (not accompanied by dishonesty, deceit, or abandonment of clients) not be confused with professional misconduct. Negligence, while obviously not commendable, is not culpable wrongdoing. There are numerous remedies for negligence including malpractice damages.

Respondent was negligent. There was no abandonment of a single client, no cover up, and diligent attention in both cases to remedying his negligence without in any way attempting to exonerate himself or limit his liability.

No client, former client, or member of the public testified or offered a single item of evidence against the respondent. This is a case based on allegations of neglect of clients' cases advanced solely by the local bar association and prosecuted by an attorney colleague (Tr. at 65:23) who evidently is offended by respondent's failure to abide by local mores. Tr. at 116:19.

## Objection No. 2

**RESPONDENT OBJECTS TO THE RECOMMENDATION OF THE BOARD  
OVERRULING THE PANEL'S RECOMMENDATION THAT ALL TIME OFF BE  
SUSPENDED.**

Actual time off will not serve to protect the public, is unnecessary to protect the legal system, and is excessive punishment for the conduct proven. A majority of the panel who heard the testimony and personally cross examined respondent concluded that based on the totality of the evidence, actual time off was not required to achieve the objectives of lawyer discipline.

Respondent's transgressions are administrative failures and arise from improper calendar attentiveness. They do not involve dishonesty, theft, deceit, or a conscious disregard of the Rules of Professional Conduct.

In *Disciplinary Counsel v. Doellman*, 2010-Ohio-5990, Doellman was retained by a bank to do collection work from 1981 to 2001. During this period Doellman violated a number of legal and ethical rules that culminated in legal action by his client and disciplinary proceedings. Doellman's transgressions far exceed any conduct charged against respondent. The court held that Doellman committed eight distinct violations. The court found that, as respondent suggests in the instant case, the violations were anecdotal; they were "separate and independent violations, not a pattern as relator suggests." Thus, the *Doellman* case stands for the proposition that actual time off is not always appropriate simply because several offenses have been asserted and found.

The wrongdoing in the *Doellman* case was more severe than that in the instant case. Doellman was experiencing financial difficulties during the time period in question, and the charges in *Doellman* involved improper handling of client funds; another factor not present. The court found no need to impose an actual suspension.

The Court stated at page 17 of the opinion:

*Relator is correct that dishonest or deceitful conduct generally mandates an actual suspension. However, ... although respondent's conduct was wrong, it was not deceptive or dishonest. Accordingly, we are not constrained to impose an actual suspension.*

The evidence demonstrates that respondent's prior discipline<sup>2</sup> accomplished its intended modification of respondent's behavior, not the contrary as argued by the board. Respondent recognized and acknowledged his lapses and acted honorably without any attempt to limit his liability to his clients. Tr. at 60:1; 61:3; 62:1; 63:21; 64:1. Serious as they may be, the violations asserted here involve only alleged violations of Rule 1.3.

The board report relies upon three uncharged incidents<sup>3</sup> first asserted on cross-examination at the hearing as aggravating factors. Respondent asserts that the three uncharged matters are ordinary events that may be considered commonplace in an active practice. They are not offenses, much less multiple offenses. Consequently, respondent asserts that it is inappropriate and unjust to contend that these matters constitute aggravating factors evidencing the need for harsh discipline.<sup>4</sup>

One case involved a simple miscommunication between respondent and the court about whether a document had been filed. Respondent established at court that it had been filed and the judge dismissed the matter. Tr. at 86:25; 87:1. In another, a client had trouble with a party asserting a claim against the client. The claim had been

---

<sup>2</sup> *Cleveland Bar Assn v. Berk*, 2007-Ohio-4264

<sup>3</sup> Finding of Fact, Conclusions of Law at page 5

<sup>4</sup> Respondent had no notice that the uncharged incidents were at issue. He was required to respond without an opportunity to prepare or present witnesses in explanation. Due process requires no less if they are to be used to enhance penalties.

resolved by respondent some time prior. The client became irate when respondent did not produce the release as quickly as the client believed appropriate and filed a grievance. The document was in a dead file. Respondent produced it and the matter was dismissed. Tr. at 67:18; 68:25; 69:1. The third involved a matter of professional judgment by respondent that it was unnecessary for him to appear at a hearing. The court initially disagreed and issued a show cause order. When respondent explained his reasoning to the judge (Tr. at 78:1 to 81:1), the court dismissed the show cause citation. Tr. at 81:3. Neither of the clients nor the judge filed a grievance or presented evidence against respondent. Bar counsel did not take the stand or submit to cross-examination. The entire line of questioning evidently caused at least one panel member discomfort about either the bar association's tactics or its motives. Tr. at 116:1.

The sole authority relied upon by the board in support of its recommendation is *Disciplinary Counsel v. Fowerbaugh*, 199-Ohio-261. Respondent submits that *Fowerbaugh* is not authority supporting actual time off for respondent from the practice of law. *Fowerbaugh* is the leading, precedent for the proposition that "dishonesty toward a client ... will require severe discipline". *Fowerbaugh* is the foundation precedent in a line of cases including *Disciplinary Counsel v. Rooney*, 2006-Ohio-4567 and *Disciplinary Counsel v. Beeler*, 2005-Ohio-1143 that establish that professional misconduct involving dishonesty will usually warrant actual suspension from the practice of law. *Cincinnati Bar Assn. v Hauck*, 2011-Ohio-3281. *Fowerbaugh*, and its progeny, including *Hauck*, are not material in this case.

Relator, in its trial brief, asserted precedents that were claimed to but do not stand for the proposition that time off has been a sanction in pure lack of diligence cases. There are many lack of diligence cases in which actual time off has not been imposed involving aggravating facts that are absent here. For example:

In *Cleveland Bar Assn v. Norton*, 2007-Ohio-6038, Norton was found to have neglected two cases, failing to communicate his lack of malpractice

insurance to his clients, and not cooperating in the professional misconduct investigation. Norton explained that, "... he had simply bitten off more than he could chew while trying to practice on his own for the first time." Norton was given a six month suspension, stayed.

In *Allen Cty Bar Assn v. Brown*, 2010-Ohio-580, Allen was charged with two counts of not acting with diligence and promptness, and being dilatory in reporting receipt of client funds. The hearing panel found a "disturbing pattern" of misconduct but recommended a one year stayed suspension which the court accepted.

The evidence at the hearing before the panel was that respondent's practice included many indigent client cases; serving well over 200 clients referred by the Cleveland Legal Aid Society (Tr. At 38:17), plus others referred by the Cleveland Consumer Protection Agency. Tr. at 54:1. Often the cases involved representing clients pro bono. Tr. at 38:7; 45:1. No referred clients ever complained about respondent neglecting their cases. Tr. at 39:9; 45:22. Although there was no evidence that any client

was actually harmed by respondent's temporary neglect of their cases, there was live uncontroverted testimony that the removal of respondent from the practice of law will cause actual harm to the public, particularly the portion of the public underserved by the legal profession because they cannot pay market rates for legal services. Tr. at 41:18; 46:2; 49:1; 50:6.

When this matter was heard by the entire board, the dissenting panel member evidently persuaded a majority of the board to overrule the panel. The board report adopted the dissenting panel member's conclusion that actual time off is appropriate, overruling the majority's calibrated balancing of the underserved public's interest in access to lawyers with the possibility that respondent might pose a risk in the future, without explanation.

A history of significant service to an underserved, economically deprived clientele is a mitigating factor. See: *Disciplinary Counsel v. Rohrer*, 2009-Ohio-5930; *Cincinnati Bar Assn. v. Lawson*, 2008-Ohio-3340; *Dayton Bar Association v. Corbin*, 2006-Ohio 2289. The testimony in this record constitutes substantial credible evidence that respondent's actual removal would be contrary to the only logical rationale for overruling the panel's recommendation.

### CONCLUSION

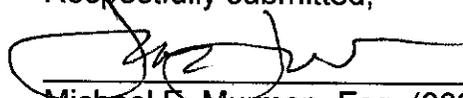
Disciplinary cases involving lawyer negligence and lack of diligence are legion but most include neglect plus other violations, or involve consistent failure to attend to clients, or conscious disregard of the Rules of Professional Conduct. The negligence involved when coupled with the mitigation present in this case should not warrant discipline.

The record here is devoid of evidence of actual client harm. No client spoke a critical word against respondent, likely because respondent acted honorably throughout these matters. Respondent's conduct in recognizing, acknowledging, addressing and mitigating the harm from his admitted negligence establishes that actual suspension would be mere punishment.

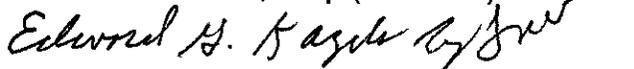
Actual time off would be counterproductive to the goals of attorney discipline. The uncontroverted evidence is that actual time off for this respondent will cause a real and substantial reduction in legal services for an economically deprived, and hence, underserved clientele.

Accordingly respondent requests that this matter be dismissed. If the Court disagrees, then respondent submits that whatever sanction is deemed appropriate should not include any actual suspension from the practice of law.

Respectfully submitted,



Michael E. Murman, Esq. (0029076)



Edward G. Kagels (0025958)

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Objections to Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline, and Respondent's Brief in Support of Objections was served upon Counsel for Relator, Heather Zirke, Esq., Cleveland Metropolitan Bar Association, 1301 East Ninth Street, Second Level, Cleveland, Ohio 44114 and David O. Simon, Esq., 1370 Ontario Street, 450 Standard Building, Cleveland, Ohio 44114 this 4 day of August, 2011 by regular United States Mail, postage prepaid.

  
Michael E. Murman, Esq. (0029076)