

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	
	:	
Relator,	:	Case No. 2011-0756
	:	
v.	:	
	:	
Nicholas Matthew Gallo,	:	
	:	
Respondent.	:	

**Memorandum of Amicus Curiae
the Ohio Association of Criminal Defense Lawyers
in Support of Respondent's Motion for Reconsideration**

Jonathan E. Coughlan (0026424)
Disciplinary Counsel

Lori J. Brown (0040142)
Chief Assistant Disciplinary Counsel
(Counsel of Record)

Karen H. Osmond (0082202)
Staff Attorney

Office of Disciplinary Counsel
250 Civic Center Dr., Suite 325
Columbus, Ohio 43215
(614) 461-0256
(614) 461-7205 – Fax

Counsel for Relator,
Disciplinary Counsel

Brent L. English (0022678)
Law Offices of Brent L. English
M.K. Ferguson Plaza, Suite 470
1500 West Third Street
Cleveland, OH 44113-1422
(216) 78109917
(216) 781-8113 – Fax

Counsel for Respondent,
Nicholas Gallo

Stephen P. Hardwick (0062932)
Chair, Amicus Committee
The Ohio Association of Criminal
Defense Lawyers

250 E. Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
hardwicklaw@gmail.com

Counsel for Amicus,
The Ohio Association of
Criminal Defense Lawyers,
In Support of Respondent

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Our legal system relies upon vigorous advocacy, which occasionally leads to spirited interplay between lawyers and judges. We ought not rule in a way that may affect that friction

Office of Disciplinary Counsel v. Grimes, 66 Ohio St.3d 607, 610 (1993)
(Pfieffer, J., dissenting)

I. Introduction and Statement of Interest of Amicus Curiae

The Ohio Association of Criminal Defense Lawyers (OACDL) files this amicus because we believe that the opinion in this case, as currently drafted, will have an unintended chilling effect on the ability of our members to represent their clients.¹

The OACDL respectfully asserts that two aspects of this Court's opinion merit reconsideration. First, the majority opinion suggests that allegations of judicial misconduct should be primarily, if not exclusively addressed through the disciplinary process. This part of the opinion fails to recognize the exigencies of litigation, as well as our constitutional duty to diligently assert the rights of our clients. Second, to the extent that the majority opinion still allows allegations to be the subject of pleadings and briefs, the opinion has raised the standard for inclusion of factual representations to a level that will chill effective advocacy.

¹ As of the end of 2011, the OACDL is a group of 796 dues-paying members from all over the State of Ohio.

II. Discussion

A. Even though Mr. Gallo made an honest mistake, he adequately investigated his claim.

The majority opinion justifiably struggles to find additional investigation that Mr. Gallo could have conducted. Slip Op. at ¶ 20. In reality, once the disputed events occurred and Mr. Gallo had mistakenly verified the judge's identity with his client, his supervisor, and by checking the judge's photograph on the court's web page, *Id.* at ¶ 10, it is implausible that interviewing courthouse personnel would have corrected the misidentification. Courthouse personnel would only have Mr. Gallo's oral description on which to base their responses, and Mr. Gallo's oral description would logically be very similar to the photo of the judge he had found on the court's website. *Id.* at ¶ 10 (majority per curium decision) and ¶ 26 (Lundberg Stratton and O'Donnell, JJ., dissenting). As a result, it is highly unlikely that conducting courthouse interviews could have corrected Mr. Gallo's honest misperception.

The Board of Commissioners on Grievances and Discipline found, and this Court agreed, that Mr. Gallo's conduct was not "dishonest[]" and that Mr. Gallo did not "knowingly ma[k]e false statements. . . ." *Id.* at ¶ 11, 21.

B. The majority opinion will chill the ability of lawyers to diligently protect their clients' interests.

The language in the majority opinion in this case makes it perilous for attorneys to investigate and report perceived misconduct, especially when the misconduct is relevant to a particular case. This case involves an honest mistake made by a rookie lawyer who filed a pleading that alleged judicial

misconduct based on facts that he had triple-checked. In part, this Court specifically reprimanded Mr. Gallo because he made his honest mistake in a “public filing in a domestic-relations court instead of in a confidential grievance submitted. . . .” Slip Op. at ¶ 20.

That ruling ties the hands of lawyers when the alleged misconduct relates to the facts of a case. According to the text of the majority opinion, when alleged judicial misconduct relates to the issues of a case, a lawyer faces discipline if that lawyer makes an honest mistake in a properly filed pleading in a case. Instead, the opinion strongly suggests that the lawyer must file the allegations as “a confidential grievance” against the judge, not as a pleading in the case. The breadth of the majority opinion stifles good-faith diligent advocacy, not just wild allegations.

Mr. Gallo also had no reason to further question his client. When a person says, “I just saw Mr. Smith,” the person clearly implies that they know who Mr. Smith is. That implication would make sense in this case because of the judge’s “relationship” with Mr. Rymer’s wife and family. *Id.* at ¶ 4.

The *Gallo* decision, as written, could have a chilling effect on attorneys who appear in front of judges who, in fact, have acted inappropriately, especially when the facts supporting the allegations occur in private and when the facts affect the merits of a case. The *Gallo* majority reprimanded Mr. Gallo in part because he raised his “allegations in a public filing in . . . court.” Slip

Op. at ¶20.² But disciplinary allegations against judges often concern not only disciplinary issues, but also issues of the rights of the litigants appearing before them. Lawyers must be able to raise good faith issues of judicial misconduct in relevant pleadings on behalf of their clients. As a result of *Gallo*, lawyers representing clients would, at their peril, raise issues of judicial misconduct in properly-filed, good-faith appeals and collateral challenges.

For example, this Court suspended Franklin County Common Pleas Court Judge Deborah O'Neill in part because she “engaged in improper ex parte communications[.]” *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, ¶ 11. This Court explained that another allegation of retaliation was based on an apparently unrecorded conversation with defense counsel. *Id.* at ¶ 17. When an allegation is based on off-the-record conversations, there is often no evidence of what was said other than the testimony of the attorney and the judge. That leaves the attorney open to discipline if he or she litigates issues related to the conversation.

Other matters in Judge O'Neill's case came down to the word of the judge against the word of another individual. For example, she was disciplined for “a pattern of rude, undignified, and unprofessional conduct[.]” *Id.* at ¶ 30, and “offered a version of the facts diametrically opposed to that of the witness” in another. *Id.* at ¶ 32 She was also charged with asking staff attorney to improperly seek campaign contributions. *Id.* at ¶ 42. This Court also found as

² Mr. Gallo apparently was not charged with failing to report the alleged disciplinary violation.

unfounded allegations that Judge O'Neill "refused to allow attorneys to go on the record to preserve their objections to [her] rulings." *Id.* at ¶ 21.

Likewise, this Court suspended Franklin County Domestic Relations Judge Carole Squire in part because of what she told an attorney in an ex parte civil protection order proceeding. *Disciplinary Counsel v. Squire*, 116 Ohio St.3d 110, 2007-Ohio-5588, 876 N.E.2d 933, ¶ 3. That attorney eventually obtained relief through a duty judge when Judge Squire was unavailable. *Id.* at ¶ 3-5. Counsel in that case also filed an affidavit of disqualification, again raising the "allegations in a public filing[.]" *Id.* at ¶ 12. In another matter, Judge Squire refused a request to make a record at a (properly) ex parte hearing. *Id.* at ¶ 31. In that case, substitute counsel eventually filed an appeal and a disqualification affidavit. *Id.* at ¶ 37-8

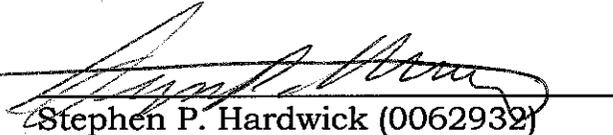
The lawyers representing clients in the courtrooms of Judges Squire and O'Neill had a duty to diligently represent their clients. And litigants often cannot wait for the disciplinary process to conclude before protecting their rights. Under *Gallo*, lawyers observing judicial misconduct would have to risk a public reprimand for a triple-checked honest mistake in order to protect the rights of their clients in court.

III. Conclusion

The OACDL recognizes that there is a valid place for disciplining attorneys for unfounded allegations against judges. But based on the facts and law as set forth in the text of the *Gallo* majority opinion, this case will likely have a chilling effect on the ability of lawyers to diligently and lawfully protect the interests of their clients.

The Ohio Association of Criminal Defense Lawyers asks this Court to either reconsider its sanction against Mr. Gallo for his honest mistake, or, in the alternative, to set forth a more narrow holding that would not have a similarly chilling effect on appropriate, and even needed, litigation.

Respectfully submitted,



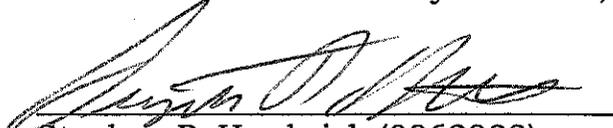
Stephen P. Hardwick (0062932)
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250 E. Broad Street – Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
hardwicklaw@gmail.com

Counsel for Amicus,
The Ohio Association of
Criminal Defense Lawyers,
(In Support of Respondent)

Certificate of Service

I certify that a copy of the foregoing was sent by regular U.S. Mail to Lori J. Brown, Chief Assistant Disciplinary Counsel, Office of Disciplinary Counsel, 250 Civic Center Dr., Suite 325, Columbus, Ohio 43215, and to Brent L. English, Law Offices of Brent L. English, M.K. Ferguson Plaza, Suite 470, 1500 West Third Street, Cleveland, OH 44113-1422 on this 12th Day of March, 2012.



Stephen P. Hardwick (0062932)
Chair, Amicus Committee
The Ohio Association of Criminal
Defense Lawyers