

ORIGINAL

IN  
THE SUPREME COURT OF OHIO

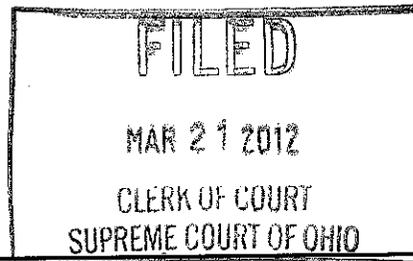
Disciplinary Counsel

Relator

CASE NO. 2011-0756

Nicholas M. Gallo (0083226)

Respondent



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RELATOR'S MEMORANDUM OPPOSING RESPONDENT'S  
AND AMICUS CURIAE'S MOTIONS FOR RECONSIDERATION

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## RELATOR'S MEMORANDUM IN OPPOSITION TO RECONSIDERATION

Through counsel, respondent has filed a motion for reconsideration pursuant to S.Ct.Prac.R. 11.2. Pursuant to this rule and the precedent of this Court, respondent is specifically precluded from rearguing his case in a motion for reconsideration. See, e.g., *State ex rel. Gross v. Indus. Comm. of Ohio*, 115 Ohio St.3d 249, 2007-Ohio-4916, 874 N.E.2d 1162, ¶ 78 (O'Connor, J., dissenting). "The standard for reconsideration is nebulous, but we have suggested that we grant such motions when persuaded, 'upon reflection,' to deem our prior decision as having been made in error." *Id.* (citation omitted).

This Court's *Gallo* decision was not made in error. An examination of the motion for reconsideration reveals that respondent has offered nothing more than a reargument of claims previously considered by this Court. This Court's rules should prevent it from considering this motion. See, e.g. *State ex rel. Shemo v. Mayfield Hts.*, 960 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 9.

All of respondent's arguments were previously contemplated and rejected by the Board of Commissioners on Grievances and Discipline (the board) and, after respondent filed objections, by this Court. In agreeing with the board that respondent violated the Ohio Rules of Professional Conduct, this Court held that respondent did not have a reasonable factual basis for "making serious allegations against Judge [Eugene] Lucci[.]" *Gallo* at ¶20. This Court found by clear and convincing evidence that respondent "engaged in conduct that is prejudicial to the administration of justice by recklessly making false statements impugning the integrity of Judge Lucci in violation of Prof. Cond.R. 8.2(a) and 8.4(d)." *Id.* Notably, this Court's sanction of a public

reprimand was actually the sanction suggested by respondent at the conclusion of the board hearing. Id. at ¶ 15.

Endeavoring to convince this Court that it should reconsider its decision, respondent repeats his arguments that he made a “mistake” and that he “merely got the facts wrong.” Respondent also claims that imposing discipline will have a “chilling effect” upon Ohio’s lawyers.<sup>1</sup>

Placing respondent’s motion for reconsideration side-by-side next to the objections that he filed in June 2011 indicates that this Court has already evaluated all of respondent’s claims. In addressing precisely these arguments, this Court held:

Gallo made no effort to confirm the man’s identity with anyone working at the courthouse. Nor did he ask Mr. Rymers, whom he had just met, about his familiarity with Judge Lucci. Instead, he relied upon the identification by a client he barely knew, a telephonic identification by his employer, and his own determination that the man he had seen in the courthouse matched an online photograph of Lucci to levy serious charges of professional misconduct against a sitting judge. Furthermore, he made those allegations in a public filing in a domestic-relations court instead of in a confidential grievance submitted to disciplinary counsel or a certified grievance committee in accordance with Gov. Bar R.IV(2) (requiring a lawyer to maintain a respectful attitude toward the courts and to submit any serious complaints against judicial officers to the proper authorities) and Prof. Cond.R. 8.3(b) (requiring a lawyer who possesses unprivileged knowledge that a judge has violated the rules of professional or judicial conduct to information the appropriate authority). Given the evidence that Gallo relied on and the minimal effort that he undertook to confirm the identity of the man in the hallway before making serious allegations against Judge Lucci, we do not find that he had a reasonable basis for his statements.

Id.

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<sup>1</sup> Respondent is joined in his “chilling effect” claim by the OACDL.

Contrary to the implications in respondent's motion, this Court did not blindly hold that it was "reckless" for respondent to rely on statements made by his client about the identity of another person. This Court considered and evaluated all of the facts before reaching the conclusion that respondent acted recklessly. For example, in deciding that respondent did not do enough to verify the identity of the person in the hallway, this Court considered that respondent had just been assigned to the *Rymers* case and that he had just met Jeffery Rymers. This Court noted that after Rymers ostensibly told respondent that Lucci was "in the hallway," respondent conducted no further inquiry to determine Rymers' knowledge-base for making such a statement.<sup>2</sup> Respondent's marked lack of due diligence in confirming the man's identity, his reliance on a "telephonic" identification from his employer, and his subsequent willingness to put his baseless allegations against Judge Lucci into a "public filing," led this Court to conclude that respondent's statements were made without a reasonable factual basis. *Id.* at ¶ 19-20.<sup>3</sup>

What is perhaps most unfortunate about respondent's motion for reconsideration is that it further establishes that respondent has missed much of the true import of this disciplinary case. Respondent's motion for reconsideration is solely focused upon his affidavit – the one in which he swore under oath that Judge Lucci was standing in the

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<sup>2</sup> As it turned out, according to Rymers' testimony at the disciplinary hearing, the first time that he could be certain that he actually saw Lucci was at a baseball game that took place after the June 3<sup>rd</sup> pretrial. *Tr.* at 133. 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<sup>rd</sup> pretrial. *Tr.* at 242.

<sup>3</sup> On March 8, 2012, respondent's employer, Joseph G. Stafford, was suspended from the practice of law for one year for misconduct related to the *Rymers* case along with one other count of misconduct. See, *Disciplinary Counsel v. Stafford*, Slip Op. 2012-Ohio-909.

hallway of the courthouse staring at Jeffery Rymers. Respondent continues to totally ignore the fact that he relied upon that affidavit and upon the equally fallacious affidavit of his client when he signed and filed a motion to strike in response to Lucci's motion to intervene. It was in the motion to strike that respondent argued that Lucci violated Jud.Cond.R. 1.3 and Prof.Cond.R. 3.3 by inter alia, "engag[ing] in a pattern of harassing and threatening conduct toward the Defendant, Jeffery G. 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 ¶ 6.

Following precedent, after considering the nature of respondent's statements and the context in which they were made, this Court determined that in the affidavit and the motion to strike, respondent recklessly made false statements impugning the integrity of a judicial officer. Id. at ¶ 19-20. "Sanctions are appropriate when an attorney lodges accusations of judicial impropriety that a reasonable attorney would consider untrue." *Disciplinary Counsel v. Stafford*, Slip. Op. 2012-Ohio-909, ¶ 55 (citing *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, 793N.E.2d 425, ¶ 31).

In his motion for reconsideration, respondent has done nothing more than reargue his case. Respondent claims that this case has "broad" and "frightening implications." In fact, nothing about this case expands prior decisions of this Court and nothing about the holding of this case is "frightening."

The OACDL has filed a memorandum “in support of respondent’s motion for reconsideration.” In its memorandum the OACDL raises two issues.<sup>4</sup> First, the OACDL claims that the Court’s opinion suggests that allegations of judicial misconduct should be “primarily, if not exclusively addressed through the disciplinary process.” Second and as addressed previously, the OACDL asserts that this Court’s *Gallo* decision will “chill effective advocacy.”

On the whole, the memorandum filed by the OACDL displays what appears to be an unfortunate lack of understanding of this disciplinary case. The OACDL describes the *Gallo* case as involving “an honest mistake made by a rookie lawyer who filed a pleading that alleged judicial misconduct based on facts that he had triple-checked.” The OACDL claims that *Gallo* 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.”

It is evident that the OACDL simply does not comprehend even the basic facts that brought Nicholas M. Gallo and Joseph G. Stafford before this Court in separate disciplinary cases. Respondent was not appearing before Eugene Lucci. Nothing

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<sup>4</sup> S. Ct. Prac.R. 11.2(C) states that an “amicus curiae may not file a motion for reconsideration.” The same rule further states that an “amicus curiae may file a memorandum in support of a motion for reconsideration within the time permitted for filing a motion for reconsideration.” Although captioned as being a “memorandum” in “support of respondent’s motion for reconsideration,” the OACDL filing is primarily focused upon an issue that was not raised when this case was considered on its merits and is not raised in respondent’s motion for reconsideration. Notably, no brief was filed by the OACDL or by any other amici when this Court was considering this matter on its merits.

about the *Gallo* decision addresses the situation lawyers face if they believe a judge before whom they are appearing acts “inappropriately.”

Lucci was not presiding over the *Rymers* divorce. Contrary to the position of the OACDL, nothing about the *Gallo* decision implies that lawyers are no longer able to “raise good faith issues of judicial misconduct in relevant pleadings on behalf of their clients.”

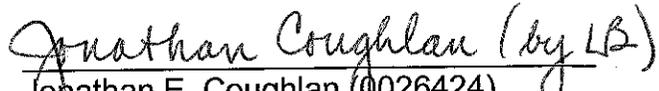
The most important distinction between the arguments of the OACDL and the facts of *Gallo* is that none of the allegations against Lucci were in any way relevant to the merits of *Rymers v. Rymers*. In *Stafford*, this Court held that “the record reflects that Gallo personally made statements [about Lucci] that were false, inflammatory, and irrelevant to the issues presented.” *Stafford*, ¶ 52.

The *Gallo* decision is consistent with this Court’s previous decisions addressing similar misconduct. It neither expands nor contracts an attorney’s duties and responsibilities to the attorney’s clients.

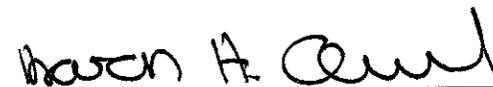
## CONCLUSION

The arguments set forth in respondent’s motion for reconsideration were previously raised, contemplated and rejected by the board and by this Court. This Court’s decision based upon those same arguments should not be reconsidered. Respondent’s motion and the memorandum of the OACDL asking this Court to reconsider the *Gallo* decision should be overruled for all of the reasons stated herein.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a photocopy of the foregoing "Memorandum Opposing Respondent's Motion for Reconsideration" was served upon respondent's counsel, Brent L. English, M.K. Ferguson Plaza, Suite 470, 1500 West Third Street, Cleveland, OH 44113, and upon counsel for the OACDL, Stephen P. Hardwick, 250 E. Broad Street, Suite 1400, Columbus, OH 43215, this 21<sup>st</sup> day of March, 2012.

  
Lori J. Brown (0040142)