

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

v.

Timothy Andrew Shimko,

Respondent.

: Case No. 2012-1002

:

:

:

: On Appeal from the Board of
: Commissioners on Grievances
: and Discipline of the
: Ohio Supreme Court

:

:

: Board of Commissioners
: Case No. 11-069

RESPONDENT TIMOTHY ANDREW SHIMKO'S OBJECTIONS TO
THE FINAL REPORT OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

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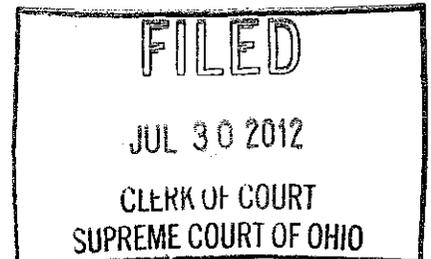
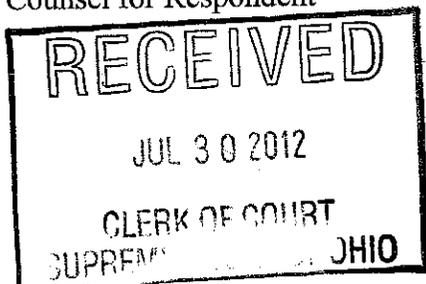


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I. INTRODUCTION

Respondent Timothy Andrew Shimko (hereinafter "Respondent" or "Mr. Shimko") hereby submits his objections to the Final Report of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court (hereinafter "Opinion" (App. A)) which recommends the imposition of a six-month suspension from the practice of law. The Panel, after hearing the testimony of eight witnesses and receiving exhibits admitted during the hearing concerning the Professional Conduct Rule violations alleged (Prof.Cond.R. 8.2(a) (App. B) and 8.4(h) (App. C)) and certain aggravating and mitigating factors, recommended that Respondent be suspended in connection with the disciplinary Complaint brought by Disciplinary Counsel.

Because the Panel failed to apprise the Board of significant evidence adduced during the Hearing bearing directly upon Respondent's objectively verifiable beliefs as it relates to the language he chose to use in appellate briefs filed with the Third District Court of Appeals and two nearly identical Affidavits of Disqualification filed with the Ohio Supreme Court, *i.e.*, the testimony of three witnesses who were present for the events which were addressed in the documents authored by Respondent, the Board erroneously agreed with the Panel in its recommendation of a six-month suspension. Further, the Panel and the Board failed to give credence to Respondent's constitutional argument that imposing sanctions under the circumstances of this case would chill legitimate advocacy in litigation. Instead, Respondent's reasonable beliefs, which were corroborated by the evidence, should shield him from discipline, since the statements were not made with malice, if not objectively true.

A careful review of the Panel's report demonstrates the Panel's failure to appropriately consider evidence presented during the hearing from two lawyers and a lay witness who substantiated Respondent's objective belief as to the accuracy of the statements and arguments

he made. Further, the minimal discussion of the constitutional issue raised evinces a lack of appreciation of the significance of Respondent's charge that advocacy in Ohio will be chilled by imposing sanctions upon Respondent for the conduct in which he had admittedly engaged in the instant matter. For these reasons, Respondent seeks, in the alternative, a dismissal of this matter or a stayed suspension.

II. STATEMENT OF THE FACTS

A. Introduction

The instant disciplinary matter arises from Respondent's involvement as counsel for Jeffrey Angelini and the Trustee in Bankruptcy (related to Jeffrey Angelini's bankruptcy) in a case brought by First Federal Bank of Ohio in Crawford County, *First Federal Bank of Ohio v. John Angelini, Jr., et al.*, Crawford Cty. C.P. Case No. 03CV0098. Jeffrey Angelini was one of several defendants in this action when it was originally filed, after which filing he declared bankruptcy.

The other defendants included his parents, John Angelini, Jr. and Joyce Angelini¹ and Galion Building and Loan Bank (hereinafter "Galion Bank") which was represented by attorneys G. Scott McBride and James W. Pry, both of the firm Sears, Pry, Griebing & McBride P.L.L.²

¹ By the time this action proceeded to trial, John Angelini, Jr. and Joyce Angelini were no longer parties.

² A review of the Opinion (App. A) reveals one sentence and a footnote devoted to a review of the testimony of Messrs. McBride and Pry. Their names are not even mentioned, although each of them filed important Affidavits in connection with Affidavits of Disqualification filed by Respondent which support the argument that not only did Mr. Shimko have a subjective, reasonable belief as to the truth of what he wrote in his appellate briefs and Affidavits of Disqualification, but also an objectively verifiable belief because two other attorneys involved in the events likewise concluded that Judge Markus was biased and was an advocate on behalf of Plaintiff First Federal. See Opinion, ¶ 19 and fn. 2; Exs. A, D. Indeed, at the time Mr. Shimko filed his second Affidavit of Disqualification containing statements with which Relator has taken issue, so did Mr. Pry (Ex. D) when he filed his Affidavit of Disqualification on behalf of

Plaintiff First Federal Bank of Ohio (hereinafter "First Federal") was represented by Stephen Chappellear and John Marsh. As the trial transcript indicates, Mr. Shimko was shown as representing Jeffrey Angelini (Ex. 1)³ although by agreement of the parties at this time in the proceedings, he was representing the real party in interest, the Trustee in bankruptcy. That Mr. Angelini was in bankruptcy was never revealed to the jury, and as far as the jury knew, the party to the case was Jeffrey Angelini, not the Trustee in bankruptcy.⁴

The underlying case which finally went to trial in January 2009 arose from First Federal's efforts to foreclose on real property owned by John and Joyce Angelini and property pledged by Jeffrey Angelini, as a guarantor for his parents.

Defendant Galion Bank. See Sec. II(B)(4), *infra* at pp. 21-23. While fn. 2 of the Opinion indicates both attorneys "had or were assisting Respondent for trial," such statement is incorrect. Instead, Galion Bank had claims separate from the claims of Jeffrey Angelini represented by Respondent (Tr. 318) and Galion Bank was seeking the properties owned by all the Angelinis, including Respondent's client, Jeffrey Angelini. (Tr. 334) Respondent's client was not a guarantor for Defendant Galion Bank. (Tr. 357-358)

³ Exhibits ("Ex. __") cited in this brief refer to exhibits admitted during the Hearing on the Merits. Arabic numerals are assigned to Relator's exhibits, and letters are assigned to Respondent's exhibits.

⁴ This distinction is only important, as it became a point of contention after trial between Judge Richard Markus and Mr. Shimko. It was not until a month after the trial was completed that Judge Markus came to the conclusion that the Trustee in bankruptcy had not been properly made a party. (Tr. 433) Notably, no objection was ever lodged by any of the parties to the trial as to Mr. Shimko's involvement on behalf of the Trustee in bankruptcy. (Tr. 434) Respondent had filed a Notice of Substitution of the Parties at the time of his entry into the case. (Tr. 433) At that time, no objection was raised by counsel for First Federal as to that method of substituting a party. A colorable argument can be made that Civ.R. 25 (App. D) does not require a motion under all circumstances. As Rule 25(C) indicates: "In case of any transfer of interest [which is what occurred here when the Trustee in bankruptcy sought to defend the matter which had been brought against the bankrupt so that a counterclaim could be pursued against the plaintiff], the action may be continued by or against the original party **unless the court upon motion** directs the person upon whom the interest is transferred to be substituted in the action..." (Emphasis added) No such motion was ever filed by any party. While Judge Markus invited Mr. Shimko to file a motion to amend, Mr. Shimko chose not to do so. Indeed, even after the Court of Appeals ruled that a retrial was necessary, no objection was ever made by any parties to the Trustee's continued participation in the proceedings, which included a second trial.

Jeffrey Angelini's parents had run a car dealership. In connection with the car dealership, they wrote checks which were dishonored by United Bank. United Bank, in turn, froze their account leaving \$850,000 of outstanding checks on which First Federal had paid. Being an unsecured creditor to the \$850,000, three officers of First Federal visited the Angelinis twice, threatening criminal prosecution and jail if the Angelinis did not give them mortgages on other properties the Angelinis owned and if Jeffrey Angelini did not also contribute his property which was worth \$500,000 to \$600,000. At the end of three days of intimidation, all three of the Angelinis signed mortgages. (Tr. 435-436)

During the three days when First Federal was attempting to securitize the debt, it was understood that the first \$300,000 which was paid on the outstanding Notes would allow for the properties pledged by Jeffrey Angelini to be released. Instead, later, First Federal applied the proceeds received to every other note John and Joyce Angelini had with the bank leaving Jeffrey as a guarantor of every one of the Angelini notes, which was about \$2 million, rather than the \$850,000 which had previously been the subject of the bank's activity.

As a result of this factual situation, Jeffrey Angelini brought affirmative defenses and counterclaims against First Federal, alleging fraud and constructive fraud. It was Mr. Shimko's theory that the acts of extortion and coercion engaged in by the bank officials would substitute as a matter of law for the reliance required in the constructive fraud claim. The affirmative defense of payment was also pled. (Tr. 436-437)

Additionally, before this case went to trial and before Mr. Shimko's involvement in it, the case had gone up and down from the Court of Appeals twice, having been dismissed on Motions for Summary Judgment. (Tr. 433-434)

B. Context in which the alleged offending statements in Appellate Briefs and Affidavits of Disqualification were made.

1. Proceedings leading up to Trial of *First Federal Bank of Ohio v. John Angelini, Jr., et al.*

Prior to trial which began in January 2009, Respondent filed his first Affidavit of Disqualification with the Ohio Supreme Court on or about October 10, 2008. (Ex. 5) As the Panel acknowledged in its report, it was Relator who submitted this evidence meant to explain the subsequent action of Respondent, and further, that Relator did not acknowledge that Respondent's actions in filing this first Affidavit constituted misconduct. See Opinion, ¶ 11 (App. A). Indeed, the Panel found that "[r]espondent did not violate any code of conduct in filing..." this Affidavit which alleged bias. See Opinion, ¶ 33.

Importantly, this Affidavit was filed by Respondent after a telephone conference where Respondent alleged that Judge Markus informed him that he had "lost all respect" for Respondent, "thought him incompetent for embarking on such a trial strategy [withdrawing stipulations]," and threatened to punish Respondent's client for Respondent having disappointed "the judge trying Respondent's case." Interpreting these remarks of Judge Markus as an expression of a clear bias and prejudice against him, Respondent filed his Affidavit of Disqualification. (Ex. 5)

In this first Affidavit of Disqualification, Respondent indicated to his reasonable belief that "these imprudent remarks [were] outrageous and beyond the scope of any acceptable judicial conduct," and that the "comments clearly reveal[ed] an obviously biased disposition of the Trial Court toward Respondent and "denigrated counsel and created an insurmountable appearance of bias and prejudice," and "created a loss of confidence in the integrity of the judicial system and

the integrity of any outcome in this pending litigation.” At a minimum, Respondent argued that “the court’s conduct [had] created at least the appearance of impropriety.” See Ex. 5.

At the hearing, attorney G. Scott McBride reaffirmed that which he placed in a supporting Affidavit filed shortly after Respondent’s.⁵ (Tr. 321, 324) In his Affidavit, attorney McBride wrote:

7. As I recall, during the telephone conference, Judge Markus was urging the parties to enter into stipulations of fact. Mr. Shimko informed the Court and counsel that he was not agreeing to any stipulations of fact, a position that he had taken approximately a week before in a previous telephone conference with counsel.
8. Mr. Shimko had argued that he had a punitive damage case and it was in his client’s best interests to have the jury hear as many of the facts as possible coming from the witnesses.
9. In a remark he directed at Mr. Shimko, Judge Markus stated that he had no respect for any lawyer who would not stipulate to facts that were not in dispute. He then stated that he considered Mr. Shimko’s strategy to be that of an incompetent lawyer.
10. A moment or two later in the discussion, when Judge Markus could not make any headway with Mr. Shimko, I did hear Judge Markus inform Mr. Shimko that although he could not make Mr. Shimko enter into any stipulations, it was not wise for a lawyer to disappoint the judge trying his client’s case. (See Ex. A)

In another development prior to trial, Judge Markus issued a sanction in connection with Respondent’s failure to pay an expert witness fee for one of Defendant’s experts, Hal Nickels. The Order was a judgment against Respondent personally in the full amount of the expert fee owed. Most significantly, the sanction also prevented the use of Mr. Nickels’ deposition for any purpose at trial, including to impeach Mr. Nickel. Respondent was also ordered not to consult with anyone who had a copy of the deposition. (Tr. 486-487) This sanction appeared to Respondent to be aimed at his client and not only him who was responsible for the late payment.

⁵ Respondent’s Affidavit was filed one day after the telephone conference during which Judge Markus’ statements were made.

Finally, before both of the preceding events, when Judge Markus first became involved as a visiting judge in the case, he conducted a mediation in Cleveland. At that time, James Pry, one of the attorneys representing the defendant Galion Bank, had concerns about Judge Markus' partiality, given his conduct during the mediation. (Tr. 344) Likewise, Respondent felt that the mediation did not go well and that it was his understanding the Judge Markus thought Mr. Shimko's client's case was worth nothing. (Tr. 441) Of course, this was the same impression that Attorney Pry got (concerning the merits of his client's case) from speaking with Judge Markus on that occasion. (Tr. 342)

2. **The Trial of First Federal Bank of Ohio v. John Angelini, Jr., et al.**

Several events occurred during the course of trial which gave Respondent the reasonable belief that Judge Markus was acting out of prejudice and bias both toward him and his client. These several events were brought to the attention of Judge Markus by Respondent in order that the record could be preserved for appeal. Indeed, it is in connection with these various events that Respondent wrote what he did in appellate briefs which the Panel determined were comments about Judge Markus' integrity (Opinion, ¶¶ 20-21) (App. A) and which the Panel found to be "unreasonable and objectively false with a *mens rea* of recklessness." (Opinion, ¶ 34) The underlying basis for all of the statements Respondent made in his briefs arose from that which occurred during trial which Respondent supported with transcript references coupled with the aforementioned events. See Sec. II(B)(1), *supra* at pp. 5-6.

First, an episode took place during the *voir dire* of the jury that led Respondent to question Judge Markus' motives. A number of potential jurors had identified themselves as being depositors of either First Federal or Galion Bank, both of which are mutual banks, meaning that each depositor was an owner of the bank. Respondent took the position that the

depositors of First Federal and Galion Bank were not qualified to sit as jurors in the case. The Respondent argued that the law in Ohio on this issue was well settled.

The following is the discussion that ensued outside the presence of the jury at that point in the trial.

20 THE COURT: Please understand that I'm
21 listening to you because I want to give you
22 fair consideration and attention.

23 Go ahead, sir.

24 MR. SHIMKO: I appreciate that, Your
25 Honor, and I want to start by saying that I

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1 have the utmost respect for this Court. I have
2 been at this bar for 30 years. I am capable of
3 taking negative rulings. That's not my -- my
4 problem here, Your Honor.

5 I have received negative rulings from
6 judges from the time I started practicing. A
7 negative ruling in a case does not bother me,
8 does not in any way, shape, or form, Your
9 Honor, cause me to suspect the judge.

10 But in this particular case, Your Honor,
11 you made comments that were untoward; you made
12 comments that you had no respect for me; you
13 made comments, and you know you did, Your
14 Honor, that indicated it would be unpleasant
15 for me to disappoint you.

16 I am not upset with any rulings this
17 Court has made. Again, I have the utmost
18 respect for that.

19 But there are two parties to this, Your
20 Honor. And, yes, you say you need my
21 confidence, but my client needs the confidence
22 that he's going to get a fair shake.

23 And in light of the past comments that
24 this Court has made, I -- you know, I am sorry,
25 I don't think that -- that you're saying that

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1 you can be fair cures the problem.

2 The problem is, do we have confidence,
3 does the Defendant have confidence that this
4 will occur fairly. (Ex. 1, Vol. 1, pp. 188-190)

Respondent made those comments reasonably believing them to be factually true. There was a substantial basis for Mr. Shimko to fear reprisal from the judge, as he had threatened to do just that, and had now appeared to have acted on that threat twice. It is significant that Mr. Shimko reminded the judge of the comments made during the October 2008 telephone conference which the Judge Markus did not deny or to refute on the record at that time. Judge Markus had a perfect opportunity to deny that he insulted and threatened Mr. Shimko, and he did not take the opportunity to do so. It was not until Judge Markus' complaint to the Disciplinary Counsel in May 2010 that he changed his story and for the first time denied that the incidents in the October 2008 telephone conference had occurred at all.

That this discussion took place in a professional manner is supported by the fact that the trial judge did not say otherwise. Furthermore, the trial judge did not contradict Respondent when he placed on the record the following:

1 MR. SHIMKO: I think the record should
2 reflect that we have been having a professional
3 discussion, the tones have not been raised. I
4 have treated you with the utmost respect in
5 both my mannerisms and tones and the words I
6 have chosen. I don't think anyone could say
7 there has been any disrespect going on in either
8 direction between us, Your Honor. It's been
9 what I feel is a professional discussion on a
10 difference of opinion.
11 THE COURT: Can we put this subject to
12 rest now? (Ex. 1, Vol I, p. 190)

The law governing the right of a litigant to challenge a potential juror for cause is set forth in R.C. 2313.42 and R.C. 2313.43 (Apps. B and C). Beginning with R.C. 2313.42, it states:

- ... The following are good causes for challenge to any person called as a juror:
- (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
 - (B) That he has an interest in the cause** (Emphasis added)

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If it is shown that the juror has a personal bias for or against a party, and the facts as to it are uncontradicted so that the only conclusion that can legally be drawn is that the juror is prejudiced, the overruling of the challenge is a manifest abuse of discretion such as would warrant reversal. 64 Ohio Jurisprudence 3d, Jury, at 473. Presumed bias exists only in extraordinary circumstances - the relationship between the prospective juror and some aspect of the litigation must make it unlikely that the average person could remain impartial. Generally, courts will presume bias where a prospective juror is a close relative to a party or witness in the case or where the juror has a *direct* financial interest in the trial's outcome, such as where the juror is a stockholder in a corporation that is a party or where the juror is an employee of a party. In presumed bias situations, any attempts to rehabilitate will fail. The relationship between the challenged juror and a party to the suit raises such a presumption of partiality, that the trial judge must dismiss the prospective juror for cause even if the juror unequivocally promises to be fair and impartial. Rogge, Dunn, *Trial Objections*, § 208, (3rd Ed. 2007). In *Getter v. Wal-Mart Stores*, 66 F.3d 1119 (10th Cir. 1995), the court held that the refusal to dismiss a prospective juror for cause when the juror owned stock in defendant company was an abuse of discretion. "The juror's financial well being was dependent upon the defendant's, which was precisely the type of relationship that required the district court to presume bias."

After deciding that depositors in mutual banks were not within the definition of statutorily defined cause, a lengthy discussion took place between Mr. Shimko and the Court on this ruling, demonstrating his firm belief that the Court was biased against the Angelini

defendants.⁶ (Ex. 1, Vol. 1, p. 186, 193) During Mr. Shimko's argument to preserve the record, he again reminded the Court of statements made during the October 9, 2009 telephone conference which the Court did not deny or modify. (Ex. 1, Vol. 1, p. 189) Although interpreting these comments as a personal attack, neither he nor opposing counsel disputed them by way of an objection. (Tr. 195-197) This exchange took place outside of the presence of the jury. (Tr. 198) By way of contrast, Judge Crawford, in the retrial of this case, rejected Judge Markus' ruling and instead devised a method which was agreeable to all counsel as to how to handle the issue of depositors as owners of the mutual banks which were parties to this case. (Ex. J)

In connection with Mr. Chappellear's first witness, John Angelini, Defendant Jeffrey Angelini's father, Judge Markus did not permit Mr. Shimko to use leading questions to cross-examine this witness who had been placed on direct examination by the choice of Plaintiff's counsel. This trial strategy of Plaintiff's counsel was at the heart of Mr. Shimko's argument that he should be permitted to cross-examine the witness. Judge Markus analyzed the situation as if Mr. Chappellear had called the witness on cross-examination in his case-in-chief. Had that been the case, the Court could have ruled that John Angelini was a witness identified with an adverse party, and therefore, under Evid.R. 611(C) (App. G), not subject to further examination.

Yet, although Mr. Chappellear had chosen to call John Angelini on direct in his case, Judge Markus precluded Mr. Shimko from cross-examining him on the theory that as a witness identified with an adverse party, leading questions could not be used. An extensive argument over this took place. (Ex. 1, Vol. 4, pp. 541-561) It is during this exchange that even Mr.

⁶ It should be noticed that Mr. Shimko pointed out to Judge Markus that it was Judge Markus who accentuated the role of depositors in mutual banks by instructing the jury that they were owners. (Ex. 1, Vol. 1, pp. 192-193) Of course, this is what made it extremely important for Mr. Shimko to seek removal by cause of persons who had a direct financial interest in the cause.

McBride felt that Mr. Shimko had a right to cross-examine this witness. (Ex. 1, Vol. 4, pp. 545-546) As soon as Mr. McBride began to argue in favor of Mr. Shimko's position, the Court asked a question suggesting that such argument on the part of Mr. McBride might affect his ability to use leading questions (an implicit threat). (Ex. 1, Vol. 4, p. 545, lines 10-13) As this argument proceeded, Mr. Shimko felt it necessary to preserve the record again, explaining that he felt this additional ruling was further evidence of the bias and prejudice of the Court. (Ex. 1, Vol. 4, p. 546)

At this point in the proceedings, the Court now revealed his reaction to Mr. Shimko's preserving the record. Rather than simply indicating "objection noted," the Court chose to continue the exchange by accusing Mr. Shimko of baiting the Court, of attacking the judge and of being disrespectful for asserting this objection. (Ex. 1, Vol. 4, pp. 546-552) The remainder of this exchange between the Respondent and Judge Markus (Ex. 1, Vol. 4, pp. 551-561) clearly demonstrates that Judge Markus played a major role in what Respondent placed on the record. While it may be appropriate to say that counsel need only make a short, concise objection, such as "this ruling demonstrates the bias and prejudice of the Court," without more, by the Court's further repartee, Mr. Shimko, was constrained to place additional explanation on the record. In essence, this and other exchanges throughout the trial were nothing more than the snowballing of argument between two very strong-willed persons, Respondent and Judge Markus.

Judge Markus' refusal to permit Mr. Shimko to use a demonstrative exhibit to illustrate the testimony of a key witness of First Federal also represented an occasion where reasonable lawyers could conclude that the judge was exhibiting bias. At no time did Mr. Shimko seek to have this demonstrative exhibit admitted into evidence. Instead, all he wanted to do was use it to cross-examine the witness, thereby making the testimony understandable to the jury. There is no

doubt that such appropriate exhibit would assist the jury in understanding the issues. Again, Mr. McBride was puzzled with this ruling of the Court. He indicated on the record that "Mr. Chappellear looked at the document, shook his head 'yes,' Mr. Shimko put it up, Mr. Chappellear had no objection, and suddenly we stopped the testimony. I'm a little confused." (Ex. 1, Vol. 12, p. 1720) Although concluding that this incident also supported the conclusion that the Court was biased and prejudice, at this point in the trial, Mr. Shimko did not make a protracted argument on the record, since he had been admonished by the Court earlier not to.

After the jury completed all of the interrogatories and both verdict forms it was directed to complete by Judge Markus, he granted a motion for a mistrial and wrote a lengthy opinion. (Ex. 10) Judge Markus claimed that a mistrial was warranted because of both the misconduct during the trial by Mr. Shimko and the inconsistency inherent in the jury's answers to interrogatories and completion of the verdict forms. Mr. Shimko believed that neither of these grounds was supported by the record and therefore reasonably concluded that because of Judge Markus' personal animosity towards him (which affected his client), these reasons were constructed (fabricated) to support such a result. This advocacy and the words chosen to build this argument were supported by the record as well.

3. The Appeal

Subsequent to the Trial Court's granting of a Motion for New Trial based upon Respondent's alleged misconduct during trial and inconsistent answers to the jury interrogatories by the jury, Respondent appealed the Trial Court's decision on behalf of Jeffrey Angelini. In that context, he authored two briefs, the Opening Brief of Defendant-Appellant, the Trustee in Bankruptcy for the Estate of Jeffrey J. Angelini (Relator's Ex. 11) and a second brief, Reply Brief of Defendant-Appellant, the Trustee in Bankruptcy for the Estate of Jeffrey J.

Angelini (Relator's Ex. 12). The Reply Brief was filed to address the Brief of Appellee First Federal Bank of Ohio in response to Opening Brief of Defendant-Appellant, the Trustee in Bankruptcy for the Estate of Jeffrey J. Angelini (Ex. C).⁷

A review of these briefs reveals argument by Respondent that the Trial Court was incorrect when it declared a mistrial, based upon Respondent's conduct during the trial and because the jury was allegedly confused rendering inconsistent answers to Interrogatories.

Because Respondent was convinced that the Trial Court was biased and prejudiced against both him and his client, he ascribed this attitude of the Trial Court to the reasons used by the Trial Court supporting the Trial Court's conclusion that a mistrial was warranted. As a review of the appellate briefs demonstrates, Respondent went to great lengths to cite to the record in support of his argument that such record in no way demonstrated either his misconduct during trial or that the jury was at all confused. See Exs. 11, 12.

Indeed, the record from the Trial Court proceeding and the testimony of attorneys McBride and Pry, as well as the testimony of Jeffrey Angelini, who was never mentioned by the Panel in its report to the Board, support Respondent's reasonable beliefs and provide objective evidence corroborating such beliefs.

As it relates to Judge Markus' assertion of unethical and inflammatory conduct, none is demonstrated in the transcript of the proceedings.

Firstly, any claim of misconduct did not rise to the level of a disciplinary rule violation, as such was not charged by Disciplinary Counsel. As Judge Markus pointed out in his testimony, despite his assertion of misconduct in his grievance against Respondent, all matters

⁷ It should be noted that no argument was made by Plaintiff First Federal that Defendant-Appellant, the Trustee in Bankruptcy for the Estate of Jeffrey J. Angelini, was not a proper party. See Ex. C. Statements made in these two briefs form the majority of statements with which Relator has taken issue in this matter. See Complaint and Certificate of Relator, ¶¶ 17-18.

raised by him in that regard are not before the Panel in this case. (Tr. 177, Ex. M) Although Judge Markus asserted that Mr. Shimko violated an order concerning the use of an alleged crime to argue that bank personnel had committed one, Judge Markus had to concede that coercion could be argued by Mr. Shimko (Tr. 203-204). During the hearing, Judge Markus conceded that in responding to Mr. McBride's question on this subject, he indicated that coercion could be argued. (Tr. 247-248) During opening statements in the trial when Respondent read the elements of coercion, Judge Markus did not prevent him from doing so. (Tr. 205) Likewise, in closing argument, Judge Markus did not prevent Mr. Shimko from doing so. (Tr. 206) Further, opposing counsel made no objections at those points in time during the trial.

The testimony of attorneys McBride and Pry corroborate Respondent's arguments in the appellate briefs that the reason Judge Markus ascribed attorney misconduct as one ground for granting the mistrial was because he had become an advocate for First Federal against both Respondent and his client.

In this connection, Mr. McBride indicated that before the trial, during the October 9 telephone conference, Judge Markus made troubling comments, including that he [Judge Markus] "has no respect for lawyers who do not stipulate to things that are not in dispute and that he felt that that type of strategy was one of an incompetent lawyer." The judge was having a "conversation with Mr. Shimko" when he made that statement. (Tr. 326) Further, he corroborated that Judge Markus indicated it was not wise "for an attorney to disappoint the trier of fact or the judge that is hearing his case." (Tr. 327) Mr. McBride felt that the judge was advocating for First Federal or against Mr. Shimko. (Tr. 332-333)

Mr. McBride also indicated that he "saw nothing in the trial in front of the jury even remotely that the jury would have any inclination of any wrongdoing by Mr. Shimko at all or any

wrongdoing by anybody.” (Tr. 336) Mr. McBride indicated that Mr. Shimko acted professionally, although firm, and with respect. (Tr. 337, 353) He concluded that Judge Markus was biased against Mr. Shimko, and the judge should have recused himself. (Tr. 338) Mr. Shimko’s body language throughout the trial was appropriate. (Tr. 339) Mr. McBride did not observe Mr. Shimko rolling his eyes or making inappropriate facial gestures to negative rulings. (Tr. 339) Indeed, Mr. Bride felt that Judge Markus was advocating against Mr. Shimko and his client and for First Federal. (Tr. 356)

The advocacy opinion that Mr. McBride shared with Mr. Shimko and his client, Jeffrey Angelini, (Tr. 415-418)⁸ was also shared by his partner, James W. Pry, II.

As Mr. Pry observed, the trial became Judge Markus versus Tim Shimko. It was clear to Mr. Pry that Judge Markus did not like Respondent. (Tr. 370) Mr. Pry indicated that the relationship between Respondent and Judge Markus was “pretty adversarial.” (Tr. 372) This was the case even though Mr. Pry never noticed Mr. Shimko exhibiting disrespectful behavior during the trial toward Judge Markus. (Tr. 372) Mr. Pry concurred that he saw no act of misconduct on the part of Mr. Shimko which would have justified a mistrial. (Tr. 389) Even Mr. Pry’s client wondered why Judge Markus was taking First Federal’s side in the matter. There would be no objections made, yet Judge Markus would object. (Tr. 373)

Finally, Jeffrey Angelini made similar observations during the trial as well. His description of what he had observed included:

The one thing I noticed was every time that Mr. Shimko would try and introduce any of our evidence that we had already kind of figured out this is -- you know, this is the story

⁸ The observations of Mr. Angelini during trial are significant. While the Panel failed to mention his testimony at all in its report, Mr. Angelini corroborates that there appeared to be disparate treatment between Judge Markus and Respondent versus Judge Markus and the attorney for First Federal. (Tr. 415-417) He also corroborates that at no time was Mr. Shimko raising his voice or being anything other than professional in his presence in open court. (Tr. 417)

that we are trying to portray to the jury, we want to explain our side of it -- and, again, I was there kind of on behalf of the trustee because at that point there wasn't anything that was my own stake, it was all going to the bankruptcy. But every time Mr. Shimko would try and introduce any evidence, Judge Markus would kind of shut him down immediately. It was almost like Judge Markus was the opposing attorney. He wasn't really acting as the role of judge, in my -- just in my take on it. It seemed like every time Mr. Shimko would stand up to object to anything or to introduce anything, Judge Markus would repeatedly kind of shut him down.

At some point, it got to the point where as soon as Mr. Shimko would start to stand up, Judge Markus would say, 'sit down Mr. Shimko.' Judge Markus didn't want to hear what we had to say. (Tr. 415)

In fact, Mr. Angelini observed that Judge Markus wouldn't wait for Mr. Chappellear, First Federal's lawyer, to say something before he would address Mr. Shimko. As Mr. Angelini recalled, most of the time Mr. Chappellear had no objection to anything Mr. Shimko had to say. (Tr. 415-416) Mr. Angelini observed a clear difference in demeanor between the way Judge Markus treated Mr. Chappellear and way he treated Mr. Shimko. As Mr. Angelini observed, it was "...like Judge Markus was acting as the opposing attorney more so than even Mr. Chappellear was." (Tr. 416) In court when the parties and lawyers were before the jury, Mr. Angelini observed no disrespect or the raising of his voice by Mr. Shimko. (Tr. 416-417)

The trial transcript reveals that Judge Markus, without any objection from opposing counsel, interrupted Respondent over 75 different times, interfering with Respondent's presentation of his case, criticizing his witnesses, admonishing him, directing and explaining testimony, and instructing the jury to disregard his arguments. See Ex. 11, pp. 26-27; Tr. 512-514. In First Federal's appellate brief, its counsel did not dispute Mr. Shimko's claim of 75 unwarranted intrusions. Indeed, counsel did not dispute Respondent's claim that "Judge Markus admonished Mr. Shimko, instructed the jury to disregard his client's evidence, made evidentiary

rulings, and instructed the jury to disregard Respondent's arguments over 75 times during the trial." (Tr. 297)⁹

As it relates to the ground of inconsistent jury interrogatories, Respondent was convinced that the jury followed the Court's instructions precisely. Curiously, Judge Markus took it upon himself to draft the interrogatories provided to the jury. This is so despite Civ.R. 49(B) (App. H) which prescribes that "counsel shall submit the proposed interrogatories..." When the jury in this case found fraud had been committed by First Federal entitling Jeffrey Angelini to \$641,000, such finding, along with the jury's determination in interrogatory #5 that the agreement to cosign and guarantee his parent's bad check loan was obtained fraudulently (Ex. 1, Vol. 16, p. 2371) were consistent and should result in the Court's disregard of any finding in favor of First Federal since the affirmative defense of fraud and duress had been established. This was a reasonable interpretation of the findings of the jury and a conclusion based upon the meaning of an affirmative defense.

In this connection, an affirmative defense admits the legitimacy of the underlying claim, but its establishment serves to vitiate such entitlement. Thus, while there could be money owed to First Federal under the notes, that the guarantee was obtained on the basis of fraud and duress vitiates an obligation to satisfy such amount. As such, the Court was in a position to enter judgment based upon the interrogatory answers.

Respondent concluded that the failure to do so, especially given the Court's drafting of the interrogatories and verdict forms and requiring the jury to respond to all of them (the Court's previously stated protocol) led him to the conclusion that the Court was constructing a way to avoid a verdict in favor of Jeffrey Angelini. Reasonable lawyers could so conclude.

⁹ Instead, this witness during the hearing chose to assert that he disputed this in an Affidavit which is not part of the record. (Tr. 297)

Although counsel for First Federal in moving for a mistrial argued “that the jury was hopelessly confused” as evidenced by the inconsistent interrogatory answers and verdicts and conduct of defendant Jeffrey Angelini’s counsel in closing argument in improperly inflaming the passion and prejudice of the jury by improper appeals to bias and prejudice. (Ex. 1, Vol. 16, p. 2374) Judge Markus expanded the same in his ruling (Ex. 10) as it relates to the misconduct argument by going well beyond conduct during the closing argument. No objection had been made during trial by Mr. Chappellear as to Mr. Shimko’s conduct, or body language for that matter. (Tr. 306)¹⁰ This expansion of the grounds for mistrial further led Respondent to conclude that Judge Markus was acting on his bias toward Respondent and his client.

While some of the statements made by Respondent in the appellate briefs concerns these two grounds of mistrial, many of them were made to support his argument that the Trial Court was biased and prejudiced, which served to explain the Trial Court’s conclusions on those grounds, thereby abusing his discretion. (See Ex. 11, p. 6)

As Respondent explained in his appellate brief, when a Court openly acts on disdain for a party’s counsel due to judicial bias, a Trial Court’s judgment can be vacated. Respondent cited *Dennie v. Hurst Const., Inc.*, 9th Dist. No. 06CA009055, 2008-Ohio-6350 (Dec. 8, 2008):

It is important to note that circumstances can arise where this Court may address improper actions of a trial court judge on appeal. *State v. Brown*, 9th Dist. No. 24119, 2008-Ohio-5846, ¶¶ 20-23; *Conti v. Spitzer Auto World Amherst, Inc.*, 9th Dist. No. 07CA009121, 2008-Ohio-1320, ¶¶ 25-27; *State v. Sellers*, 173 Ohio App. 3d 60, 2007-Ohio-4681, 877 N.E.2d 387, (8th Dist) ¶ 11. (Ex. 11, p. 23)

Respondent goes on to explain that conduct of a judge may deprive a party of his due process rights. Finally, Respondent explained that his resort to the record and characterization of the record in his arguments (many of which are cited as misconduct by Relator) support his claim

¹⁰ Interestingly, in a later proceeding, Judge Crawford found no link between purported misconduct of Mr. Shimko at trial and the grant of a mistrial. (Tr. 277)

that the Court abused its discretion in granting the mistrial, because the Court's obvious bias and prejudice amounted to "unreasonable, arbitrary, or unconscionable conduct." (Ex. 11, p. 31)

4. **Post-trial Hearings leading up to Respondent's Second and Third Affidavits of Disqualification**

During a hearing on March 31, 2009, a little more than a month after trial was concluded, Judge Markus chose to refer to Mr. Shimko as a "spectator" during this proceeding. Yet, Mr. Shimko was more than a spectator. He represented the real party in interest, the Trustee in Bankruptcy, throughout the trial which had just concluded, and this hearing concerned property that was being sold as security for the Notes involved in the proceeding. As Respondent explained, "I was counsel of record; and under these circumstances, I thought I needed to monitor everything that was going on in these proceedings, I needed to be there even if I didn't say a word, you know...and...my client had a direct and indirect interest in all of these transactions..." (Tr. 531) This is where Judge Markus' conclusion about the Trustee in Bankruptcy not being a proper party comes into play. As mentioned earlier, *supra* at p. 3, fn. 4, it is not at all clear that Judge Markus' conclusion was correct.¹¹ A subsequent telephone conference occurred on April 10, 2009 where Mr. Shimko was required to retain and pay for a court reporter. It was not Mr. Shimko who called for this hearing. Thus, any earlier ruling of Judge Markus requiring a party to pay for a court reporter in order to be present at a hearing did not apply. Yet, despite the fact that neither Mr. Chappellear nor Mr. Pry objected to Respondent's participation in the hearing, he was required to do so. (Tr. 533-534) A reasonable

¹¹ This is so despite Chief Justice Moyer's seeming concurrence in Judge Markus' argument that the Trustee in Bankruptcy was not a party to the proceeding. Ex. 15, pp. 1-4. As fn. 2 on p. 4 indicates, Chief Justice Moyer's ruling dismissing Shimko's Affidavit of Disqualification was "not controlling or persuasive authority as to whether the bankruptcy trustee is a proper party in the underlying proceeding." See Ex. 15, p. 4, fn. 2.

attorney could conclude that Judge Markus' order in this regard also evinced bias against Mr. Shimko and/or his client.

Finally, Judge Markus called a hearing for January 14, 2010. This hearing precipitated not only an Affidavit of Disqualification by Mr. Shimko but also one brought by Mr. Pry.¹² Mr. Pry unequivocally asserted in this Affidavit and testified consistent therewith at the hearing on this matter that the January 14, 2010 hearing appeared to him to be held for the purpose of confronting and provoking Respondent, even though the other attorneys had resolved the issues. (Tr. 375-376) Mr. Pry indicated in his Affidavit that he read the second Affidavit of Disqualification filed by Mr. Shimko. See Ex. D, ¶ 14. Not only did he read it, he indicated that he believed that "...the facts contained in those two documents are a fair and accurate representation of what took place in this case." He went on to assert in the next paragraph that he believed filing that Affidavit would cause Judge Markus to be prejudiced against him if the case were retried. (Ex. D, ¶ 15) These are very significant assertions by Mr. Pry as it relates to Judge Markus, the reasonable beliefs of Respondent and what reasonable attorney's would do under similar circumstances.

Here, another attorney just like Respondent, after the January 2010 hearing sought to have Judge Markus disqualified based on bias and prejudice. Mr. Pry believed that Judge Markus baited Mr. Shimko. (Tr. 375) Mr. Pry concluded that Judge Markus had a personal bias against the Respondent which affected the case which would prevent a defendant from having a fair trial before an impartial judge. (Tr. 378) Mr. Pry characterized the trial as an "adversarial

¹² Despite Mr. Pry's rather explicit attributions to Judge Markus of his motives for setting up this hearing and what occurred both before and after it, no grievance has been brought against him nor has Disciplinary Counsel chosen to pursue any against him.

proceeding between Judge Markus and Timothy Shimko.” (Tr. 380) To Mr. Pry, Judge Markus simply did not like Respondent. (Tr. 370)

While Relator ascribes language in the second Affidavit of Disqualification to Mr. Shimko as worthy of discipline (Complaint, ¶ 19), Mr. Pry’s Affidavit did the very same thing.

For example, Mr. Pry indicated:

5. As the case progressed, Judge Markus’ behavior became more pronounced as to what I initially perceived as a ‘personality conflict’ between Judge Markus and Mr. Shimko deteriorated to what I would describe as a “personal legal battle by Judge Markus against Mr. Shimko,” and it appeared to be Judge Markus versus Timothy A. Shimko.
6. At the trial, Judge Markus’ behavior further deteriorated which was reflected not only in his rulings, but in his continued interruption of Mr. Shimko’s presentation of his case without any other party objecting.
7. Judge Markus’ intrusive behavior at the jury trial was so blatant that it was as if Judge Markus was trying the case on behalf of the plaintiff, First Federal Bank of Ohio, against Timothy A. Shimko and Galion Building & Loan Bank.
9. After the jury trial, which was on appeal, a hearing was held on January 14, 2010 and it appeared to me that this hearing was set up to confront and provoke Mr. Shimko even though all of the issues in question had been previously agreed to by all attorneys.
10. The manner in which the trial and the post-trial proceedings were conducted have been uncomfortable for me, as a member of the bar, to watch. **Any member of the bar witnessing the proceedings would conclude that Judge Markus had made up his mind on this case long ago.** His continued involvement in the case could only lead to disrepute and embarrassment for the bench and the bar. (Emphasis added.)
12. I believe Judge Markus has a personal bias against Timothy A. Shimko which affects this case and will prevent the Defendants from having a fair trial before an impartial judge.
14. I have read the Memorandum of Law and Support of the Affidavit of Disqualification filed by Timothy A. Shimko and I believe the facts contained in those two documents are a fair and accurate representation of what took place in this case.

15. I believe that by filing this Affidavit and if I try this case again, Judge Markus will be prejudiced against me because of this fact. (Ex. D)

Subsequent to this Affidavit, Chief Justice Moyer dismissed the Affidavit of Timothy A. Shimko concluding that he did not represent a party to the proceeding as required by R.C. 2701.03(A) (App. I) (Ex. 15, p. 4) and denied the Affidavits of attorneys Pry and McBride concluding that the Affidavits were not specific enough to support the bias or prejudice of Judge Markus. It is noteworthy that Chief Justice Moyer concluded that comments about what occurred during trial in the Affidavits filed in 2010 came too late to be considered. (Ex. 15, p. 5) These were rulings by Chief Justice Moyer far from conclusions based upon the merits of the matters set forth in either of the Affidavits. Yet, the Opinion erroneously ascribes *res judicata* effect to this ruling, asserting it is binding on the Panel. Opinion, ¶ 31.

Finally, Respondent filed a third Affidavit of Disqualification on May 17, 2010 after he had formally become counsel of record for Jeffrey Angelini. (Ex. 16, ¶ 2) Relator accuses Respondent of misconduct based upon statements made in this Affidavit similar to specific allegations previously mentioned in the Complaint. (Complaint, ¶ 21) While this Affidavit was denied by Chief Justice Brown on May 26, 2010, his opinion in no way evinces that the merits of Mr. Shimko's Affidavit were even considered. Instead, the Chief Justice mistakenly concluded that Mr. Shimko still did not represent Jeffrey Angelini, having previously represented that he was counsel for Josiah Mason. Ex. 18, pp. 1-2. The Chief Justice went on to erroneously dismiss this Affidavit of Disqualification based upon the same procedural grounds advanced by Chief Justice Moyer in respect to the second Affidavit of Disqualification. Ex. 18, p. 2. However, by this time, Mr. Shimko did indeed represent Jeffrey Angelini in an effort to cure what prevented Chief Justice Moyer from considering the allegations previously raised. (Tr. 541-542)

III. LAW AND ARGUMENT

Proposition of Law No. I: Relator did not prove, by clear and convincing evidence, that under an objective standard Respondent made statements violative of Prof. Cond.R. 8.2(a) unsupported by a reasonable, factual basis.

The law concerning sanctioning lawyers, under the predecessor to Rule 8.2 (App. B), DR 8-102 (App. J), is expressed in *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048, 797 N.E.2d 93. This Court considered the question of whether it was an automatic, ethical violation to argue that a judge is biased. Expressly, this Court answered that question "no." It was acknowledged that there are circumstances where such an argument is proper. The Court observed that DR 8-102(B) provides that a lawyer "shall not knowingly make false accusations against a judge or other adjudicatory officer." This Court agreed with the majority of courts that had addressed the issue and 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. Annotated Model Rules of Professional Conduct (4th Ed.1999) 566, Rule 8. This 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." (citations omitted)
Gardner, supra, ¶25

And, this Court expressly permitted criticism of a trial judge as **protected argument**, so long as the criticism is based on knowledge and is not recklessly made. The *Gardner* Court cited with approval the following rationale from courts of other states.

Ethical rules that prohibit false statements impugning the integrity of judges, by contrast, are not designed to shield judges from unpleasant or offensive criticism, but to preserve a public confidence in the fairness and impartiality of our system of justice. (Citations omitted.)

[A]n objective malice standard strikes a constitutionally permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: **Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.**" (Emphasis added.)

... Under the objective standard, an attorney may still freely exercise free speech rights and make statements supported by a reasonable factual basis, even if the attorney turns out to be mistaken. (Emphasis added.)

To determine whether or not Judge Markus' rulings and conduct at trial created the appearance of bias and prejudice or judicial advocacy in the mind of any reasonable attorney, the testimony of attorneys Pry and McBride was significant, although virtually ignored by the Panel. Yet, the Panel did not assert that their testimony was not worthy of belief, although in a backhanded way, in fn. 2 (Opinion, p. 9 (App. A)), incorrectly concluded that these lawyers had or were assisting Respondent for trial, when they, in fact, as previously stated, represented Galion Bank. In any event, the Panel did not indicate that it disbelieved their testimony. However, it is clear that the Panel chose not to acknowledge it, as objective evidence supporting Respondent's reasonable beliefs, as expressed in his appellate briefs and subsequent Affidavits of Disqualification.

Yet, Mr. Pry, in his testimony and Affidavit, made similar accusations of misconduct against Judge Markus, as those made by Mr. Shimko in his appellate briefs and second Affidavit of Disqualification, for which Disciplinary Counsel has charged Respondent with ethical misconduct. See supra, Section II(B)(4) at pp. 21-23. Even though the same accusations of bias and judicial advocacy were made by Mr. Pry, Disciplinary Counsel has not charged him with a violation of Prof.Cond.R. 8.2 (App. B).

Respondent, here, is not arguing or suggesting that Disciplinary Counsel ought to file a complaint against Mr. Pry. On the contrary, Respondent argues that another reasonable attorney experiencing the same trial, witnessing the same events, came to the same conclusions. That Mr. Pry has not been charged with misconduct is, at the very least, a tacit recognition by Disciplinary Counsel that a reasonable attorney under identical circumstances could conclude that Judge

Markus was biased; that his rulings and conduct demonstrated that bias; that he had become an advocate for First Federal; and that he was acting on the obvious bias he had against Respondent. Resort to Mr. Pry's Affidavit supports this analysis. See Ex. D, ¶¶ 7, 9.

Likewise, Mr. McBride testified that he was also concerned about the appearance of Judge Markus' conduct. He was also critical of the constant interruptions and the rulings made without objection or request from First Federal's counsel. He, as well as Mr. Pry, confirmed the professional and respectful manner in which Mr. Shimko conducted himself throughout the trial. Both lawyers confirmed that they saw no acts of attorney misconduct; and had no knowledge of any ruling or order of the Court that Mr. Shimko had violated during the course of the trial. See supra, Section II(B)(3) at pp. 15-17.

In this matter, Respondent does not have the burden to prove that the comments he made in his appellate briefs and in his Affidavits of Disqualification were true, although even as the Panel acknowledged,

...he subjectively, yet honestly, believe[d] in the rightfulness of his position, albeit his outlook may be clouded by the emotions involved in the clash of personalities. As such, we cannot conclude that his motives were dishonest. Finally, his sanctionable statements were made in a forum in such a way that only the bench and opposing counsel would see them; at no time was the sanctionable activity shown to the jury or general public.

(Opinion, p. 15, ¶ 40)

Rather, the burden is upon Disciplinary Counsel to prove that under the unfortunate circumstances of this case that it would not appear to any reasonable lawyer that the trial judge was biased against Mr. Shimko, or his client, or that the trial judge had become an advocate, or that the judge invented reasons for granting a mistrial that did not exist.

Specifically, it was Disciplinary Counsel's burden to prove, by clear and convincing evidence, that Respondent's appellate arguments were the type of comments circumscribed by Prof.Cond.R. 8.2 (App. B). As the Court held in *United States v. Brown*, 72 F.3d 25, 29 (5th Cir.

1995) when it reversed a district court's suspension and fine of an attorney for an alleged violation of Prof.Cond.R. 8.2: **“Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court.”** (Emphasis added.) The Court in *United States v. Brown* held as a matter of policy that courts should be wary of equating an attorney's questioning of the court's conduct of a trial with the sort of character proscribed by Prof.Cond.R. 8.2. It further held “that because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged. *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988)”

Further, it was Disciplinary Counsel's burden to prove, by clear and convincing evidence, that “no other reasonable attorney,” under the same or similar circumstances, would have come to the same conclusions as those reached by Mr. Shimko and argued in his appellate briefs and second and third Affidavits of Disqualification.

Although, Disciplinary Counsel parsed out Mr. Shimko's written comments, taken as a whole and within the context of the trial and the appeal, as demonstrated above, these comments allege that the Trial Court had become biased against him, and that it appeared the judge was making decisions and conducting himself consistent with such bias. Now, whether that bias took the form of judicial advocacy or of creating nonexistent or strained reasons to grant a mistrial or in making questionable rulings, at the core of his appellate arguments was Mr. Shimko's profound belief that Judge Markus had become biased and had acted under the influence of that bias.

Through Disciplinary Counsel's questioning of Respondent at the Hearing, he seemed to imply that Respondent may have contributed to the cause of Judge Markus' dislike for him.¹³ Indeed, while the Panel did characterize Respondent's repartee with Judge Markus as "...repeatedly disrespectful and confrontational..." (Opinion, p. 13, ¶ 30), Disciplinary Counsel never charged such conduct as violative of any of the Rules of Professional Conduct. This is so even though Disciplinary Counsel was invited to do so by Judge Markus' complaint against Mr. Shimko. (Ex. M) Disciplinary Counsel has not alleged in his Complaint that Mr. Shimko did a single inappropriate thing during the trial: no abusive language; no deliberate violation of court rules or orders; no disrespectful conduct toward the Court, counsel or witnesses; and no outrageous behavior. The testimony of Messrs. Pry and McBride corroborate that Mr. Shimko remained professional with Judge Markus throughout the trial.

Rather, Mr. Shimko is charged with arguing certain conclusions he arrived at on the basis of what the record revealed had transpired in the trial court. He is charged with making arguments in defense of allegations of misconduct made against him by the Trial Court. He is charged with arguing that the allegations of misconduct made against him by the Trial Judge were not real, but instead were born out of the bias and prejudice of the Trial Court. He is charged with giving illustrations in writing of biased conduct that he believed occurred during the trial. In short, he is charged with making arguments pointing out events at the trial (and, in some respects, after trial in regard to the 2nd and 3rd Affidavits of Disqualification) that demonstrated an "unreasonable" or "unconscionable" attitude on the part of the Trial Court. This, indeed, was his burden on appeal in order to demonstrate an abuse of discretion. Case law

¹³ Even if Respondent did cause Judge Markus' dislike for him, it became Judge Markus' duty to examine whether his conduct was creating the appearance of bias, and to act in furtherance of the reputation of the profession and the bar.

addressing similar circumstances support arguments of bias and prejudice made by Mr. Shimko in his briefs and affidavits.

First, Courts have found bias or the appearance of bias when a judge has expressed hostility or frustration toward one of the litigants or her attorney. *See Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009). Thus, those comments reported by Mr. Shimko in his first Affidavit of Disqualification (Ex. 6) (which Affidavit of Disqualification has not been made the subject of Disciplinary Counsel's Complaint) and which were corroborated by Mr. McBride in both his affidavit (Ex. A) and hearing testimony, certainly could form the basis for an argument that Judge Markus was either biased or appeared to be biased, just as Mr. Shimko continued to argue during trial, while he preserved the record in that regard.

Second, there is no question that it is appropriate for a reviewing court to examine the rulings of a trial court in the exercise of determining whether an appearance of prejudice or bias had been created by the trial court. In *Sentis Group, supra*, the Court held that the combination of hostility toward the plaintiffs and questionable rulings made by the court certainly gave rise to an appearance of bias and prejudice. In *Rhodes v. Avon Prods., Inc.*, 504 F.3d 1151 (9th Cir. 2007) the Court of Appeals examined the partiality of the court based on rulings favorable to one side. The Courts in *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005) and in *Mitchell v. Maynard*, 80 F.3d 1433 (10th Cir. 1996) also held it proper to examine lower court rulings to determine whether there was an appearance of bias. In the case of *In re Guardianship of Salaben*, 11th Dist. Case No. 2008-A-0037, 2008-Ohio-6989 (December 31, 2008), ¶¶ 113-120, the dissent pointed out that the magistrate's conduct created the impression of bias and that his rulings constituted an abuse of discretion.

Third, this Court has endorsed the precept that judicial advocacy can warrant discipline. *Disciplinary Counsel v. Ferreri*, 88 Ohio St.3d 456, 727 N.E.2d 908 (2000); *Disciplinary Counsel v. Parker*, 116 Ohio St. 3d 64, 68, 2007-Ohio-5635, 876 N.E.2d 556. Certainly, such discipline could never occur if lawyers could be punished for bringing such claims to the attention of reviewing courts.

As recounted above, there were at least 75 documented occasions on the record, where Judge Markus intruded into the presentation of Respondent's case and entered rulings, commented on the evidence, instructed the jury, and disallowed evidence without a single objection or requests from opposing counsel to do so. Further, two other reasonable lawyers, Messrs. McBride and Pry, both felt that Judge Markus was advocating for First Federal or advocating against Tim Shimko. Finally, even Mr. Angelini felt that this was a case of Judge Markus verses Mr. Shimko and that First Federal had another advocate in its behalf in the Trial Judge. *See supra* at pp. 17-18.

Along these lines, the court in *Commonwealth v. Sylvester*, 388 Mass. 749, 448 N.E.2d 1106 (1983) chronicled a trial judge's repeated "ridicule [of] defense counsel, his threat[s] to cut off her argument, interrupt[ing] and question[ing] witnesses, and comment[s] on the evidence," for which he moved for a mistrial, created at least an appearance of bias against the defendant. Judicial advocacy was forbidden. The judge may not materially assist one party at the expense of another. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. Likewise, in *Commonwealth v. Sneed*, 376 Mass. 867, 383 N.E.2d 843 (1978), the Supreme Court of Massachusetts held that the role of the trial judge is that of an impartial arbiter and not that of a prosecutor. In disregard of these principles, the court in *Sneed* stated that "the judge here adopted the role of an advocate," and a failure of judicial restraint. Certainly,

Judge Markus' role in drafting interrogatories, contrary to Civ.R. 49 (App. H), can be interpreted as providing material assistance to First Federal, which, as it turns out, formed a basis for Judge Markus to find a reason for mistrial.

Finally, it is certainly proper to examine lower court rulings to determine whether there was an appearance of bias. See *Rhodes v. Avon Prods., Inc.*, 504 F.3d 1151 (9th Cir. 2007); *Living Designs, Inc. v. E.I. DuPont de Nemours & Co., supra*. Thus, that Judge Markus made questionable rulings concerning evidence which demonstrated that the agents of First Federal had committed fraud and had used physical intimidation and threats of criminal prosecution and jail to extract mortgages and guarantees from Mr. Angelini such that he made claims for mental suffering and for punitive damages, Judge Crawford allowed both claims to go to the jury, contrary to Judge Markus' rulings in those respects.

Trial by a biased judge has been cited as an example of structural error. Judicial bias has been defined as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956).

The burden is upon the Disciplinary Counsel to prove by clear and convincing evidence that Mr. Shimko's arguments in his appellate briefs and Affidavits of Disqualification were known to him to be false at the time he made them or that he made them with a reckless disregard for their truth. Clear and convincing evidence is that "measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established." *In re Estate of Bohrer*, 12th Dist. Case No. CA 95-01-001, 1995 Ohio App. LEXIS 4480 (October 9, 1995). Applying that standard here, it was Disciplinary Counsel's duty to establish a firm belief or conviction that no reasonable attorney finding himself in the same or

similar circumstances as Respondent would have reasonably concluded that Judge Markus had created the appearance of bias and judicial advocacy and of being influenced by that bias.

When one considers that every time an attorney appeals a trial court's decision where the standard of review is an "abuse of discretion," he or she is actually arguing that the trial judge's actions were "arbitrary and capricious" or "unreasonable" or "unconscionable." *Blakemore v. Blakemore*, 5 Ohio St. 3d 217, 219, 450 N.E.2d 1140 (1983). Merriam Webster defines "unconscionable" to be 1: not guided or controlled by conscience: UNSCRUPULOUS 2: *a*: EXCESSIVE, UNREASONABLE *b*: shockingly unfair or unjust. "Abuse of discretion" has also been decribed as:

[A]n abuse of discretion involves far more than a difference in * * * opinion * * *. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984)

Ohio law has long recognized an attorney's right to argue that a court's attitude was unreasonable or unconscionable. Is this well-established rule of law now to be read as allowing arguments alleging unreasonable and unconscionable conduct of a judge, except for unreasonable and unconscionable conduct that creates the appearance of bias and partiality? Clearly, such interpretation should not prevail.

Proposition of Law No. II: Attorneys may not be disciplined under Prof.Cond.R. 8.2(a) for statements made in judicial filings when a reasonable, factual basis exists supporting such statements and actual malice is not shown by clear and convincing evidence.

The face of Prof.Cond.R. 8.2 (App. B) appears to adopt the constitutional standard created in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct.710, 77 L.Ed.2d 686 (1964).

That standard, as this Court in *Gardner, supra*, acknowledged, is an “actual malice” standard. At least one commentator has pointed out the inconsistency between the face of this rule and the objective standard adopted in *Gardner, supra*.

The rejection of the *Sullivan* standard is particularly surprising because the rule under which discipline or sanctions are generally imposed is Rule 8.2 of the Model Rules of Professional Conduct (“MRPC”), which expressly adopts the *Sullivan* standard and thus only prohibits statements “that the lawyer knows to be false” or that are made “with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”¹⁴ Importantly, the *Sullivan* standard examines the speaker’s *subjective* intent—thus, punishment is forbidden unless the speaker subjectively knew the statements were false or “*in fact entertained serious doubts* as to the truth of his publication.”¹⁵ Nevertheless, and in direct contradiction to *Sullivan* and its progeny,¹⁶ attorneys facing discipline for impugning judicial integrity have been required to show that their statements were objectively reasonable in order to obtain constitutional protection.¹⁷ Indeed, some courts have denied attorneys any recourse through the First Amendment at all.¹⁸ For example, the Missouri Supreme Court has stated that: “[A]n attorney’s voluntary entrance to the bar acts as a voluntary waiver of the right to criticize the judiciary.”¹⁹

Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 *B.C.L.Rev.* 363, 367 (2010)

¹⁴ fn. in original. See MODEL RULES OF PROF’L. CONDUCT R. 8.2 (2009); *Sullivan*, 376 *U.S.* at 279-80; Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 *GEO. L.J.* 1567, 1569, 1571-72 (2009).

¹⁵ fn. in original. See *St. Amant v. Thompson*, 390 *U.S.* 727, 731 (1968) (emphasis added).

¹⁶ fn. in original. See *St. Amant*, 390 *U.S.* at 731 (explaining that *Garrison* made it “clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing”); *Garrison*, 379 *U.S.* at 79 (explaining that the *Sullivan* standard is not satisfied by explaining the reasonableness of the person in making the statement); see also Tarkington, *supra* note 2, at 1587-88.

¹⁷ fn. in original. See Tarkington, *supra* note 2, 1588-90, (citing cases). Notably, the objective reasonableness standard applied to attorneys comes in two basic variations. See *id.* at 1589. Some courts require attorneys to show that their statements would be made by a reasonable attorney in the same circumstances while others require attorneys to show a reasonable basis in fact for the statements. See *id.* Neither is applied in a manner that is consistent with ordinary applications of similar standards. See *id.* at 1589-90.

¹⁸ fn. in original. See *Notopoulos v. Statewide Grievance Comm.*, 890 *A.2d* 509, 521 n. 17 (Conn. 2006) (“Several courts have held that attorneys may be punished under the Rules of Professional Conduct for engaging in derogatory speech toward the judiciary even when the speech is protected by the first amendment.”)

¹⁹ fn. in original. *In re Westfall*, 808 *S.W.2d* 829, 834 (Mo. 1991)

Unquestionably, this Court in *Gardner* has reviewed rights attorneys have in connection with the First Amendment. *Gardner, supra*, ¶ 14. Unlike the *Gardner* case, the instant matter involves speech contained in court filings which has, as its basis, objections raised during the course of trial (or at hearings) involving the allegation that the Trial Court was acting in a biased and prejudicial manner, culminating in the granting of a mistrial. This conduct of the Trial Court addressed during the course of trial and which involved matters of record preceding the trial, (*i.e.*, the telephone conference resulting in the first Affidavit of Disqualification) was referenced in language used by Respondent to support his claim that the Trial Court abused its discretion because of the bias and prejudice it harbored toward Respondent and his client.

Respondent submits that the *Gardner* objective standard should be modified in the context of a lawyer making statements in judicial filings about which he has an honest belief which is also reasonable, and based on the observations of other attorneys present during the events giving rise to the statements made which are charged to be violative of Prof.Cond.R. 8.2(a) (App. B). In this context, Respondent urges this Honorable Court to adopt the actual malice standard in determining whether an attorney should be sanctioned under circumstances such as those present here.

In this regard, admittedly a majority of courts have adopted an objective standard in assessing whether “a lawyer’s statement about a judicial officer is made with knowledge or reckless disregard of its falsity.” *See Gardner, supra*, at ¶ 26. As this Honorable Court previously noted:

This 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’ *** [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.’ (citations omitted)

Applying this language to the case at bar, it is submitted that the record establishes a reasonable, factual basis for the statements made by Respondent in his briefs and affidavits when considering their nature and the context in which they were made. This context involves a legal argument meant to support a claim that Judge Markus was biased and prejudiced, which bias and prejudice motivated him to erroneously grant a mistrial and, as the second Affidavit of Disqualification further expanded, committed other conduct which occurred post-trial.

In line with the observations of the Panel in the instant matter, given the Panel's finding that "we cannot conclude that his [Mr. Shimko's] motives were dishonest" and that "no apparent damage has occurred to Judge Markus' reputation," such actual malice standard is appropriate. It should be remembered that the standard facially adopted in Rule 8.2 is the one set forth in *New York Times Co. v. Sullivan*, which libel case concerned protected speech made about a public official unless the speech was motivated by actual malice, in an effort to harm the public official's reputation.

This Court is urged to consider United States Supreme Court precedent which should be read to protect Mr. Shimko's statements in the context of this case. Indeed, as the U.S. Supreme Court reaffirmed in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L.Ed.2d 1208 (2009), "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process,'" and such fairness includes a fair and impartial adjudicator. See also, *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). A free speech right to impugn judicial integrity must be recognized for attorneys--even, and perhaps especially, when acting as an officer of the court and filing papers with a court. Such a right is necessary to protect the constitutional rights of litigants to an unbiased judiciary, as well as to preserve statutory rights and other protections granted to litigants regarding judicial qualifications.

Further, the recognition of such a right in the attorney preserves both litigants' access to courts and their due process rights. These rights of litigants may be lost or impaired if attorneys can be punished for asserting them in court proceedings. In 2001, the U.S. Supreme Court recognized that a free speech right residing in attorneys to make relevant arguments in court proceedings is essential to the proper functioning of our judicial system. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001).

The U.S. Supreme Court has repeatedly recognized that “[t]rial before ‘an unbiased judge’ is essential to due process” *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971) --and this is so in both criminal (see, e.g., *Bracy v. Gramley*, 520 U.S. 899, 908-909, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997)) and civil proceedings. See *Caperton v. A.T. Massey Coal Co.*, *supra*, 556 U.S. at 884-885 (2009) (concluding that due process was denied to litigant because of judicial bias in civil tort case); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) (finding a violation of due process because of judicial bias in a civil insurance case). As elaborated in 1955 in *In re Murchison*, “A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.” *Supra*, 349 U.S. at 136.

In *Caperton v. A.T. Massey Coal Co.*, *supra*, the Supreme Court held that an objective “potential” or “probability of bias” by a judge or decision-maker can reach unconstitutional proportions and deny a litigant due process. Further, due process is not satisfied by invoking an assumption that judges are above common failings of other men and women. *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927). As the Supreme Court explained:

[T]he requirement of due process of law in judicial procedure is *not* satisfied by the argument that men of the highest honor and the greatest self-sacrifice could

carry it on without danger of injustice.

The Supreme Court in *Caperton* reaffirmed this statement as “the controlling principle.” Although the *Caperton* Court repeatedly noted that the criteria for finding a violation of due process “cannot be defined with precision,” it held that the inquiry is “objective” and does “not require proof of actual bias.” Instead, it requires, “under a realistic appraisal of psychological tendencies and human weakness,” a determination of “whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional ‘potential for bias.’” *Supra*, 556 U.S. at 884-885.

The Court noted that its objective test “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” It is important to recognize that if due process sometimes bars an unbiased, upright judge from hearing a case, then certainly challenges to judges in papers filed with courts may include challenges against judges who are in fact biased and not so upright. Attorneys should and must be able to assert and preserve their client's due process rights even when doing so results in challenging the neutrality or integrity of a judge. Further, under the Code of Judicial Conduct, judicial disqualification is required under similar circumstances, including in proceedings where “the judge's impartiality might reasonably be questioned” or when a judge “has a personal bias or prejudice concerning a party or a party's lawyer.” Jud.Cond.R. 2.11(A)(1) (App. K).

Of course, in order for litigants to meaningfully assert any of these rights, attorneys must be allowed to express them. Additionally, attorneys may make statements that allegedly impugn judicial integrity in appellate briefs in order to seek reassignment of the case to a different judge on remand. In most of the federal appellate courts and in several states, reassignment is granted

based on the weighing of three factors, including “whether reassignment is advisable to preserve the appearance of justice;”²⁰ *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167 (3d Cir. 1993); accord *Wright v. Moore*, 953 A.2d 223, 227 (Del. 2008) n.13 or whether “impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.” *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 904 (8th Cir. 2009); accord *People v. Enriquez*, 160 Cal. App. 4th 230, 244 (2008) (indicating that reassignment is necessary “[i]f a reasonable man would entertain doubts concerning the judge’s impartiality.”)

These tests make discussion in an appellate brief about the impartiality or potential bias of a judge essential. Further, courts have found bias or the appearance of bias on the basis that the judge expressed hostility or frustration toward one of the litigants or her attorney.²¹ Some cases have considered erroneous and adverse rulings against one party in determining that there was an appearance of impartiality. *Sentis, supra*. An attorney must be allowed to express concerns of partiality or other defects in order to assert that interest of the client.

Finally, it is the very function of appellate attorneys in our system of justice to highlight the failings of the lower court’s handling of, and decision in, the case in order to obtain a reversal

²⁰ *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977). The factors are: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

²¹ See *Sentis Group*, 559 F.3d at 904-05 (noting that in addition to expressing hostility to the plaintiffs, the court denied the plaintiffs an opportunity to respond during a sanctions hearing and misconstrued its own discovery orders in adopting the defendant’s mischaracterization thereof). See generally *Rhodes v. Avon Prods., Inc.*, 504 F.3d 1151 (9th Cir. 2007) (examining partiality of the court based on rulings favorable to one side, including granting a motion to dismiss without allowing the party against whom it was granted an opportunity to respond); *Living Designs, Inc. v. E.I. DuPont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005) (examining prior court rulings to determine whether there was an appearance of bias and ordering reassignment); *Mitchell v. Maynard*, 80 F.3d 1433 (10th Cir. 1996) (considering appellant’s evidence of bias including prior adverse rulings and finding reassignment appropriate).

for their clients. See, e.g., *Peters v. Pine Meadow Ranch Home Ass'n.*, 151 P.3d 962, 964-66 (Utah 2007); *In re Wilkins*, 777 N.E. 2d 714, 716 (Ind. 2002) (*per curiam*); *In re Graham*, 453 N.W.2d 313, 322-24 (Minn. 1990). In the context of speech impugning judicial integrity, litigants have underlying rights to fair proceedings from an impartial judge as outlined above. By threatening punishment for bringing such claims, attorneys are deterred from asserting or strongly pursuing them, and thus the judiciary has created an impediment to raising them. In addition to providing a right to access courts, the Due Process Clause in general requires that there be fair proceedings and that “persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.” Particularly for litigants, who do not have the option to resort to other forms of dispute resolution, constitutional due process requires state and federal courts “within the limits of practicability” to “afford to all individuals a meaningful opportunity to be heard” --which means “an opportunity granted at a meaningful time and in a meaningful manner.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L. Ed. 865 (1950). A meaningful opportunity to be heard cannot be provided when a litigant’s attorney is threatened with punishment for impugning judicial integrity with argument based upon the record. *Velazquez, supra*, 531 U.S. at 545.

As applied to the suppression or punishment of speech critical of the judiciary made in court filings, courts should not be able to “impose rules ... which in effect insulate [their] own [actions] from legitimate judicial challenge” and “exclude from litigation those arguments and theories [that the judiciary] finds unacceptable [or insulting] but which by their nature are within the province of the courts to consider.” Indeed, to the extent that courts seek to prohibit the “analysis of certain legal issues and to truncate presentation to the courts” regarding judicial abuse, corruption, or bias, they prohibit the constitutionally protected “speech and expression” of

the affected attorneys and their clients. *Id.*

The specific ability to complain about unfairness and to rectify it in individual cases in the court system, such as those arising from a biased, incompetent, or abusive judge, serves a checking function by which the overall integrity and fairness of the system is monitored and ensured. *Boddie v. Connecticut*, 401 U.S. 371, 377, 380-381, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Indeed, it is important that citizens can challenge governmental action in court proceedings without fear of sanction for impugning government integrity. *NAACP v. Button*, 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Freedom of expression does not solely protect uninhibited robust debate on street corners and in newspapers, but as declared in *Button*, also “vigorous advocacy” through the medium of litigation “against governmental intrusion.” *Id.* For the litigant who believes that his constitutional right to an unbiased judiciary has been violated, his counsel's ability to freely and vigorously contest the impartiality of the trial judge is the litigant's only “means for achieving the lawful objectives of equality of treatment by all government”--specifically the judiciary. *Id.*

Attorneys who seek to have a judge disqualified or who make arguments of judicial bias or denial of due process are challenging the government, specifically the judiciary. *See, e.g., Velazquez, supra*, 531 U.S. at 545. Judges should not be able to limit or curb the extent to which their actions can be called into question where there is a legal argument or remedy available to the affected client. It is the attorney's core function to present a client's colorable arguments and claims and the core function of the judicial system to hear these claims in court proceedings--even if such arguments implicate judicial integrity.

Under our adversary system, in any given case, there are at least two different positions or messages that are presented to the court and are largely controlled by the attorneys in the case.

As recognized in *Velazquez, supra*, 531 U.S. at 542, it is assumed that attorneys “will be free of state control” because “[a]n informed independent judiciary presumes an informed independent bar.” *Id.* at 545. The judiciary relies on attorneys to present arguments to it; the judiciary does not promote its own message or policies.

What is essential, then, for statements made in court filings, is that parties receive relief from actions made by biased, abusive, or incompetent judges--and that relief must happen in the underlying case itself (usually through an appeal or some other form of review by another tribunal or authority). Litigants have due process rights to an impartial tribunal. The problem with prohibiting attorneys from making statements in court filings and, instead, requiring attorneys to bring such complaints solely to a judicial disciplinary authority, or in an affidavit of disqualification, is that judicial disciplinary authorities are powerless to effect any remedy in the underlying case as to the affected client.

Attorneys should not be admonished to be wary of making *any* colorable constitutional claim on behalf of their clients whose rights and interests are at stake. Nor should there be extra judicially imposed “pitfalls” (namely, sanctions or other punishment) that “accompany” arguments made by attorneys that a litigant was denied due process because of a biased judge. It is shocking that a court would be more concerned with ensuring respectful rhetoric regarding the judiciary than with ensuring that civil litigants are afforded due process by impartial judges. Due process rights afforded to all litigants can be vindicated only if attorneys actively seek their enforcement during the actual proceedings and subsequent judicial review. If the attorney fails to raise such arguments, due process rights are generally waived and lost forever. For courts to chill or to punish attorneys for speech, raising such claims, all but denies the existence of a litigant his or her due process rights. Attorneys must have the right to make such arguments,

when colorable, on behalf of their clients without threat or fear of punishment.

But even in the narrow context of speech made in court filings and proceedings, there are important reasons why attorneys should be allowed to impugn judicial integrity in accordance with a subjective standard. First is the preservation of the constitutional, statutory, and other rights of clients to an impartial and otherwise qualified judiciary. Although clients assuredly have these rights as a matter of due process and other laws, these rights are all but meaningless to the extent that attorneys are inhibited from asserting such rights or punished for so doing. Litigants have constitutional rights to an unbiased judiciary and to be represented by counsel. Punishing attorneys to preserve judicial reputation frustrates the combined promise of these rights--that attorneys be able to raise on their clients' behalf colorable claims that challenge, and thus potentially impugn, judicial integrity.

Recognizing this free speech right of the attorney thus preserves the attorney-client relationship. Attorneys are to competently represent their clients. At least, such representation should entail presenting their clients' colorable claims. Attorneys should not be required to pull their punches merely because their client's rights involve questioning actions of the judiciary. As the Court held in *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995) when it reversed a district court's suspension and fine of an attorney for an alleged violation of Prof.Cond.R. 8.2 (App. B): **“Attorneys should be free to challenge, in appropriate legal proceedings, a court’s perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court.”**

The Court in *United States v. Brown*, held “that Rule 8.2’s restriction on reckless statements regarding members of the judiciary does not apply to a lawyer’s in court comments concerning the judge’s actual performance during the conduct of the trial.” The court stated:

Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged. *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988). We are also wary, as a matter of policy, of equating an attorney's questioning of the court's conduct of a trial with the sort of character attack proscribed by Rule 8.2. **Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court.** Such challenges should, however, be made only when substantiated by the trial record." The court went on to state "Based then on our examination of other courts' application of Rule 8.2, the ABA Comment and the strict construction in favor of the charged, we conclude that Rule 8.2 does not reach Kidd's statements made in his motion for new trial. **Rule 8.2 solely proscribes false or reckless statements questioning judicial qualifications or integrity (usually allegations of dishonesty or corruption).** While such comments could arise in the trial context, a trial court should be careful to distinguish frivolous motions on the appearance of partiality from attacks on the character of the court. (Emphasis Added)

Moreover, allowing attorneys to raise such claims preserves the role of the attorney in the American adversarial system, where each side is required to raise the arguments of its own clients. A viewpoint-based prohibition on court speech is particularly problematic in the adversarial system because it ensures that only one side's view of the matter will be heard. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) ("[C]ontent discrimination raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace") Although it has been argued that speech regarding the judiciary is punishable in part because the judiciary does not generally respond to such criticism, that concern is largely superficial in the context of court proceedings. Notably, the judiciary, in response to allegations of judicial bias or incompetence raised in court filings, can respond to such allegations and address them in the form of an opinion. Moreover, the opposing side will often have an incentive to articulate the opposing viewpoint and thus to vindicate the judiciary's reputation. Although judges may "not take to the talk shows to defend themselves," it is likely that an opposing party who does not want a new trial granted, for example, will vigorously advocate on behalf of the judge and the fairness of the underlying proceedings. See

In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995). The judiciary need not take up the soapbox or punish the attorney who questioned the integrity of the proceedings to vindicate its reputation. Further, the adversary system is intended to help ensure the fairness of the proceedings by allowing both sides to air their view of the facts, law, and proceedings.²² By silencing only one side and one viewpoint, the premise and purpose of the adversary system is frustrated. The case of *In re Application for Discipline of Peterson*, 260 Minn. 339 (1961) stands for the proposition that disciplinary proceedings are not designed "to prevent [an attorney] from, in good faith, espousing a legal cause, however unpopular or seemingly untenable."

Somewhat ironically, to the extent that the judiciary deters and punishes speech questioning the integrity of an underlying proceeding, it also frustrates its own role in the proper functioning of the judicial system. As pointed out in by the U.S. Supreme Court in *Velazquez*, stifling "the analysis of certain legal issues" and "truncating presentation to the courts ... prohibits speech and expression upon which the courts must depend for the proper exercise of the judicial power." *Velazquez, supra*, 531 U.S. at 545. The judiciary serves a special role in preserving and protecting constitutional rights, and ought to be particularly jealous of ensuring that it fulfills these constitutional imperatives.²³ Yet, the judiciary cannot ensure that due process

²² See, e.g., *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir. 1984) ("[T]he adversary system is based on the premise that the truth is best ascertained ... through the zealous and competent presentation by each side of its strongest case."); see also *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.").

²³ Cf. Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 San Diego L. Rev. 1 (2010) (arguing that Chief Justice Brent Benjamin of the West Virginia Supreme Court of Appeals, whose participation in the *Caperton* litigation denied litigants due process, should be disciplined for his conduct and arguing that without such discipline, "*Caperton's* message to the legal profession remains muted and provides insufficient incentive for judges to take seriously their duties of impartiality and judicial competence.")

is being afforded by judges when it turns a blind eye to possible judicial deficiencies in providing due process, and even enforces that blindness through punishment.

In the matter at hand, there were sound legal bases to make the argument of judicial bias. An appellate court has jurisdiction to vacate the trial court's judgment on a claim of judicial bias. In *Dennie v. Hurst Const., Inc., supra*, the Court of Appeals held that "it is important to note that circumstances can arise where this Court may address improper actions of a trial court on appeal." *State v. Brown, supra; Conti, supra; and State v. Sellers, supra*.

The usual example of this exception is conduct of a judge that deprives a party of his due process rights, *Dennie, supra*, (Noting that such situations can arise where bias by a trial judge permeates the proceedings and manifests in a way that denies parties their right to due process, therefore allowing for review on appeal.) *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038 (2006); *Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). Trial by a biased judge has been cited as one of the very limited examples of structural error. *Id.* **Judicial bias has been defined as "a hostile feeling or spirit of ill will or undue friendship or favoritism toward one of the litigants or his attorney, with the formation of a fixed anticipatory judgment on the part of the judge."** *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (Emphasis added)

Thus, under the particular circumstances of the instant matter, it is appropriate to modify the rule in *Gardner* to adopt an actual malice standard when a reasonable basis in fact exists for the statements made and when such statements are made for purposes of establishing the bias and prejudice of a judge which allegedly impacted the rulings made. This standard will serve the purpose of appropriately circumscribing an attorney's speech, and at the same time preserving the right of the judiciary to be free from the impugning of their integrity. Indeed, this standard

serves to protect the importance of advocacy in our judicial system in light of the due process rights we all enjoy.

The question here is whether judges should be insulated from accountability at the expense of a client's constitutional rights to fair and impartial trial. As Justice Pfeifer indicated in *Disciplinary Counsel v. Grimes*, 66 Ohio St.3d 607, 614 N.E.2d 740 (1993):

Finally, I am always concerned to see a lawyer reprimanded for his speech. Our legal system relies on vigorous advocacy, which occasionally leads to spirited interplay between lawyers and judges. We ought not rule in a way that may affect that friction. Militating against a wholesale application of the objective standard to all asserted violations of Professional Conduct Rule 8.2.

Also, one legal commentator has observed:

Under current objective approaches to MRPC 8.2 and similar rules, attorneys can easily be found to have violated MRPC 8.2, which makes it more likely the courts will find a violation and increases the judicial perception that such conduct is wrongful and should be punished. By employing *Sullivan's* subjective standard, the judiciary is deterred from finding such a violation. (Footnote omitted) Rather, the focus in court proceedings will be (and should be) whether the attorney had a reasonable basis in fact as that phrase is defined in cases interpreting FRCP 11 and MRPC 3.1.

Margaret Tarkington, *Attorney's Speech and the Right to an Impartial Adjudicator*, 30 Rev. Litig. 849, 887-888 (2011).

Indeed, the Ohio Rules of Civil Procedure employ Civ.R. 11 (App. L) similar to Fed.R.Civ.P. 11 (App. M) and Prof.Cond.R. 3.1 (App. N), is identical to Mod.R.P.Cond. 3.1 (App. O).

As such, because of the due process concerns associated with obtaining a fair trial before a fair and impartial adjudicator, the rule in *Gardner* should be modified to adopt an actual malice (subjective) standard when the statements scrutinized under Prof.Cond.R. 8.2 (App. B) are made in briefs and affidavits supported by the record of the proceedings. Applied to the instant matter, Mr. Shimko's statements would not run afoul of Prof.Cond.R. 8.2 under this analysis.

Proposition of Law No. III: An actual suspension is not warranted for a violation of Prof.Cond.R. 8.2(a), and consequently, Prof.Cond.R. 8.4(h), when a Respondent subjectively and honestly believes in the rightfulness of his position, and other mitigating factors far outweigh aggravating factors.

Relator sought a one-year suspension while Respondent moved for dismissal at the close of both Relator's case and at the end of the presentation of all the evidence. In the alternative, Respondent sought a fully stayed suspension. See Tr. 312, 704 and Opinion, ¶ 38 (App. A). The Panel, after recounting facts it considered aggravating and those it considered mitigating, reviewed the cases of *Gardner, supra*, and *Disciplinary Counsel v. Proctor*, 131 Ohio St.3d 215, 2012-Ohio-684, 963 N.E.2d 806 to arrive at its recommendation of a six-month suspension, which was adopted by the Board. Opinion, ¶¶ 39-41, and Board Recommendation.

Respondent submits that the written statements made in his two appellate briefs and two Affidavits of Disqualification, while considered in connection with the application of Prof.Cond. R. 8.2(a) (App. B), should not also serve as independent aggravating factors. Further, it is not entirely accurate that Respondent was unapologetic. While indeed he did maintain the reasonableness of his accusations of Judge Markus' bias, he did support the same with independent testimony of three witnesses and legal argument based upon resort to the record of the proceeding below.

In addition, at the Hearing, Respondent acknowledged that he did contribute to the whole series of events. When asked to reflect upon whether he learned anything from these proceedings, he acknowledged that the whole series of events was a tragedy. He indicated that the better course of action would have been to withdraw after Chief Justice Moyer denied the first Affidavit of Disqualification, since Judge Markus was not going to leave the case. (Tr. 583-585) Indeed, as Mr. Shimko explained, his perceived duty which was to represent his client to the best of his ability and to make sure that the process happened fairly brought him into conflict

with Prof. Cond.R. 8.2. He felt that it was his job to make the various objections during trial, make the statements that he did in court of appeals brief, and later, the statements made in the Affidavits of Disqualification after post-trial hearings. (Tr. 582-583)

By way of mitigation, the Panel acknowledged that Respondent was cooperative in the disciplinary process. (Opinion, ¶ 40) (App. A) In fact, his disclosure to the disciplinary board was exemplary. (See Exs. H, I, J, K) He allowed his deposition to be taken, even though the time had expired for discovery in the instant disciplinary matter. (Tr. 581-582) Disciplinary Counsel was willing to stipulate that Respondent cooperated in the disciplinary proceedings. (Tr. 578) Further, the acknowledged excellent reputation Mr. Shimko has with the bench and bar as an intelligent, accomplished, competent attorney who zealously represents his clients to the best of his ability was supported by the three character letters of two attorneys and one judge submitted in his behalf (Exs. E-G) and the live witnesses who testified during the Hearing, The Honorable Nancy A. Fuerst and attorney David Newcomer. (Tr. 455, 457-469)

Importantly, the Panel found, “[b]ased on [Mr. Shimko’s] demeanor, he subjectively, yet honestly, believes in the rightfulness of his position, albeit his outlook may be clouded by the emotions involved in the clash of personalities. As such, we cannot conclude that his motives were dishonest.” Further, and equally importantly as it relates to why a subjective standard of review under a *New York Times v. Sullivan* analysis is appropriate was the Panel’s finding that “[n]o apparent damage has occurred to Judge Markus’ reputation.” Opinion, ¶ 40.

Resort to precedent does not require a six-month suspension under these particular facts related to aggravating and mitigating factors.

In this regard, the facts in *Gardner* do not support that Mr. Gardner honestly believed in the rightfulness of his position taken in an appellate brief. Instead, Gardner stipulated otherwise.

Likewise, in *Proctor*, this Court specifically found that Mr. Proctor “did not have a reasonable belief that “[accusations in his appellate brief] were true, and therefore, he had stipulated that the allegations were recklessly made.” *Proctor, supra*, at ¶ 7.

However, as acknowledged in *Proctor*, a presumptive six-month suspension does not necessarily obtain based upon a long line of precedents which have not imposed actual suspensions for courses of conduct involving dishonesty, fraud, deceit, or misrepresentation, despite a pronouncement by this Court that an actual suspension should follow. *See Proctor, supra*, at ¶ 18. In addition to the cases cited in *Proctor* for this proposition is the case Respondent cited to the Panel, *Disciplinary Counsel v. Markijohn*, 99 Ohio St.3d 489, 2003-Ohio-4129, 794 N.E.2d 24.

Recently, this Court held that a public reprimand was appropriate for an attorney who violated Prof.Cond.R. 8.2(a) (App. B) and Prof.Cond.R. 8.4(d) (App. C) when such attorney recklessly made false statements impugning the integrity of a judge he allegedly observed having an inappropriate contact with a party. Attorney Gallo was incorrect in the conclusion that Judge Lucci was the person that Mr. Gallo asserted in the affidavit he had seen. *See Disciplinary Counsel v. Gallo*, 131 Ohio St.3d 309, 2012-Ohio-758, 964 N.E.2d 1024.

As such, given the particular circumstances of the instant matter, this Honorable Court is urged to stay the six-month suspension recommended by the Board if it is inclined to issue a sanction at all.

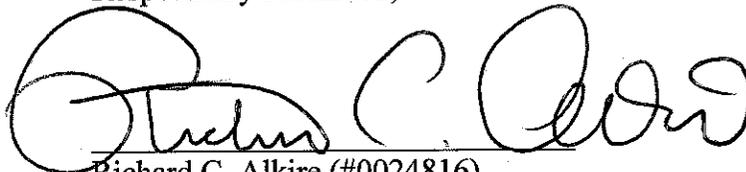
IV. CONCLUSION

Accordingly, for the foregoing reasons, this Honorable Court is requested to dismiss the Complaint of Disciplinary Counsel against Respondent after applying an objective standard or a modified standard under Prof.Cond.R. 8.2(a). As it relates to the application of a subjective,

rather than objective, standard to the statements made by Respondent in his appellate briefs and Affidavits of Disqualification, and recognizing that such statements were made honestly by Respondent who believed in the rightfulness of his position which was corroborated by the record and the witness testimony presented at the Hearing, Disciplinary Counsel's Complaint should be dismissed.

In the alternative, should this Honorable Court decline to apply the modified standard, or in applying the objective standard conclude that false statements were recklessly made concerning the integrity of Judge Markus, it is respectfully urged that the sanction recommended should be stayed in its entirety, given the mitigating factors which far outweigh the aggravating ones.

Respectfully submitted,



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APP. A

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

In Re:	:	
Complaint against	:	Case No. 11-069
Timothy Andrew Shimko	:	Findings of Fact,
Attorney Reg. No. 0006736	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	
	:	

OVERVIEW

{¶1} This matter was heard on March 13 and 14, 2012 in Columbus, Ohio before a panel consisting of members Charles E. Coulson, Lawrence Elleman and Judge Robert Ringland, chair. None of the panel members resides in the district from which the complaint arose or was a member of the probable cause panel that certified this matter to the Board.

{¶2} Relator was represented by Joseph M. Caligiuri. Respondent was represented by Richard L. Alkire and was present at the hearing. Evidence was presented to the panel in a lengthy two-day hearing. Relator and Respondent agreed to submit closing arguments by way of written memoranda.

{¶3} On August 16, 2011, the Board certified a one-count formal complaint against Respondent alleging that Respondent made statements that he knew to be false or with reckless disregard as to their truth or falsity concerning the qualifications or integrity of a judicial officer in violation of Prof. Cond. R. 8.2(a). Respondent was also charged with engaging in conduct

that adversely reflects on his fitness to practice law in violation of Prof. Cond. R. 8.4(h).

Respondent answered the complaint admitting the statements but denying that such statements were false as well as denying that they impugned the qualifications or integrity of the judicial officer.

{¶4} The specific allegations involve events occurring between the visiting Judge Richard Markus and the Respondent, who was one of the attorneys for the parties in the case of *First Federal Bank of Ohio v. John Angelini, Jr., et al.*, 03 CV 0098, Crawford County. The issues involve statements made during three time periods.

{¶5} The first time period involved an unrecorded telephone conference on October 9, 2008 between visiting Judge Markus and the attorneys in the *First Federal Bank* case.

{¶6} During the telephone conference, which was initiated primarily to address Respondent's request for a continuance of the trial, the conversation shifted to Respondent's alleged unwillingness to enter into stipulations, despite having filed proposed stipulations before the telephone conference.

{¶7} The following day, Respondent filed a motion to recuse Judge Markus along with an affidavit of disqualification with the Supreme Court of Ohio, alleging that Judge Markus exhibited bias and prejudice against Respondent during the telephone conference. In the affidavit of disqualification, Respondent alleged that Judge Markus stated that he "had lost all respect for Respondent," thought Respondent was "incompetent for embarking upon such a trial strategy," and "impliedly threatened to punish Respondent's client if Respondent further disappointed [Judge Markus]." Relator's Ex. 6.

{¶8} In response to Respondent's affidavit of disqualification, Judge Markus denied making the comments attributed to him. Relator's Ex. 7.

{¶9} Affidavits were subsequently filed by other attorneys involved in the conference which neither supported the position of Judge Markus' denial or the position of Respondent. The content of the alleged statements of Judge Markus was the only factual dispute in this hearing. Relator's Ex. 8; Respondent's Ex. A.

{¶10} At the request of the Supreme Court's Master Commissioner, Judge Markus postponed the trial to January 26, 2009, so the Chief Justice could consider Respondent's affidavit of disqualification.

{¶11} On October 24, 2008, the Supreme Court of Ohio denied Respondent's affidavit of disqualification and ordered the case to proceed before Judge Markus. Relator's Ex. 9. Relator submitted this evidence to explain subsequent actions of Respondent, but does not allege that Respondent's action or representation in filing the first affidavit is misconduct.

{¶12} The second time period involved Judge Markus presiding over the trial in the *First Federal Bank* case. On February 6, 2009, Judge Markus declared a mistrial based upon (1) inconsistencies between the jury's verdict and answers to interrogatories, and (2) Respondent's misconduct during the trial, which deprived the plaintiff of a fair trial. The misconduct alluded to involved trial incidents, some of which are set forth below. These incidents were offered by Relator to show the mindset and later motivation of Respondent in making allegations concerning Judge Markus in Respondent's later court filings. It is the position of Relator, that these incidents, as transcribed, show that Respondent's later allegations were false. Respondent, on the other hand, relied on these excerpts from the trial to show that his allegations concerning Judge Markus were justified and reasonable.

FINDINGS OF FACT

Jury Challenge for Cause

{¶13} During voir dire, Respondent made a challenge for cause concerning a juror who was a depositor of one of the banks involved. The following discussion occurred outside of the jury's hearing:

Markus: I will deny that challenge for cause. His is an issue that we discussed briefly before, and I will tell counsel that I have, in fact, made some effort to research this question. It arises more commonly with mutual insurance companies than with mutual banks. There are virtually no decisions dealing with mutual banks.

* * *

Markus: I might add that if, in fact, we were to accept your view and to disqualify all of the jurors who are depositors in one of these two institutions, we may well have to seek a change of venue.

Respondent: Wouldn't bother me, Your Honor.

Markus: Are you moving for that?

Respondent No, I am not.

Markus: Oh, all right.

Respondent: Does it come with a change of judge? (Emphasis added.)

Markus: I'm interested in your comment. Is that something that you think is appropriate?

Respondent: Well, Your Honor, I think we have all avoided speaking about the 400-pound gorilla elephant that's in this room. And I still must go on the record to say that the Angelini Defendants have no confidence that they can obtain a fair trial in this case.

Markus: I'm sorry that you have that view. I can assure you, sir, that I have no favor or disfavor for you or any of the lawyers or any of the litigants. I may disagree with your view on some legal issues or on some strategy that you choose to follow, but I can assure you that I will give you and every other litigant the best I can of a fair trial using the rules of law as I understand them and the evidence that I present—that I hear. I don't present evidence. I'm really sorry that you have to make that statement, Mr.—

Respondent: Indeed I am too, Your Honor.

Relator's Ex. 1, Vol. I at 184-187.

Cross-Examination

{¶14} During the *First Federal* trial, opposing counsel Chappellear called John Angelini in his case-in-chief. John Angelini was the father of Respondent's client and also one of Respondent's witnesses. [First Federal Tr. p. 68.] During a recess, Judge Markus advised Respondent that he was not permitted to use leading questions when questioning John Angelini.¹

Markus: I have advised counsel that my reading of Evidence Rule 611 indicates that a party questioning someone identified with an adverse party shall be permitted to use leading questions, and that is why I had no problem with the questions asked by counsel for the Plaintiff.

I suggested to other counsel that I view that this witness is identified with Jeffrey Angelini and, therefore, his counsel should avoid using leading questions; that counsel for Galion Bank can use leading questions. * * *

* * *

Respondent: Unless they call them in their direct case-in-chief, and that's what they did. And I'm entitled to cross examine in his case-in-chief, Your Honor.

Markus: I appreciate your position.

Respondent: Don't appreciate yours. (Emphasis added.)

* * *

Respondent: Let me assert one more, then. I think this is further evidence of a bias and prejudice of the Court, Your Honor.

Realtor's Ex. 1, Vol. IV at 542-546.

Use of Exhibit

{¶15} During the *First Federal* trial, Respondent, relying on the hearsay exception of

1. Judge Markus had spoken and written on Evid. R. 611 and previously advocated the modification of the "as on cross" rule. See Markus, J., "Cross-Examination of Adverse Parties," Ohio Judicial Conference Annual Meeting, *Evidence Evidence Evidence!* September 15, 2005.

past recollection recorded, was questioning a witness regarding a handwritten note the witness had made. Respondent displayed a blow-up of the note so the jury could see it. Id.

Respondent: Mr. Stone, looking at Exhibit 1 and looking at this, this poster, can you tell me whether or not this poster here is a true and accurate replica, although enlarged, of that note that you made?

Markus: Excuse me. May I see counsel? Would you take that down for a minute, please?

I presume that you're seeking to gain the admission of this evidence under Evidence Rule 803.5 as an exception to the hearsay rule. I think you have laid sufficient foundation for that purpose; however, 803.5 says it must be read to the jury but it may not be admitted into evidence.

Respondent: Right. I have not asked for its admission.

Markus: When you're displaying it, that's more than reading it. That's the problem.

Respondent: Well, I don't know Your Honor. I don't think that's the case. I think it's a visual aid. I don't think I'm seeking the admission of it.

Markus: I understand, but in this case—

Respondent: The other thing, Your Honor, there was no objection from Plaintiff's counsel here. Why—Why if he's not objecting, why is it bothering you? I mean he's—

Markus: I suppose because I try to follow the evidence rules. I don't know, maybe I shouldn't.

Respondent: Maybe you should just let us try our case. (Emphasis added.)

Markus: Maybe you should give a little deference in consideration for the judge. I think that's important, too.

Respondent: Yeah, but, Your Honor, throughout this—

Markus: That's enough. Do you have a view on the subject?

Chappelle: I object to the display of this document to the jury.

Relator's Ex. 1, Vol. XII at 1718-1719.

Jury Charge

{¶16} Before closing argument, Respondent had objected to Judge Markus' jury instruction.

Markus: It would assist me at this time if you tell me specifically what language you wish me to use instead of the language I have. I don't have those instructions immediately before me. If you want me to look at them again—

Respondent: Would it change your mind Your Honor? I doubt it would. But I have them in front of me.

Markus: If you wish me to consider something, you'll have to give it to me.

Respondent: I'm gonna need it back. Only copy I got left here.

Markus: Which part of this? You've given me something that contains a lot of subjects that were not meaningful before.

Respondent: That's why I submitted it before and I rest on them. And I know the Court does have it, so I refer the Court to the proposed jury instructions that I filed before.

Markus: Mr. Shimko, I don't have those in front of me. Now, the file in this case is extremely voluminous.

I'm now asking you not for a generic description of many things, but on this subject to Contract Duties, what language do you propose that is different from the language I have?

Relator's Ex. 1, Vol. XV at 2153-2154

{¶17} Respondent then proceeded to read his entire set of jury instructions into the record. Relator's Ex. 1, Vol. XV at 2154-2179. Respondent alleges that he was forced to do so by Judge Markus.

Closing Argument

{¶18} At Respondent's closing argument, the court *sua sponte* gave cautionary instructions.

Respondent: But the fact of the matter is, Ladies and Gentlemen, this bank here is acting like every other bank in this country throwing its weight around, saying it can do

what it wants. If we break it, you folks have to fix it and we don't have to pay the cost. We're above the law. That's what the message of First Federal was to you in this courtroom, Ladies and Gentlemen.

Markus: Ladies and Gentlemen, I instruct you to disregard an argument that appeals to your feelings about other banks.

Respondent: I made no such argument, Your Honor.

Markus: All right, if you didn't, then they won't worry about it.

Respondent: Then why make the instruction, Your Honor?

Respondent: I am going to leave you with one last thought, Ladies and Gentlemen, one last thought to reflect upon. Sir Edmund Burke, Prime Minister of Great Britain in the 18th century made the following comment: He said, "all that is necessary for tyranny to triumph is for good men and good women to do nothing."

Ladies and Gentlemen, it is time to stop doing nothing. It is time for you to decide and let your verdict rendered without bias, passion, prejudice say to your community that things as you have seen happen here shall not be permitted. And send that message, Ladies and Gentlemen, in the only language that banks understand. Thank you very much.

Markus: Again, Ladies and Gentlemen, you're to disregard any argument about what banks generally may or may not do.

Respondent: May I approach the bench, Your Honor?

Markus: Not at this time. Please sit down.

Respondent: I object to the comments, Your Honor.

Id. at 2321-2322.

{¶19} In addition to the scenarios discussed above, Respondent cites other examples during trial as well as pre- and post-trial to demonstrate that Judge Markus was biased and acted on his bias or at the very least made a strong showing of an appearance of bias. For example, Judge Markus ruled that based on Respondent's lateness in paying an expert witness fee, Respondent could not use the witness deposition at trial. While Respondent concedes he could be sanctioned, he argues that such sanction was unusually harsh, contrary to his experience in

practice, and designed to have an impact on the merits of the case. Respondent also relies on the court suggesting during trial that counsel read DR 8-102(b) further evincing the bias or appearance of bias toward him. Respondent also argues that the reasons for Judge Markus' granting of mistrial particularly the allegation of Respondent's misconduct, was unwarranted. Additionally, Respondent points to a post-trial hearing and phone conference where Judge Markus *sua sponte* held that because Respondent had not properly substituted parties he precluded Respondent from participating in the hearing and required him to pay for his own court reporter in the phone conference. Finally, Respondent presented two attorneys who witnessed many of the events; they opined that Judge Markus gave the appearance of bias against Respondent and his client.²

{¶20} The third series of events involve the filings of post-trial appellate briefs and additional affidavits of bias and prejudice. Respondent filed an appeal in the Third District Court of Appeals on September 1, 2009. Relator's Ex. 11. In his brief, Respondent made several comments regarding Judge Markus' integrity:

- Yet, the trial declared a mistrial holding that the jury was obviously confused and that appellant's counsel had engaged in unethical and inflammatory conduct. Neither ground for the court's decision are true.
- The trial court conducted itself throughout the entire trial under the influence of an ethical impediment that drove it to the point of becoming an advocate for the appellee, First Federal Bank. The ethical impediment under which the court conducted itself during this trial was an intense bias that it harbored against appellant's counsel for having previously filed an affidavit of disqualification against the person of the trial court. The trial court's bias so blinded its vision that it could not acknowledge that the jury was in no way confused and that it had returned a verdict consistent with this court's instructions and intentions to the letter. Even though the Answers to Interrogatories clearly established that Jeffrey Angelini ("Jeff") had proven not only his counterclaim, but also his affirmative defense to First Federal's case, the trial court contrived a reason to deny Jeffrey Angelini of his

2. Both attorneys had or were assisting Respondent for trial and viewed Judge Markus' remarks and action from that perspective.

verdict.

- When the trial court realized that the Answers to the Interrogatories mandated a judgment in favor of Jeffrey Angelini and against First Federal, the trial court's bias once again surfaced and he contrived a means to find that the jury was now somehow confused, even though they had followed his instructions to the letter.
- The court's ruling, motivated by its own agenda, was nothing but an abuse of discretion.
- Throughout the trial, the trial judge was so vindictive in his attitude toward appellant's counsel that he became an advocate for First Federal. In short, the trial judge was trying First Federal's counsel's case for him.

{¶21} In response to the Appellee brief, Respondent filed a reply brief, [Relator's Ex.

12] in which he further discussed Judge Markus's integrity:

- A closing argument, such as the one appellant's counsel made, could only be seen as inflammatory by someone that had become, for whatever reason, personally invested in the outcome of this case. No one else could see it as such.
- The absurdity of the trial court's conduct in this instance ought to underscore the whimsical lengths to which it was willing to go to deny Jeffrey Angelini his verdict.
- The entire proposition that appellant's counsel engaged in attorney misconduct is a convenience created by the person of the trial court to justify his own arbitrary and capricious conduct in rejecting his earlier adopted protocol and in granting a new trial.
- In fact, the trial court felt that its contention that the jury was confused was so thin that it had to resort to manufacturing allegations of attorney misconduct to obscure his own abuse of discretion.
- When the trial court realized that the jury had returned a verdict for Jeffrey Angelini, he arbitrarily disregarded the protocol he had originally adopted, and fabricated allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct.

{¶22} While the case was pending on appeal, Respondent filed a second affidavit of disqualification, [Relator's Ex. 13] casting many of the same allegations contained in his

appellate briefs. For example, Respondent asserted:

- The holding by [Judge Markus] to the effect that Affiant had committed misconduct was completely fabricated to make true on [Judge Markus'] threat to punish Affiant's client, and to deflect any potential examination into [Judge Markus'] own misconduct.
- In order to justify [Judge Markus'] decision to grant a new trial, he cited jury confusion, and for the first time in the trial, accused Affiant of multiple acts of misconduct throughout the trial and of engaging in inflammatory argument during closing argument. [Judge Markus] completely fabricated the basis for his decision to grant a new trial. He did so to obscure his own misconduct. He deliberately misrepresented the state of the record.
- [Judge Markus] had become such an advocate for First Federal in this action that he was also willing to fabricate grounds to support his ruling to take away the verdict in favor of Affiant's client.
- A trial judge is not a trial lawyer, but just as a trial lawyer is not permitted to fabricate grounds for appeals or motions, so too, a trial judge should not be permitted to fabricate reasons and grounds that do not exist in the record.

{¶23} By entry dated March 16, 2010, Chief Justice Moyer dismissed Respondent's second affidavit of disqualification. Relator's Ex. 15.

{¶24} On May 17, 2010, Respondent filed a third affidavit of disqualification against Judge Markus in which he again reiterated many of the allegations previously mentioned in this complaint. Relator's Ex. 16.

{¶25} On May 24, 2010, the Third District Court of Appeals affirmed Judge Markus' granting of a mistrial. Relator's Ex. 17. On May 26, 2010, Chief Justice Brown dismissed Respondent's third affidavit of disqualification, stating "Shimko is cautioned that the filing of any further frivolous, unsubstantiated, or repeated affidavits of disqualification involving the underlying case may result in an imposition of appropriate sanctions." Relator's Ex. 18.

{¶26} Respondent does not deny writing the above comments in his briefs or affidavits indicating he believed them to be true but denies he intended them to impugn Judge Markus'

integrity and claims that to find a violation of Prof. Cond. R. 8.2(a) and Prof. Cond. R. 8.4(h) would chill the right to file affidavits or bias of further litigants.

{¶27} Respondent and his counsel argue that Respondent had a “firmly held belief” that Judge Markus violated his duty as a judge and had a right to complain about the conduct of Judge Markus. Respondent in his closing argument asks rhetorically whether (Ohio) “attorneys must sacrifice their client’s constitutional right to a fair and impartial trial at the altar of judicial deference.”

{¶28} These arguments miss the point of the complaint. Respondent has had and continues to have the right to allege violations of judicial officers in the proper forum and in using the proper method under the rules provided by our Supreme Court. We stress that we find no violation in the filing or specific factual examples used to support these allegations. What we find as actionable violations are the use in appellate briefs and post-trial affidavits of ad hominem attacks and hyperbole; *i.e.*, “fabricating allegations,” “completely fabricating the basis for his decision,” “deliberately misrepresenting,” “contriving a reason,” “personally invested in the outcome.” Such use of hyperbole lessen the effectiveness of his appellate briefs.

{¶29} Respondent concedes that attorneys do not have an unfettered right to say whatever they desire about a member of the judiciary during or after trial. They apparently argue that as long as the subjective belief appears reasonable to the declarant, all comments are permissible regardless of the reckless disregard of the truth. Such subjective test is unworkable for the test of falsity or reckless disregard of it.

{¶30} Respondent has summarized this as a disagreement between two strong-willed personalities. It was, however, more than that. Under our system of jurisprudence, only one of the personalities is charged with the responsibility of seeing that the rules of evidence and trial

procedure are followed. The record disclosed that Judge Markus was quick to take control and address what he legitimately considered violations of such rules and left no doubt as to who was in control of the trial process. On the other hand, Respondent “clearly felt there was something personal there.” As a result, he was quick to take offense at the judge’s rulings and acted out his pique in a repeatedly disrespectful and confrontational manner.

CONCLUSION OF LAW

{¶31} The findings of Chief Justices Moyer and Brown as to lack of claimed bias of Judge Markus are binding on this panel and res judicata. *State v. Getsy*, 84 Ohio St.3d 180, 1998-Ohio-533; *Haney v. Trout*, 2002-Ohio-564. The findings of the Third District Court of Appeals as to Respondent’s misconduct are not res judicata or binding on this panel.

{¶32} In the alternative, upon independent review of the actions of Judge Markus no objective, reasonable evidence exists to support the allegations in Respondent’s briefs or affidavits as to the specific claimed impropriety or bias of Judge Markus. The fact that the trial court ruled against Respondent in matters of evidence or procedure does not equate to bias or show in and of itself improper conduct of the court.

{¶33} Respondent did not violate any code of conduct in filing his first affidavit of bias, and Relator is not seeking any claim for such.

{¶34} The following statements concerning a judicial officer which Respondent admits writing were proved by clear and convincing evidence to be unreasonable and objectively false with a *mens rea* of recklessness:

- “contriving a reason to deny Jeffrey Angelini his verdict;”
- “contriving a means to find the jury was somehow confused;”
- being “motivated by his own agenda;”

- “trying First Federal’s case for him;”
- being “personally invested in the outcome of the case;”
- “manufacturing allegations of attorney misconduct;”
- “fabricating allegations of attorney misconduct to camouflage his own unreasonable and injudicious conduct;”
- “completely fabricating the basis for his decision to grant a new trial;” and
- “deliberately misrepresenting the state of the record.”

{¶35} Requiring Respondent to be held accountable for such conduct does not violate or chill his First Amendment rights under the United State Constitution or his rights under Section II, Article I of the Ohio Constitution. *Disciplinary Counsel v Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048. Rules of Conduct that prohibit the impugning of the integrity of judges are not designed to shield judges from offensive criticism but are to preserve public confidence in the fairness and impartiality of our system of justice. *In re Disciplinary Action Against Graham*, (Minn.1990), 453 N.W.2d 313, cited in *Gardner*, supra.

{¶36} An objective standard rather than a subjective standard is to be used in determining the reasonableness of Respondent’s claims. See *Disciplinary Counsel v. Gardner*, supra; *Matter of Holtzman*, 78 N.Y.2d 184, 577 N.E.2d 30, 573 N.Y.S.2d 39, (1991).

{¶37} Relator has proved by clear and convincing that Respondent as such has violated Prof. Cond. R. 8.2(a) [making statements known to be false or with reckless disregard to their truth or falsity concerning the qualification or integrity of a judicial officer], and a violation of Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the fitness to practice law].

AGGRAVATION, MITIGATION, AND SANCTION

{¶38} Relator seeks a one-year suspension. Respondent seeks dismissal or, in the alternative, a fully stayed suspension.

{¶39} On four separate occasions, Respondent made written statements accusing a judicial officer of dishonesty and improper motive in his rulings. These statements were deliberate and calculated, not made in a moment of anger or off-the-cuff as well as made over a nine-month period. While Relator argues that Respondent made false statements during the disciplinary hearing, these were reiterations of his previous factual and legal assertions that he could not back up at hearing. The panel, however, does not find that these assertions were more in the manner of argument supporting his position and not false or deceptive evidence or practices at hearing. Respondent, however, was unapologetic and did not acknowledge any wrongful nature of his conduct but continued to maintain the reasonableness of his accusations of Judge Markus' bias. Respondent has received a public reprimand on June 23, 2009 from the Arizona Supreme Court from which he was reciprocally disciplined in Ohio. *Disciplinary Counsel v. Shimko*, (December 15, 2009), Case No. 2009-1957. These constitute factors in aggravation.

{¶40} In mitigation, Respondent was cooperative in the disciplinary process. No apparent damage has occurred to Judge Markus' reputation. Respondent has an excellent reputation with the bench and bar, is an intelligent, accomplished, competent attorney who zealously represents his clients to the best of his ability. Based on his demeanor, he subjectively, yet honestly, believes in the rightfulness of his position albeit his outlook may be clouded by the emotions involved in the clash of personalities. As such, we cannot conclude that his motives were dishonest. Finally, his sanctionable statements were made in a forum in such a way that only the bench and opposing counsel would see them; at no time was the sanctionable activity shown to the jury or general public.

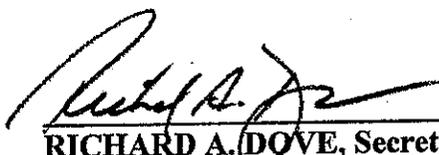
{¶41} Based upon the reasoning in *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416,

2003-Ohio-4048; and *Disciplinary Counsel v. Procter*, 131 Ohio St.3d 215, 2012-Ohio-684, as well as the consideration of the aggravating and mitigating factors above, this panel recommends a six-month suspension.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 7, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Timothy Andrew Shimko, be suspended from the practice of law for a period of six months. 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 Recommendation as those of the Board.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**

APP. B

RULE 8.2: JUDICIAL OFFICIALS

(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, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

Comment

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] [RESERVED]

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule. Rule 8.2(b) corresponds to DR 1-102(A)(1).

Comparison to ABA Model Rules of Professional Conduct

Rule 8.2(a) has been modified from the Model Rule to remove the phrase “public legal officers.” Those officers are not included in DR 8-102, and disciplinary authorities should not be responsible for investigating statements made during campaigns for county attorney, attorney general, or any other public legal position. The title of Rule 8.2 is modified to reflect this revision. Rule 8.2(b) is recast in terms of an express prohibition consistent with DR 1-102(A)(1).

APP. C

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

APP. D

RULE 25. Substitution of Parties

(A) Death.

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 through Rule 4.6 for the service of summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(B) Incompetency. If a party is adjudged incompetent, the court upon motion served as provided in subdivision (A) of this rule shall allow the action to be continued by or against his representative.

(C) Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (A) of this rule.

(D) Public officers; death or separation from office.

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name. The court however may require the addition of his name.

(E) Suggestion of death or incompetency Upon the death or incompetency of a party it shall be the duty of the attorney of record for that party to suggest such fact upon the record within fourteen days after he acquires actual knowledge of the death or incompetency of that party. The suggestion of death or incompetency shall be served on all other parties as provided in Rule 5.

[Effective: July 1, 1970.]

APP. E



1 of 1 DOCUMENT

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 124
*** Annotations current through May 7, 2012 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2313. COMMISSIONERS OF JURORS
CHALLENGE OF JURORS

Go to the Ohio Code Archive Directory

ORC Ann. 2313.42 (2012)

§ 2313.42. Causes for challenge of persons called as jurors; examination under oath [Renumbered]

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. A person is qualified to serve as a juror if he is an elector of the county and has been certified by the board of elections pursuant to *section 2313.06 of the Revised Code*. A person also is qualified to serve as a juror if he is eighteen years of age or older, is a resident of the county, would be an elector if he were registered to vote, regardless of whether he actually is registered to vote, and has been certified by the registrar of motor vehicles pursuant to *section 2313.06 of the Revised Code* or otherwise as having a valid and current driver's or commercial driver's license.

The following are good causes for challenge to any person called as a juror:

- (A) That he has been convicted of a crime which by law renders him disqualified to serve on a jury;
- (B) That he has an interest in the cause;
- (C) That he has an action pending between him and either party;
- (D) That he formerly was a juror in the same cause;
- (E) That he is the employer, the employee, or the spouse, parent, son, or daughter of the employer or employee, counselor, agent, steward, or attorney of either party;
- (F) That he is subpoenaed in good faith as a witness in the cause;
- (G) That he is akin by consanguinity or affinity within the fourth degree, to either party, or to the attorney of either party;

(H) That he or his spouse, parent, son, or daughter is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him;

(I) That he, not being a regular juror of the term, has already served as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months;

(J) That he discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court.

Each challenge listed in this section shall be considered as a principal challenge, and its validity tried by the court.

HISTORY:

GC § 11419-51; 114 v 193(207); 117 v 72; Bureau of Code Revision, 10-1-53; 127 v 419 (Eff 9-9-57); 133 v H 104 (Eff 9-12-69); 140 v H 183 (Eff 10-1-84); 143 v H 381. Eff 7-1-89.

NOTES:

Section Notes

Editor's Notes

This section will be renumbered as *RC § 2313.17* by 2012 HB 268, § 1, effective May 22, 2012.

Related Statutes & Rules

Cross-References to Related Statutes

Causes for challenge in criminal cases, *RC § 2945.25*.

Challenge of petit juror, *RC § 2313.43*.

No disqualification based on race, *RC § 2313.47*.

Procedure for removal of public officers; jury trial, *RC § 3.02*.

Selection of grand jury, *RC § 2939.02*.

Ohio Rules

Challenge for cause, *CrimR 24(B)*.

Competency of juror as witness, *EvR 606*.

Examination of jurors, *CivR 47(A)*; *CrimR 24(A)*.

Comparative Legislation

CHALLENGES, 28 USCS § 1870

CHALLENGES FOR CAUSE: CA--Cal Code Civ Proc §§ 229, 230

FL--Fla. R. Civ. P. 1.431

IL--705 Ill. Comp. Stat. § 305/13, 735 Ill. Comp. Stat. § 5/2-1105

IN--Burns Ind. Code Ann. § 34-36-3-5

KY--KRS § 29A.290

MI--MCLS § 600.1355

NY--NY CLS CPLR §§ 4108, 4110

PA--42 P.S. § 323

Practice Manuals & Treatises

Anderson's Ohio Civil Practice with Forms § 176.03 Challenges to Jury

Practice Checklists

Master Checklist: Jury Selection, *1-4-1 Ohio Litigation Checklists* § 1.01

Checklist: Initial Selection of Jury, *1-4-1 Ohio Litigation Checklists* § 1.02

Checklist: Voir Dire, *1-4-1 Ohio Litigation Checklists* § 1.04

Checklist: Challenges to Prospective Jurors, *1-4-1 Ohio Litigation Checklists* § 1.05

Checklist: Drafting Challenges to Prospective Jurors, *1-4-1 Ohio Litigation Checklists* § 1.06

Checklist: Filing Challenges to Prospective Jurors, *1-4-1 Ohio Litigation Checklists* § 1.07

Jury Instructions

OJI-CV 301.03 Qualifying the jury

ALR

Additional peremptory challenges because of multiple criminal charges. 5 ALR4th 533.

Comment Note. -- Beliefs regarding capital punishment as disqualifying juror in capital case -- post-Witherspoon cases. 39 ALR3d 550.

Competency of juror as affected by his membership in cooperative association interested in the case. *69 ALR3d 1296.*

Cure of prejudice resulting from statement by prospective juror during voir dire, in presence of other prospective jurors, as to defendant's guilt. *50 ALR4th 969.*

Disqualification, as juror, of residents or taxpayers of litigating political subdivision, in absence of specific controlling statute. *81 ALR2d 708.*

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. *75 ALR5th 295.*

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. *38 ALR4th 267.*

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family. *66 ALR4th 509.*

Examination and challenge of state case jurors on basis of attitudes toward homosexuality. *80 ALR5th 469.*

Juror's presence at or participation in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant. *6 ALR3d 519.*

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. *64 ALR3d 126.*

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. *63 ALR3d 1052.*

Jury: number of peremptory challenges allowable in civil case where there are more than two parties involved. *32 ALR3d 747.*

Necessity for presence of judge during voir dire examination of prospective jurors in state criminal case. *39 ALR4th 465.*

Prejudicial effect of juror's inability to comprehend English. *117 ALR5th 1.*

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts. *67 ALR2d 560.*

Professional or business relations between proposed juror and attorney as ground for challenge for cause. *52 ALR4th 964.*

Propriety of asking prospective female jurors questions on voir dire not asked of prospective male jurors, or vice versa. *39 ALR4th 450.*

Propriety of inquiry on voir dire as to juror's attitude toward, or acquaintance with literature dealing with, amount of damage awards. *63 ALR5th 285.*

Propriety, on voir dire in criminal case, of inquiries as to juror's possible prejudice if informed of defendant's prior convictions. *43 ALR3d 1081.*

Prospective juror's connection with insurance company as ground for challenge for cause. *9 ALR5th 102.*

Prospective juror's connection with insurance company as ground for challenge for cause in action for personal injuries or damage to property. 103 A.L.R. 511.

Racial or ethnic prejudice of prospective jurors as proper subject of inquiry or ground of challenge on voir dire in state criminal case. *94 ALR3d 15*.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. *95 ALR3d 172*.

Right of counsel in criminal case personally to conduct the voir dire examination of prospective jurors. *73 ALR2d 1187*.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors. *86 ALR3d 571*.

Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. *11 ALR3d 859*.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation -- post-Batson state cases. *63 ALR5th 375*.

Voir dire exclusions of men from state trial jury or jury panel -- post-*J.E.B. v. Alabama ex rel T.B.*, *511 U.S. 127*, Cases. *88 ALR5th 67*.

LexisNexis 50 State Surveys, Legislation & Regulations

Civil Juries

Case Notes & OAGs

ANALYSIS Acquaintance with victim Acquaintance with witness Attorney-client relationship Bias Challenges Deputy municipal court clerk Discretion of court Discretionary standard Disqualifications for cause Felony conviction of juror Grounds for challenge, generally Hearing impairment Ineffective assistance of counsel Insurance matters Medical malpractice New trial Oath of jurors Physical impairment of juror Physician/patient relationship Prior service Prosecutor as juror Relative of counsel Relative of judge Removal proper Standard of review State employees as jurors Sua sponte dismissal Time of juror challenge Voir dire generally

ACQUAINTANCE WITH VICTIM.

An indictment will not be presumed defective merely because the grand jury foreman had a casual acquaintance with the deceased victim: *State v. Thomas*, *80 Ohio App. 3d 452*, *609 N.E.2d 601*, *1992 Ohio App. LEXIS 2998 (1992)*, dismissed by *65 Ohio St. 3d 1462*, *602 N.E.2d 1171*, *1992 Ohio LEXIS 3025 (1992)*.

ACQUAINTANCE WITH WITNESS.

At defendant's trial for assault, theft, and robbery, defense counsel was not ineffective for failing to move for disqualification of a juror who disclosed a prior interaction with the deputy at a clothing store; because the trial court and counsel questioned the juror and he indicated he was not biased or more likely to believe the deputy's testimony, there was no basis for disqualification of the juror for cause under *R.C. 2313.42*. *State v. Primus*, *2011 Ohio App. LEXIS 4503*, *2011 Ohio 5497*, (Oct. 27, 2011).

Trial court did not abuse its discretion when it refused to declare a mistrial because defendant did not demonstrate

juror misconduct; the juror came forward with the information, without having discussed it with fellow jurors, and the juror was not even certain that the witness was the same person whom she had known. There was no evidence that the juror had concealed her potential knowledge about the witness during voir dire and the trial court was in the best position to weigh the juror's credibility when she stated that she could remain fair and impartial. *State v. McGlothin*, 2007 Ohio App. LEXIS 4227, 2007 Ohio 4707, (Sept. 14, 2007).

Trial court did not abuse its discretion in refusing to remove a witness (who revealed during voir dire that he knew one of the police officers who would be testifying) for cause because the witness was honest about his preconceptions about attorneys and police officers but repeatedly stated that he could put aside those preconceptions if he were to become a juror. The trial court believed him and the witness did not indicate that he would refuse to apply the applicable law. *State v. McGlothin*, 2007 Ohio App. LEXIS 4227, 2007 Ohio 4707, (Sept. 14, 2007).

Replacing a juror who recognized a witness was not an abuse of discretion where it found that the juror's ability to be fair and impartial was compromised under the provisions of R.C. 2313.42(J). *State v. Porter*, 2003 Ohio App. LEXIS 4925, 2003 Ohio 5485, (Oct. 14, 2003).

A juror's acquaintance with a witness is not a challenge for cause under R.C. 2313.42: *McQueen v. Goldey*, 20 Ohio App. 3d 41, 484 N.E.2d 712 (1984).

ATTORNEY-CLIENT RELATIONSHIP.

Revised Code § 2313.42(H) did not apply where the representation of the juror's father was several years earlier: *Jenkins v. Bazzoli*, 99 Ohio App. 3d 421, 650 N.E.2d 966, 1994 Ohio App. LEXIS 6076 (1994).

Where prospective juror stated one of the attorneys in the case was his personal attorney, his failure to disclose pending suit in which the attorney represented him and others as trustees of a religious society, was not prejudicial: *Eikenberry v. McFall*, 33 Ohio L. Ab. 525, 36 N.E.2d 27 (App 1941).

BIAS.

Trial court properly denied defense counsel's request to remove a juror for cause in defendant's criminal trial, as the juror clearly indicated that he could be fair and impartial with respect to testimony regarding fingerprints found at the scene. There was no cause to remove him under *Ohio R. Crim. P. 24(C)(9)* and (14), R.C. 2313.42(J), and 2313.43, as he indicated that he assumed defendant was innocent, that he could maintain the presumption of innocence until the conclusion of the evidence, and that he could listen to the evidence and judge it fairly. *State v. Phillips*, 2007 Ohio App. LEXIS 2005, 2007 Ohio 2150, (May 4, 2007).

There was no error under R.C. 2313.42(J) and 2313.43, and under *Ohio R. Crim. P. 24(C)*, by the trial court's excusing a prospective juror for cause where the juror indicated that she had previously worked as a victim/witness advocate, was the victim of a sex offense, and had been robbed twice at gunpoint. The juror had also indicated that she was not sure if she would be able to serve on the jury and be unbiased, and that she would tend to favor the defendant. *State v. Hinson*, 2006 Ohio App. LEXIS 3803, 2006 Ohio 3831, (July 27, 2006).

Even assuming that the trial court erred in refusing to remove two potential jurors on a husband and wife's motion to dismiss them on grounds they were biased, since the husband and wife were able to utilize their peremptory challenges to eliminate these allegedly biased jurors from the case, they were not prejudiced by the trial court's actions. *Lloyd v. Willis*, 2004 Ohio App. LEXIS 388, 2004 Ohio 427, (Jan. 28, 2004).

Where, during voir dire, by her answers to questions posed by counsel for plaintiffs and defendants, a prospective juror expressly stated that she could not be a fair and impartial juror in the case, the trial court erred in overruling the challenge for cause with respect to this prospective juror: *Hankinson v. Brown*, 3 Ohio App. 3d 249, 444 N.E.2d 1059 (1981).

CHALLENGES.

Trial court did not err in refusing to excuse a prospective juror for cause because the fact that his wife had privileges at the hospital did not equate her to being either an employee or an agent for purposes of *R.C. 2313.42(E)*. the patient offered no proof during the voir dire questioning of the juror that his wife was either an employee or an agent of the hospital. *Edge v. Fairview Hosp., 2011 Ohio App. LEXIS 1830, 2011 Ohio 2148, (May 5, 2011)*.

Trial court did not err by denying the patient's challenge to the prospective juror for cause because, although the juror was personally acquainted with counsel for the medical group, he stated that it would not be a factor in his ability to be a fair and impartial juror. He also stated that he took his duty seriously and that, both as a rule of law and civic responsibility, he believed he could be fair and impartial. *Edge v. Fairview Hosp., 2011 Ohio App. LEXIS 1830, 2011 Ohio 2148, (May 5, 2011)*.

Decisions on juror seating and retention were proper where good cause challenges were unsupported and the decision to excuse a juror who lacked impartiality was proper; specifically, the patient failed to prove relationships justifying the challenges and an impartial juror was properly removed. *Parusel v. Ewry, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004)*, appeal denied by *102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004)*.

DEPUTY MUNICIPAL COURT CLERK.

A deputy municipal court clerk is not automatically disqualified from serving as a juror: *State v. McKinney, 80 Ohio App. 3d 470, 609 N.E.2d 613, 1992 Ohio App. LEXIS 2864 (1992)*.

DISCRETION OF COURT.

Trial court did not abuse its discretion by refusing to excuse a juror from the jury because, based on the juror's responses to the trial court's questions, it was reasonable for the trial court to conclude that, despite the juror's prior professional relationship with the witness (the juror was a nurse and had trained under the witness), the juror would be fair and impartial. *State v. Albert, 2006 Ohio App. LEXIS 6805, 2006 Ohio 6902, (Dec. 26, 2006)*.

The determination of whether a prospective juror should be disqualified for cause pursuant to *R.C. 2313.42(J)* is a discretionary function of the trial court. Such determination will not be reversed on appeal absent an abuse of discretion. (*Maddex v. Columer [1926], 114 OS 178, 151 NE 56, approved and followed.*): *Berk v. Matthews, 53 Ohio St. 3d 161, 559 N.E.2d 1301, 1990 Ohio LEXIS 352 (1990)*.

DISCRETIONARY STANDARD.

Trial court did not err in refusing to remove a juror for cause, based upon the possibility that she had a previous adversarial relationship with counsel for an executrix of a deceased patient's estate in the patient's medical malpractice action, as there was no showing under *R.C. 2313.42* and *2313.43* that the juror was partial because she indicated that she did not recall ever seeing counsel previously. The issue had not been waived under *Ohio R. Civ. P. 47(C)*, as the executrix had exhausted all of her peremptory challenges. *Iglodi v. Tolentino, 2007 Ohio App. LEXIS 1832, 2007 Ohio 1982, (Apr. 26, 2007)*.

Though subsequent courts apply the discretionary standard to all of *R.C. 2313.42*, caselaw limits its application to *R.C. 2313.42(J)*; the Lucas County, Sixth Appellate District, Court of Appeals (Ohio) views those cases which apply the caselaw beyond application to *R.C. 2313.42(J)* as erroneous. *Parusel v. Ewry, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004)*, appeal denied by *102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004)*.

DISQUALIFICATIONS FOR CAUSE.

Record supported the trial court's ruling on the challenge for cause because the juror clearly indicated that she could set aside anything regarding the case that she may have heard or read outside the court and that she could make her decision based only on the facts and the evidence and indicated that she could be fair to both the State and to defendant in making that decision. *State v. Rodvold*, 2012 Ohio App. LEXIS 552, 2012 Ohio 619, (Feb. 17, 2012).

Principal challenges to prospective jurors incorporated into R.C. 2313.42(A) through (I), which are tried to the court, establish a conclusive presumption of disqualification if found valid. The court must dismiss the prospective juror and may not rehabilitate or exercise discretion to seat the prospective juror upon the prospective juror's pledge of fairness: *Hall v. Banc One Mgmt. Corp.*, 114 Ohio St. 3d 484, 873 N.E.2d 290, 2007 Ohio LEXIS 2220, 2007 Ohio 4640, (2007).

Trial court did not abuse its discretion when it denied defendant's request to dismiss a deputy sheriff for cause during jury selection. The deputy told the trial court that the county sheriff's office had not been the investigating agency in the case, that the deputy could fairly assess the investigating officer's credibility, and that the deputy could follow the court's instructions. *State v. Farr*, 2007 Ohio App. LEXIS 2900, 2007 Ohio 3136, (June 25, 2007).

Juror who has been challenged for cause is excused if the court has any doubt as to the juror being entirely unbiased under R.C. 2313.42; thus, defendant's rights under the Fourteenth Amendment and Ohio Const., art. I, § 2 were not violated by racial discrimination during the jury selection process, under the plain error standard, when the state removed a potential juror for cause where the juror's son had been convicted of vehicular homicide and where defense counsel in this case had prosecuted the juror's son because the trial court properly found that the connection between the juror and defense counsel, along with the feelings that could be resurrected through the trial, was a sufficient justification for granting the prosecutor's challenge for cause and because defendant agreed with the removal. *State v. Turner*, 2004 Ohio App. LEXIS 1379, 2004 Ohio 1545, (2004).

FELONY CONVICTION OF JUROR.

Denial of motion for a new trial pursuant to *Ohio R. Crim. P. 33(A)(2)* based on juror's failure to reveal a drug conviction was not an abuse of discretion, as there was no showing that the juror concealed the information intentionally, and counsel could have asked about prior convictions; disqualification requires showings that the juror was not impartial and that his misconduct caused prejudice. *State v. Hughes*, 2003 Ohio App. LEXIS 5447, 2003 Ohio 6094, (2003), appeal denied by 101 Ohio St. 3d 1490, 2004 Ohio 1293, 805 N.E.2d 540, 2004 Ohio LEXIS 614 (2004).

A prospective juror should have been questioned as to whether his rights had been restored after his felony conviction, but the fact that the same prosecutor and police officer were involved in both cases was sufficient to support removal for cause: *State v. Madrigal*, 87 Ohio St. 3d 378, 721 N.E.2d 52, 2000 Ohio LEXIS 3, 2000 Ohio 448, (2000), writ of certiorari denied by 531 U.S. 838, 121 S. Ct. 99, 148 L. Ed. 2d 58, 2000 U.S. LEXIS 5353, 69 U.S.L.W. 3226 (2000).

The fact that a juror who had been convicted of a felony remained silent when the jury was asked by the court whether any juror had been so convicted did not entitle the defendant to a new trial absent a showing of prejudice: *Firestone v. Freiling*, 91 Ohio L. Ab. 1, 188 N.E.2d 91 (CP 1963).

GROUNDS FOR CHALLENGE, GENERALLY.

Defendant's motion to excuse a prospective juror for cause at a trial for numerous sexual offenses relating to minors was properly denied because the prospective juror, who had previously served on a sexual molestation jury, told the trial court that he was a "blank page." *State v. Coleman*, 2003 Ohio App. LEXIS 5763, 2003 Ohio 6440, (2003).

Pursuant to R.C. 2313.42(J), if a juror indicates that he cannot be fair and impartial, he is to be excused for cause;

the trial court did not abuse its discretion in making a determination not to excuse a pediatrician from the venire where she was rehabilitated and responded that she could apply the facts of the case impartially to the court's instructions. *Chang v. Cleveland Clinic Found.*, 2003 Ohio App. LEXIS 5557, 2003 Ohio 6167, (Nov. 20, 2003).

The court did not err by refusing to excuse a juror who stated a general antipathy for big business where the juror indicated he could follow the law in the case at hand: *Zachariah v. Rockwell Int'l*, 127 Ohio App. 3d 298, 712 N.E.2d 811, 1998 Ohio App. LEXIS 2137 (1998).

Revised Code § 2313.42 lists a number of causes for challenge of persons called as jurors but neither idiocy, insanity or other lack of qualifications of an elector appear among them: *Baker v. Keller*, 15 Ohio Misc. 215, 237 N.E.2d 629 (CP 1968).

The fact that a prospective juror is the wife of an agent for an insurance company which has issued a liability insurance policy covering liability of a party to the suit is not of itself ground for challenge for cause either under R.C. 2313.42 or at common law: *General Exchange Ins. Co. v. Elizer*, 32 Ohio L. Ab. 579, 31 N.E.2d 147 (App 1940).

In an action against a city for injury on a defective sidewalk, the fact that a juror is a resident and taxpayer is not a disqualification (R.C. 2313.42), where the court determined that if accepted, he would render a fair and impartial verdict: *Maddex v. Columer*, 114 Ohio St. 178, 151 N.E. 56 (1926).

HEARING IMPAIRMENT.

Excluding a deaf juror for cause was valid where an interpreter was not available to assist the juror: *Burke v. Schaffner*, 114 Ohio App. 3d 655, 683 N.E.2d 861, 1996 Ohio App. LEXIS 4653 (1996).

INEFFECTIVE ASSISTANCE OF COUNSEL.

In a murder prosecution, where a prospective juror stated that the murder of her friend 12 years earlier invoked no sympathy for defendant or the victim and she could be impartial, as the trial court could have properly denied a challenge for cause, appellate counsel was not ineffective for failing to argue that trial counsel was ineffective for not removing the prospective juror for cause. *State v. Green*, 2003 Ohio App. LEXIS 4906, 2003 Ohio 5442, (2003).

INSURANCE MATTERS.

In the examination of a juror upon his voir dire, in cases involving property damage, personal injury, or both, he may be asked the general question whether he has or has had any connection with or interest in a casualty insurance company. If the answer be in the affirmative, the juror may then be asked the name of such company and the nature of his connection with or interest therein: *Dowd-Feder, Inc. v. Truesdell*, 130 Ohio St. 530, 200 N.E. 762 (1936), [affirming 17 Ohio L. Ab. 647; reversing third syllabus of *Vega v. Evans*, 128 Ohio St. 535, 191 N.E. 757, 95 A.L.R. 381.].

MEDICAL MALPRACTICE.

Automatic exclusion of nurses and other medical personnel from medical malpractice juries is not within the realm of R.C. 2313.42: *Sowers v. Middletown Hosp.*, 89 Ohio App. 3d 572, 626 N.E.2d 968, 1993 Ohio App. LEXIS 3026 (1993).

NEW TRIAL.

OATH OF JURORS.

Failure to swear the jury panel before voir dire examination, as required by this section does not constitute

prejudicial error, where no request was made to swear the panel, no exception was taken for failure to do so, no exception was noted to the manner of the selection of the jury and there is no suggestion of prejudice resulting from failure to swear the panel: *Thormyer v. Rauch*, 108 Ohio App. 432, 162 N.E.2d 190 (1958).

PHYSICAL IMPAIRMENT OF JUROR.

In deciding a challenge for cause to a prospective juror on the basis of a physical impairment, the court must determine, in light of the specific evidence to be presented, whether any reasonable and effective accommodation can be made to enable the juror to serve. In making that determination, the court must balance the public interest in equal access to jury service against the right of the accused to a fair trial, the latter being the predominant concern of the court. The right to a fair trial requires that all members of the jury have the ability to understand all of the evidence presented, to evaluate that evidence in a rational manner, to communicate effectively with other jurors during deliberations, and to comprehend the applicable legal principles as instructed by the court. An accommodation made to enable a physically impaired individual to serve as a juror must afford the accused a fair trial. A hearing impairment by itself does not render a prospective juror incompetent to serve on a jury, but when the accommodation afforded by the court fails to enable a juror to perceive and evaluate the evidence, the accused is deprived of a fair trial. To avoid such situations, a trial court must determine whether reasonable accommodations will enable an impaired juror to perceive and evaluate all relevant and material evidence, and when no such accommodation exists, the court must excuse the juror for cause: *State v. Speer*, 124 Ohio St. 3d 564, 925 N.E.2d 584, 2010 Ohio LEXIS 449, 2010 Ohio 649, (2010).

PHYSICIAN/PATIENT RELATIONSHIP.

Physician/patient relationship is not one of those enumerated in R.C. 2313.42(A)-(I), so the determination for cause concerning that issue is within the court's discretion in this area. *Parusel v. Ewry*, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004), appeal denied by 102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004).

PRIOR SERVICE.

Revised Code § 2313.42 provides as a cause for challenge that a person called, not being a regular juror, has served already as a talesman in a court of record within the preceding twelve months: *Conrad v. Kerby*, 66 Ohio App. 359, 31 N.E.2d 168 (1940).

PROSECUTOR AS JUROR.

Trial court erred in denying a challenge for cause of a prosecutor who was in the jury venire, thereby forcing the defense to utilize a peremptory challenge; the prosecutor had a personal history not only with defendant, but with his family as well. *State v. Freshwater*, 2004 Ohio App. LEXIS 339, 2004 Ohio 384, (2004).

RELATIVE OF COUNSEL.

Disqualifying trial counsel's relative from the jury, notwithstanding the absence of that reason for disqualification from Ohio R. Crim. P. 24(B), was proper because R.C. 2313.42 applies instead of that rule where the two do not conflict. *State v. Tenace*, 2003 Ohio App. LEXIS 3143, 2003 Ohio 3458, (2003), affirmed in part and reversed in part by, remanded by 109 Ohio St. 3d 255, 2006 Ohio 2417, 847 N.E.2d 386, 2006 Ohio LEXIS 1571 (2006).

RELATIVE OF JUDGE.

A prospective juror who is a relative of the trial judge can only be challenged when there is an actual showing of bias: *State v. Brumley*, 1996 Ohio App. LEXIS 1390 (11th Dist. 1996), dismissed by 77 Ohio St. 3d 1468, 673 N.E.2d 135, 1996 Ohio LEXIS 2117 (1996).

REMOVAL PROPER.

Trial court did not abuse its discretion by removing a juror because the prospective juror stated that she did not feel comfortable sitting in judgment of others and that she therefore could not render a verdict in accordance with the law. Although the juror vacillated somewhat in her answers to the court, her final response indicated that she could not faithfully discharge the duties of a juror. *State v. Alexander*, 2012 Ohio App. LEXIS 439, 2012 Ohio 460, (Feb. 10, 2012).

STANDARD OF REVIEW.

R.C. 2313.42(J) and R.C. 2313.43, to which R.C. 2313.42(J) is related, are reviewed on an abuse of discretion standard; the trial court's determination must be affirmed absent a finding by the appellate court that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Parusel v. Ewry*, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004), appeal denied by 102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004).

STATE EMPLOYEES AS JURORS.

Revised Code §§ 2313.42(E) and 2945.25 do not disqualify a state employee from serving as a juror in a criminal case where the state is a party and where actual bias is lacking: *State v. Sims*, 20 Ohio App. 2d 329, 253 N.E.2d 822 (1969).

SUA SPONTE DISMISSAL.

Implicit in *CrimR 24* is a trial court's authority to sua sponte dismiss a juror when it determines that the juror is not impartial or is otherwise unsuitable for service: *State v. Midwest Pride IV*, 131 Ohio App. 3d 1, 721 N.E.2d 458, 1998 Ohio App. LEXIS 6304 (1998), dismissed by 85 Ohio St. 3d 1486, 709 N.E.2d 1214, 1999 Ohio LEXIS 1576 (1999), writ of certiorari denied by 528 U.S. 965, 120 S. Ct. 400, 145 L. Ed. 2d 312, 1999 U.S. LEXIS 7099, 68 U.S.L.W. 3289 (1999).

TIME OF JUROR CHALLENGE.

A challenge made after trial in progress is properly overruled: *Moody v. Vickers*, 79 Ohio App. 218, 72 N.E.2d 280 (1947).

VOIR DIRE GENERALLY.

Trial court did not abuse its discretion in allowing the state's voir dire as to four contested questions, as said questions were part of a long line of questioning regarding the jurors' feelings on voting in accordance with the law, especially a law wherein the government was imposing regulations upon license holders which might have seemed onerous or unfair. Inquiries designed to determine if the juror will be unbiased and will vote in accordance with law were permissible, and such inquiries could form a basis for removal under R.C. 2313.42(J). *State v. Saxton*, 2003 Ohio App. LEXIS 2831, 2003 Ohio 3158, (2003), appeal denied by 100 Ohio St. 3d 1432, 2003 Ohio 5396, 797 N.E.2d 512, 2003 Ohio LEXIS 2720 (2003).

The examination of persons called to act as jurors is limited to such matters as tend to disclose their qualifications in that regard, under the established provisions and rules of law, and hypothetical questions are not competent when their evident purpose is to have the jurors indicate in advance what their decision will be under a certain state of the evidence or upon a certain state of facts: *State v. Huffman*, 86 Ohio St. 229, 99 N.E. 295 (1912).

APP. F



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Page's Ohio Revised Code Annotated:
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*** ARCHIVE DATA ***

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through file 47
*** Annotations current through July 22, 2011 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2313. COMMISSIONERS OF JURORS
CHALLENGE OF JURORS

ORC Ann. 2313.43 (2011)

§ 2313.43. Challenge of petit juror

In addition to the causes listed under *section 2313.42 of the Revised Code*, any petit juror may be challenged on suspicion of prejudice against or partiality for either party, or for want of a competent knowledge of the English language, or other cause that may render him at the time an unsuitable juror. The validity of such challenge shall be determined by the court and be sustained if the court has any doubt as to the juror's being entirely unbiased.

HISTORY:

GC § 11419-52; 114 v 193(208); Bureau of Code Revision. Eff 10-1-53.

NOTES:

Related Statutes & Rules

Cross-References to Related Statutes

Causes for challenge in criminal cases, *RC § 2945.25*.

Ohio Rules

Challenge for cause, *CrimR 24(B)*.

Jurors, *CivR 47*.

Practice Manuals & Treatises

Anderson's Ohio Civil Practice with Forms § 176.03 Challenges to Jury

Practice Checklists

Master Checklist: Jury Selection, *1-4-1 Ohio Litigation Checklists § 1.01*

Checklist: Initial Selection of Jury, *1-4-1 Ohio Litigation Checklists § 1.02*

ALR

Bias, prejudice, or conduct of individual member or members of jury panel as ground for challenge to array or to entire panel. *76 ALR2d 678*.

Claustrophobia or other neuroses of juror as subject of inquiry on voir dire or of disqualification of juror. *20 ALR3d 1420*.

Disqualification, as jurors, of residents or taxpayers of litigating political subdivision, in absence of specific controlling statute. *81 ALR2d 708*.

Disqualification or exemption of juror for conviction of, or prosecution for, criminal offense. *75 ALR5th 295*.

Effect of juror's false or erroneous answer on voir dire regarding previous claims or actions against himself or his family. *66 ALR4th 509*.

Effect of juror's false or erroneous answer on voir dire in personal injury or death action as to previous claims or actions for damages by himself or his family. *38 ALR4th 267*.

Fact that juror in criminal case, or juror's relative or friend, has previously been victim of criminal incident as ground of disqualification. *65 ALR4th 743*.

Juror's presence at or participation in trial of criminal case (or related hearing) as ground of disqualification in subsequent criminal case involving same defendant. *6 ALR3d 519*.

Juror's previous knowledge of facts of civil case as disqualification. *73 ALR2d 1312*.

Juror's voir dire denial or nondisclosure of acquaintance or relationship with attorney in case, or with partner or associate of such attorney, as ground for new trial or mistrial. *64 ALR3d 126*.

Jury: membership in racially biased or prejudiced organization as proper subject of voir dire inquiry or ground for challenge. *63 ALR3d 1052*.

Jury: number of peremptory challenges allowed in criminal case, where there are two or more defendants tried together. *21 ALR3d 725*.

Prejudicial effect of juror's inability to comprehend English. *117 ALR5th 1*.

Prejudicial effect of reference on voir dire examination of jurors to settlement efforts. *67 ALR2d 560*.

Prior service on grand jury which considered indictment against accused as disqualification for service on petit jury. *24 ALR3d 1236*.

Propriety of inquiry on voir dire as to juror's attitude toward amount of damages asked. *82 ALR2d 1420*.

Professional or business relations between proposed juror and attorney as ground for challenge for cause. *52 ALR4th 964*.

Racial, religious, economic, social, or political prejudice of proposed juror as proper subject of inquiry or ground of challenge on voir dire in civil case. *72 ALR2d 905*.

Relationship of juror to witness in civil case as ground of disqualification. *85 ALR2d 851*.

Religious belief, affiliation, or prejudice of prospective juror as proper subject of inquiry or ground for challenge on voir dire. *95 ALR3d 172*.

Use of peremptory challenges to exclude persons from criminal jury based on religious affiliation -- post-Batson state cases. *63 ALR5th 375*.

Voir dire inquiry, in personal injury or death case, as to prospective juror's acquaintance with literature dealing with amounts of verdicts. *89 ALR2d 1177*.

LexisNexis 50 State Surveys, Legislation & Regulations

Civil Juries

Case Notes & OAGs

ANALYSIS Authority of court Challenge during trial Doubt as to impartiality General antipathy for big business Grounds for challenge, generally Standard of review

AUTHORITY OF COURT.

There was no error under *RC §§ 2313.42(J) and 2313.43*, and under *Ohio R. Crim. P. 24(C)*, by the trial court's excusing a prospective juror for cause where the juror indicated that she had previously worked as a victim/witness advocate, was the victim of a sex offense, and had been robbed twice at gunpoint. The juror had also indicated that she was not sure if she would be able to serve on the jury and be unbiased, and that she would tend to favor the defendant. *State v. Hinson, 2006 Ohio App. LEXIS 3803, 2006 Ohio 3831, (July 27, 2006)*.

Revised Code § 2313.43 leaves to the trial court the determination of the validity of a challenge of a juror, with the admonition that it be sustained if the court has any doubt as to the juror's being entirely unbiased: *Carle v. Courtright, 69 Ohio App. 69, 40 N.E.2d 431 (1941)*.

CHALLENGE DURING TRIAL.

Where a juror did not disclose obviously relevant information until after the trial began and one of the parties

moved to strike the juror at the close of evidence, the court should have made further inquiry as to whether the juror should have been dismissed: *Jenkins v. Bazzoli*, 99 Ohio App. 3d 421, 650 N.E.2d 966, 1994 Ohio App. LEXIS 6076 (1994).

Where, after the trial is in progress, a juror makes known to the court he is acquainted with defendant, it was not error to refuse to declare a mistrial: *Moody v. Vickers*, 79 Ohio App. 218, 72 N.E.2d 280 (1947).

DOUBT AS TO IMPARTIALITY.

Trial court did not err in refusing to remove a juror for cause, based upon the possibility that she had a previous adversarial relationship with counsel for an executrix of a deceased patient's estate in the patient's medical malpractice action, as there was no showing under RC §§ 2313.42 and 2313.43 that the juror was partial because she indicated that she did not recall ever seeing counsel previously. The issue had not been waived under Ohio R. Civ. P. 47(C), as the executrix had exhausted all of her peremptory challenges. *Iglodi v. Tolentino*, 2007 Ohio App. LEXIS 1832, 2007 Ohio 1982, (Apr. 26, 2007).

Where the court expressed substantial doubt as to the impartiality of a juror in a highway appropriation case, the state's challenge for cause should have been granted: *In re Leas*, 5 Ohio App. 3d 120, 449 N.E.2d 780 (1981).

GENERAL ANTI-PATHY FOR BIG BUSINESS.

The court did not err by refusing to excuse a juror who stated a general antipathy for big business where the juror indicated he could follow the law in the case at hand: *Zachariah v. Rockwell Int'l*, 127 Ohio App. 3d 298, 712 N.E.2d 811, 1998 Ohio App. LEXIS 2137 (1998).

GROUNDINGS FOR CHALLENGE, GENERALLY.

Trial court properly denied defense counsel's request to remove a juror for cause in defendant's criminal trial, as the juror clearly indicated that he could be fair and impartial with respect to testimony regarding fingerprints found at the scene; there was no cause to remove him under Ohio R. Crim. P. 24(C)(9) and (14), RC §§ 2313.42(J), and 2313.43, as he indicated that he assumed defendant was innocent, that he could maintain the presumption of innocence until the conclusion of the evidence, and that he could listen to the evidence and judge it fairly. *State v. Phillips*, 2007 Ohio App. LEXIS 2005, 2007 Ohio 2150, (May 4, 2007).

Decisions on juror seating and retention were proper where good cause challenges were unsupported and the decision to excuse a juror who lacked impartiality was proper; specifically, the patient failed to prove relationships justifying the challenges and an impartial juror was properly removed. *Parusel v. Ewry*, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004), appeal denied by 102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004), criticized by *Hall v. Banc One Mgmt. Corp.*, 2006 Ohio 913, 2006 Ohio App. LEXIS 808 (Ohio Ct. App., Franklin County Feb. 28, 2006).

Trial court did not abuse its discretion by refusing to remove two prospective jurors who expressed the view that they would lean in favor of the defendant where both jurors stated that they could be fair to both sides: *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App. 3d 351, 823 N.E.2d 945, 2004 Ohio App. LEXIS 6382, 2004 Ohio 6853, (2004), appeal dismissed by 108 Ohio St. 3d 1209, 2006 Ohio 551, 842 N.E.2d 58, 2006 Ohio LEXIS 385 (2006).

Challenge for cause for a prospective juror whose spouse worked at the prosecutor's office was properly denied because the juror said that he could honor his oath in serving on the jury, regardless of his spouse's employment status. *State v. Reid*, 2003 Ohio App. LEXIS 5433, 2003 Ohio 6079, (2003), appeal denied by 102 Ohio St. 3d 1530, 2004 Ohio 3580, 811 N.E.2d 1150, 2004 Ohio LEXIS 1638 (2004), appeal denied by 103 Ohio St. 3d 1406, 2004 Ohio 3980, 812 N.E.2d 1288, 2004 Ohio LEXIS 1842 (2004).

Prospective juror was properly excused for cause because he indicated that he could not judge others. *State v. Reid*, 2003 Ohio App. LEXIS 5433, 2003 Ohio 6079, (2003), appeal denied by 102 Ohio St. 3d 1530, 2004 Ohio 3580, 811 N.E.2d 1150, 2004 Ohio LEXIS 1638 (2004), appeal denied by 103 Ohio St. 3d 1406, 2004 Ohio 3980, 812 N.E.2d 1288, 2004 Ohio LEXIS 1842 (2004).

STANDARD OF REVIEW.

RC § 2313.42(J) and RC § 2313.43, to which RC § 2313.42(J) is related, are reviewed on an abuse of discretion standard; the trial court's determination must be affirmed absent a finding by the appellate court that the trial court's attitude is arbitrary, unreasonable, or unconscionable. *Parusel v. Ewry*, 2004 Ohio App. LEXIS 355, 2004 Ohio 404, (2004), appeal denied by 102 Ohio St. 3d 1472, 2004 Ohio 2830, 809 N.E.2d 1158, 2004 Ohio LEXIS 1384 (2004), criticized by *Hall v. Banc One Mgmt. Corp.*, 2006 Ohio 913, 2006 Ohio App. LEXIS 808 (Ohio Ct. App., Franklin County Feb. 28, 2006).

APP. G

RULE 611. Mode and Order of Interrogation and Presentation

(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(B) Scope of cross-examination. Cross-examination shall be permitted on all relevant matters and matters affecting credibility.

(C) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

[Effective: July 1, 1980; amended effectively July 1, 2007.]

APP. H

RULE 49. Verdicts; Interrogatories

(A) General verdict. A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used.

(B) General verdict accompanied by answer to interrogatories. The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

(C) Special verdicts abolished. Special verdicts shall not be used.

[Effective: July 1, 1970; amended effective July 1, 1980.]

APP. I



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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 124
*** Annotations current through May 7, 2012 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2701. COURTS OF RECORD -- GENERAL PROVISIONS

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ORC Ann. 2701.03 (2012)

§ 2701.03. Disqualification of common pleas judge; proceedings after affidavit filed against common pleas or appellate judge

(A) If a judge of the court of common pleas allegedly is interested in a proceeding pending before the court, allegedly is related to or has a bias or prejudice for or against a party to a proceeding pending before the court or a party's counsel, or allegedly otherwise is disqualified to preside in a proceeding pending before the court, any party to the proceeding or the party's counsel may file an affidavit of disqualification with the clerk of the supreme court in accordance with division (B) of this section.

(B) An affidavit of disqualification filed under *section 2101.39 or 2501.13 of the Revised Code* or division (A) of this section shall be filed with the clerk of the supreme court not less than seven calendar days before the day on which the next hearing in the proceeding is scheduled and shall include all of the following:

(1) The specific allegations on which the claim of interest, bias, prejudice, or disqualification is based and the facts to support each of those allegations or, in relation to an affidavit filed against a judge of a court of appeals, a specific allegation that the judge presided in the lower court in the same proceeding and the facts to support that allegation;

(2) The jurat of a notary public or another person authorized to administer oaths or affirmations;

(3) A certificate indicating that a copy of the affidavit has been served on the probate judge, judge of a court of appeals, or judge of a court of common pleas against whom the affidavit is filed and on all other parties or their counsel;

(4) The date of the next scheduled hearing in the proceeding or, if there is no hearing scheduled, a statement that there is no hearing scheduled.

(C) (1) Except as provided in division (C)(2) of this section, when an affidavit of disqualification is presented to the

clerk of the supreme court for filing under division (B) of this section, all of the following apply:

(a) The clerk of the supreme court shall accept the affidavit for filing and shall forward the affidavit to the chief justice of the supreme court.

(b) The supreme court shall send notice of the filing of the affidavit to the probate court served by the judge if the affidavit is filed against a probate court judge, to the clerk of the court of appeals served by the judge if the affidavit is filed against a judge of a court of appeals, or to the clerk of the court of common pleas served by the judge if the affidavit is filed against a judge of a court of common pleas.

(c) Upon receipt of the notice under division (C)(1)(b) of this section, the probate court, the clerk of the court of appeals, or the clerk of the court of common pleas shall enter the fact of the filing of the affidavit on the docket of the probate court, the docket of the court of appeals, or the docket in the proceeding in the court of common pleas.

(2) The clerk of the supreme court shall not accept an affidavit of disqualification presented for filing under division (B) of this section if it is not timely presented for filing or does not satisfy the requirements of divisions (B)(2), (3), and (4) of this section.

(D) (1) Except as provided in divisions (D)(2) to (4) of this section, if the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, the affidavit deprives the judge against whom the affidavit was filed of any authority to preside in the proceeding until the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, rules on the affidavit pursuant to division (E) of this section.

(2) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may do any of the following that is applicable:

(a) If, based on the scheduled hearing date, the affidavit was not timely filed, the judge may preside in the proceeding.

(b) If the proceeding is a domestic relations proceeding, the judge may issue any temporary order relating to spousal support pendente lite and the support, maintenance, and allocation of parental rights and responsibilities for the care of children.

(c) If the proceeding pertains to a complaint brought pursuant to Chapter 2151. or 2152. of the Revised Code, the judge may issue any temporary order pertaining to the relation and conduct of any other person toward a child who is the subject of a complaint as the interest and welfare of the child may require.

(3) A judge against whom an affidavit of disqualification has been filed under divisions (B) and (C) of this section may determine a matter that does not affect a substantive right of any of the parties.

(4) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section, if the chief justice of the supreme court, or a justice of the supreme court designated by the chief justice, denies the affidavit of disqualification pursuant to division (E) of this section, and if, after the denial, a second or subsequent affidavit of disqualification regarding the same judge and the same proceeding is filed by the same party who filed or on whose behalf was filed the affidavit that was denied or by counsel for the same party who filed or on whose behalf was filed the affidavit that was denied, the judge against whom the second or subsequent affidavit is filed may preside in the proceeding prior to the ruling of the chief justice of the supreme court, or a justice designated by the chief justice, on the second or subsequent affidavit.

(E) If the clerk of the supreme court accepts an affidavit of disqualification for filing under divisions (B) and (C) of this section and if the chief justice of the supreme court, or any justice of the supreme court designated by the chief

justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit does not exist, the chief justice or the designated justice shall issue an entry denying the affidavit of disqualification. If the chief justice of the supreme court, or any justice of the supreme court designated by the chief justice, determines that the interest, bias, prejudice, or disqualification alleged in the affidavit exists, the chief justice or the designated justice shall issue an entry that disqualifies that judge from presiding in the proceeding and either order that the proceeding be assigned to another judge of the court of which the disqualified judge is a member, to a judge of another court, or to a retired judge.

HISTORY:

RS § 550; S&C 387; 57 v 5; 82 v 24; 84 v 129; 85 v 267; 86 v 263; 98 v 59; GC § 1687; 103 v 405(417); Bureau of Code Revision, 10-1-53; 130 v 654 (Eff 10-14-63); 138 v S 332 (Eff 3-23-81); 140 v H 426 (Eff 4-4-85); 146 v S 263 (Eff 11-20-96); 148 v S 179, § 3. Eff 1-1-2002.

NOTES:

Section Notes

Editor's Notes

The effective date is set by section 5 of SB 179.

Related Statutes & Rules

Cross-References to Related Statutes

Affidavit of disqualification --

Court of appeals judge, *RC § 2501.13*.

Probate court judge, *RC § 2101.39*

Compensation of judges holding court outside county of residence, *RC § 141.07*.

Ohio Constitution

Additional powers of supreme court, OConst art IV, § 5.

Ohio Rules

Disqualification of judges, Code of Judicial Conduct, Canon 3.

Comparative Legislation

APP. J

**DR 8-102. STATEMENTS CONCERNING JUDGES AND OTHER
ADJUDICATORY OFFICERS.**

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

[Effective: October 5, 1970.]

APP. K

RULE 2.11 Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's *impartiality* might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal *knowledge* of facts that are in dispute in the proceeding.
- (2) The judge *knows* that the judge, the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person is any of the following:
 - (a) A party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
 - (b) Acting as a lawyer in the proceeding;
 - (c) Has more than a *de minimis* interest that could be substantially affected by the proceeding;
 - (d) Likely to be a material witness in the proceeding.
- (3) The judge *knows* that he or she, individually or as a *fiduciary*, or the judge's spouse, *domestic partner*, parent, or child, or any other member of the *judge's family residing in the judge's household*, has an *economic interest* in the subject matter in controversy or in a party to the proceeding.
- (4) [RESERVED]
- (5) The judge, while a judge or a *judicial candidate*, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.
- (6) The judge *knows* that the judge's spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person has acted as a judge in the proceeding.
- (7) The judge meets any of the following criteria:
 - (a) The judge served as a lawyer in the matter in controversy or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) The judge served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the particular matter, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) The judge was a material witness concerning the matter;

(d) The judge previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and *fiduciary economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or *domestic partner* and minor children residing in the judge's household.

(C) A judge subject to disqualification under this rule, other than for personal bias or prejudice under division (A)(1) of this rule, may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

Comment

[1] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of divisions (A)(1) to (6) apply. A judge's knowledge that a lawyer, law firm, or litigant in a proceeding contributed to the judge's election campaign within the limits set forth in Rules 4.4(J) and (K), or publicly supported the judge in the campaign, does not, in and of itself, disqualify the judge.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's

impartiality might reasonably be questioned under division (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under division (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] [RESERVED]

Comparison to Ohio Code of Judicial Conduct

Rule 2.11 is comparable to Ohio Canons 3(E) and (F) with the exception of Rule 2.11(A)(5), which has no comparable provision in the Ohio Code.

Comparison to ABA Model Code of Judicial Conduct

With two exceptions, Rule 2.11 is comparable to Model Rule 2.11. Division (A)(4), relative to the disqualification of a judge who receives a campaign contribution in excess of a specific amount, is not adopted, in part because Rule 4.4 contains what are considered reasonable contribution limits applicable to individuals and organizations, including parties, lawyers, and law firms.

Division (A)(6) is new language that addresses disqualification when a judge's spouse has previously acted as a judge in the same proceeding. This provision is comparable to Ohio Canon 3(E)(1)(d)(iii) but is not found in the Model Code.

Comment [1] is modified to remove a reference to the fact that some jurisdictions use interchangeably the terms "recusal" and "disqualification" and to indicate that the mere receipt of a campaign contribution within the permissible limits set forth in Rule 4.4 is not grounds for disqualification. Comment [6] is stricken because it merely restates the definition of "economic interest" found in the Terminology section.

APP. L

RULE 11. Signing of Pleadings, Motions, or Other Documents

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, facsimile number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. A party who is not represented by an attorney may further state a facsimile number or e-mail address for service by electronic means under Civ.R. 5(B)(2)(f). Except when otherwise specifically provided by these rules, pleadings, as defined by Civ.R. 7(A), need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

[Effective: July 1, 1970; amended effective July 1, 1994, July 1, 1995; July 1, 2001; July 1, 2012.]

Staff Note (July 1, 2012 Amendment)

Rule 11 has been amended to permit a party who is not represented by an attorney to designate a facsimile number or e-mail address for purposes of service by electronic means.

The amendment also highlights that the term "pleading" as used in the Ohio Rules of Civil Procedure refers to the six specific documents listed in Civ.R. 7(A), and does not refer to other documents filed or served in the action.

Staff Note (July 1, 2001 Amendment)

Civil Rule 11 Signing of Pleadings, Motions, or Other Documents

The amendments to this rule were part of a group of amendments that were submitted by the Ohio Courts Digital Signatures Task Force to establish minimum standards for the use of information systems, electronic signatures, and electronic filing. The substantive amendment to this rule was the addition of the requirement that an attorney's telefax number and e-mail address, if any, be on all documents. Also, "document" was substituted for "paper" in the title and in two places in the text, for consistency with other Rules of Civil Procedure.

As part of this electronic filing and signature project, the following rules were amended effective July 1, 2001: Civil Rules 5, 11, and 73; Criminal Rule 12; Juvenile Rule 8; and Appellate Rules 13 and 18. In addition, Rule 26 of the Rules of Superintendence for Courts of Ohio was amended and Rule of Superintendence 27 was added to complement the rules of procedure. Superintendence Rule 27 establishes a process by which minimum standards for information technology are promulgated, and

requires that courts submit any local rule involving the use of information technology to a technology standards committee designated by the Supreme Court for approval.

Staff Note (July 1, 1995 Amendment)

Rule 11. Signing of Pleadings, Motions, or Other Papers

The amendment of this rule that took effect July 1, 1994 contained two errors that the 1995 amendment corrects. First, in the next-to-last sentence, the word "a" was erroneously omitted and is reinserted as the second word of the sentence by this amendment. Second, the last sentence, which was contained in the original version of this rule, was erroneously omitted from the 1994 amendment and is restored with this amendment.

Staff Note (July 1, 2012 Amendment)

Rule 11 has been amended to permit a party who is not represented by an attorney to designate a facsimile number or e-mail address for purposes of service by electronic means.

The amendment also highlights that the term "pleading" as used in the Ohio Rules of Civil Procedure refers to the six specific documents listed in Civ.R. 7(A), and does not refer to other documents filed or served in the action.

APP. M

Federal Rules of Civil Procedure [ABOUT SEARCH](#)**RULE 11. SIGNING PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO THE COURT; SANCTIONS**

(a) **SIGNATURE.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) **REPRESENTATIONS TO THE COURT.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(c) **SANCTIONS.**

(1) *In General.* If, after notice and a reasonable opportunity to respond, the court determines that [Rule 11\(b\)](#) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) *Motion for Sanctions.* A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates [Rule 11\(b\)](#). The motion must be served under [Rule 5](#), but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) *On the Court's Initiative.* On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated [Rule 11\(b\)](#).

(4) *Nature of a Sanction.* A sanction imposed under this rule must be limited to what

suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) *Limitations on Monetary Sanctions.* The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) *Requirements for an Order.* An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) **INAPPLICABILITY TO DISCOVERY.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

NOTES

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This is substantially the content of [former] Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare [former] Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold Mining Co. v. Martin, L. R.*, 5 Ch.Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn.Stat. (Mason, 1927) §9265; N.Y.R.C.P. (1937) Rule 91; 2 N.D.Comp.Laws Ann. (1913) §7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U.S.C., Title 28:

§381 [former] (Preliminary injunctions and temporary restraining orders)

§762 [now 1402] (Suit against the United States).

U.S.C., Title 28, §829 [now 1927] (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rules 23(b) (Secondary Action by Shareholders) and 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa.Stat. Ann. (Purdon, 1931) see 12 P.S.Pa., §1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, 69 F.2d 294 (C.C.A. 3d, 1934).

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Since its original promulgation, Rule 11 has provided for the striking of pleadings and the imposition of disciplinary sanctions to check abuses in the signing of pleadings. Its provisions have always applied to motions and other papers by virtue of incorporation by reference in Rule 7(b)(2). The amendment and the addition of Rule 7(b)(3) expressly

confirms this applicability.

Experience shows that in practice Rule 11 has not been effective in deterring abuses. See 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1971). There has been considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions. See Rodes, Ripple & Mooney, *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 64-65, Federal Judicial Center (1981). The new language is intended to reduce the reluctance of courts to impose sanctions, see Moore, *Federal Practice* 7.05, at 1547, by emphasizing the responsibilities of the attorney and reinforcing those obligations by the imposition of sanctions.

The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

The expanded nature of the lawyer's certification in the fifth sentence of amended Rule 11 recognizes that the litigation process may be abused for purposes other than delay. See, e.g., *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977).

The words "good ground to support" the pleading in the original rule were interpreted to have both factual and legal elements. See, e.g., *Heart Disease Research Foundation v. General Motors Corp.*, 15 Fed.R.Serv. 2d 1517, 1519 (S.D.N.Y. 1972). They have been replaced by a standard of conduct that is more focused.

The new language stresses the need for some prefiling inquiry into both the facts and the law to satisfy the affirmative duty imposed by the rule. The standard is one of reasonableness under the circumstances. See *Kinee v. Abraham Lincoln Fed. Sav. & Loan Ass'n*, 365 F.Supp. 975 (E.D.Pa. 1973). This standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation. See *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980).

The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

The rule does not require a party or an attorney to disclose privileged communications or work product in order to show that the signing of the pleading, motion, or other paper is substantially justified. The provisions of Rule 26(c), including appropriate orders after *in camera* inspection by the court, remain available to protect a party claiming privilege or work product protection.

Amended Rule 11 continues to apply to anyone who signs a pleading, motion, or other paper. Although the standard is the same for unrepresented parties, who are obliged themselves to sign the pleadings, the court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner* 404 U.S. 519 (1972).

The provision in the original rule for striking pleadings and motions as sham and false has been deleted. The passage has rarely been utilized, and decisions thereunder have tended to confuse the issue of attorney honesty with the merits of the action. See generally Risinger, *Honesty in Pleading and its Enforcement: Some "Striking" Problems*

with *Fed. R. Civ. P. 11*, 61 Minn.L.Rev. 1 (1976). Motions under this provision generally present issues better dealt with under Rules 8, 12, or 56. See *Murchison v. Kirby*, 27 F.R.D. 14 (S.D.N.Y. 1961); 5 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1969).

The former reference to the inclusion of scandalous or indecent matter, which is itself strong indication that an improper purpose underlies the pleading, motion, or other paper, also has been deleted as unnecessary. Such matter may be stricken under Rule 12(f) as well as dealt with under the more general language of amended Rule 11.

The text of the amended rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless by insuring that the rule will be applied when properly invoked. The word "sanctions" in the caption, for example, stresses a deterrent orientation in dealing with improper pleadings, motions or other papers. This corresponds to the approach in imposing sanctions for discovery abuses. See *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976) (per curiam). And the words "shall impose" in the last sentence focus the court's attention on the need to impose sanctions for pleading and motion abuses. The court, however, retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted.

The reference in the former text to wilfulness as a prerequisite to disciplinary action has been deleted. However, in considering the nature and severity of the sanctions to be imposed, the court should take account of the state of the attorney's or party's actual or presumed knowledge when the pleading or other paper was signed. Thus, for example, when a party is not represented by counsel, the absence of legal advice is an appropriate factor to be considered.

Courts currently appear to believe they may impose sanctions on their own motion. See *North American Trading Corp. v. Zale Corp.*, 73 F.R.D. 293 (S.D.N.Y. 1979). Authority to do so has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties. The detection and punishment of a violation of the signing requirement, encouraged by the amended rule, is part of the court's responsibility for securing the system's effective operation.

If the duty imposed by the rule is violated, the court should have the discretion to impose sanctions on either the attorney, the party the signing attorney represents, or both, or on an unrepresented party who signed the pleading, and the new rule so provides. Although Rule 11 has been silent on the point, courts have claimed the power to impose sanctions on an attorney personally, either by imposing costs or employing the contempt technique. See 5 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1969); 2A Moore, *Federal Practice* 11.02, at 2104 n.8. This power has been used infrequently. The amended rule should eliminate any doubt as to the propriety of assessing sanctions against the attorney.

Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client. See *Browning Debenture Holders' Committee v. DASA Corp.*, *supra*. This modification brings Rule 11 in line with practice under Rule 37, which allows sanctions for abuses during discovery to be imposed upon the party, the attorney, or both.

A party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so. The time when sanctions are to be imposed rests in the discretion of the trial judge. However, it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter. The procedure obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record. Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

Although the encompassing reference to "other papers" in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

Purpose of revision. This revision is intended to remedy problems that have arisen in the interpretation and application of the 1983 revision of the rule. For empirical examination of experience under the 1983 rule, see, e.g., New York State Bar Committee on Federal Courts, *Sanctions and Attorneys' Fees* (1987); T. Willging, *The Rule 11 Sanctioning Process* (1989); American Judicature Society, *Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (S. Burbank ed., 1989); E. Wiggins, T. Willging, and D. Stienstra, *Report on Rule 11* (Federal Judicial Center 1991). For book-length analyses of the case law, see G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989); J. Solovy, *The Federal Law of Sanctions* (1991); G. Vairo, *Rule 11 Sanctions: Case Law Perspectives and Preventive Measures* (1991).

The rule retains the principle that attorneys and pro se litigants have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1. The revision broadens the scope of this obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court. New subdivision (d) removes from the ambit of this rule all discovery requests, responses, objections, and motions subject to the provisions of Rule 26 through 37.

Subdivision (a). Retained in this subdivision are the provisions requiring signatures on pleadings, written motions, and other papers. Unsigned papers are to be received by the Clerk, but then are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney or pro se litigant. Correction can be made by signing the paper on file or by submitting a duplicate that contains the signature. A court may require by local rule that papers contain additional identifying information regarding the parties or attorneys, such as telephone numbers to facilitate facsimile transmissions, though, as for omission of a signature, the paper should not be rejected for failure to provide such information.

The sentence in the former rule relating to the effect of answers under oath is no longer needed and has been eliminated. The provision in the former rule that signing a paper constitutes a certificate that it has been read by the signer also has been eliminated as unnecessary. The obligations imposed under subdivision (b) obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court.

Subdivisions (b) and (c). These subdivisions restate the provisions requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and facts before signing pleadings, written motions, and other documents, and prescribing sanctions for violation of these obligations. The revision in part expands the responsibilities of litigants to the court, while providing greater constraints and flexibility in dealing with infractions of the rule. The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

The rule applies only to assertions contained in papers filed with or submitted to the court. It does not cover matters arising for the first time during oral presentations to the

court, when counsel may make statements that would not have been made if there had been more time for study and reflection. However, a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit. For example, an attorney who during a pretrial conference insists on a claim or defense should be viewed as "presenting to the court" that contention and would be subject to the obligations of subdivision (b) measured as of that time. Similarly, if after a notice of removal is filed, a party urges in federal court the allegations of a pleading filed in state court (whether as claims, defenses, or in disputes regarding removal or remand), it would be viewed as "presenting"—and hence certifying to the district court under Rule 11—those allegations.

The certification with respect to allegations and other factual contentions is revised in recognition that sometimes a litigant may have good reason to believe that a fact is true or false but may need discovery, formal or informal, from opposing parties or third persons to gather and confirm the evidentiary basis for the allegation. Tolerance of factual contentions in initial pleadings by plaintiffs or defendants when specifically identified as made on information and belief does not relieve litigants from the obligation to conduct an appropriate investigation into the facts that is reasonable under the circumstances; it is not a license to join parties, make claims, or present defenses without any factual basis or justification. Moreover, if evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention. Subdivision (b) does not require a formal amendment to pleadings for which evidentiary support is not obtained, but rather calls upon a litigant not thereafter to advocate such claims or defenses.

The certification is that there is (or likely will be) "evidentiary support" for the allegation, not that the party will prevail with respect to its contention regarding the fact. That summary judgment is rendered against a party does not necessarily mean, for purposes of this certification, that it had no evidentiary support for its position. On the other hand, if a party has evidence with respect to a contention that would suffice to defeat a motion for summary judgment based thereon, it would have sufficient "evidentiary support" for purposes of Rule 11.

Denials of factual contentions involve somewhat different considerations. Often, of course, a denial is premised upon the existence of evidence contradicting the alleged fact. At other times a denial is permissible because, after an appropriate investigation, a party has no information concerning the matter or, indeed, has a reasonable basis for doubting the credibility of the only evidence relevant to the matter. A party should not deny an allegation it knows to be true; but it is not required, simply because it lacks contradictory evidence, to admit an allegation that it believes is not true.

The changes in subdivisions (b)(3) and (b)(4) will serve to equalize the burden of the rule upon plaintiffs and defendants, who under Rule 8(b) are in effect allowed to deny allegations by stating that from their initial investigation they lack sufficient information to form a belief as to the truth of the allegation. If, after further investigation or discovery, a denial is no longer warranted, the defendant should not continue to insist on that denial. While sometimes helpful, formal amendment of the pleadings to withdraw an allegation or denial is not required by subdivision (b).

Arguments for extensions, modifications, or reversals of existing law or for creation of new law do not violate subdivision (b)(2) provided they are "nonfrivolous." This establishes an objective standard, intended to eliminate any "empty-head pure-heart" justification for patently frivolous arguments. However, the extent to which a litigant has researched the issues and found some support for its theories even in minority opinions, in law review articles, or through consultation with other attorneys should certainly be taken into account in determining whether paragraph (2) has been violated. Although arguments for a change of law are not required to be specifically so identified, a contention that is so identified should be viewed with greater tolerance under the rule.

The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring

participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc. See *Manual for Complex Litigation, Second*, §42.3. The rule does not attempt to enumerate the factors a court should consider in deciding whether to impose a sanction or what sanctions would be appropriate in the circumstances; but, for emphasis, it does specifically note that a sanction may be nonmonetary as well as monetary. Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants: all of these may in a particular case be proper considerations. The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.

Since the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty. However, under unusual circumstances, particularly for [subdivision] (b)(1) violations, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney's fees to another party. Any such award to another party, however, should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement. If, for example, a wholly unsupported count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself. The award should not provide compensation for services that could have been avoided by an earlier disclosure of evidence or an earlier challenge to the groundless claims or defenses. Moreover, partial reimbursement of fees may constitute a sufficient deterrent with respect to violations by persons having modest financial resources. In cases brought under statutes providing for fees to be awarded to prevailing parties, the court should not employ cost-shifting under this rule in a manner that would be inconsistent with the standards that govern the statutory award of fees, such as stated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

The sanction should be imposed on the persons—whether attorneys, law firms, or parties—who have violated the rule or who may be determined to be responsible for the violation. The person signing, filing, submitting, or advocating a document has a nondelegable responsibility to the court, and in most situations is the person to be sanctioned for a violation. Absent exceptional circumstances, a law firm is to be held also responsible when, as a result of a motion under subdivision (c)(1)(A), one of its partners, associates, or employees is determined to have violated the rule. Since such a motion may be filed only if the offending paper is not withdrawn or corrected within 21 days after service of the motion, it is appropriate that the law firm ordinarily be viewed as jointly responsible under established principles of agency. This provision is designed to remove the restrictions of the former rule. Cf. *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120 (1989) (1983 version of Rule 11 does not permit sanctions against law firm of attorney signing groundless complaint).

The revision permits the court to consider whether other attorneys in the firm, co-counsel, other law firms, or the party itself should be held accountable for their part in causing a violation. When appropriate, the court can make an additional inquiry in order to determine whether the sanction should be imposed on such persons, firms, or parties either in addition to or, in unusual circumstances, instead of the person actually making the presentation to the court. For example, such an inquiry may be appropriate

in cases involving governmental agencies or other institutional parties that frequently impose substantial restrictions on the discretion of individual attorneys employed by it.

Sanctions that involve monetary awards (such as a fine or an award of attorney's fees) may not be imposed on a represented party for causing a violation of subdivision (b)(2), involving frivolous contentions of law. Monetary responsibility for such violations is more properly placed solely on the party's attorneys. With this limitation, the rule should not be subject to attack under the Rules Enabling Act. See *Willy v. Coastal Corp.*, ____ U.S. ____ (1992); *Business Guides, Inc. v. Chromatic Communications Enter. Inc.*, ____ U.S. ____ (1991). This restriction does not limit the court's power to impose sanctions or remedial orders that may have collateral financial consequences upon a party, such as dismissal of a claim, preclusion of a defense, or preparation of amended pleadings.

Explicit provision is made for litigants to be provided notice of the alleged violation and an opportunity to respond before sanctions are imposed. Whether the matter should be decided solely on the basis of written submissions or should be scheduled for oral argument (or, indeed, for evidentiary presentation) will depend on the circumstances. If the court imposes a sanction, it must, unless waived, indicate its reasons in a written order or on the record; the court should not ordinarily have to explain its denial of a motion for sanctions. Whether a violation has occurred and what sanctions, if any, to impose for a violation are matters committed to the discretion of the trial court; accordingly, as under current law, the standard for appellate review of these decisions will be for abuse of discretion. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (noting, however, that an abuse would be established if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence).

The revision leaves for resolution on a case-by-case basis, considering the particular circumstances involved, the question as to when a motion for violation of Rule 11 should be served and when, if filed, it should be decided. Ordinarily the motion should be served promptly after the inappropriate paper is filed, and, if delayed too long, may be viewed as untimely. In other circumstances, it should not be served until the other party has had a reasonable opportunity for discovery. Given the "safe harbor" provisions discussed below, a party cannot delay serving its Rule 11 motion until conclusion of the case (or judicial rejection of the offending contention).

Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b). They should not be employed as a discovery device or to test the legal sufficiency or efficacy of allegations in the pleadings; other motions are available for those purposes. Nor should Rule 11 motions be prepared to emphasize the merits of a party's position, to exact an unjust settlement, to intimidate an adversary into withdrawing contentions that are fairly debatable, to increase the costs of litigation, to create a conflict of interest between attorney and client, or to seek disclosure of matters otherwise protected by the attorney-client privilege or the work-product doctrine. As under the prior rule, the court may defer its ruling (or its decision as to the identity of the persons to be sanctioned) until final resolution of the case in order to avoid immediate conflicts of interest and to reduce the disruption created if a disclosure of attorney-client communications is needed to determine whether a violation occurred or to identify the person responsible for the violation.

The rule provides that requests for sanctions must be made as a separate motion, *i.e.*, not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days (or such other period as the court may set) after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or contention, the motion should not be filed with the court. These provisions are intended to provide a type of "safe harbor" against motions under Rule 11 in that a party will not be subject to sanctions on the basis of another party's motion unless, after receiving the motion, it refuses to withdraw that position or to acknowledge candidly that it does not currently have evidence to support a specified allegation. Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the "safe harbor" period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a Rule 11 motion.

As under former Rule 11, the filing of a motion for sanctions is itself subject to the requirements of the rule and can lead to sanctions. However, service of a cross motion under Rule 11 should rarely be needed since under the revision the court may award to the person who prevails on a motion under Rule 11—whether the movant or the target of the motion—reasonable expenses, including attorney's fees, incurred in presenting or opposing the motion.

The power of the court to act on its own initiative is retained, but with the condition that this be done through a show cause order. This procedure provides the person with notice and an opportunity to respond. The revision provides that a monetary sanction imposed after a court-initiated show cause order be limited to a penalty payable to the court and that it be imposed only if the show cause order is issued before any voluntary dismissal or an agreement of the parties to settle the claims made by or against the litigant. Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case. Since show cause orders will ordinarily be issued only in situations that are akin to a contempt of court, the rule does not provide a "safe harbor" to a litigant for withdrawing a claim, defense, etc., after a show cause order has been issued on the court's own initiative. Such corrective action, however, should be taken into account in deciding what—if any—sanction to impose if, after consideration of the litigant's response, the court concludes that a violation has occurred.

Subdivision (d). Rules 26(g) and 37 establish certification standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. It is appropriate that Rules 26 through 37, which are specially designed for the discovery process, govern such documents and conduct rather than the more general provisions of Rule 11. Subdivision (d) has been added to accomplish this result.

Rule 11 is not the exclusive source for control of improper presentations of claims, defenses, or contentions. It does not supplant statutes permitting awards of attorney's fees to prevailing parties or alter the principles governing such awards. It does not inhibit the court in punishing for contempt, in exercising its inherent powers, or in imposing sanctions, awarding expenses, or directing remedial action authorized under other rules or under 28 U.S.C. §1927. See *Chambers v. NASCO*, ___ U.S. ___ (1991). *Chambers* cautions, however, against reliance upon inherent powers if appropriate sanctions can be imposed under provisions such as Rule 11, and the procedures specified in Rule 11—notice, opportunity to respond, and findings—should ordinarily be employed when imposing a sanction under the court's inherent powers. Finally, it should be noted that Rule 11 does not preclude a party from initiating an independent action for malicious prosecution or abuse of process.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Providing an e-mail address is useful, but does not of itself signify consent to filing or service by e-mail.

< [Rule 10. Form of Pleadings](#)

up

[Rule 12. Defenses and Objections:
When and How Presented; Motion
for Judgment on the Pleadings;
Consolidating Motions; Waiving
Defenses; Pretrial Hearing](#) >

APP. N

III. ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

APP. O

Advocate

Rule 3.1 Meritorious Claims And Contentions

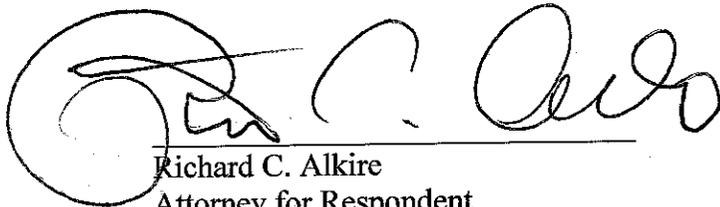
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

CERTIFICATE OF SERVICE

A copy of the foregoing **RESPONDENT TIMOTHY ANDREW SHIMKO'S**
OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE has been mailed by ordinary U.S. mail this 27th day of
July, 2012 to:

Jonathan E. Coughlan, Disciplinary Counsel
Joseph M. Caligiuri, Asst. Disciplinary Counsel
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Counsel for Relator



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