

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

Robert Leon Schwartz,

Respondent.

CASE NO. 2012-0644

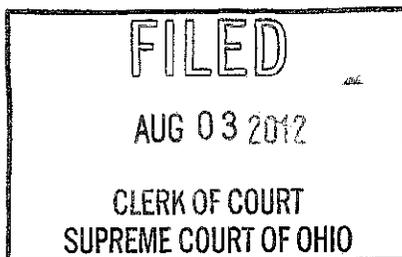
BOARD CASE NO. 11-008

**RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION TO
PERMIT ARGUMENT BY WRITTEN SUBMISSION OR CONTINUE ORAL
ARGUMENT UNTIL PERSONAL APPEARANCE IS POSSIBLE**

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Relator Disciplinary Counsel opposes respondent Robert Schwartz's *Motion to Permit Argument by Written Submission or Continue Oral Argument until Personal Appearance is Possible*, filed on July 26, 2012.

In his motion, respondent explains that he is incarcerated and requests that this Court (1) allow him to present oral argument in writing, (2) allow him to present oral argument by telephone, or (3) continue the oral argument until his release from prison. (Respondent's Motion at 1-3.) For the reasons set forth herein, this Court should deny respondent's motion.

First, respondent's request to submit oral argument in writing is essentially an improper request to submit a supplemental brief and additional evidence. Represented by counsel, respondent submitted his evidence at the panel hearing. Respondent then submitted factual and legal arguments in objections filed with the Court on May 15, 2012.

The evidentiary record was closed at the conclusion of the panel hearing. Any argument that respondent failed to raise in his objections is arguably waived for purposes of oral argument. *See State Ex Rel. Julnes et al. v. South Euclid City Council et al.*, 130 Ohio St. 3d 6, 2011-Ohio-4485, 955 N.E.2d 363. Therefore, respondent's written brief contains every argument that respondent should be permitted to make at an oral argument. Furthermore, to the extent that respondent hoped to supplement his original brief with additional evidence, S.Ct. Prac. R. 6.8 prohibits such supplementation in writing or orally at this time.

Second, there is no compelling reason to grant respondent's request to present oral argument telephonically. Respondent has already received sufficient due process in this matter. In Ohio disciplinary proceedings, the accused lawyer is entitled to the most basic procedural due process protections including notice of the charges, *see Columbus Bar Assn. v. Farmer*, 111 Ohio St. 3d 137, 2006-Ohio-5342, 855 N.E.2d 462, an evidentiary hearing, the right to issue subpoenas and depose witnesses, and an opportunity to explain the circumstances surrounding the disciplinary allegations. *See Cleveland Bar Assn. v. Acker*, 29 Ohio St. 2d 18, 278 N.E.2d 32 (1972).

Notably, respondent does not claim a lack of due process regarding the previous stages of this proceeding. Respondent was provided with notice, discovery, and an opportunity to testify at the hearing. Moreover, respondent was represented by legal counsel during the panel hearing in this matter. Instead, respondent informs this Court that he cannot attend the oral argument because he is incarcerated and argues that due process requires the Court to allow him to make an oral argument by telephone. (Respondent's Motion at 3.) Relator is unaware of a specific due process right to participate in oral argument in disciplinary cases, telephonically or otherwise, and respondent does not offer any authority to establish the existence of such a right.

Rather, due process dictates a general right to be heard. *See Disciplinary Counsel v. Character*, 129 Ohio St.3d 60, 2011-Ohio-2902, 950 N.E.2d 177. “Due process ‘guarantees no particular form of procedure; it protects substantial rights.’” *State ex rel. Owens-Illinois, Inc. v. Industrial Com. of Ohio*, 61 Ohio St. 3d 456, 575 N.E.2d 202 (1991) (quoting *Natl. Labor Relations Bd. v. Mackay Radio & Tel. Co.* (1938), 304 U.S. 333, 351, 58 S.Ct. 904, 913, 82 L.Ed. 1381, 1393.) “A party had been sufficiently ‘heard’ for due-process purposes when the decision maker ‘in some meaningful manner, consider[ed] evidence obtained at [a] hearing.’” *Id.* at 61 Ohio St. 3d at 458, 575 N.E.2d at 203 (quoting *State ex rel. Ormet Corp., v. Indus. Comm.*, 54 Ohio St.3d 102, 561 N.E.2d 920 (1990). (Emphasis *sic* in original.) At the hearing, a party may be “heard” either orally or in writing. *See Hannan v. Ohio Bureau of Empl. Servs.*, 8th Dist. No. 99CA74779, 1999 Ohio App. LEXIS 4934 (Oct. 21, 1999). This Court has previously found no violation of due process despite the absence of an oral hearing where the party had sufficient opportunity to be heard in writing. *See State ex rel. Owens-Illinois, Inc.*, 61 Ohio St. 3d 456, 575 N.E.2d 202.

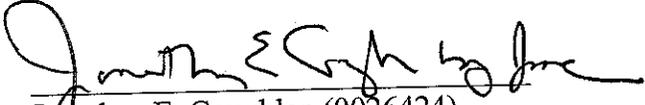
Respondent received an opportunity to be heard orally at the panel hearing and by this Court through his written objections. Respondent cannot show a denial of his due process rights or that he is prejudiced. Respondent cannot justify granting his extraordinary request to make an oral argument by telephone. Furthermore, respondent never filed a motion for conveyance from prison to attend the oral argument leaving the issue of respondent’s physical appearance at oral argument still outstanding. In essence, respondent has waived his right to be “present,” personally or telephonically, at oral argument.

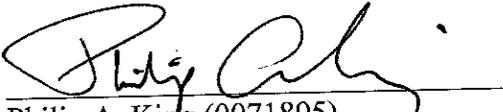
Third, this Court should deny respondent’s request to continue the oral argument. On July 13, 2012, this Court denied respondent’s previous request to continue the oral argument

because of his incarceration. In this second request to continue oral argument, respondent offers no new evidence or legal argument to indicate that the Court erred when it denied respondent's previous motion. Moreover, the circumstance in which respondent finds himself was entirely foreseeable. Acting pro se since the conclusion of the panel hearing, respondent filed objections, admittedly received notice of the oral argument, and is, by his own calculation, incarcerated until January 2014. It was not unforeseeable or unexpected that respondent would be unable to attend oral argument. Therefore, the Court should uphold its prior decision and deny this second request to continue the oral argument currently scheduled for August 21, 2012.

Wherefore, relator respectfully requests that the Court issue an order denying respondent's *Motion to Permit Argument by Written Submission or Continue Oral Argument until Personal Appearance is Possible*.

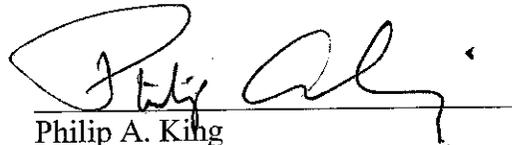
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Relator's Memorandum in Opposition to Respondent's Motion to Permit Argument by Written Submission or Continue Oral Argument until Personal Appearance is Possible* was served via U.S. Mail, postage prepaid, upon respondent, Robert Leon Schwartz, at the Federal Prison Camp, Unit A-1, P.O. Box 6000, Ashland, Kentucky, 41105-6000, and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, at 65 S. Front Street, 5th Floor, Columbus, Ohio 43215, on August 3, 2012.



Philip A. King
Counsel for Relator