

# The Supreme Court of Ohio

Disciplinary Counsel,

Case No. 2012-1107

Relator

v.

RESPONSE TO ORDER TO SHOW CAUSE

Joel David Joseph,

Respondent.

Respondent hereby shows cause why the Supreme Court should not impose reciprocal discipline that was imposed by the Maryland Court of Appeals.

Under Gov. Bar R. V(11)(F)(4) reciprocal discipline does not have to be imposed if the alleged misconduct warrant substantially different discipline. First of all, respondent has been disciplined enough for an unintentional violation of Maryland's ethical code. Secondly, the findings of the Maryland Court of Appeals was contrary to rulings of the United States Supreme Court.

Respondent was admitted to practice law in Maryland in 1981. He physically resided in Maryland from 1981 until 2007. Respondent represented Arthur Wartell, a Vietnam War Veteran, in a claim against the Veteran's Administration for medical malpractice. Mr. Joseph was given notice that the VA had denied the claim and that Mr. Wartell had to file a complaint in United States District Court in the Central District of California to preserve his rights.

Respondent sought local counsel in California without success. He traveled to Los Angeles in February of 2007, and in Los Angeles found local counsel. Mr. Joseph sought

admission in California pro hac vice claiming the he had Maryland residency.

The attorney that respondent found in California filed a complaint with the Attorney

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Grievance Commission of Maryland claiming that respondent had falsely stated his residence in Maryland when the motion for admission pro hac vice was submitted.

Under the procedures established in Maryland for attorney discipline, the matter is first submitted to a Peer Review Committee. This Committee voted four to three for the matter to proceed further. The Court of Appeals then appoints a judge, in this case Judge Dugan, to take testimony.

Judge Dugan conducted a hearing and the parties submitted proposed findings of fact and conclusions of law. Judge Dugan first ruled that since petition did not file proposed findings that he adopted the Attorney Grievance Commission's proposed findings. However, Mr. Joseph did file timely proposed findings. The Maryland Court of Appeals ordered Judge Dugan to reconsider his decision in light of respondent's proposed findings.

Judge Dugan, once again, adopted the Attorney Grievance Commission's proposed findings verbatim.

The Maryland Court of Appeals heard argument and accepted Judge Dugan's findings and disbarred respondent.

The Maryland Court of Appeals ruled, "We reject Respondent's contention that he 'was a resident and domiciliary of the State of Maryland' in 2007 and therefore did not attempt to violate the California statute."

**I. With the Multi-State Practice of Law Becoming Prevalent, An Attorney Should be Allowed to Maintain Domicile Where He or She Desires.**

The United States Supreme Court ruled in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) that "the practice of law is important to the national economy. As the Court noted in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788 (1975), the 'activities of lawyers play

an important part in commercial intercourse.’ ”

The Supreme Court noted in *Piper*,

The lawyer’s role in the national economy is not the only reason that the opportunity to practice law should be considered a “fundamental right.” We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may -- and often do -- represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. *See Leis v. Flynt*, 439 U.S. at 450 (STEVENS, J., dissenting). The lawyer who champions unpopular causes surely is as important to the “maintenance or wellbeing of the Union,” *Baldwin*, 436 U.S. at 388. . . . 470 U.S. at 281.

Respondent has been practicing law for more than 39 years, handling public interest cases in 25 states, championing many important, sometimes unpopular, causes. For example, Respondent handled a case challenging the constitutionality of the North American Free Trade Agreement. *Made in the USA Foundation v. United States*, 242 F.3d 1300, cert. denied November 26, 2001. Mr. Joseph successfully challenged regulations of the U.S. Civil Service Commission. *Joseph v. United States Civil Service Commission*, 554 F.2d 1140 (D.C. Cir. 1977).

Joseph represented plaintiffs in *Federal Employees For Non-Smokers' Rights (FENSR) v. United States*, 446 F. Supp. 181, (1978 D.D.C.). cert. denied, 444 U.S. 926 (1979). FENSR was a group of Federal employees who sued to stop smoking in federal buildings.

Joseph successfully represented holocaust survivors whose property was seized by the United States Army after World War II. *Rosner v. United States*, 231 F.Supp. 2d 1202 (S.D. Fla. 2002).

In *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978). cert. den., 436 U. S. 907 (1978), Respondent represented 60 members of Congress challenging the constitutionality of the Panama Canal Treaty under Article 4, Section 3, Clause 2 of the constitution.

In *Baltrosky v. Kugler*, 395 Md. 468 (2006), Respondent challenged Maryland's foreclosure laws that allowed trustees to recover both attorneys' fees and foreclosure fees.

The Maryland Circuit Court stripped Respondent of his citizenship in Maryland and bar membership of 26 years, depriving him of the right to practice law and to represent important, yet unpopular causes. The Circuit Court rubber-stamped the proposed findings verbatim of the Attorney Grievance Commission, and the Maryland Court of Appeals accepted the Circuit Court's findings of fact and conclusions of law.

## **II. The Decision of the Maryland Court of Appeals is in Conflict with Decisions of the United States Supreme Court.**

The Maryland Court of Appeals found that Respondent gave up his Maryland domicile in early 2007. This finding is directly contrary to U.S. Supreme Court holdings. In *Sáenz v. Roe*, 526 U.S. 489 (1999), this court ruled that States do not have the right to determine who is and who is not a citizen of the state. The Supreme Court ruled:

Citizens of the United States, whether rich or poor, have the right to choose to be citizens "of the State wherein they reside." U.S. Const. Amdt. 14, Section 1. The states, however, do not have any right to select their citizens. 526 U.S. at 510, 511 (emphasis added).

Maryland Circuit Court Judge Dugan found that respondent lost his Maryland domicile in early 2007. That decision was not Judge Dugan's to make. Respondent chose to remain a

citizen of Maryland, and kept his voting address there.

The respondent physically lived in Maryland from April, 1981 until January 31, 2007, nearly 26 years. He raised three sons in Maryland. He owned a house in Maryland for 23 years. Mr. Joseph arrived in California on February 5, 2007. He filed his first case in California with a pro hac vice motion on March 27, 2007. *Wartell v. United States*, United States District Court for the Central District of California, Case No. 2:2007cv02005. Mr. Joseph represented Mr. Wartell in a case concerning the Veterans Administration and had a duty to file his case in the Central District of California in early March, 2007. Respondent went to California to find local counsel for this case because a deadline for filing was looming.

Respondent felt that it was his duty to represent a Vietnam Veteran who was denied medical treatment by a Veterans Administration hospital. And Respondent earned Mr. Wartell a substantial settlement. This case demonstrates Claire Booth Luce's warning that "no good deed goes un-punished."

It is a preposterous and unconstitutional finding that a mere seven weeks after Mr. Joseph arrived in California that he had abandoned his Maryland domicile.

In *Selling v. Redford*, 243 U.S. 46 (1917), the U.S. Supreme Court ruled that disciplinary action must be based on a sound factual record.

The Maryland Court of Appeals adopted the findings of the Circuit Court. The Circuit Court in turn adopted verbatim the recommendations of the Attorney Grievance Commission, and initially ruled that respondent had not submitted proposed finding of fact and conclusions of law. In fact, the Court of Appeals remanded the matter to the Circuit Court to consider respondent's proposed findings that had indeed been filed in a timely fashion.

The Circuit Court ignored the Court of Appeals order, and again adopted verbatim the

proposed findings of fact and conclusions of law of the Attorney Grievance Commission.

Nevertheless, the Court of Appeals accepted the Circuit Court's findings of fact and conclusions of law.

Justice John Paul Stevens recently criticized Chief Justice Earl Warren for copying paragraphs from one party's brief. Justice Stevens said, "I was surprised to find that Warren's opinion had copied several paragraphs from the solicitor general's brief in the case . . . . Needless to say, that discovery made me wonder about the care that the chief justice took, not just in writing opinions, but also in editing the work of his law clerks in which he had no special interest." *Five Chiefs: A Supreme Court Memoir*, John Paul Stevens, Little Brown & Co, 2011, at 97.

The Circuit Court in this case did not copy just a few paragraphs from the Attorney Grievance Commission's "brief," it copied the entire document verbatim. One should wonder about the care that Judge Dugan took reviewing the proposed findings, while completely ignoring respondent's proposed findings. Further, Judge Dugan did not even give the appearance of impartiality, by failing to reference any of respondent's proposed findings of fact or conclusions of law.

The Circuit Court's finding that respondent misrepresented his domicile is entirely incorrect and not based on substantial evidence. The fact that respondent was registered to vote in Maryland in 2007 is sufficient basis for respondent to have been able to claim Maryland domicile.

As a matter of constitutional law respondent was a Maryland citizen at all relevant times. This court has ruled, "it has long been settled that residence and citizenship were wholly different things within the meaning of the Constitution and the laws defining and regulating the

jurisdiction of the circuit courts of the United States; and that a mere averment of residence in a particular state is not an averment of citizenship in that state for the purposes of jurisdiction.”

*Steigleder v. McQuesten*, 198 U.S. 141 (1905). In that case the plaintiff claimed citizenship from Massachusetts even though she lived in Washington State. The U.S. Supreme Court held, “the plaintiff was, for many years prior to the commencement of the action, a citizen of Massachusetts, and that her residence in the state of Washington, at and before the suit was brought, is not shown to be otherwise than temporary, without any fixed purpose to abandon citizenship in Massachusetts. So far as appears from the record, she was, when the suit was brought, a citizen of Massachusetts.” 198 U.S. 141.

The facts before this court are quite similar to that of the *Steigleder* case. Respondent did not give up his citizenship in Maryland in 2007, certainly not in March of 2007, when his first pro hac vice case was filed.

This court in *Selling v. Redford*, 243 U.S. 46 (1917) ruled that discipline should not be imposed if it would result in grave injustice.

The grave injustice in this case is that respondent, who has practiced law before this court and other courts for many years without any disciplinary issues, relied on decisions of the U.S. Supreme Court regarding citizenship and domicile.

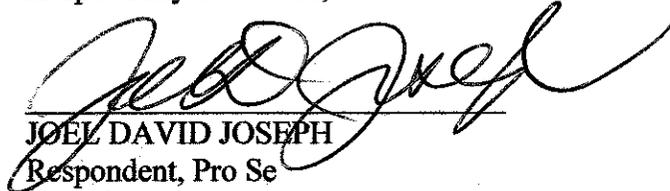
Respondent did not intentionally violate any rule. He acted in good faith at all times. Respondent was disciplined for not maintaining a physical residence in Maryland. This logic allows a wealthy practitioner to maintain two residences, and avoid a disciplinary problem, while a less wealthy one is subject to discipline of the harshest type.

The discipline imposed was excessively harsh. Respondent did not intentionally violate any rule, or intentionally misstate his domicile.

**Conclusion**

For all of these reasons, the court should not disbar respondent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joel David Joseph', written over a horizontal line.

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