

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	CASE NO. 2012-1002
	:	
Relator,	:	
	:	
vs.	:	
	:	
Timothy Andrew Shimko.	:	
	:	
Respondent.	:	

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS

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TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	<i>ii</i>
Statement of Facts	1
Relator's Answer to Respondent's Objections	6
I. RELATOR PROVED RESPONDENT'S MISCONDCUT BY CLEAR AND CONVINCING EVIDENCE	6
II. IN ANALYZING RESPONDENT'S CONDUCT, THIS COURT SHOULD APPLY THE OBJECTIVE STANDARD ARTICULATED IN <i>DISCIPLINARY COUNSEL V. GARDNER</i> , 99 OHIO ST.3D 416 2003-OHIO-4048, 793 N.E. 2d 425	25
III. RESPONDENT'S REPEATED ATTACKS UPON JUDGE MARKUS' INTEGRITY WARRANT AT LEAST A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW	31
Conclusion	35
Certificate of Service	36

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Disciplinary Counsel v. Frost</i> , 122 Ohio St.3d 219, 2009-Ohio-2870, 909 N.E.2d 1271	29
<i>Disciplinary Counsel v. Gardner</i> , 99 Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425	25, 26, 27, 28, 29, 30, 31, 32, 33
<i>Disciplinary Counsel v. Proctor</i> , 131 Ohio St.3d, 2012-Ohio-684, 963 N.E. 2d. 806	32, 33
<i>Disciplinary Counsel v. Shimko</i> , 124 Ohio St.3d 1201, 2009-Ohio-6879, 918 N.E.2d 1007	32
<i>Disciplinary Counsel v. West</i> (1999), 85 Ohio St.3d 5, 1999-Ohio-197, 706 N.E.2d 760	31
<i>In re Chmura</i> , 461 Mich. 517, 608 N.W. 2d 31 (2000)	26
<i>In re Disciplinary Action Graham</i> (Minn. 1990), 453 N.W.2d 313	29, 30
<i>In the Matter of Emil J. Becker, Jr.</i> , 620 N.E.2d 691 (Ind.1993)	30
<i>Matter of Holtzman</i> , 78 N.Y. 2d 184, 577 N.E. 2d 30 (1991)	25
<i>Matter of Westfall</i> , 808 S.W. 2d 829 (Mo. 1991)	30
<i>United States v. Brown</i> , 72 F.3d 25 (5 th Cir. Tex. 1995)	29, 30, 31
<i>United States v. Nolen</i> , 472 F.3d 362 (5 th Cir. Tex. 2006)	30
<i>U.S. District Court for Eastern District of Washington v. Sandlin</i> , 12 F. 3d 861 (9 th Cir. Wash. 1993)	26

RULE

PAGE(S)

BCGD Proc.Reg. §10(B)(1)(g)

31, 32, 33

DR 8-102(B)

31, 33

Prof. Cond. R. 8.2(a)

25, 28, 30, 31, 33

Prof. Cond. R. 8.4(h)

31

R.C. 2701.03(A)

19

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RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF
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Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections.

STATEMENT OF FACTS

The facts of this matter are cogently set forth in the Board of Commissioners' ["board"] Findings of Fact, Conclusions of Law, and Recommended Sanction, hereinafter referred to as the board's "report."

The allegations against respondent arose from his representation of the bankruptcy trustee for Jeffrey Angelini in a civil action entitled *First Federal Bank of Ohio v. John Angelini, Jr., et al.* "First Federal", case no. 03 CV 0098 in the Crawford County Court of Common Pleas.

[Report at ¶14] Judge Richard Markus presided over the matter and scheduled a jury trial for October 14, 2008.

On or about October 9, 2008, Judge Markus conducted an unrecorded telephone conference with the lawyers for the plaintiff and defendants. 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 unwillingness to enter into stipulations, despite having filed proposed stipulations before the telephone conference. [Report at ¶16]

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. *Id.* at ¶7. In the affidavit of disqualification, respondent alleged that Judge Markus stated that he "had lost all respect for respondent;" thought respondent "incompetent for embarking upon such a trial strategy;" and "impliedly threatened to punish respondent's client if respondent further disappointed [Judge Markus]." *Id.*

In his response to respondent's affidavit of disqualification, Judge Markus denied making the comments attributed to him by respondent. [*Id.* at ¶8, Rel. Ex. 7]. At the request of the Supreme Court's Master Commissioner, Judge Markus postponed the trial to January 26, 2009, so the Court could consider respondent's affidavit of disqualification. On October 24, 2008, the Supreme Court of Ohio denied respondent's affidavit of disqualification and ordered the *First Federal* case to proceed before Judge Markus. [Report at ¶11]

Between January 26 and February 6, 2009, Judge Markus presided over the *First Federal* jury trial. On February 6, 2009, Judge Markus granted plaintiff's motion for 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. *Id.* at ¶12.

Respondent filed a timely appeal in the Third District Court of Appeals. In his appellate brief, respondent made the following false statements:

- Yet, the trial Court 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 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.

[Report at ¶20, Rel. Ex. 11]

In response to the Appellee's brief, respondent filed a reply brief, in which he further impugned Judge Markus' 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.

[Report at ¶21, Rel. Ex. 12]

While the case was pending on appeal, respondent filed a second affidavit of disqualification, 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.¹
- 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

¹ To illustrate the absurdity of respondent’s actions, this Court must consider that by May 17, 2010, the Ohio State Bar Association had already dismissed respondent’s grievance against Judge Markus with no finding of misconduct. [Tr. p. 113]. Respondent then appealed the Ohio State Bar Association’s dismissal of his grievance and the Mahoning County Bar Association affirmed the OSBA’s dismissal and issued a letter to respondent indicating that Judge Markus had not engaged in judicial misconduct. *Id.* Despite the fact that two separate entities found that Judge Markus committed no misconduct, respondent falsely asserted in his third affidavit of disqualification that Judge Markus committed judicial misconduct. [Rel. Ex. 13, ¶47, 48]. No reasonable lawyer would have continued to cast aspersions against a judge after two independent disciplinary entities absolved Judge Markus of any wrongdoing. Even at the disciplinary hearing, respondent remained steadfast, “I made those statements because I believed every one of them to be true, and I still do.” [Tr. p. 120].

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.

[Report at ¶22, Rel. Ex. 13]

By entry dated March 16, 2010, the Supreme Court of Ohio dismissed respondent's second affidavit of disqualification. [Report at ¶23, Rel. Ex. 15] 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. [Report at ¶24, Rel. Ex. 16]

On May 24, 2010, the Third District Court of Appeals unanimously affirmed Judge Markus' granting of a mistrial. [Report at ¶25, Rel. Ex. 17] In the opinion, the judges for the Third District chastised respondent for his repeated attacks on Judge Markus' integrity. [Rel. Ex. 17]

On May 26, 2010, Former Chief Justice Eric 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." [Report at ¶25, Rel. Ex. 18]

After the retrial, Judge Dale Crawford issued an order imposing sanctions upon respondent and counsel for Galion Bank, James Pry and Scott McBride. In his order, Judge Crawford specifically addressed respondent's conduct in the trial before Judge Markus:

This Court has and will make a finding that Mr. Shimko engaged in misconduct during the trial. On numerous occasions he impugned the character of the trial judge by stating that the judge was biased and could not give his client a fair trial. In his 55- page post-hearing brief, Mr. Shimko devotes 50 pages of his brief seeking to convince this Court that Judge Markus was, in fact, biased.

Mr. Shimko doesn't seem to get the point. When there is an adverse ruling, arguments with the judge should cease and appellate remedies should be followed to rectify perceived improper rulings. When two Chief Justices of the Supreme Court determine that Judge Markus is not biased and one Chief Justice (Brown) admonishes Mr. Shimko to cease with his frivolous attacks against the judge, the attacks on the judge should cease. The attacks on Judge Markus continue to this date.

[Rel. Ex. 20, p. 10]

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. RELATOR PROVED RESPONDENT'S MISCONDUCT BY CLEAR AND CONVINCING EVIDENCE

In his first assignment of error, respondent erroneously asserts relator failed—under an objective standard—to prove that the statements respondent made in his appellate briefs and affidavits of disqualification were false or made with reckless disregard for their truth or falsity. In support of his argument, respondent claims he had a reasonable factual basis for asserting that Judge Markus “was biased or appeared to be biased.” For several reasons, respondent’s argument lacks merit and must fail.

First, contrary to respondent’s assertions, this case is not about a lawyer who, in two appellate briefs and two affidavits of disqualification, accused a judge of being biased. Rather, it is about a previously-disciplined, 35-year practitioner who accused a judge—in four different pleadings—of fixing a case and then manufacturing allegations of attorney misconduct to cover up the judge’s own alleged misconduct. In its report, the board held, “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,’ ‘contriving a reason,’ ‘personally invested in the outcome.’ Such hyperbole lessen[s] the effectiveness of his appellate briefs.” [Report at ¶28] Respondent’s desperate attempt to reframe the issue as one of bias underscores his refusal to acknowledge the wrongful nature of his misconduct and illustrates the lengths respondent is willing to go to avoid discipline.

Second, respondent had no reasonable factual basis to assert that Judge Markus “fabricated,” “manufactured,” “contrived,” and/or “created” reasons to justify his granting of a mistrial in order to “camouflage his own misconduct.” In his objections, respondent relies upon several incidents that occurred before, during, and after trial as proof that he had a “reasonable factual basis” for attacking Judge Markus’ integrity via his appellate briefs and post-trial affidavits. In its report, the board considered each of these incidents and unequivocally declared:

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.

Id. at ¶32.

Whether taken individually or collectively, the incidents respondent relies upon as the basis to attack Judge Markus’ integrity illustrate respondent’s intransigence and Judge Markus’ willingness to bend over backward to accommodate respondent. In its report, the board summarized the interplay between respondent and Judge Markus as follows:

In 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. (Emphasis added).

Report at ¶30.

Each of the incidents respondent relies upon as his “reasonable factual basis” for impugning Judge Markus’ integrity is addressed below.

OCTOBER 9, 2008 PRE-TRIAL CONFERENCE

According to respondent, the October 9, 2008 pre-trial telephone conference was the event that triggered respondent’s first affidavit of disqualification. [Tr. p. 476]. The pre-trial conference was held to address respondent’s request for a continuance of the trial, which was to begin five days later. Judge Markus denied respondent’s request and then turned the discussion to stipulations. During the call, respondent alleged, “...the Court angrily and expressly informed Affiant, that it had ‘lost all respect’ for Trustee’s counsel, ‘thought him incompetent for embarking on such a trial strategy,’ and impliedly threatened to punish Trustee’s counsel’s client if Trustee’s counsel further disappointed [Judge Markus].” [Rel. Ex. 6, ¶7].

Within days of receiving respondent’s first affidavit of disqualification, Attorney Chappellear, who also participated in the telephone conference, filed an affidavit with the Supreme Court of Ohio in which he refuted respondent’s allegations. [Rel. Ex. 8]. Judge Markus filed a response denying the allegations, “I did not say he was incompetent, though I did say that many experienced counsel favor stipulations...I certainly did not threaten him.” *Id.*

In his objections, respondent relies upon McBride’s testimony in support of what was said during the pre-trial conference. However, as Chief Justice Moyer noted in his entry dismissing the affidavit of disqualification, “Those who participated in the telephone conference

call remember the conversation between Judge Markus and attorney Shimko quite differently.”

[Rel. Ex. 9, p.4]

The fact of the matter is that Judge Markus never made the comments alleged by respondent. At the disciplinary hearing, Judge Markus categorically denied making the statements. *Id.* at 144. The more plausible explanations were the ones advanced by Attorney Chappellear and Judge Markus. Judge Markus was frustrated with respondent’s refusal to stipulate to facts that respondent had previously agreed to stipulate to—including his own proposed stipulations—and attempted to educate the respondent:

I may very well have made comments relating to the somewhat abusive manner and the insistence that he would not agree to things that he knew were true as ineffective advocacy because I do suggest to counsel things that I think are less than effective advocacy. It doesn’t mean that I am angry with the lawyer. Really, I’m commenting on the techniques. I think that is the best way I can describe it.

[Tr. p. 144].

As Attorney Chappellear testified, during the conference call, respondent “was petulant and acting like a ten-year-old. He just was pouting, like, I’m not getting my way, and so here’s what I’m going to do.” [Tr. p. 255]. According to Attorney Chappellear, Judge Markus informed respondent that “refusing to admit the obvious causes others to lose respect for you...refusing to admit the obvious is not good advocacy.” *Id.* at 258.

SANCTIONS FOR FAILING TO PAY AN EXPERT WITNESS FEE

The next incident involved respondent’s failure to pay an expert witness’ fees, despite the fact that respondent deposed the expert. Judge Markus granted judgment against respondent for the amount owed to the expert and precluded respondent from *using the deposition* at trial. “Further, as a sanction for failure to comply with the Civil Rules and this Court’s express Order, the court directs that (a) Attorney Shimko...shall not use the deposition of R. Hal Nichols for

any purpose at the trial of the underlying case, and (b) he shall not confer with counsel for defendant Galion Bank about the use of that deposition for that trial.” [Resp. Ex. B]. Although the sanction prohibited respondent from *using* the deposition, it did not prohibit respondent from cross-examining the expert. [Tr. p. 59]. Incidentally, the expert never testified during the trial.

At the disciplinary hearing, respondent admitted the following:

- Respondent understood it was his responsibility to pay the expert’s fees.
- Mr. Chappellear sent respondent an invoice on July 21, 2008.
- Respondent did not pay the invoice.
- Mr. Chappellear sent a second invoice on August 17, 2008.
- Respondent did not pay the invoice.
- Mr. Chappellear sent a third invoice on October 6, 2008.
- Respondent did not pay the invoice.
- Mr. Chappellear filed a motion requesting an order for respondent to pay the expert’s fees.
- Judge Markus issued an order on December 15, 2008 requiring respondent to pay the invoice by December 31, 2008.
- Respondent did not comply with Judge Markus’ order.
- Judge Markus sent an e-mail to respondent on January 1, 2009 asking if the invoice had been paid.
- Respondent failed to respond to Judge Markus’ January 1, 2009 e-mail.

[Tr. pp. 58-59; Resp. Ex. B].

Incredibly, respondent presents this incident as evidence of Judge Markus’ alleged punitive attitude toward respondent. [Tr. p. 60]. Respondent is either unwilling or incapable of acknowledging that it was his disrespect for opposing counsel and the court that led to the imposition of sanctions. At the disciplinary hearing, respondent testified that he felt this incident

related back to the “implied threat” that Judge Markus allegedly made during the October 9, 2008 pre-trial telephone conference. *Id.* at 61. Rather than reflect upon his own involvement in the matter, respondent pins the blame on Judge Markus. This is a prime example of respondent’s refusal to take responsibility for his actions.

VOIR DIRE

The next issue that respondent cites as contributing to his belief that Judge Markus fabricated reasons to deny his client a verdict was Judge Markus’ refusal to exclude for cause any juror who was a depositor of Galion Bank and/or First Federal Bank. [Tr. p. 62]. At the *First Federal* trial, respondent argued that since Galion and First Federal were mutual banks, each depositor “owned” a portion of the bank and should therefore be excluded for cause. *Id.* at 63. When the issue initially surfaced, Judge Markus informed respondent:

All right. Well, we’ll inquire as to whether or not that affects their thinking and I have to make a legal decision as to whether or not that is a ground for disqualification depending upon other circumstances. I have to make that determination. I have at your encouragement earlier made some study of this subject. It does not appear that you have cited any authority in your memorandum that refers to a mutual institution.

[*First Federal*, Tr. p. 30]

During voir dire, Judge Markus asked the jurors:

Do any of you think that you have a personal stake in this lawsuit because you are a depositor in First Federal Bank of Ohio? I don’t see any answer to that.

Now, in theory or in law, a mutual bank is owned by its depositors. They have some general share of ownership because they’re depositors. Does that fact cause any of the jurors here to believe that that would affect their ability to be fair and impartial in this case? If so, please raise your hand. I don’t see any response to that question.

Id. at. 84-85.

Thereafter, the following exchange occurred:

Markus: All right. Now, we are going to go to Mr. Shimko, do you have any challenges for cause?

Respondent: Yes, Your Honor, Juror No. 1 is a Galion Building and Loan depositor.

Markus: Any other grounds besides that he's a depositor?

Respondent: No.

Markus: I will deny that challenge for cause. This 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.

And the general weight of authority is that absent a specific statute that deals with a mutual company, the involvement of a juror as a mutual participant in an entity is not a sufficient interest for disqualification.

Georgia has such a statute for mutual insurance policyholders. I find cases from Wisconsin, Nebraska, Missouri which are to the effect that mutual policyholders are not subject to disqualification for cause absent a showing that, in fact, it affects their impartiality.

No juror here has indicated that the fact that they had a deposit would affect their thinking in any way. I am constrained by the decision of the Ohio Supreme Court in *Hall v. Bank One Management*, which is, I believe, the controlling decision on the exercise of challenges for cause to conclude that this is not within the statutorily defined causes for which there is an automatic right of disqualification and it is, therefore, subject to the Judge's discretion in determining whether there is potential bias.

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.

Id. at 184-187.

The preceding exchange illustrates several points. First, Judge Markus made a legal ruling based upon his understanding of the law. He considered respondent's position, researched the issue, and made a decision. It is inconceivable how any lawyer could view Judge Markus' actions as anything other than professional, appropriate, and legally sound. Second, respondent's disrespect for the court was palpable, yet respondent cites to this exchange as proof that Judge Markus "fabricated," "contrived," "misrepresented," "manufactured," and "advocated" while presiding over the *First Federal* matter. Nothing could be further from the truth. If anything, this exchange shows Judge Markus remaining patient and respectful in spite of respondent's discourteous behavior.

At the disciplinary hearing respondent stated, "...this is where I began to see and I believe that this point with that ruling, and I still believe today, there would be no basis in law

for him to have made that ruling; that, yes, the only explanation for that ruling was his disdain for me.” [Tr. p. 67]. As he demonstrated throughout the *First Federal* trial, respondent viewed any adverse ruling as a sinister ploy by Judge Markus to deny his client the right to a fair trial.

REFUSAL TO ALLOW RESPONDENT TO CROSS-EXAMINE JOHN ANGELINI

During the *First Federal* trial, Attorney Chappelle called John Angelini as a witness in his case-in-chief. John Angelini was the father of respondent’s client, Jeffrey Angelini, and also one of respondent’s witnesses. [Tr. p. 68]. During a recess, Judge Markus advised respondent that he was not permitted to use leading questions when questioning John Angelini.

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 as identified with Jeffrey Angelini and, therefore, his counsel should avoid using leading questions; that counsel for Galion Bank can use leading questions.

The language in Rule 611 provides that ordinarily in cross examination leading questions will be permitted. And the word “ordinarily” is there for that purpose, that when the witness, in fact, is, for example, the lawyer’s own client, then the lawyer shall not be permitted to use leading questions, although the lawyer is, in whatever language we use, asking questions on what might be termed cross examination. That is my interpretation, and, indeed, I’ve written legal articles that you’ve probably seen.

Respondent: I have not, Your Honor.

* * *

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.

[*First Federal*, Tr. pp. 543-546].

Once again, Judge Markus made a legal ruling based upon his understanding of the Rules of Evidence, explained his basis for making the ruling, only to be subjected to respondent's unsubstantiated attacks upon his integrity. In its report, the board addressed Judge Markus' authority to speak on matters of evidence: "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." [Report at ¶14, FN 1]. Yet respondent is relying upon this episode to convince the Court that he had a reasonable basis to assert that Judge Markus completely fabricated the reasons to grant a mistrial. Again, respondent's position defies logic.

USE OF A BLOW-UP EXHIBIT

During the *First Federal* trial, respondent, relying on the hearsay exception of past recollection recorded, was questioning a witness regarding a handwritten note the witness had made. [*First Federal*, Tr. pp. 1717, 1718]. 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 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?

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

Id. at 1718-1719.

Despite respondent's representations at trial and at the disciplinary hearing that Attorney Chappelear consented to respondent showing the exhibit to the jury, Attorney Chappelear explained:

And just as we had done on all these other instances, he came over, shielding it from the view of the jury, showed it to me. I looked at it, saw that it was in fact a blow-up of the same document, nodded my head. He then went over to the witness with it. Then he put it on the—on the easel facing the jury. At that time I

stood up and Judge Markus said something to the effect of wait a minute, what are you doing?...The judge said, what's your position? I said, that document should not be shown to the jury. And that is not was I agreed to.

[Tr. p. 268].

At the disciplinary hearing, respondent conceded on cross-examination that Attorney Chappellear had objected to the display of the document to the jury. *Id.* at 77. "Well, enlightenment came late to Mr. Chappellear that day, but it did come." *Id.* Incredibly, moments after admitting that Attorney Chappellear had objected to the display, respondent stated, "But in my 35 years I've never seen a judge overrule an agreement between counsel on the use of an exhibit." *Id.*

Respondent's reliance upon this incident as evidence that he had a reasonable basis in fact for impugning Judge Markus' integrity is preposterous.

MISTRIAL

In his objections, respondent argues that Judge Markus' finding in his order declaring a mistrial that respondent violated a court order to refrain from discussing criminal conduct in connection with First Federal's activities proves Judge Markus fabricated his reasons for declaring a mistrial. In support of his argument, respondent points to the fact that during the *First Federal* trial, and in response to a question from Attorney McBride, Judge Markus informed McBride that he was prohibited from using the word "extortion," but could use the word "coercion." [Tr. p. 242]. During his closing argument to the jury, respondent read the statutory elements of criminal coercion, a lesser included offense of criminal extortion. As respondent explained in the disciplinary hearing, respondent's actions were in direct violation of his order:

This is a civil case. There is no civil claim for extortion. Mr. Shimko expressly agreed in writing that there is no civil claim for extortion. There are appellate decisions in Ohio that there is no civil claim for extortion. It was on that basis that I initially said he couldn't bring up the subject related to this at all; but then on my own motion, not even at his request, I reconsidered and said, well, coercion is the opposite side of duress, which is a civil defense. Duress is a defense civilly; and, therefore, they could argue that the decision was made under duress as a result of the coercion of the bank personnel. It was very clear from my tone, if not from my language, that the criminal issues had nothing to do with the case; and, indeed, if we did, I would make it very clear that the statutory language for coercion has nothing to do with this case at all* * *This was not a criminal case, and to inject criminal charges in it necessarily created not only improper issues, but encouraged passion, prejudice, and everything we're trying to avoid.

[Tr. p. 243].

True to his character, respondent defied the court's order, then relied upon a distorted interpretation to defend his misconduct. As Judge Crawford noted in his order imposing sanctions against respondent, "Mr. Shimko has a tendency to take everything to the limit. He did it with Judge Markus and he did it with this Court on the retrial." [Rel. Ex. 20, p. 12]

POST-TRIAL CONFERENCES

After Judge Markus declared a mistrial, there were other matters that needed to be addressed. While preparing for the additional proceedings, Judge Markus discovered that respondent, who actually represented the bankruptcy trustee, Josiah Mason, never moved to make Josiah Mason a party in the *First Federal* litigation. Despite respondent's participation since 2006, his actual client had never been a party to the case. [Tr. p. 161]. At the disciplinary hearing, Judge Markus explained:

And so beginning in March 2009, I brought this matter to Mr. Shimko's attention. And I said, it appears that you have never been—the party you're purporting to represent is not a party in this case. He was again antagonistic to my comments. I said, you know, if you would like to file that motion, I would be receptive to it. I would encourage you to do it; and unless the other parties can show me some

very good reason, I'm likely to grant it. I said that to him multiple times, and he continued to refuse to file an application to have his purported client as a party in the case.

Id.

Despite respondent's invitation for respondent to join his client as a party, respondent refused. Consequently, when Judge Markus held pre-trial conferences on March 31, 2009 and January 14, 2010, he did not recognize respondent as counsel for any party. In his second affidavit of disqualification, respondent falsely asserted:

When Affiant appeared at the hearing, respondent was rude and arrogant. He would not let Affiant participate in the hearing and referred to Affiant as a Spectator [March 31, 2009 Tr. @ pp.4-6, 29]. [Judge Markus] repeatedly rejected Affiant's efforts to address the Court on the issues. He was rude and impolite. His actions were clearly intended to humiliate Affiant and to demean his presence at the hearing.

[Rel. Ex. 13, ¶59]

A reading of the March 31, 2009 transcript forces one to question whether respondent was describing a different hearing in front of a different judge. At no time during the hearing was Judge Markus rude or arrogant. At no time during the hearing did Judge Markus reject respondent's efforts to address the issues. In fact, Judge Markus invited respondent to participate, "As a spectator, Mr. Shimko, do you have anything else you wish to contribute or ask at this time." To which respondent replied, "Well, I don't believe I'm a spectator here. Might not have had much to offer, but whatever my status was here, no, I have nothing to offer."

[Resp. Ex. H, March 31, 2009, Tr. p. 29]

The fact of the matter is that respondent's client was not a party to the case. In denying his second affidavit of disqualification, the late Chief Justice Moyer agreed with Judge Markus, "Based on the foregoing, Shimko has not demonstrated that he represents a party to the proceedings as required by R.C. 2701.03(A)... Accordingly, his affidavit of disqualification is

dismissed.” [Rel. Ex. 15, p. 4]. At the disciplinary hearing, respondent testified that the Chief Justice’s ruling was in error. [Tr. p. 602].

On January 14, 2010, Judge Markus conducted another conference. Respondent claims that the sole purpose of the hearing was to “grill” respondent for having filed a grievance against Judge Markus. [Tr. p. 537]. Once again, the transcript reflects that, by respondent’s own admission, there was a purpose for the hearing, and that it was respondent who violated Gov. Bar R. V§11(e) by disclosing in a public forum that respondent had filed a grievance against Judge Markus.

Shimko: Your Honor, let’s make the record clear. You know I filed a judicial complaint against you. This is inappropriate for grilling me like this when you know I filed a judicial grievance against you. That is not the purpose of this hearing. The purpose of this hearing is as you first said. Why are we grilling me, Your Honor? I may have nothing to say here in these proceedings if they go as planned. Why create this controversy? Why continue to create antagonism that has existed between you and me since you got on this case?

Markus: I will again disregard the discourteous comment.

Shimko: Sir, you disregard everything I say. Your Honor, why don’t we get on with the hearing?

[Rel. Ex. 14, Bates p. 149].

At the disciplinary hearing, Pry testified that during the January 14, 2010 post-trial conference, Judge Markus “baited” respondent. Yet, when panel member Coulson pressed Pry as to why he felt Judge Markus baited respondent, he simply stated, “...I didn’t see there was a need for the hearing...” [Tr. p. 393]. At the time, Judge Markus explained his reasons for the hearing and no one—including Pry—objected. [Rel. Ex. 14, Bates, p. 158]

A review of the January 14, 2010 hearing transcript reveals Judge Markus trying to ascertain respondent’s role in the proceedings in light of the fact that respondent did not

represent a party, and, even if he did represent someone, his purported client did not have an interest in the properties that were germane to that particular hearing. [*Id.*, Bates, pp. 144-150]. Even Pry agreed that respondent's alleged client "was not a person who has an interest in the two properties that are subject of Counts 2, 4, and 6." [Rel. Ex. 14, Bates p. 154.]. Judge Markus never baited respondent. To the contrary, it was respondent who continued his petulant, condescending attitude toward Judge Markus.

In dismissing respondent's second affidavit of disqualification, Chief Justice Moyer aptly noted, "My own review of the [January 14, 2010] transcript reveals no words or actions by Judge Markus that would warrant disqualification." [Rel. Ex. 15, p. 5]

The transcripts from the March 31, 2009 and January 14, 2010 conferences illustrate Judge Markus' attempts to accommodate respondent, despite the fact that respondent did not represent a party in the action. The fact that respondent relies upon these transcripts as proof of Judge Markus' alleged corruption forces this Court to question respondent's fitness to practice law.

In his objections, respondent argues that the board "virtually ignored" the testimony of Messrs. Pry and McBride, counsel for Galion Bank. Recognizing that Prof. Cond. R. 8.2(a) requires an objective standard of review, respondent purports to cast Pry and McBride as "reasonable" attorneys who came to the "same conclusions" as respondent. Respondent's strategy has several critical flaws.

First—and most important—neither Pry nor McBride have ever corroborated respondent's baseless allegations that Judge Markus "fabricated," "created," "contrived," "manufactured," and/or "misrepresented" any fact from the underlying trial. Just as he did in the *First Federal* litigation, respondent continues to twist the facts to support his precarious position.

Pry's affidavit of disqualification contained two statements regarding his concern for Judge Markus' impartiality.

- 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.
- Any member of the bar witnessing the proceedings would conclude that Judge Markus had made up his mind on this case long ago.

[Resp. Ex. D, ¶ 7, 10].

Unlike respondent, Pry never accused Judge Markus of:

- Exhibiting "paranoia"
- Contriving a reason to deny Jeffrey Angelini his verdict
- Contriving a means to find the jury was confused
- Being motivated by his own agenda
- Being personally invested in the outcome of the case
- Creating a convenience to justify his own arbitrary and capricious conduct
- Manufacturing allegations of attorney misconduct to obscure his own abuse of discretion
- Fabricating that respondent had committed misconduct
- Completely fabricating the basis for his decision to grant a new trial
- Deliberately misrepresenting the state of the record
- Engaging in judicial misconduct.

Further, at the disciplinary hearing, Pry would not corroborate the spurious allegations respondent repeatedly lodged against Judge Markus:

Mr. Alkire: Did you come to a conclusion as to whether Judge Markus had harbored a personal bias against Mr. Shimko?

Pry: I don't know what Judge Markus thought.

[Tr. p. 377].

* * *

Relator: Do you feel in your mind that Judge Markus, based upon everything you observed at the trial, manufactured reasons to grant a mistrial?

Pry: I don't know what Judge Markus had in his mind.

Id. at 388.

Like Pry, McBride also refused to corroborate respondent's baseless attacks upon Judge Markus' integrity.

Relator: Now, I am going to ask you some specific questions here. Since you were at the trial all the way up until the last day, you'll have a firsthand perspective of this. Do you think Judge Markus fabricated the reasons for denying Jeffrey Angelini a verdict?

McBride: I have no idea what Judge Markus was thinking.

Relator: Do you think Judge Markus was motivated by his own agenda and that his actions in this case were a simple abuse of discretion?

McBride: I have no idea what Judge Markus was thinking. I can't answer what Judge Markus was thinking.

Relator: Do you think Judge Markus fabricated that Mr. Shimko committed attorney misconduct to obscure the judge's own judicial misconduct?

McBride: Again, I have no idea what Judge Markus was thinking about in his head.

[Tr. pp. 350-351].

* * *

Relator: You didn't think he was engaging in any judicial misconduct, did you?

McBride: I never said that he did, no. (Emphasis added).

Id. at 352.

Not only was McBride unwilling to corroborate respondent's false conclusions, he testified that his client received a fair trial before Judge Markus.

Relator: And in fact, as you sit here today under oath you believe your client received a fair trial?

McBride: I'm not arguing that my client did not receive a fair trial. I disagree with Judge Markus' decisions, but that's why we have the court of appeals. (Emphasis added).

Id. at 348-349.

Second, for purposes of applying an objective standard, Pry and McBride are anything but “reasonable” attorneys. Pry and McBride enjoy a long-standing business relationship with respondent dating back to the 1970s for Pry and 1986 for McBride. [Tr. at 367, 318]. It was Pry who referred the underlying case to respondent. *Id.* at 369. In addition to their common business interests, Pry and respondent maintain a social relationship as well, having vacationed together in India in 2003. *Id.* at 367. Contrary to respondent’s assertions, the board did not ignore Pry and McBride’s testimony, they simply discounted it based upon their close affiliation with respondent. “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.” [Report at ¶19] “Both attorneys had or were assisting Respondent for trial and viewed Judge Markus’ remarks and action from that perspective.” *Id.* at ¶19, FN 2. Indeed, after the retrial and in his order imposing Civ. R. 11 sanctions against Pry and McBride, Judge Dale Crawford duly noted, “The Court will note that Galion Bank, unfortunately for all involved, piggybacked on the claims of Jeffrey Angelini and the Trustee. It did so at its peril.” [Rel. Ex. 20, p. 29]

Despite having participated in the trial before Judge Markus, Pry and McBride filed their affidavits of disqualification one year after the mistrial. In dismissing their affidavits, Chief Justice Moyer noted, “Affiants cannot wait until they receive an adverse ruling to raise concerns about events that occurred over a year earlier.” [Rel. Ex. 15, p. 5]

No lawyer, let alone a reasonable lawyer, would believe that the preceding incidents—taken individually or collectively—would provide a reasonable basis in fact to attack Judge Markus’ integrity. As the board noted in its report, “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.” [Report at ¶32]. The board further found that respondent’s

statements in his appellate briefs and affidavits of disqualification were “proved by clear and convincing evidence to be unreasonable and objectively false with a *mens rea* of recklessness.”

Id. at ¶34.

II. IN ANALYZING RESPONDENT’S CONDUCT, THIS COURT SHOULD APPLY THE OBJECTIVE STANDARD ARTICULATED IN *DISCIPLINARY COUNSEL V. GARDNER*, 99 OHIO ST.3D 416, 2003-OHIO-4048, 793 N.E.2d 425.

In his second proposition of law, respondent asserts that a lawyer cannot violate Prof. Cond. R. 8.2(a) for “statements made in judicial filings, when a reasonable, factual basis exists for making such statements and actual malice is not shown by clear and convincing evidence.” Respondent’s assertion contains two critical flaws. First, in the instant matter, there was no reasonable, factual basis to accuse Judge Markus of “fabricating,” “manufacturing,” “contriving,” and/or “creating” reasons to justify his granting of a mistrial in order to “camouflage his own misconduct.” Second, this court has repeatedly rejected the actual malice standard in cases involving Prof. Cond. R. 8.2(a) in favor of an objective standard—a fact that respondent concedes.

At the disciplinary hearing, respondent argued for the application of a subjective standard, but the board summarily rejected it. “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.” *Id.* at ¶29. “An objective standard rather than a subjective standard is to be used in determining the reasonableness of Respondent’s claims.” *Id.* at ¶36.

The board’s finding was consistent with this Court’s holding in *Gardner*,

As the Court of Appeals of New York observed in *Holtzman, supra*, at 192, 573 N.Y.2d 184, 577 N.E.2d 30 (1991), adopting a subjective standard “would

immunize all accusations, however reckless or irresponsible, from censure as long as the attorney uttering them did not actually entertain serious doubts as to their truth * * * .” The state’s interest in protecting the public, the administration of justice, and the legal profession supports applying a different standard in disciplinary proceedings. *Chmura*, 461 Mich. at 543, 608 N. W.2d 31, quoting *Sandlin*, 12 F.3d at 861 (9th Cir. Wash. 1993).

Gardner at ¶27.

In a desperate attempt to avoid discipline, respondent seeks to distinguish his misconduct from that of *Gardner* on the basis that respondent’s statements emanated from objections made at trial involving the allegations of judicial bias. Under respondent’s flawed logic, so long as an attorney claims bias at trial, he or she is free to castigate the judge in subsequent court filings. Respondent’s argument misses the point. A lawyer is not prohibited from making allegations of judicial bias or even corruption, so long as there is a reasonable basis in fact to support the allegations. Further, and contrary to respondent’s assertions, the board did not punish respondent for alleging that Judge Markus was biased; rather, the board punished respondent for making the following unfounded, unsubstantiated attacks upon Judge Markus’ integrity:

- 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.

[Report at ¶34]. The board concluded that relator proved by clear and convincing evidence that the aforementioned statements were “unreasonable and objectively false with a *mens rea* of recklessness.” *Id.*

As this Court articulated in *Gardner*,

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.

Gardner at ¶26 [Citations omitted].

A reasonable attorney would believe respondent’s statements impugning Judge Markus’ integrity were false or, at the very least, made with reckless disregard for their truth or falsity. Assuming, *arguendo*, that Judge Markus was biased against respondent, there was still no reasonable basis in fact to argue that Judge Markus threw the case. In granting a mistrial, Judge Markus issued a 19-page decision in which he explained in detail his reasons for granting a mistrial. [Rel. Ex. 10]. Further, it was First Federal’s lawyer, Chappellear, who moved for a mistrial, citing respondent’s misconduct and inconsistencies between the jury verdict and interrogatories, thus negating respondent’s baseless argument that Judge Markus “completely fabricated” the reasons for granting a mistrial. [*First Federal*, Tr. pp. 2359, 2374] Additionally, the Court of Appeals affirmed the decision and, contrary to respondent’s assertions, found that the verdict and interrogatories were inconsistent and that respondent engaged in “potential misconduct,” thus triggering the appellate justices’ duty to report respondent to the Office of Disciplinary Counsel. [Rel. Ex. 17, p. 22].

In addition to the appellate court's unanimous decision, Judge Dale Crawford, who presided over the second trial, specifically found that respondent had engaged in misconduct during the first trial.

This Court has and will make a finding that Mr. Shimko engaged in misconduct during the trial. On numerous occasions he impugned the character of the trial judge by stating that the judge was biased and could not give his client a fair trial. In his 55 page post-hearing brief, Mr. Shimko devotes 50 pages of his brief seeking to convince this Court that Judge Markus was, in fact, biased.

Mr. Shimko doesn't seem to get the point. When there is an adverse ruling, arguments with the judge should cease and appellate remedies should be followed to rectify perceived improper rulings. When two Chief Justices of the Supreme Court determine that Judge Markus is not biased and one Chief Justice (Brown) admonishes Mr. Shimko to cease with his frivolous attacks against the judge, the attacks on the judge should cease. The attacks on Judge Markus continue to this date.

[Rel. Ex. 20, p. 10]

In his objections, respondent devotes 14 pages to a discussion on judicial bias and how it can deprive a party of its due process rights. Respondent's rambling narration completely misses the point. There was no judicial bias in the underlying matter and respondent's appellate briefs and affidavits of disqualification went well beyond accusations of bias. In his objections, respondent ultimately concludes by stating:

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 the purpose 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 impugning of their integrity. [sic]

Respondent's assertion makes no sense. If there is a reasonable basis in fact to make the statements, then there is no violation of Prof. Cond. R. 8.2(a). That is the objective standard.

"Under this 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.” *Disciplinary Counsel v. Frost*, 122 Ohio St.3d 219, 2009-Ohio-2870, 909 N.E.2d 1271, ¶34, citing *Gardner* at ¶31. Respondent simply cannot accept the fact that there was no reasonable basis in fact for accusing Judge Markus of “fabricating,” “contriving,” “deliberately misrepresenting,” “advocating,” and “manufacturing,” while he presided over the *First Federal* litigation. As Judge Crawford stated in his order imposing sanctions against respondent, “At times, Mr. Shimko does not accept ‘no’ whether it deals with adverse rulings on his counterclaims, evidentiary rulings and/or a judge’s refusal to succumb to his ‘threats’ of forced recusal.” [Rel. Ex. 20, p. 23].

Respondent faults the board for failing to adequately address respondent’s baseless assertion that the imposition of a sanction in this matter will have a chilling effect on legitimate advocacy. The board did address respondent’s argument but rejected it:

Requiring respondent to be held accountable for such conduct does not violate or chill his First Amendment rights under the United States 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, 793 N.E.2d 425 . 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), 253 N.W.2d 313, cited in *Gardner, supra*.

[Report at ¶35].

In his objections, respondent relies upon *United States v. Brown*, 72 F.3d 25 (5th Cir. Tex. 1995), for the proposition that “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.” *Id.* at 29.

For several reasons, respondent’s reliance upon *Brown* is misplaced. First, unlike respondent, the lawyer in *Brown* did not engage in a character assassination of the trial judge.

The *Brown* court concluded that the lawyer's statements about "gestures, comments and inattentiveness made in the confines of the judicial process hardly equal the statements noted *supra* of graft and conspiracy."² *Id.* at 28. The *Brown* court continued, "Rule 8.2 solely proscribes false or reckless statements questioning judicial qualifications or integrity (usually allegation of dishonesty or corruption)." *Id.* In the case at bar, respondent assaulted Judge Markus' integrity alleging, among other things, that he "manufactured" and "completely fabricated" the reasons for a mistrial in order to "camouflage his own misconduct." Surely, respondent's comments fall within the purview of Prof. Cond. R. 8.2(a).

Second, as stated previously, under Prof. Cond. R. 8.2(a), a lawyer is permitted to challenge a perceived partiality, so long as there is a reasonable factual basis for the allegations. See *Gardner* at ¶31. In the case at bar, the evidence proved, and the board found, that respondent had no reasonable factual basis to attack Judge Markus' integrity.

Finally, in *United States v. Nolen*, 472 F.3d 362 (5th Cir. Tex. 2006), the court found a lawyer's statement in a motion accusing a judge of providing false reasons for a ruling violated Rule 8.02 [Texas' exact equivalent to Prof. Cond. Rule 8.2]. In arriving at its decision, the *Nolen* court clarified its earlier holding in *Brown, supra*, stating:

We cannot read *Brown* so broadly as to foreclose the possibility that such obvious allegations of judicial dishonesty may constitute a violation of Rule 8.02 * * * Green's conduct here cannot be equated with the allegations of perceived partiality at issue in *Brown*. Accordingly, we find no error in the district court's determination that Green's statements in this case came within the purview of Rule 8.02—and violated it."

² The "graft and conspiracy" consisted of allegations that a judge and various attorneys conspired to fix the outcome of a federal case (*In re Disciplinary Action Against Graham*, (Minn. 1990), 453 N.W.2d 313) allegations that the court interfered with audio recordings of trial and had granted continuances to favor one side of the litigation (*In the Matter of Emil J. Becker, Jr.*, 620 N.E.2d 691 (Ind.1993)); and, an attorney accusing a judge in a televised statement of purposefully dishonest conduct (*Matter of Westfall*, 808 S.W.2d 829 (Mo. 1991)).

Contrary to respondent's assertions, his attacks upon Judge Markus' integrity fall under *Brown's* purview and violate Prof. Cond. R. 8.2(a) and 8.4(h).

III. RESPONDENT'S REPEATED ATTACKS UPON JUDGE MARKUS' INTEGRITY WARRANT AT LEAST A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW.

Contrary to respondent's assertions, he stands before this Court because he falsely accused Judge Markus of fixing the outcome in the *First Federal* case. "Unfounded attacks against the integrity of the judiciary require an actual suspension from the practice of law." *Gardner* at ¶36, citing *Disciplinary Counsel v. West* (1999), 85 Ohio St.3d 5, 1999-Ohio-197, 706 N.E.2d 760.

In *Gardner*, the Ohio Supreme Court imposed a six month suspension from the practice of law upon an attorney who, in *one* motion to reconsider, accused the court of appeals panel of being dishonest and ignoring well-established law, thus violating DR 8-102(B), the predecessor to Prof. Cond. R. 8.2(a). *Id.* at ¶3.

In *Gardner*, the lawyer had no previous discipline and, during the hearing, apologized for the manner in which he expressed his frustration and acknowledged that his response to the court of appeals' decision was neither appropriate nor professional, although he steadfastly asserted his belief in the statements he made. *Gardner* at ¶11.

In the case at bar, respondent has steadfastly refused to acknowledge the wrongful nature of his misconduct, an aggravating factor under BCGD Proc. Reg. §10(B)(1)(g). He has shown no remorse. In fact, at the hearing, respondent testified he did nothing wrong and that he still believes today that all the spurious allegations that he leveled against Judge Markus are true. [Tr. pp. 27, 644]. The board found that respondent 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." [Report at ¶39.]

Further, *Gardner* involved several statements in one pleading. In the case at bar, respondent filed four separate pleadings—each of which contained numerous assaults on Judge Markus' integrity—over a protracted period of time. In addition, the board found that respondent's "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." *Id.* Finally, unlike *Gardner*, respondent has been previously disciplined.³ *Disciplinary Counsel v. Shimko*, 124 Ohio St.3d 1201, 2009-Ohio-6879, 918 N.E.2d 1007.

In *Disciplinary Counsel v. Proctor*, 131 Ohio St.3d, 2012-Ohio-684, 963 N.E. 2d. 806, Attorney Phillip Proctor falsely accused a judge in two separate pleadings of harboring a bias against him, engaging in an ex parte communication with the prosecutor, and attempting to cover up and/or deny his actions. Although Proctor originally stipulated to a violation of Prof. Cond. R. 8.2(a), he reneged on his stipulation at the disciplinary hearing, claiming he did have a reasonable belief that the statements were true. *Id.* at ¶19. This Court, citing *Gardner*, suspended Proctor for six months.

Incredibly, respondent seeks to distinguish his misconduct from that of *Gardner* and *Proctor*, by alleging that his genuine belief that Judge Markus "fabricated," "contrived," "manufactured," "advocated," and "camouflaged," warrants a lesser sanction. Respondent argues that neither *Gardner* nor *Proctor* honestly believed in the rightfulness of their positions, as evidenced by their stipulations. Respondent's argument is absurd. Respondent's refusal to

³ The Arizona Supreme Court issued a public reprimand against respondent on June 23, 2009, three months before respondent submitted his appellate brief in the First Federal case. [Ex. 11]. The Supreme Court of Ohio reciprocally disciplined respondent on December 15, 2009, six weeks before respondent submitted his second Affidavit of Disqualification. [Ex. 13].

acknowledge the wrongful nature of his misconduct is an aggravating factor. BCGD Proc.Reg. §10(B)(1)(g). His stubborn insistence that he was right does not transform an aggravating factor into a mitigating factor. In any event, Gardner did not stipulate to violating DR 8-102(B) and he never relinquished his belief in the truth of the statements he leveled against the appellate panel.

However, while respondent professed to understand that need to challenge judicial decisions only in an appropriate manner, he confirmed his continued belief that the court of appeals during his client's appeal had skewed and ignored the facts, disregarded honesty and truth, and violated their oaths to decide cases fairly and impartially.

Gardner at ¶11.

Similarly, Proctor reneged on the Prof. Cond. R. 8.2(a) stipulation and argued that he did indeed have reason to believe the statements he made against a judge were true. And the Court treated Proctor's change of heart as an aggravating factor. *Proctor* at ¶19.

If anything, in light of all of the evidence, including the court of appeals decision, Judge Crawford's comments in his order imposing sanctions against respondent, Chief Justice Moyer and former Chief Justice Brown's dismissal of the affidavits of disqualification, the bar association's dismissals of respondent's grievance against Judge Markus, and the board's report, respondent's continued denial reinforces the unreasonableness of respondent's beliefs and forces this Court to question respondent's fitness to practice law.

The following exchange from the disciplinary hearing illustrates respondent's unwillingness and/or inability to acknowledge wrongdoing:

Panel Member: I have to tell you, I'm a little troubled by your testimony that you think that—you think what you did in calling the judge such things as fabricating reasons, that the judge is making up things. This is calling a judge a liar. There are ways to handle—if you think a judge is wrong in a decision, there's ways to do it. And the way to do it, you say you disagree with it, Judge, here are the facts; but when you start calling the judge a liar and saying the judge is fabricating things, you're going beyond—crossing a line. And I'm

kind of perplexed a little bit that you think that you were absolutely right in this and there was no reason or no room for you to be wrong in it other than you think you should have resigned. And I have to tell you that I'm a little troubled by that. Can you help me out with that at all?

Respondent: I do think I was right. ***

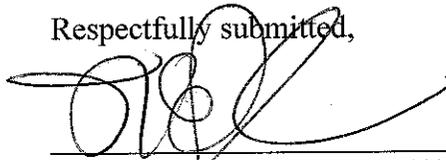
[Tr. pp. 658-659].

When considered in conjunction with this court's precedent, respondent's misconduct warrants at least a six-month suspension from the practice of law.

CONCLUSION

In weighing the evidence and applying an objective standard, the board correctly concluded that respondent's unfounded attacks upon Judge Markus' integrity were "unreasonable and objectively false" and made with a "mens rea of recklessness." [Report at ¶34]. Relator respectfully requests that this Court adopt the board's recommendation and suspend respondent from the practice of law for at least six months.

Respectfully submitted,



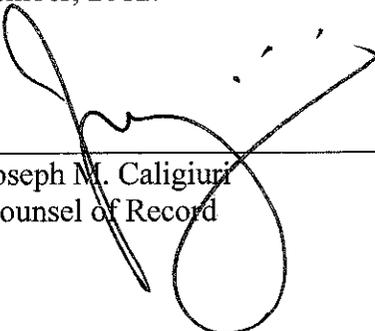
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CERTIFICATE OF SERVICE

A copy of the foregoing Relator's Answer to Respondent's Objections to the Board of Commissioners' Report and Recommendations has been served upon Richard Charles Alkire, Esq., Richard C. Alkire Co., LPA, 250 Spectrum Office Building, 6060 Rockside Woods Boulevard, Independence, OH 44131-7300, via ordinary mail transmission and e-mail transmission (r_alkire@earthlink.net); and to Richard Dove, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio, 43215, via ordinary mail, this 4th day of September, 2012.



Joseph M. Caligiuri
Counsel of Record