

Before the Supreme Court of Ohio

DALE ELMER BRICKER N° 0004922
100 DeBartolo Place
P.O. Box 3232
Youngstown, Ohio 44513

Respondent,

Case N° 2012-1713

v.

DISCIPLINARY COUNSEL
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

Relator.

RESPONDENT'S REPLY TO RELATOR'S OBJECTION TO THE
FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
AND DISCIPLINE AND BRIEF IN SUPPORT

JOHN B. JUHASZ N° 0023777
E-mail: Jbjjurisdoc@yahoo.com
7081 West Boulevard, Suite N° 4
Youngstown, Ohio 44512-4362
Telephone: 330.758-7700
Facsimile: 330.758.7757
COUNSEL FOR RESPONDENT

Jonathan E. Coughlan N° 0026424
Ohio Disciplinary Counsel

Philip A. King N° 0071895
Assistant Disciplinary Counsel
250 Civic Center Dr., Suite 325
Columbus, Ohio 43215-7411
Telephone: (614) 461-0256
p.king@sc.ohio.gov
Counsel of Record For Relator

FILED
DEC 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Before the Supreme Court of Ohio

DALE ELMER BRICKER N° 0004922
100 DeBartolo Place
P.O. Box 3232
Youngstown, Ohio 44513

Respondent,

v.

DISCIPLINARY COUNSEL
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

Relator.

Case N° 2012-1713

**RESPONDENT'S REPLY TO RELATOR'S OBJECTION TO THE
FINDINGS OF FACT AND CONCLUSIONS OF LAW
OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
AND DISCIPLINE AND BRIEF IN SUPPORT**

TABLE OF CONTENTS

Table of Contents I

Table of Authorities ii

Statement of Facts 1

Argument in Reply to Relator’s Objections 1

Respondent’s Reply to Objection No. 1: The Panel and the Board Properly
Concluded That There Was Insufficient Evidence to Establish by
Clear and Convincing Evidence That Respondent Violated Prof.
Cond. R. 8.4(h)..... 1

*Respondent’s Reply to Objection No. 2: A Public Reprimand is Proper as
Being in Line with Previously Sanctioned Conduct of other Lawyers
and the Specific and Unique Facts of this Case.* 4

Conclusion 6

Certificate of Service 7

TABLE OF AUTHORITIES.

Cases:

Butler County Bar Assn. v. Matejkovic, 121 Ohio St.3d 266, 2009 Ohio 776, 903 N.E.2d 633 4

Cincinnati Bar Assn. v. Seibel, 132 Ohio St.3d 411, 2012 Ohio 3234, 972 N.E.2d 594 5

Columbus Bar Assn. v. Craig, 131 Ohio St.3d 364, 2012 Ohio 1083, 965 N.E.2d 287 5

D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 52 S.Ct. 322, 76 L.Ed. 704 (1932) 2

Disciplinary Counsel v. Fletcher, 122 Ohio St.3d 390, 2009 Ohio 3480, 911 N.E.2d 897 5

Disciplinary Counsel v. Murraine, 130 Ohio St.3d 397, 2011 Ohio 5795, 958 N.E.2d 942 5

Medina County Bar Assn. v. Piszczek, 115 Ohio St.3d 228, 2007 Ohio 4946, 874 N.E.2d 783 5

Thomas Steel, Inc. v. Bennett, Inc., 127 Ohio App.3d 96, 711 N.E.2d 1029 (8th Dist. 1998) 2

Toledo Bar Assn. v. Sawers, 121 Ohio St.3d 229, 2009 Ohio 778, 903 N.E.2d 309 5

Statutes:

R.C. 1.51 2

Rules:

Prof. Cond. R. 8.4(h) 2

STATEMENT OF FACTS

The facts of the case are as stipulated by the parties and is found by the panel. Respondent does not disagree with the factual findings, and there is accordingly no need to repeat the essential facts of the case here.

ARGUMENT IN REPLY TO RELATOR'S OBJECTIONS

Respondent's Reply to Objection No. 1: The Panel and the Board Properly Concluded That There Was Insufficient Evidence to Establish by Clear and Convincing Evidence That Respondent Violated Prof. Cond. R. 8.4(h).

Relator claims that Respondent's misconduct adversely reflects on his fitness to practice law, and therefore violates Prof. Cond. R. 8.4(h). The Panel, of course, was in the best position to assess the evidence, and it found that Relator had *not* presented clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(h). *See, Findings of Fact and Conclusions of Law*, at ¶15. There was ample reason for the Panel and the Board to have arrived at this conclusion.

First, Respondent's clients suffered no harm. *See, Findings of Fact and Conclusions of Law*, at ¶26. Second, Respondent kept scrupulous records for his collection accounts, although concededly, as the Panel and the Board found, not in the format required by the Rules. *See, Findings of Fact and Conclusions of Law*, at ¶ 27.

To accept Relator's argument is to accept that every lawyer who commits a disciplinary violation *ipso facto* is guilty of violation Prof. Cond. R. 8.4(h). This argument, however, overlooks the well established principle in the law that when there is a *specific* provision of the law it prevails over the general provision. *See, e.g., D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 52 S.Ct. 322, 76 L.Ed. 704 (1932); *Thomas Steel, Inc. v. Bennett, Inc.*, 127 Ohio App.3d 96, 711 N.E.2d 1029 (8th Dist. 1998); R.C. 1.51. The Panel appropriately found, based upon the stipulations and based upon the evidence, that Respondent violated specific provisions of the Code that related to his specific misconduct. If every disciplinary violation is, *ipso facto*, clear and convincing evidence of misconduct that adversely reflects on a lawyer's fitness to practice law, then every disciplinary complaint would have to contain such an allegation and every disciplinary proceeding that found *any* violation would, by Relator's definition result in a Prof. Cond. R. 8.4(h) violation. That construction would reduce Prof. Cond. R. 8.4(h) to a meaningless one.

It is submitted here that the proper office of Prof. Cond. R. 8.4(h) is for situations where a panel finds that certain conduct of a respondent in violating other specific provisions was so egregious as to adversely reflect on his fitness to practice law; or, where there is no specific provision that

relates to unethical conduct, but the panel is persuaded by clear and convincing evidence that the conduct of a respondent is unethical and adversely reflects on his fitness to practice law.

As a hypothetical example, consider a case where, during a recess or during a lunch break in a trial, the lawyer for one party rifles through the briefcase of his opposing counsel, and removes and copies confidential documents from that file. The documents may have been immaterial to the lawsuit or otherwise privileged from discovery. If the lawyer who purloins that document or set of documents distributes them, publishes them, or uses them in a way that harms someone, the reprehensible and thoroughly unprofessional conduct might move the Disciplinary Counsel or the local bar association to file a complaint. From Respondent's review of the rules, there is no specific rule that says that a lawyer shall not violate the privacy of his opposing party and counsel, purloin documents, or distribute or publish such purloined documents. Depending upon the evidence, a panel might find that such conduct adversely reflects on the lawyer's fitness to practice law. Because there is no *specific* provision related to stealing documents, the *general* provision, if such a complaint were to proceed, would be the allegation, and, if proved, would constitute the violation.

That is decidedly not the situation here. The Panel and the Board found *specific* violations. The procedure in Ohio entrusts to the panel the obligation to listen to and to weigh that evidence against the allegation, and to decide if, in the Panel's considered judgment, the allegation is proved by clear and convincing evidence. The Panel did not so conclude here with regard to Prof. Cond. R. 8.4(h), and this Court should affirm that finding—not only based upon the evidence, but based upon the idea, discussed above that the specific provision should prevail over the general provision.

Respondent's Reply to Objection No. 2: A Public Reprimand is Proper as Being in Line with Previously Sanctioned Conduct of other Lawyers and the Specific and Unique Facts of this Case.

Relator cites cases to suggest that the appropriate discipline is a six month suspension, conditionally stayed. That is a change in Relator's position, for at the hearing, Relator recommended that Respondent should be given a one year suspension, upon conditions. *See, Findings of Fact and Conclusions of Law*, at ¶29. The Panel reviewed similar cases, including cases cited by the parties. *See, Findings of Fact and Conclusions of Law*, at ¶30. This review included many of the case cited by the Relator in its brief to this Court. *See, Findings of Fact and Conclusions of Law*, at ¶31-32; and, *Butler County Bar Assn. v. Matejkovic*, 121 Ohio St.3d 266, 2009

Ohio 776, 903 N.E.2d 633; *Cincinnati Bar Assn. v. Seibel*, 132 Ohio St.3d 411, 2012 Ohio 3234, 972 N.E.2d 594; *Columbus Bar Assn. v. Craig*, 131 Ohio St.3d 364, 2012 Ohio 1083, 965 N.E.2d 287; *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009 Ohio 3480, 911 N.E.2d 897; *Disciplinary Counsel v. Murraine*, 130 Ohio St.3d 397, 2011 Ohio 5795, 958 N.E.2d 942; *Medina County Bar Assn. v. Piszczek*, 115 Ohio St.3d 228, 2007 Ohio 4946, 874 N.E.2d 783; and *Toledo Bar Assn. v. Sawers*, 121 Ohio St.3d 229, 2009 Ohio 778, 903 N.E.2d 309.

As was appropriate, the panel looked at the fact that each disciplinary case is unique. *See, Findings of Fact and Conclusions of Law*, at ¶33. The Panel members also believed that the cases cited in support of a public reprimand were more “appropriate because of the substantial mitigation and unique circumstances.” *Id.* The Panel noted Respondent’s practice of law for 50 years without a blemish, 30 years of it as in-house counsel. *Id.* The Panel found no reason to believe that Respondent cannot continue to practice law in a highly ethical and competent manner. *Id.* The Panel found that no one was harmed and that the public would continue to be protected without further incident if a public reprimand were issued. *Id.*, at ¶¶33-34.

Relator's objection, with due respect, cites cases where, to be sure, a stayed suspension was imposed. But there are other cases that imposed a public reprimand. The Panel found those cases more appropriate and found a public reprimand more appropriate. Relator has furnished no reason—simply cases—why the recommendation of the Panel and the Board should be overturned. These discipline cases are unique, and this Court's jurisprudence reflects that fact. The Panel and the Board doubtless recommended a public reprimand based upon a recognition that Respondent, after spending a majority of his career as in-house counsel, struggled with the application of the rules. That conduct is not to be excused, of course, and the Panel and the Board did not do so. The Board found the appropriate violations. However, in addition to the other mitigation discussed by the Panel, there was the immutable fact that Respondent kept meticulous records and that no clients were harmed. The public reprimand "wake up call" was found to be sufficient by the Panel and the Board to protect the public. That finding should be affirmed here, and Respondent's objection should be overruled.

CONCLUSION

For the forgoing reasons, Realtor's objections should be overruled. The recommendation of the Board of Commissioners on Grievances and

Discipline that there is not sufficient clear and convincing evidence of a violation of Prof. Cond. R. 8.4(h), and that a public reprimand is proper, should be adopted by this Court.

Respectfully submitted,



JOHN B. JUHASZ N^o 0023777
E-mail: Jbjjurisdoc@yahoo.com
7081 West Boulevard, Suite N^o 4
Youngstown, Ohio 44512-4362
Telephone: 330.758-7700
Facsimile: 330.758.7757
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was [] sent by regular United States Mail, postage prepaid; [] hand delivered to counsel or counsel's office; [] sent by telecopier this 7th day of December, 2012 to Mr. Philip A. King, Esq., 250 Civil Center Drive, Suite 325, Columbus, Ohio 43215; and to Mr. Richard A. Dove, Esq., Secretary Board of Commissioners on Grievances and Discipline, Supreme Court of Ohio, 65 South Front Street, Fifth Floor, Columbus, Ohio 43215.3431



JOHN B. JUHASZ

C:\Users\John\Documents\AtOfc\JB\Civil\Discipline Cases\Bricker Dale 2641\Reply Objections wtable.wpd⇒Fri 7 December, 2012 12:56pm