

ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	:	Case No. 2013-0999
	:	
Relator	:	
	:	
vs.	:	
	:	
ERIC CHARLES DETERS, ESQ.,	:	
	:	
Respondent	:	

RESPONSE TO ORDER TO SHOW CAUSE

JONATHAN E. COUGHLAIN
(0026424)
Disciplinary Counsel

Joseph M. Caligiuri (0074786)
Chief Assistant Disciplinary Counsel
Counsel of Record
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
614.461.0256
614.461.7205 (f)
Joseph.Caligiuri@sc.ohio.gov

Charles T. Lester, Jr. (0017601)
Attorney for Respondent
Counsel of Record
P.O. Box 75069
Fort Thomas, KY 41075-0069
(513) 685-7300, (859) 838-4294, (859)
781-2406
Fax: (859) 486-6590
Email: cteljr@yahoo.com, cteljr@fuse.net

RECEIVED
NOV 27 2013
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
NOV 27 2013
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	:	Case No. 2013-0999
	:	
Relator	:	
	:	
vs.	:	RESPONSE TO ORDER TO SHOW
	:	CAUSE
ERIC CHARLES DETERS, ESQ.,	:	
	:	
Respondent	:	

On November 7, 2013, this Court ordered the respondent to notify this Court of “any claim predicated upon the grounds set forth in Gov.Bar R. V(11)(F)(4)(a), that the imposition of identical or comparable discipline in this State would be unwarranted and the reasons for that claim.” This is that response.

TABLE OF CONTENTS

Introduction	2
The Due Process Issues in the Kentucky Proceedings	2
<i>A. Background</i>	3
<i>B. Analysis</i>	4
Petition for Writ of Certiorari	8
Conclusion	9

Introduction

Gov.Bar R. V(11)(F)(4)(a) provides: “[T]he Supreme Court shall impose the identical or comparable discipline imposed in the other jurisdiction, unless the attorney proves either of the following by clear and convincing evidence: (i) A lack of jurisdiction or fraud in the other jurisdiction’s disciplinary proceeding; (ii) That the misconduct established warrants substantially different discipline in Ohio.”

There is not a lot of case law interpreting this section, but *Disciplinary Counsel v. Hine*, 80 Ohio St.3d 448, 687 N.E.2d 420 (1997) is relevant to this matter. The *Hine* Court denied a stay of reciprocal discipline for a filed Petition for Writ of Certiorari in the Supreme Court of the United States, noting that the Petition had been denied (some three months prior to the Court’s decision) and the rule does not provide for a stay for that reason. However, the Court went on to state, “The record before us indicates that respondent was afforded a hearing before the Professional Responsibility Tribunal in Oklahoma and respondent does not dispute that she was provided procedural due process in that state.” *Id.*, 80 Ohio St.3d at 449, 687 N.E.2d at 421. The inference is that a denial of procedural due process would be “evidence that ‘the misconduct established warrants substantially different discipline in Ohio.’” *Id.*; Gov.Bar R. V(11)(F)(4)(a)(ii).¹

In the case at bar, the respondent does take issue with the due process afforded him in the Kentucky disciplinary proceedings.

The Due Process Issues in the Kentucky Proceedings

¹ Indeed, the fact that a petition for writ of certiorari has been filed in the Supreme Court of the United States, although not grounds for a stay, may indeed be relevant to the issue of whether there should be substantially different discipline in Ohio.

A. Background

Eric Deters was admitted to the practice of law in Kentucky on October 10, 1986. In 2011, hearings were held on nineteen counts of misconduct in his professional activities, first before a trial commissioner pursuant to Ky. SCR 3.300 and 3.350, and then before the Board of Governors pursuant to Ky. SCR 3.370. At the Board of Governor's hearing on September 16, 2011, Deters had appeared with a court reporter and videographer, but was denied the use of them on the grounds that he needed to request permission for such in advance. He did not argue the point with the Board or subsequently with the Kentucky Supreme Court. Deters was found guilty of only four of the nineteen charges, and suspended for 61 days. *Kentucky Bar Ass'n v. Deters*, 360 S.W.3d 224 (Ky. 2012) ("Deters 1") *reinstated* 408 S.W.3d 71 (Ky. 2012) ("Deters 2"). This Court then subsequently imposed reciprocal discipline. *Disciplinary Counsel v. Deters*, 132 Ohio St.3d 1401, 2012-Ohio-2330, *reinstated* 132 Ohio St.3d 1497, 2012-Ohio-3739.

More charges were brought against Deters, and on August, 13, 2012, mindful of his experience at the hearing in 2011, Deters filed a motion requesting the presence of a court report and videographer, in advance of the Board of Governors' *de novo* hearing in two additional files against Deters. This was denied without comment by the Board.² On September 15, 2012, the Board of Governors of the Kentucky Bar Association, pursuant to Ky. SCR 3.370, held a *de novo* hearing in two additional files against Deters. *Kentucky Bar*

² Matters in Kentucky state courts are routinely recorded, not stenographically, but electronically, by either audio recording devices or by video recording devices. *See, e.g., Ky. Civ. R. 98, Procedures for video recorded court proceedings and appeals.* The bar discipline proceedings before the Trial Commissioner are to be recorded by videorecorder if possible. Ky. SCR 3.350.

Ass'n v. Deters, 406 S.W.3d 812, 817 (Ky. 2013) (“Deters 3”).

The Board recommended a finding of guilty in both files and a total of sixty days of suspension. Deters filed a brief in the Kentucky Supreme Court objecting on due process grounds to the failure to have a stenographic or video record of the *de novo* hearing before the Board of Governors, as he had requested. The Kentucky Supreme Court responded to that argument in this manner:

The Court sees no prejudice in this practice as it relates to this Court’s review of the matter. When this Court undertakes review of a disciplinary proceeding, whether at the party’s urging under SCR 3.370(7) or the Court’s own motion under SCR 3.370(8), it is not bound as it would be in a pure appeal. The Court is not required to defer to the findings of fact or conclusions of law of the trial commissioner or the Board. Rather, in disciplinary proceedings, **those entities act as administrative agents of this Court to produce a record** and a recommendation.

Once this Court undertakes review of a case, it “shall enter such orders or opinion as it deems appropriate **on the entire record.**” SCR 3.370(8). Thus, the demeanor and actions of the Board and Bar Counsel are not relevant. This **Court instead decides the case de novo itself based on the record developed below.** Any potential unfairness shown by a Board member or by Bar Counsel is alleviated by this Court’s independent review of a lawyer’s alleged misconduct.

Kentucky Bar Ass’n v. Deters, 406 S.W.3d at 819 [emphasis supplied]. The court accepted the recommendations of the Board of Governors, and on May 23, 2013, entered an Opinion and Order suspending Deters for sixty days. *Id.* at 822-23.

B. Analysis

The Kentucky Supreme Court’s decision, and the reason why counsel is filing a petition simultaneously with this response in the United States Supreme Court, conflicts with the U.S. Supreme Court’s holdings in numerous precedents and violates basic requirements of procedural due process when (1) review is based upon the record below but (2) the respondent is denied the right to have a record of one of the critical fact-finding

proceedings.

The practice of law has long been recognized as a right that, once acquired, is entitled to due process protection. Chief Justice Marshall noted in *Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824) that: “the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him.” Justice Field, writing for the Court in *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866), reiterated this sentiment:

The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

Id. at 379. The Court, in *Ex Parte Bradley*, 74 U.S. (7 Wall.) 364, 375 (1868), also recognized that the lower court had no power to punish an attorney without notice or an opportunity to defend. The same term, the Court, discussing attorney discipline in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523 (1868), stated “[N]otice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence. The manner in which the proceeding shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.” Due process also requires notice of and adherence to those regulations.

A century later, the Court again reiterated the due process rights in disciplinary proceedings in *In re Ruffalo*, 390 U.S. 544 (1968). The Court cited *Randall* in determining that fair notice and an opportunity to be heard had been denied Ruffalo, the court

concluding, “This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process.” *Id.* at 552.

If one is to have an opportunity to be heard, and that decision is reviewed in any fashion (whether “de novo” on the record, or solely on the record for errors of law or abuses of discretion), it is a fundamental prerequisite that there be a record of what transpired, especially before a trier of fact. As the *Ruffalo* Court pointed out, “These are adversary proceedings of a quasi-criminal nature.” *Id.* at 551.

The right to a record of proceedings is assumed in many of the cases, but expressly prescribed in a number of cases, especially involving deprivation of rights or liberties.

The principle of [*Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion)] is that ‘(d)estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts,’ 351 U.S., at 19, a holding restated in [*Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958) (per curiam)] to be ‘that a State denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials,’ 357 U.S., at 216.

Draper v. Washington, 372 U.S. 487, 488 (1963) (reaffirming *Griffin*). In a case involving a nonfelony charge, this Court said, “appellant cannot be denied a ‘record of sufficient completeness’ to permit proper consideration of his claims.” *Mayer v. Chicago*, 404 U.S. 189, 198 (1971) (even when the punishment was only a fine). And in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996), this Court held that Mississippi could not deny the petitioner appellate review of the sufficiency of the evidence on which the trial court based its parental termination decree because of her poverty.

In the case at bar, Deters was not asking for anything at Kentucky’s expense, but at his own expense, and yet the fundamental right to have a record of the fact-finding

proceedings before the Board of Governors, even at his own expense, was denied him. Ky. SCR 3.350 requires a record, preferably a video record, but otherwise a stenographic record, before a Trial Commissioner, but does not specifically state that a record must be made before the Board of Governors when it sits *de novo*. Nevertheless, a record of the proceedings is fundamental to the due process requirement of being heard when the Kentucky Supreme Court does its review. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

Ohio also requires a record at the fact-finding stage. Ohio Gov. Bar R. V, which deals with disciplinary procedure, particularly § 6, proceedings of the Board after filing of the complaint, states in relevant part:

(F) Hearing. Upon reasonable notice and at a time and location set by the panel chair pursuant to the hearing procedures and guidelines of the Board, the panel shall hold a formal hearing on the complaint. Requests for continuances may be granted by the panel chair for good cause shown. All hearings shall be recorded by a court reporter provided by the Board and a transcript filed with the Secretary.” [emphasis supplied]

In *Dayton Bar Ass’n v. Clinard*, 60 Ohio St.3d 59, 573 N.E.2d 45 (1991), this Court remanded a disciplinary proceeding to the panel for further evidentiary proceedings where it appeared that the record of a disciplinary hearing did not contain all relevant evidence due to the ineffectiveness of the attorney’s counsel.¹

¹ There is a hole in the Ohio rules, just like the one in the Kentucky rules. Ohio Gov. Bar R. V provides: “ (J) Review by Entire Board. After review, the Board may refer the matter to the hearing panel for further hearing, **order a further hearing before the Board**, or proceed on the certified report of the prior proceedings before the hearing panel. After the final review, the Board may dismiss the complaint or find that the respondent is guilty of misconduct. If the complaint is dismissed, the dismissal shall be reported to the Secretary of the Board, who shall notify the same persons and organizations that would have received

This is a case of great public importance. Just as our men and women in uniform protect our liberties from external threats, the members of the bar protect our liberties from internal threats. Dick the Butcher, a participant in the civil unrest in Henry VI, part 2, Act 4, Scene 2 says, “The first thing we do, let’s kill all the lawyers.” Although also intended as a joke in that play, it illustrates that then, as now, lawyers protect our rights, and the way to destroy those rights is to eliminate the lawyers.

Just as lawyers protect the rights of others, so they too should be accorded the same protections, not less, that are accorded other’s rights and privileges. This case involves the failure of elementary due process principles to be applied to the lawyer discipline process.

This failure of due process is the reason why substantially different discipline should be imposed in this state.

Petition for Writ of Certiorari

In the case at bar, simultaneously with the filing of this response, counsel for respondent is also filing a petition for writ of certiorari in the Supreme Court of the United States. Pursuant to the rules of that court,

a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment.

U.S. S.Ct. R. 13(1). The Supreme Court of Kentucky entered its judgment on August 29, 2013. *See Relator’s Motion, Exhibit A*. Thus, the petition in the Supreme Court of the

notice if the complaint had been dismissed by the hearing panel.” [emphasis supplied] Although the rule would seem to permit the same result Kentucky imposed upon Deters, counsel has not found any Ohio case like this one, and the *Dayton Bar* case suggests that this Court would have afforded Deters the right to a transcript.

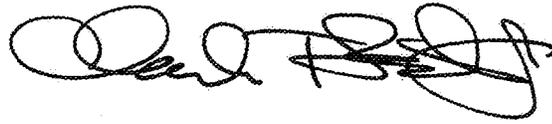
United States is due November 27, 2013, the same day this response is due to this Court's November 7, 2013 Show Cause Order.

Because of the significant due process issues, there is a probability that the petition being filed in the Supreme Court of the United States will be granted, and the case heard on its merits. Such action could well reverse the decision of the Supreme Court of Kentucky. If the petition is denied or not successful, respondent will still have to serve the sixty day reciprocal discipline.

The fact this is reciprocal discipline further supports the reason why substantially different discipline should be imposed in this state. If respondent's petition is granted, and the Supreme Court of the United States reverses the Kentucky court's decision, but substantially different discipline is not imposed in this state, respondent will have unfairly served a sixty day suspension in Ohio. The U.S. Supreme Court, in *In re Ruffalo*, 390 U.S. 544 (1968), reversed the Sixth Circuit's application of reciprocal discipline because of the failure of due process. This Court should follow the *Ruffalo* example.

Conclusion

Accordingly, this Court should impose substantially different discipline in this state because of the failure of due process in the Kentucky proceedings. There is nothing in the rule that prevents "substantially different discipline" from being no discipline at all, which is what respondent suggests. "Substantially different discipline" could also mean delaying imposition of discipline until resolution of the petition in the U.S. Supreme Court. In any event, this Court should avoid a miscarriage of justice by imposing discipline prematurely.



Charles T. Lester, Jr. (0017601)
Attorney for Respondent, Counsel of Record
P.O. Box 75069
Fort Thomas, KY 41075-0069
(513) 685-7300, (859) 838-4294, (859) 781-
2406
Fax: (859) 486-6590
Email: cteljr@yahoo.com and cteljr@fuse.net

CERTIFICATE OF SERVICE

I certify that on November 26, 2013, a copy of the foregoing was served upon Joseph M. Caligiuri, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411, Joseph.Caligiuri@sc.ohio.gov by U.S. Mail and e-mail transmission and upon Richard Dove, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, OH 43215 by U.S. Mail.



Charles T. Lester, Jr. (0017601)
Attorney for Respondent, Counsel of Record