

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:)
)
COMPLAINT AGAINST)
)
LARRY DEAN SHENISE)
)
RESPONDENT)
)
AKRON BAR ASSOCIATION)
)
RELATOR)
)
)
)

CASE NO. 13-1934
BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
CASE NO. 2013-037

FILED
FEB 13 2014
CLERK OF COURT
SUPREME COURT OF OHIO

RELATOR'S RESPONSE IN SUPPORT OF MOTION
TO HOLD PHIL TREXLER IN CONTEMPT OF COURT

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SUMMARY

Attorney disciplinary proceedings are of at least as much public importance as civil proceedings. Indeed, they are more like criminal proceedings than civil ones. In general, an elevated "clear and convincing" standard of proof must be met by Relator. Failure to obey a Board of Commissioners subpoena is expressly a contempt of this Court, emphasizing the public importance of disciplinary proceedings.

Reporter eyewitnesses should be required to obey Board of Commissioners subpoenas to testify as to the accuracy of disputed stories about attorneys' allegedly disparaging statements about judges. It would be unfair to attorney grievance respondents to deprive them of the ability to cross-examine reporters' sworn statements.

There has been no harassment of the reporter. All that is sought is for the reporter to travel several blocks to provide a few minutes of testimony to confirm that he stands by the accuracy of his story. No source disclosure or other confidential information is sought. The Bar Association was willing to submit the reporter's affidavit in lieu of his testimony, but Respondent would not agree to give up cross-examination of the reporter, as was his right.

If there has been any waste of resources in this matter, it has been from the baseless refusal of the reporter simply to take an hour to come say live in a hearing what he has said in his affidavit, that he stands by the accuracy of his story, and to be questioned about that testimony so that the Panel is properly able to evaluate it.

NEWSPAPER'S ERRONEOUS STATEMENT OF FACTS¹

¹ Relator stands by the Statement of Facts in its previous Motion papers and hopes the

In its Memorandum in Opposition, at page 1, the Newspaper² incorrectly said that the only evidentiary issue is whether Respondent used the word "intentionally" before or after the phrase "miss a hearing." But Respondent also contends that in a portion of the story not quoted by the Newspaper in its Memorandum, he was inaccurately reported to have said that he had not received the arrest warrants that were issued.

The omitted accuracy dispute is important. The alleged disparagement of Judge Gallagher is Respondent's reported accusation that the Judge does not run his court properly, failing to give notice of proceedings, leading to the unjustified arrest of an elderly man. The report in the story that Respondent said that he did not receive *two* such notices in the same case conveys far more criticism than that there was just one such failure to give notice. It suggests consistently improper procedure by the Judge.

And of course the arrest warrant is what led directly to Mr. Little's jailing. Failure to give notice of the arrest warrant would justifiably be seen by the public reading the story as even more egregious than failure to give notice of the hearing. Respondent now denies that he told Trexler he had not received notice of the arrest warrant. If that is true, Respondent's offense is less serious and conversely more serious if not true.

So the subpoena dispute is about far more than an omitted "intentionally." The Newspaper misleads this Court by failing to include that matter in its Statement

Court will rely on it. But the Newspaper's errors in its Statement of Facts must be noted.

² The Beacon Journal Publishing Company and Phil Trexler are referred to jointly as "the Newspaper."

of Facts, wrongly trying to trivialize what is at stake.³

Also, as noted above, Relator was willing to submit Trexler's affidavit in lieu of the subpoena, but Respondent would not consent to that. That is also omitted from the Newspaper's Statement of Facts. The omitted information puts the lie to the Newspaper's baseless contention that there has been harassment.

ARGUMENT

1. Board of Commissioners subpoenas for reporter eyewitness testimony should be enforced like any other subpoenas.

The Newspaper has not commented at all on most of Relator's arguments and law offered in support of its Motion, which demonstrate that the subpoena power should be available to obtain reporter eyewitness testimony in attorney disciplinary proceedings such as this one. Relator anticipated and met most of the Newspaper's arguments and law in its previous brief and accordingly will not discuss those points at length in this response.

To summarize the key points Relator made previously, this Court has held that a disciplinary proceeding "is neither a criminal nor a civil proceeding," in which "the regulations relating to investigation and proceedings involving complaints of misconduct are to be construed liberally for the protection of the public, the courts,

³ Relator has of course noted Justice Pfeiffer's dissent to the Court's Order of February 7, 2014. Relator respectfully disagrees that it would not be misconduct for the Respondent to have *untruthfully* made the reported statements about Judge Gallagher, as alleged. It is no light matter to falsely accuse a sitting judge of running a slipshod court that fails twice in the same case to give required notices, leading to an unjustified arrest. If Respondent lied to Trexler about those things, as Relator alleges and Trexler's testimony would support, he should be disciplined for it. Further, there are other prongs of disciplinary issues before the panel in this case; it is important that each prong be fully presented before conclusions are drawn about the merits.

and the legal profession.” *Disciplinary Counsel v. Heiland* (S.Ct.), 2008 Ohio 91, at ¶¶ 32 and ¶¶ 34. In *Heiland*, due process was found to have been accorded sufficiently to the respondent attorney.

This Court has established the subpoena power of the Board of Commissioners and has provided, through Gov Bar Rule V, Section 11(C), that this Court itself – not some lower court or other officer or tribunal – will consider the enforcement of such subpoenas. Surely the Rule indicates that this Court considers attorney disciplinary proceedings to be of high public importance, according Board subpoenas the same authority as any others.

The Newspaper’s reporters have been ordered to testify under similar circumstances in civil trials, *Fawley v. Quirk* (9th App. Dist., 1985), 11 Med.L.Rptr. 2336, 2337–2338; *City of Akron v. Cripple*, 2003 Ohio 2930 (9th App. Dist., 2003), at ¶¶ 6. Those decisions were fully consistent with national precedent and the holdings of this Court, in particular *National Broadcasting Company, Inc. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d. 104, 111 (1990). The Newspaper now concedes that Trexler would properly be required to testify if these were criminal proceedings.

The Newspaper’s new argument, that attorney disciplinary proceedings are of too little public significance to warrant the use of the subpoena power to compel reporter testimony, is unsupported. The Newspaper has cited no cases in which reporters were provided more protection in attorney disciplinary cases, or in any kind of “quasi-judicial” proceedings, than in criminal proceedings, much less than in civil proceedings. Respondent has found no cases supporting the Newspaper’s position.

To the contrary, in *Prince George's County v. Hartley*, 150 Md. App. 581, 822 A.2d 537 (2003) a reporter was compelled to testify in a police disciplinary proceeding. *In re Roche*, 448 U.S. 1312, 101 S.Ct. 4, 65 L.Ed.2d 1103 (1980), Justice Brennan acting as Circuit Justice applied a *Branzburg* criminal grand jury subpoena analysis to the question of enforcement of a reporter subpoena in a disciplinary proceeding against a state court judge. (He granted a stay of the contempt order because confidential sources were sought and the judge had other means of obtaining the information. Neither of those factors are present here.) There is no basis for giving attorney disciplinary proceeding subpoenas less force than those in other proceedings.

The Newspaper also unjustly slights the Panel Chair as merely "a private lay person who is not open to public scrutiny, holds no role in government and was elected by no one." Just as the Newspaper (or at least its counsel) seems not to understand that attorney disciplinary proceedings *are public* from the time of the probable cause determination⁴, the Newspaper seems not to understand this Court's rigorous process for appointing and regulating Board of Commissioners members. Any Panel Chair acts on the direct authority of this Court and is entitled to a high level of respect for his position and his decisions.

The Newspaper's attitude that it ought to be able to disregard the decision of a Panel Chair to overrule its motion to quash, because the Chair carries insufficient legitimacy in its eyes, is both arrogant and insulting to this Court as much as to the

⁴ Trexler has recently attended and reported on disciplinary proceedings involving two judges.

Panel Chair and other Panel members themselves.⁵

2. An affidavit would insufficiently protect Respondent's rights.

Boiling its argument down, the Newspaper only wants to spare Trexler cross-examination. It asks this Court to allow Trexler to submit his affidavit over Respondent's objection and do no more. But Respondent – whose license and thus his livelihood is at stake, as well as his public reputation – ought not to be deprived of his right of cross-examination. Relator has an obligation to protect the fairness of the proceedings, thus to oppose that attempt by the Newspaper.

The Panel, in overruling the Motion to Quash, in fact applied the very test that the Newspaper proposed to it and proposes to this Court: 1) Relevance to the proceedings, 2) Absence of alternative means to obtain the information and 3) Essentiality to the administration of justice. The Panel also found the subpoena not to be vague, overly broad or designed to harass.⁶ The Panel's findings are entitled to significant respect by this Court, since the Panel had a first-hand understanding of the evidentiary and legal matters before it.

While the Newspaper has attempted to trivialize the disciplinary proceedings and the consequent need for the information, the Newspaper for the most part now concedes that the elements of the test it proposes have been met. It nevertheless asks that Trexler's affidavit be ordered admitted over Respondent's objection, so that Trexler will not have to appear live and be cross-examined. That is unwarranted.

⁵ While signed only by the Panel Chair, the Entry overruling the Motion to Quash recites that it is a decision of the entire Panel.

⁶ Relator does not waive its argument that the far less demanding test established by this Court in *National Broadcasting Company, Inc. v. Court of Common Pleas of Lake County*, 52 Ohio St. 3d. 104, 111 (1990) should be applied. The subpoena has a legitimate purpose, rather than being issued for harassment.

Trexler's accuracy of reporting and present memory ought not to be shielded from scrutiny in that way.

Trexler insists on respect for his rights as a professional. His story had impact when it was published and it may have more impact by way of these proceedings. He has said under oath that he stands by the accuracy of his story and Relator needs to establish that he is correct to meet its burden of proof. Barring unexpected developments in Trexler's testimony, Relator expects to advocate to the Panel that he should be believed rather than Respondent. But Trexler ought to be prepared to be questioned about the story, since Respondent chooses to dispute his accuracy.⁷

CONCLUSION

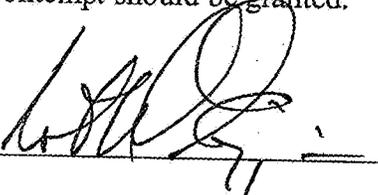
Every attorney disciplinary matter is of significant public importance. False statements disparaging judges violate the Rules of Professional Conduct. Such statements are of particular importance when they appear in a lead, front-page story of the major local newspaper. Reported statements by a lawyer that a judge *twice* failed to give notice of proceedings in a case, especially of the issuance of an arrest warrant that led to the jailing of an elderly man, should result in disciplinary sanctions if untrue.

When the lawyer disputes the accuracy of the reported statements and the reporter is the only witness to them, the reporter's statement under oath that the story is accurate becomes essential. If the lawyer insists on his right of cross-examination, the reporter's live testimony becomes essential and he is subject to subpoena.

⁷ Relator would prefer to have Trexler's live testimony, subject to cross-examination, since in practice that is likely to carry more persuasive weight than his affidavit. But Relator was prepared to use only the affidavit, in the interest of compromise, had Respondent been willing to stipulate to its admission.

The Newspaper's contention that Trexler ought to be protected from cross-examination, if not from participation entirely, flies in the face of every precedent of this and other courts. There are no First Amendment issues here. No source identification or other confidential information is sought. Trexler simply needs to testify that his affidavit is accurate and then be cross-examined on that testimony.

It is unfortunate that the Newspaper has forced the unwarranted expenditure of time, energy and judicial resources, as if the very Freedom of the Press were at stake. It is not. Consistent with all precedent, the Motion to Hold Trexler in Contempt should be granted.



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Respectfully submitted,

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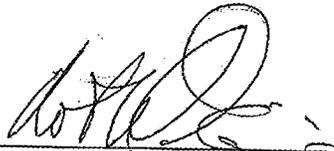
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Response was sent by email and U.S. Mail this 13th day of February, 2014 to:

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