

ORIGINAL

IN THE SUPREME COURT OF OHIO

State ex. rel., JURADO, et al. :  
 :  
 Relators, :  
 :  
 : Case No. 2014-1225  
 v. :  
 :  
 : Original Action in Mandamus  
 OFFICE OF DISCIPLINARY COUNSEL, et :  
 al. :  
 :  
 Respondents. :

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MOTION TO DISMISS OF RESPONDENT  
 OFFICE OF DISCIPLINARY COUNSEL

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 Ohio Attorney General

*Relator, pro se*

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*Office of Disciplinary Counsel*

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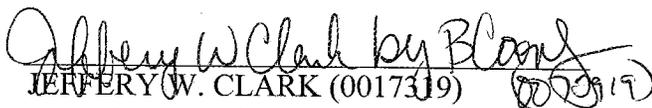
MOTION TO DISMISS OF RESPONDENT  
OFFICE OF DISCIPLINARY COUNSEL

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Pursuant to S.Ct.Prac.R. 12.04 and Ohio Civ.R. 12(B)(6), Respondent Office of Disciplinary Counsel hereby moves this Court to dismiss Relator's petition for a writ of mandamus. Respondent has attached a memorandum in support.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

Aristides Jurado (“Relator”) seeks to compel Respondent, the Office of Disciplinary Counsel, “to investigate” his grievance against an attorney acting as Guardian ad Litem of Relator Jurado’s child. Further, “in addition or in the alternative,” Relator Jurado seeks “declaratory relief addressing questions of law presented, and probable cause of the grievance for misconduct.” (Petition, p. 2.) Prior to filing this action, Relator admits he received correspondence from Respondent Office of Disciplinary Counsel (“Respondent” or “Disciplinary Counsel”) advising him that the Office of Disciplinary Counsel reviewed his grievance and that by court rule, he had legal remedies to redress his concerns. (Petition, p. 7; Relator’s Exhibit H2 – ODC Determination Letter.) Unsatisfied, Relator seeks the order of this Court to compel Disciplinary Counsel to conduct an investigation. However, the Local Rules of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch provide Relator with an adequate remedy by which to seek redress and review of his complaints regarding the performance of a Guardian ad Litem. *See* Local Rule 27(L), “Complaints Regarding Guardians ad Litem; Motions to Remove Guardians ad Litem,” of the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch.

Relator’s complaint should be dismissed for the following reasons: (1) Respondent Disciplinary Counsel and his staff fulfilled their only legal duties by evaluating Relator’s grievances and notifying Relator that by court rule, he had legal remedies to redress his concerns; and (2) Relator has an adequate remedy for redress of his complaints regarding a Guardian ad Litem.

## II. STATEMENT OF FACTS

Relator is engaged in a dispute over custody of his minor child in the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch. (Petition, ¶ 1.) In the course of this dispute, the Court assigned a Guardian ad Litem to represent the interests of the minor child. (Petition, ¶ 10.) Dissatisfied with the Guardian ad Litem's conduct, Relator filed a grievance containing allegations against the Guardian ad Litem with the Office of Disciplinary Counsel. (*Id.* at ¶ 13.)<sup>1</sup> As evidenced in the letter referenced in Relator's petition, the Office of Disciplinary Counsel reviewed Relator's complaint and found that Relator's grievance "complain[ed] about the performance of the Guardian ad litem for your son. Guardian ad litem are court appointed, and because of this fact, all of their actions are subject to court review and approval. Concerns with the conduct of a Guardian ad litem should be raised to the court that appointed him/her (see, Rule 48(G)(9) of the Rules of Superintendence for the Courts of Ohio)." (Petition, p. 7; Petitioner's Exhibit H2 – ODC Determination Letter.) (Attached for this Court's convenience as Exh. A.)<sup>2</sup> Despite this notification, Relator seeks to compel Respondent

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<sup>1</sup>Disciplinary Counsel is not permitted to deny or confirm the existence of any grievances filed against an attorney. Ohio Gov. Bar. V, Section (11)(E). Disciplinary Counsel and his staff take an oath to maintain this privacy of disciplinary proceedings and documents, and the confidentiality of disciplinary deliberations. Ohio Gov. Bar R. V, Section (11)(E)(4). Ohio Gov. Bar R. V, Section (11)(E) provides that "[a]ll proceedings and documents relating to review and investigation of grievances made under these rules shall be private," subject to limited exceptions contained in Ohio Gov. Bar R. V, Section (11)(E)(1)(a) - (c), or upon the certification of the complaint against the respondent attorney by a probable cause panel. Ohio Gov. Bar R. V, Section (11)(E)(2)(a). Only the respondent can waive his or her right to the privacy of proceedings and documents from the investigation, unless an exception applies. Ohio Gov. Bar R. V, Section (11)(E)(1). This Court has sanctioned an attorney under Ohio Gov. Bar R. V, Section (11)(E) for disclosing in an affidavit of disqualification that he had filed grievances against the judge he sought to disqualify. *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 201- Ohio-6241, 940 N.E.2d 952, ¶¶9-16, and authorities cited therein. "[D]isciplinary complaints remain private until and unless formal proceedings begin before the Board of Commissioners on Grievances and Discipline." *In re Disqualification of Krueger*, 74 Ohio St.3d 1267, 1268, 657 N.E.2d 1365 (1995).

<sup>2</sup> "Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ. R. 12(B)(6)." *State ex rel. Crabtree v. Franklin Cty. Bd. of Health* (1997), 77 Ohio St.3d 247, 249.

Disciplinary Counsel to investigate his allegations of misconduct by the Guardian ad Litem.<sup>3</sup>  
(Petition, p. 29, Par. A.)

## II. LAW AND ARGUMENT

### A. Standard of Review

“A court can dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in the relator's favor, it appears beyond doubt that he can prove no set of facts entitling him to the requested writ of mandamus.” *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. As to the nature of allegations within a petition, S.Ct.Prac.R. 10.4(B) “requires the pleading of specific facts in mandamus actions in this court rather than unsupported conclusions.” *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 390, 1999-Ohio-114, 715 N.E.2d 179; *accord, Zukowski v. Brunner*, 125 Ohio St. 3d 53, 54, 2010-Ohio-1652, 925 N.E.2d 987; *see, also, State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 109, 647 N.E.2d 799 (1995). Only well pleaded factual allegations in the petition and affidavit must be accepted for purposes of this motion to dismiss, and the Court is not required to accept unsupported conclusions. *State ex rel. Boccuzzi v. Cuyahoga County Bd. of Comm'rs*, 112 Ohio St. 3d 438, 441-442, 2007-Ohio-323, 860 N.E.2d 749. However, pursuant to Civ. R. 10(C), written instruments attached to a pleading are part of the pleading for all purposes, including determination of a motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St. 3d 247, 249, fn. 1, 1997-Ohio-274, 673 N.E.2d 1281.

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<sup>3</sup> Relator also requests declaratory relief (Petition, ¶ 6); however, the Supreme Court of Ohio has no jurisdiction over this claim. Ohio Constitution, Article IV, Section 2.

**B. Relator's Request for a Writ of Mandamus to Compel Respondent to Conduct an Investigation of a Guardian Ad Litem Fails to State a Claim.**

It is well established that relief in the form of mandamus is extraordinary relief. *See, e.g., State ex rel. Rashada v. Pianka*, 112 Ohio St. 3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 2 (2006). To be entitled to the requested writ of mandamus, Plaintiffs must establish three elements: (1) the relator has a clear legal right to the requested relief; (2) the respondent is under a clear legal duty to perform the requested act; and (3) the relator has no plain and adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n.*, 111 Ohio St. 3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. Pursuant to this standard, "it is incumbent upon relator to show a clear legal right in his favor and a manifest duty of the respondent to perform the act demanded." *State ex rel. Brewer v. Smith*, 136 Ohio St. 67, 70, 23 N.E.2d 836 (1939). This standard also mandates that "all three of these requirements must be met in order for mandamus to lie." *State ex rel. Kirtz v. Corrigan*, 61 Ohio St.3d 435, 438, 575 N.E.2d 186 (1991). Therefore, failure to establish any single one of the three elements for a writ of mandamus should result in dismissal. In this case, Relator has no clear right to compel the Respondent to conduct an investigation of a Guardian ad Litem, and the Respondent owes no clear statutory duty to Relator to investigate a Guardian ad Litem.

**1. Disciplinary Counsel Respondent has no clear statutory duty to investigate a Guardian ad Litem.**

Mandamus cannot lie to compel a public official, here the Disciplinary Counsel Respondent, to take an action not specifically required by law. R.C. 2731.01. It is well established that "in mandamus proceedings, the creation of the legal duty that a relator seeks to enforce is the distinct function of the legislative branch of government." *State ex rel. Woods v. Oak Hill Cmty. Med. Ctr.*, 91 Ohio St.3d 459, 461, 746 N.E.2d 1108 (2001); *State ex rel.*

*Brettrager v. Newburgh Hts.*, 89 Ohio St.3d 272, 274, 730 N.E.2d 981 (2000). The legal right or duty Relator seek to enforce in mandamus cannot be created by courts because “[c]ourts are not authorized to create the legal duty enforceable in mandamus.” *State ex rel. Woods v. Oak Hill Cmty. Med. Ctr.*, 91 Ohio St.3d at 461. Therefore, in order to meet the legal duty prong required for a writ of mandamus, Relator must allege a duty established by the legislature or other statutory enactment, not a right created by common law.

In his complaint, Relator only cites to the general requirement that the Disciplinary Counsel investigate grievances for the proposition that the Disciplinary Counsel Respondent has a duty to investigate a Guardian ad Litem. However, Rule 48 of the Rules of Superintendence for the Courts of Ohio (Sup.R. 48) sets specific standards regarding the appointment, responsibilities, training, and report requirements of Guardians ad Litem and for the responsibilities of appointing courts. In particular, Sup.R. 48(G)(9) requires that “[e]ach court *shall* develop a process or local rule and appoint a person for accepting and considering written comments and complaints regarding the performance of guardians ad litem practicing before that court.” (Emphasis added.) Sup.R. 48(G)(9) confers the right to review and investigate complaints against Guardians ad Litem to the appointing courts. In complying with the dictates of Sup.R. 48(G)(9), the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch, has enacted Local Rules governing the process by which it reviews complaints filed against Guardians ad Litem. Specifically, Rule 27(L) of the Local Rules for the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch requires that “complaints regarding the performance of a guardian ad litem appointed pursuant to this rule

*shall* be in writing and shall be directed to the administrative domestic magistrate, Franklin County Common Pleas Court, Division of Domestic Relations and Juvenile Branch.” Nowhere do these Local Rules or the Rules of Superintendence require the Disciplinary Counsel Respondent to investigate any complaints filed against Guardians ad Litem. Rather, the right to review such complaints is conferred upon the appointing court. Accordingly, the Respondent has no clear duty to investigate complaints against Guardians ad Litem.

Moreover, because Respondent has no clear duty to perform the action Relator seeks to compel in mandamus, Relator has no corresponding legal right to the relief he seeks. As a result, Relator’s complaint should be dismissed.

**C. Relator Has an Adequate Remedy in the Ordinary Course of Law.**

In accordance with Sup.R. 48(G)(9), the Local Rules of the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch, provide a mechanism by which Relator may address his allegations of misconduct by a Guardian ad Litem. *See* Rule 27(L) of the Local Rules for the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch. Nothing in Relator’s complaint disputes the fact that he was free to raise these allegations in the procedure provided under this Rule. More to the point, Relator admits that he did avail himself of this process. (Petition, p. 12, ¶ 29.) Because “mandamus will not issue when the relators have an adequate remedy in the ordinary course of law,” *State ex rel. Voleck v. Powhatan Point*, 127 Ohio St.3d 299, 2010-Ohio-5679, 939 N.E.2d 819, ¶ 7; R.C. 2731.05, Relator is not entitled to a writ of mandamus.

Moreover, the fact that Relator was unsuccessful in pursuing that alternate remedy does not entitle him to extraordinary relief in mandamus. *See State ex rel. Tenace v. Court of Claims*

*of Ohio*, 94 Ohio St. 3d 319, 321, 2002-Ohio-790, 762 N.E.2d 1009, 1011; *Howard v. Spore*, 91 Ohio St.3d 131, 132, 742 N.E.2d 649, 650 (2001) (“to the extent that Howard may have already unsuccessfully invoked this alternate remedy, he may not relitigate the same issue by way of mandamus”).

For example, in *State ex rel. Kingsley v. State Emp. Relations Bd.*, the appellee initiated a mandamus action seeking an order compelling the State Employment Relations Board to reinstate her to her former position following the passage of legislation that resulted in her termination from employment. 130 Ohio St.3d 333, 2011-Ohio-5519, 958 N.E.2d 169, ¶¶ 1-2. However, after the termination, the appellee challenged her removal through an administrative appeal and subsequent appeals to the court of common pleas, the court of appeals, and the Supreme Court of Ohio. *Id.* at ¶ 22. Because the appellee had an available adequate remedy by appeal, the Court held that the appellee was not entitled to an order in mandamus. *Id.* And “[t]he mere fact that she has already unsuccessfully invoked her appellate remedy does not thereby entitle her to the requested extraordinary relief in mandamus.” *Id.*

This reasoning applies equally here. Relator made two attempts to remove the Guardian ad Litem assigned to his child’s case. (Petition, pp. 12-17, ¶¶ 29-40.) His unsuccessful attempts in that venue do not permit him to seek review of the same issue here. Because Relator had an adequate remedy by way of the procedures provided in Local Rule 27(L), Relator’s complaint seeking mandamus relief should be denied.

**D. In the Alternative, Relator’s Request for an Investigation is Moot.**

In demanding a writ to compel Respondents to “investigate” his grievance, Relator asks the court to compel an act which the Disciplinary Counsel has already performed.

“Neither procedendo nor mandamus will compel the performance of a duty that has already been performed.” *State ex rel. Howard v. Doneghy*, 102 Ohio St.3d 355, 2004 Ohio 3207, 810 N.E.2d 958, P 6, quoting *State ex rel. Kreps v. Christiansen* (2000), 88 Ohio St.3d 313, 318, 2000 Ohio 335, 725 N.E.2d 663. Judge Kontos has already ruled on Fontanella’s motions through his entries in 2004 and 2007. See *State ex rel. Forsyth v. Brigner* (1999), 86 Ohio St.3d 299, 300, 1999 Ohio 105, 714 N.E.2d 922 (mandamus will not lie to compel judge to rule on pretrial motion that was presumptively overruled when judgment was entered).”

*State ex rel. Fontanella v. Kontos*, 117 Ohio St. 3d 514, 515, 2008-Ohio-1431, 885 N.E.2d 220; See also, *State ex rel. Grove v. Nadel* (1998), 84 Ohio St. 3d 252, 253, 1998-Ohio-541, 703 N.E.2d 304. The letter from Respondent referenced in Relator’s complaint explains to Relator that “[i]n your grievance you complain about the performance of the Guardian ad litem for your son. Guardians ad litem are court appointed, and because of this fact, all of their actions are subject to court review and approval. Concerns with the conduct of a Guardian ad litem should be raised to the court that appointed him/her (see, Rule 48(G)(9) of the Rules of Superintendence for the Courts of Ohio).” The Rules do not mandate or define the scope, breadth, or form of an investigation conducted by Disciplinary Counsel, nor do the Rules require Disciplinary Counsel to share the details of an investigation with the grievant. An investigation may be as involved as the allegations warrant, which may mean as brief as an initial evaluation which shows that no claim of professional misconduct has been alleged. As this Court noted in *Hecht v. Levin*, 66 Ohio St. 3d 458, 462, 1993-Ohio-110, 613 N.E. 2d 585:

“Investigation and independent review of a grievance occur at several stages before this court makes its own independent determination of discipline. Gov.Bar R. V(4)(C), 6(D)(1), 6(G) and 6(K). *These procedures assure that clearly frivolous complaints are summarily dismissed*, with little emotional, professional, or financial toll on the subject of the complaint.”

(emphasis added). In the letter dated March 3, 2014, Respondents briefly stated the reason that no further action was warranted in the instant matter- because Relator had a remedy at law available to him in the form of raising his issues to the court that appointed the Guardian ad litem through the process outlined in Sup. R. 48(G) and Local Rule 27(L).

This letter establishes that the Respondent conducted sufficient investigation to determine that Relator's grievances consisted of complaints regarding the conduct of a Guardian ad Litem. Relator may or may not have understood Respondents' letters completely, but its import is sufficiently clear, and must be presumed to comport with Respondents' duties under the Rules:

“[I]n the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner.” *State ex rel. Shafer v. Ohio Turnpike Comm.*, 159 Ohio St. 581, 590, 113 N.E.2d 14 (1953); *Toledo v. Levin*, 117 Ohio St.3d 373, 2008-Ohio-1119, 884 N.E.2d 31, ¶ 28.

*State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St. 3d 372, 379-380, 2008-Ohio-6253, 899 N.E.2d 961.

Ohio Gov. Bar. R. V, Section 4(I)(4) requires that if, after investigation, the Disciplinary Counsel or a Certified Grievance Committee decide “that the filing of a complaint is not warranted, the grievant... shall be notified in writing of that determination, with a brief statement of the reasons that a complaint was not filed with the Board.” Respondents' letter satisfied its duty to notify Relator of the disposition of his grievance.

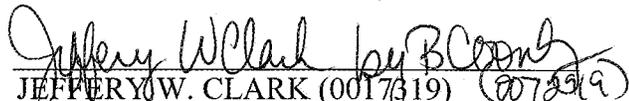
The Disciplinary Counsel satisfied his duty to conduct an investigation of Relator's grievances, and Relator's demand that Respondent “investigate” is therefore moot.

### III. CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court to dismiss Relator's Petition for Writ of Mandamus.

Respectfully submitted,

MIKE DeWINE (0009181)  
Ohio Attorney General

  
JEFFERY W. CLARK (0017319) (072019)  
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*Attorney for Respondent  
Ohio Disciplinary Counsel*

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Motion to Dismiss* was served by regular

U.S. mail, postage prepaid, on August 12, 2014, upon the following:

Aristides Jurado  
3963 Easton Way  
Columbus, Ohio 43219  
*Relator*

  
JEFFERY W. CLARK (0017319) 007799  
Assistant Attorney General

March 3, 2014

**PERSONAL AND CONFIDENTIAL**

Aristides Jurado  
3963 Easton Way  
Columbus, OH 43219

RE: [REDACTED]

Dear Mr. Jurado:

Your grievance regarding [REDACTED] was received in our office on January 8, 2014.

Please be advised that the authority of this office is limited to investigating alleged misconduct and violations of the Code of Professional Responsibility, the Ohio Rules of Professional Conduct and the Code of Judicial Conduct by attorneys and judges. Therefore, only violations of specific rules governing the conduct of attorneys and judges can be addressed by this office.

In your grievance you complain about the performance of the Guardian ad litem for your son. Guardian ad litem are court appointed, and because of this fact, all of their actions are subject to court review and approval. Concerns with the conduct of a Guardian ad litem should be raised to the court that appointed him/her (see, Rule 48(G)(9) of the Rules of Superintendence for the Courts of Ohio). The court will take whatever action it deems is appropriate, and is obligated by the Code to report any disciplinary rule violations to this office.

For the aforementioned reasons, your grievance is dismissed and our file on this matter is closed.

Sincerely,

Amy C. Stone  
Assistant Disciplinary Counsel

ACS/lkj

cc: [REDACTED]