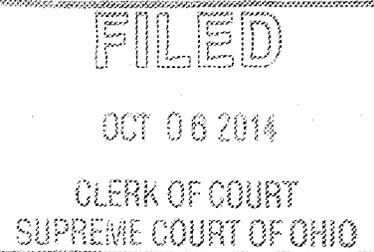


BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In Re:	:	Case No. 2014-009
Complaint against	:	
Robert Paul DeMarco Attorney Reg. No. 0031530	:	Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Toledo Bar Association	:	
Relator	:	



OVERVIEW

{¶1} This matter was heard on August 7, 2014, in Columbus before a panel consisting of Judge Robert Ringland, David Tschantz, and David L. Dingwell, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Michael A. Bonfiglio and David G. Grude appeared on behalf of Relator. Respondent was present and was represented by Richard C. Alkire.

{¶3} Initially, the parties in this case filed an agreement to consent to discipline that set forth stipulations of fact, rule violations, as well as an agreed sanction of a six-month suspension from the practice of law with all six months stayed. The panel recommended the adoption of the agreement to consent to discipline. The Board voted to reject the recommended approval of the consent to discipline.

{¶4} The matter proceeded to a hearing before the panel. Based on the evidence presented at the hearing and the parties' stipulations, the panel recommends the imposition of a one-year suspension with six months stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} The parties and counsel have entered into 13 written stipulations of fact. Twelve exhibits were admitted into evidence at the hearing, including the transcript of a contempt hearing held before the Lucas County Court of Common Pleas on November 29, 2012. Respondent, Cheryl DeMarco (Respondent's wife), Daniel J. Stypula, and Christopher J. Berger testified at the hearing. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶6} Respondent was admitted to the practice of law in the state of Ohio on May 3, 1969 and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶7} Respondent undertook the representation of a life-long friend, Douglas Cunningham, in a civil lawsuit alleging a defamation claim against two individuals, Bernie Ness and Joseph Plandowski (hereinafter "Ness Litigation"). Cunningham was the plaintiff. Ness and Plandowski were the co-defendants.

{¶8} The Ness Litigation was filed in Lucas County Court of Common Pleas. Judge Myron C. Duhart was assigned to preside over the case.

{¶9} Respondent testified that he had known Cunningham since he was 14 years old. Hearing Tr. 29.

{¶10} The Ness Litigation involved allegations that Ness and Plandowski authored and disseminated defamatory statements about Cunningham related to double-billing Cunningham's employer for certain business expenses.

{¶11} Based upon prior litigation between Cunningham, Ness, and Plandowski, the relationship among these individuals was already very contentious. The Ness Litigation continued and deepened the ill will among these parties.

{¶12} Respondent's wife testified at the hearing that Respondent is generally very "protective of his clients." Hearing Tr. 116. She described the Ness Litigation as "very ugly and frustrating." *Id.*

{¶13} It is with this emotionally-charged backdrop that the following events unfolded in the Ness Litigation.

{¶14} During the discovery phase of the Ness Litigation, Respondent requested an electronic harvest of various computer hard-drives of Ness and Plandowski in order to try to confirm that it was the Ness/Plandowski computers that were the origin of certain defamatory materials that were the crux of the Ness Litigation.

{¶15} A transcript of a November 29, 2012 contempt hearing, held before Judge Duhart, was introduced as Exhibit 2. This transcript contains many details relating to how the electronic harvest process unfolded and evidences the multiple misrepresentations that were made by Respondent during the Ness Litigation that give rise to Relator's complaint.

{¶16} Respondent retained Jack Harper to serve as the electronic data forensic expert on behalf of Cunningham. Harper was asked to harvest electronic documents from the Ness/Plandowski computers.

{¶17} Respondent and counsel for Ness and Plandowski reached an agreement that set forth the protocol by which Harper would conduct the copying of the Ness/Plandowski computer hard drives, search the data contained on those hard drives, and then handle the results of that search.

{¶18} This electronic data harvesting agreement is documented in a June 20, 2011 letter authored by Respondent and sent to James Tuschman, one of the attorneys representing Ness and Plandowski. That letter was introduced as Relator's Ex. 1.

{¶19} The letter agreement proposed a search for documents, including "word documents, Excel spreadsheets, and emails" that contained certain words, phrases, or abbreviations in order to locate relevant materials from the Ness/Plandowski computers. *Id.* at p. 2.

{¶20} The letter agreement contained the following provision:

All documents to be delivered to Judge Duhart's chambers for an in-camera inspection to determine what documents, if any, may be turned over to the [Respondent].

Id.

{¶21} Following this agreement, Harper traveled to Nantucket in the Fall 2011 in order to conduct the electronic harvest of the Ness/Plandowski hard drives. Harper made a mirror image of the Ness/Plandowski hard drives by copying the entire hard drive onto a mirror-image drive ("Mirror Image Disk"). Relator's Ex. 2 at 17-19.

{¶22} Harper brought the Mirror Image Disk back to Ohio. Harper used proprietary software in his possession that was able to search the Mirror Image Disk and create a separate disk that contained a filtered set of data that met the search term criteria set forth in the letter agreement. *Id.* at 19.

{¶23} This filtered set of data was then loaded onto a separate disk ("Filtered Results Disk"). *Id.* at 19-20.

{¶24} According to Harper, and unbeknownst to counsel for Ness and Plandowski, this Filtered Results Disk was then given to Respondent "within a week" after Harper went to Nantucket to conduct the electronic data harvest in Fall 2011. *Id.* at 24. According to Harper, Respondent told Harper that "he [Respondent] would take care of it." *Id.* at 31-32.

{¶25} Despite the letter agreement, the Filtered Results Disk was never given to Judge Duhart to conduct an in camera inspection to decide what documents on that Filtered Results Disk would be turned over to Respondent. Instead, Respondent testified that based on his interpretation of the letter agreement, Respondent was permitted to search the Filtered Results Disk himself, and he did so. Hearing Tr. 36-37, 40.

{¶26} Counsel for Ness and Plandowski were unaware that Respondent was doing this, and they were never provided with a copy of the Filtered Results Disk.

{¶27} According to Respondent, after he searched the Filtered Results Disk, he determined that “it did not contain what we hoped it might.” *Id.* at 41.

{¶28} According to Respondent, the timing of his review of the Filtered Results Disk coincides with Harper’s recollection of it occurring in October or November 2011. *Id.* at 42.

{¶29} In late March 2012, Judge Duhart scheduled a pretrial conference in the Ness Litigation. Respondent attended the pretrial.

{¶30} According to Respondent’s testimony at the hearing in this matter, Respondent believed that “the whole computer thing was a distant memory.” *Id.* at 45. Having not found anything of note on the Filtered Results Disk, Respondent no longer believed that anything associated with the electronic harvest was at issue.

{¶31} Despite that belief, counsel for Ness and Plandowski pressed the issue at the March 2012 pretrial about whether or not there had been any results of the electronic data harvest.

{¶32} During the pretrial with opposing counsel and Judge Duhart, Respondent misrepresented that he had not looked at any of the electronic data harvest results. Respondent was questioned at the hearing about what precisely he stated during that pretrial. He testified at the hearing as follows:

Q: What did you say instead of “Because I looked”?

A: I said “Because Harper told me there was nothing there.”

So in any event, that’s why I said “He saw it.” How do you know – Then Tuschman asked me, “How do you know?” I said, “Because he saw it.” He said, “Well, do you have a copy?” I said, “No, I never saw it” which was a flat out lie. I was actually talking to Tuschman at the time, but the judge was in the room.

Id. at 48.

{¶33} Following the pretrial, and on the drive home from Toledo, Respondent placed a telephone call to Harper and left Harper a voice mail message. The voice mail message stated as follows:

Jack, it’s Bob DeMarco. Apparently Plandowski called you before I did. I told the Court today that we were not going forward with the extraction. I told him that you had the disc

and never gave it to me. You didn't look into it, I didn't look into it. And that you would send it back, which I have. You gave it to me, but I didn't (inaudible), and my secretary said you just called and it just beeps it through before I did, that's all.

Relator's Ex. 2 at 58-59.

{¶34} Despite knowingly making the misrepresentation to counsel and in the presence of Judge Duhart during a pretrial conference, Respondent did nothing to correct the misrepresentation.

{¶35} The parties reached a resolution to the Ness Litigation. However, counsel for Ness and Plandowski pressed Harper to provide them with the data that he had harvested from the Ness/Plandowski computers.

{¶36} By that time (Spring and Summer 2012), Harper had already written over the Mirror Image Disk so that the mirror image of the drives no longer existed. *Id.* at 38. Harper had also received back the Filtered Results Disk from Respondent and had destroyed that as well based upon Respondent's representation to Harper that the case was over.

{¶37} Based upon Respondent's misrepresentation to the court and counsel that he had never had possession of the Filtered Results Disk, counsel for Ness and Plandowski apparently refocused their attention upon Harper and pursued Harper to produce the disk. Ultimately, they filed a motion in the Ness Litigation for an order to show cause why Harper should not be held in contempt of court.

{¶38} Judge Duhart scheduled the motion for hearing on November 29, 2012. The November 29, 2012 hearing was transcribed and was admitted as Relator's Ex. 2. In addition, the court's security camera footage video was played for the panel at the hearing in this matter.

{¶39} Present at the November 29, 2012 hearing was Harper, Respondent, and counsel for Ness and Plandowski. Judge Duhart presided over the hearing.

{¶40} During the first portion of the proceeding, Respondent was silent while Harper was aggressively cross-examined by counsel for Ness and Plandowski. Respondent made no attempt to come forth and correct the record with regard to his prior March 2012 misrepresentation.

{¶41} As the hearing wore on, counsel and Judge Duhart continued to aggressively press Harper regarding the extraction process and what happened to the disk. Harper's testimony was truthful, but it appears that counsel for Ness and Plandowski and Judge Duhart may have believed that Harper was giving false testimony.

{¶42} This culminated in Ness and Plandowski's counsel asking Harper about whether Harper believed that Respondent had misrepresented facts to the court. *Id.* at 47. Harper testified that he did believe that Respondent made a misrepresentation to the court. *Id.*

{¶43} Following that statement, counsel for Ness and Plandowski requested that they go off the record in order to have a brief discussion in chambers with Judge Duhart and Respondent.

{¶44} In chambers, Respondent repeated his misrepresentation to Judge Duhart and counsel that he had never had possession of the Filtered Results Disk. *Id.* at 48. It is not clear whether Harper was present in chambers during that exchange off the record.

{¶45} When the hearing reconvened on the record moments later, Respondent stated in open court and on the record that "the testimony that was given by Mr. Harper before this Court under oath was flatly refuted by me in chambers." *Id.* at 49.

{¶46} Judge Duhart then questioned Respondent directly. Respondent once again misrepresented on the record that he had never accepted delivery of any disk, and that no one other than Harper and Plandowski had ever seen any of the contents of either the Mirror Image Disk or the Filtered Results Disk. *Id.* at 50-51.

{¶47} Then, upon being questioned by counsel for Ness and Plandowski, Respondent yet again restated his misrepresentations and stated on the record that Harper's testimony was untruthful, and that "I never received a disc, no." *Id.* at 52.

{¶48} When asked about the March 2012 pretrial, Respondent once again continued his series of misrepresentations and stated, "No, I had not looked at the disc." *Id.* at 55.

{¶49} Despite having multiple opportunities to correct the record and reveal that he had made misrepresentations to the court, both on and off the record, Respondent concluded his statements by yet again making false statements of fact on the record to the court and counsel with the following:

Q: Did you ever – Mr. Harper sat on that stand and said that you talked to him on the telephone and said to him that you lied to the Court. Did you ever make that statement?

A: He said that? I didn't hear him say that. If he did, I would like to go outside with him. I never lied to anybody, especially to a Court.

Q: You never made that statement, to your knowledge?

A: No. Of course not.

Q: So just to be clear, you did not receive any disc whatsoever from Mr. Harper, your retained expert in this case, true?

A: True.

Id. at 55.

{¶50} Harper, the subject of the contempt proceeding, had endured cross-examination from counsel for Ness and Plandowski and from Judge Duhart. Despite having told the truth, Harper was now being accused by Respondent of having just committed perjury and threatened with being taken “outside” by Respondent. Respondent made no effort whatsoever to extract Harper from this most unenviable position.

{¶51} The panel is left to wonder what would have happened to Harper had Harper not been fortuitous enough to have saved the March 2012 voice mail message from Respondent whereby Respondent admitted in the voice mail that he had outright lied to the court. Fortunately for Harper, he did save it, and he was able to play the message at the November 29, 2012 hearing in order to clear himself. *Id.* at 58-59.

{¶52} The contempt hearing then quickly concluded once it became obvious to everyone that Respondent had made a series of misrepresentations to the court and to counsel. No punitive action was taken against Harper.

{¶53} During the hearing in this matter, Relator elicited the following testimony from

Respondent:

Q: I'm a little bit troubled by your testimony today. It almost sounds to me like you lied, then you lied again, and it seems like it's all okay up until the time that you got caught. The voicemail was played, and all of a sudden now I'm caught and now I'm remorseful.

Were you remorseful before then?

A: **No.**

Q: **You were not?**

A: **No.** I didn't think of it as a lie. I know how that sounds. I'm trying to be honest with you. The moment that voicemail was played, I realized I had lied to a judge. It's the truth.

Hearing Tr. 84-85; emphasis added.

{¶54} Despite knowing that he had made misrepresentations to Judge Duhart and counsel for Ness and Plandowski, Respondent's testimony confirms that he was not remorseful for having made those misrepresentations. Instead, only when he was caught in the series of lies was he remorseful.

{¶55} The parties stipulated to, and the panel concludes by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following:

- Prof. Cond. R. 3.3(a)(1) [a lawyer shall not knowingly make a false statement of fact to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer];
- Prof. Cond. R. 3.3(a)(3) [a lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal]; and
- Prof. Cond. R. 8.4(c) [conduct that involves fraud, dishonesty, deceit, or misrepresentation].

{¶56} Respondent stipulates to all the rule violations.

MITIGATION, AGGRAVATION, AND SANCTION

{¶57} The parties stipulated to, and the panel finds, one aggravating factor, specifically, Respondent acted with a dishonest motive.

{¶58} The parties stipulated to, and the panel finds the following mitigating factors: Respondent has no prior disciplinary record; Respondent has displayed a cooperative attitude in these proceedings; and Respondent has provided letters from the bench and the bar of Cuyahoga County attesting to his good character.

{¶59} The parties stipulated to two mitigating factors, but the panel rejects the stipulation and fails to find any evidence of the following.

{¶60} *Respondent did not act with a selfish motive.* The evidence actually demonstrates the contrary. Respondent made the misrepresentations likely because he feared that he violated the letter agreement regarding the handling of the Filtered Results Disk because he looked at them himself rather than submit them to Judge Duhart for the in camera inspection as set forth in the letter agreement. Relator did not charge Respondent with regard to whether or not he violated the letter agreement, nor does the panel make any determination that Respondent did violate the letter agreement. Whether Respondent violated the letter agreement or did not has no relevance to the charges asserted by Relator, nor does the panel find that it constitutes any evidence of a violation of any of the charged rules. However, what is clear is that Respondent's motive was selfish and dishonest, and that is an aggravating factor as set forth above.

{¶61} *Respondent made a timely good-faith effort to rectify the consequence of his misconduct.* Once again, the evidence demonstrated exactly the opposite. Respondent's misrepresentations continued to be made even as Harper was right on the verge of being held in contempt of court by Judge Duhart. The one and only thing that saved Harper from a contempt finding, and even possibly a charge of perjury, was the fact that he had the good fortune to have saved the damning voice mail confirming that

Respondent had lied to the court at the March 2012 pretrial. Rather than go on record to advise Judge Duhart that he made a misrepresentation, and that Harper's testimony at the contempt hearing was truthful, Respondent initially sat silent, and then continued to repeat his misrepresentations, and even went so far as to falsely state that Harper had committed perjury. Only after he was "caught red-handed," did Respondent have no other option but to admit his misrepresentations to the court.

{¶62} Relator and Respondent stipulate to a recommended sanction of a fully-stayed suspension from the practice of law of twelve months or less.

{¶63} The Supreme Court of Ohio has held:

Although an actual suspension from the practice of law is the general sanction when an attorney engages in dishonest conduct, a lesser sanction **may be appropriate** when the misconduct is an isolated incident in an attorney's career or when little or no harm resulted from the misconduct. [Emphasis added.]

Medina Cty. Bar Assn. v. Cameron, 130 Ohio St.3d 299, 2011-Ohio-5200 at ¶17, citing *Disciplinary Counsel v. Cuckler*, 101 Ohio St.3d 318, 2004-Ohio-784 at ¶10.

{¶64} The *Cameron* case is somewhat similar to the present case because it involved an attorney who made a misrepresentation to a court which was an isolated incident in the attorney's career. In *Cameron*, there was also no actual harm attributable to the misconduct. The Court therefore suspended Cameron for a period of one year, and stayed the entire period.

{¶65} The panel also considered other cases which involved Prof. Cond. R. 3.3(a) misrepresentations.

{¶66} *Akron Bar Assn. v. Groner*, 131 Ohio St.3d 194, 2012-Ohio-222 involved an attorney who was suspended for six months, all stayed, when the attorney's reckless and sloppy conduct resulted in attorney filing false and misleading statements with the court. This case was less egregious than the present case because Respondent was fully aware that he was making misrepresentations to Judge Duhart and to counsel on each and every occasion that he made misrepresentations both on the record and off the record.

{¶67} *Toledo Bar Assn. v. Miller*, 132 Ohio St.3d 63, 2012-Ohio-1880 involved an attorney who was suspended for one year, with six months stayed, when the attorney submitted false statements to a court in response to garnishment requests. This case is different than the present case because the attorney in *Miller* was also found to have mishandled trust account funds in addition to the misrepresentation.

{¶68} The parties presented additional cases involving violations of Prof. Cond. R. 8.4(c) that led to a variety of sanctions, many of which were six-month stayed suspensions. However, the panel finds that the conduct in this case makes it more appropriate to focus upon those cases relating to Prof. Cond. R. 3.3(a), misrepresentations to courts, when deciding what sanction to recommend.

{¶69} Like *Cameron*, this case involves an attorney making intentional misrepresentations to a court. Like *Cameron*, this is an isolated incident in an otherwise long career. Although there was no actual harm in *Cameron*, the conduct that the Court was faced with in *Cameron* was less egregious than the conduct in the present case because it was one misrepresentation.

{¶70} In the present case, Respondent engaged in a series of misrepresentations, beginning at the March 2012 pretrial and continuing during the November 29, 2012 contempt hearing. Further, the misrepresentations by Respondent were made at the contempt hearing while being questioned by counsel and by Judge Duhart while on the record.

{¶71} In *Cameron*, the misrepresentation was more quickly discovered and resolved, without a “near miss” that occurred in the present case. While there was no harm that was ultimately caused, it is only because Harper saved the voice mail message from Respondent that proved that Respondent had lied to the court in March 2012 and was still making misrepresentations both on and off the record at the November 2012 contempt hearing. Had Harper not saved the voice mail message, there could have been significant harm to him, a non-party to the Ness Litigation.

{¶72} The panel believes that Respondent’s conduct, and the facts of this case, present a more egregious violation than the Court addressed in *Cameron*. Unlike the situation in *Cameron*, Judge Duhart and counsel for Ness and Plandowski had no independent basis to know that Respondent had misrepresented facts to them in order to confront Respondent with his misrepresentation and remedy the misrepresentation.

{¶73} A nonparty to the case, Harper, was left to his own resources to defend himself at the contempt hearing, was accused by Respondent of testifying untruthfully, and was even threatened by Respondent of being taken “outside” merely because Harper testified to the truth of what happened.

{¶74} Respondent’s candid admission at the hearing in this matter was that he was not remorseful for making the misrepresentations. Instead, he was remorseful only when he was discovered to have lied.

{¶75} A key foundation upon which the judicial process rests is the truthfulness of attorneys appearing before our courts. The failure of Respondent to have any remorse after knowingly making several misrepresentations directly to Judge Duhart and to opposing counsel leads this panel to conclude that a sanction that includes an actual suspension is appropriate here.

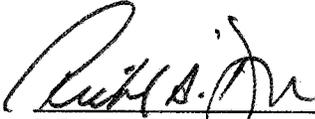
{¶76} The panel, having considered the case law cited, the rule violations, and the aggravating factors verses the mitigating factors, recommends that Respondent be suspended from the practice of law for a period of one year with six months stayed on the condition that he pay the costs associated with this matter and commit no further violations.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 3, 2014. The Board adopted the findings of fact and conclusions of law of the panel. In light of Respondent’s repeated misrepresentations to the court and client, the potential for harm to the expert witness

Harper, and his failure to acknowledge or show remorse for his misconduct until he was caught, the Board amended the sanction recommended by the panel and recommends that Respondent, Robert Paul DeMarco, be suspended from the practice of law for a period of one year. The Board further recommends that the costs of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**



RICHARD A. DOVE, Secretary