

ORIGINAL

THE SUPREME COURT OF OHIO

AKRON BAR ASSOCIATION )  
)  
RELATOR )  
)  
v. )  
)  
LARRY DEAN SHENISE )  
)  
RESPONDENT )  
)

CASE NO. 2014-1388

RELATOR'S ANSWER BRIEF TO OBJECTIONS TO  
BOARD OF COMMISSIONERS  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
RECOMMENDATIONS

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## INTRODUCTION

Respondent was fortunate to have avoided the recommendation of an actual suspension that Relator thought was warranted. The Board of Commissioners' Findings of Fact and Conclusions of Law are all amply supported by the record. The recommended sanction of a two-year fully stayed suspension is lenient. It should not be made even less severe.

The Board found that Respondent so badly mishandled a client matter as to violate numerous Rules of Professional Conduct, degraded a Common Pleas Judge by what he told a reporter about the matter and failed to inform his clients that he did not have malpractice insurance. The mishandling of the matter included repeated failures to inform his clients adequately and to abide by their decisions, plus knowing disobedience of Court rules, amounting to incompetence.

The consequences to one of Respondent's clients, in particular, were severe. He lost tens of thousands of dollars, was forced into bankruptcy and spent a day in jail. The other client was forced into bankruptcy and the Judge suffered public degradation against which his position prevented him from defending himself. A two-year stayed suspension is minimally commensurate with the harm Respondent caused.

## ARGUMENT

### SUMMARY

- I. The Board's findings of fact are fully supported by the record.
  - A. There was a pattern of misconduct.
  - B. Respondent violated Prof. Cond. R. 1.2 (failure to abide by decisions and to consult).
  - C. Respondent violated Prof. Cond. R. 1.4 (informing and explaining to clients).
  - D. Respondent violated Prof. Cond. R. 3.5(a)(6) (degrading a tribunal).
- II. The Panel properly excluded the testimony of Respondent's proffered expert.
- III. The recommended sanction is fully warranted, being if anything too lenient.

### DISCUSSION

#### **I. The Board's findings of fact are fully supported by the record.**

The Court defers to the Panel's findings of fact unless the record weighs heavily against them. *Disciplinary Counsel v. Character*, 129 Ohio St.3d 60, 2011-Ohio-2902, at ¶ 34. The record here fully supports the Panel's findings as adopted by the Board, the record does not weigh against the findings at all.

Respondent challenges only a limited number of Board's findings of fact. The challenges are unwarranted. But even if the specific challenges had merit, the balance of the record would fully support the Board's findings of the violations. Relator responds below to the challenged findings.

#### **A. There was a pattern of misconduct.**

Relator cites no authority for his contention that a pattern of misconduct as an aggravating factor cannot arise from the handling of just one matter. The Court has explicitly

held otherwise. *Disciplinary Counsel v. McCormack*, 133 Ohio St.3d 192, 2012-Ohio-4309, at ¶ 19.

Here, the Board found that, “On multiple occasions [Respondent] had the opportunity and responsibility to re-direct the downward spiral of his clients’ legal fortunes after the judgment was taken and he failed to do so.” (Board of Commissioners Findings of Fact, Conclusions of Law and Recommendations, hereafter “BOC,” ¶ 37.) That conclusion is amply supported by the record.

Respondent concedes that he did not respond to the judgment creditor’s discovery request, then filed only a leave to respond to the motion to compel, he did not respond to the motion itself. (Respondent’s Objections, hereafter “Objections,” p. 1.) He concedes further that “he may have not even reviewed the notices” that the trial court sent after the motion to compel was granted, to show cause and then that arrest warrants were issued. (Objections, p. 2.)

Respondent concedes further that his misconduct “created a violation,” *id.*, he contends only that there was no pattern. But plainly there was one, as the Board correctly found, continuing over a period of many months with repeated, separate failures to act as he should have done, analogous to the pattern in *McCormack*.

**B. Respondent violated Prof. Cond. R. 1.2 (failure to abide by decisions and to consult).**

Respondent mistakenly says that the only possible violation of Rule 1.2 could have been his dismissal of the counterclaim, as to which he contends the record shows that he consulted with William Little (Objections, p. 3.) Rather, the Board found the violation to have arisen from the numerous occasions on which Respondent failed to advise his clients of the post-

judgment events, thus his failure to act based on decisions that should have been made by *them*, not by himself alone.

Thus, the Board found in summary, “[I]t is clear that there was a complete lack of communication between Respondent and the clients who were left in the dark regarding their legal fortunes.” (BOC, {¶ 30}). In more detail, the Board found numerous instances of failure to consult concerning the post-judgment events – particularly with Leonard Little – at BOC {¶¶ 16, 18 and 27}.

Failure to communicate has often been found to violate Rule 1.2. See, most recently, *Disciplinary Counsel v. Ranke*, 2011-Ohio-4730 and *Cleveland Metro. Bar Assn. v. Lemieux*, 2014-Ohio-2127. The Rule does not just prohibit unauthorized action or inaction.

**C. Respondent violated Prof. Cond. R. 1.4 (informing and explaining to clients).**

The Board found by clear and convincing evidence that Respondent violated Prof. Cond. Rules 1.4(a)(1) (inform client promptly of matters requiring informed consent), 1.4(a)(3) (inform client of status of case) and 1.4(b) (explain matters to clients sufficiently for informed consent).

Respondent attacks the conclusion by picking out limited excerpts from the record that he contends show that he kept William Little informed and, to a much lesser extent, Leonard Little. The excerpts, first of all, do not support his contention.

Respondent notes that William Little testified that he recalled a conversation about depositions, Hearing Transcript, pages 58, line 23 to 59, line 5 (hereafter “Tr., page/lines) (Objections, p. 4) and Tr. 67/2-16 (Objections, p. 5). But Respondent omits the key further testimony that William Little thought that Respondent was going to get the date changed but was never told that had happened or that the deposition was canceled. Tr. 59/6-14 and 67/15-16. He

never told Respondent that he and his father would not cooperate. Tr. 59/15-21. Yet, Respondent concedes that the Board correctly found that, “Respondent made no attempt to discuss the deposition or document production with opposing counsel.” (BOC ¶ 16.) Respondent’s clients were never told that, much less consulted about it, quite the contrary.

Respondent offers Tr. 59/22-60/2 (Objections, p. 4) to try to show that Leonard Little was informed by William of the post-judgment discovery, but even as quoted, William’s response that, “I can’t – that might have been the time that – that might have been the time we met with my father,” proves nothing. The Panel was properly entitled to give the response no weight.

Respondent quotes William Little as saying, “I mean there were so many times that I was with Larry over Jeff Lake,” Tr. 60/4-5 (Objections, p. 4), to suggest that there was extensive communication. But Respondent omits the rest of the answer, which makes it clear that Mr. Little was speaking of the time before the judgment was entered, “Because all the other stuff before this, this 2008, 2007 – may I elaborate a little bit?” Tr. 60/8-10. The Board’s findings of violations, including the Rule 1.4 violations, concerned the *post-judgment* events, as to which there was no communication.

In similar fashion, Respondent points to William Little’s testimony at Tr. 66/12-20, suggesting at first glance that he remembered being told that the court had ordered depositions and document production. But the further testimony, at Tr. 66/20-68/1, negates that conclusion. Mr. Little testified “Not that I recall” to the question of whether he had been told of Judge Gallagher’s orders for depositions and document production. The Panel correctly concluded that there was no reliable evidence that the Littles had been informed of what was going on, indeed that the evidence was overwhelming that they had not been informed.

Respondent further points to William Little's testimony that he received documents by mail and in person, Tr. 75/13-18 (Objections, p. 6), but that does not prove any better than any of the other testimony that the Littles were kept informed about the post-judgment events. Respondent points to William Little's testimony at Tr. 86/18-20, "that Respondent tried to have frank discussions with him about everything," (misstated at Objections, p. 6, as being at Tr. 87/18). But that general answer likewise proves nothing about the post-judgment communications at issue, as to which the evidence showed beyond fair dispute that Respondent failed to inform his clients about what was happening.

Respondent's citation to Leonard Little's testimony, at Objections p. 6, establishes nothing either. Indeed, it only reinforces that the elder Mr. Little "didn't remember what was discussed." *Id.* It is the lawyer's obligation to be sure his clients understand, especially if they are elderly and may be impaired.

Beyond the failure of the narrow excerpts to negate the Board's findings, the full record clearly and convincingly demonstrates the lack of post-judgment communication. The reasons for that, as Respondent himself testified, were that he believed he had no obligation to cooperate with the judgment creditor's collection efforts and in any event envisioned bankruptcy for his clients. In his view, there was nothing for him to communicate with his clients about.

Respondent was quite adamant in his position that he had no obligation to cooperate, saying at Tr. 231/9-25 and 232/1-9:

- 9 Q. Wasn't it your position then, as it  
10 is now, that you have no obligation to assist  
11 opposing counsel in the collection of a  
12 judgment?  
13 A. That's my position.  
14 Q. And you acknowledge now that that  
15 is at least a technical violation of the  
16 professional rule?

17 A. No. I still have no obligation to  
18 assist him in collecting his judgment. Okay?  
19 But as far as not responding to his discovery  
20 requests or sending him a letter saying, hey,  
21 we're not going to give you the discovery and,  
22 you know, do what you got to do, yeah, that was  
23 improper on my part. As you say technical  
24 violation. But, no, I don't have any duty to  
25 help him collect his judgment.

1 Q. But you do have a duty to make a  
2 good-faith effort with your clients to respond  
3 to his post-judgment discovery requests,  
4 correct?

5 A. Well, my first duty is to my  
6 clients and that's what I was looking at, my  
7 clients. That's what I was interested in. And  
8 both of them at that point in time were talking  
9 bankruptcy.

Respondent further explained his view that the prospect of bankruptcy made discovery responses irrelevant, at Tr. 232/24-233/3:

17 Q. Did you discuss the consequences  
18 with Bill?  
19 A. I don't know if he -- when you say  
20 consequences, if I discussed the full thing, we  
21 discussed basically that all we were trying to  
22 do was delay them collecting on their judgment  
23 until the point he could get his bankruptcy  
24 filed. Simple as that.  
25 Q. So it was an intentional decision

1 not to respond to the post-judgment discovery,  
2 correct?  
3 A. Yes.

Respondent thus saw no reason to discuss the post-judgment proceedings with his clients because he was of the professional view that no responses to the judgment creditor's collection efforts should be made, especially in light of the bankruptcies that he thought (mistakenly) were imminent.

The Board correctly evaluated the totality of the record, which showed no credible evidence of communication with the Littles about the post-judgment collection efforts and an undisputed explanation of why that communication never occurred. Respondent violated the three cited provisions of Rule 1.4, by clear and convincing evidence.

**D. Respondent violated Prof. Cond. R. 3.5(a)(6) (degrading a tribunal).**

Respondent makes too much of an immaterial misstatement by the Board, at BOC {¶ 25}, that he denied making all of the reported comments “with the exception that he denies telling the reporter that Judge Gallagher failed to notify him of the hearing.” In fact, as Respondent says, he admitted making that comment but denied saying that the Court had not sent notices of the subsequent arrest warrants.

The further discussion by the Board at BOC {¶¶ 32-33} makes it clear that it correctly understood what was admitted and denied, the apparent clerical error notwithstanding. The Board found it not proved that Respondent knowingly made a false statement to the reporter about *the hearing notice* and dismissed all of alleged violations in Count III except for the Rule 3.5(a)(6) violation.

As to that violation, the Board found that even if Respondent believed them to be true, “Viewed in their entirety, the comments imply that Judge Gallagher acted impetuously and in a heavy handed manner in dealing with an elderly man. As such, Respondent’s comments were degrading to Judge Gallagher and his staff.” (At ¶33.)

The Board’s conclusion bears little dispute. Respondent chose a mocking, even braying style to criticize the Court. To say, as the Board did, that Respondent “clearly could have been more conservative,” understates the point. Rule 3.5(a)(6) embodies the fundamental principle that lawyers are sworn to help uphold the dignity of the courts in the public eye. Respondent’s

tone made Judge Gallagher out to be just another public official callously abusing an elderly citizen.

Respondent makes no effort to defend against that conclusion, except to say that he did not name Judge Gallagher. But the context of his statements to the reporter left no doubt about his target or that Judge Gallagher would be the subject of the story.

In *Disciplinary Counsel v Grimes*, 66 Ohio St.3d 607, 1993-Ohio-125, cited by Respondent, the lawyer used an obscenity to characterize a judge to a reporter, but did not attack the judge's conduct as Respondent did here. The lawyer was further in violation in calling proceedings "a silly game" and a "charade" in open court, comments of roughly the same level of disrespect as those made by Respondent – in a far less public setting than a front-page newspaper story.

Rule 3.5(a)(6) contains no required elements of proof of untruthfulness or malice. It is designed simply to protect the dignity of the courts by requiring lawyers to take care in *how* they speak to and about judges. The Board correctly found that Respondent violated the Rule, even as it dismissed the other more severe allegations of Count III. This Court will create a dangerous invitation to even further disrespect of judges if it fails to uphold the Board's conclusion and thus erodes the rule requiring professional dignity in statements about the courts.

## **II. The Panel properly excluded the testimony of Respondent's proffered expert.**

Respondent was not permitted to present the opinion of attorney Warner Mendenhall that Judge Gallagher could not legally proceed with the show cause hearing and arrest warrants after Leonard Little filed for bankruptcy, because of the automatic stay provisions of 11 U.S.C. § 362.

The Panel, like any legally-trained tribunal, had broad discretion to receive or to refuse a proffered expert opinion on the law. *State v. Decker*, 28 Ohio St.3d 137 (1986). That was

especially true because the legal issue presented was of only collateral significance. This was not a legal malpractice case being tried to a jury. Whether or not Judge Gallagher proceeded in error was irrelevant to Respondent's failure to pay attention to the post-judgment proceedings – thus forfeiting the opportunity to try to persuade the Judge that he could not legally proceed.

The real basis for the exclusion of Mr. Mendenhall's testimony, however, was that he lacked even minimum expert qualifications. The voir dire is at Tr. 562/13-568/4. Mr. Mendenhall has represented over 300 consumer debtors in bankruptcy and taken six hours of bankruptcy-related CLE every year for some years. But he has never litigated the issue of the applicability of the stay, never written any law review articles (on any subject), never written on bankruptcy in any publications, never taught law school, never given expert testimony except on the subject of fees, had never researched the issue of the stay before his deposition and had never heard of the doctrine of the state court vindicating its authority notwithstanding the stay. He had no special expertise whatsoever.

The exclusion of Mr. Mendenhall's testimony moreover did not affect the disposition of the case. The Board made no finding as to Judge Gallagher's authority to proceed, since that did not matter. It is perhaps worth noting, however, that any state court has the "inherent power to take whatever steps [are] necessary to ensure those persons within its power comply with its orders," notwithstanding the stay. *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 683 F.3d 757, 761 (Sixth Cir., 2012). Judge Gallagher in fact acted within his authority.

### **III. The recommended sanction is fully warranted, being if anything too lenient.**

Respondent was found to have violated Prof. Cond. Rules 1.1, 1.2, 1.3, 1.4(a)(1), 1.4(a)(3), 1.4(b), 1.4(c), 3.4(c) and 3.5(a)(6). He concedes that he violated Rules 1.1, 1.4(c) and 3.4(c) – thus that he acted incompetently, failed to give notice that he did not have malpractice

insurance and knowingly failed to obey an obligation imposed by a tribunal. While he has disputed the other findings, the Board correctly found that they occurred, as demonstrated in the preceding sections.

The Board imposed a two-year suspension, fully stayed. The authority relied upon by the Board was only partially on point for the combination of violations, since there was no authority cited and no discussion of the sanctions to be imposed for the degradation of Judge Gallagher and his staff. As the Board noted, the decisions it cited where there was “neglect and related conduct” imposed “more often than not, a term suspension with a portion or all of it stayed,” BOC {¶ 45}.

The Board chose to stay the entire suspension for two reasons: 1) the potential effect on the “Akron Police Department,” as the Board put it, and other of Respondent’s clients, BOC {¶ 46}<sup>1</sup> and 2) Respondent’s demonstrated competence in the disciplinary proceedings, {¶ 47}.

As noted above, the Board apparently did not impose any sanction for the Rule 3.5(a)(6) violation, concerning Judge Gallagher, without discussion. A sanction should be imposed for it. *Disciplinary Counsel v. Grimes, supra*, is the closest case to the present one. A public reprimand was imposed. Adding that omitted factor to the Board’s rationale for a two-year fully-stayed suspension further supports the view that this Court should uphold the recommendation, not reduce it as Respondent has asked.

Relator has not taken issue with the Board’s decision, including the Board’s reasons for not recommending an actual suspension. But those reasons were very unique ones. The clients of any lawyer actually suspended are necessarily impacted and respondents do not typically demonstrate their skills by representing themselves. Those unusual circumstances show that

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<sup>1</sup> Respondent’s clients are actually retirees of the Akron Police and Fire Departments and widows of such retirees, who seek certain insurance coverage. Tr. 571/23-24.

Respondent received unusual leniency, notwithstanding the Board's noting correctly that, "Certainly, granting Respondent a reprieve from an actual suspension would be an easier conclusion to reach if Respondent accepted responsibility for the debacle that was his clients' case; a debacle that was of his making." BOC {¶ 46}.

Taking even just his conceded violations, Respondent's argument for only a public reprimand cannot be sustained. His discussion, Objections pp. 12-13, is first of all off-point. He cites authority for the insurance/communication combination of violations and for disrespect towards a tribunal. He thus fails to discuss the sanctions precedent for incompetence and disobedience. Even then, he comes just short of admitting that the separate public reprimands that would be warranted for the violations he discusses should be combined to something more (presumably a stayed suspension of some length). (He calls it a "decision for this Court to make," without arguing against that potential outcome, Objections, p. 13.)

It is all the more true that the combination of *the violations actually found* plus *the conceded violations* warrants more than just a public reprimand. There must be a suspension of some length, even if all of it is stayed. The Board's recommendation of a two year suspension fully stayed is at the very lenient end of the range suggested by precedent under the facts of this case. This Court should uphold the recommendation, not reduce it.

### CONCLUSION

Respondent created a "debacle" that harmed his clients severely. He showed no remorse whatsoever. He continues to believe that it is his professional obligation to obstruct the collection of judgments, including, as occurred here, knowing disobedience of the obligations imposed by a tribunal. And Respondent degraded a sitting judge.

The outcome of all of that would "more often than not" be some length of actual suspension. But for the nature of Respondent's clients and his demonstration of the skills that he can bring to bear when he is of a mind to do so, that very likely would have been the Board's recommendation here.

All of the Board's findings and conclusions were fully supported by the record. These numerous, substantial violations did occur, forming a pattern of misconduct. The recommended sanction of a two-year fully-stayed suspension is very lenient. It should be upheld.



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