

IN

THE SUPREME COURT OF OHIO

Disciplinary Counsel, Relator	:	
	:	CASE NO. 2014-1744
Raymond Thomas Lee Respondent	:	RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS
	:	
	:	

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections.

STATEMENT OF FACTS

Respondent was admitted to practice law in the state of Ohio on November 21, 1983 and is subject to the Ohio Rules of Professional Conduct and Rules for the Government of the Bar of Ohio. Bd. Report ¶ 12. Respondent has been suspended from the practice of law four times for failure to register with the Supreme Court in the 2005-2006, 2007-2008, 2009-2010, and 2011-2012 biennia. Bd. Report ¶ 13. With the exception of the 2011-2012 biennium suspension, respondent was reinstated after each suspension. *Id.* Respondent received an additional suspension from the practice of law on December 17, 2010 for failing to complete his continuing legal education requirements. *Id.* Respondent remains suspended from the practice of law. *Id.*

Respondent is a sole practitioner with an office in Dublin, Ohio, and one of his clients is a federal teacher's union, the Federal Education Association Stateside Region ("FEASR"). Bd.

Report ¶ 16; Hearing Tr., Pg. 39:1-41:6. Respondent's wife, Dorothy Lee, is General Counsel for FEASR. Bd. Report. ¶ 16; Hearing Tr., Pg. 40:3-9. FEASR pays respondent a monthly retainer to handle matters for it, over 50 percent of which involve teacher discipline. Bd. Report ¶ 16; Hearing Tr., Pg. 40:15-41:6. FEASR follows an informal procedure for assigning cases to respondent, and it is presumed that he will handle matters involving teacher discipline. Hearing Tr., Pg. 41:7-45:16.

Patricia Buhl was employed as a teacher by Ft. Knox schools from 2000 – 2007 and was a member of FEASR. Bd. Report ¶ 16; Hearing Tr., Pg. 190:12-192:21. Buhl has a bachelor's degree in elementary and special education and a master's degree in early childhood special education and early intervention. Hearing Tr., Pg. 190:3-11. During her employment with Ft. Knox schools, Buhl received legal services from Dorothy Lee and respondent several times. Hearing Tr., Pg. 45:19-22 and 192:12-194:18.

In the spring of 2007, an aide in Buhl's classroom was fired. Hearing Tr., Pg. 195:1-11. On the day she was fired, the aide made an allegation of child abuse against Buhl with the Criminal Investigation Division ("CID") at Ft. Knox. *Id.* at 195:1-20. An investigation began, and Dorothy Lee represented Buhl during that investigation. Hearing Tr., Pg. 46:17-21 and 195:25-196:2. Buhl also retained a criminal attorney in case charges were filed, and Buhl informed Dorothy Lee about the private attorney. Hearing Tr., Pg. 196:5-197:7. After the investigation was completed, neither CID, nor Ft. Knox schools filed any formal charges against Buhl. Hearing Tr., Pg. 46:22-47:11 and 195:21-24.

In the summer of 2007, Buhl left her employment with Ft. Knox schools in order to move with her husband, who is a Colonel in the United States Army, to Kwajellon Island, where he was to be stationed for two years. Bd. Report ¶ 17; Hearing Tr., Pg. 189:7-17 and 197:12-

198:12. Buhl was granted Leave Without Pay status for 90 days to seek new employment in Kwajellon. Hearing Tr., Pg. 198:17-199:9. During that 90-day period, Ft. Knox was considering either to elect not to renew her status or to terminate her. *Id.* at 47:15-48:6, 197:8-198:11. Respondent represented Buhl on that issue. *Id.* at 47:23-48:12 and 198:8-16. However, because she was not going to return to Ft. Knox, Buhl resigned effective October 5, 2007. *Id.* at 198:19-199:9; Bd. Report ¶ 17.

Prior to her resignation, on or about August 9, 2007, Buhl received notice that the Kentucky Professional Standards Board (“Kentucky Board”) was going to investigate the conduct alleged by her former aide. Ex.’s 50 and 51; Hearing Tr., Pg. 201:2-204:19. Upon receiving that notice, Buhl sought respondent’s assistance. *Id.* Because Buhl was considering resigning from her position at Ft. Knox schools, she was concerned about what affect her resignation might have. *Id.* at 204:20-23. However, respondent assured Buhl that he could continue to represent her in the Kentucky Board matter, and Buhl resigned based in part upon that representation. *Id.* at 204:24-206:6.

On November 28, 2007, the Kentucky Board sent Buhl a letter informing her that she had been accused of misconduct and providing her with a chance to respond. Bd. Report ¶ 19; Ex.3. As she had done in the past when presented with a legal issue stemming from her employment at Ft. Knox, and in accordance with respondent’s assurances of representation, she contacted respondent and other individuals with FEASR. Bd. Report ¶ 20; Ex. 4; Hearing Tr., Pg. 206:7-209:20. In response, respondent indicated that he reviewed “voluminous material,” suggested revisions to Buhl’s response, indicated that a further argument would be submitted, and stated that he had “something pretty close to ready to go.” Bd. Report ¶ 21; Ex. 3. Then, because Buhl was out of the country, respondent submitted her response for her, and represented in that

submission that further material from him would be forthcoming. Bd. Report ¶ 22; Ex. 5.

Further, when respondent confirmed that he had submitted Buhl's response, he told her to wait and stated that he would submit additional material. Bd. Report ¶ 23; Ex. 6. Respondent failed to submit a response. Bd. Report ¶ 23; Hearing Tr., Page 53:6-14, 54:10-21, 55:10-56:14, and 207:3-209:20.

In March 2008, the Kentucky Board notified respondent and Buhl that they voted to hear her case. Bd. Report ¶ 24; Ex. 7. On April 29, 2008, Buhl emailed respondent seeking advice regarding what she should do. Bd. Report ¶ 25; Ex. 8. Respondent replied advising her that there was no time limit for the Kentucky Board to act, stating that she had to wait until a judge was assigned and prehearing conference scheduled, and assuring her that "[w]e will naturally review the charges and take whatever action is appropriate based on the charges brought, if any." Bd. Report ¶ 25; Ex. 8.

On October 1, 2008 and again on June 5, 2009, Buhl emailed respondent and Dorothy Lee to check on the status of her case. Bd. Report ¶ 25; Ex.'s 9 and 10. Buhl even asked if she needed a private attorney. Ex. 10. Respondent did not reply to either inquiry. Bd. Report ¶ 26.

On March 24, 2010, Attorney Courtney Baxter sent a letter to Buhl notifying her that she had been retained by the Kentucky Board to prosecute the disciplinary matter. Bd. Report ¶ 27; Ex. 11. The letter was sent to Buhl's old address in Kentucky; however, Buhl was living in Omaha, Nebraska and did not receive the letter. Bd. Report ¶ 27; Ex. 11; Hearing Tr., Pg. 223:1-224:18. During that time, Baxter had called respondent more than once and left him messages. Ex. 11; Hearing Tr., Pg. 144:14-145:2. Baxter was calling in an attempt to resolve the case without the need to put Buhl through a lengthy hearing. Hearing Tr., Pg. 145:24-146:5. Respondent failed to return any of Baxter's calls. Bd. Report ¶ 27; Hearing Tr. 145:16-19.

On April 4, 2010, unaware of the letter from Baxter, Buhl emailed Dorothy Lee to inquire about the complaint. Bd. Report ¶ 28; Ex. 12. Dorothy advised her that she should do nothing and should have no reason to believe the complaint was still under review. Bd. Report ¶ 28; Ex. 12.

On February 11, 2011, Baxter filed a Notice of Statement of Charges and Issues (“complaint”) with the Kentucky Board. Bd. Report ¶ 29; Ex. 13. Buhl was served at her old address in Kentucky, and Buhl did not receive a copy of the complaint until months later. Bd. Report ¶ 29; Hearing Tr., Pg. 226:19-227:5. Then, on February 15, 2011, Stuart Cobb, the hearing officer for the Kentucky Board, issued a Notice Assigning Case, Order Setting Filing Requirements, and Scheduling Prehearing Conference. Bd. Report ¶ 30; Ex. 14. Again Buhl was served at her old address and did not receive that order until months later. Bd. Report ¶ 30; Ex. 14; Hearing Tr., Pg. 227:11-15. The order was also served on respondent; however, there was a typographical error in the address, and respondent does not recall receiving it. Bd. Report ¶ 30.

On March 2, 2011, Cobb issued a Prehearing Conference Order and noted that they were unable to serve Buhl at her old address. Bd. Report ¶ 31; Ex. 15. Cobb attempted to serve respondent but mistakenly served Rock T. Lee. Bd. Report ¶ 31; Ex. 15. The order granted leave for Baxter to file a motion for default judgment. Bd. Report ¶ 31; Ex. 15.

Baxter contacted Rock Lee and determined that he was the incorrect attorney. Bd. Report ¶ 32. She then contacted respondent, who told Baxter that he was unsure if he **still** represented Buhl. Bd. Report ¶ 32; Hearing Tr., Pg. 148:8-149:5 (emphasis added). Respondent told Baxter that he would contact Buhl and get back to her. Bd. Report ¶ 32.

By March 7, 2011, respondent had neither contacted Buhl nor Baxter, and Baxter filed a motion for default judgment. Bd. Report ¶ 33; Hearing Tr., Pg. 149:20-23; Ex. 16. Respondent

was served with a copy, but Buhl was not served because the Kentucky Board again attempted to serve her at her old address. Bd. Report ¶ 33; Ex. 16; Hearing Tr., Pg. 227:20-25.

On March 13, 2011, Buhl emailed respondent notifying him that she had received a copy of the prehearing conference order. Bd. Report ¶ 34; Ex. 17; Hearing Tr., Pg. 228:1-230:14. In the email, Buhl stated that “[t]hey obviously have not reviewed anything in their files for surely there is information from you.” Bd. Report ¶ 34; Ex. 17.

Then, on March 15, 2011, Cobb issued a recommended order of default. Bd. Report ¶ 35; Ex. 19. On the same afternoon, respondent emailed Baxter and falsely indicated that Buhl authorized him to represent her but he would need to be admitted *pro hac vice* because he is not licensed in Kentucky. Bd. Report ¶ 36; Ex. 22. Respondent proceeded to forward those emails to Buhl and promised to file a notice of appearance and request *pro hac vice* admission. Bd. Report ¶ 36; Ex. 20.

On March 16, 2011, Baxter and respondent exchanged emails and agreed to seek a new prehearing conference date from Cobb and to discuss settlement. Bd. Report ¶ 37; Ex. 21. Respondent then sent a letter to Cobb seeking a new date and informing Cobb that he would be filing for *pro hac vice* admission. Bd. Report ¶ 37; Ex. 22. In her response, Baxter advised respondent that a default judgment had been entered and that he would need to file a motion to have it set aside. Bd. Report ¶ 37; Ex. 21.

The afternoon of March 16, 2011, respondent emailed Buhl forwarding a copy of the letter he sent to Cobb and promised her that he would file something else on Monday. Bd. Report ¶ 38; Ex. 23. Buhl replied, thanking him and asking several questions. Bd. Report ¶ 38; Ex. 23. Respondent failed to reply. Bd. Report ¶ 38; Ex. 23. Additionally, respondent failed to file any further material, a notice of appearance, a motion to set aside the default judgment, and a

motion to be admitted *pro hac vice*. Bd. Report ¶ 38. Respondent did not even inform Buhl about the default judgment. Hearing Tr., Pg. 234:4-11.

Buhl had not heard anything by April 11, 2011, and she sent an email to respondent seeking an update. Bd. Report ¶ 40; Ex. 24.

On May 16, 2011, the Kentucky Board issued a final order permanently revoking Buhl's teaching certificate. Bd. Report ¶ 41; Ex. 25. Service of the order went to Buhl at her old address. Bd. Report ¶ 41. She never received it. *Id.*

On June 21, 2011, Buhl again sent an email to respondent seeking an update. Bd. Report ¶ 42; Ex. 26. Respondent failed to respond to her. Bd. Report ¶ 42.

On November 2, 2011, Buhl learned for the first time that her teaching certification in Kentucky was permanently revoked. Bd. Report ¶ 43. She only learned of the permanent revocation because Pennsylvania initiated proceedings seeking reciprocal discipline. *Id.* Upon receiving notice of Pennsylvania's action, Buhl emailed respondent, but respondent failed to reply to her. Bd. Report ¶ 43; Ex. 27.

In an email exchange that began on November 3, 2011, Dorothy Lee replied to Buhl asking her to forward all of the relevant documents to her. Bd. Report ¶ 44. By the end of the email exchange on November 9, 2011, Buhl had sent Dorothy all of the documents and had asked respondent and Dorothy for help. *Id.* Neither respondent nor Dorothy responded to Buhl's request. *Id.*

On November 21, 2011, Buhl notified respondent that she had retained new counsel, Jeffery Walther, and asked them to provide him with all of the information related to her case. Bd. Report ¶ 45. Respondent did not reply. *Id.*

On December 13, 2011, Walther sent a letter to respondent requesting Buhl's file. Bd. Report ¶ 46. Respondent replied to Walther on December 16, 2011 and promised to "devote tomorrow" to getting Buhl's file. Bd. Report ¶ 46; Ex. 33. Respondent failed to produce the file. Bd. Report ¶ 46.

On March 6, 2012, Walther sent a letter to respondent asking him to explain why he abandoned his representation of Buhl. Bd. Report ¶ 47; Ex. 34. On March 8, 2012, respondent emailed Walther and disputed the assertions in Walther's letter. Bd. Report ¶ 48; Ex. 35.

The facts underlying Count II are cogently set forth in the Board's report, which is attached hereto as Appendix A.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. RESPONDENT IS SUBJECT TO THE DISCIPLINARY AUTHORITY OF THE OHIO SUPREME COURT.

Article IV, Section 2(B)(1)(g) of the Ohio Constitution grants this Court "exclusive power to regulate, control, and define the practice of law in Ohio." *Disciplinary Counsel v. Harris*, 137 Ohio St.3d 1, 2013-Ohio-4026, 996 N.E.2d 921, ¶ 7. The Board correctly found that disciplinary actions are an extension of this Court's inherent power to regulate and control the practice of law. Bd. Report ¶ 55, citing *Mahoning County Bar Ass'n v. Franko*, 168 Ohio St. 17, 23, 151 N.E.2d 17 (1958). In exercising that exclusive power, this Court has explained that "[a]ny definition of the practice of law inevitably includes representation before a court, as well as the preparation of pleadings and other legal documents, the management of legal actions for clients, all advice related to law." *Id.*, quoting *Cleveland Bar Assn. v. CompManagement, Inc.*, 111 Ohio St.3d 444, 2006-Ohio-6108, 857 N.E.2d 95, ¶ 22.

Upon admission to the practice of law in Ohio, respondent took an oath, in which he swore to "abide by the Ohio Rules of Professional Conduct." *See* Gov. Bar R. I(1)(F) and Gov.

Bar R. I(8)(A). Further, Prof. Cond. R. 8.5(a) states that “[a] lawyer admitted to practice law in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer’s conduct occurs.” Because respondent subjected himself to Ohio’s Rules of Professional Conduct as a result of the oath he swore upon admission to the practice of law in Ohio, it is beyond question that he is subject to the disciplinary authority of this Court.

A. RESPONDENT IS NOT IMMUNE FROM DISCIPLINE

In his objections, respondent argues that federal law preempts all state law causes of action arising from the representation of federal employees by agents of a union. Resp. Objections, Pg. 14. Like the Board did, this Court should reject respondent’s flawed argument. Because the body of case law upon which respondent attempts to rely does not stand for the proposition that he is immune from the disciplinary authority of this Court, the Board correctly found that any immunity that respondent might enjoy as an agent of a federal-sector union does not apply to the instant disciplinary matter. Bd. Report ¶ 53-55.

The body of case law that respondent cites does not apply to the authority of a state supreme court to regulate the practice law through a disciplinary action against a member of that state’s bar. Rather, respondent cites a series of cases in which the United States Supreme Court and other federal courts have held that federal employees and union members do not have a private cause of action against the agents of their unions, including private attorneys retained by a union, like respondent. As shown below, any immunity enjoyed by respondent in the execution of his duties as an attorney retained by a union is limited to private causes of action, including contract and tort actions, filed by an employee or union member. That immunity does not extend to other matters, including attorney disciplinary proceedings addressing conduct that

violates the Rules of Professional Conduct of the state or jurisdiction in which the attorney is admitted to practice law.

The cases cited by respondent fall into three categories: (1) suits filed by employers against union-member employees; (2) suits filed by private-sector employees against a union or its agents; (3) and suits filed by federal-sector employees against their employers. The seminal case cited by respondent is *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962). In *Atkinson*, the Supreme Court decided whether officers of a union could be held personally liable for breaching a no-strike agreement when it was alleged that they, acting on behalf of the union, caused the breach. *Id.* at 238. The Court examined the legislative intent behind the Taft-Hartley Act, determined that it was the intent of Congress to insulate union-member employees from personal liability for breach of a no-strike agreement, and dismissed that portion of the lawsuit. *Id.* at 247-249. The Court noted that parties cannot evade congressional policy by suing union agents, whether in contract or tort, and held that “when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable. *Id.* at 249. The Court reached a similar result in a second employer-filed suit against union members in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 101 S.Ct. 1836, 68 L.Ed.2d 248 (1981). In that case, the Court held that the employer could not seek damages from union-member employees when the employees violate a no-strike agreement, even if the union did not participate in or authorize the strike. *Id.* at 417. In each of these employer-filed suits, the Court dismissed any cause of action against individual union members.

Additionally, respondent has cited two legal malpractice cases brought by private sector employees against attorneys for their respective unions. *Carino v. Stefan*, 376 F.3d 156 (3rd Cir.2004); and *Arnold v. Air Midwest*, 100 F.3d 857 (10th Cir.1996). In both cases, union-

employed attorneys represented the employees during grievance procedures initiated pursuant to a collective-bargaining agreement. *Carino* at 157-158; *Arnold* at 859. Both suits were dismissed after the respective courts found that union members cannot hold union attorneys individually liable for legal malpractice when the services performed relate to a collective bargaining agreement or process. *Carino* at 162; *Arnold* at 862 (“an attorney who performs services for...a union may not be held liable in malpractice **to individual grievants**”)(emphasis added).

The remaining cases cited by respondent in support of his position include civil actions filed by federal-sector employees against their respective employers, their respective unions, or their union-employed attorneys. In each of these cases, the courts dismissed the employee’s civil claims citing both the existence of a comprehensive federal regulatory scheme meant to provide relief to employees and the congressional intent that the provided framework established the sole mechanism for resolving labor conflicts. *See, Bush v. Lucas*, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) ;*United States v. Fausto*, 484 U.S. 439, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988); *Karahalios v. NFFE*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989); *Elgin v. Dept. of Treasury*, ___ U.S. ___, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012); *Montplaisir v. Leighton*, 875 F.2d 1 (1st Cir.1989).

None of these cases support or justify respondent’s position that he is immune from the inherent power of this Court to regulate the legal profession of this state. These cases prevent *employers* from suing union members individually, prevent *employees* from suing union attorneys, and deny a private cause of action to *employees* when a comprehensive regulatory scheme exists to address the issues involved in the suit. Further, each case cited by respondent forecloses a *private* cause of action. Both the authority for and the purposes of initiating a

formal disciplinary proceeding against an attorney, including respondent, are entirely separate and distinct from federal labor law and render respondent's citations irrelevant. This proceeding is not a private cause of action, it is not seeking damages, it is not filed by an employee or employer, and it is not a labor dispute falling under a comprehensive federal remedial scheme. This is an action brought by an arm of this Court, The Office of Disciplinary Counsel, seeking to discipline an attorney licensed in Ohio in order to protect the citizens of Ohio and to ensure the integrity of our profession. Simply stated, the precedent cited by respondent has nothing to do with the matter before this Court.

The limited scope of *Atkinson* and its progeny was further demonstrated in *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir.1985). While dismissing a legal malpractice claim brought by a union member against an attorney working for the union in fulfilling the union's obligation to represent its members in the collective bargaining process, the court stated, "nothing we have said limits a union's right to sue its attorney." *Id.* at 1259. The court further stated that, "[u]nion members may also sue attorneys whether or not the attorneys are employed by the union where the legal services provided are wholly unrelated to the collective bargaining process; e.g., drafting a will, handling a divorce, or litigating a personal injury suit." *Id.* As *Peterson* clearly states, union attorneys are hardly immune from all causes of action.

In the underlying matter on which this disciplinary proceeding is based, the action against Buhl before the Kentucky Board was not a grievance brought pursuant to a collective bargaining agreement. And in so far as respondent is claiming preemption as an affirmative defense, he provided no evidence from the union. He did not call any representatives from the union to testify on his behalf or to establish his claims. He only provided his own self-serving testimony regarding his role.

In an effort to bolster his argument for immunity, respondent asserts that this action only seeks to protect federal employees; however, he misunderstands the purpose of our disciplinary process. Resp. Objections at 16. Respondent is admitted to practice law in Ohio, and our disciplinary system exists to protect the citizens of this state and ensure the integrity of those granted the privilege of representing Ohio citizens—it does not exist only to protect any potential federal employees he might represent. Respondent is subject to this disciplinary proceeding by virtue of his admission to the practice of law in Ohio. How he exercises that privilege, if at all, does not immunize him from this action and does not determine the purpose of this action or the system as a whole. “It is fundamental that the legal profession of Ohio includes every person who has been admitted to the practice of law...regardless of the subsequent capacity or status of such person, be he banker, farmer, businessman or judge,” or practicing with a federal-sector union as a client. *Mahoning County Bar Ass’n v. Franko*, 168 Ohio St. 17, 23, 151 N.E.2d 17 (1958). It is his ability to practice in this state and the oath he took that subject him to this Court’s disciplinary authority. How or where he chooses to exercise that ability does not affect the jurisdiction of this Court.

Finally, the Board correctly found and relied upon the clear distinction between the types of claims discussed in respondent’s cited precedent and the nature of this disciplinary proceeding. Bd. Report ¶ 11-12. As noted by the Board, this Court has explained the inherent differences between tort and disciplinary actions. *Id.* citing *Fred Siegel Co. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E.2d 853 (1999). Tort actions provide a potential remedy to individuals for damage resulting from tortious conduct. Disciplinary actions seek to protect the public interest and to ensure the competency of members of the bar. *Id.* at 178. Given that

fundamental difference, the Board properly denied respondent's claim of immunity. Bd. Report ¶ 55.

II. THE BOARD CORRECTLY FOUND THAT AN ATTORNEY-CLIENT RELATIONSHIP EXISTED BETWEEN RESPONDENT AND BUHL

It its report, the Board found an attorney-client relationship between respondent and Buhl. Bd. Report ¶56. In reaching that conclusion, the Board noted the "numerous instances" in which respondent provided advice to Buhl at the time the Kentucky Board initiated its investigation. *Id.* at ¶ 59. The Board also cited respondent's assurances that he would submit something on Buhl's behalf to the Kentucky Board and would review anything that was filed. *Id.* at ¶ 25 and 59. Further, the Board relied upon respondent's clear representation to Buhl that he would seek to enter an appearance on her behalf and submit further material in her defense. *Id.* at ¶60. For the reasons set forth below, the Board's finding is correct, and relator asks this Court to affirm the Board's finding of an attorney-client relationship between respondent and Buhl.

A. BECAUSE AN EXPRESS ATTORNEY-CLIENT RELATIONSHIP WAS CREATED AND BUHL REASONABLY BELIEVED SUCH A RELATIONSHIP EXISTED BASED UPON RESPONDENT'S CONDUCT, THIS COURT SHOULD FIND THAT AN ATTORNEY-CLIENT RELATIONSHIP EXISTED

The reasonable beliefs and expectations of the client control whether an attorney-client relationship is created. Buhl reasonably believed that respondent was her attorney because of his express statements to her and because of his conduct. As a result, an attorney-client relationship existed between Buhl and respondent.

Under Kentucky law, "[t]he contractual relationship between an attorney and client may be either expressed or implied by the conduct of the parties." *Pete v. Anderson*, 413 S.W.3d 291,

296 (Ky.2013). “Indeed, an attorney-client relationship may be created as a result of a party’s ‘reasonable belief or expectation,’ based upon the attorney’s conduct, that the attorney has endeavored to undertake representation.” *Id.*, citing *Lovell v. Winchester*, 941 S.W.2d 466, 468 (KY.1997). In the instant case, an attorney-client relationship was expressly established in 2007. Hearing Tr., Pg. 201:2-206:6. On August 9, 2007, the investigative report created after the investigation of Buhl was forwarded to the Kentucky Education Professional Standards Board (“Kentucky Board”), and the letter to the Kentucky Board was emailed to Buhl. Ex. 50; Hearing Tr., Pg. 202:3-5. After receiving the letter, Buhl contacted respondent. *Id.* at 202:14-20.

During this time period, respondent was representing Buhl on a separate employment matter, and Buhl was still employed by Ft. Knox schools pursuant to an approved leave of absence. *Id.* at 197:12-25. Additionally, Buhl became aware that Ft. Knox was going to terminate her leave and her employment. *Id.* at 198:8-12. Respondent represented her in an effort to prevent her termination. *Id.* at 47:15-48:8 & 198:8-16. Because she was not returning to Ft. Knox, Buhl considered resigning from her position and asked respondent about how that might affect his ability to continue representing her in the disciplinary matter before the Board. *Id.* at 250:13-19. Respondent assured her that he would continue to represent her even after her resignation because the action against her arose out of her employment with Ft. Knox schools and began while she was still employed there. *Id.* at 204:24-205:24. Based on the advice she received from respondent, Buhl resigned in October 2007. *Id.* at 205:25-206:6; Bd. Report ¶ 17. Given Buhl’s testimony, which the Panel found to be “very credible,” an express attorney-client relationship between respondent and Buhl was clearly created with regard to the disciplinary action pending before the Board. *Id.* at ¶ 50.

B. ASSUMING ARGUENDO THAT AN EXPRESS ATTORNEY-CLIENT RELATIONSHIP WAS NOT ESTABLISHED PRIOR TO BUHL'S RESIGNATION, AN ATTORNEY-CLIENT RELATIONSHIP SHOULD BE INFERRED FROM THE CONDUCT OF THE PARITES

When Buhl received notice that the Board was going to proceed with her case, she contacted the union and respondent. Respondent advised her regarding her response and how she should proceed, causing her to believe that he was still representing her. Because respondent acted in a manner that was consistent with the existence of an attorney-client relationship, and he did not further clarify the boundaries of their professional relationship, Buhl reasonably believed that an attorney-client relationship existed.

At the end of 2007, when the Kentucky Board notified Buhl that it had received a referral and requested her response, she contacted respondent. Bd. Report ¶ 19 and 20; Ex. 2; Hearing Tr., Pg. 206:7-21. Respondent replied and suggested how Buhl should edit her response. Bd. Report ¶ 21. He told Buhl that "he had something pretty close to ready to go" and that he or Dorothy could add a "lawyer argument as a supplement." Bd. Report ¶ 21; Ex. 3; Hearing Tr., Pg. 208:10-209:13. Following that, respondent submitted Buhl's response using the letterhead of his law practice and stated in that letter that a further submission would be forthcoming. Bd. Report ¶ 22; Ex. 5. Then, respondent confirmed that he had submitted her response, again stated that he would submit further material, and instructed Buhl to wait. Bd. Report ¶ 23; Ex. 6. Contrary to his representations to Buhl, respondent failed to submit any additional information to the Kentucky Board. Bd. Report ¶ 23.

Several months later when the Kentucky Board voted to hear her case, Buhl again contacted respondent. Bd. Report ¶ 24 and 25; Ex. 7 & 8; Hearing Tr., Pg. 209:24-210:10.

Respondent again advised her to wait, told her that the Kentucky Board would notify them, and explained what would occur if charges were filed. Bd. Report ¶ 25; Ex. 8. Respondent stated that, "We will naturally review the charges and take whatever action is appropriate," which Buhl reasonably understood to mean that she and respondent would review the charges. Bd. Report ¶ 25; Ex. 8; Hearing Tr., Pg. 274:10-15. Finally, respondent acknowledged to Buhl that normally he would complete some preliminary work, but that work was already completed. Ex. 3.

During this time, respondent acted like he was Buhl's attorney, and she reasonably believed that he was. Bd. Report ¶ 60; Hearing Tr., Pg. 206:22-207:2. Respondent advised her how to edit her response, submitted her response, told her several times that she should wait, explained the procedure, and represented that he would submit a response to the allegations. Further, although respondent claims that he was not representing Buhl, he never advised her that he was not her attorney. Bd. Report ¶ 50 and 62; Hearing Tr., Pg. 245:1-246:4.

Additionally, Kentucky's disciplinary rules place the burden of defining the scope of the attorney-client relationship on the attorney rather than the client. SCR 3.130(1.3). The rules acknowledge that, in circumstances in which there is a continuing professional relationship over the course of several matters, a client may assume that the representation will continue. SCR 3.130(1.3) cmt. 4. The rules also require the attorney to resolve any doubt regarding whether there is an attorney-client relationship. *Id.* Over the course of her employment with Ft. Knox schools, respondent and Dorothy Lee acted as Buhl's legal counsel several times. Hearing Tr., Pg. 45:19-46:1 & 193:4-25. Buhl believed that the two of them were married and were a team. *Id.* at 230:7-14. Based upon that history, as well as respondent's conduct during late 2007 and early 2008, Buhl reasonably believed that respondent was her attorney, and respondent made no attempt to define the relationship as required under the rules. Respondent acted like he was her

attorney, and was, in fact, her attorney. Respondent's testimony that he was only representing the union is not credible.

Finally, respondent asserts that the involvement of the non-lawyer union leadership in Buhl's case made it clear that he was representing the union and not Buhl. Respondent's assertion is without merit. The involvement of union leadership was not unusual. *Id.* at 207:3-208:9. Even respondent admitted that it was standard for union leadership to be involved in cases. *Id.* at 41:10-45:16. Given that this was common, there is nothing about having union leadership involved that would render Buhl's belief in the existence of an attorney-client relationship unreasonable.

C. EVEN ASSUMING ARGUENDO THAT AN ATTORNEY-CLIENT RELATIONSHIP, WHETHER EXPRESS OR IMPLIED, WAS NOT CREATED IN 2007 AND EARLY 2008, AN ATTORNEY-CLIENT RELATIONSHIP WAS ESTABLISHED IN 2011.

Despite numerous attempts by the Kentucky Board to contact respondent, Buhl only received notice that charges had been filed against her when her tenants forwarded a letter to her, which she received in March 2011. Bd. Report ¶ 34; Ex's. 11, 13-17; Hearing Tr., Pg. 144:14-145:23. Once she received notice, she contacted respondent. Bd. Report ¶ 34; Ex. 17. Respondent sent an email to the prosecutor, Courtney Baxter, and falsely informed her that Buhl *recently* authorized him to represent her. He forwarded that email to Buhl. Bd. Report ¶ 36; Ex. 20. Respondent also wrote to the hearing officer informing him that he would be representing Buhl. He signed that letter as Buhl's attorney and provided a copy to Baxter and Buhl. Bd. Report ¶ 37; Ex's. 21-23. It is clear from these exhibits that an attorney-client relationship existed. Therefore, even if an attorney-client relationship was not created in 2007 or 2008, there is no doubt that one was expressly created in 2011.

D. RESPONDENT'S EMPLOYMENT WITH THE UNION DID NOT AFFECT THE CREATION OF THE ATTORNEY-CLIENT RELATIONSHIP WITH BUHL, AND HIS EMPLOYMENT DID NOT RENDER UNREASONABLE BUHL'S BELIEF THAT HE WAS REPRESENTING HER

Respondent cites *Innis v. Howell*, 76 F.3d 702 (6th Cir. 1996) and SCR 3.130(1.13) for the proposition that the union was his client rather than Buhl. Resp. Objections, Pg. 12 and 13; Hearing Tr., Pg. 16:19-17:14. Initially, it is important to note that *Innis* is a Sixth Circuit decision interpreting Kentucky law, and predates *Lovell v. Winchester*, 941 S.W.2d 466, 468 (KY.1997) (“The lawyer/client relationship can arise not only by contract but also from the conduct of the parties.”). However, contrary to respondent’s claims, both *Innis* and SCR 3.130 (1.13) stand for the proposition that an attorney-client relationship can exist under the circumstances of the instant case.

In *Innis*, Howell Corporation sued its president for breach of fiduciary duty, and the president sued the corporation for wrongful discharge. *Innis*, 76 F.3d at 706. The president also filed suit against the corporate attorney for legal malpractice. *Id.* The jury found there was no malpractice because the corporate attorney did not represent the president, and the Sixth Circuit affirmed the verdict. *Id.*

While the court stated that “[t]he law is generally settled that an attorney for a corporation does not automatically represent the corporation's constituents in their individual capacities even on the same matters,” the court acknowledged that corporate attorneys can represent constituents in their personal capacity. *Id.* at 712. Even prior to *Lovell*, the Sixth Circuit acknowledged that an express or implied attorney-client relationship could have existed between the president and the corporate attorney. *Id.* The court stated that in order for there to have been an attorney-client relationship, the corporate attorney “would have needed to take action on [the president’s]

personal behalf, not just action for the general good of the corporation. *Id.* Thus, rather than foreclosing the possibility that an attorney-client relationship could exist between respondent and Buhl, the *Innis* court explained how such a relationship could be formed.

Additionally, SCR 3.130 (1.13) allows for the formation of an attorney-client relationship between an organizational attorney and a member of that organization. The rule explicitly states that “[a] lawyer representing an organization may also represent any of its...members.” *Id.* The comments to (1.13) place the burden on the attorney to define the relationship if a conflict arises. *Id.* at cmt. 12.

It should be noted that *Innis* and SCR 3.130 (1.13) primarily focus on corporations and corporate attorneys. Legal services provided by a union to its members are distinguishable from those provided by a corporate attorney. In the corporate setting, an attorney is generally retained to represent the entity only. Although an attorney-client relationship can be formed with the corporate constituents, the corporate attorney is generally not hired for the purpose of providing legal services to anyone other than the corporation itself. However, in the case of a union, attorneys are hired to provide legal services to union members. While a union attorney might also represent the union as an entity in some situations, individual legal representation of its members is one of the benefits of union membership.

In the instant case, respondent provided personal legal representation to Buhl. While the case arose out of her employment, the action was not brought pursuant to a collective bargaining agreement or master labor agreement. It was a personal licensure action before the Board. Respondent assured Buhl that his representation would continue because the action arose out of her employment. Hearing Tr., Pg. 204:20-206:2. Further the union leadership assured Buhl that representation would continue and Laurel Dawson, the local area union president, believed that

respondent was representing Buhl. *Id.* at 219:17-221:17; Ex. 30, Pgs. 6-7. Thus, rather than negating the existence of an attorney-client relationship, *Innis*, SCR 3.130 (1.13), and respondent's employment with the union, provide further support for the existence of an attorney-client relationship.

Finally, respondent's argument that that he was only representing the union appears to imply that he does not have any ethical obligations to diligently and competently represent the union's members. However, that is simply not the case. Respondent still has an ethical duty to properly represent the union and its members. *Peterson*, 771 F.2d at 1258. He cannot evade his ethical obligations by hiding behind the union.

**E. THE LAW REVIEW ARTICLE CITED BY
RESPONDENT DOES NOT APPLY TO THE INSTANT
CASE**

Levinson, *Legal Ethics in the Employment Law Context: Who Is the Client?*, 37 N. Ky. L. Rev. 1 (2010) does not apply to the instant case for three reasons. First, the author acknowledges that there is no Kentucky authority for the proposition that a union attorney does not represent a union member. "There is no Kentucky or Sixth Circuit authority specifically addressing whether a union attorney represents the entity or its constituents. There is likewise no authority on whether a union member is a constituent or third-party." *Id.* at 4. Second, the article limits its analysis to analogizing from *Innis v. Howell Corporation*. The author does not examine any of the case law from Kentucky regarding the formation of an attorney-client relationship, and the author acknowledges that the formation of an attorney-client relationship between a member and a union attorney is not addressed by the article. "If the union attorney has created an individual client relationship with a grievant or other member, then the rules governing conflict of interest between multiple clients will govern. That topic is beyond the scope of this paper." *Id.* at 29, fn.

33. Third, the author acknowledges that a union attorney can create an attorney-client relationship with a member:

To avoid creating an attorney-client relationship with a union constituent (or member), the attorney should remind the constituent (or member) that the attorney is the union's attorney whenever the constituent seems to refer to the attorney as the constituent's own attorney. The attorney could also consider providing a grievant a writing at the outset that clearly states that the attorney is the union's attorney. *Id.* at 6.

Despite his contention that he only represented the union, respondent failed to explain the limits of his representation to Buhl, either orally or in writing. Without question, respondent formed an attorney-client relationship with Buhl, and she reasonably believed that respondent was her attorney.

III. RESPONDENT FAILED TO COOPERATE WITH THE OFFICE OF DISCIPLINARY COUNSEL

In his objections, respondent argues that, contrary to the Board's findings, he cooperated with the Office of Disciplinary Counsel. Resp. Objections, Pg. 21. He maintains that he responded to all the communications he received from relator. *Id.* However, the Board was unconvinced and correctly found that respondent failed to cooperate. A review of the timeline and the uncontested communications between the parties demonstrate that by clear and convincing evidence that respondent failed to cooperate.

Relator maintains that respondent did not respond to its letters of inquiry and subpoenas. Relator did not receive a response to either the first or the second letter of inquiry. Bd. Report ¶ 73. Further, respondent did not appear for a deposition after a subpoena was taped to his door. Bd. Report ¶ 65. In early November 2012, respondent finally responded to an email from relator, claiming that he had sent a response to the initial letter of inquiry. Bd. Report ¶ 67. Relator advised respondent that it had not received a response and that relator had issued a subpoena for

him, and requested good contact information and another copy of his response. Bd. Report ¶ 67; Ex. 43. Respondent provided his current contact information but failed to provide a response to the letter of inquiry. Bd. Report ¶ 67; Ex. 43.

Relator again emailed respondent on November 15, 2012 seeking his response, and respondent assured relator that he would provide it. Bd. Report ¶ 68; Ex. 43. Despite knowing that relator had not received a response for months and despite knowing that he had failed to respond to a subpoena, respondent failed to provide his response. Bd. Report ¶ 68; Ex. 43.

Relator sent a third inquiry in January 2013 and taped another subpoena to respondent's door in February 2013. Bd. Report ¶ 69 and 70. Respondent failed to respond. Bd. Report ¶ 69 and 70. Only when relator managed to hand-deliver a copy of the draft complaint did respondent finally provide a response. Bd. Report 71 and 72. While respondent maintains that he responded in June 2012, his self-serving testimony is not credible. His conduct in November 2012 further demonstrates that he did not respond and had no intention of responding. Rather than provide his purported response, he ignored relator's inquiries. He was on notice that relator had received nothing and that relator had issued a subpoena to which he did not respond. Any reasonable attorney who had already drafted and provided a response would have made every effort to ensure that relator received it. Any reasonable *local* attorney, like respondent, would have hand-delivered his response if necessary. Rather than act like an attorney who had drafted and provided a response, respondent ignored further inquiries from relator. And he did so because there was no response. He had not drafted or provided anything to relator. And the Board correctly found that respondent did not fully respond to the November 2012 emails and failed to cooperate. Bd. Report ¶ 74.

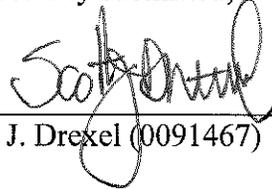
The only inquiry that respondent might not have received was the second letter of inquiry from relator. Respondent testified during the hearing that he might not have checked the mail for his law office during the entire month of July. Hr. Transcript, Pg. 103:1-104:11. Respondent argues that the mere fact that he could have done more does not prove that he failed to cooperate. Resp. Objections, Pg. 21. However, respondent did next to nothing. Respondent admits that he received the first inquiry, and even after he was on notice that relator was investigating him, he could not even be bothered to check his mail for an entire month. Willful blindness to one's ethical obligations does not absolve someone from their duty to cooperate. Respondent's testimony in this regard exemplifies the negligent and callous disregard respondent has for his clients and his legal work. Just like with his registration obligations, his legal education requirements, and his representation of Buhl, respondent did next to nothing to meet his obligation to cooperate with this office. Thus, the Board correctly found that he failed to cooperate.

CONCLUSION

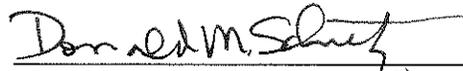
From late 2007 until November 2011, Buhl placed her trust and confidence in respondent to handle a career-threatening matter before the Kentucky Board (of Education-?). However, at every critical juncture, respondent neglected Buhl's matter, resulting in irreparable harm to Buhl. Respondent's arguments hold no merit. The board unequivocally found that respondent is subject to this Court's jurisdiction, that an attorney-client relationship between respondent and Buhl, and that respondent violated numerous disciplinary rules while representing Buhl. Respondent's baseless claim of immunity underscores his refusal to acknowledge his misconduct and accept responsibility for his actions. Coupled with his failure to cooperate in the

disciplinary process, respondent's misconduct warrants an indefinite suspension from the practice of law.

Respectfully submitted,



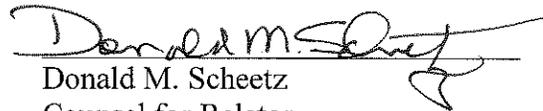
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon Raymond Thomas Lee, P.O. Box 308, Dublin, OH 43017 and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, 65 S. Front Street, 5th Floor, Columbus, Ohio 43215 this 22nd day of December, 2014.


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