

ORIGINAL

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THE SUPREME COURT OF OHIO

Disciplinary Counsel :
 Relator :
 v. : Case No. 2012-1107
 Joel David Joseph :
 Respondent :

MEMORANDUM OF RESPONDENT IN
RESPONSE TO ORDER TO SHOW CAUSE

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I.

Introduction

The Board of Professional Conduct of the Supreme Court of Ohio conducted a hearing in this matter on February 19, 2015. The Board “unanimously finds the Petitioner has satisfied all of the requirements for reinstatement to the practice of law in Ohio, except one. Petitioner has not been reinstated to the practice of law in Maryland.” Paragraph 13. The Board relied on *In re Bustamonte*, 100 Ohio St. 3d 39, 2003-Ohio-4828 regarding admission to the Maryland Bar. Paragraph 20.

While there are similarities between *In re Bustamonte, supra*, and the present case, the differences are substantial. John Henry Bustamonte was convicted in a federal district court of participating in a scheme to defraud an insurance company. Petitioner herein was not charged with commission of a crime. Mr. Joseph was disbarred in Maryland based on the “findings” of a single judge who copied verbatim the proposed findings of fact of the attorney grievance commission. Mr. Joseph allegedly misstated that he was a Maryland resident when he was temporarily living in California to file several California cases pro hac vice.

Actually, at the time in question, Mr. Joseph was a Maryland resident and paid Maryland state income taxes for the year in question. The Ohio Board of Professional Conduct found that Mr. Joseph “Presented evidence at the hearing in demonstrated that he had filed income tax returns in the state of Maryland during the during the time period in which the Maryland Court of Appeals determined that he was a resident of the State of California. At a minimum this demonstrates that respondent sought pro hac vice status in California in good faith, with a reasonable belief that he was a Maryland resident.

II.

Respondent Satisfied all Requirements for Reinstatement

The Board found that respondent satisfied all requirements for reinstatement to practice in Ohio except one, readmission to the Maryland Bar. Respondent has a pending petition with the Maryland Court of Appeals for reinstatement.

However, this Court does not have to require readmission in Maryland if Maryland denied respondent due process of law, or if the Maryland Courts were unduly harsh. Respondent seeks to be exempted from the Supreme Court's order that he be reinstated in Maryland.

III.

Bustamante is Distinguishable

The Ohio Supreme Court, in paragraph 5 of the *Bustamante* decision, stated, "In fact, his petition gives us no reason to suppose that he so much as *applied* for reinstatement in Florida. Moreover, respondent does not request to be exempted from the requirement that he be reinstated in Florida before being reinstated in Ohio. He simply ignores the entire issue."

First of all, petitioner, unlike Mr. Bustamante, has applied for reinstatement in Maryland. Further, petitioner has asks that he be exempted from the requirement that he be reinstated in Maryland, and specifically asked the Ohio Supreme Court that this requirement be eliminated. Earlier, the Ohio Supreme Court denied this request, even though disciplinary counsel did not oppose the motion to eliminate the requirement. Respondent herein did not ignore the issue of reinstatement to the Maryland bar and has

addressed it head-on. He once again respectfully asks the Supreme Court to waive the necessity of being readmitted in Maryland first.

Mr. Bustamante did not make restitution to those harmed by his conduct. Quite frankly, no one was harmed by petitioner's alleged violations of the code of ethics in Maryland. No one even claimed that he was harmed by Mr. Joseph's actions.

In fact, Mr. Joseph traveled to California because he had a deadline hanging over his head. His client, Arthur Wartell, was a veteran claiming medical malpractice by the Veterans Administration. Mr. Joseph filed the appropriate claim forms with the Veterans Administration in Washington, D.C. He was given a right to sue letter for Mr. Wartell. Based on the date of the right to sue letter, Mr. Wartell was required to file suit in the United States District Court for the Central District of California by March of 2007 or else he would lose his claim.

Before traveling to California, Mr. Joseph tried to find counsel in California to handle the case, but was unable to do so. In order to protect his client's rights, Mr. Joseph traveled to California in February of 2007, found local counsel to work with him and drafted and filed the complaint in a timely fashion. In fact, Mr. Joseph successfully settled the *Wartell* case for \$100,000. *Wartell v. United States of America*, CD California, Case No. cv 07-2005 SVW (SHx).

Mr. Joseph did all of the work on the *Wartell* case. Local counsel, Robert Moss, did virtually no work on the case, yet, contrary to their contract, seized one-half of the legal fee. When Mr. Joseph objected, Mr. Moss's assistant filed a complaint with the Maryland Bar.

Quite simply, the respondent contends that the Maryland bar discipline was improper and should not be rubber-stamped by the Ohio Supreme Court.

IV.

The Ohio Supreme Court Has Authority to Grant Exemptions and Reinstate Petitioner

Reciprocal discipline has its genesis in the U.S. Supreme Court's ruling in the *Matter of Selling*, 243 U.S. 46 (1917). In that case the United States Supreme Court ruled that it would treat discipline by one state as binding on it unless one of the following three conditions were established:

1. That the state procedure from want of notice or opportunity to be heard was wanting in due process;
2. That there was such an *infirmary of proof as to facts* found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or
3. That some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do. 243 U.S. at 51 (emphasis added).

The Supreme Court of Ohio, like the U.S. Supreme Court, is the last word on attorney discipline within its jurisdiction. Respondent has presented proof that the judge in Maryland that heard his case copied verbatim the proposed findings of the Maryland Bar Counsel, and did not even consider respondent's proposed findings of fact and conclusions of law.

The Maryland Court of Appeals *exclusively* relied on the findings of Judge Joseph A. Dugan to whom it had referred the case. Judge Dugan *copied verbatim* the proposed findings of fact and conclusions of law submitted by the Maryland Attorney Grievance Commission. Docket No. 34, October 10, 2010. Judge Dugan did not even consider petitioner's proposed findings of fact and conclusions of law. When the Maryland Court of Appeals ordered Judge Dugan to consider Mr. Joseph's proposed findings of fact and conclusions of law he still did not change one word of his opinion. Docket 37, December 29, 2010 and Docket 39, January 25, 2011.

Based solely on Judge Dugan's opinion the Maryland Court of Appeals disbarred Mr. Joseph on October 27, 2011. 422 Md. 670, 31 A.3d 137 (2011). Mr. Joseph was accused of lying to a California court, claiming that he was a Maryland resident in a motion to proceed pro hac vice. Judge Dugan found that Mr. Joseph was not a Maryland resident in 2007 despite the fact that he paid Maryland taxes in 2007 and was registered to vote in Maryland. At all relevant times petitioner believed that he was a bona fide Maryland resident and presented this evidence to the Ohio Board of Professional Conduct (Mr. Joseph lived in Maryland from 1980 until 2007 raising three children there.)

The Third Circuit ruled in *In re: Community Bank of Northern Virginia*, holding that it is "highly disapproved of" for judges to adopt the briefs of parties in a "verbatim or near verbatim" fashion. *In re: Community Bank of Northern Virginia*, 418 F.3d 277, 300, 319 (3rd Cir. 2005). In *Bright v. Westmoreland County*, the Third Circuit also had harsh words for a judge which unilaterally adopted the recommendations of one party:

Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are

tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions. We, therefore, cannot condone the practice used by the District Court in this case. 380 F.3d 729, 732 (3rd Cir. 2004).

A 1964 U.S. Supreme Court case called a judge who adopted a party's findings of facts verbatim "not the product of the workings of the district judge's mind" and noted the findings of fact had been "mechanically adopted by the district court." *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 656, 657 (1964).

The late Judge James Skelly Wright was favorably quoted by the U.S. Supreme Court for instructing judges to avoid the blanket adoption of lawyer's arguments:

I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case. *United States v. El Paso Natural Gas Company*, 376 U.S. 651, 657, fn4 (1964) (internal citations and quotations omitted).

Similarly, in a 1985 ruling the U.S. Supreme Court noted that "[w]e, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to the record." *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985).

V.

Conclusion

The *Bustamante* decision is not controlling here for several reasons. This case is distinguishable because petitioner was not convicted of a crime, no one was injured by petitioner, and because petitioner has applied to the Maryland Court of Appeals for readmission to the bar. Further, the Ohio Supreme Court has right to regulate the practice of law in the State of Ohio and to amend, alter or change the terms and conditions of any earlier ruling. The Board of Professional Conduct found that Mr. Joseph is fully qualified to practice law, and that it was the earlier ruling of this court regarding readmission to Maryland that is his only barrier to being readmitted. In light of the reliance of the Maryland Court of Appeals on the “findings” of one judge who rubber stamped the proposed findings of counsel for the disciplinary committee, this court should reinstate Mr. Joseph to the bar of the state of Ohio.

Respectfully submitted,

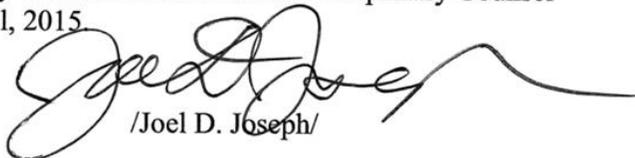


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Certificate of Service

I certify that I have emailed a copy of this memorandum to Disciplinary Counsel for the State of Ohio this 27th day of April, 2015.



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