ORIGINAL

THE SUPREME COURT OF OHIO

Dayton Bar Association
Relator

V.

John J. Scaccia
Respondent

Case No : 2015-1628
(Practice of law case)

BRIEF OF RELATOR IN SUPPORT OF RECOMMENDATION OF BOARD OF PROFESSIONAL CONDUCT.

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The Board of Professional Conduct (hereinafter Board), filed its certified report and recommendation with this Court on October 5, 2015. That report found respondent in violation of the following Rules of Professional Conduct ;

1. Prof. Cond. R. 1.1 [competence];
2. Prof. Cond. R. 1.3 [diligence];
3. Prof. Cond. R. 3.4(c) [knowingly failing to comply with rules of a tribunal];
4. Prof. Cond. R. 3.4(d) [failure to make a reasonably diligent to comply with a legally proper request by an opposing party].

This Court , on October 13,2015 issued an Order To Show Cause , ordering that any objections to the Board report be filed within 20 days and that any Answer Brief be filed within 15 days thereafter. Respondent filed Objections on October 2, 2015. This Answer Brief of Relator follows.

Respondent's objections appear to be three ;

1. The Board recommended sanction is too severe;
2. The Hearing Panel discounted the mitigation evidence Presented by Respondent;
3. The conclusion of the Hearing Panel and Board that Respondent 's violation of Prof. Cond. R. 3.4(d) was "intentional" is not supported by the evidence.

What Relator does not see in Respondent's objections is any objection to the findings of the report that Respondent violated Prof. Cond. R. 1.1, or 1.3 or 3.4(c).

In this case, Respondent was hired by one Marco Smith to pursue Smith's appeal of an adverse administrative ruling concerning Smith's workers compensation claim. In June 2010, Respondent's law office, through attorney-employee Jeffrey Wilson, filed that appeal in the Van Wert Ohio Common Pleas Court. The defendant-employer, Cooper Farms, through their attorney Sara Rose , filed an answer and discovery requests. Attorney Wilson eventually responded to the discovery requests. However, just prior the scheduled trial date, Wilson voluntarily dismissed Smith's complaint. One year later Respondent herein, John J. Scaccia, filed Smith's complaint . Attorney Rose again representing defendant, filed an answer and discovery requests. Rose testified before the Hearing panel that the discovery requests were nearly identical to those in the 2010 case.

Responses to the discovery requests were due on July 11, 2012. Respondent did not respond. Nor did he contact attorney Rose. Rose, however, did both telephone and write Respondent concerning receiving replies to her

requests. Respondent made no reply to Rose. Rose filed a motion to compel responses and for sanctions on August 13, 2012. The Common Pleas Court set a hearing on the motion and request for sanctions for September 20,2012. Again, Respondent did not respond.

In fact, Respondent did not ever file a response to the motion to compel and for sanctions. Nor did he appear at the September 20th hearing. Respondent claimed in his testimony that he had another hearing that day in Federal District Court in Cincinnati. He testified that someone from that court told him on the phone that if did not appear , federal marshal's would be sent to arrest him. Respondent also claimed that he had not received notice of the Van Wert court hearing. This was communicated to Rose on September 19 when she finally talked with Respondent in a call initiated by her. Rose, of course, had received the notice.

Respondent testified that he had no procedure for such conflicts. There was no one available to stand in for him.

The Hearing Panel report, adopted by the Board, gives a much more detailed recitation of all the facts. Briefly, when Respondent failed to appear, of obtain a postponement, the Court granted Rose's motions as to the Requests

For Admission, and granted Respondent 5 additional days to respond to the other discovery requests. The Court granted the motion as to sanctions in the amount of $2669.14, to be paid by October 15,2012.

September 26, 2012, the last day the discovery requests were to be complied with, in the late afternoon, Respondent commenced emailing items to Rose. These were incomplete at best. Rose moved to dismiss the complaint on the following day. That motion was sustained by the Court on September 28th, 2012

Still, Respondent could appeal the Van Wert Common Pleas decision of September 28th, dismissing the case. However, the notice of appeal was not filed until October 30. Out of time. Marco Smith was out of court.

Respondent failed to pay the sanction amount until June 2013. Shortly before he did pay with a bank check, he attempted payment with a check drawn on his law office account . That check was returned by the bank for insufficient funds.

Respondent questions the Board recommendation, following the Hearing Panel report, that he be sanctioned by this Court with a suspension of 18

months, 6 months stayed , as "too severe for the circumstances of his situation". One might ask about the circumstances of Marco Smith's situation. Or of the situation of the 47 Mound Clients whose case was dismissed without any hearing on the merits in the first of the now three ethics cases this Court has heard concerning the Respondent. Dayton Bar Assn. v. Scaccia, 143 Ohio St. 3d. 144, 2014-Ohio-4278.

The Board report cites cases from this Court in support of the recommended sanction. Relator concurs with and supports the recommendation, without additional citation.

Respondent also objects that the Hearing Panel discounted mitigation evidence he submitted. That evidence was primarily, and in most instances exclusively, from testimony he gave. Respondent claimed he suffered from a vitamin D deficiency. No medical evidence of any kind was presented to substantiate that claim. Respondent recited the sickness of a child and the illness and death of his mother. While all would empathize these situations, they are unfortunate examples that happen as we go through this thing called life. And , as the Board noted, Respondent did not testify as to how these matters affected him in the practice of law nor that any

contributed to his misconduct.

Lastly , Respondent objects to the Hearing panel and Board's finding that conduct in "his late attempts to comply with opposing counsel's discovery requests were somehow intentional". (Objections pg.4) This is in apparent reference to the finding that Respondent violated Prof. Cond. R. 3.4(d). (Respondent's listing of Prof. Cond. R.3.4(c) at pg. 6 of his Objections appears to be a typographical error.) Relator disagrees with that conclusion. The report discusses Prof. Cond. R. 3.4(d) at some length over pages 14 to 16. Relator contends that Respondent violated that rule's last clause which reads;

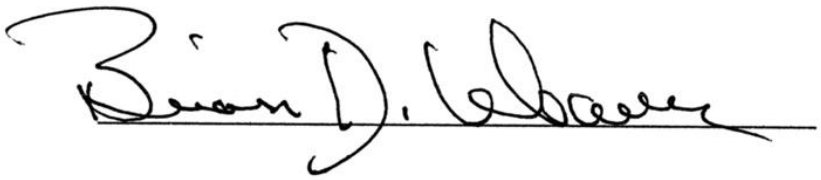
> "...or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party ."

Relator contends that it is not necessary for it to show that Resondent's conduct was intentional , only that he he failed to make a "reasonably diligent effort" to comply with the discovery. And , such was held by the panel and Board report. The report however went on to explain how, in its view , Respondent's actions (and inactions) caused the panel and Board to conclude the Respondent's conduct was also "intentional". It is the Relator's position that Respondent violated this rule , whether his conduct

was "intentional" or not. Should this court wish to make a finding of "intentionality" , that is its prerogative.

The Dayton Bar Association, Relator herein, requets that this Court approve the report of the Hearing Panel and Board of Professional Conduct in this case, and suspend the respondent for 18 months, with 6 months stayed and the costs of this matter.

Respectfully submitted ,



CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was sent to counsel for the Respondent , Attorney David P. Williamson, 400 PNC Center, 6 North Main Street, Dayton , Ohio 45402-1908 on the 12TH day of November , 2015.