Supreme Court of Ohio Clerk of Court - Filed August 09, 2016 - Case No. 2016-0859

No. 2016-0859

In the Supreme Court of Ohio

APPEAL FROM THE BOARD OF PROFESSIONAL CONDUCT
CASE NO. 2014-085

CLEVELAND METROPOLITAN BAR ASSOCIATION

Relator

v.

KENNETH R. DONCHATZ

Respondent

RESPONDENT KENNETH R. DONCHATZ'S ANSWER BRIEF

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IN THE SUPREME COURT OF OHIO

CLEVELAND METROPOLITAN BAR ASSOCIATION	:	Case No. 2016-0859
Relator	:	
v.	:	
KENNETH RONALD DONCHATZ	:	
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RESPONDENT KENNETH R. DONCHATZ'S ANSWER BRIEF

In its Findings of Fact, Conclusions of Law, and Recommendation to the Board of Professional Conduct of the Supreme Court of Ohio (the "Report"), the Board of Professional Conduct recommended that Respondent be suspended from the practice of law for two years, with six months stayed. Relator objects to that recommendation and seeks an indefinite suspension. In support of its objection, Relator relies on four cases. Each of those cases, which resulted in the imposition of indefinite suspensions, involved more serious violations than those present in the instant case.

1) *Disciplinary Counsel v. Frost*, 122 Ohio St.3d. 219, 2009-Ohio-2870, 909 N.E.2d 1271. In *Frost*, the respondent filed false accusations of bias and corruption against three common pleas judges and the county prosecutor, leveled false allegations of racial bias and subsequently filed grievances against a federal judge, and brought and pursued a baseless defamation suit against two of her opposing counsel. The Court found that respondent had no reasonable basis for leveling any of these charges. *Frost* at ¶¶ 17, 24, 31, 35. Frost put forth only one mitigating factor: lack of a prior disciplinary record. *Frost* at ¶ 36. The Court found that her attacks on public officials

caused considerable harm. *Frost* at ¶ 37. Also factoring into the Court's decision was respondent's failure to inquire into the truth of the alleged racial discrimination and other claims before bringing them and the cost of her actions to her clients. *Frost* at ¶ 38. Respondent was indefinitely suspended from the practice of law.

2) *Columbus Bar Association v. Cooke*, 111 Ohio St.3d 290, 2006-Ohio-5709, 855 N.E.2d 1226. In *Cooke*, respondent committed multiple violations in the course of representing a client before the bankruptcy court. Respondent represented the same client in a personal injury claim and did not report the claim to the bankruptcy court. *Cooke* at ¶ 5. Respondent stood silent while his client misrepresented the facts at a creditors meeting. *Cooke* at ¶ 6. Once the bankruptcy was filed, the bankruptcy trustee had exclusive authority to hire counsel to pursue the claim, yet respondent undertook representation of the client directly. *Cooke* at ¶ 8.

Respondent settled the personal injury claim, but did not inform the trustee or the bankruptcy court of the settlement. *Cooke* at ¶ 9. When the bankruptcy trustee learned of the settlement, he filed an adversary action, asking that the settlement proceeds be paid into the bankruptcy estate. *Id*. Respondent then misrepresented the nature of the settlement in a letter to the trustee. *Cooke* at ¶ 10.

Respondent overcharged his client for his work in the bankruptcy case. *Cooke* at ¶¶ 12, 13. Respondent misused his trust account. *Cooke* at ¶ 14. Respondent did not maintain malpractice insurance and did not disclose that information to his client. *Cooke* at ¶ 15. Respondent made serial misrepresentations about the distribution of the personal injury settlement proceeds to the relator and to the bankruptcy trustee. *Cooke* at ¶¶ 20-24. "The Board described respondent's actions before the bankruptcy court as 'fraudulent and deceitful,' and it concluded that he had lied to his client about his

actions and her funds, lied to the relator during the disciplinary investigation, and lied to the panel during its four-day hearing into his actions." *Cooke* at ¶ 28.

As aggravating factors, the board found that respondent had acted with a dishonest and selfish motive, had engaged in a pattern of misconduct, had committed multiple offenses, gave false statement during the relator's investigation, refused to acknowledge the wrongful nature of his actions, caused harm to a vulnerable victim, and failed to make restitution. *Cooke* at ¶ 27. The only mitigation was the lack of a prior disciplinary record. *Id*. Respondent was indefinitely suspended from the practice of law.

3) *Cleveland Metropolitan Bar Association v. Wrentmore*, 138 Ohio St3d. 16, 2013-Ohio-5014, 3 N.E.3d 149. In *Wrentmore*, the respondent converted client funds and lied in an attempt to conceal his actions. He also attended three CLE events without paying and told the staff members for each seminar that he had prepaid the fees. When it was discovered that respondent had not prepaid for his CLE attendance, he was billed, but he did not promptly respond to the bills. On two other occasions, respondent paid for CLE seminars with checks that bounced. While the board found three mitigating factors—absence of a prior disciplinary record, ultimate payment of restitution, and cooperation in the proceedings—the court significantly discounted the restitution and cooperation factors based on the timing of the restitution and respondent's conduct at the hearing. Again, the sanction was an indefinite suspension.

4) *Cleveland Metropolitan Bar Association v. Gruttadaurio*, 136 Ohio St.3d 283, 2013-Ohio-3662, 995 N.E.2d 190. *Gruttadaurio* involved a nine-count complaint alleging that respondent failed to place into his IOLTA account client fees received pursuant to flat fee arrangements, failed to refund unearned client payments, failed to

advise his clients he did not carry malpractice insurance, failed to perform the contracted for legal work, and lied to the relator's investigator. The complaint further alleged that respondent engaged in dishonesty, fraud, deceit or misrepresentation, that his conduct was prejudicial to the administration of justice, and that it adversely reflected on his fitness to practice law. *Gruttadaurio* at ¶ 2. The panel found that most of these violations were established by clear and convincing evidence. However, the panel recommended that the alleged violations of Prof.Cond.R 8.1(a) and 8.4(c) be dismissed. The Court, in reviewing the record, found respondent had violated Rules 8.1(a) and 8.4(c) and therefore rejected the board's recommended sanction and imposed an indefinite suspension. *Gruttadaurio* at ¶ 4.

Respondent's conduct herein is different from—and less harmful than—the conduct of respondents in the cases cited by Relator.

Count One - Davey Tree

This count involved no client. A contractor working at Respondent's residence backed into and knocked down a portion of a tree. (Stipulations, ¶¶ 8, 9.) Respondent contacted Davey Tree Expert Company ("Davey") to remove the tree. (Stipulations, ¶ 10.) The contractor reported the incident to its insurer (Stipulations, ¶ 11), but Davey's invoice was never paid by the contractor, its insurer or Respondent (Stipulations, ¶ 12). Davey instituted suit against Respondent in municipal court (Stipulations, ¶ 13) and obtained a default judgment against Respondent for $2,180.92 (Stipulations, ¶¶ 15, 16; Jt. Ex. 1).

For a variety of reasons, Respondent thought the judgment had been paid. It was not. Respondent was admittedly sloppy in the way he handled the matter: ignoring it until it periodically surfaced and then failing to fully investigate the status of the matter

before taking action. He incorrectly filed a Notice of Satisfaction of Judgment when the judgment had not been paid. When he was apprised of facts demonstrating that the judgment had not been paid, he failed to withdraw the notice. Instead, he allowed Davey's Motion to Vacate the Satisfaction of Judgment to go unopposed. The trial court ultimately vacated the Satisfaction of Judgment. (Stipulations, ¶¶ 24-26.) Thereafter, Respondent filed a Motion to Reconsider Default Judgment Pursuant to Civ. R. 60(b). (Stipulations, ¶ 27.) This was filed on the advice of counsel as a way to reopen the case so that a subpoena could be issued (*TT 63:17-64:4*), but the Court denied the motion and sanctioned Respondent for filing a frivolous motion (Stipulations, ¶ 31). Respondent subsequently paid the balance of the judgement. (Stipulations, ¶ 33).

<u>Count Two - Lin Cracknell</u>

Mrs. Cracknell was involved in a contentious family dispute involving dissolution of a family partnership. (Stipulations, ¶ 36.) Respondent agreed to represent Mrs. Cracknell pro bono, although she remained responsible for hard costs. (Stipulations, ¶ 37.)

During the course of the representation, Mrs. Cracknell loaned Respondent $100,000. Respondent did not fulfill the requirements of Rule 1.8 in accepting the loan and, at the hearing, admitted that in accepting the loan, he violated Rule 1.8. Tr. 390:14-391:16. By early 2011, Respondent had repaid $17,000 of the loan. (Stipulations, ¶ 41.) Mrs. Cracknell and Respondent ultimately settled all claims between them by entering into a Settlement Agreement, pursuant to which Respondent paid an additional $40,000 and returned a gift of an antique roll top desk that he had paid to refurbish. (Jt. Ex. 13.)

Count Three - Hampton

This count involves Respondent's inartful statement of opinion, under exigent circumstances, while representing a client in a disciplinary proceeding. Respondent took over as counsel for Carol Jean Hampton in her disciplinary case late in the litigation and after formal discovery had closed. (*TT 103:25-104:3; 286:1-4*.) Only 11 days before the grievance was to be heard, Respondent learned, through sworn testimony, that the attorney for the grievant, JT Holt, had tape-recorded three meetings attended by Holt, grievant, Hampton, and her son, Chris Destocki. (*TT 111:15-25; TT 113:3-5*.) Hampton and her son testified that Holt recorded all of the meetings and that, at the third meeting, grievant admitted she had no claims against Hampton. (*TT 258:20-259:19*.)

Relator produced the recordings of the first two meetings, but indicated she did not have a recording of the third meeting. Relator and Respondent argued over the Relator's responsibilities in regards to exculpatory evidence. (*TT 112:1-9; 283:10-284:3*.) In response, Relator contacted Holt, who predictably denied recording the third meeting. (*TT 266:7-13*.) Respondent attempted to call Holt, but was unsuccessful. (*TT 122:24-123:2*; Respondent's Ex. 3.) Respondent then filed a First Motion in Limine, arguing that the panel should not allow grievant to put on any evidence in support of the charges on this count because Relator failed to turn over the exonerating evidence. (Jt. Ex. 16.) Hampton resigned from the practice of law a few days later.

Scott Drexel then sent Respondent inquiries about the statements made in the Motion in Limine. With more time on his hands to respond, Respondent set forth the factual bases for the argument made in the motion. (Relator's Ex. 19.)

The Board found that Respondent's statements in the First Motion in Limine violated Rules 3.1, 3.3(a)(1), 3.4(c), 8.4(c), and 8.4(d). (Report, ¶ 27.) Respondent has separately objected to the findings and recommendations of the Board on this count.

Count Four - McKibben

Respondent represented his own interests with regard to money owed by McKibben/Leader Technologies. The amount owed was not in dispute. (Report at ¶ 36.) The parties attended ongoing mediation sessions conducted through the court, and, at one such session, Respondent understood that Magistrate Harilstad (the "Magistrate") requested he put together a consent judgment to circulate amongst the parties. (*TT 84:12-21.*) Respondent consulted with his attorney in the case, Rick Brunner, who prepared a draft of a Stipulated Entry and Consent Judgment (the "Consent Judgment") and forwarded it to Respondent. (Respondent's Ex. 4.) Respondent then circulated drafts of the Consent Judgment by email to all parties, indicating he was doing so at the behest of the Magistrate, followed by sending a draft to the Magistrate and copying all parties and their counsel. (Respondent's Ex. 5; Jt. Ex. 17, p. 2.) None of the recipients of the draft Consent Judgment told Respondent that he had misinterpreted the Magistrate's request. (Jt. Ex. 17.)

Respondent electronically submitted the Consent Judgment to the Court a few weeks later as a proposed judgment entry, and the trial judge signed and filed the Consent Judgment a few days later. (Respondent's Ex. 6; Jt. Ex. 19.) Respondent and McKibben/Storey exchanged several emails over the next few days, several of which were copied to the Magistrate, arguing over whether Respondent had properly followed the Magistrate's instructions. (Jt. Ex. 20.) Although the Consent Judgment was ultimately vacated on McKibben's motion, Respondent was never told by the Magistrate

or trial judge that he had done anything wrong, and he was not sanctioned by the court for his actions. (Jt. Exs. 21, 23.)

CONCLUSION

Here Respondent, representing himself, incorrectly filed a Notice of Satisfaction of a $2,100.00 judgment and failed to withdraw it when he realized his error. He chose, instead, to refrain from opposing Plaintiff's Motion to Vacate Notice of Satisfaction. Here Respondent took a loan from a client which he admitted he did not properly document. Here Respondent was arguably overzealous in his arguments in a Motion in Limine. Here Respondent followed a magistrate's instruction and a local rule in circulating a proposed Consent Judgment. When he received no objections to that proposed Consent Judgment, he filed it. Respondent's violations herein pale in comparison to the violations committed in the four cases cited by Relator.

Respondent did not steal money from his clients; misuse his trust account; file completely fabricated and slanderous accusations against state and federal judges, prosecutors and opposing counsel; lie to his client and a bankruptcy trustee and make multiple misrepresentations about the distribution of settlement proceeds; convert client funds; attempt to steal CLE hours; lie to the Relator's investigator; fail to perform contracted for legal work; or fail to tell his client that he did not carry malpractice insurance, etc.

If this Court accepts all of the findings of the Board and rejects the arguments set forth in Respondent Kenneth R. Donchatz's Objections to the Final Report of the Board of Professional Conduct, the Board's recommended sanction is appropriate. The Board's reliance on *Disciplinary Counsel v. Shaw*, 126 Ohio St.3d 494, 2010-Ohio-4412 is well placed. The facts in Shaw are much more akin to the facts at issue herein than the facts

in the four cases argued by Relator. And in addition to having no prior disciplinary record (the only mitigation in *Shaw*), Respondent is of good character and reputation (*see* Character letters admitted as Respondent's Exhibit 10). Additionally, Respondent has engaged in extensive public service (*see* page 2 of Respondent Kenneth R. Donchatz's Objections to the Final Report of the Board of Professional Conduct).

If this Court agrees with Respondent that there were no violations proven by clear and convincing evidence as to Counts 3 and 4 herein, then the recommended sanction by the Board is too harsh, and a fully-stayed suspension would be appropriate.

Respectfully submitted,

/s/ George D. Jonson

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following via email, per S.Ct.Prac.R. 3.11(C), this 9th day of August, 2016:

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