

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 RICHARD DONCHATZ,

Respondent.

RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S ANSWER BRIEF TO OBJECTIONS OF RESPONDENT KENNETH R. DONCHATZ

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Second, Respondent objects to the Panel's recommended sanctions and findings of misconduct as to Counts Three and Four as "against the manifest weight of evidence." Respondent's Objections at 1. But as explained below, the Panel correctly concluded that Relator proved, by clear and convincing evidence, that Respondent had violated multiple Rules of Professional Conduct as a result of his conduct in the Hampton matter and the McKibben matter. Moreover, Respondent's misconduct in the four separate matters—misconduct he only now concedes in Counts 1 and 2—coupled with the relevant aggravating factors justifies a sanction beyond what the Panel recommended.

Respondent's objections should be overruled.

LAW AND ARGUMENT

I. Standard of Review.

In disciplinary matters, this Court "is not bound by the conclusion of either the panel or the board regarding facts or law when determining the propriety of an attorney's conduct and the appropriate sanction." *Cleveland Metro. Bar Assn. v. Gruttadaurio*, 136 Ohio St.3d 283, 2013-Ohio-3662, 995 N.E.2d 190, ¶ 31, quoting *Disciplinary Counsel v. Furth*, 93 Ohio St.3d 173, 181, 754 N.E. 2d 219 (2001). The Court, however, "typically defer[s] to the factual findings of the panel and the board unless the record weighs heavily against those determinations." *Id.*

II. The Panel Properly Considered and Appropriately Assigned Weight to All Relevant Mitigating Factors.

Respondent argues, without support, that "[t]he Panel erred in failing to consider any of the character evidence" that had been offered and admitted into evidence. Respondent's Objections at 1-2. But in its Report, the Panel clearly stated that it had

“review[ed] and consider[ed] *all of the exhibits*, the testimony, relevant case law” in reaching its conclusions. Report at ¶ 74 (emphasis added). There is no support for Respondent’s argument that the Panel “disregarded” his character evidence.

But, even if this Court believes Respondent’s character evidence deserves further consideration, self-serving letters from colleagues and friends do not alter the Panel’s conclusions in any way. As this Court held in *Ohio State Bar Association v. Alexander*, even though respondent provided character evidence and reached a settlement with grievants, these “mitigating elements are derogated by respondent’s lack of candor in this matter, lack of memory and the inherent contradictions in his testimony.” *Ohio State Bar Assn. v. Alexander*, 44 Ohio St.2d 11, 12, 335 N.E.2d 867 (Ohio 1975).

So too here. The Panel outlined the troubling behavior by Respondent:

- “Respondent never conceded any wrongdoing.” Report at ¶ 49.
- “The failure on the part of Respondent, personally, to admit any wrongdoing underscored his refusal to accept responsibility.” *Id.*
- “Respondent offered explanations that lacked credibility.” *Id.* at ¶ 57.
- “[H]is responses call into question his character and integrity as a lawyer.” *Id.*
- “In each case, Respondent had an easy explanation for his conduct. Such responses were an attempt to avoid accepting responsibility for his misconduct.” *Id.* at ¶ 64.
- “Respondent’s repeated pattern of misconduct calls into question whether Respondent is worthy of the public’s trust and confidence essential to the attorney-client relationship and his fitness to practice.” *Id.* at ¶ 50.

Respondent did not object to any of these findings nor did Respondent object to the Panel’s conclusion that he had acted with a selfish motive. Report at ¶ 49. Such findings more than offset any potential value of Respondent’s proffered character evidence.

Respondent's character evidence does not overcome the overwhelming evidence about Respondent's character and integrity as observed by the Panel and does not alter the Panel's conclusions.

III. The Panel's Conclusions Regarding Counts Three and Four Are Amply Supported By the Record.

The Panel correctly found that Relator had proved, by clear and convincing evidence, that Respondent violated multiple Rules of Professional Conduct in connection with Counts Three and Four. The Panel's decision is not against the manifest weight of the evidence, and Respondent's second objection is without merit.

A. The Record Supports The Panel's Findings in the Hampton Matter.

While Respondent offers this Court additional facts in an effort to explain the context in which he filed the motion in limine in the Hampton matter, his recitation of facts does not convert his sanctionable conduct—as correctly found by the Panel—into zealous advocacy.

The Panel succinctly explained why Respondent's motion in limine crossed the line from zealous advocacy to unethical conduct:

The motion did not mention that: (1) Osmond had performed an investigation regarding a third tape recording; (2) she had informed Respondent that the tape did not exist; and (3) Respondent had been given the opportunity to investigate for himself whether the tape existed.

Report at ¶ 32. Each one of these conclusions is confirmed by Respondent's own hearing testimony:

- Respondent admitted that Ms. Osmond, in writing, stated she did not have the third tape and had no reason to believe it existed. 10/7/15 Hearing Tr. 113:6-114:25.

- Respondent admitted that Ms. Osmond told him she spoke to J.T. Holt, who had indicated he did not record the third meeting. *Id.* 115:1-117:3.
- Respondent also admitted that Ms. Osmond gave him Mr. Holt's phone number and told him he was free to call Mr. Holt to confirm this information. *Id.*
- Respondent admits he only called Mr. Holt one time. *Id.* 122:16-123:02. Respondent also admits he did not use the number provided by Ms. Osmond but instead used a number provided by his client. *Id.*

Likewise, each one of Respondent's admissions is supported by Ms. Osmond's testimony:

- Ms. Osmond told Respondent she did not have the third tape and that she did not even know it existed. 10/7/15 Hearing Tr. 261:16-261:10. She also testified that Respondent told her that "he understands" she did not have the third tape. *Id.* 264:25-265:15.
- Ms. Osmond testified she explained to Respondent that she had learned that J.T. Holt never recorded the third meeting. *Id.* 265:16-267:12.
- She also testified that she gave Respondent Mr. Holt's phone number in order for Respondent to independently confirm this information. *Id.*

This testimony demonstrates that Respondent's statements that (1) Ms. Osmond was "fully aware" that exculpatory evidence exists and that (2) Hampton "now knows without a doubt" that a recording exists were not simply opinions or arguments, but misstatements of fact. Moreover, Respondent cannot rely on "zealous advocacy" in a one-time pleading to excuse his conduct because, as even he admits, *even after his representation of Hampton ended*, he stood by his statements. See Respondent's Objections at 6. After Scott Drexel wrote to Respondent seeking clarification of the statements in his motion in limine,

Respondent defended the statements, even though (as the Panel correctly noted), they were not true. *See* Report at ¶ 33.

Even if considered “opinion/argument,” Respondent’s statements are still sanctionable. Respondent claims he cannot be sanctioned for his opinion/argument “[b]ecause he disclosed the facts on which his opinion is based.” Respondent’s Objections at 7. But Respondent cannot shield his statements as protected opinion/argument when he concededly failed to present *all* of the relevant facts in his motion in limine, leaving what he did say to be misleadingly false. As the Sixth Circuit in *Berry v. Schmitt* explained, “[a]n opinion can ‘be the basis for sanctions . . . if it could reasonably be understood as declaring or implying actual facts capable of being proved true or false.’” 688 F.2d 290, 303, quoting *Standing Comm. v. Yagman*, 55 F.3d 1430, 1438-39 (9th Cir. 1995). By failing to state all of the facts surrounding the third recording and the investigation into whether a third tape existed, Respondent’s statements lacked a proper factual basis and he knew them to be false; they thus constitute sanctionable statements. *See id.* (“If [there is] no factual basis to support [an] assertion, then the statement would be actionable even if couched as [an] opinion.”)

Finally, Respondent’s claim that his actions were “colored by his experience with Relator in the *Smith* case,” Respondent’s Objections at 8, does not justify his conduct and serves as yet another example of Respondent’s failure to accept responsibility for his actions.¹ Unlike *Smith*, in the Hampton matter, Respondent was given access to all the discoverable material he requested and was invited to investigate the issues himself. The

¹ Respondent testified regarding the *Smith* matter at the hearing. 10/8/2015 Hearing Tr. 367:20-369:2. Thus, this excuse was considered by the Panel in reaching its decision. *See* Report at ¶ 74.

fact that Respondent did no investigation himself or otherwise made strategic decisions to not more fully explore the issues, *see* Respondent's Objections at 5, does not excuse his conduct. His experience in *Smith* also does not explain why, in the Hampton matter, he sought to *exclude* exculpatory evidence from being admitted into the record.

The Panel properly concluded that Relator established, by clear and convincing evidence, that Respondent had in fact violated Prof. Cond. R. 3.1; Prod. Cond. R. 3.3(a)(1); Prod. Cond. R. 3.4(c); Prof Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d) in the Hampton matter. Report at ¶ 27.

B. The Record Supports the Panel's Finding in the McKibben Matter.

Respondent objects to the Panel's findings in the McKibben matter by blaming everyone but himself for his conduct. His arguments only further support the Panel's findings that Respondent's "easy explanations" lack credibility and only underscore his refusal to accept responsibility for his conduct. *See* Report at ¶¶ 57, 64.

First, Respondent somewhat shockingly claims that his actions "were at all times guided by Magistrate Harilstad." Respondent's Objections at 9. But nowhere in the record is it established—and Respondent cites to no such evidence—that Magistrate Harilstad "guided" Respondent to file the Stipulated Entry and Consent Judgment with the Court. Nor is there any evidence in the record—and again, Respondent points to none—that Magistrate Harilstad "guided" Respondent to object to McKibben's motion to have the judgment vacated once it had been improperly entered. Respondent's attempt to blame Magistrate Harilstad for his conduct is completely unsupported by the record.

Next, Respondent attempts to insulate his conduct by suggesting Magistrate Harilstad and Judge Bessey, the presiding judge in the McKibben matter, should have

reported his unethical conduct. *See* Respondent's Objections at 11. But any failure on the part of Magistrate Harilstad and Judge Bessey to report Respondent's conduct has no bearing on the Panel's conclusion that Respondent did in fact violate multiple ethical rules.

Respondent then claims the testimony of Robert Storey regarding what the Magistrate had asked the parties to do lacks credibility because Mr. Storey failed to "call[] out the impropriety of the draft Consent Judgment on April 6." *See* Respondent's Objections at 11. But Respondent cannot discredit Mr. Storey's testimony that, once the Consent Judgment was entered, he repeatedly requested that Respondent withdraw it. *See* 10/7/2015 Hearing Tr. 217:4-227:3. And Respondent offers no credible explanation for his repeated refusal to withdraw the Consent Judgment at Mr. Storey's urging. 10/7/15 Hearing Tr. 95:1-23.

Respondent next argues that the Panel "improperly disregarded the testimony of Attorney Rick Brunner" and "did not explain why they disregarded this testimony." Respondent's Objections at 12. In fact, the Panel *did* consider Brunner's testimony and offered an explanation for disregarding it. *See* Report at ¶ 74. Mr. Brunner testified at the hearing that the Stipulated Entry and Consent Judgment submitted by Respondent was supported by Local Rule 25.01. The Panel correctly noted in its Report that Local Rule 25.01 did *not* apply in the circumstances because no decision, order or judgment had been rendered. *See* Report at ¶ 44.

Finally, Respondent brazenly attempts to excuse his conduct by arguing that he was "acting pursuant to his counsel's advice and guidance." Respondent's Objections at 12. Respondent argues that it was Brunner—who "served as Respondent's counsel in the underlying case"—who provided Respondent "with legal counsel in drafting and handling

the draft consent order.” *Id.* But Respondent points to no evidence in the record to establish that Brunner was serving as his counsel at the time the Stipulated Entry and Consent Judgment was submitted to Judge Bessey. This is because there is none. Mr. Brunner testified that Respondent brought him in to serve as *co-counsel* for Recovery Funding; and Respondent testified that Mr. Brunner was not “hired to take over the case” until *after* the Stipulated Entry and Consent Judgment was entered. *See* 10/7/2015 Hearing Tr. 331:19-332:16; 10/8/2015 Hearing Tr. 419:19-20. Brunner further testified that he had no knowledge of Respondent’s filing an objection to McKibben’s motion to vacate the judgment. 10/7/2015 Hearing Tr. 324:1-8. Respondent cannot excuse his behavior by passing it off as advice from counsel. This “easy explanation” lacks not only credibility, but factual support.

These excuses only pile on to the excuses offered by Respondent at the hearing, including but not limited to: the opposing party should have objected when the “draft” was circulated, 10/8/2015 Hearing Tr. 452:10-456:10; and the Judge who approved the Consent Judgment “could have said no,” 10/7/2015 Hearing Tr. 92:05-94:06. The complete disregard of responsibility shown at the hearing, along with these continued excuses, serve as perfect examples of why Respondent deserves not only a two-year suspension, but more severe sanctions.

There is ample evidence and support for the Panel’s findings. The Panel properly concluded that Relator established, by clear and convincing evidence, that Respondent had in fact violated Prof. Cond. R. 3.1; Prod. Cond. R. 3.3(a)(1); Prod. Cond. R. 3.4(c); Prof Cond. R. 8.4(c); and Prof. Cond. R. 8.4(d) in the McKibben matter. Report at ¶ 34.

CONCLUSION

For all the above reasons, this Court should overrule Respondent's Objections, adopt the Panel's factual determinations, and indefinitely suspend Respondent for his multiple ethical violations, his selfish motive, and his unwillingness to admit wrongdoing and accept responsibility.

Respectfully submitted,



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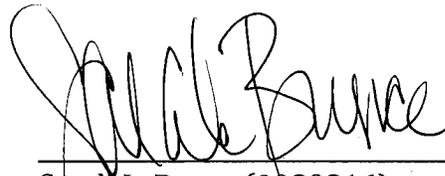
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CERTIFICATE OF SERVICE

A copy of the foregoing was served on August 9, 2016 per S.Ct.Prac.R. 3.11(C) by e-mailing it to:

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