No. 2020-1513

In the Supreme Court of Ohio

APPEAL FROM THE BOARD OF PROFESSIONAL CONDUCT
CASE NO. 2020-031

MAHONING COUNTY BAR ASSOCIATION

Relator

v.

JOSEPH R. MACEJKO

Respondent

RESPONDENT'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

David C. Comstock, Jr. (0040145)
Counsel for Relator
3701B Boardman-Canfield Road
Suite 101
Canfield, Ohio 44406
Tel: 330.286.3701
Fax: 330.286.7345
dcomstock@bsphlaw.com

Ronald E. Slipski (0014404)
Counsel for Relator
527 Greenmont
Canfield, Ohio 44406
Tel: 330.506.7022
rslip5305@gmail.com

George D. Jonson (0027124)
Montgomery Jonson LLP
Counsel for Respondent
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Tel: 513.768.5220
Fax: 513.768.9220
gjonson@mojolaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Authorities	**Page**

IN THE SUPREME COURT OF OHIO

MAHONING COUNTY BAR ASSOCIATION Relator v. JOSEPH R. MACEJKO Respondent	:	Case No. 2020-1513

RESPONDENT'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

I. Introduction

On July 1, 2020, the Mahoning County Bar Association filed a one-count Complaint against Respondent Joseph R. Macejko. The Complaint alleged that Respondent violated Rule 8.4(c) of the Ohio Rules of Professional Conduct when he notarized an unsigned power of attorney.

The matter was heard on October 16, 2020. Relator advocated for the imposition of a public reprimand. Respondent sought dismissal of the Complaint based on the absence of intent, the absence of any reliance on the improperly executed power of attorney, and the presence of significant mitigation evidence. (Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct, "Recommendation," ¶ 18.)

The Board recommended the imposition of a public reprimand (Recommendation, ¶ 21) and cited two cases upon which it relied: *Cincinnati Bar Assn. v. Thompson*, 129

Ohio St.3d 127, 2011-Ohio-3095, 950 N.E.2d 550 (Recommendation, ¶ 19) and *Cincinnati Bar Assn. v. Gottesman*, 115 Ohio St.3d 222, 2007-Ohio-4791, 874 N.E.2d 778. (Recommendation, ¶ 20.)

II. Statement of Relevant Facts

In July 2017, Robert Durick, a client and friend of Respondent, approached Respondent about reviewing and updating the wills and related estate planning documents of his elderly parents, Joseph Durick, Jr. and Mary Lou Durick (the "Duricks"). (Stipulations, ¶ 4-5.) In response, Respondent prepared updated wills, powers of attorney, and healthcare powers of attorney for the Duricks. (Stipulations, ¶ 6.)

The wills Respondent prepared for the Duricks were spouse-to-spouse, with the Duricks' three children (Robert, Thomas, and Janet) as the beneficiaries of the surviving spouse. The powers of attorney drafted by the Respondent were to Robert Durick, and the healthcare powers of attorney drafted by Respondent were to Robert Durick as the primary power, with the alternate being Janet Durick. (Stipulations, ¶ 7-8.)

In late July 2017, Respondent took his final drafts of the estate planning documents to the Duricks' home for their review and approval. Respondent anticipated either immediately reviewing the documents with the Duricks or returning later that day (or shortly thereafter) to review the documents and to have the Duricks execute them if they were acceptable in their current form. (Stipulations, ¶ 9.) Respondent was planning to return to the Duricks' home with a witness if the documents were acceptable to do a full execution at that time. (Stipulations, ¶ 11.) On July 28, 2017, before Respondent took the final drafts to the Duricks' home, he pre-notarized the powers of attorney for his own convenience because he wanted to avoid having to remember to bring his notary stamp and seal when he met with the Duricks. (Stipulations, ¶ 10; Hearing Tr. 22, 23.)

Respondent does not make house calls as a regular part of practice. (Hearing Tr. 22.) Respondent had not pre-notarized documents before this, and he has not done so since. (Hearing Tr. 31.)

When Respondent arrived at the Duricks' house, Mr. Durick was sitting on the porch. While Respondent was talking with him, Janet Durick came out and told Respondent that Mary Lou Durick had just returned from a doctor's visit and wasn't feeling well. Janet asked if Respondent could return later to do the document review. Respondent left the documents with the Duricks, expecting that Janet or Mr. Durick would call him to reschedule a meeting. No one ever did. (Hearing Tr. 23.)

In mid-August, Respondent received a text message from Robert Durick asking how hard it would be to change the order of the attorneys-in-fact, as he wanted to put his sister, Janet, into the first position and move himself to the second position. (Hearing Tr. 25.)

During the summer of 2017, the fairly amicable sibling relationship between Robert and Janet Durick deteriorated and, by August 2017, Janet moved in with her parents. While living with her parents, and unbeknownst the Respondent, Janet scheduled an appointment with attorney Carol Clemente-Wagner because Janet claimed her parents wanted to change the documents Respondent prepared for them the month before. The appointment with Clemente-Wagner was set for August 28, 2017 and, by August 31, 2017, Clemente-Wagner and a staff member went to the Duricks' home with the new wills and powers of attorney. The Duricks executed the documents prepared by Clemente-Wagner, which left the Duricks' entire estate to Janet and designated her power of attorney for her parents. The Duricks also deeded several parcels of real estate to Janet, put Janet on their bank accounts, and transferred money from a joint account the Duricks

had with their son Robert. Janet also changed the beneficiaries on some of the Duricks' life insurance policies from all three Durick children to herself. (Stipulations, ¶ 14, 16-17.)

At the end of August, Respondent learned that Janet and Thomas Durick had taken their parents to another lawyer to have their estate planning documents finished. (Hearing Tr. 26.) Respondent never billed the Duricks for the work he did. He didn't feel he had completed the job because the documents he prepared were never signed. (Hearing Tr. 27.)

Mrs. Durick passed away on October 12, 2017, and Mr. Durick passed away on December 12, 2017. The will of Joseph Durick, Jr., as the surviving spouse, was presented for probate in the Mahoning County Court of Common Pleas, Probate Division in Case Number 2019ES604. In 2019, a will contest was initiated by Robert Durick against his sister Janet and others. During the will contest, the question arose of whether the documents Respondent prepared were pre-notarized or whether Respondent received the signed documents and notarized them at a later date outside the presence of the Duricks, as claimed by Janet. (Stipulations, ¶ 19-22.)

Respondent was deposed for the will contest in August 2019. At the deposition, the attorney for the estate presented Mary Lou Durick's power of attorney (Joint Exhibit 1) to Respondent. Prior to his deposition, Respondent had never seen Mary Lou Durick's executed power of attorney. (Stipulations, ¶ 23-24.) Respondent testified he was shocked when he saw the signed document at deposition. (Hearing Tr. 30.)

Immediately after Respondent's deposition, he went to his office and wrote a letter to Relator, self-reporting what might be a possible rule violation. (Hearing Tr. 31.)

III. Argument

The conduct prohibited by Prof. Cond. R. 8.4(c) involves an element of intentional wrongdoing, which is absent from Respondent's conduct. Therefore, the Complaint, which alleged only a violation of Prof. Cond. R. 8.4(c), should have been dismissed by the Board, and must be dismissed by this Court.

Respondent's execution of the notary jurat on the power of attorney for Mary Lou Durick was a misrepresentation of fact because she had not appeared before him at the time he signed the document. (Hearing Tr. 14.) Yet, the instant case does not involve *intentional* misconduct. Unlike the universe of improper notary cases decided in Ohio, Respondent did not notarize a signature he didn't witness. He didn't notarized a blank document he intended to be executed outside of his presence and used. He notarized powers of attorney he was taking to his clients to review and sign in his presence, had circumstances not delayed the signing that day. The client subsequently retained other counsel, and Respondent assumed the documents he prepared had not been executed. One of them was signed, however, but there is no evidence it was ever used.

Prof. Cond. R. 8.4(c) prohibits a lawyer from engaging in dishonesty, *fraud*, deceit or misrepresentation. Of these four terms, only fraud is defined in Prof. Cond. R. 1.0. Fraud denotes conduct "that has an intent to deceive." Rule 1.0(d). Fraud is also a cause of action in Ohio, an element of which is the intent to mislead another into reliance on a false representation of material fact. *State ex rel. Illuminating Co. v. Cuyahoga County Court of Common Pleas*, 97 Ohio St. 3d 69, 74, 2002-Ohio-5312, ¶ 24, 776 N.E.2d 92, 97-98.

The remaining three categories of prohibited conduct—"dishonesty," "deceit," and "misrepresentation"—are undefined in the Rules, and so carry their common meaning, and an element of intent is inherent in each.

Dishonesty is defined as "a lack of honesty or integrity: disposition to defraud or deceive." (Merriam-Webster Online Dictionary.) Synonyms include "deceit," "deceitfulness," and "falsehood." *Id.* One who unintentionally misspeaks is not dishonest. One who utters a lie is.

Deceit is defined as "the act of causing someone to accept as true or valid what is false or invalid." *Id.* Synonyms include "cheating," crookedness," deception," "dishonesty," "double-dealing," "duplicity," "fakery," and "fraud." *Id.* Deceit also has an implicit element of intentionality. *Id.*

The only one of the four terms that doesn't necessarily contain an element of intent is "misrepresentation." Misrepresentation comes in two flavors: intentional or fraudulent misrepresentation, and negligent misrepresentation, which is also a cause of action in Ohio:

> The tort of negligent misrepresentation provides that "one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for economic loss caused to them by their justifiable reliance upon the information if he fails to exercise reasonable care or competence in obtaining or communicating the information."

Delman v. Cleveland Heights, 41 Ohio St.3d 1, 4, 534 N.E.2d 835 (1989), quoting 3 Restatement of the Law 2d. Torts (1965) 126-127, Section 552. Because the other three related terms in subsection (c) involve intent, logically, the Rule cannot be read to prohibit negligent misrepresentation.

There are two rules of statutory construction that support this conclusion. The first, R.C. 1.42, states: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage." The second, *noscitur a sociis*, translates to "it is known from its associates." "Under this doctrine, where the meaning of a word is unclear, a court will look at the surrounding words to ascertain the doubtful word's meaning." *Ashland Chem. Co. v. Jones*, 92 Ohio St. 3d 234, 236-237, 2001-Ohio-184, 749 N.E.2d 744, 747 (internal citation omitted). In context, "misrepresentation" in Ohio Prof. Cond. R. 8.4(c) must mean intentional misrepresentation, not the type of unintentional, negligent misrepresentation engaged in by Respondent.

R.C. 147.141, Prohibited Acts, adds further clarity to this particular fact situation. That section prohibits a notary from "Affix[ing] the notary's signature to a blank form of an affidavit or certificate of acknowledgement and deliver[ing] that form to another person with the intent that it be used as an affidavit or acknowledgement." (Emphasis added.) Obviously, if the notary statute allowed notarizing unsigned documents, doing so would not be a violation of the Rules of Professional Conduct.

The distinction between an intentional and an unintentional misrepresentation in the context of Ohio Prof. Cond. R. 8.4(c) has been the focus of only one Ohio case that Respondent has been able to locate: *Disciplinary Counsel v. Mecklenborg*, 139 Ohio St.3d 411, 2014-Ohio-1908, 12 N.E.3d 1166 (Rule 8.4(c) charge dismissed because the conduct "did not constitute an intentional act of dishonesty, fraud, deceit, or misrepresentation).

In *Mecklenborg*, respondent was charged with an 8.4(c) violation based on false declarations on his application to renew his expired Ohio driver's license. Respondent had signed a pre-printed form stating that his driving privileges had not been suspended and that he had no pending citations in Ohio or any other state. In fact, he had a citation

pending in Indiana for driving under the influence, and his driving privileges had been suspended in Indiana for failing to take a breath test.

In *Mecklenborg*, it was stipulated that respondent "acted on the advice of counsel when he sought to renew his Ohio driver's license while his Indiana DWI case was pending and that he failed to read the entire application before signing it." *Mecklenborg* at ¶ 8. Based on that stipulation, "the Board found that in light of the fact that Mecklenborg had sought and acted on the advice of counsel and signed a pre-printed form, his conduct did not constitute an *intentional* act of dishonesty, fraud, deceit, or misrepresentation." *Mecklenborg*, at ¶ 11. This Court adopted that finding in dismissing the 8.4(c) charge.

In the instant case, the Board relied on two of this Court's prior decisions, *Cincinnati Bar Association v. Thompson*, 129 Ohio St. 3d 127, 2011-Ohio-3095, 950 N.E.2d 550, and *Cincinnati Bar Association v. Gottesman*, 115 Ohio St. 3d 222, 2007-Ohio-4791, 874 N.E.2d 778. Both are factually distinguishable.

In *Thompson,* respondent was given two affidavits that had been prepared by his former law partner. They were to be signed by the former partner's business associate, with whom the former partner was engaged in a legal dispute. If signed, the affidavits would have divested the business partner of his interest in two Kentucky liquor licenses. Respondent notarized them in blank, without entering the date on the jurat and without administering the oath to the purported affiant, and gave them to his former partner. The former partner later presented the affidavits to his business associate outside the presence of respondent. The documents were never signed. *Thompson* at ¶ 5.

Respondent here intended to witness his client execute the power of attorney, while the respondent in Thompson clearly did not intend to witness the execution of the affidavits.

In *Gottesman*, Attorney Farrell went to respondent's office without his wife and asked respondent to notarize a power of attorney that had purportedly been signed by Farrell's wife. The wife was not present. Respondent, trusting the Farrell's statement that the signature was genuine, notarized the power of attorney. In fact, Farrell's wife had not signed the document, and Farrell subsequently used that power of attorney to obtain a line of credit secured by the marital residence without his wife's knowledge. *Gottesman*, 115 Ohio St. 3d 222 at ¶ 3, 874 N.E.3d 778.

In *Gottesman*, respondent notarized an executed document that was not executed or acknowledged in his presence. This was an intentional misrepresentation and a clear violation of the established case law on Prof. Cond. R. 8.4(c).

Thus, in both of the cases relied upon by Board, the respondents intentionally breached the obligations of a notary and intentionally made false/fraudulent representations. Respondent here did not intend the power of attorney to be signed outside of his presence.

Other Ohio case law dealing with improper notarization is similarly distinguishable from the instant case along the fault line of intentionality:

- *Disciplinary Counsel v. Freedman*, 110 Ohio St. 3d 284, 2006-Ohio-4480, 853 N.E.2d 291

  In *Freedman*, the respondent obtained a loan that was secured by a second mortgage on property respondent co-owned with his wife. The loan terms required respondent to sign a cognovit note and required respondent and his wife to execute a quitclaim deed transferring the real property to the lender. The mortgage and the deed required the notarized signatures of respondent and his wife, and the jurat on each document applied to authenticate both signatures. Respondent signed the mortgage and deed, but left blank the signature lines for his wife's name. The documents were notarized by respondent's associate. After they were notarized, respondent signed his wife's name to the documents. *Freedman* at ¶ 3, 4, 5.

The associate testified by affidavit that "she had trusted that respondent would not ask her to improperly notarize a document, and therefore she did not examine the jurat language and did not realize that she was notarizing [wife's] signature despite the fact that it did not appear on either the mortgage or the deed." *Id.* at ¶ 4.

The significant fact about this case is that the associate attorney who notarized the blank signature lines was not prosecuted. Like Respondent here, she notarized an unsigned document without intending to make a misrepresentation.

- *Disciplinary Counsel v. Roberts*, 117 Ohio St. 3d 99, 2008-Ohio-505, 881 N.E.2d 1236

  In *Roberts*, the respondent's client sent him an executed but un-notarized release of information form. Respondent changed the date of the document and the date of the client's signature before notarizing the signature, falsely representing that his client had signed the document in his presence. Although respondent had a limited power of attorney from his clients authorizing him to settle their claims with the insurance company, respondent signed the clients' names to a Release of Claims provided as part of the settlement and notarized his own signature, which purported to be the signatures of his clients, again falsely attesting they had personally appeared before him. *Roberts* at ¶ 8.

  The respondent in *Roberts* made multiple intentional misrepresentations. He changed the dates on a document, notarized a signed document, and intentionally misrepresented that he either witnessed the act of signing or that the signature had been acknowledged in his presence, he falsified his clients' signatures on the release, and then notarized the false signature. The instant case involves no such intentional misrepresentation.

- *Disciplinary Counsel v. Simon*, 71 Ohio St. 3d 437, 1994-Ohio-11, 644 N.E.2d 30

  In *Simon*, respondent notarized and witnessed the signatures of grantors on a deed conveying real property. The document had been signed outside of his presence, and he notarized the document on the representation by grantors' son that the grantors had signed the deed.

- *Cleveland Bar Association v. Russell*, 114 Ohio St. 3d 171, 2007-Ohio-3603, 870 N.E.2d 1164

  In *Russell*, respondent prepared deeds transferring two pieces of real property to his clients and gave the deeds to his clients with instructions to obtain the notarized signatures of the grantors and return them to him for filing. *Russell* at ¶ 6. The client returned the deeds purportedly signed by grantors, but without the required notarization, and told respondent the grantors were ill and unable to appear before a notary. Respondent notarized and filed the deeds transferring the property to his clients. *Id*. at ¶ 7. Ultimately, the grantors' signatures and, consequently, the transfer was contested. *Id*. at ¶ 8. For this intentional misrepresentation, respondent received a public reprimand.

- *Disciplinary Counsel v. Karris*, 129 Ohio St. 3d 499, 2011-Ohio-4243, 954 N.E.2d 118

  In *Karris*, the respondent prepared notarized a promissory note, mortgage deed, quitclaim deed, and land contract, all of which purportedly were signed by the borrower and his wife. Both the borrower and his wife testified that the wife had not signed any of these documents; rather, the borrower testified that he had signed his wife's name. Respondent testified the borrower's wife had signed the instruments in his presence. A forensic document examiner for the Ohio Bureau of Criminal Identification & Investigation testified that the signatures purporting to be those of the borrower's wife were, to a high degree of certainty, the signatures of the borrower. *Karris* at ¶ 8, 9.

- Mahoning County Bar Association v. Melnick, 107 Ohio St. 3d 240, 2005-Ohio-6265, 837 N.E.2d 1203

  Melnick notarized three affiants' signatures without having witnessed them or administering an oath. Melnick relied on his clients' assurances that the signatures on the affidavits were authentic when he notarized the signatures. Thereafter, he spoke with each affiant in person to confirm that their signature was authentic, and then filed the affidavits. *Melnick* at ¶ 5, 6, 7. Melnick intentionally misrepresented that he had administered the oath to and witnessed the signature of each of the three affiants.

IV. Conclusion

The cases cited above are a representative sample of the cases where improper notarization resulted in a finding that Prof. Cond. R. 8.4(c) had been violated. In each

and every case, the lawyer made an intentional misrepresentation: The lawyer notarized a signed document and intentionally represented that it was signed or acknowledged in his presence. The lawyer notarized a signed affidavit and intentionally represented that he has administered an oath and witnessed the signature. The lawyer signed someone else's name to an affidavit, attesting that the signature was genuine and that the affidavit was signed in his presence after administration of an oath. The lawyer pre-notarized a document, intending that it would be signed outside of his presence. The lawyer pre-notarized an affidavit, knowing that he would never administer an oath, and the affidavit would be signed outside of his presence.

In each case, the lawyer intended to circumvent the requirements of notarization by making a misrepresentation about the circumstances of execution. Not so here. Here, Respondent notarized a document and then took it to his client's house for review and execution in his presence. When he arrived, the client was ill. The meeting was postponed and never rescheduled. Soon thereafter, Respondent learned that the client had retained other counsel, and he assumed his documents were replaced by documents drafted by the other lawyer. Although there is no evidence the offending power of attorney was ever used, it was signed by the client outside Respondent's presence and over his notarization.

Respondent's error was unintentional. He didn't set off to circumvent the requirements of notarization, and he didn't realize that he had done so until he was confronted with the document at a deposition. As soon as he realized the power of attorney had been signed, he immediately self-reported his conduct. Respondent's conduct is more akin to the conduct in two cases: *Disciplinary Counsel v. Freedman*, 110 Ohio St.3d 284, 2006-Ohio-4480, 853 N.E.2d 291, and *Disciplinary Counsel v. Mecklenborg*, 139 Ohio St.3d 411, 2014-Ohio-1908, 12 N.E.3d 1166. In *Freedman,* the

uncharged associate made an unintentional misrepresentation by notarizing a document that was only partially signed at the time of notarization and to which a forged signature was later affixed. In *Mecklenborg*, the respondent—believing, after consulting with counsel, that he could renew his driver's license even after suspension of his privileges in another state—signed an application without reading it. In doing so, he unintentionally attested to facts which were not true. Like Respondent here, Mecklenborg made an unintentional misrepresentation. This Court adopted the Board's finding that Mecklenborg's "conduct did not constitute an *intentional* act of dishonesty, fraud, deceit, or misrepresentation." Based on that finding, this Court dismissed the Prof. Cond. R. 8.4(c) charge against Mecklenborg. Because there was no intentional act of dishonesty, fraud, deceit, or misrepresentation in this case, Respondent respectfully requests this Court likewise dismiss the 8.4(c) charge here.

Respectfully submitted,

/s/ George D. Jonson
GEORGE D. JONSON (0027124)
MONTGOMERY JONSON LLP
Counsel for Respondent
600 Vine Street, Suite 2650
Cincinnati, Ohio 45202
Tel: 513.768.5220
Fax: 513.768.9220
gjonson@mojolaw.com

PROOF OF SERVICE

Pursuant to Civ. R. 5(B)(2)(f), I served a copy of the foregoing by electronic mail upon the following on this 25th day of January, 2021:

David C. Comstock, Jr.
Bonezzi Switzer Polito & Hupp Co., L.P.A.
3701B Boardman-Canfield Road
Suite 101
Canfield, Ohio 44406
dcomstock@bsphlaw.com
Counsel for Relator

Ronald E. Slipski
527 Greenmont
Canfield, Ohio 44406
rslip5305@gmail.com
Counsel for Relator

/s/ George D. Jonson
GEORGE D. JONSON (0027124)