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

RELATOR'S ANSWER BRIEF TO 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

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

David C. Comstock, Jr.
Counsel for Relator
3701B Boardman-Canfield Road, Suite 101
Canfield, Ohio 44406
Tel: 330.286.3701
Fax: 330.286-3745
dcomstock@bsphlaw.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**

I. Introduction

Relator, Mahoning County Bar Association, filed a complaint with the Board of Professional Conduct of the Ohio Supreme Court ("Board") alleging that Respondent, Joseph R. Macejko, violated Prof. Cond. R. 8.4(c) when he notarized a blank power of attorney(s), left that power with another person, and, in a will contest a few years later, was subpoenaed and deposed about how the document was or was not signed and notarized. Relator sought a public reprimand. Respondent sought a dismissal of the complaint.

After a hearing and consideration by the full Board, the Board found, by clear and convincing evidence, that Respondent violated the Prof. Cond. R. 8.4(c) and recommended that Respondent be publicly reprimanded. Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct ("Recommendation").

Respondent objects to the Recommendation and again seeks dismissal of the complaint. (Respondent's Objections to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct of the Ohio Supreme Court ("Objection")). Respondent's objection should be overruled and the Recommendation of the Board should be adopted by this Court.

Respondent argues that the complaint should be dismissed because, in Respondent's words, there was "the absence of intent, the absence of any reliance on the improperly executed power, and the presence of significant mitigation evidence." (Objection, p. 1). Respondent confuses the difference between a violation of the Ohio Rules of Professional Conduct with the factors to be considered in determining the appropriate sanction for a violation. Indeed, "significant mitigation evidence" does not negate a rule violation. Similarly, the "absence of any reliance on" an "improperly executed power" of attorney does not negate a rule violation.

Likewise, "the absence of intent" does not negate the violation here. Rather, each of the reasons Respondent argues support a dismissal of the complaint are actually aggravating or mitigating factors to be considered when determining an appropriate sanction. Gov. Bar R. V, § 13. They are not necessary elements to establish a violation of Prof. Cond. R. 8.4(c).

II. Statement of Facts

In July 2017, Respondent prepared a number of estate planning documents for Joseph Durick, Jr. and Mary Lou Durick, husband and wife (the "Duricks"). (Stipulations, ¶ 4). The documents included wills, powers of attorney, and health care powers of attorney. (Stipulations, ¶ 8).

On July 28, 2017, Respondent dropped the documents off at the home of the Duricks. "Prior to dropping the documents off at the home of the Duricks, Respondent notarized the powers of attorney for his own convenience." (Stipulations, ¶ 10). The notary jurat on the powers of attorney provide, above Respondent's "Signature of Notary" - "This document was acknowledged before me on this 28 day of July 2017, by Mary Lou Durick." (Stipulations, Joint Exhibit 1, p. 5). Respondent admits that the signature line for Mary Lou Durick was blank and that neither she nor anyone else ever acknowledged that they signed the document. Respondent did not see the Duricks sign any of the documents. (Stipulations, ¶ 32).

After dropping the documents off, Respondent never communicated with the Duricks. He made no attempt to retrieve the documents. He made no attempt to inform the Duricks that they should not sign or use the documents.

In fact, the power of attorney was subsequently signed by someone, most probably Mary Lou Durick. (Stipulations, ¶¶ 22-24). Eventually, in 2019, after the Duricks had passed away, their children became involved in a will contest in the Mahoning County Probate Court. Whether

Respondent pre-notarized the documents prepared by him or whether he received signed documents and notarized them at some later date outside the presence of the signatories, as asserted by one of the Duricks' children, became an issue in the 2019 will contest. (Stipulations, ¶¶ 19, 21-22). As a result, Respondent was subpoenaed and deposed in the will contest matter to explain how he notarized the document. (Stipulations, ¶ 23).

III. Argument

The Board concluded that there was clear and convincing evidence that Respondent violated Prof. Cond. Rule 8.4(c) "in that Mary Lou Durick did not acknowledge her signature before the Respondent as required by the version R.C. § 147.541 in effect at the time Respondent pre-notarized the powers of attorney." (Recommendation, ¶ 14).

"R.C. 147.141 (A)(13), effective September 20, 2019, prohibits a notary from notarizing "***a signature on a document if the document is incomplete or blank." (Stipulations, ¶ 29). The prior version of Chapter 147, R.C. 147.541, in effect in July 2017, defines the words "acknowledged before me" to mean "the person acknowledging appeared before the person taking the acknowledgement" and acknowledged that the signer executed the document. (Stipulations, ¶ 30). Respondent admits that he did not see the Duricks sign any of the documents he prepared for them and that the Duricks never acknowledged before Respondent that they executed any documents Respondent prepared and notarized for them. (Stipulations, ¶¶ 31-32).

Prof. Cond. Rule 8.4(c) provides: "It is professional misconduct for a lawyer to…engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

Respondent admits that "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." (Objection, p. 5; Hearing Tr. 14). Thus,

Respondent clearly violated his duty as a notary per R.C. 147.541. Furthermore, Respondent admits that he misrepresented a fact (that Mary Lou Durick appeared before him and acknowledged her signature). Respondent claims, however, that his violation of R.C. 147.541and his admitted misrepresentation of fact is not a violation of Prof. Cond. R. 8.4(c).

Respondent argues that his misrepresentation is not prohibited by Prof. Cond. R. 8.4(c). Respondent asserts that his violation of his notarial duties and his admitted misrepresentation of fact are not contemplated by Prof. Cond. R. 8.4(c) because his misrepresentation "does not involve ***intentional*** misconduct." (Objection, p. 5; emphasis in original). Respondent does not deny knowledge of the duties of a notary. He does not deny he intentionally notarized a blank document "for his own convenience". (Objection, p. 2; Stipulations, ¶ 10). One must ask rhetorically, what more intent is needed for there to be a "misrepresentation" under the Rule? It seems that Respondent believes there must be some type of "bad" or "malevolent" intent, or proof that someone is actually harmed by the misrepresentation, before there can be a violation of Prof. Cond. R. 8.4(c). Proof of a "bad" or "malevolent" (or some other type of) "intent" is not required for there to be a violation of the Rule. Rather, as is demonstrated below, the issues of bad intent or harm to an individual are to be considered as aggravating or mitigating factors when determining the sanction for the violation.

Respondent offers dictionary definitions and synonyms for dishonesty and deceit. He does not do the same for the words misrepresentation or intentional. Synonyms for "intentional" include conscious, deliberate, knowing, purposeful, voluntary, and willful.[1] Clearly, Respondent's notarization of a blank power of attorney for his own convenience was conscious,

[1] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/intentional?utm_campaign=sd&utm_medium=serp&utm_source=jsonld accessed January 27, 2021.

deliberate, knowing, purposeful, voluntary, and willful.[2] Synonyms for "misrepresent" include falsify, misstate, and misrelate. [3] Similarly, it is clear that Respondent's actions misstate, and misrelate what was on the document when he notarized it. The definition of "misrepresent" is "to give a false or misleading representation *usually* with an intent to deceive or be unfair." [4] Respondent's conduct, under these definitions, constitutes an intentional misrepresentation.

Respondent also, using tort definitions, argues that the word "misrepresentation" cannot include "negligent" misrepresentation, simply because the words fraud, deceit, and dishonesty, used in the Rule, include more than negligence. (Objection, p. 6). While not conceding that Respondent's conduct was simply negligence, Relator suggests that quite the opposite is true. If the elements of "dishonesty, fraud, [and] deceit" must be the same as "misrepresentation," there would be no need to list misrepresentation separately (or, for that matter, all four words). Misrepresentation, Relator submits, is included in the Rule for cases involving something different than "dishonesty, fraud, [and] deceit." And, the conduct here meets the definition provided by Respondent, i.e., Respondent provided "false information for the guidance of others." (Objection, p. 6).

Respondent also attempts to use rules of statutory construction to bolster his argument that any elements of intent inferred by the words dishonesty, fraud, or deceit must be read into the word misrepresentation. (Objection, p. 7). Citing R.C. 1.42 and *Ashland Chem. Co. v. Jones,*

---

[2] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/intentional?utm_campaign=sd&utm_medium=serp&utm_source=jsonld accessed January 27, 2021.

[3] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/misrepresentation#synonyms accessed January 27, 2021.

[4] Merriam-Webster online dictionary, https://www.merriam-webster.com/dictionary/misrepresentation, accessed January 27, 2021, emphasis added.

92 Ohio St.3d 234, 236-237, 2001-Ohio-184, 749 N.E.2d 744, 747, Respondent states the obvious rule that words and phrases must be read in context and construed per the rules of grammar and usage, and that where the meaning of a word is unclear, a court should look at surrounding words to ascertain its meaning. (Objection, p. 7). First, Relator submits that the meaning of the word "misrepresentation" is not unclear. Second, the word is not used in a statute. And, third, but most importantly, looking at the surrounding words it is clear that the word "misrepresentation" is meant to mean something different than the words fraud, dishonesty, or deceit. Otherwise, the words are all redundant.

In discussing the acts prohibited by R.C. 147.141, Respondent argues that "[o]bviously, if the notary statute allowed notarizing unsigned documents, doing so would not be a violation of the Rules of Professional Conduct." (Objection, p. 7). Exactly. Since the notary statute *does* prohibit the notarizing of unsigned documents, to do so, as Respondent did here, is a violation of the Rules. Respondent emphasizes the use of the word "intent" in the prohibition in R.C. 147.141 – "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." (Objection, p. 7, emphasis is Respondent's). This is exactly what Respondent did here. He affixed his notary signature to a blank acknowledgement with the intent that it would be used as an acknowledgement.

Respondent challenges the Board's reliance on *Cincinnati Bar Assn. v. Thompson,* 129 Ohio St.3d 127, 2011-Ohio-3095, 950 N.E.2d 550. Of all the cases cited by the parties, *Thompson* is, perhaps, most on point and instructive. Among the documents to be signed in *Thompson* were two forms prepared by Thompson's former law partner for the signature of a business associate. Thompson "did not enter the date on the jurats, but he notarized the unsigned

documents in contravention of the jurat." *Thompson,* ¶ 4. The documents were never signed, unlike here. *Id*. There was no finding that Thompson had any malevolent or bad intent. Nonetheless, this Court determined that Thompson violated Prof. Cond. R. 8.4(c). *Thompson,* ¶ 5.

The *Thompson* Court's discussion of the sanction to be imposed rejects Respondent's argument here. Citing *Columbus Bar Assn. v. Dougherty*, 105 Ohio St.3d 307, 2005-Ohio-1825, 825 N.E.2d 1094, the *Thompson* Court explained that Dougherty did not receive an actual suspension for "notarizing a purported affiant's signature without having actually witnessed the signature" because "Dougherty's conduct was not as egregious as that of other attorneys who had received actual suspensions, *given that there was no evidence establishing that she had engaged in a course of conduct designed to deceive*." *Thompson,* ¶ 8, emphasis added.

Similarly, Respondent seeks to diminish the Board's reliance upon *Cincinnati Bar Assn. v. Gottesman*, 115 Ohio St.3d 222, 2007-Ohio-4791, 874 N.E.2d 778. As in *Thompson,* the *Gottesman* Court's decision does not comport with Respondent's argument. In *Gottesman*, Attorney Farrell asked Gottesman to notarize a power of attorney purportedly signed by Farrell's wife. This Court explained – "Trusting that the signature was genuine, respondent [Gottesman] notarized the power of attorney, swearing in the jurat that he had witnessed the wife's signature. *Gottesman,* ¶ 3. In fact, Ferrell's wife had not signed the power of attorney. There was no finding that Gottesman had some kind of nefarious intent when he notarized the signature. He was simply duped. Nonetheless, this Court concluded – "By compromising his duties as a notary public, respondent [Gottesman] violated DR 1-102(A)(4) [predecessor of Prof. Cond. R. 8.4(c)]." *Gottesman,* ¶ 4.

And, as with *Thompson*, the *Gottesman* Court's discussion of the sanction belies Respondent's argument with regard to "intent". Relying on *Dougherty,* the *Gottesman* Court explained that a lawyer's dishonesty usually warrants an actual suspension from the practice of law. The Court again explained that an actual suspension was not imposed in *Dougherty* because the "lawyer did not, however, forge the signature or know of the forgery, nor had the lawyer engaged in a deceitful course of conduct beyond failing to witness signatures as required." *Gottesman,* ¶ 5.

The requirement of some kind of special "intent" sought here by Respondent did not exist in either *Thompson* or *Gottesman.* Rather, each respondent received a public reprimand for "compromising his duties as a notary public." *Gottesman,* ¶ 4. The same result should obtain here.

Respondent relies heavily upon *Disciplinary Counsel v. Mecklenborg,* 139 Ohio St.3d 411, 2014-Ohio-1908, 12 N.E.3d 1166. Respondent's reliance is misplaced. The facts and analysis in *Mecklenborg* are significantly different and do not involve the violation of an attorney's notarial obligations.

Mecklenborg's driver's license was suspended in Indiana after he refused to take a roadside breath test. *Mecklenborg,* ¶ 7. Four days later, while the Indiana matter was still pending, Mecklenborg applied to have his Ohio driver's license renewed. To complete his application, Mecklenborg signed a preprinted form which included a statement indicating that "his driving privileges had not been suspended, revoked, or canceled and that he did not have pending citations for violations of any motor-vehicle laws or ordinances in Ohio or any other state." *Mecklenborg,* ¶ 8.

Initially, the Board found Mecklenborg's signature on the form to be a violation of Prof. Cond. R. 8.4(c) and 8.4(h) and recommended a public reprimand. *Mecklenborg*, ¶ 2. This Court remanded the case to the Board for consideration of a harsher sanction. *Mecklenborg*, ¶ 3. After hearing, the panel issued a report recommending a six-month suspension from the practice of law, all stayed. After further review, however, the full Board concluded that Mecklenborg had not violated Prof. Cond. R. 8.4(c) and recommended that this allegation be dismissed. *Mecklenborg,* ¶¶ 4-5.

This Court then adopted the Board's recommendation. It must be emphasized that Mecklenborg did not notarize a document contrary to his duties as notary. He did not falsely witness a document. He was not acting on behalf of a client. He was not acting as an attorney for a client. But, he was found to have violated Prof. Cond. R. 8.4(h), i.e., he engaged in conduct that adversely reflects on the lawyer's fitness to practice law, for which he received a public reprimand. And, most importantly, Mecklenborg engaged in this conduct "on the advice and consent of counsel." *Mecklenborg,* ¶ 11. The Court explained – ***"But the board found that in light of the facts that Mecklenborg had sought and acted on the advice of counsel and signed a preprinted form…his conduct did not constitute an intentional act of dishonesty, fraud, deceit, or misrepresentation."*** *Mecklenborg,* ¶ 10-11, emphasis added. The fact that Mecklenborg made his representation on the advice of counsel makes it, in addition to all of the other distinguishing facts, very different from Respondent's misrepresentation here.

Respondent discusses a string of cases arguing that other "Ohio case law dealing with improper notarization is similarly distinguishable from the instant case along the fault line of intentionality…" (Objections, p. 9). Unfortunately, Respondent does not explain what he means

by a "fault line of intentionality" or how this list of cases supports his proposition that there can be no misrepresentation without some type of bad intent.

In discussing these cases, Respondent confuses the violation of a rule with the mitigating and aggravating factors to be considered in imposing a sanction. Indeed, the mitigating and aggravating factors listed in the Rules for the Government of the Bar, strongly contradict what Respondent argues here. Gov. Bar R. V, § 13(B)(2) and (C)(2) provide for the consideration of a dishonest or selfish motive as either a mitigating or aggravating factor in determining a sanction. Here, the Board specifically considered, as a mitigating factor in determining the sanction, that there was "the absence of a selfish or dishonest motive…" (Recommendation, ¶ 20). If one accepts Respondent's argument, there can never be a violation without at least a selfish or dishonest motive.

In *Dougherty*, this Court explained the importance of the duties of a notary. The Court stressed that documents acknowledged by a notary are self-authenticating. Thus, notaries cannot take a "cavalier attitude" toward their responsibilities. *Dougherty,* ¶¶ 14-15. The Court explained, while discussing *Disciplinary Counsel v. Simon*, 71 Ohio St.3d 1437, 1994-Ohio-11, 644 N.E.2d 30 (relied upon by Respondent), that failing to follow the duties of a notary, without more, is a violation of DR 1-102(A)(4) [predecessor to Prof. Cond. R. 8.4(c)]. The Court explained, with regard to both Dougherty and Simon – "Neither lawyer, however, forged a signature, knew of a forgery, or engaged in deceit or other misconduct *beyond failing to witness signatures as required*." *Dougherty,* ¶ 15, emphasis added. (As to Simon, however, the Board found the aggravating factor of a dishonest motive. *Simon,* ¶ 10).

Respondent argues that *Disciplinary Counsel v. Freedman*, 110 Ohio St.3d 284, 2006-Ohio-4480, 853 N.E.2d 291 supports his position because "the associate attorney who notarized

the blank signature lines was not prosecuted." (Objections, p. 10). With no record or facts, speculation as to why the associate attorney may not have been charged with misconduct simply does not support Respondent's argument.

Disciplinary Counsel v. Roberts, 117 Ohio St.3d 99, 2008-Ohio-505, 881 N.E.2d 1236 is consistent. Again, this Court held that the violation of a notary's duties by a lawyer, without more, is a violation of the Rule. The Court provided - "Failing to properly notarize a document, although a violation of DR 1-102(A)(4) for which an actual suspension usually follows, may warrant a lesser sanction depending on the presence of mitigating factors. [citations omitted] A public reprimand will issue *if the lawyer does nothing improper in addition to notarizing a signature affixed outside the lawyer's presence*." *Roberts,* ¶ 17, emphasis added.

Similarly, *Cleveland Bar Assn. v. Russell*, 114 Ohio St.3d 171, 2007-Ohio-3603, 870 N.E.2d 1164, is in accord. The lack of more misconduct is not proof that the Rule was not violated, but is a mitigating factor relating to any sanction that might be imposed. The Court stated: "Respondent admitted having falsely attested to the authenticity of two deeds in violation of the notary jurat. We therefore find respondent in violation of DR 1-102(A)(4)." *Russell*, ¶ 9. Again relying on *Dougherty,* the Court explained: "The lawyer did not, however, forge the signature or know of the forgery, nor had the lawyer engaged in a deceitful course of conduct beyond failing to witness signatures as required." *Russell,* ¶ 10. Russell was publicly reprimanded. *Disciplinary Counsel v. Karris,* 129 Ohio St.3d 499, 2011-Ohio-4243, 954 N.E.2d 118 follows the same logic.

Similar reasoning is used in *Mahoning County Bar Assn. v. Melnick*, 107 Ohio St.3d 240, 2005-Ohio-6265, 837 N.E.2d 1203. There, Melnick was a reserve officer in the Judge Advocate General Corps and was under orders to leave for Germany in advance of the Iraq war. He had

another individual circulate affidavits for signature. Trusting the circulator, Melnick notarized the affidavits. Within days, he called each affiant and confirmed the authenticity of the signatures. *Melnick,* ¶¶ 5-6. Although the Board found that Melnick had not acted in self-interest, this was considered a mitigating factor and not proof that Melnick had not violated the Prof. Cond. R. 8.4(c). *Melnick,* ¶ 13. Melnick received a public reprimand.

IV. Conclusion

Respondent violated his duties as a notary. He notarized a blank document. There can be no question that he intended to notarize the blank document, as he says, for his own convenience. As demonstrated above, this alone is a violation of Prof. Cond. R. 8.4(c).

Respondent then left the blank notarized document with another person. He intended to do this. When his clients did not invite him back to review the documents, he made no effort to communicate with them. He did not ask for the documents to be returned. He made no effort to advise or caution them that they should not sign or use the documents. He did nothing until the document became an issue in a will contest a few years later. He was subpoenaed and deposed as a result. Although he may not have "intended" for the document to be signed outside of his presence and become an issue in a will contest, and certainly he did not intend to be subpoenaed and deposed, this does not negate the violation of Prof. Cond. R. 8.4(c). He violated his duties as a notary and Prof. Cond. R. 8.4(c) when he intentionally notarized the blank document for his convenience.

After finding there was clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(c), the Board found that there were no aggravating factors but gave Respondent full credit in mitigation for not having a dishonest or selfish motive. Thus, the sanction of a public reprimand was imposed. This is consistent with similar cases.

For the foregoing reasons, and upon the authorities cited, Relator respectfully requests that Respondent's objection be overruled and that the Recommendation of the Board be adopted.

Respectfully submitted,

MAHONING COUNTY BAR ASSOCIATION

By: /s/ *Ronald E. Slipski*
Ronald E. Slipski (0014404)
527 Greenmont Drive
Canfield, Ohio 44406
Tel: 330.506.7022
rslip5305@gmail.com

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

CERTIFICATE OF SERVICE

A copy of the forgoing Relator's Answer Brief to 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, was sent by email this 3rd day of February 2021, to:

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

/s/ *David C. Comstock, Jr.*
David C. Comstock, Jr.
Attorney for Relator