

SUPREME COURT OF OHIO

Disciplinary Counsel v. Lehmkuhl

137 Ohio St. 3d 71, 2013-Ohio-4539 (2013) · No. 2012-1719 · Decided October 16, 2013

SUMMARY

The Ohio Supreme Court publicly reprimanded Phillip Douglas Lehmkuhl for filing a defamation action without adequately investigating the identity of the proper defendants, failing to timely amend the complaint after discovering the error, and failing to cooperate in a disciplinary investigation. The court adopted the findings that he violated Ohio Prof.Cond.R. 3.1 and Gov.Bar R. V(4)(G), with costs taxed to him.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	O'Connor, C.J.; Pfeifer, J.; O'Donnell, J.; Lanzinger, J.; Kennedy, J.; French, J.; O'Neill, J.
JURISDICTION	Ohio
DECIDED	October 16, 2013
DOCKET	2012-1719
DISPOSITION	other
PROCEDURAL POSTURE	Attorney-discipline proceeding on a certified report from the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.
PRECEDENTIAL VALUE	Published opinion of the Supreme Court of Ohio; precedential within Ohio.
PARTIES	Disciplinary Counsel v. Phillip Douglas Lehmkuhl

TOPICS

defamation pleadings civil procedure sanctions

PRACTICE AREAS

legal ethics attorney discipline professional responsibility defamation litigation

QUESTIONS PRESENTED

1. Whether Lehmkuhl violated Prof.Cond.R. 3.1 by filing and maintaining a defamation proceeding without adequately investigating and timely correcting the identity of a proper defendant.
2. Whether Lehmkuhl violated Gov.Bar R. V(4)(G) by failing to assist in the disciplinary investigation.
3. What sanction was appropriate for the established misconduct.

HOLDINGS

1. Lehmkuhl violated Prof.Cond.R. 3.1 by initiating the defamation action without adequately investigating the identity of the proper defendants and by failing to timely amend the complaint after discovering that Amanda Erb was not a proper defendant.
2. Lehmkuhl violated Gov.Bar R. V(4)(G) by failing to assist in the disciplinary investigation, including by failing to respond to letters of inquiry and failing to appear for a subpoenaed deposition.
3. A public reprimand was the appropriate sanction for Lehmkuhl's misconduct.

KEY QUOTATIONS

“Accordingly, we publicly reprimand Phillip Douglas Lehmkuhl for initiating a defamation action without adequately investigating the identity of the proper defendants, failing to timely amend his complaint when he learned that he had misidentified one of the defendants, and failing to cooperate in the ensuing disciplinary investigation.” (¶ 18)

FACTUAL BACKGROUND

Lehmkuhl filed a defamation action naming Joseph and Amanda Erb as defendants without adequately verifying their identities and relationship. After learning that Amanda Erb was Joseph Erb's daughter and was not involved in the alleged conduct, he delayed dismissing the claims against her and seeking leave to amend the complaint. He also failed to respond to disciplinary-inquiry letters and failed to appear for a subpoenaed deposition.

PROCEDURAL HISTORY

Disciplinary Counsel charged Lehmkuhl with professional misconduct arising from a defamation action and his failure to cooperate with the disciplinary investigation. The parties stipulated to misconduct and a public reprimand. After the Supreme Court remanded the matter to clarify a discrepancy between the hearing panel's findings and the board's report, the board submitted a supplemental report stating that only violations of Prof.Cond.R. 3.1 and Gov.Bar R. V(4)(G) remained. The Supreme Court adopted the board's findings and imposed a public reprimand.

DISPOSITION

other

CASES CITED

- Stark Cty. Bar Assn. v. Buttacavoli, 96 Ohio St. 3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16
- Disciplinary Counsel v. Broeren, 115 Ohio St. 3d 473, 2007-Ohio-5251, 875 N.E.2d 935, ¶ 21

- Akron Bar Assn. v. Fink, 131 Ohio St. 3d 34, 2011-Ohio-6342, 959 N.E.2d 1045
- Disciplinary Counsel v. Gallo, 131 Ohio St. 3d 309, 2012-Ohio-758, 964 N.E.2d 1024, ¶¶ 5-6, 20-21

OPINION

Disciplinary Counsel v. Lehmkuhl

2013 Ohio 4539

PER CURIAM.

[Cite as Disciplinary Counsel v. Lehmkuhl, 137 Ohio St.3d 71, 2013-Ohio-4539.] DISCIPLINARY COUNSEL v. LEHMKUHL. [Cite as Disciplinary Counsel v. Lehmkuhl, 137 Ohio St.3d 71, 2013-Ohio-4539.] Attorneys—Misconduct—Violating the Rules of Professional Conduct by bringing a proceeding unsupported by law—Neglecting to assist in a disciplinary investigation—Public reprimand. (No. 2012-1719—Submitted July 9, 2013—Decided October 16, 2013.) ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court, No. 11-110. _____ Per Curiam. {¶ 1} Respondent, Phillip Douglas Lehmkuhl of Mount Vernon, Ohio, Attorney Registration No. 0021246, was admitted to the practice of law in Ohio in 1978. {¶ 2} In a December 5, 2011 complaint, relator, disciplinary counsel, charged Lehmkuhl with professional misconduct based on (1) his failure to conduct an investigation to identify the proper party-defendants before filing a defamation action, (2) his failure to timely amend his complaint when he learned that he had erroneously filed suit against the daughter of the intended defendants, and (3) his failure to respond to the ensuing disciplinary investigation. {¶ 3} The parties stipulated, and the panel found, that Lehmkuhl's conduct with regard to the defamation action violated Prof.Cond.R. 3.1 (prohibiting a lawyer from bringing or defending a proceeding that is unsupported by law or lacks a good-faith argument for an extension, modification, or reversal of existing law) and 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice) and that his failure to cooperate with

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relator's investigation violated Prof.Cond.R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law) and Gov.Bar R. V(4)(G) (prohibiting a lawyer from neglecting or refusing to assist in a disciplinary investigation). Relator withdrew several other alleged violations, and the parties agreed that Lehmkuhl should be publicly reprimanded for his misconduct. {¶ 4} The Board of Commissioners on Grievances and Discipline recommends that we dismiss the allegations that Lehmkuhl violated Prof.Cond.R. 8.4(d) and (h). It adopted the parties' remaining stipulations and recommends that we publicly reprimand Lehmkuhl for his misconduct. For the reasons that follow, we adopt the board's findings of fact and agree that a public reprimand is the appropriate sanction in this case. Misconduct {¶ 5} The parties stipulated that in December 2009, Lehmkuhl filed a civil action in the Morrow County Court of Common Pleas on behalf of himself, his wife, and Arlene and Timothy J. McAfee. In his complaint, he

alleged that the named defendants, Joseph and Amanda Erb, were a married couple residing on Township Road 197 in Marengo, Ohio, and that on December 13, 2009, they had been interviewed by a local television news crew about the purported treatment of horses owned by the Lehmkuhls and pastured by the McAfees. Lehmkuhl further alleged that Joseph and Amanda Erb made numerous false accusations against the plaintiffs with careless disregard as to whether the statements were true, with the intent to defame the plaintiffs. {¶ 6} In their January 20, 2010 answer and counterclaim, Joseph and Amanda Erb admitted that Joseph had spoken with the news crew and expressed his opinions regarding the treatment of the Lehmkuhls' horses. The Erbs stated, however, that Amanda was Joseph's daughter, not his wife, and denied that Amanda had any involvement in the incident. In their March 8, 2010 motions for 2 January Term, 2013 summary judgment and for sanctions pursuant to Civ.R. 11, they alleged that Amanda was not a proper party to the action. Despite having been advised as early as January 2010 that he had erroneously named Erb's daughter as a defendant in the defamation action, Lehmkuhl waited until May 4, 2010, to dismiss the claims against her and did not seek leave to amend his complaint until May 6, 2010. {¶ 7} On March 23, 2010, Joseph and Amanda Erb filed a grievance against Lehmkuhl, but relator dismissed it in May 2010 and advised Erb that he could refile it at the conclusion of the underlying litigation. During settlement negotiations in the defamation case, Lehmkuhl attempted to condition the dismissal of his civil case on the Erbs' agreement to abandon their grievance against him. After he was advised that such a condition would violate ethical rules, however, he settled the case without any limitations on the Erbs' right to pursue their disciplinary grievance. Mr. Erb refiled his grievance in April 2011. {¶ 8} In response to relator's first letter of inquiry, Lehmkuhl requested an extension of time to reply, but he never provided a response. Two days after Lehmkuhl's father-in-law died, relator sent a second letter of inquiry by certified mail. Though he received the letter, he did not respond due to the family turmoil surrounding his father-in-law's death. He also failed to appear for a deposition in relator's office after being personally served with a subpoena duces tecum because the date did not get placed on his calendar. {¶ 9} The parties stipulated and the panel initially found that by naming Amanda Erb as a defendant in his defamation action and then failing to timely amend his complaint once he discovered that she was not a proper party, Lehmkuhl violated Prof.Cond.R. 3.1 and 8.4(d). In addition, the parties stipulated and the panel found that Lehmkuhl's failure to respond to relator's letters and his failure to appear for the deposition after having been served with a subpoena violated Prof.Cond.R. 8.4(h) and Gov.Bar R. V(4)(G). The board found that 3

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Lehmkuhl's conduct violated Prof.Cond.R. 3.1 and Gov.Bar R. V(4)(G) and indicated that the panel had dismissed the remaining violations. {¶ 10} We remanded the case to the board with instructions to clarify the apparent discrepancy between the findings as stated in the panel report and the board's recitation of those findings in its own report. The board submitted a supplemental report, stating that after a discussion at its October 5, 2012 meeting, the board (with the consent of

the hearing panel) adopted a motion to amend the panel report to delete the findings that Lehmkuhl had violated Prof.Cond.R. 8.4(d) and (h). Thus, the board unanimously found that Lehmkuhl's conduct violated only Prof.Cond.R. 3.1 and Gov.Bar R. V(4)(G). {¶ 11} We adopt the board's findings of fact and misconduct. Sanction {¶ 12} When imposing sanctions for attorney misconduct, we consider relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16. In making a final determination, we also weigh evidence of the aggravating and mitigating factors listed in BCGD Proc.Reg. 10(B). *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, 875 N.E.2d 935, ¶ 21. {¶ 13} The board found that there are no aggravating factors present in this case and that just one mitigating factor—the absence of a prior disciplinary record—is present. See BCGD Proc.Reg. 10(B)(1) and 10(B)(2)(a). Citing *Akron Bar Assn. v. Fink*, 131 Ohio St.3d 34, 2011-Ohio-6342, 959 N.E.2d 1045, in which we publicly reprimanded an attorney who had failed to cooperate in the disciplinary process in violation of Prof.Cond.R. 8.4(d) and Gov.Bar R. V(4)(G), the board adopted the parties' stipulated sanction of a public reprimand. {¶ 14} In *Disciplinary Counsel v. Gallo*, 131 Ohio St.3d 309, 2012-Ohio- 758, 964 N.E.2d 1024, ¶ 5-6, 20-21, we publicly reprimanded an attorney who 4 January Term, 2013 failed to take reasonable steps to verify the identity of a person who he thought was staring at his domestic-relations client outside a judge's office suite before accusing the judge, who was in a relationship with the client's spouse, of engaging in a pattern of harassing and threatening conduct. Gallo relied on the identification of a client he barely knew, a telephonic identification by his employer, and his own determination that the man he had seen in the courthouse matched an online photograph of the judge he accused of professional misconduct. *Id.* at ¶ 20. {¶ 15} Similarly, Lehmkuhl relied on information obtained by his wife and on Mrs. McAfee's indication that the name Amanda sounded correct. In retrospect, he acknowledged that he should have attempted to independently verify Mrs. Erb's first name before filing his complaint and that he should not have waited for additional discovery before amending his complaint to name the proper defendant. He stated that once he realized that it would be an ethical violation to require the Erbs to drop their grievance as part of a settlement of the defamation action, he settled the case without any restrictions on their ability to pursue a grievance against him. {¶ 16} Although Lehmkuhl explained that his father-in-law's death and its impact on his family prevented him from timely responding to relator's investigation, he openly acknowledged his mistakes and accepted full responsibility for his misconduct. He also stated that he has made changes to his office procedures to ensure that depositions, court appearances, and deadlines are properly logged on his calendar. {¶ 17} Having considered the misconduct, the absence of aggravating factors, the absence of any prior disciplinary record, Lehmkuhl's willingness to accept responsibility for his actions, and the sanctions we have imposed for comparable misconduct, we find that a public reprimand is the appropriate 5

sanction in this case. Therefore, we adopt the board's findings of fact and conclusions of law and adopt its recommended sanction. {¶ 18} Accordingly, we publicly reprimand Phillip Douglas Lehmkuhl for initiating a defamation action without adequately investigating the identity of the proper defendants, failing to timely amend his complaint when he learned that he had misidentified one of the defendants, and failing to cooperate in the ensuing disciplinary investigation. Costs are taxed to Lehmkuhl. Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur. _____ Jonathan E. Coughlan, Disciplinary Counsel, and Stacey Solocheck Beckman, Assistant Disciplinary Counsel, for relator. Phillip Douglas Lehmkuhl, pro se. _____ 6