IN THE

SUPREME COURT OF OHIO

In re:	:	
Thomas Joel Manning **Attorney Registration No. (0059759)** 800 East Franklin Street Centerville, Ohio 45459	:	**CASE NO. 2006-0738**
Respondent	:	
Disciplinary Counsel 250 Civic Center Drive, Suite 325 Columbus, OH 43215-7411	:	**RELATOR'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION**
Relator	:	

RELATOR'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION

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RELATOR'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION

INTRODUCTION

On November 22, 2006, this Court suspended respondent, Thomas J. Manning, from the practice of law for two years. *Disciplinary Counsel v. Manning*, 111 Ohio St.3d 349, 2006-Ohio-5794, 856 N.E.2d 259. In relevant part, this Court determined that "The number and intricacy of respondent's lies to his clients, the three-and-a-half-year period during which he continued to mislead them, and the large number of ethical violations found by the board all justify the recommended two-year suspension." Id. at ¶ 14.

On December 1, 2006, respondent filed a motion for reconsideration, alleging that this Court's sanction was excessive given the cases decided by this Court after the oral argument in the case at bar.

Now comes relator, Disciplinary Counsel, and states that for the reasons set forth in the following memorandum, as well as the reasons already articulated in this Court's decision, respondent's motion for reconsideration should be denied.

RELATOR'S MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION

"This court has invoked the reconsideration procedures set forth in S. Ct. Prac. R. XI to 'correct decisions that upon further reflection are determined to have been made in error.'" *Buckeye Community Hope Found v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, 697 N.E.2d 181, 183. See also *State ex rel. Mirlisena v. Hamilton Cty. Bd. of Elections* (1993), 67 Ohio St.3d 597, 622 N.E.2d 329, (reasoning contained in a previous dissenting opinion adopted by a majority of this court pursuant to a motion for reconsideration) and *State ex re. Eaton Corp. v. Lancaster* (1989), 44 Ohio St. 3d 106, 541 N.E.2d 64, (views contained in a previous concurring opinion adopted by a majority of this court pursuant to a motion for "rehearing").

An examination of respondent's motion for reconsideration reveals no legitimate basis for "further reflection" by this Court, much less a determination that the Court's decision to suspend respondent for two years was erroneous. Respondent's motion for reconsideration lacks merit and should be denied.

In its opinion, this Court stated, "The number and intricacy of respondent's lies to his clients, the three-and-a-half year period which he continued to mislead them, and the large number of ethical violations found by the board all justify the recommended two-year suspension." *Manning*, 110 Ohio St. 3d at 352 .

In his objections to the Board of Commissioners' Report and Recommendation, respondent submitted 38 cases in support of his request for a stayed suspension. In response, this Court correctly concluded, "Respondent's view that he should be permitted to continue to

practice law without any period of actual suspension suggests that he does not grasp the seriousness of his misconduct and does not understand how damaging this kind of dishonesty and deception can be to our legal system." Id.

Incredibly, respondent now "concedes" that he deserves an actual suspension, but asks this Court to stay a portion of the suspension. In support of his position, respondent cites 12 cases that were decided after the oral argument in the case at bar. But the misconduct in the overwhelming majority of cases cited by respondent pales in comparison to the fraud that respondent perpetrated upon his elderly clients for nearly four years. In fact, only one case—*Disciplinary Counsel v. Bowman*, 110 Ohio St.3d 480, 2006-Ohio-4333, 854 N.E.2d 480—is analogous to the case at bar. Contrary to respondent's argument, *Bowman*, which resulted in a two-year suspension, is completely consistent with the case at bar.

In *Bowman*, Kevin Bowman represented the holders of a cognovit note. Bowman's clients rejected a settlement offer, but Bowman forged his clients' signatures along with the signature of their former attorney and represented to opposing counsel that his clients had accepted the offer. The case was then dismissed with prejudice. Id. at 481. Bowman also represented Miami University in a federal lawsuit. In an attempt to conceal his neglect, Bowman created a fictitious settlement agreement and forged three signatures on the "agreement." Bowman sent the fake agreement to his client along with a $5,000 check, which he falsely represented to be a payment on the settlement agreement. Bowman paid the remainder of the settlement from his personal funds. Id. at 483. Finally, Bowman neglected a third client in a federal lawsuit, and after failing to respond to a motion for sanctions, he dismissed the case without his client's consent. Id.

Respondent suggests that this Court's decision to impose a two-year suspension in Bowman warrants a reduction in respondent's sanction, since respondent's misconduct involved a single client. The fact that respondent's misconduct, which spanned nearly four years, involved only one client is not a mitigating factor. In fact, this Court found that respondent engaged in a pattern of misconduct—just as it did in *Bowman.*

What distinguishes *Bowman* from the case at bar is the fact that Bowman suffered from depression and an anxiety disorder, which greatly contributed to the misconduct. Id. at 486. Unlike Bowman, respondent offered no evidence of a mental disability or chemical dependency. To the contrary, this Court found that respondent acted with a dishonest or selfish motive.

This Court's imposition of a two-year suspension in the case at bar was both appropriate and consistent with its previous and post-oral argument decisions.

None of the 11 other cases cited in respondent's motion involve the fabrication of documents or a complex, protracted scheme to defraud clients. The cases cited by respondent contain one common element—a violation of DR 1-102(A)(4) [A lawyer shall not engage in conduct involving fraud, dishonesty, deceit, or misrepresentation]. Respondent fails to comprehend that there are various degrees of deception—some more serious than others. And respondent ignores the fact that he violated <u>eight</u> other disciplinary rules including neglect, collecting an excessive fee, failure to promptly refund a fee, attempting to limit liability for malpractice, intentionally failing to carry out a contract of employment, and commingling funds in a trust account. The cases cited in respondent's motion are easily distinguishable from the case at bar.

In *Mahoning County Bar Assn. v. Olivito*, 110 Ohio St.3d 64, 2006-Ohio-3564, 850 N.E.2d 702, this Court suspended Richard Olivito for two years, with one year stayed for forging

his clients' names to a bankruptcy petition, and then making several misrepresentations to the bankruptcy trustee. In *Olivito*, the misconduct spanned a total of six months, and despite Olivito's misdeeds, the client benefited from his work. Id. at 66.

In the case at bar, respondent performed no work on his client's behalf, despite the fact that the misconduct spanned nearly four years. Further, the depth of respondent's misconduct dwarfs the misconduct in *Olivito*. Respondent engaged in an elaborate scheme to conceal his misdeeds. Respondent fabricated settlement documents that ostensibly released two physicians from liability and barred his clients from discussing the fictitious settlement with anyone else. *Manning*, 111 Ohio St.3d at 352. But for his elderly client's decision to retain another attorney, respondent's deceit may have continued unabated.

Similarly, respondent cites two cases that resulted in six-month suspensions, yet the misconduct in each of the cases pales in comparison to respondent's misconduct. See *Disciplinary Counsel v. Rooney*, 110 Ohio St.3d 349, 2006-Ohio-4576, 853 N.E.2d 663, (attorney neglected a probate matter and made oral misrepresentation to client that the matter was proceeding, when nothing had been filed); *Disciplinary Counsel v. Stollings*, 111 Ohio St.3d 155, 2006-Ohio-5345, 855 N.E.2d 479, (attorney misrepresented to his client that civil matter was proceeding smoothly despite the fact that case had been dismissed).

Many of the cases respondent relies upon in support of staying a portion of the actual suspension involve a mental disability or chemical dependency—factors <u>not</u> present in the case at bar. In *Disciplinary Counsel v. Novak*, 110 Ohio St.3d 134, 2006-Ohio-3823, 851 N.E.2d 498, this Court imposed a two-year suspension with one-year stayed after Lawrence Novak neglected three cases, misrepresented to two of the three clients that he had performed legal work when he had not, and failed to advise the court of a scheduling conflict. In arriving at its sanction, the

Court placed great emphasis on the fact that Novak's depression contributed to the misconduct. Id. at 137.

Similarly, in *Disciplinary Counsel v. Keller*, 110 Ohio St.3d. 240, 2006-Ohio-4354, 852 N.E.2d 1195, Larry Keller neglected a personal injury case and then misrepresented to the client that the case was progressing, when, in fact, the attorney had never filed a complaint and missed the statute of limitations. Keller falsely advised his client that he had received a $30,000 settlement offer, and that if his client accepted the offer, he would not charge the client for his services. The clients retained another attorney and obtained a civil judgment against respondent, who did not have malpractice insurance. Unlike the respondent in the case at bar, the attorney in *Keller* provided compelling mitigation evidence, including a chemical dependency, a painful divorce, the murder of his adopted daughter, and the subsequent trial of his daughter's killer. Id. at 242.

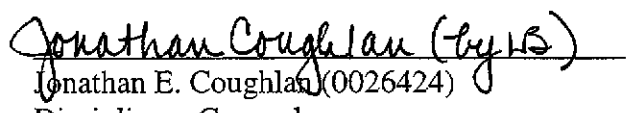
Finally, the remainder of cases cited by respondent are factually dissimilar and irrelevant to the case at bar. See *Stark County Bar Assn. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, 855 N.E.2d 1206, (six-month stayed suspension for attorney who represented himself in a divorce proceeding and violated various court orders); *Disciplinary Counsel v. Ault*, 110 Ohio St.3d 207, 2006-Ohio-4247, 852 N.E.2d 727, (judge received two-year stayed suspension for deceptively procuring prescription pain medication to support a chemical dependency); *Cincinnati Bar Assn. v Lukey*, 110 Ohio St.3d 128, 2006-Ohio-3822, 851 N.E.2d 493, (two-year suspension with 18-months stayed for attorney who failed to disclose a conflict of interest when he accepted a guilty plea on behalf of his clients' grandson, while representing the grandparents in a dependency proceeding involving the grandson); *Cuyahoga County Bar Assn. v. Paulson*, 111 Ohio St.3d 415, 2006-Ohio-5859, 856 N.E.2d 970, (default proceeding resulting in a two-year suspension

against a previously suspended attorney who failed to timely file appellate brief and failed to cooperate in disciplinary investigation); *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-5342, 855 N.E.2d 462, (two-year suspension with one-year stayed for criminal defense attorney who charged an excessive fee, filed an appellate brief that was identical to the brief prepared by previous counsel, and failed to account for and refund fees in a second case); *Iowa Supreme Ct. Atty. Disciplinary Bd. v. Frerichs*, 718 N.W.2d 763, (90 day suspension for attorney who, after failing to appear for a forfeiture hearing, falsely stated in a motion that a judge from a different county had prevented him from participating in the hearing by telephone).

CONCLUSION

This Court's decision to suspend respondent from the practice of law for two years was commensurate with the misconduct, supported by precedent, and consistent with recent decisions. Relator respectfully requests that respondent's motion for reconsideration be denied.

Respectfully Submitted,



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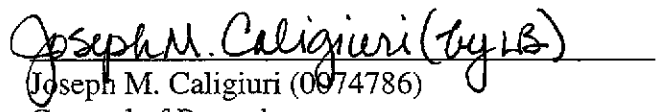

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, William Knapp, III, Esq., and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 this 8th day of December, 2006.

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