

recommendation of a six-month stayed suspension for McMahon's violations of the disciplinary rules is the appropriate sanction in light of the Panel's findings.

I. Violations of the Disciplinary Rules of the Ohio Code of Professional Responsibility.

The facts giving rise to this grievance are straightforward and undisputed.¹ McMahon's client, Ms. English, was a passenger in a car involved in an accident with another car driven by a Ms. Jerri Marrs, and insured by the State Automobile Insurance Company ("State Auto"). (Findings of Fact and Board's Recommendation at 2). McMahon submitted a claim to State Auto on behalf of his client, which was initially denied because State Auto disputed liability. *Id.* at 3. In response to the denial of his client's claim, McMahon wrote a letter to State Auto. In this letter, dated August 20, 2004, McMahon included what appeared to be a verbatim transcript of a purported proceeding that occurred in a Shaker Heights court. Contained in this "transcript," was a "no contest" plea by Ms. Marrs to the charge of improper lane change, Ms. Marrs' admission of fault for the accident and an "official" finding of guilt by the court. *Id.* Based on Ms. Marrs' admission and the court's ruling, McMahon indicated that he would forward a settlement demand to State Auto. *Id.* The "court proceeding" and "testimony" included in McMahon's August 20, 2004 letter never took place and was a complete fabrication. *Id.*

On December 7, 2006 the Board certified the Panel's findings that McMahon had violated DR 1-102(A)(4) and DR 7-102(A)(5), but rejected the Panel's recommendation that McMahon be given a public reprimand for his misconduct.²

¹ Neither Relator nor McMahon have objected to the Panel's findings of fact or conclusions of law. The only issue before the Court is whether the Board's recommended sanction is appropriate.

² The Board held that the violation of DR 7-102(A)(8) (knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule) was superfluous and not a violation. (Findings of Fact and Board's Recommendation at 6.)

II. A Six-Month Stayed Suspension is the Appropriate Sanction.

McMahon's deceitful behavior directed to State Auto was simply an attempt by McMahon to improperly take advantage of an opposing party at a time when liability was in dispute. McMahon's misconduct was a serious breach of his duty as an officer of the Court and such conduct tarnishes the image of our legal profession in the eyes of the public.³ The fact that McMahon did not ultimately benefit from his deceit does not negate his bad acts. Any sanction less than that recommended by the Board would trivialize McMahon's misconduct.

Prior Court precedent also favors the recommended sanction.⁴ When an attorney has engaged in a course of conduct that violates DR 1-102(A)(4), the attorney should actually be suspended from the practice of law for an appropriate period of time. *Disciplinary Counsel v. Fowerbaugh* (1995), 74 Ohio St. 3d 187, 191. Mitigating factors can, however, justify a lesser sanction. *Disciplinary Counsel v. Carroll* (2005), 106 Ohio St. 3d 84 at ¶ 13. McMahon has indisputably violated DR 1-102(A)(4) and DR 7-102(A)(5). Such violations and the nature of McMahon's impropriety merit a suspension.

³ What is perhaps most disconcerting in this case is the cavalier attitude that McMahon showed after being confronted with his lie. McMahon waited three weeks until after State Auto alerted him that his letter was false to admit that Ms. Marrs never appeared in court and initially explained to Relator that the August 20, 2004 letter was meant to be illustrative of outcomes in traffic court and that he had only "assumed" that Ms. Marrs had appeared in court. (Findings of Fact and Board Recommendation at 3.)

⁴ Relator submits that the following authorities appropriately support the Board's recommended sanction: *Disciplinary Counsel v. Carroll* (2005), 106 Ohio St. 3d 84 (six-month stayed suspension for misrepresenting time on timesheets submitted to government board); *Dayton Bar Ass'n. v. Kinney* (2000), 89 Ohio St. 3d 77 (six-month stayed suspension for attorney's misrepresentations to a government agency that did not harm client or change outcome of the representation); *Disciplinary Counsel v. Markijohn* (2003), 99 Ohio St. 3d 489 (six-month stayed suspension warranted for attorney who misrepresented to law firm that he was making required contributions to firm's retirement plan and for filing of false state and federal income tax returns); *Disciplinary Counsel v. Heffter* (2003), 98 Ohio St. 3d 320 (six-month stayed suspension where attorney, for convenience, notarized limited powers of attorney of minors without witnessing their signatures).

Relator has, however, stipulated to and the Board has accepted, numerous mitigating factors that warrant that the suspension be stayed in its entirety. Despite McMahon's claim, however, that he "submitted evidence at the hearing of his depression," (Respondent's Objections at 4) the Board correctly pointed out that McMahon "offered no additional evidence as required by BCGD Proc. Reg. 10(2)(g) to support this claim, therefore, his depression cannot be used as a mitigating factor." (Findings of Fact and Board Recommendation at 5.)

McMahon cites six cases to support his position that sanctions in similar cases support a public reprimand for his fraudulent act. Two of the six cases relied upon by McMahon resulted in the imposition of a six month stayed suspension⁵ and the other four cases are easily distinguishable and do not advance McMahon's cause. In *Disciplinary Counsel v. Cuckler* (2004), 101 Ohio St. 3d 318, for example, the Court issued a public reprimand for an attorney who, while serving as a legislative aide, identified himself on business cards as 'Majority Deputy Legal Counsel' without any disclaimer that he had not yet passed the bar. Although Mr. Cuckler's conduct was a violation of DR 1-102(A)(4) and (6), the Court noted that the respondent was serving as a legislative aide, not counsel, and any legal work he may have done was supervised by a licensed attorney. The Court, therefore, held that Mr. Cuckler's conduct warranted a public reprimand.

In *Office of Disciplinary Counsel v. Eisenberg* (1998), 81 Ohio St. 3d 295, the Court issued a public reprimand to the respondent who had his secretary trace the signatures of the beneficiaries on a will. The beneficiaries had not authorized the signatures and the documents

⁵ McMahon incorrectly stated that in *Dayton Bar Ass'n. v. Kinney* (2000), 89 Ohio St. 3d 77, the Court issued a public reprimand for an attorney who misrepresented to a government agency the purchase price of a liquor establishment. The respondent in *Kinney* was, in fact, suspended for six months with the entire suspension stayed.

were then filed in court. The panel in *Eisenberg* noted that there was no intent to defraud and that the signatures were signed as a convenience to the parties.

The two recent Supreme Court decisions cited by McMahon, *Disciplinary Counsel v. Agopian* (2006), 112 Ohio St. 3d 103 and *Disciplinary Counsel v. Taft*, 112 Ohio St. 3d 155 are also factually and legally inapposite to the instant action. In *Agopian*, for example, the Court issued a public reprimand when it found no evidence of deceit – only "sloppy time keeping" – in respondent's submission of fee bills to the Cuyahoga County Court of Common Pleas for legal services he rendered as a court appointed counsel. *Agopian*, 112 Ohio St. 3d 155 at ¶6.

Further, in *Taft*, respondent was charged with violating DR 1-102(A)(6) (prohibiting conduct that adversely reflects on a lawyer's fitness to practice law) and not DR 1-102(A)(4), for disclosure deficiencies in his financial filings with the Ohio Ethics Commission. In accepting the parties' consent to discipline agreement and the sanction of a public reprimand for respondent's disciplinary rule violation, the Court noted that, like in *Agopian*, respondent's conduct was "not the result of dishonesty or selfishness," but was a result of respondent's carelessness. *Taft*, 112 Ohio St. 3d 155 at ¶¶ 11-12.

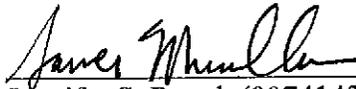
In contrast to the conduct of the respondents in the cases cited by McMahon, McMahon's misconduct was not a consequence of sloppy drafting or carelessness on his part, but rather a result of his dishonesty. McMahon would like the Court to believe that the fabrications contained in his August 20, 2004 letter to State Auto had no improper purpose or motivation, even though, if true, would have summarily established liability on behalf of State Auto's insured. McMahon's deceit is alarming not only because of his material misrepresentations of fact, but also because he falsely attributed words to a judge. McMahon's misconduct admittedly

"senseless," was clearly dishonest and "for which there was no explanation". (Findings of Fact and Board Recommendation at 6.)

CONCLUSION

For the foregoing reasons, Relator respectfully requests that McMahon's objections be overruled and the Board's recommended sanction adopted.

Respectfully submitted,



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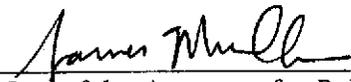
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *Relator Cleveland Bar Association's Answer to Respondent's Objections to Recommendations of the Board of Commissioners* was served via First Class U.S. Mail on January 30, 2007 to the following:

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