

No. 2006-2306

In the

# Supreme Court of Ohio

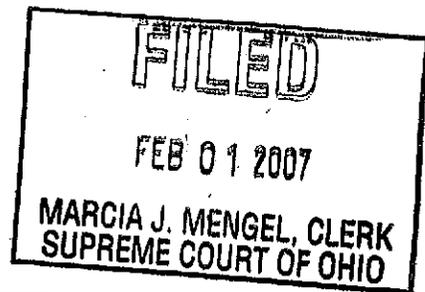
THE CINCINNATI BAR ASSOCIATION,

*Relator*

vs.

ROBERT SCHWIETERMAN,

*Respondent*



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**On the Report of the Board of Commissioners on Grievances and Discipline of the  
Supreme Court of Ohio, Case No. 04-034**

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**OBJECTIONS OF RESPONDENT ROBERT SCHWIETERMAN TO REPORT  
AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS,  
AND BRIEF IN SUPPORT**

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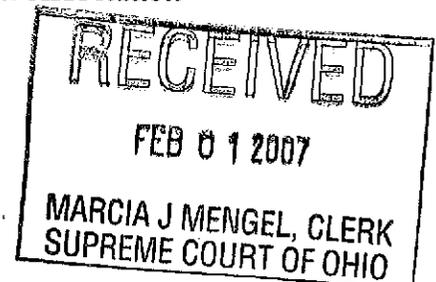
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**IN THE SUPREME COURT OF OHIO**

**THE CINCINNATI BAR ASSOCIATION,**

*Relator*

vs.

**ROBERT C. SCHWIETERMAN,**

*Respondent*

**RESPONDENT'S OBJECTIONS TO REPORT OF THE BOARD OF  
COMMISSIONERS ON GRIEVANCES AND DISCIPLINE  
OF THE SUPREME COURT OF OHIO, AND  
BRIEF IN SUPPORT OF OBJECTIONS**

Respondent, Robert C. Schwieterman, respectfully objects to the Report of the Board of Commissioners on Grievances and Discipline of this Court in Case No. 04-034, *Cincinnati Bar Association v. Schwieterman*, and offers this Brief in Support of his Objections.

  
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## STATEMENT OF THE CASE AND FACTS

Robert C. Schwieterman, Respondent herein, was raised in Maria Stein, Ohio in a family of medical doctors. His father is an M.D., as are three of his brothers. Another brother is a Ph.D. He is married, and he and his wife, Brenda, are the parents of four children, ages 17, 14, 13 and 11. Mr. Schwieterman and his wife grew up together, and went to school together from kindergarten through high school in Maria Stein.

Mr. Schwieterman graduated from Purdue University and later enrolled in Thomas Cooley Law School and attended Law School at night, while he worked in the day at Electronics Data Systems. He graduated from Cooley in 1993. After a year, the family moved to Cincinnati and he began to practice law.

After practicing in several locations, associated with different lawyers, Mr. Schwieterman became affiliated with the Phillips Law Firm in West Chester, Ohio. He was with the Phillips firm for approximately six months. During the latter part of that period, Mr. Schwieterman collected fees from clients, which he was required to deposit or have deposited in the Phillips Law Firm Trust Account. The firm would then pay him his agreed upon share of the fees. In eight instances, he retained money that was to be deposited or otherwise given to the Phillips Law Firm. He thus retained more of the fees than he was entitled to, and the Phillips Law Firm did not receive its share of the fees in those eight instances.

Mr. Phillips had worried about Mr. Schwieterman in his adjustment to the firm, work

habits and financial irresponsibility, and contacted the Bar Association. The Ohio Lawyers' Assistance Program OLAP became involved. According to the testimony of Ms. Stephanie Krznarich of OLAP, John Phillips, Mr. Schwieterman's employer, began to suspect something was amiss, and consulted with OLAP at the suggestion of the Cincinnati Bar Association. Input was received from Mr. Schwieterman's family, parents and three brothers, Mr. Phillips, and an unnamed judge (Tr. 118) On December 13, 2003, an intervention was held by OLAP, and Mr. Schwieterman was evaluated for mental problems. (T.p. 119-120).

It was decided that Mr. Schwieterman needed to go to an inpatient level of care at the Menninger Clinic in Texas (T.p. 120). He was sent for mental health issues, not substance abuse or alcohol. Just three days after the intervention, Mr. Schwieterman was in Houston, Texas, at the Menninger Clinic. He remained there for a month.

Mr. Phillips filed a grievance against Mr. Schwieterman, who filed a lengthy response in which he admitted on eight occasions misappropriating funds from fees received for the Phillips Law Firm. The information found its way to the Prosecutor of Hamilton County, and Mr. Schwieterman was indicted on eight counts of theft, each count alleging that the funds were taken from the Phillips Law Firm.

Mr. Schwieterman entered a plea of guilty to the first count, and the other seven counts were dismissed by the prosecution. On September 20, 2004, Judge Steven Martin of the Court of Common Pleas of Hamilton County imposed a sentence placing Mr.

Schwieterman on community control for five years; he was ordered to make restitution to the Phillips Law Firm in the amount of \$9,400.00 (comprising the total fees taken on all eight counts, without deduction for Mr. Schwieterman's share of the fees, which was greater than half); he was ordered to complete drug testing; he was ordered to perform 300 hours of community service; he was ordered to see Dr. Walters (his medical doctor, who was monitoring his medications prescribed by the Menninger Clinic) and Dr. Bill Malone (his psychotherapist); he was ordered to take the medicine that was prescribed for him, and was ordered to pay court costs. The restitution was paid within a day or two of sentencing, and Mr. Schwieterman has completed the 300 hours of community service.

Upon his conviction of a felony, this Court suspended his license to practice law, which suspension is still in full force and effect after two years.

At the hearing before the panel on May 19, 2006, Mr. Schwieterman, his wife Brenda, and Stephanie Krznarich of OLAP testified on Mr. Schwieterman's behalf, and Dr. Kennedy testified for the Relator. Extensive reports were admitted from the Menninger Clinic, and also from Mr. Malone, Respondent's psychotherapist. The factual basis of the misconduct was presented by stipulation, as were Mr. Schwieterman's admissions of the misconduct charged.

The Board has submitted its Report and Recommendation, recommending an indefinite suspension with no credit for the two years he has served on the interim suspension imposed. Mr. Schwieterman hereby respectfully submits his Objections.

## ARGUMENT IN SUPPORT OF OBJECTIONS

### *PROPOSITION OF LAW NO. 1:*

**AN INDEFINITE SUSPENSION WITHOUT CREDIT FOR TWO YEARS OF AN ACTUAL SUSPENSION ALREADY SERVED IS EXCESSIVE WHERE THE RESPONDENT ATTORNEY STIPULATES COMMITTING MISCONDUCT WHICH VIOLATES DR 1-102(A)(4), THE RECORD INDICATES SUBSTANTIAL MITIGATION, INCLUDING SIGNIFICANT MENTAL ILLNESS, COMPLETE CANDOR AND COOPERATION WITH THE DISCIPLINARY PROCESS, PLEADING GUILTY TO CRIMINAL CHARGES, LEADING TO A SUSPENSION OF HIS LICENSE FOR A PERIOD OF OVER TWO YEARS, RESTITUTION, ADMISSION OF RESPONSIBILITY, AND OTHER MITIGATING CIRCUMSTANCES.**

Respondent's Objection is not to the conclusions of the Board with respect to the disciplinary violations found to have been committed by him, but to the sanction recommended by the Board, which Respondent contends is based in part on the misapprehension of both aggravating factors and mitigating factors, is disproportionately severe and unjust, and gives insufficient consideration to the weight of the substantial mitigating factors present in the case which call for a substantially lesser sanction than that recommended.

The Board recommends a sanction of an indefinite suspension, with no credit to be given for the time spent under suspension imposed by the Court on November 8, 2004 upon Mr. Schwieterman's conviction of one felony offense in the Court of Common Pleas of Hamilton County. Since, if that sanction were imposed, Mr. Schwieterman could not apply for reinstatement of his license for two years thereafter, and since it takes approximately one year for the reinstatement process to be completed, even if Mr. Schwieterman were

successful in obtaining reinstatement of his license, he will have served an actual suspension of at least five years. Considering the mental and emotional illness, which precipitated the course of conduct resulting in his transgressions, other significant mitigation, his present fitness, and lesser sanctions frequently imposed for similar conduct, the recommendation of the Board is unnecessarily draconian and disproportionately severe.

The subject of this Brief is limited to argument on behalf of Respondent, Mr. Robert C. Schwieterman with respect to sanctions to be imposed upon him for the violations of the Disciplinary Rules which were stipulated by Relator and Respondent and which have been submitted to the Board and admitted into evidence.

It is Mr. Schwieterman's position that, although his transgressions were serious, he has already suffered a two year actual suspension of his license, imposed November 8, 2004 by the Supreme Court upon Mr. Schwieterman's conviction of a felony. In brief, a major causative factor is mental/emotional illness from which Mr. Schwieterman had suffered for several years. This is not offered as a defense, nor as a justification, nor as an excuse, but as a reason for the misconduct. The following Brief will discuss Mr. Schwieterman's progress in dealing with that mental disability, the other punishments which he has suffered, other mitigating factors, and will offer a suggested sanction which recognizes the serious nature of the misconduct, but also that Mr. Schwieterman has recovered sufficiently to once again be trusted with his license to practice law.

\* \* \* \* \*

“To determine the appropriate sanction, we consider ‘the duties violated, the actual injury caused, the lawyer’s mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases,’” *Disciplinary Counsel v. Connors*, 97 Ohio St.3d 479, 2002-Ohio-6722, 780 N.E.2d 567, ¶ 16, *Stark County Bar Ass’n v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818.

As to the first factor, the duties violated are several, have been stipulated by the parties, admitted to by Mr. Schwieterman, and are set forth on Page 7 of the stipulations. The second factor, the lawyer’s mental state is a significant factor in this case, and will be discussed in the discussion of mitigating circumstances, of which there are several in addition to Mr. Schwieterman’s mental condition. This Brief will conclude with a discussion of sanctions imposed in similar cases.

The Court has set forth Guidelines for Imposing Lawyer Sanctions which lists aggravating and mitigating factors to be considered. Rule 10, Rules and Regulations Governing Procedure on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline of the Supreme Court.

**A. AGGRAVATING FACTORS:**

**1. Prior disciplinary offenses.** Mr. Schwieterman has no prior disciplinary offenses or proceedings.

**2. Dishonest or selfish motive.** There is, obviously, a dishonest or selfish motive

behind theft offenses. Mr. Schwieterman has never claimed to be not guilty by reason or insanity, nor that at the time of the offenses, he did not know right from wrong, nor that he was unable to conform his conduct to the requirements of the law. At the same time, however, the commission of the offenses were related to his ongoing mental illness, depression, panic over finances, etc., about which he and Mrs. Schwieterman testified. Had he been in better mental and emotional shape at the time, he would have been better able to resist the temptation. And, it must be recalled, both the Menninger Clinic reports and those from his therapist, Mr. Malone, indicated that part of the mental illness involved self-destructive behavior. The acts of taking money which have led to his conviction and these proceedings as well are the only self destructive acts presented by the record in this case.

**3. And 4. A pattern of misconduct, and multiple offenses.** There was a pattern of misconduct, all of the same essential nature, which resulted in multiple offenses. However, the offenses all occurred within a fairly short period of time, with the same victim, the Phillips Law Firm. Mr. Schwieterman worked for the Phillips Law Firm for six months, and the activities generating most of these offenses occurred toward the end of his employment with the Phillips firm. Mr. Schwieterman testified that the misconduct occurred within the last three month of his association with the Phillips Law Firm (Tr. 79).

**5. Lack of cooperation in the disciplinary process.** This aggravating factor is completely absent, as the Board acknowledged, Report, ¶ 61. To the contrary, Mr. Schwieterman was cooperative at the outset, beginning with the initial intervention and his

involvement with the Ohio Lawyers Assistance Program (OLAP) even before a grievance or criminal charges were filed.

**6. Submission of false evidence, etc.** This aggravating factor is absent.

**7. Refusal to acknowledge the wrongful nature of the conduct.** This aggravating factor is completely absent. In his initial submission to the first letter received from a member of the Bar Association's grievance committee, Mr. Schwieterman admitted fully each and every offense claimed by Mr. Phillips. In fact, he used words such as "misappropriated" and "confiscated" to describe his conduct. Thus, he freely admitted the wrongful nature of his conduct. In addition, he entered a plea of guilty to felony theft in the Court of Common Pleas of Hamilton County in connection with these offenses, and has stipulated in these very proceedings all of his offenses, the wrongful nature of his conduct, and the violation of several Disciplinary Rules. see transcript 93-94, 96.

The Board acknowledged that Mr. Schwieterman "was genuinely remorseful for his actions." Report, ¶ 61. But then the Board concluded that "Respondent had not yet fully appreciated the wrongful nature of his own misconduct." Report, ¶ 72. These are totally contradictory findings as to what even the Board characterized as "crucial." *Id.* The Board's conclusion that Mr. Schwieterman's response to a question "suggested" that he has not yet fully appreciated the wrongful nature of his misconduct is not only unsupported by this record; it is belied by it. *Id.*

**8. and 9. Vulnerability and harm to the victim, and Failure to make restitution.**

The victim is Mr. John Phillips, the proprietor of the Phillips Law Firm. Mr. Schwieterman made the restitution to Mr. Phillips required by the Court of Common Pleas in the criminal case, \$9,400.00. In addition, Mr. Phillips filed a civil action against Mr. Schwieterman. Mr. Schwieterman testified at the hearing before this Panel that he has settled that case (Tr. 115). It appears, then, that there is no lasting harm to the victim, and that full restitution has been made. No restitution has ever been ordered paid to anyone other than Mr. Phillips. He is the victim, not the clients in the various cases. Mr. Schwieterman testified that he never misappropriated a client's money (Tr. 107).

The Board is evidently confused as to the identity of the victim of Mr. Schwieterman's misconduct. It is Mr. Phillips. The counsel for Relator made it plain as much in his opening statement to the Panel hearing the Disciplinary case, as do the Stipulations:

... the misconduct primarily involves conversion of funds *from the Phillips Law Firm.*

And the criminal charges were for theft from the Phillips Law Firm, as counsel for Relator again stated:

There was an eight-count indictment issued against the Respondent in March of 2004 for theft *from the Phillips law firm.*

(Tr. 12). This is not a case of conversion of the property of the client; it is conversion of the property of Mr. Schwieterman's employer, Mr. Phillips, and the Phillips Law Firm.

The Court has recognized that misconduct directed against the respondent lawyer's law firm is less aggravated than misconduct directed toward the client, *Disciplinary Counsel v. Markijohn*, 99 Ohio St. 3d 489, 2003-Ohio-4129.

## **B. MITIGATING FACTORS:**

### **1. Mental disability contributing to the misconduct.**

Mr. Schwieterman suffered a mental illness which contributed to the misconduct which gave rise to these proceedings. The Court has recognized mental illness, specifically depression, as a mental illness which should be accorded substantial consideration in the determination of the appropriate sanction to be imposed upon an attorney who has committed misconduct, *Cincinnati Bar Association v. Stidham*, 87 Ohio St.3d 455, 2000-Ohio-476, 721 N.E.2d 977. BCDG Proc Reg 10 (B)(2)(g) has been amended to include mental disability as well as chemical dependency.

Under the Rule, in order for mental disability to be considered as a mitigating factor, there must be a diagnosis of a mental disability by a qualified health care professional, a determination that the mental disability contributed to cause the misconduct, and a prognosis from a qualified health care professional that the attorney will be returned to competent, ethical professional practice under specified conditions.

The Menninger Clinic, a qualified health care professional organization, examined and treated Mr. Schwieterman. Reports were received from Dr. Efrain Bleiberg, M.D. the chief of psychiatric medicine at Menninger; Jon G. Allen, PhD, a psychologist; and Donna

Yi, M.D. Each submitted a separate report, diagnosing Mr. Schwieterman as having a depressive disorder, attention deficit hyperactivity disorder. His mental disorder, depression characterized by impulsive behavior, was the cause of “self-destructive behavior,” which can refer only to the thefts which are the subject of this action. Indeed, other than the thefts, there is no evidence of the self-destructive behavior described by these mental health professionals. The three health care professionals at Menninger thus diagnosed both mental illness (principally depression) and a causal connection between that mental illness and the misconduct generating this complaint, described as “self-defeating” or “self destructive” behavior.

His therapist, Mr. Malone, submitted a report indicating that Mr. Schwieterman’s depression included “self sabotaging behavior,” and that his mental state and impulsiveness led him to make poor decisions that “greatly impact his future, family, clients and business associates.” Dr. Kennedy, the Relator’s psychiatric witness, stated in his report, and confirmed in his testimony, that Mr. Schwieterman was suffering “moderate depression and anxiety” at the time of the offense, and that he still suffers with some moderate degree of anxiety and depression. Dr. Kennedy’s report is silent with respect to causation, stating only that Mr. Schwieterman knew right from wrong at the time of the misconduct (which is undisputed). The Board’s conclusion that there is no causal relationship between the mental illness and the commission of the misconduct is unsupported in the record.

The reports from the Menninger Clinic and Mr. Malone both indicate that Mr.

Schwieterman's mental disability has been plaguing him for many years, going back to childhood and is based partly on a lack of support, and even rejection, from his family. Mrs. Schwieterman, who has known her husband since both were in Kindergarten, confirmed these facts in her testimony before the Board.

Dr. Kennedy's report is straightforward and essentially accurate. There are aspects of his testimony at the hearing which deserve comment, however. Both the report and his testimony conclude that, at the time of the misconduct, Mr. Schwieterman was aware of the difference between right and wrong. This is accurate. That test is the one usually applied in criminal cases where the accused enters a plea of not guilty by reason of insanity. Mr. Schwieterman entered a straight guilty plea, and never has, and does not now, claim that his mental condition is a defense to the charges brought against him in the criminal proceedings, nor in this disciplinary proceeding.

Nor does Mr. Schwieterman claim his mental illness, though it was involved in the causation of the misconduct, is justification or an excuse for his misconduct. It is not. However, it is the primary reason that this misconduct occurred. At the hearing, Dr. Kennedy's testimony, guided by the questioning on direct, seemed an attempt to minimize the mental disability suffered by Mr. Schwieterman, although Dr. Kennedy agreed that Mr. Schwieterman suffered from "a moderate degree of mental illness" at the time of the misconduct, and "continues to struggle with some moderate degree of anxiety and depression," concluding, however, that Mr. Schwieterman does not suffer from any mental

illness “that would render him unable to perform his professional duties in a responsible fashion.” (Report, Stipulations).

It is not difficult to conclude that Mr. Schwieterman suffered a more severe illness than intimated by Dr. Kennedy’s testimony at the hearing. The Menninger reports indicate that Mr. Schwieterman had suffered from emotional or mental difficulties all of his life. The current disorders became more acute in about the year 2000, according to the testimony of both Mr. Schwieterman and his wife (Tr. 74, 131-132).

An examination of the medications prescribed for him by the Menninger Clinic, and other physicians during his struggle with depression, clearly shows the seriousness of the problem. At one time or another during the present treatment, Mr. Schwieterman was prescribed, and took, Effexor, Zoloft, Trazodone, Wellbutrin, Previously, he had been prescribed Ritalin and Celexa at Menninger. These are all major antidepressants or antianxiety medications.

One other medicine prescribed at the Menninger Clinic, while Mr. Schwieterman was there, and also to be taken after his release, according to Dr. Yi’s discharge summary, was Risperdal (Risperidone). That is an antipsychotic medication approved in the treatment of schizophrenia and acute manic phases of bipolar disorder, as well as depression. While Mr. Schwieterman fortunately does not suffer from either schizophrenia or bipolar disorder, the prescribing physicians clearly believed that he could benefit from those medications. The prescription of such high-powered medications indicates that Mr. Schwieterman’s anxiety

and depression were substantial, and serious, and not, as Relator apparently attempted to get Dr. Kennedy to say, some minor emotional upset.

The fact that the Menninger Clinic felt that Mr. Schwieterman needed to remain at the Clinic for thirty days also underscores the seriousness of his illness, as does the fact that when he left Menninger, the Clinic gave him a prescription for Risperdal, as well as Effexor, Wellbutrin and trazodone, as well as other medications, and recommended that he see Mr. Malone, his Ohio therapist, his primary care physician, and OLAP, upon his return to Cincinnati.

Dr. Kennedy had to admit that there had to be reasons that the doctors at Menninger had to have reasons for prescribing Zoloft, Zyprexa, Risperdal, Effexor and Wellbutrin for Mr. Schwieterman, and that some of these medications given him at Menninger was a direct response to Mr. Schwieterman's situation (having been referred to Menninger at OLAP's request because of his misconduct) (Tr. 67).

Mr. Malone's and Dr. Kennedy's reports also conclude that Mr. Schwieterman is capable at the present time of resuming the practice of law, with, as Mr. Malone put it, "with integrity, compassion and competence." (Malone Report 6-9-04, 4-26-06). Dr. Kennedy's report concludes that "at the present time - Mr. Schwieterman suffers mild to moderate levels of depression and anxiety, but not of the type or severity that would render him unable to perform his professional duties in a responsible fashion." This satisfies the requirement that a health care professional give an opinion that the attorney will be returned to

competent, ethical professional practice under specified conditions. That requirement is satisfied by Dr. Kennedy's report and testimony, and Mr. Malone's reports as well.

**2. Absence of prior disciplinary record.** This mitigating factor is present. This is the first disciplinary complaint filed against Mr. Schwieterman with the Board of Commissioners. This mitigating factor is not mentioned in the Report; the Board evidently did not consider this mitigating factor.

**3. Absence of a dishonest or selfish motive.** As with Aggravating Factor No. 2, there is an element of a dishonest or selfish motive in the act of theft. But, as was pointed out above, "the commission of the offenses were related to Mr. Schwieterman's ongoing mental illness, depression, panic over finances, etc., about which he and Mrs. Schwieterman testified. Had he been in better mental and emotional shape at the time, he would have been better able to resist the temptation. And, both the Menninger Clinic reports and those from his therapist, Mr. Malone, indicated that part of the mental illness involved self-destructive behavior. The acts of taking money which have led to his conviction and these proceedings as well are the only self destructive acts presented by the record in this case." *Ante*, section A (2).

**4. Timely good faith effort to make restitution and to rectify the consequences of misconduct.**

Mr. Schwieterman made restitution to Mr. Phillips through the Hamilton County Probation Department in the amount established by the Court of Common Pleas, \$9,400.00,

shortly after he was sentenced. Mr. Phillips had filed a civil action against Mr. Schwieterman, claiming additional damages, and, as Mr. Schwieterman testified, he has settled that case with Mr. Phillips. (Tr. 115) This mitigating factor is present, as the Board recognized in its report, at ¶ 61..

**5. Full and free disclosure to the Disciplinary Board, and a Cooperative Attitude toward the Proceedings.**

The record in this case reflects Mr. Schwieterman's full and free disclosure to the Board, and also his cooperative attitude toward not only these proceedings, but also the proceedings in the criminal justice system:

- Mr. Schwieterman has stipulated Relator's entire case. The stipulations closely track the allegations in the complaint, and Mr. Schwieterman has stipulated all of those allegations, including, not only the facts alleged, but the disciplinary violations alleged in the stipulations.
- Mr. Schwieterman pleaded guilty to felony theft in the Court of Common Pleas of Hamilton County.
- Mr. Schwieterman made complete disclosure to the Cincinnati Bar Association in his response to their first communication with respect to the allegations brought by Mr. Phillips. He provided information on every client during his tenure with the Phillips firm, regardless of whether or not the particular client was involved in the misconduct alleged here. (Tr. 86-87).

From the outset, Mr. Schwieterman, without qualification, fully admitted his

criminal conduct and, implicitly, his unethical conduct as well, with respect to his handling of several cases. He did so in writing. Those admissions were submitted by Relator to the Office of the Hamilton County Prosecutor and formed the bases for the Indictment returned against him by the Grand Jury. The Board found that Mr. Schwieterman had established this mitigating factor, Report, ¶ 61.

#### **6. Character and Reputation:**

It is important, when obtaining testimony or letters attesting to the character of an attorney undergoing a disciplinary proceeding, to make full disclosure to the persons whose testimonials are being sought of the basis for the charge, the conduct which occurred, and the attorney's situation, both at the present time, and at the time of the misconduct, with respect to causative factors. Accordingly, because of a reluctance to share with such persons the very personal and private matters involved in Mr. Schwieterman's emotional and mental health, it was decided not to submit such testimony to the Panel, whether in testimony or correspondence.

#### **7. Other Penalties and Sanctions Imposed against Respondent.**

In addition to the sanctions which will be imposed by the Court, Mr. Schwieterman has suffered and will continue to suffer, from additional sanctions which have been, and which will be imposed on him.

- **Felony conviction.** By virtue of his guilty plea Mr. Schwieterman was convicted of a felony offense. He was (1) placed on probation for five years; (2) required to

complete 300 hours of community service, which he has completed; (3) required to submit to complete drug testing (also completed) (4) continue his therapy with Mr. Bill Malone LISW, and medical supervision of his medication by his regular physician, Dr. Walters and (5) restitution of \$9,400, without credit for his share of the fees (which he did not claim). Although he was not incarcerated, he now has a felony criminal record, which, as he testified, is a considerable impediment to employment. As the Panel heard from Mr. Schwieterman and Mrs. Schwieterman, this conviction and the inability to practice law since his suspension have worked a considerable financial hardship on the Schwietermans, including their four children.

- **Actual suspension of his license to practice law.** Upon his conviction of felony theft, the Court in November 2004 suspended Mr. Schwieterman's license to practice law in Ohio. To date, Mr. Schwieterman has served more than two years of an actual suspension of his license to practice law. This is a substantial sanction, particularly considering the sanction imposed on some other lawyers upon proof of commission of similar offenses. See *post*, at p. 23. And, as stated *ante*, the financial hardship placed upon the family by Mr. Schwieterman's conduct, his conviction, and the suspension of his license to practice law has been severe (Tr. 70 et seq., 126 et seq.).
- **Continued financial hardship.** The financial hardship set forth above will continue after the conclusion of these proceedings even if, as is hoped, Mr. Schwieterman soon regains his license to practice law.

The Board found that this mitigating factor -- other punishments for Mr. Schwieterman's conduct -- is present, ¶ 67.

**.8. Other interim rehabilitation, and other mitigating factors.**

**OLAP Participation.** It is significant that, when Mr. Schwieterman's misconduct first came to light, an intervention process commenced in which several parties became involved. Notably, OLAP became involved and as a result, Mr. Schwieterman went almost immediately to the Menninger Clinic in Houston, Texas for evaluation and treatment. A comprehensive report has been stipulated and submitted to the Panel. The significance is in the fact that, even prior to the filing of a complaint with the Cincinnati Bar Association, even prior to the institution of the criminal investigation and charges, Mr. Schwieterman had enrolled in OLAP. Ms. Krzmarich, an associate at OLAP, testified that OLAP's evaluation of Mr. Schwieterman was that he suffered from mental health difficulties (Tr. 120). Mr. Schwieterman and entered into immediate mental health treatment. He was treated for 30 days at the Menninger Clinic. OLAP was represented at the hearing by its Director, Mr. Scott Mote, and Ms. Stephanie Kzmarich, who testified on Mr. Schwieterman's behalf at the hearing before the Panel. She stated that Mr. Schwieterman's participation in the OLAP program has been "excellent". He has been in 100% compliance with the program's requirements. (Tr. 121). The Board recognized that this factor is present, ¶ 66.

**Remorse.** Mr. Schwieterman expressed remorse for his actions, and demonstrated his awareness of the seriousness of his transgressions, and the wide ranging consequences of

his acts. He is sincerely sorry, for his actions, and for their consequences. Significant and compelling evidence of Mr. Schwieterman's remorse is the testimony of his wife, Brenda. She described for the Panel how devastating the entire episode has been to Mr. Schwieterman, who is aware that he has betrayed the trust placed in him by Mr. Phillips, by his wife, and his children, and the legal profession itself. Restitution can be, and has been made. But it will take more to regain the trust of those affected directly by his actions, as well as the profession and the public as well. And Mr. Schwieterman knows it.

Mr. Schwieterman testified at length about his problems with depression and anxiety, much lengthier than the brief excerpt quoted by the Board in connection of its unsupported conclusion that he does not "fully appreciate" the wrongful nature of his own misconduct. In support of its conclusion, the Board cited Mr. Schwieterman's statements that his conduct was "dumb," "cutting corners," and "giving the impression that he stole from clients." Report, ¶ 72. Given the testimony in this case, the evidence admitted and the stipulations, it is difficult to see how the Board (in this case a two-member Panel) could make such a conclusion.

Certainly, his actions were dumb, and there was some cutting of corners, but the impression he stole from clients is incorrect, and is belied by this record, which will be demonstrated below. As it concluded previously in the Report, Mr. Schwieterman "admitted at the hearing his misconduct, apologized and was genuinely remorseful for his actions." ¶ 61.

Mr. Schwieterman testified about the difficulties he suffered due to the depression and anxiety at the time of the misconduct. The effects of the situation on his immediate family were substantial, because of his reaction to financial and other difficulties was affected and aggravated by his depression and anxiety disorders.

Mr. Schwieterman testified that he was torn up about his treatment of Mr. Phillips who had befriended him, given him a job, took him under his wing. “And this is how I thank him. . . .I’m still torn up about that to this day.” (Tr. 95). He testifies that he owes an apology to the profession as a whole. (Tr. 96). After thanking Mr. Phillips, the Bar Association and OLAP for being there for him and giving him the help that he needed, when he needed it. He then stated,

But I am very apologetic to the bar. Our profession has so many problems. It has so many problems with perception with the public. I know only too well from my own family that I – it’s in the paper. It’s another person who did something that’s not right. The impression is that I stole from clients. And it’ a noble profession and I’ve let it down, and I’m really sorry.

(Tr. 97).

Mrs. Schwieterman testified on her husband’s behalf. When asked her perceptions of her husband’s reaction to the present situation, she stated, “He feels horrible” (Tr. 133). She testified that Mr. Schwieterman is “very, very, sorry. . . . He’s very ashamed. He’s very guilt-ridden (Tr. 134).

The Board found that Mr. Schwieterman was genuinely remorseful about his misconduct.

### C. SANCTIONS IMPOSED IN OTHER CASES:

One of the Disciplinary Rules which Mr. Schwieterman stipulated that he had violated is DR 1-102(A)(4), prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation. In 1995, the Supreme Court held that violation of this Rule requires a sanction of an actual suspension of the Respondent's license, *Disciplinary Counsel v. Fowerbaugh* 74 Ohio St. 3d 187, 190, 1995-Ohio-261, 658 N.E.2d 237. There are two things worth noting about the *Fowerbaugh* rule. First, Mr. Schwieterman has received an actual suspension, imposed in November, 2004, which is still in effect. Thus, Mr. Schwieterman has served, and continues to serve, over two years of an actual suspension.

The second *Fowerbaugh* consideration is that the Court now does not automatically impose an actual suspension for violations of DR 1-102(A)(4). The following cases involved violations of DR 1-102(A)(4).

In *Disciplinary Counsel v. Carroll*, 106 Ohio St. 3d 84, 2005-Ohio-3805, the Court imposed a six month suspension, all of which was stayed, on the Executive Director of the state Barber Board who had submitted inaccurate time records misrepresenting the number of hours worked. He was convicted of a misdemeanor charge of dereliction of duty and was fined. The Supreme Court stated that mitigating evidence can justify a lesser sanction than required by *Fowerbaugh* for violations of DR 1-102(A)(4).

Similarly, in *Disciplinary Counsel v. Markijohn*, 99 Ohio St. 3d 489, 2003-Ohio-4129, at ¶ 7, the Court imposed a stayed six month suspension for violation of DR 1-

102(A)(4), where the Respondent failed to make required payments to a retirement account as part of his law firm's retirement plan. He nevertheless falsely reported to the firm that he had, in fact, made the payments. In addition, he filed false state and federal income tax returns, claiming as deductions the payments he had not made to the retirement account. The law firm relied upon the Respondent's misrepresentations in preparing and filing tax returns for the firm's retirement plans. He did, however, advise the firm of his misrepresentations and made restitution. The Board recommended, and the Court agreed, that the mitigation of extreme marital and financial difficulties, sincere remorse, the absence of prior disciplinary proceedings, making restitution, and other mitigation warranted a suspended suspension. The Board and the Court also considered the fact that the misrepresentations were made to the other members of the firm, and not to a client or a court. While there was additional mitigation other than the factors set forth herein, the factors that Mr. Schwieterman cites here parallel closely the mitigating factors which are present in this case.

In this case, contrary to the apparent conclusion of the Board that the victim(s) were clients, the Board ignored the stipulations that Mr. Phillips was the victim, the fact that the indictment in the criminal case specifically named Mr. Phillips as the victim. Mr. Markijohn will not serve any suspension, and Mr. Schwieterman has served two years already, of a total, actual suspension.

In *Disciplinary Counsel v. Wrenn*, 99 Ohio St. 3d 222, 2003-Ohio-3288, the Court imposed a six month stayed suspension on an assistant prosecuting attorney who was aware at the time a criminal defendant pleaded guilty that a report had been returned from the BCI laboratory establishing that DNA evidence found on the 12 year old alleged victim of criminal sexual activity was not that of the accused. The prosecutor did not inform the defendant, his counsel, or the trial court of this exculpatory evidence. In addition, the prosecutor interviewed the purported victim, who changed his story and admitted that the semen was his, and not that of the Defendant. Upon his plea of guilty, the Defendant was sentenced to three years in prison. When the prosecutor's perfidy came to light, a grievance was filed, and he was found to have violated DR1-102(A)(4), three other Disciplinary Rules, and several rules of Discovery. Regardless of the egregiousness of the prosecutor's misconduct, he received a sixth month suspension, all of which was stayed.

In *Cincinnati Bar Ass'n v. Statzer*, 101 Ohio St. 3d 14, 2003-Ohio-6649, the Court imposed a six month suspension, entirely stayed, for violation of DR 1-102(A)(4), again acknowledging that in some cases, mitigation may be such as to justify a more lenient sanction than some period of actual suspension.

Even where an actual suspension is imposed, the Court in a proper case will credit the time served on an interim suspension imposed after conviction of a felony against the suspension ultimately imposed after the conclusion of the grievance process. This is such a case, and Mr. Schwieterman has served two years of an actual suspension.

In *Akron Bar Ass'n. v. Peters*, 94 Ohio St. 3d 215, 2002-Ohio-639, the Court had imposed an interim suspension upon the Respondent's being convicted of a felony in state court, having an unlawful interest in a public contract, and conflict of interest, a misdemeanor. In addition, she was convicted in federal court of conspiracy to commit mail fraud. She was actually incarcerated for four months in the federal case. In this case, decided in January, 2002, the Court imposed a two year actual suspension, but deemed the suspension to have commenced almost two years before, on May 23, 2000.

In *Disciplinary Counsel v. Agopian*, 112 Ohio St. 3d 103, 2006-Ohio-6510, the Court issued a public reprimand to a lawyer who submitted inaccurate fee bills for services as an appointed counsel in criminal cases, sometimes billing for more than 24 hours on a given day. The Board had recommended a one year stayed suspension. In *Disciplinary Counsel v. Holland*, 106 Ohio St.3d 372, 2003-Ohio-5322, the Court issued a one year suspension for an attorney also guilty of double billing in bills to the courts for representation as appointed counsel. In *Holland*, the Court cited the absence of a prior disciplinary record, Respondent's full cooperation with the investigation, and his acceptance of responsibility for his conduct. In *Disciplinary Counsel v. Johnson*, 106 Ohio St. 3d 365, 2005-Ohio-5323, also a double billing case, an attorney who worked in Holland's office and was his secretary for years prior to becoming a lawyer, received a one year suspended suspension with six months stayed on the Respondent, because she was a "novice" attorney, and had worked with Holland. Johnson exhibited the same mitigating factors as Holland,

the absence of a prior disciplinary record, her full cooperation with the investigation, and his acceptance of responsibility for her conduct.

In *Disciplinary Counsel v. Carroll, supra*, the Court imposed a one year suspension, with six months stayed, on a member of the state Barber Board, for billing excessive hours and receiving money therefor which had not been earned. Among of the mitigating circumstances found by the Court to warrant a lesser sanction than that recommended by the Board was that Carroll had already been appropriately punished by the criminal justice system, and that he made full restitution. *Id.*, ¶14.

In this case, Mr. Schwieterman was convicted of a felony, and received a sanction of probation, community service and an order for restitution, which was paid almost immediately. His 300 hours of community service has been completed, and he has continued in therapy for his depression.

In *Cincinnati Bar Assn. v. Buckley*, 94 Ohio St. 3d 333, 2002-Ohio-884, the Respondent received a sanction of a two year suspension, with one year stayed, for participating in sham settlement negotiations made a stipulation of false facts to the detriment of his client, and did not inform the client until confronted by the client. The Court cited Buckley's lack of a prior disciplinary record, cooperative attitude throughout the proceedings, his commitment to sobriety (he suffered from a severe alcohol problem) and his completion of a contract with OLAP.

Here, while the facts underlying the violation of DR 1-102(A)(4) were quite different

from those in this case, Respondent also has entered into a contract with OLAP, and his participation was 100%, and was considered “excellent” by OLAP, according to Ms. Krznarich, testifying for Mr. Schwieterman on behalf of OLAP (Tr.121).

In *Cincinnati Bar Assn. v. Stidham*, supra, the Court imposed a two year suspension with the second year suspended, due principally because of the Respondent’s depression, and the Court also cited the cooperation with relator, including his stipulation of the facts and most of the disciplinary violations as well, a lack of prior disciplinary history, expressed remorse and took responsibility for his actions. Many of the factors present in *Stidham* are present here as well.

And in *Disciplinary Counsel v. Bowman*, 110 Ohio St. 3d 480, 2006-Ohio-4333, the Court cited favorably the fact that the respondent acknowledged the need for mental-health services and sought professional assistance; that he obtained the services of OLAP. While the Court declined to impose an indefinite suspension, it imposed a two year suspension in order to protect the public and to ensure that the respondent is able to successfully manage his mental illness. *Id.*, at ¶ 39.

## RECOMMENDED SANCTION

“[T]he purpose of the disciplinary process is not to punish the offender but rather to protect the public,” *Disciplinary Counsel v. O’Neill*, 103 Ohio St. 3d 204, 2004-Ohio-4704, 815 N.E.2d 286, at ¶ 53.

Mr. Schwieterman has taken the opportunity afforded him during his interim suspension to get his depression and anxiety under control, and to understand himself, and what led to his misconduct; he is aware that he must conform his conduct not only to the requirements of the law, but to the highest aspirations of our Profession. Significantly, one of the characteristics of his mental and emotional disability was his low self-esteem and lack of self-respect. In a lesser individual, the events giving rise to the various proceedings against him might actually reinforce his negative self-image and make recovery even more difficult, if not impossible. But Mr. Schwieterman has availed himself of the assistance available to him and has regained his self respect as he has for the first time in his life acquired an appreciation of the situations and attitudes which led him to transgress. As the reports of Dr. Kennedy, Mr. Malone, and the testimony of Ms. Kzmarich of OLAP indicated, Mr. Schwieterman is presently fit for his license to be restored to him.

The Board also slighted Mr. Schwieterman’s medical problems as a mitigating factor, accepting Dr. Kennedy’s testimony that in his opinion he did not see the depression and anxiety which he diagnosed as well as the Menninger Clinic and Mr. Malone, as a causative factor, though the Board acknowledged Mr. Schwieterman suffered from a “moderate”

depression and anxiety. Those are recognized as mental illnesses. This is also shown by the fact that Menninger, which, it should be noted, treated Mr. Schwieterman at the time of the misconduct, prescribed many heavy-duty medications, Zoloft, Zyprexa, Risperdal, Effexor and Wellbutrin for him. This fact alone, admitted by Dr. Kennedy, establishes the connection between the disease and the misconduct. Mr. Schwieterman was in such shape that he was sent to Menninger two to three days after the intervention with OLAP and other interested parties. The doctors at Menninger, at least two psychiatrists and psychologists who made reports, evidently saw something that Dr. Kennedy would not admit, and could not know, not having examined Mr. Schwieterman at that time. Both Menninger and Mr. Malone, the psychotherapist, described the depression and anxiety disorders as causing the self-destructing behavior in which Mr. Schwieterman engaged at the time of the misconduct.

The Board, however, seizes on brief excerpts from Mr. Schwieterman's testimony and concludes that he does not fully appreciate the wrongfulness of his conduct, and discusses the aggravating factors. But the Board incorrectly concludes that the pattern of misconduct involving the misappropriation of money admitted by Mr. Schwieterman involves "multiple clients." ¶ 73

In justifying the recommendation of the imposition of an indefinite suspension, the Board found that the appropriate sanction for misappropriation of funds from a client is disbarment, with the possibility that mitigating circumstances could lead to a lesser sanction. Report, ¶ 74. The Board found the existence of mitigation rendered disbarment in this case

a sanction that is “too severe” and recommended an indefinite suspension of Mr. Schwieterman’s license.¶ ¶ 75, 76.

But, as was emphasized previously, the victim here was the Phillips Law Firm, not “multiple clients;” the indictment to which Mr. Schwieterman pleaded guilty named the victim as Mr. Phillips; Bar counsel, in opening statement to the Panel of the Board, asserted that the misconduct involved conversion of funds or theft “from the Phillips Law Firm.” (Tr. 12). The indictment in the criminal case contained eight counts of theft. The victim in each count, including the seven counts dismissed as part of the plea agreement, was stated in the indictment to be “Phillips Law Firm, Inc.” And the sentencing entry stated, “DEFENDANT TO MAKE RESTITUTION IN THE AMOUNT OF \$9,400.00 TO PHILLIPS LAW FIRM.”

Mr. Schwieterman testified, in response to a question from the panel, “. . . I want to emphasize that I have never taken money from any clients ever . . . “ (Tr. 107).

The Board further concludes that Mr. Schwieterman has not fully appreciated the wrongful nature of his own conduct. But, in a response to a question from the Panel, Mr. Schwieterman directly testified, “I knew what I was doing was wrong.” (Tr. 100).

There were other violations, most of which stemmed from the misconduct involving the money, and all caused by Mr. Schwieterman’s depression and anxiety.

In *Disciplinary Counsel v. Markijohn, supra*, the Court considered the fact that the misconduct, the lawyer’s misrepresentations, were made to the other members of his firm,

and not to a client or a court. Markijohn was given a stayed six month suspension for a violation of DR 1-102(A)(4). In that case, the lawyer lied to partners in his firm about his contribution to a firm retirement account. He filed a false tax return and his misrepresentations caused the firm to file false tax returns for the retirement plans. Certainly, his misrepresentations caused the firm a substantial financial loss, for which he made restitution (as has Mr. Schwieterman here).

This case is analogous to *Markijohn* in that the victim was Mr. Schwieterman's law firm-employer, rather than clients, and the sanction, a stayed six month suspension, is at the low end of the scale of sanctions, while the indefinite suspension recommended by the Board in this case is near the top of that scale, being surpassed only by disbarment (which the Board correctly found is "too severe." Report, ¶ 75.).

While the misappropriation of funds is the principal violation, the other violations are also attributable to Mr. Schwieterman's mental illness, particularly those involving neglect.

The Board recommends a sanction of an indefinite suspension, with no credit for the time served, and which will continue to be served, under the Court's interim suspension. It is respectfully submitted that such a sanction is unnecessarily draconian, as well as being impractical and unreasonable. The reinstatement process where an indefinite suspension is imposed requires an application, a referral to the Board of Commissioners, another hearing before this Panel of Commissioners, for the purpose of ascertaining that which was already demonstrated in this proceeding, that the public will be protected and Mr. Schwieterman will

be sufficiently punished. The matter then goes to the full Board, and its report then is docketed in the Supreme Court, where objections can be filed, briefs prepared, and oral argument held. The entire process of reinstatement can easily consume an entire year. The mitigation evidence presented in the hearing on the application for reinstatement will be exactly the same as that presented on Mr. Schwieterman's behalf in this proceeding. Thus, the imposition of an indefinite suspension on a lawyer consecutive to a two year interim suspension already served amounts to a suspension of **at least five years**.

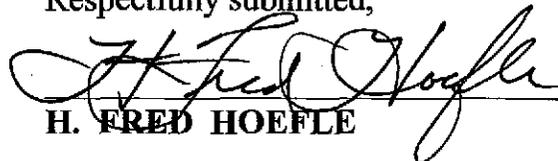
A suspension beyond that which has already been served would serve no useful purpose. A two year actual suspension is substantial, serious punishment. Mr. Schwieterman has also undergone the humiliation of the criminal proceedings, and the publicity attendant thereto; while not incarcerated, he has been given substantial additional punishment, five years of complying with the rules of probation, and 300 hours of community service, which he has completed. He has made the \$9,400.00 restitution imposed by the court in the criminal case, and has settled a civil suit brought against him by Mr. Phillips, the victim in the case.

Mr. Schwieterman has followed through with his psychiatric treatment, is taking the medicine currently prescribed, and is working with OLAP, and will continue to do so. He has approximately three years still to serve on probation. He will also continue with OLAP for as long as is necessary. He will have ample assistance and support should it be required.

## CONCLUSION

Mr. Schwieterman respectfully submits that an actual suspension of no more than two years with credit for the suspension already served will satisfy the goals of disciplinary proceedings to protect the public, as well as imposing a punishment sufficiently proportionate to the offenses committed, and proportionate to the sanctions imposed in similar cases.

Respectfully submitted,

  
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*Attorney for Respondent, Robert C. Schwieterman*

## CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2007, a true copy of this Objection and Brief in Support on Behalf of Respondent, Robert C. Schwieterman, was served by regular U.S.

Mail on counsel for Relator, the Cincinnati Bar Association, addressed to the following:

Stephen M. Nechemias, 425 Walnut Street, Suite 1800, Cincinnati, OH 45202

Pamela Popp, C/O Cincinnati Bar Association at 225 East Sixth Street, Cincinnati, OH 45202 .

  
H. FRED HOEFLE # 1717  
*Attorney for Respondent, Robert C. Schwieterman*

# APPENDIX

**BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

<b>In Re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 04-034</b>
<b>Robert C. Schwieterman</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0061353</b>	:	<b>Conclusions of Law and</b>
<b>Respondent,</b>	:	<b>Recommendation of the</b>
<b>Cincinnati Bar Association</b>	:	<b>Board of Commissioners on</b>
	:	<b>Grievances and Discipline of</b>
	:	<b>the Supreme Court of Ohio</b>
<b>Relator.</b>	:	
	:	

This matter came on for hearing on May 19, 2006 before Walter Reynolds, Panel Chair, Jean M. McQuillan and Judge Daniel Gaul, duly qualified members of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (Board). None of the panel resides in the judicial district from which the Complaint originated or served on the Probable Cause Panel that reviewed the Complaint. Judge Gaul was not in attendance at the May 19, 2006 Board hearing but the parties agreed and elected to have Judge Gaul review the transcript, and to participate in the deliberations to the same extent as if he were present at the hearing.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Prior to the hearing, the Relator and the Respondent entered into the following stipulations (including the Board's editorial corrections).

## STIPULATIONS

Relator and Respondent, through undersigned counsel, hereby admit the following Stipulations:

1. All facts necessary to determine whether Respondent violated Disciplinary Rules as alleged in Relator's Second Amended Complaint are contained in this Stipulation and shall be taken to be true.
2. Respondent admits that the facts so admitted constitute Disciplinary Rules violations as alleged in Relator's Second Amended Complaint and as set forth in this Stipulation.
3. Respondent, Robert C. Schwieterman, is an attorney duly admitted to the practice of law in the State of Ohio in 1993.
4. Respondent was employed as an associate attorney at Phillips Law Firm, Inc. from March 24, 2003, until November 14, 2003.
5. Respondent registered as "inactive" with the Supreme Court of Ohio for the biennium which began on September 1, 2001. He subsequently changed his registration status to "active" on November 13, 2001, and retained that status until the registration period ended on August 31, 2003. Respondent failed to register with the Supreme Court of Ohio for the current biennium, which began on September 1, 2003.
6. On December 5, 2003, Respondent was sanctioned \$250 for failing to comply with the continuing legal education requirements of Gov. Bar R. X. Respondent failed to pay that sanction.

### Brantford Butts Grievance

7. In June, 2003, while employed by Phillips Law Firm, Respondent undertook representation of Brantford Butts in a breach of contract action.

8. Respondent required Mr. Butts to pay a \$2,000 retainer in connection with his undertaking of representation of the matter.

9. Respondent accepted the retainer from Mr. Butts; however, Respondent failed to list Mr. Butts as a firm client and did not deposit the funds in the Phillips Law Firm IOLTA account but rather converted the funds for his own use.

10. When John Phillips, of Phillips Law Firm, learned of this discrepancy from Mr. Butts, Respondent lied to Phillips and said he never received the funds from Mr. Butts.

11. After Respondent's actions were discovered, Respondent returned the funds to Mr. Butts.

### Becky A. Schaaf Grievance

12. Respondent acquired a \$450 flat fee from Ms. Schaaf for the creation of a "will package."

13. Respondent failed to deposit the funds in the Phillips Law Firm IOLTA account and converted the funds for his own use.

### John D. Lahni Grievance

14. In November, 2003, Respondent undertook representation of Mr. Lahni in a child custody matter and requested and received a \$300 retainer from Mr. Lahni.

15. Respondent failed to deposit the funds in the Phillips Law Firm IOLTA account and converted the funds for his own use.

Cindy Stepanic Grievance

16. Respondent undertook representation of Ms. Stepanic in a criminal matter.

17. Respondent received and failed to turn over the \$2,000 fee to Phillips Law Firm; rather he converted it for his own use.

Sheri Moore Grievance

18. Respondent undertook representation of Ms. Moore in connection with a criminal matter and received a \$525 retainer from Ms. Moore.

19. Respondent failed to deposit the \$525 retainer in the Phillips Law Firm IOLTA account and converted the funds for his own use.

Qing S. Mei Grievance

20. Respondent undertook representation of Mei in connection with a family law matter and received \$875 for his services.

21. Respondent failed to turn over this income to the firm and converted the funds for his own use.

22. At a later time, Respondent received an additional \$175 from Mei and deposited those funds in the Phillips Law Firm IOLTA account.

Donald Lucas Grievance

23. In April, 2003, Respondent undertook representation of Mr. Lucas in connection with a child custody matter.

24. Respondent received a \$1,000 retainer from Mr. Lucas.

25. Respondent failed to deposit the \$1,000 retainer in the Phillips Law Firm IOLTA account or any other law firm bank account.

26. When Mr. Lucas received invoices from Phillips Law Firm that did not reflect the retainer was already paid, Respondent told Mr. Lucas not to pay the bill and not to worry about it.

27. In the summer of 2003, Respondent requested and received another \$500 from Mr. Lucas, which was in the form of a check made out to Phillips Law Firm. Respondent failed to deposit the funds in the Phillips Law Firm IOLTA account and never cashed the check.

28. Additionally, Respondent arranged for several continuances in Mr. Lucas's case without his client's knowledge and told Mr. Lucas the opposing party filed the continuances. Respondent later confessed the continuances were at his own request due to personal problems.

29. Upon Mr. Lucas's request for a refund, Respondent wrote a personal check to Mr. Lucas for \$1,500. Respondent's check was twice returned for insufficient funds, but Mr. Lucas eventually received the refund. In addition, Respondent returned Mr. Lucas's check for \$500, which he had never cashed.

30. The following matters were first brought to Relator's attention in August, 2004.

Tonya Duritsch Grievance

31. During the fall of 2003, Respondent represented Tonya Duritsch in a divorce in Warren County. The husband in the divorce was not represented by counsel.

32. The court set a date for the final decree to be entered on October 10, 2003.

33. Respondent failed to submit the decree by that date, and was notified by the court that the case would be dismissed if the final decree was not submitted by October 17, 2003.

34. Respondent again failed to submit the final decree to the court, which dismissed the divorce action for failure to prosecute.

Ewell and Laura Brock Grievance

35. In 2003, while employed by the Phillips Law Firm, Respondent was retained to defend Ewell Brock, Jr. and Laura Brock in a lawsuit involving a family-owned business.

36. Respondent failed to notify the Brocks of his departure from the Phillips Law Firm in late 2003, and also failed to inform them of his departure from the city for the month of January, 2004, as further described below.

37. In March, 2004, Respondent contacted the Brocks and asked for another chance to represent them. They agreed because Respondent was very familiar with the details of their case. However, by May, 2004, the Brocks were concerned about Respondent's handling of their case and eventually retained substitute counsel.

38. Substitute counsel determined that Respondent had failed to file a timely answer and that a default judgment had been taken against the Brocks. However, substitute counsel was able to obtain relief from the default judgment.

39. The following matter was first brought to Relator's attention on January 12, 2005:

Edward L. Flottman Grievance

40. In July, 2004, Mr. Flottman and his wife engaged Respondent to prepare a living trust and to assist in the transfer of assets to that trust.

41. Respondent received \$1,500 as payment in full.

42. Respondent prepared and the Flottmans executed the documents, including a deed to transfer the Flottmans' residence to the trust.

43. Respondent failed to record the deed transferring the residence to the trust.

44. Mr. Flottman attempted unsuccessfully to contact Respondent concerning the status of the deed on numerous occasions between July and late November. Respondent failed to respond to any of Mr. Flottman's inquiries.

45. In late November, Mr. Flottman finally reached Respondent by phone. Respondent informed him that he would file the deed promptly.

46. Respondent failed to inform Mr. Flottman that he was under suspension from the practice of law by order of the Supreme Court of Ohio. The November 8, 2004 order required Respondent to notify all clients of his suspension within 30 days.

47. Respondent did not record the deed until Relators sent a copy of the grievance to Respondent's counsel.

48. Relators learned of the following misconduct in August, 2005:

49. In September, 2003, while employed by the Phillips Law Firm, Respondent paid the filing fee for a client's case with a personal check.

50. That same day, the Phillips Law Firm reimbursed Respondent for the amount of the filing fee.

51. In October, 2003, the Clerk of Courts believed the case had concluded and issued a refund check in the amount of \$283 for the client's court costs. The check was made payable to Respondent.

52. Respondent took possession of the check and converted the funds for his own use.

53. The client never received a refund of the filing fee.

54. Respondent was notified in early December, 2003, that a grievance had been filed. Pursuant to an intervention by the Ohio Lawyer's Assistance Program (OLAP) on December 13, 2003, he entered a 30-day inpatient program at Menninger Clinic in Houston,

Texas, for treatment. Upon his return to Cincinnati and by letter to Relators dated January 21, 2004, he disclosed that at the Menninger Clinic, he was diagnosed and medically treated for Attention Deficit Hyperactive Disorder. Additionally, he was diagnosed with and counseled for depression. See Exhibit B

#### Criminal Charges

55. On March 15, 2004, a Hamilton County Grand Jury returned an eight-count indictment against Respondent for theft from the Phillips Law Firm in regard to the foregoing client matters.

56. On September 20, 2004, Respondent pled guilty to one count of theft, a felony of the fifth degree. The other counts were dismissed. Respondent was sentenced to five years of community control, and ordered to make restitution in the amount of \$9,400.00 to Phillips Law Firm, among other conditions. He subsequently made restitution.

57. By order of November 8, 2004, the Supreme Court of Ohio suspended Respondent from the practice of law for an interim period on the basis of his felony conviction. See Exhibit A.

#### STIPULATED MISCONDUCT

58. By reason of the foregoing, and in regard to his representation of all clients previously named in paragraphs 7, 12, 14, 16, 18, 20, 23 and as an employee of Phillips Law Firm, Respondent has violated Disciplinary Rules 9-102(A), in that he failed to deposit client funds in an identifiable bank account; 1-102(A)(3), in that he engaged in illegal conduct involving moral turpitude; 1-102(A)(4), in that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; and 9-102(B)(3), in that he failed to maintain complete records and account for client funds. In regard to his representation of all clients previously

named in paragraphs 31, 35 and 40, Respondent has violated Disciplinary Rules 6-101(A)(3) [a lawyer shall not neglect a legal matter entrusted to him] and 7-101(A)(1) [a lawyer shall not intentionally fail to seek the lawful objectives of his client], (2) [fail to carry out a contract of employment] and (3) [prejudice or damage his client during the course of the professional relationship]. Further, in connection with his representation of Mr. Flottman, Respondent's failure to notify Mr. Flottman that Respondent was suspended from the practice of law constitutes misconduct under Gov. Bar Rule V Section 8, (E)(1)(a), which defines misconduct to include disobedience of a court order imposing suspension from practice.

59. The Panel finds that Respondent Schwieterman has misappropriated funds from seven (7) different clients in the sum of about \$10,000. This misappropriation occurred over a one and one-half year period. Respondent also agreed and the Panel finds that he converted these monies for his own use.

60. Based on the foregoing, the Panel unanimously makes the following conclusions of law:

- a. Respondent violated DR 1-102(A)(3) – Engaging in conduct involving moral turpitude;
- b. Respondent violated DR 1-102(A)(4) – Engaging in conduct involving fraud, dishonesty, or deceit;
- c. Respondent violated DR 9-102(A) – Not depositing client funds into separate and identifiable accounts;
- d. Respondent violated DR 9-102(B)(3) – Not maintaining complete and accurate records of client funds;

- e. Respondent violated DR 6-101(A)(3) – Neglecting a legal matter entrusted to him;
- f. Respondent violated DR 7-101(A)(1) – Intentionally fail to seek the lawful objectives of the client;
- g. Respondent violated DR 7-101(A)(2) – Intentionally fail to carry out his contract of employment;
- h. Respondent violated DR 7-101(A)(3) – Intentionally prejudice or damage his client during the course of the professional relationship; and
- i. Respondent violated Gov. Bar Rule V (8)(E)(1)(a) – Disobeying a court order suspending one from the practice.

#### **AGGRAVATION AND MITIGATION**

61. In mitigation, the Panel notes that Respondent admitted at the hearing his misconduct, apologized and was genuinely remorseful for his actions. The Panel also notes that Respondent fully cooperated at every level of the disciplinary investigations. Respondent has made full restitution.

62. Respondent offered evidence that he suffered from a mental illness which allegedly contributed to his misconduct. Respondent submitted reports from the Menninger Clinic, specifically Dr. Efrain Bleiberg, the chief of psychiatric medicine at the Menninger Clinic, John G. Allen, PhD., a psychologist and Donna Yi, M.D.

63. These reports diagnosed Respondent as having a depressive disorder and an attention deficit hyperactivity disorder. His alleged depression was characterized by impulsive behavior which allegedly resulted in the self-destructive behavior which allegedly resulted in the disciplinary violations.

64. The Relator offered the testimony of Dr. John C. Kennedy. Dr. Kennedy concluded that Respondent, at the time of his misconduct, was not suffering from any mental disorder or mental illness that so impaired him as to contribute or cause the misconduct or to impair him so that he did not know his misconduct was wrong.

65. The Panel finds that the testimony of Dr. Kennedy is more persuasive and therefore accepts that Respondent may have suffered from mild depression and a condition of anxiety but such conditions were not sufficient to constitute a mental disorder or mental illness that contributed to or caused the misconduct.

66. The Panel also notes as evidence of mitigation that Respondent entered into a contract with OLAP and his participation in the OLAP program has been in full compliance with the program's requirements.

67. The Panel further notes that Respondent is currently being punished for his misconduct. Respondent entered a guilty plea and was convicted of a felony and sentenced to five (5) years probation. As a result, the Supreme Court in November 2004 suspended Respondent's license to practice law on an interim basis.

68. The testimony of Respondent and his wife described that the cause of Respondent's misconduct arose from family issues and financial pressure. Respondent comes from a family of physicians who have maintained a practice for over 100 years in Maria Stein, Ohio. He testified that his family was both controlling and dismissive of his personal potential. He has 4 brothers – 3 are physicians, one is a tenured college professor. He testified his family made it clear he was not expected to become a physician. He worked at Electronic Data Systems after college and then entered the night program at Thomas Cooley Law School while working full time. He graduated and entered law practice in 1993. Prior to joining Phillips law firm in

2003 he had held positions assisting a tax attorney in Cincinnati, working with a firm in West Chester, then he spent some time analyzing whether the practice of law was for him while selling legal software and working for LexisNexis selling research materials. He was hired at the Phillips firm to handle primarily domestic relations cases which otherwise would have been referred out. He was paid 60% of the fees received on the firm cases he was assigned.

Respondent's thefts occurred when he planned to leave the Phillips firm and start his own practice, because he was not making enough money. Both he and his wife felt considerable pressure to compete with the financial success of Respondent's family and were living beyond their means.

69. Asked by the panel about what has changed with Respondent that financial pressure would not cause him to make bad decisions again, Respondent testified:

"At the time I was making these bad decisions, I was living a fairy-tale life...I was trying to fit into my own swinging doctor dynamic that I'm doing just as well as the rest of you kind of thing. Those things are no longer there. We are living-we are living within so much of our means. And the little money that we've made in the last two years, all those pretenses are gone. I don't feel - so that there's a huge - my dependency on money is much, much less now than before."

Q: But even where you are today, what if the situation comes up that...no matter what you do, you're still facing the situation where the choice is do I make a bad choice or do I do something else?

A: I've learned that I don't think the Bar is going to be very appreciative of anything I do; I'm going to lose that again. I don't think I had that appreciation last time. Currently I'm on probation. That's certainly - not that that is stopping me from doing bad behavior, but this has been - I would prefer anything to this right now...I'm not going to put my reputation on the line again...I'm going to protect my law license...I did not do that last time. I did not put that into perspective that I am putting all this at jeopardy. I didn't have the realization that this was all going to be exposed.....If anybody is going to make sure they stay in the lines it's going to be me because I've been hit over the head pretty hard." (T.P. 108-110)

70. Respondent and his wife testified that they have made changes in their relationship with Respondent's family, maintaining a little more distance. "I'm not quite listening quite so much to what they think my role should be." (T.P. 111) Respondent's wife at the time of the final hearing had planned to return to work and obtain a teaching position. The

couple have four children between the ages of 11 and 17. Respondent wants to resume the practice of law but does not know what kind of practice he would enter.

71. In his testimony Respondent described his actions as dumb, depressed and desperate. "Dumb in the sense that I know better. I knew better, what I was doing. I was really cutting corners and that was dumb. All for the little bit of money that I got. Desperate though, because I have four kids." "But I am very apologetic to the Bar. Our profession has so many problems. It has so many problems with perception with the public. I only know too well from my own family that I – it's in the paper, it's another person who did something that's not right. The impression is that I stole from clients." (T.P. 93-94, 96)

72. With the panel's conclusion that neither mental illness nor substance abuse contributed to cause Respondent's misconduct, Respondent's recognition of the wrongful nature of his conduct and a clear understanding of his ethical obligations is crucial. While Respondent now clearly understands the severe sanctions that attend a felony theft conviction, he describes his conduct as 'dumb', 'cutting corners' and 'giving the impression' he stole from clients. These descriptions suggest Respondent has not yet fully appreciated the wrongful nature of his own misconduct.

73. As evidence of aggravation, the Panel notes that Respondent admitted that the conversions and thefts showed a dishonest or selfish motive. Also, the Panel finds that the number of violations show a pattern of misconduct involving multiple offenses and multiple clients.

### **RECOMMENDED SANCTION**

74. The Supreme Court of Ohio has stated on numerous occasions that the appropriate sanction for misappropriation of funds from a client is presumptively disbarment with the possibility that mitigating circumstances could lead to a lesser sanction. *Cleveland Bar Assn. v. Belock*, 82 Ohio St. 3d 98, 1998-Ohio-261 (ordering disbarment of an attorney who was convicted of a felony, served sixteen months in prison and paid \$30,000 in restitution).

75. In this case, the mitigating factors suggest that disbarment is too severe. The Panel believes that Respondent's case is most analogous to those cases where an indefinite suspension was imposed. See, e.g. *Disciplinary Counsel v. Nagorny*, 105 Ohio St. 3d 97, 2004-Ohio-6899 (noting several mitigating factors, including the attorney's payment of full restitution); *Columbus Bar Assn. v. Hamilton*, 88 Ohio St. 3d 330, 2000-Ohio-349 (stating that mitigation included absence of any continuing pattern of misconduct and restitution); *Akron Bar Assn. v. Dietz*, 108 Ohio St. 3d 343, 2006-Ohio-1067 (mitigating factor was lack of prior disciplinary record and full restitution).

76. Given the evidence in this case, the Panel unanimously recommends that Respondent be indefinitely suspended from the practice of law, with no credit for the suspension imposed by the Supreme Court on November 8, 2004. The Respondent shall pay all costs of these proceedings.

### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 1, 2006. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Robert C. Schwieterman, be indefinitely suspended from the

practice of law, with no credit for the interim suspension imposed by the Supreme Court of Ohio on November 8, 2004. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall", written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
The Supreme Court of Ohio**

## **CODE OF PROFESSIONAL RESPONSIBILITY**

### **DR 1-102(A)(4)**

**(A) A lawyer shall not:**

....

**(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.**

### **BCGD Proc. Reg. 10 (B)(2)(g)**

**(2) Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction:**

....

**(g) chemical dependency or mental disability when there has been all of the following:**

**(i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/ substance abuse counselor;**

**(ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct.**

**(iii) . . . . in the event of mental disability, a sustained period of successful treatment;**

**(iv) A prognosis from a qualified health care professional . . . That the attorney will be able to return to competent, ethical professional practice under specified conditions.**