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RESPONDENT'S OBJECTIONS

Pursuant to Gov. Bar R. V, Section (8)(B), Respondent John R. Tomlan objects to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline, as follows:

(1) A more severe sanction than the three-member Panel's unanimous recommendation of a two-year suspension is not warranted.

(2) Mr. Tomlan accepts the Board's conclusion that he failed to comply with the Disciplinary Rules; he acknowledges and apologizes for his mistakes in judgment and is willing to take responsibility for them. Mr. Tomlan, however, objects to any finding or conclusion by the Board that suggests that Katharine Rice did not truly wish to make the gifts to Mr. Tomlan, as contrary to the undisputed and corroborated evidence.

INTRODUCTION

The three-member Panel, which heard and weighed all of the testimony, facts and circumstances firsthand during the four-day disciplinary hearing, was persuaded by the evidence to reject Relator's proposal to indefinitely suspend Respondent John R. Tomlan from the practice of law. Instead, the Panel unanimously recommended a two-year suspension. The Panel was obviously moved by the undisputed testimony that Katharine Rice looked to Mr. Tomlan as the only family she had. Indeed, Mr. Tomlan (and his family) genuinely cared for, and consistently showed kindness to, Ms. Rice for nearly nine years – long before Mr. Tomlan did legal work for Ms. Rice or accepted any gifts from her.

The testimony from independent witnesses is unrefuted that Mr. Tomlan was the natural object of Ms. Rice's affections when she personally signed over to him the financial gifts at issue. The nursing director who interacted with Ms. Rice for nearly eight years testified:

Katharine [Rice] and John [Tomlan] were very close....

And I also feel that I knew Katharine pretty well. I knew that she wouldn't do anything she didn't want to do, and I can just see Katharine thinking that, you know, John was – John was the family for her that – you know, he was her family at this point in time. And she didn't have – you know whatever assets she had, she didn't have anybody to leave it to.

John was the one that was always there for her. He was the one that cared about her. He's the one that showed her the compassion, and it didn't surprise me to see that, you know, Katharine had control right up to the end, you know. She had control of those assets, but I think she, too, knew that once she died, she had no use for them. And where else would she have done with her assets? She gave them to family which was her family at that point in time. I see Katharine held John as that family....

[Carol Wagner Testimony, Hearing Transcript, at
581-82 (emphasis added)]

While Mr. Tomlan always believed that Ms. Rice truly wished to gift him the assets that she signed over to him, he now understands that this does not excuse the method and manner of his

acceptance of those gifts or his subsequent actions (and inactions) in connection with Ms. Rice's estate. Mr. Tomlan is sincerely remorseful for such conduct. Indeed, during the disciplinary hearing, Mr. Tomlan candidly admitted his mistakes in judgment and apologized for them. [Tr. (Tomlan) at 139, 142-43, 873-75, 945]

But it is respectfully submitted that a lesser sanction, such as the Panel's recommended two-year suspension (rather than the Board's proposed indefinite suspension), better reflects the close, family-like relationship that existed between Ms. Rice and Mr. Tomlan – an undisputed fact that explains why Mr. Tomlan believed he could accept the gifts from Ms. Rice, yet is overlooked in the written Findings of Fact and Conclusions of Law. In other words, this is not a case of an attorney stealing, or otherwise helping himself to, a client's money – the type of conduct that this Court has held may warrant an indefinite suspension.

The Panel's less harsh (but still strong) recommendation of a two-year suspension also better reflects the existence of compelling mitigating circumstances favoring a less severe sanction than an indefinite suspension:

“[1] Respondent has no prior disciplinary record. [2] Respondent made a voluntary settlement in the related civil action and restitution to the satisfaction of the plaintiff in that matter. [3] He had a cooperative attitude toward the disciplinary proceedings. [4] Testimony at the hearing and by letters furnished to [the] panel showed that Respondent has done many good deeds professionally and personally in his community and is of good character and reputation.”

[Findings of Fact/Conclusions of Law ¶ 115]

In sum, the unique facts of this case and the other mitigating circumstances simply do not warrant a more severe sanction than the two-year suspension recommended by the Panel.

STATEMENT OF FACTS

I. Who John Tomlan Is

Respondent John Tomlan has been married for 26 years to his wife, Shawn; they have two children, Lindsey and Christopher. Mr. Tomlan graduated from The Ohio State University Law School in 1983 and was admitted to the Ohio Bar that same year. [Tr. (Tomlan) at 762] After practicing law with a small law firm in Bridgeport, Ohio for a number of years, Mr. Tomlan fulfilled one of his lifelong dreams by becoming a solo practitioner in 1996, with his office located in St. Clairsville. His primary area of practice is representing injured workers in workers' compensation cases, though he also has a general practice. [Tr. (Tomlan) at 763]

Those who know Mr. Tomlan, without exception, state that he is a caring, kind individual who is always willing to go out of his way to lend a helping hand – often for nothing in return. [Tr. (Olexa) at 619-22] Monsignor Mark Froehlich, pastor of St. Joseph Church in Lansing, Ohio, in which Mr. Tomlan has been actively involved in church ministries since age 16, testified that Mr. Tomlan is the kind of person who “would drop everything to help” someone in need. [Tr. (Froehlich) at 532-33] “[A]nything that we need to be done in the parish, ... he’s always willing to help.” [Tr. (Turos) at 538] Another witness, a client for whom Mr. Tomlan has been her family lawyer since the 1980s, put it this way: “I would say that if you asked anybody in the community of Bridgeport, Lansing, Blaine, they would tell you that John always had time for you, and you never got a bill from him.” [Tr. (Miller) at 628-29]

Mr. Tomlan’s service to his clients and his community is reflected in the testimony and letters of numerous character witnesses presented to the Panel. One of Mr. Tomlan’s clients informed the Panel of how, on one occasion, Mr. Tomlan came to the assistance of the client and her family with “no hesitation” at 4:00 a.m. when her home was endangered by flooding of the Ohio

River. Mr. Tomlan not only saved all of the client's furniture and appliances by moving them out of the home, he stored the furniture at his own property until the client's home was habitable. Mr. Tomlan asked for nothing in return. [Sally L. Means' Letter to Board]

The record is replete with other examples of Mr. Tomlan giving of his time and resources to help others, often for nothing in return. As an active member of the local Rotary Club, Mr. Tomlan was one of the persons who headed the medical mission called "Operation We Care," in which urgent medical care and supplies were provided to the needy in the Philippines. [Tr. (Tomlan) at 914-16] Mr. Tomlan helps in his church's food pantry, providing food baskets and toys to the less fortunate every Christmas. [Tr. (Tomlan) at 917-18] He also manages a basketball program for high schoolers in the winter – to help keep adolescents off the streets and from getting into trouble. [Tr. (Tomlan) at 917]

It was John's willingness to help others that led to his relationship with Katharine Rice beginning in 1993.

II. John Tomlan's Personal Friendship With Katharine Rice

Mr. Tomlan had been friends with Ms. Rice's brother, Robert Hill, Sr., since 1983. [Tr. (Tomlan) at 763-66] In late 1993, Mr. Hill asked Mr. Tomlan to visit, and be a companion for, his sister, Ms. Rice, who had just entered a nursing home in Lansing, Ohio because she had physical difficulty taking care of her own home. [Tr. (Tomlan) at 765-66; Tr. (Lazo) at 268-69] Ms. Rice was unmarried and had no children. [Findings of Fact ¶ 17] Her closest relatives were her brother, Mr. Hill, and her nephew, Robert Wesley Hill, Jr., [Tr. (Wagner) at 567-68] – who both ended up predeceasing Ms. Rice.

As requested, Mr. Tomlan began visiting Ms. Rice in late 1993. [Tr. (Tomlan) at 766-67] He steadfastly continued to do so for nearly nine years, until Ms. Rice died on Christmas Day, 2002. [Tr. (Tomlan) at 774]

From the start, Mr. Tomlan visited Ms. Rice frequently – at least three times each week. [Tr. (Wagner) at 575-76; Dep. Tr. (Roth) at 45 & Dep. Ex. 1; Tr. (Tomlan) at 766-67]¹ No one visited Ms. Rice as often as Mr. Tomlan. [Tr. (Wagner) at 575] In fact, very few others came to see her. [Dep. Tr. (Roth) at 34] Mr. Tomlan not only would keep Ms. Rice company in the nursing home, he also took her for strolls outside. [Tr. (Tomlan) at 868-71] It is undisputed that Mr. Tomlan was, in the words of one nursing home employee, kind to, and very caring with, Ms. Rice. [Tr. (Wagner) at 577] For instance, on Sundays, Mr. Tomlan, his wife and their children would visit Ms. Rice on their way home from church. [Tr. (Wagner) at 575-76; Tr. (Tomlan) at 767-68] They often would bring their dog because Ms. Rice loved animals. [Tr. (Tomlan) at 768] Mr. Tomlan and his family also made it a point to visit and bring food to Ms. Rice when it mattered most -- on holidays. [Tr. (Tomlan) at 769-71]

Put simply, Mr. Tomlan was always there for Ms. Rice whenever she needed someone. [Tr. (Wagner) at 579-82] Mr. Tomlan never asked Ms. Rice for a penny for his countless hours of time.

Over the years, Ms. Rice grew very fond of Mr. Tomlan, and they developed a friendship. [Tr. (Wagner) at 576-77; Dep. Tr. (Roth) at 32-33; Tr. (Brown) at 675; Tr. (Tomlan) at 766-71, 774] It is undisputed that, during the nearly four-year period until 1997, the relationship between Ms. Rice and Mr. Tomlan (and his family) was purely a personal one. Mr. Tomlan had not yet done any

¹ The videotape of Betty Lou Roth's out-of-county deposition was played and viewed by the Panel in the disciplinary hearing without objection.

legal work for Ms. Rice. [Tr. (Tomlan) at 772-73] [Findings of Fact ¶ 60 (“initial legal services” “in 1997”)]²

After the death of her brother in 1998, Ms. Rice became closest with Mr. Tomlan, who continued to regularly visit her. [Tr. (Wagner) at 581-82; Tr. (Tomlan) at 858-59] Independent witnesses provided unrefuted testimony that Ms. Rice now viewed John Tomlan as family, and she favored him over everyone else: “[H]e [John Tomlan] was her family at this point in time. . . . John was the one that was always there for her. He was the one that cared for her. He’s the one that showed her the compassion. . . .” [Tr. (Wagner) at 581-82 (emphasis added)] Mr. Tomlan testified that the feeling was mutual: “Katharine had become family, and I’d become family to her.” [Tr. (Tomlan) at 866-67] Another nurse, who knew Ms. Rice for years at the nursing home, testified:

Q: Could you describe for me the relationship that existed between John [Tomlan] and Katharine Rice?

A: I think they were good friends. And I think she trusted him. And she felt that he was – actually *I think she felt he was one of her family* because he came often to see her. And she just loved it when he’d bring her in those ham sandwiches. *And I think she thought he was one of her family.*

[Dep. Tr. (Roth) at 30 (emphasis added); see also Dep. Tr. (Roth) at 45 (“[h]e was like family to her”)]

The corroborating evidence is therefore undisputed that Ms. Rice viewed Mr. Tomlan as family and the person to whom she wanted to give the benefit of her estate. Ms. Rice’s strong affection for Mr. Tomlan as her family was indisputably present when she signed the bank forms adding Mr. Tomlan as a joint owner with rights of survivorship on three bank certificates of deposit and on her stock in a pharmaceutical company in June 1999, June/July 2000, and February 2002.

² The earlier reference to “1987” in Findings of Fact ¶ 60 is an obvious error because Mr. Tomlan did not meet Ms. Rice until 1993.

This is why Mr. Tomlan did not believe that he was acting as Ms. Rice's attorney when he accepted her gifts.

During the course of their nine-year relationship and literally hundreds of visits, Mr. Tomlan did provide legal services to Ms. Rice, but only on four occasions: (1) in February 1997 for the sale of Ms. Rice's summer cabin; (2) preparation of her May 5, 1998 will; (3) preparation of two letters on July 13, 1998; and (4) preparation of medical and financial powers of attorney, dated July 14, 1999. [Tr. (Tomlan) at 855, 858, 772, 783-84] Mr. Tomlan never charged Ms. Rice for these legal services (though he acknowledges he acted as her attorney on those occasions). [Tr. (Tomlan) at 201-04] At Ms. Rice's request, Mr. Tomlan also helped Ms. Rice on a variety of other things over the years, such as running errands, bringing her mail, and making trips to and from banks at her direction, but Mr. Tomlan never considered such assistance to be the practice of law. [Tr. (Tomlan) at 779-780, 895-96; Respondent's Hearing Ex. 107] As Mr. Tomlan put it, "I would have done the same things for her if I wasn't an attorney" [Tr. (Tomlan) at 858-59]

ARGUMENT

I. Summary Of Factors To Consider For Appropriate Sanction

This Court considers several factors to determine the appropriate sanction in a disciplinary case: "the duties violated, the actual injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances and sanctions imposed in similar cases." Stark County Bar Ass'n v. Buttacavoli, 96 Ohio St. 3d 424, ¶ 16 (2002).

These factors weigh heavily against the Board's recommendation to indefinitely suspend Mr. Tomlan from the practice of law and in favor of a lesser sanction -- one that is no greater than the less harsh (but still strong) suspension of two years unanimously recommended by the three-member Panel. The Panel, which heard and weighed all of the evidence firsthand, was obviously

moved by the evidence that it heard and the mitigating circumstances to recommend against the indefinite suspension that was sought by Disciplinary Counsel. While this Court is not bound by the recommendations of either the Panel or the Board, it should give “some deference” to the Panel “in light of the reality that the panel observed the witnesses firsthand.” Cleveland Bar Ass’n v. Cleary, 93 Ohio St. 3d 191, 198 (2001). Accord: Disciplinary Counsel v. Moore, 101 Ohio St. 3d 261, ¶¶ 19-20 (2004) (adopting sanction recommended by the panel rather than the more severe sanction recommended by the board, because “[t]he panel heard this evidence firsthand and was obviously moved enough to recommend against actual suspension”).

II. Attorney’s Mental State/Duties Violated/Actual Injury Caused

A. Mr. Tomlan’s Acceptance Of Gifts From Ms. Rice – [DR 1-102(A)(6) And DR 5-101(A)(1)]

One of the most important considerations in this case is John Tomlan’s good faith belief, based upon his close relationship with Ms. Rice that developed over the years, that Ms. Rice truly wished to give him, upon her death, the funds and stock that she signed over to him. This case is therefore not at all like the cases in which an attorney steals from an unknowing client or coerces or tricks a client into giving him money. No one – not even a single witness – disputed the fact that Ms. Rice truly wanted to make the gifts to Mr. Tomlan. Indeed, the Panel properly found that Ms. Rice wished to leave Mr. Tomlan a financial bequest, [Findings of Fact ¶ 22], (though the Panel later questioned whether Ms. Rice came up with the idea to use joint and survivorship forms, rather than a will, to accomplish her expressed intent).

There are three undisputed facts, corroborated by independent witnesses or documentation, that conclusively establish that Ms. Rice truly wanted to make the gifts to Mr. Tomlan:

First, Mr. Tomlan was like family to Ms. Rice. He genuinely cared for, and spent countless hours with, Ms. Rice for nearly nine years. Carol Wagner, the head nurse at the nursing home, put it best when she testified:

John was the one that was always there for her. He was the one that cared about her. He's the one that showed her the compassion.... She [Ms. Rice] gave [her assets] to family which was her family at that point in time. I see Katharine held John as that family....

[Tr. (Wagner) at 581-82 (emphasis added)]

Second, the evidence is undisputed that Ms. Rice personally signed all the deposit checks and every single joint and survivorship form used to make the gifts to Mr. Tomlan. [Findings of Fact ¶¶ 23, 27-28, 31] [Respondent's Hearing Exs. 4, 5, 7, 15-16, 18-19] Indeed, an independent witness was present to verify Ms. Rice's signing joint ownership of the largest gift (the stock) to Mr. Tomlan.³ [Tr. (Goclan) at 512-19] The whole process was done in the open; nursing home employees were aware of it and even helped Ms. Rice get ready to sign the joint transfer document. [Tr. (Goclan) at 517] A separate independent witness also confirmed that Ms. Rice was sharp as to financial matters and understood what joint and survivorship accounts were.⁴ [Tr. (Wagner) at 561-66]

This Court holds that Ms. Rice's execution of these joint and survivorship account forms is conclusive evidence that she intended to gift those assets to Mr. Tomlan upon her death:

The opening of a joint and survivorship account in the absence of fraud, duress, undue influence or lack of capacity on the part of the decedent *is conclusive evidence of his or her intention to transfer to the*

³ The Board's Finding of Fact/Conclusion of Law ¶ 82 that there was "no corroboration or documentation of any ... consents with Rice" therefore contradicts the undisputed evidence.

⁴ The finding of the Panel and Board that Ms. "Rice was *not* mentally *incompetent* at the time of any of the transfers to Respondent," [Findings of Fact ¶ 34 (emphasis added)], is overwhelmingly supported by the deposition testimony of Betty Lou Roth and Shirley Bench and the extensive hearing testimony of Carol Wagner, Dr. Renato Dela Cruz, Michael Goclan, and Donna Brown.

surviving party or parties a survivorship interest in the balance remaining in the account at his or her death.

[Wright v. Bloom, 69 Ohio St. 3d 596 (1994)
(Syllabus ¶ 2) (emphasis added)]

Third, the undisputed and corroborating evidence also supports Mr. Tomlan’s testimony that he genuinely believed that he did not try to, and did not actually, influence Ms. Rice to make gifts to him. [Tr. (Tomlan) at 854-55] Independent witnesses uniformly testified that Ms. Rice was not only financially savvy, she was not susceptible to influence by others – negating the very first essential element of undue influence. Krischbaum v. Dillon, 58 Ohio St. 3d 58, 65-66 (1991) (the “[e]lements of undue influence include a susceptible testator”). Carol Wagner, who personally knew Ms. Rice for eight years while serving as the nursing director at the nursing home, testified that Ms. Rice was “[s]harp as a tack” and “very frugal with her money” – “she wasn’t going to spend or not know where every penny of her money was at all times.” [Tr. (Wagner) at 559] When asked whether Ms. Rice was susceptible to influence, Ms. Wagner emphatically stated that “[t]here is no way that Katharine would ever do anything that she didn’t want to do.” [Tr. (Wagner) at 580-81] Ms. Wagner further explained:

Q: Was Katharine Rice the kind of person who was easily influenced?

A: *Not at all.*

Q: Okay. Why do you say that?

A: *Katharine was very strong-willed. She – it was Katharine’s way or no way. If she didn’t want to do something, she wasn’t going to do it.*

* * *

Q: [I]f Katharine Rice had not wanted to give money to John Tomlan, would he have been able to persuade her to do so?

A: No.

* * *

Q: Ma'am, do you have any reason to believe that John Tomlan improperly influenced Katharine Rice to do something with her financial assets that she did not want to do?

A: No.

[Tr. (Wagner) at 559-60, 579-80 (emphasis added)]

Betty Lou Roth, another nurse who knew Ms. Rice for years at the nursing home, agreed that "Katharine wouldn't do anything if she didn't want to." [Dep. Tr. (Roth) at 29] Ms. Roth provided further compelling testimony that Ms. Rice was not a person who was susceptible to influence by anyone:

Q: Could you describe Katharine Rice for me during that time period prior to the [late June] 2002 alumni reunion?

A: I always thought that she was pretty smart. And I always thought she knew what she wanted

... *She was very strong willed* and just --

Q: When you say "strong willed," was -- was Katharine Rice the kind of person who was easily influenced? ...

A: *No way. She wouldn't be -- she wouldn't do anything she didn't want to.*

* * *

Q: Was Katharine Rice the type of person who could be influenced to make a gift to someone if she did not want to do so?

A: *I believe she could not have been influenced by anybody.* She --

Q: And why do you say that?

A: Katharine was a tightwad She wasn't easily influenced to do anything. I don't think so.

[Dep Tr. (Roth) at 18-19, 24 (emphasis added)]

Donna Brown, yet another nurse, who knew Ms. Rice through her work at the nursing home during the last year of Ms. Rice's life, corroborated the other witness' testimony that Ms. Rice, though elderly, was "very strong-willed" and could not be influenced. [Tr. (Brown) at 647] Ms. Brown testified: Ms. Rice "was very much on top of her toes. She knew what she wanted. She knew what she didn't want. She was actually very brilliant." [Tr. (Brown) at 645] Ms. Brown further testified:

Q: Was she [Ms. Rice] the type of person who could be influenced to make a gift to someone if she did not want to?

A: Absolutely not.

[Tr. (Brown) at 650]

In view of this uniform testimony from independent witnesses that Ms. Rice was a sharp, strong-willed person who was not susceptible to influence, the Panel's conclusions at Findings of Fact/Conclusions of Law ¶ 69 that "the presumption of undue influence exists and is not overcome by the evidence presented," and at Findings of Fact/Conclusions of Law ¶ 114 that "Rice was vulnerable," are plainly wrong and should not be accepted by this Court. See Cincinnati Bar Ass'n v. Statzer, 101 Ohio St. 3d 14, ¶ 8 (2003) (the Court normally shows deference to the panel's findings "*unless the record weighs heavily against those findings*") (emphasis added); Findlay/Hancock County Bar Ass'n v. Filkins, 90 Ohio St. 3d 1, 3-4 (2000) (not accepting panel's findings because they were not supported by "the clear-and-convincing evidence standard").⁵

Another important consideration concerning Mr. Tomlan's mental state and any duties violated is the fact that Mr. Tomlan thought that he had maintained the integrity of the process of

⁵ Even though the evidence plainly rebuts any presumption of undue influence that may have existed, there is a legitimate threshold issue as to whether there should be such a presumption in a disciplinary case where "*relator must prove ... misconduct by clear and convincing evidence.*" Ohio State Bar Ass'n v. Reid, 85 Ohio St. 3d 327, 331 (1999) (emphasis added), citing Gov. Bar R. V(6)(J).

Ms. Rice's gifts to him by insisting that Ms. Rice first discuss the proposed gifts with, and obtain consent to the gifts from, her nephew, Robert Wesley Hill, Jr. [Tr. (Tomlan) at 790-97, 809-12, 839-42, 872-73, 948-49] Ms. Rice's nephew was her closest relative and the only person, other than Mr. Tomlan, with whom she had a close relationship. [Tr. (Wagner) at 577, Dep. Tr. (Roth) at 34; Tr. (Tomlan) at 872] The nephew lived in Cincinnati and would visit Ms. Rice once each month for three days each time.⁶ [Dep. Tr. (Roth) at 34; Tr. (Wagner) at 567-68, 574; Tr. (Tomlan) at 791] Though the Board concluded that obtaining the nephew's blessing over Ms. Rice's gifts to Mr. Tomlan was insufficient under the Disciplinary Rules, [Findings of Fact/Conclusions of Law ¶¶ 32-33, 76, 79-81, 88, 94], it is significant that Mr. Tomlan involved an independent third person (indeed, Ms. Rice's closest relative). See Ethical Consideration 5-5 ("[i]f a client voluntarily offers to make a gift to the client's lawyer, the lawyer may accept the gift, but before doing so, the lawyer should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances"); and Proffer of Expert Testimony of Alvin E. Mathews, former Assistant Disciplinary Counsel, whose testimony was excluded over objection. [Tr. at 504-09]

B. Mr. Tomlan's Disclosure Of The Belmont Savings Bank CD

The Panel's conclusion that Mr. Tomlan violated DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 7-109(A) (suppression of evidence) was based upon its finding that Mr. Tomlan failed to timely disclose Ms. Rice's earliest gift of a \$100,000 Belmont Savings Bank CD to him. [Findings of Fact/Conclusions of Law ¶¶ 100-105]

⁶ The nephew had never married and had no children of his own. [Tr. (Wagner) at 578] Ms. Rice was aware that her nephew had physical health problems resulting from a previous stroke, but it is undisputed that the nephew's physical disabilities did not affect his mental faculties in any way. [Tr. (Wagner) at 578; Tr. (Tomlan) at 56]

At the disciplinary hearing, Mr. Tomlan candidly acknowledged and apologized for his mistake in not disclosing this gift sooner than he did. [Tr. (Tomlan) at 139, 142-43]

A key consideration in determining the appropriate sanction for this untimely disclosure is the undisputed fact that it caused *no actual injury because Mr. Tomlan voluntarily rectified the situation himself*. Mr. Tomlan, upon realizing the omission of the CD, immediately reported its existence to the court and the estate administrator at the first court status conference in the civil lawsuit. [Tr. (Tomlan) at 887-89; Tr. (Semple) at 437-38; Relator's Hearing Ex. 34, ¶ 3] Mr. Tomlan also met with the Probate Judge that same day (with his counsel and opposing counsel) and requested the court, by Agreed Entry, to freeze funds equal to the current amount of that CD (with interest) pending resolution of the lawsuit. [Tr. (Tomlan) at 889-90; Relator's Hearing Ex. 21 at ¶ 3] Indeed, the estate administrator acknowledges that everything has been accounted for. [Tr. (Semple) at 438]

It is also undisputed that, rather than trying to conceal information about the Belmont Savings Bank CD, Mr. Tomlan actually produced to the administrator of Ms. Rice's estate all the documents that he had concerning that joint CD a few months *before* he provided the incomplete interrogatory answers and hearing testimony at issue. [Tr. (Tomlan) at 876-83, 886; Tr. (Semple) at 435-38; Respondent's Hearing Ex. 4, pgs. 1, 3; Relator's Hearing Ex. 52]

In short, Mr. Tomlan acknowledges, apologizes for, and accepts responsibility for the consequences of his initial nondisclosure of the Belmont Savings Bank CD. But it is respectfully submitted that the Court should take into consideration the undisputed fact that Mr. Tomlan appropriately rectified his initial error long before it caused any harm.

III. Sanctions Imposed In Similar Cases

The Board's recommended sanction of an indefinite suspension is far more severe than sanctions imposed in similar cases – even cases in which attorneys engaged in more egregious conduct. Indeed, the sanctions imposed in similar cases show that a sanction that is more severe than the two-year suspension recommended by the three-member Panel is not warranted.

A. Mr. Tomlan's Acceptance Of Gifts From Ms. Rice

The Panel found that this case is similar to Mahoning County Bar Ass'n v. Theofilos, 36 Ohio St. 3d 43 (1988). In Theofilos, this Court suspended the attorney for *one year* for violating DR 1-102(A)(6) because the attorney had offered “no documentary or testimonial evidence” offsetting the charge that he exerted undue influence in naming himself and his son as sole beneficiaries in his client's will and using in excess of \$200,000 of his client's money to establish joint and survivorship accounts in favor of himself. Id. at 44-45. Unlike Mr. Tomlan, Theofilos had only known the client for four months at the time he named himself in the will. Id. at 45. Indeed, Theofilos had no prior personal relationship with the client, who “initially appeared in [the attorney's] office without an appointment” to have her sister's estate probated. Id. at 43. And, unlike Mr. Tomlan, Theofilos also failed to make restitution of the monies he received. Id. at 45 (Holmes, J., dissenting).

In a case in which an attorney bilked an aging and vulnerable client out of her entire, half-million dollar estate, Cincinnati Bar Ass'n v. Clark, 71 Ohio St. 3d 145 (1994), this Court imposed a *two-year suspension, one year stayed* for multiple violations of DR 1-102(A)(4), DR 1-102(A)(6), DR 5-101(A), and DR 5-104(A). Again, Mr. Tomlan's acceptance of the gifts that Ms. Rice signed over to him and his subsequent conduct is less egregious than the misconduct of the attorney in Clark. In Clark, the attorney revised an aging and vulnerable client's will three times,

“transforming the mainly charitable bequests she had planned for her nearly half-million dollar estate into bequests for [the attorney] or his family’s benefit,” and then the attorney “fail[ed] to honestly account for the gifts.” Id. at 145-47. In addition, the attorney in Clark helped himself to more of his client’s funds by writing checks to himself, his sons and his law firm on four separate occasions -- with no evidence that the client knew about the transfers (such as the client’s signature). The attorney also lost another \$100,000 of his client’s funds in a high-risk investment in a different client’s company. After the transfers were discovered, the attorney first characterized the checks to his sons as gifts from the client, but then later changed his testimony and called them “loans.” The attorney also had no explanation for the other unauthorized transfer to his law firm and his false accounting of that withdrawal. Id. at 146.

In other recent cases in which an attorney violated DR 5-101(A) by preparing wills or trusts naming himself or his family as beneficiaries or otherwise engaging in a client conflict of interest, this Court has imposed either a *six-month or one-year suspension*. See Disciplinary Counsel v. Kelleher, 102 Ohio St. 3d 105 (2004) (one-year suspension with six months stayed where the attorney violated DR 5-101(A)(2) by preparing a trust for his client, naming the attorney’s wife, children, and grandchildren as beneficiaries and naming himself as successor trustee, and where the attorney showed no remorse for his ethical violation and refused to return the assets and trustee fees that he and his family had received); Toledo Bar Ass’n v. Cook, 97 Ohio St. 3d 225 (2002) (one-year suspension with six months stayed, where the attorney violated DR 5-101(A)(2) by preparing a client’s will that gave \$300,000 to a corporation owned by the attorney’s family); Stark County Bar Ass’n v. Buttacavoli, 96 Ohio St. 3d 424 (2002) (six-month, stayed suspension where attorney violated DR 5-101(A) and DR 5-104(A) by failing to disclose, and then, in the Court’s words,

“misleading” his client about, the thousands of dollars of sales commissions the attorney would receive as a result of the client following his advice).

Pre-DR 5-101(A)(2) cases analyzed under DR 5-101(A)(1), in which an attorney honored his client’s wishes in naming himself or his family as a beneficiary under a will, are analogous to the instant action because, like the lack of an express prohibition against such conduct at the time, there is no Disciplinary Rule setting forth a per se prohibition against an attorney’s acceptance of joint and survivorship gifts from a client. In these analogous cases, this Court and the highest courts of other states either determined that the appropriate sanction was a public reprimand or imposed no sanction at all. See Cincinnati Bar Ass’n v. Bortz, 74 Ohio St. 3d 207 (1996) (public reprimand); Toledo Bar Ass’n v. Sheehy, 73 Ohio St. 3d 208 (1995) (public reprimand); In re Conduct of Tonkon, 642 P.2d 660, 663-64 (Or. 1982) (not sanctioning attorney under DR 5-101(A) for preparing client’s will bequeathing attorney \$75,000, because attorney was client’s “close personal friend and ‘a natural object of the [client’s] bounty’” and “obviously the client knew that the bequest was in his lawyer’s financial interest and consented to it, for that was its intended purpose”); In re Barrick, 429 N.E.2d 842, 845-46 (Ill. 1981) (not sanctioning attorney under DR 5-101(A) for preparing long-time client’s will bequeathing attorney a lifetime annuity because “[w]e should not discipline the respondent for abiding by his client’s decision when it was properly the client’s to make”); Disciplinary Board v. Amundson, 297 N.W.2d 433, 437, 442 (N.D. 1980) (not sanctioning attorney who prepared elderly client’s will naming attorney as one of the beneficiaries at client’s request, because their close personal relationship pre-dated the attorney-client relationship: “we doubt many people who knew these individuals would have thought it odd that [the attorney] ... was one of the named beneficiaries”).

In sum, the most severe sanction imposed in similar cases was a two-year suspension, one-year stayed, or a one-year suspension. And, it is respectfully submitted that Mr. Tomlan's noncompliance in accepting the gifts from Ms. Rice was less egregious than the misconduct in those cases.

It is anticipated that Relator will again rely upon Disciplinary Counsel v. Slavens, 63 Ohio St. 3d 162 (1992), but the Panel properly did not rely upon this case, which is distinguishable because attorney Slavens actually stole money from his client. In Slavens, the attorney prepared a will for a mentally impaired client, making himself and his children beneficiaries. The attorney's conduct in Slavens was even worse. Before the client died, the attorney actually helped himself to the client's money by "giv[ing] himself 'gifts' ... valued at \$162,406.17" – all without the knowledge or consent of the client's accountant (and, apparently, the client herself.) Id. at 163. The attorney in Slavens also failed to make voluntary restitution to the client. In view of Slaven's admitted misconduct, even *Slavens himself* (as well as Disciplinary Counsel, the Panel, and the Board) recommended that the Court indefinitely suspend him.

Unlike Slavens, the overwhelming evidence in this case establishes that Ms. Rice intended to make gifts to Mr. Tomlan and knew exactly what she was doing. And, unlike the attorney in Slavens, Mr. Tomlan did *not* steal from his client or secretly give himself anything without Ms. Rice's knowledge; rather, Ms. Rice personally signed for every gift that she made to Mr. Tomlan. Finally, unlike the attorney in Slavens, Mr. Tomlan accounted for all the gifts that Ms. Rice made to him in the prior civil lawsuit, and he voluntarily made restitution to Ms. Rice's estate to everyone's satisfaction.

B. Mr. Tomlan's Curing His Initial Nondisclosure Of The Belmont Savings CD

The only case cited by the Panel concerning DR 1-102(A)(4) and DR 7-109(A) is Cincinnati Bar Ass'n v. Marsick, 81 Ohio St. 3d 551 (1998), in which this Court imposed a six-month suspension for the attorney's providing false interrogatory answers and concealment of a known material witness until after the jury verdict. The attorney in Marsick not only provided false interrogatory answers, he also failed to correct the problem when the opposing attorney asked him to supplement his interrogatory answers. Id. at 551. In view of the attorney's complete and uncorrected suppression of material evidence until the trial was finished, this Court noted that the attorney's concealment of evidence in Marsick actually caused injury: "[C]ounsel prevented the plaintiffs from fully and fairly presenting their case." Id. at 553.

Mr. Tomlan's complete cure of his prior nondisclosure (thus avoiding any actual injury) makes his conduct less egregious than the attorney's complete concealment of evidence and resulting injury in Marsick. Unlike Marsick, Mr. Tomlan voluntarily disclosed the Belmont Savings Bank CD to the court and opposing counsel at the very first status conference in the civil lawsuit (long before the case ever went to trial). Unlike Marsick, Mr. Tomlan even ensured the protection of the CD funds through an agreed court order pending the outcome of the lawsuit. Thus, unlike the attorney in Marsick, Mr. Tomlan voluntarily rectified his prior nondisclosure before any actual harm occurred.

C. Delay In Estate Administration/Ex Parte Communication

The other Disciplinary Rule violations found by the Panel/Board were for Mr. Tomlan's delay in the administration of Ms. Rice's estate and his ex parte communication with the probate judge on one occasion. [Findings of Fact/Conclusions of Law ¶¶ 98-99, 106-110] The appropriate sanction in other cases involving similar conduct was no more than a public reprimand (and

restitution, which Mr. Tomlan has already made) and does not justify increasing the sanction for Mr. Tomlan's acceptance of gifts from Ms. Rice and his initial failure to disclose one of those gifts (which he cured) to an indefinite suspension – effectively, the death knell for Mr. Tomlan's legal career. See Cincinnati Bar Ass'n v. Weber, 62 Ohio St. 3d 222 (1991) (attorney/executor, who failed to open estate for 16 months after former client's death and failed to timely pay estate debts, resulting in estate tax penalties and lost interest on funds from checks he failed to deposit, was publicly reprimanded and required to pay restitution); In the Matter of Ettl, 851 N.E.2d 1258 (Ind. 2006) (public reprimand for *ex parte* communication with judge); In the Matter of Pamm, 118 N.J. 556 (N.J. 1990) (public reprimand for *ex parte* communication with a judge).

IV. Other Mitigating Circumstances

The Panel and Board properly acknowledged the existence of four other mitigating circumstances favoring a less severe sanction:

First, as the Panel stated, Mr. Tomlan has “no prior disciplinary record,” [Findings of Fact/Conclusions of Law ¶ 115] – a mitigating factor under the Board's regulations recognized by this Court. See BCGD Proc. Reg. 10(B)(2)(a). Indeed, during the course of Mr. Tomlan's 24-year legal career, there have been no prior Disciplinary Complaints filed against him, let alone any findings of unethical conduct.

Second, as the Panel properly acknowledged, Mr. Tomlan made a voluntary, substantial restitution by settling the underlying civil lawsuit to everyone's satisfaction – a mitigating factor under BCGD Proc. Reg. 10(B)(2)(c). [Findings of Fact/Conclusions of Law ¶ 115] Both the estate administrator and the probate court found that Mr. Tomlan's settlement was in the best interests of Ms. Rice's estate and its beneficiaries. [Respondent's Hearing Ex. 99; Respondent's Hearing Ex.

98 at ¶ 11] And, Mr. Tomlan also rectified the consequences of his initial nondisclosure of the Belmont Savings Bank CD, which is a mitigating factor under BCGD Proc. Reg. 10(B)(2)(c).

Unfortunately, the Board improperly turned Mr. Tomlan's restitution against him by pointing to Mr. Tomlan's civil settlement as evidence of an ethical violation. See Findings of Fact/Conclusions of Law ¶ 96 ("no reasonable person would capitulate if Respondent is as sure as he says he was about Rice's informed consent to transfer the property interests to him"). This defeats the whole purpose of recognizing an attorney's restitution as a *mitigating* factor in a disciplinary case; it also undermines Ohio's important policy favoring settlements. Continental West Condominium Unit Owners Ass'n v. Howard E. Ferguson, Inc., 74 Ohio St. 3d 501, 502 (1996) ("settlement agreements are highly favored in the law"); State ex rel. Wright v. Weyandt, 50 Ohio St. 2d 194 (1977) (Syllabus) ("[t]he law favors the prevention of litigation by compromise and settlement"). That is why Evidence Rule 408 states that evidence of furnishing a valuable consideration and compromising a disputed claim "is not admissible to prove liability...." See Gov. Bar R. V, Section 11(A)(1) (requiring Board and Panel to follow the Ohio Rules of Evidence).

Another way in which the Board used Mr. Tomlan's restitution against him is that it recommended a more severe sanction than the two-year suspension recommended by the Panel because of the "actual harm suffered." The only meaningful harm identified (albeit not to the client) was the \$560,000 contingency fee received by the estate administrator's law firm, *which resulted solely from Mr. Tomlan's substantial restitution*. [Findings of Fact/Conclusions of Law ¶ 107; Tr. (Semple) at 411] Imposing a more severe sanction because of a large contingency fee generated by a large settlement is directly contrary to the policy of recognizing restitution as a *mitigating* factor.

A third mitigating factor is the Panel's finding that Mr. Tomlan "had a cooperative attitude toward the disciplinary proceedings." See BCGD Proc. Reg. 10(B)(2)(d). [Findings of Fact/Conclusions of Law ¶ 115] Mr. Tomlan also made full and free disclosure to the Panel.

Fourth, as the Panel found, "[t]estimony at the hearing and by letters furnished to [the] panel showed that Respondent has done many good deeds professionally and personally in his community and is of good character and reputation" – another mitigating factor under BCGD Proc. Reg. 10(B)(2)(e). [Findings of Fact/Conclusions of Law ¶ 115] Indeed, glowing testimony about Mr. Tomlan's good deeds and good character and reputation came from five live character witnesses and 14 letters -- including those from a local judge, attorneys, clients, a local mayor, a school superintendent, a worker's compensation hearing officer, local business leaders, and church leaders.

Each of the live character witnesses testified that Mr. Tomlan is not only a first-class lawyer, he is known by them and in his community to be a trustworthy and honest person. [Tr. (Froehlich) at 530-32; Tr. (Turos) at 540; Tr. (Nickerson) at 635, 637; Tr. (Miller) at 628; Tr. (Dela Cruz) at 701-02] A good example is Allan Olexa, a former teacher and current client of Mr. Tomlan, who testified about the profoundly positive effect Mr. Tomlan has made on him and his family:

Q: And how would you describe [John Tomlan] as an individual and as a lawyer?

A: As a teacher, I've come in contact with thousands of people over my life. I would put [John Tomlan] as one of the finest men I've ever known....

Q: Do you have an opinion as to his honesty?

A: *He's the finest, honest, most honest man I know who is a professional.... And I know this; he has never put money ahead of our care, consideration and feelings.*

Q: Have you ever known him to be dishonest?

A: Never, ever.

Q: Would you trust him?

A: I trust him now. I've trusted him in the past, and I sure hope that he will take care of me in the future.

[Tr. (Olexa) at 623-24 (emphasis added)]

The character letters presented on Mr. Tomlan's behalf at the disciplinary hearing are just as compelling as the live testimony. For example, Jennifer Sargus, Judge of the Common Pleas Court of Belmont County, Ohio, states in her April 23, 2007 letter:

For nearly 18 years, John Tomlan has actively practiced before me.... Throughout that period of time, he has been prepared and diligent in his representation of his clients.... In his dealings with my court, his integrity has been unimpeached by improper conduct and he has conducted himself as an able officer of the Court.

John W. Moore, Jr., executive vice president of a bank who knows Mr. Tomlan through their work together on parish and diocesan boards, states in his April 20, 2007 letter:

I have known [John Tomlan] for over fifteen years [H]e has always represented himself in the interest of those who have been his constituents with integrity, honesty and the highest level of dignity possible.

... I have always seen him represent the highest level of ethics and morality in every venue in which he has been involved. His professionalism is a hallmark for which he is well known and respected for in Belmont County.

* * *

... [T]here are not many that I consider to be true examples of the daily goodness which evokes random acts of kindness, compassion and concern but John Tomlan is one that I have never seen falter at being honest, fair and maintaining the highest levels of integrity and trustworthiness.

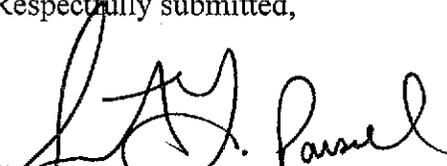
Richard E. Thompson, the Mayor of the Village of Belmont, for which Mr. Tomlan has served as the Village Solicitor for 20 years, states in his April 21, 2007 letter: "I can't say that I know a more honest, trustworthy man [than John Tomlan] through personal and business relations."

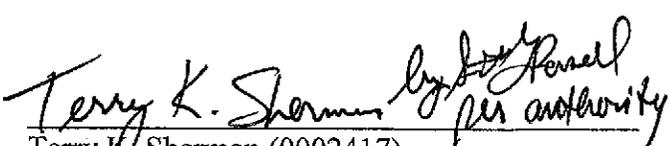
Mr. Tomlan, as a lawyer and citizen, helps scores of needy people. He is a leading, positive influence in his legal community, business community, and church and civic communities – often for nothing in return. The purpose of an attorney suspension (particularly, an indefinite suspension) is for the protection of the public. But suspending Mr. Tomlan indefinitely would have just the opposite effect: it would harm the many clients and other people Mr. Tomlan helps on a nearly everyday basis, as well as his family and those who work in his solo practice. See Disciplinary Counsel v. Young, 102 Ohio St. 3d 113, ¶ 15 (2004) (“[w]e must also take care not to deprive the public of attorneys who ... may be able to ethically and competently serve in a professional capacity”).

CONCLUSION

For all of these reasons, it is respectfully submitted that a more severe sanction than the two-year suspension that was recommended by the three-member Panel – the only decision-maker that heard and weighed the evidence firsthand – is not warranted.

Respectfully submitted,


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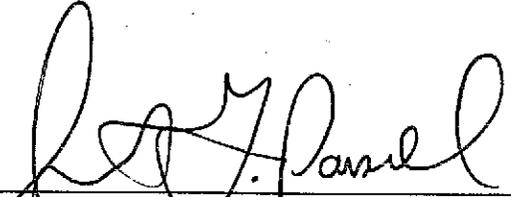
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was personally served, via hand delivery, this 11th day of October, 2007 upon:

Jonathan E. Coughlan, Disciplinary Counsel
Robert R. Berger, Jr., Assistant Disciplinary Counsel
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and

Jonathan W. Marshall
Secretary to the Board
Board of Commissioners on Grievances & Discipline
Supreme Court of Ohio
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