IN THE

SUPREME COURT OF OHIO

In re:	:	
John Richard Tomlan **Attorney Registration No. (0007449)** 108 East Main Street Saint Clairsville, OH 43950	:	
Respondent	:	**CASE NO. 2007-1595**
Disciplinary Counsel 250 Civic Center Drive, Suite 325 Columbus, OH 43215-7411	:	**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATION**
Relator	:	

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATION

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	:	

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

STATEMENT OF FACTS

On or about August 6, 1993, Katherine Rice was admitted to ManorCare, Heartland of Lansing Nursing Home by her brother Robert L. Hill. [Board Report at ¶ 17; Tr. at 50:2] Rice was 90 years old at the time of her admission and suffered from Parkinson's disease. [Report at ¶ 17; Tr. at 50:5] Rice was divorced and had no children. [Report at ¶ 17; Tr. at 764:15] Rice had substantial personal assets when she entered the nursing home and as such she paid for her own care. [Report at ¶ 18] At the time of her admission, Rice's physician was Dr. Sharon Lazo. [Tr. at 208:20]

Some time later in 1993 or 1994, respondent began visiting Rice at the nursing home, purportedly at the request of Rice's brother, Robert L. Hill. [Report at ¶ 19; Tr. at 52:7] In 1997 or 1998, respondent began assisting Rice with the payment of her bills and speaking with nursing home personnel on behalf of Rice. [Report at ¶ 20] Respondent also began to receive and review Rice's mail and some of her mail was directed by him to his home address. [Report at ¶ 20; Tr. at 60:17-61:23, 80:13, 124:13; Relator's Ex. 50 and 51] Existing medical records and the testimony of Dr. Lazo indicate that Rice suffered from dementia and/or organic brain syndrome as early as July 1997. [Tr. at 217:15; Relator's Ex. 67]

Starting in 1997, respondent began acting as Rice's attorney and assisting her with legal matters. In 1997 respondent handled a real estate closing for Rice and drafted the deed for the sale of a cabin owned by Rice. [Report at ¶ 20; Tr. at 53:1, 162:17] In 1998 and 1999, respondent wrote letters on his law office stationery to various parties on behalf of Rice and in some instances specifically identified himself as Rice's legal counsel. [Relator's Ex. 48-51]

Also in 1998, respondent prepared a will for Rice. [Report at ¶ 21; Tr. at 53:12; Relator's Ex. 36] As a part of the preparation of the will, respondent advised Rice as to whom she should make a beneficiary. [Tr. at 55:20, 151:7] Rice executed the will on May 5, 1998 and named respondent as executor and respondent's wife, Shawn D. Tomlan, as the alternate executor. [Report at ¶ 21; Tr. at 53:18-54:1] In the will, Rice made the following bequests: $20,000 to the nephew, Robert W. Hill Jr.; $3,500 divided among three individuals; $25,000 divided among three churches; $2,000 divided between two fraternal organizations; $1,000 for the perpetual care of her cemetery lot; $1,000 to the Bridgeport Alumni Association; and the remainder of her

estate divided among named hospitals and fraternal organizations. [Report at ¶ 21; Relator's Ex. 36]

According to respondent, in the spring of 1999 Rice told respondent that she wished to revise her will to leave him a financial bequest. [Report at ¶ 22; Tr. at 150:13, 784:6-784:16] At this time, respondent claims that he advised Rice that he was not permitted to prepare a will naming him as a beneficiary and that she would have to have another attorney prepare the will. [Report at ¶ 22; Tr. at 150:17, 153:22, 784:17] According to respondent, Rice declined to hire another attorney and her will was not revised. [Report at ¶ 22; Tr. at 784:17]

A short time later, respondent began transferring Rice's assets into joint and survivorship accounts in the name of himself and Rice. In June 1999, respondent obtained paperwork to create four $100,000 certificates of deposit for Rice at the Belmont Savings Bank, Wheeling National Bank, Belmont National Bank and WesBanco Bank.[1] [Report at ¶ 23; Relator's Ex. 39-42; Tr. at 63:8-63:24] The paperwork created four joint accounts with rights of survivorship in the name of Rice and respondent. [Report at ¶ 23; Tr. at 65:2, 66:18] As such, respondent would obtain sole ownership rights over the account upon Rice's death. [Report at ¶ 23; Tr. at 66:20-67:14] Rice endorsed checks and signed the paperwork creating the four certificates of deposit on June 11, 1999. [Report at ¶ 23; Relator's Ex. 39-42]

Later in 1999, respondent drafted a healthcare power of attorney and a durable power of attorney for Rice's signature. [Report at ¶ 24; Relator's Ex. 37 and 38; Tr. at 75:19] Rice signed

[1] The Board report at ¶ 23 misstates the evidence and mistakenly indicates that only one $100,000 certificate of deposit was created in June 1999, instead of the four $100,000 certificates of deposit that were actually created.

both documents on July 14, 1999. [Report at ¶ 24] The healthcare power of attorney named Rice's nephew, Robert W. Hill Jr., as Rice's attorney-in-fact for healthcare decisions. [Report at ¶ 24; Relator's Ex. 37] Rice named respondent as first alternate attorney-in-fact for healthcare decisions. [Report at ¶ 24; Relator's Ex. 37; Tr. at 76:1] The durable power of attorney designated respondent as attorney in-fact for Rice. [Report at ¶ 25; Relator's Ex. 38; Tr. at 77:4] Through this document, Rice granted respondent broad authority, including the right to buy and sell real estate and personal property, to enter into transactions with financial institutions, to buy and sell stocks and bonds, to transact business related to social security, pensions, IRA's, government benefits, insurance, credit cards, tax returns, and civil claims. [Report at ¶ 25; Relator's Ex. 38]

During Rice's lifetime, respondent repeatedly used the durable power of attorney to correspond with banks, creditors and other entities concerning Rice's legal affairs and to open bank accounts, manage funds and create and renew numerous certificates of deposit. [Report at ¶ 26; Relator's Ex. 53, 60-66; Tr. at 57:17-62:19, 83:6-89:9]

In June 2000, respondent prepared paperwork for Rice's signature to facilitate the transfer of 28,800 shares in American Home Products Corporation [nka Wyeth Pharmaceuticals] stock. [Report at ¶ 27; Relator's Ex. 43; Tr. at 960:23] The paperwork transferred the stock from Rice's sole name into joint ownership in the name of Rice and respondent. [Report at ¶ 27; Tr. at 90:6] As such, respondent would obtain sole ownership rights over the account upon Rice's death. [Report at ¶ 27; Tr. at 92:5] At the time of the transfer the value of the stock was

over $1 million. [Report at ¶ 27; 807:7] Rice signed the paperwork to make this transfer and create the joint stock ownership on June 15, 2000. [Report at ¶ 27; Relator's Ex. 43]

In January 2002, Rice's treating physician, Dr. Sharon Lazo determined that it was necessary to place Rice into hospice care due to her deteriorating health. [Report at ¶ 29; Relator's Ex. 74; Tr. at 220:2] Prior to Rice's admission to hospice, Dr. Lazo determined that Rice was incompetent to give informed consent for her own admission to hospice. [Relator's Ex. 74; Tr. at 224:19-225:18] Dr. Lazo testified that at that time Rice's "condition had deteriorated . . . quite dramatically" and Rice was "not very responsive, tended to be confused, very withdrawn" at this time. [Tr. at 221:3, 221:12]

Another health care professional reached a similar conclusion regarding Rice's mental capacity in January 2002. On January 16, 2002, Valley Hospice Admissions RN Nora Phemester completed a pre-admission evaluation of Rice. [Tr. at 305:18- 319:23; Relator's Ex. 69-72] Based upon this assessment, Phemester concluded that Rice suffered from moderate to severe cognitive impairment. [Tr. at 316:24-318:21; Relator's Ex. 72 p. 2]

As a result, RN Phemester contacted respondent and requested that he sign the paperwork to admit Rice to hospice as Rice's healthcare power of attorney. [Tr. at 97:17, 308:2] On January 16, 2002, respondent signed three documents on behalf of Rice and under the authority of Rice's medical power of attorney. [Report at ¶ 30; Relator's Ex. 76-78; Tr. at 97:17, 98:9-100:7] By signing these documents, respondent provided consent for Valley Hospice to provide care for Rice. [Report at ¶ 30; Tr. at 100:4]

At the time of her admission to hospice, Rice was in the end stage of Parkinson's disease and also suffered from a hiatal hernia, anemia, gastritis, depression, dementia and chronic dermatitis. [Report at ¶ 29; Relator's Ex. 68-72] To treat this diagnosis, Dr. Lazo prescribed several medications for Rice, including Ativan for anxiety, Aricept for organic brain syndrome/dementia and Paxil for depression. [Tr. at 228:20-229:6; Relator's Ex. 75]

A short time after Rice's admission to hospice, in early February 2002, respondent obtained paperwork to create a $250,000 certificate of deposit at Citizens Bank. [Report at ¶ 31; Tr. at 101:3] The paperwork created a joint account with rights of survivorship in the name of Rice and respondent. [Report at ¶ 31; Tr. at 102:21] As such, respondent would obtain sole ownership rights over the account upon Rice's death. [Report at ¶ 31; Tr. at 103:1] Respondent had Rice sign the paperwork creating the new joint certificate of deposit on or about February 6, 2002. [Report at ¶ 31; Relator's Ex. 44]

Respondent claims that Rice advised him that she wished to make this transfer a few weeks earlier, which would mean this alleged conversation occurred at the time of Rice's admission to hospice. [Tr. at 837:5, 932:17-933:4] Therefore, respondent facilitated this $250,000 transfer a short time after two medical professionals found Rice to be vulnerable, confused, under great stress and/or incompetent to give informed consent. [Tr. at 104:17, 105:4; Relator's Ex. 72, 74, 76-78]

During Rice's lifetime respondent facilitated the creation of four $100,000 certificates of deposit in June 1999, the transfer of over $1 million in stock in June 2000 and the creation of a

$250,000 certificate of deposit in February 2002. [Relator's Ex. 39-44] All of these financial transactions created joint and survivorship accounts with respondent obtaining sole ownership rights upon Rice's death. At no time did respondent urge Rice to obtain disinterested advice from any independent, competent and knowledgeable person with respect to the creation of the five joint bank accounts or the one joint stock account benefiting him. [Report at ¶ 32, 76] At no time did respondent insist that Rice obtain the services of another attorney with respect to the creation of the five joint bank accounts or the one joint stock account benefiting him. [Report at ¶ 33, 76; Tr. at 180:6, 182:12, 931:24-932:16] At no time did respondent advise Rice of the tax consequences of these gifts or the potential impact of these gifts on the bequests in her will and the solvency of her estate. [Report at ¶ 75, 77-78; Tr. at 67:22, 93:2, 402:3, 479:13; Relator's Ex. 18 at pp. 34, 60, 61] Finally, at the time of each of these five asset transfers, respondent knew that he could not accept the same asset if it were given to him through a will drafted by him, so he arranged to accept the transfer of assets in another [equally inappropriate] manner. [Tr. 935:16-936:12, 948:12]

Respondent claims that Rice's nephew Robert W. Hill, Jr. was aware of and approved of the creation of the five joint bank accounts or the one joint stock account benefiting respondent. [Report at ¶ 79; Tr. at 792:14, 810:6, 839:16] However, Hill's skills were limited. Hill was in poor health and had previously suffered from a stroke, was handicapped and diabetic. [Report at ¶ 80; Tr. at 578:8, 794:5] Further, prior to these gifts, Rice was concerned about Hill's health and how long Hill was going to live. [Report at ¶ 80] Hill predeceased Rice. [Report at ¶ 80; Respondent's Ex. 27]

In June 2002 while Rice was in hospice, respondent closed the Belmont Savings Bank joint and survivorship certificate of deposit account that was first created in June 1999 with $100,000 belonging to Rice. [Tr. at 106:6; Relator's Ex. 45] Respondent obtained a check for the full value of this closed account. [Relator's Ex. 45] Respondent did not re-invest or re-deposit these funds during Rice's lifetime. [Tr. at 107:1]

Rice died on December 25, 2002 at age 99. [Report at ¶ 35; Tr. at 107:9] After Rice's death, respondent arranged for her funeral and notified Rice's out of town niece, Jean Miller. [Report at ¶ 35; Tr. at 107:13] Despite the fact that respondent was the executor of Rice's will and controlled all of Rice's primary assets by operation of the joint survivorship accounts, respondent took no action on behalf of Rice's estate for over 16 months. [Report at ¶ 36; Tr. at 109:10] During this time respondent failed to:

- file Rice's will with the Probate Court [Report at ¶ 36; Tr. at 403:1];
- file estate tax returns [Report at ¶ 36; Tr. at 111:13, 403:8];
- pay Rice's creditors, such as the nursing home and funeral home [Report at ¶ 36; Tr. 112:22, 403:18];
- cancel payment of Rice's AARP health insurance premium which continued to be deducted from her checking account [Report at ¶ 36; Tr. at 111:18, 403:23];
- deposit numerous bank account interest and stock dividend checks that were mailed to respondent's residence [Report at ¶ 36; Tr. 110:17-111:8]; and
- secure Rice's former residence. [Report at ¶ 36]

However, respondent did take several actions in Rice's name. In 2003, respondent contacted the U.S. Department of Treasury regarding cashing in savings bonds owned by Rice. [Tr. at 115:1; Relator's Ex. 91, 92] Respondent also returned to Belmont Savings Bank in March 2003 and obtained a reissued check to replace the now stale check he obtained when he closed out Rice's joint and survivorship certificate of deposit in June 2002. [Tr. at 115:16; Relator's Ex. 46]

In December 2003, Rice's former nursing home hired Attorney Thomas Semple to collect Rice's outstanding bill of approximately $11,500. [Report at ¶ 37; Tr. at 367:10, 453:17] On December 30, 2003, Semple filed an Application for Authority to Administer Rice's estate in the Belmont County Probate Court. [Report at ¶ 37; Relator's Ex. 2; Tr. at 368:2] On or about February 2, 2004, Semple spoke to respondent regarding the pending Rice probate matter. [Report at ¶ 37; Relator's Ex. 3; Tr. at 116:20, 370:2] During this conversation, respondent falsely advised Semple that Rice had no living relatives. [Tr. at 370:12, 372:6; Relator's Ex. 3]

In March 1, 2004, the Probate Court appointed Semple as administrator of Rice's estate. [Report at ¶ 39; Relator's Ex. 4; Tr. at 119:4, 372:14] On March 2, 2004, Semple sent respondent a letter requesting respondent to provide Semple with documentation of Rice's assets, Rice's will and keys to Rice's house. [Report at ¶ 39; Relator's Ex. 28; Tr. at 119:8. 373:9] Respondent failed to respond to Semple's letter. [Report at ¶ 39; Tr. at 119:23-120:9, 373:21]

However, respondent did take one action subsequent to Semple's appointment as administrator. On or about March 30, 2004, respondent cashed the $112.154.86 check he

obtained when he closed Rice's Belmont Savings Bank certificate of deposit account. [Tr. at 120:10, Relator's Ex. 46] Respondent then took these funds and created a new certificate of deposit in the name of respondent and his wife at WesBanco Bank. [Report at ¶ 48, 101; Tr. at 120:23; Relator's Ex. 47]

On April 14, 2004, Semple made two filings with the probate court. [Report at ¶ 39] Semple filed a motion requesting the probate court order respondent to produce the will. [Report at ¶ 39; Relator's Ex. 5; Tr. at 374:6] Semple also filed a concealment action against respondent alleging that respondent had assets belonging to Rice's estate in his possession. [Report at ¶ 39; Relator's Ex. 6; Tr. at 374:9]

On May 5, 2004, respondent filed a Motion for Appointment of himself as Executor and Discharge of Semple as Administrator and an Application to probate the Will of Katherine Rice. [Report at ¶ 40; Relator's Ex. 7 and 9; Tr. at 123:1, 375:11] In his application to administer the estate, respondent estimated the value of Rice's estate at $190,000. [Report at ¶ 40; Relator's Ex. 8; Tr. at 123:20] Respondent's estimate of the value of Rice's probate estate was about $200,000 less than the actual value of the probate assets. [Report at ¶ 40; Tr. at 123:24, 376:8]

On May 14, 2004, Belmont County Probate Judge Mark Costine held an evidentiary hearing on the motions and pleadings filed by respondent and Semple. [Report at ¶ 41; Tr. at 125:17, 377:12, 467:10] On or about May 27 or 28, 2004, respondent approached Judge Costine as the Judge was leaving the courthouse and walking to his vehicle. [Report at ¶ 42; Tr. at 126:5,

467:19, 468:7] At that time respondent approached Judge Costine, no decision had been issued by the court on the issues argued at the May 14, 2004 hearing. [Tr. at 468:2] Respondent then made comments to Judge Costine regarding the opposing motions which the Court had heard from respondent and Semple. [Report at ¶ 42; Tr. at 126:14, 188:5] Respondent advised Judge Costine that he knew the court had discretion and that respondent hoped the Court's discretion would come down in his favor. [Report at ¶ 42; Tr. at 127:12, 468:15, 499:10] Respondent also advised Judge Costine that respondent had been Rice's attorney and knew her personal affairs. [Report at ¶ 42; Relator's Ex. 10, p. 3; Tr. at 128:1, 468:15, 499:10] Judge Costine testified that he believed respondent "was trying to influence [Judge Costine's] decision regarding that case." [Tr. at 469:1, 499:18]

On June 17, 2004, the Probate Court denied respondent's motion to discharge Semple as administrator. [Report at ¶ 43; Relator's Ex. 10; Tr. 377:16] The Court also found that respondent was "not a suitable person to serve as executor" because of respondent's "undue delay in the administration of the estate to the detriment of the beneficiaries," respondent's failure to properly manage assets and settle estate bills and respondent's failure to respond to Semple's numerous communications requesting information and documents. [Report at ¶ 43; Relator's Ex. 10; Tr. at 130:6, 380:6, 470:2-470:22] On July 17, 2004, respondent appealed the Court's order and on September 28, 2005, the Court of Appeals affirmed the Probate Court's order denying respondent's motion. [Report at ¶ 43; Relator's Ex. 22, Tr. at 472:5-472:17]

On July 15, 2004 respondent was sent another letter by Semple's law firm requesting respondent provide Semple documents in respondent's possession pertaining to Rice's assets.

[Tr. at 132:17; Relator's Ex. 29; Tr. at 381:7] Despite the fact that Semple had been appointed administrator of Rice's estate and respondent's challenge to Semple's appointment and request to stay probate proceedings had both been denied; respondent did not provide any information to Semple. [Relator's Ex. 12; Tr. at 133:9, 133:21, 382:2, 382:15] On August 5, 2004 respondent was sent a third letter by Semple's law firm requesting respondent provide Semple documents in respondent's possession pertaining to Rice's assets. [Tr. at 134:17, 383:9; Relator's Ex. 30] Respondent again failed to provide any information to Semple. [Tr. at 135:14, 383:22]

On August 27, 2004, respondent's wife, Shawn Tomlan, filed an application to administer Rice's estate based upon the fact that Rice's will named her as alternate executor. [Report at ¶ 44; Relator's Ex. 13; Tr. at 135:19, 384:13] Respondent's wife's application estimated the value of Rice's estate to be $1 million. [Tr. at 136:10; Relator's Ex. 13] The Probate Court denied this application on September 27, 2004. [Report at ¶ 44; Tr. at 136:16, 386:4; Relator's Ex. 16] At the conclusion of this hearing, the court on its own motion issued an order compelling respondent to provide Semple with Rice's documents, papers and assets that respondent had heretofore refused to release to Semple. [Tr. at 386:18; Relator's Ex. 16]

On November 8, 2004, Semple sent respondent a set of interrogatories inquiring about Rice's assets and requested a response within 28 days. [Report at ¶ 45; Relator's Ex. 25; Tr. at 137:15, Tr. at 387:18] Semple specifically requested respondent to identify all assets that were previously owned by Rice, but now owned by respondent. [Report at ¶ 45; Relator's Ex. 25; Tr. at 138:8] Respondent provided an unsworn response dated December 6, 2004. [Report at ¶ 45; Relator's Ex. 26; Tr. at 138:22, 390:3] In his response, respondent failed to identify the

$100,000 Belmont Savings Bank certificate of deposit created by Rice in June, 1999, which respondent had used to create a certificate of deposit in his own name in March 2004. [Report at ¶ 45; Tr. at 140:15, 143:7, 390:22-391:12; Relator's Ex. 47]

On December 22, 2004, Semple filed an action in the Belmont County Common Pleas Court against respondent alleging undue influence, breach of fiduciary duty, conversion, unjust enrichment and negligence in respondent's handling of Rice's affairs. [Report at ¶ 46; Tr. at 391:15; Relator's Ex. 31] On January 7, 2005, respondent appeared at a Probate Court hearing on a request for a permanent injunction by Semple. [Report at ¶ 47; Tr. at 144:4, 405:13; Relator's Ex. 17] During this hearing, respondent testified regarding Rice's non-probate assets. [Report at ¶ 47; Relator's Ex. 18; Tr. at 144:8] Respondent was directly asked if he had transferred any of Rice's assets into his own name and he falsely stated no. [Relator's Ex. 18, pp. 62-63; Tr. at 145:7] Respondent gave this answer despite the fact that he used Rice's $112,154.86 from the June 1999 Belmont Savings Bank certificate of deposit to create a certificate of deposit in his own name in March 2004. Respondent further testified that Rice only had three non-probate assets, and by doing so, again failed to disclose the Belmont Savings Bank joint certificate of deposit. [Report at ¶ 47; Relator's Ex. 18; Tr. at 144:11, 406:18]

As a result of this hearing, the probate court issued a permanent injunction[2] on February 1, 2005. [Report at ¶ 47; Relator's Ex. 19 and 20] The court's order restrained respondent from exercising any control over the three non-probate assets identified by respondent and issued

[2] By an agreed nunc pro tunc judgment entry dated May 26, 2005, the Court modified this order to become a preliminary injunction. [Relator's Ex. 21]

jointly to Rice and respondent — the Wyeth stock, the $100,000 WesBanco certificate of deposit and the $250,000 Citizens Bank certificate of deposit. [Report at ¶ 47; Tr. at 146:9, 146:19]

In May 2005, respondent retained Attorney Stuart G. Parsell to represent him in the lawsuit pending in the Common Pleas Court. [Report at ¶ 48; Tr. at 147:6] At a May 20, 2005 pretrial, Parsell advised the Court for the first time of the existence of the $112,154.86 in proceeds from Rice's Belmont Savings Bank joint certificate of deposit. [Report at ¶ 48; Relator's Ex. 34; Tr. at 147:10, 408:4] On May 26, 2005, the Probate Court signed an agreed entry that restrained respondent from exercising any control over the proceeds of this previously undisclosed certificate of deposit. [Report at ¶ 49; Relator's Ex. 21; Tr. at 148:1]

On August 22, 2006, Semple dismissed the lawsuit pending against respondent pursuant to a settlement agreement. [Report at ¶ 51; Relator's Ex. 31; Tr. at 408:15] Under the settlement agreement, respondent returned the Wyeth stock then valued at $1,431,360 and the Citizens Bank certificate of deposit then valued at $276,951.41 to the Rice estate. [Report at ¶ 51; Relator's Ex. 35; Tr. at 148:14, 149:9, 408:19] Respondent kept the Wesbanco and Belmont Savings Bank certificates of deposit, together valued at $222,944.75. [Report at ¶ 51] After the settlement, an amended inventory was filed in the Rice estate which shows the total estate value of $2,158,931.93. [Report at ¶ 52; Relator's Ex. 24]

Attorney Semple and his law firm were paid a $560,000 contingency fee for the legal work necessary to recover Rice's assets from respondent in the civil lawsuit. [Report at ¶ 107;

Tr. at 411:12] Semple testified that his firm also planned to seek a $50,000 fiduciary fee and a $75,000 attorney fee for the work necessary to administer the Rice estate. [Tr. at 412:12]

* * * *

There are several assertions presented in respondent's Introduction and Statement of Facts that require correction and/or clarification. First, respondent attempts to create the impression that he had a very close, intimate and caring relationship with Rice. Respondent's brief states that Rice "looked to [respondent] as the only family she had." However, the evidence shows that Rice had regular visits from several family members and friends including her brother Robert L. Hill, her nephew Robert W. Hill Jr., her friend Betty Lou Roth, her niece Sarah Shaw and Shirley Bench, who visited Rice weekly as a hospice volunteer. Additionally, it is worth noting that despite respondent's claims of great intimacy, he admitted that he never had Rice to his home or took her anywhere outside of the nursing home, even though Rice enjoyed getting out and did so for her annual class reunion and various medical and dental appointments. Finally, respondent's claims are further eroded by his repeated admissions that he had no knowledge of Rice's actual medical condition throughout the time that he knew her. [Tr. at 52:18, 62:20, 89:15, 93:4, 94:3-96:14, 104:15, 105:8]

Second, respondent attempts to use the testimony of several character witnesses to establish that he is an otherwise honest man. However, the testimony of these same people revealed the true limits of their knowledge. These character witnesses testified that they knew nothing about the facts underlying respondent's disciplinary case, respondent's purported close

family-like relationship with Rice or respondent's allegedly immobilizing grief upon Rice's death. [Tr. at 534:5, 535:6, 541:9, 543:4, 625:5]

RELATOR'S RESPONSE TO RESPONDENT'S OBJECTIONS

I.

BASED UPON THE SCOPE OF RESPONDENT'S CALCULATED MISCONDUCT AND THE ACTUAL HARM SUFFERED AN INDEFINITE SUSPENSION IS APPROPRIATE IN THIS MATTER.

The Board's recommendation for the indefinite suspension of respondent's law license was "based upon the scope of respondent's calculated misconduct and the actual harm suffered." [Report at 29] This misconduct includes the transfer of $1.6 million in Rice's assets into joint accounts without providing full disclosure of all material facts to Rice and without obtaining Rice's informed consent. Respondent's misconduct also includes his making false statements to Attorney Semple, in response to an interrogatory and during testimony at a court hearing. Further, respondent purposefully engaged in this dilatory and dishonest conduct to conceal his improper and unethical asset transfers. It is for these same reasons that relator requests this Court adopt the Board's well-supported recommendation.

A. The Scope of Respondent's Misconduct

During the time period in question, respondent regularly acted as legal counsel for Rice. [Report at ¶ 60] During this same period, respondent claims that Rice advised him that she wished to leave him something in her will, but wanted respondent to prepare the will.

Respondent declined to prepare the will, and instead, a few months later began the process of transferring over $1.6 million in Rice's assets into joint and survivorship accounts in both of their names. The final transfer of $250,000 took place a few weeks after respondent had been required to sign Rice's hospice admission paperwork because Rice was found incompetent to give informed consent for her treatment.

Respondent's actions, with regard to these six asset transfers, clearly violated the conflict of interest prohibitions in DR 5-101(A)(1). The Board found that respondent failed to "urge Rice to obtain disinterested advice from any independent, competent and knowledgeable person." [Report at ¶ 32] The Board further found that respondent did not "insist that Rice obtain the services of another attorney" regarding these transfers. [Report at ¶ 33] Finally, the Board found that respondent failed to disclose the potential consequences of these transfers to Rice such as "gift or estate taxes" which could make Rice's probate estate "insolvent" and "negate the specific and residual bequests" in Rice's will. [Report at ¶ 75]

Respondent makes various self-serving claims about the conversations that he purports to have had with Rice and her now deceased nephew about these transfers. The Board heard all of these explanations firsthand and did not "accept" or "believe" respondent's various claims. [Report at ¶ 85, 86] The panel further held that it was "unable to accept respondent's testimony." [Report at ¶ 87] Instead, the Board found that respondent used the certificates of deposit as a "substitute for a will which respondent admittedly knew he could not prepare if he were to be a beneficiary." [Report at ¶ 85] The Board found that "there was no testimony from

anyone other than respondent as to his claimed conversations with Rice . . . or her nephew . . . " [Report at ¶ 90]

Relator further notes that respondent's pattern of ethical misconduct extends far beyond these six improper asset transfers. Respondent:

- Did not file an action to probate Rice's estate until 16 months after Rice's death due to his realization that his misconduct would be discovered because there were no funds left to fulfill Rice's bequests or to pay the estate taxes [Report at ¶ 95];
- Made a false statement to Attorney Semple in an attempt to conceal the existence of Rice's living family members [Tr. at 370:12, 372:6; Relator's Ex. 3];
- Filed an action to be named as executor that grossly underestimated the value of Rice's estate [Report at ¶ 40; Tr. at 123:24, 376:8];
- Approached Judge Costine and engaged in an improper ex parte conversation to advance respondent's interests in being named executor [Report at ¶ 42; Tr. at 126:5, 126:14, 127:12, 128:1, 188:5, 467:19, 468:7, 468:15, 469:1, 499:10, 499:18];
- Attempted to have his wife named as executor for Rice's estate [Report at ¶ 44; Relator's Ex. 13; Tr. at 135:19, 384:13];
- Refused to provide Administrator Semple with Rice's financial documents [Report at ¶ 39; Tr. at 119:23-120:9, 133:9, 133:21, 135:14, 373:21, 382:2, 382:15, 383:22]
- Provided a false response to an interrogatory from Attorney Semple that failed to disclose one of Rice's $100,000 certificates of deposit that respondent had taken possession of after Rice's death [Report at ¶ 45; Tr. at 140:15, 143:7, 390:22-391:12; Relator's Ex. 47]; and

- Testified falsely at a probate court hearing regarding Rice's assets when he failed to disclose one of Rice's $100,000 certificates of deposit that respondent had taken possession of after Rice's death. [Report at ¶ 47; Relator's Ex. 18; Tr. at 144:11, 406:18]

Respondent also argues that his "failure to disclose" the $100,000 certificate of deposit to Semple and the probate court "caused no actual injury" because he "appropriately rectified" the matter "long before it caused any harm." Respondent misses the point. The Board found that respondent's interrogatory response and court testimony were not a "mistake," as respondent claims, but instead false and purposeful acts to conceal his misconduct. Therefore, the injury, just as this court found in *Cincinnati Bar Assn. v. Marsick*, 81 Ohio St.3d 551, 1998-Ohio-337, 692 N.E.2d 991 was "concealing evidence that is clearly requested" which is "tantamount to deceiving both opposing counsel and the court." 81 Ohio St.3d 551 at 553.

B. Respondent's Calculated Misconduct

At the disciplinary hearing, respondent pleaded innocence, ignorance and mistake to explain away various incriminating facts. However, after the panel heard and considered all of the evidence, the panel and the Board found that respondent's various excuses and explanations were not believable or plausible. For example, The Board found that:

- Respondent purposely did not suggest to Rice that she should obtain independent advice or provide Rice full disclosure of all facts related to the transfers because respondent "did not want some third party involved, which could have resulted in a reduction or elimination of the substantial benefits to him." [Report at ¶ 94]

- Respondent's "sixteen month delay" in seeking to administer Rice's estate "confirms the suspicion that respondent had not met his obligations in his financial dealings with Rice." [Report at ¶ 95] The Board further held that this delay was because respondent "knew that his conduct would be questioned." [Report at ¶ 95]

- Respondent "failed to cooperate with the court appointed administrator." [Report at ¶ 109]

- Respondent "initiated an out of court conversation" with the probate judge to facilitate the "removal of Attorney Semple" in violation of DR 7-110(B). [Report at ¶ 98]

- Respondent engaged in "deceit and misrepresentation in failing to timely disclose" the $100,000 certificate of deposit in the Semple interrogatory and at the January 2005 probate court hearing. [Report at ¶ 104] The panel further stated that it "cannot accept respondent's excuse that he simply forgot" about the certificate of deposit. [Report at ¶ 105]

Finally, relator notes that the Board found several aggravating factors directly related to the calculated nature of respondent's misconduct in this matter. These aggravating factors include a selfish motive, a refusal to acknowledge the wrongful nature of his conduct, Rice's vulnerability, the harm to Rice's beneficiaries and the fact that respondent's misconduct involved "multiple instances and offenses." [Report at ¶ 114]

C. The Actual Harm Suffered

In its report, the Board found that "respondent's inaction in not turning over the estate assets and not paying creditors which led to the related civil case also substantially damaged Rice's estate . . . and thus harmed the residual beneficiaries under her will." [Report at ¶ 106] In his testimony, respondent misleadingly [and selfishly] asserted that he was the only person harmed by this delay [Tr. at 114:5, 177:8, 874:24] The Board disagreed and found that:

- Respondent entered into a settlement with Rice's estate under which he kept the proceeds from the Wesbanco and Belmont Savings Bank certificates of deposit, valued at $222,944.75. [Report at ¶ 51; Relator's Ex. 35] Therefore, respondent's misconduct resulted in a substantial windfall for respondent and a detriment of over $222,000 to the Rice estate beneficiaries.
- Semple was required to pursue a civil lawsuit against respondent for 21 months to recover Rice's assets which resulted in a $560,000 contingency fee paid out of the proceeds recovered, thereby reducing the bequests to the residual beneficiaries.
- The litigation necessary to recover Rice's assets from respondent resulted in "delay and inconvenience to the beneficiaries and creditors of the estate." [Report at ¶ 107]
- Respondent's failure "to deposit numerous dividend and interest checks" from Rice's stock and certificates of deposit after Rice's death "deprived" the estate and Rice's beneficiaries of the use of these funds and the loss of interest that would have otherwise been earned. [Report at ¶ 108]
- Attorney Semple testified that his firm also planned to seek a $50,000 fiduciary fee and a $75,000 attorney fee for the work necessary to administer the Rice estate. [Tr. at 412:12]

Respondent also attempts to minimize the harm caused by his actions by suggesting that he has made "voluntary substantial restitution." A close examination of the pertinent facts shows that respondent's claimed "restitution" was hardly voluntary or substantial. A civil lawsuit was necessary to recover Rice's funds and took 21 months to settle. Additionally, during this litigation, respondent provided a false interrogatory response and false testimony. Finally, the settlement resulted in respondent keeping over $222,000 in Rice's funds and a cost of $560,000 in attorney fees to Rice's estate. In light of the Board's finding and respondent's own recent admission that his actions were improper, this Court should follow its well-established precedent and order respondent to make restitution of $222,944.75 for the two certificates of deposit he kept and $560,000 for the legal fees – all of which are fully attributable to respondent's misconduct. See *Disciplinary Counsel v. Johnson,* 113 Ohio St.3d 344, 2007-Ohio-2704, 865 N.E.2d 873, *Disciplinary Counsel v. Holland,* 106 Ohio St.3d 372, 2005-Ohio-5322, 835 N.E.2d 361, *Disciplinary Counsel v. Johnson* 106 Ohio St.3d 365, 2005-Ohio-5323, 835 N.E.2d 354.

D. Supreme Court of Ohio Case Law

Traditionally, attorney disciplinary bodies have viewed "gifts" from clients to attorneys with keen suspicion and this is especially true when the transaction was solely facilitated by the attorney. Ohio's disciplinary case law follows this trend and in fact this Court has routinely ordered an actual suspension from the practice of law for DR 5-101(A)(1) violations.

In *Disciplinary Counsel v. Slavens* (1992), 63 Ohio St.3d 162, 586 N.E.2d 92, Slavens was disciplined for preparing a client's will in which Slavens was named as a beneficiary and for

using a power of attorney to make himself gifts of his clients funds. In its decision, this Court noted that the will had been drafted after Slavens' client "had been diagnosed with senility and organic brain syndrome." Id. at 162. The Court also found that Slavens had violated DR 1-102(A)(4) when he "did not disclose the gifts" he had received from his client to bank representatives and further attempted to mislead the attorney for his client's estate. Id. at 163. Based upon these facts, the Court found that Slavens'conduct violated DR 1-102(A)(4), DR 1-102(A)(6) and DR 5-101(A). The Court ordered an indefinite suspension with a requirement that Slavens make restitution prior to any application for readmission.

In *Mahoning County Bar Assn. v. Theofilos* (1988), 36 Ohio St.3d 43, 521 N.E.2d 797, Theofilos was disciplined for preparing a client's will in which Theofilos was named as a beneficiary. Theofilos stated that he initially assisted his client with her finances and would look over her bills and review her check book. Id. at 44. Later, according to Theofilis, his client advised him that she wished to leave her estate to Theofilis and wished to have him draft the will. Initially, Theofilis declined and advised his client that another attorney would need to draft the will. Theofilos claims that the client stated that she did not wish to have another attorney draft her will and eventually, Theofilis prepared the will. Theofilis also received over $200,000 from this client through joint and survivorship bank accounts that he had set up. For this misconduct, the Court ordered a one year suspension.

In *Cincinnati Bar Assn. v. Clark* 71 Ohio St.3d 145, 1994-Ohio-233, 642 N.E.2d 611, Clark represented an 88-year-old client for over 35 years. During this time period, Clark had revised his client's will transforming its charitable bequests to bequests for the benefit of Clark.

Clark claimed that he had a close familial relationship with his client. Nonetheless, "the panel was troubled by the essentially complete control [Clark] exercised over his aging and vulnerable client," Clark's "failure to honestly account for the gifts . . . from [his client's] assets" and "the fact that all would have gone undetected" if other parties had not contested the will. Id. at 146. Based upon these facts, the Court found that Clark had violated, inter alia, DR 1-102(A)(4), DR 1-102(A)(6) and DR 5-101(A). After weighing the facts and Clark's mitigation evidence including character letters, his repayments to his client's estate and cooperation in the disciplinary process, the Court ordered a two year suspension with one year stayed.

Further, in addition to respondent's six asset transfers in violation of DR 5-101(A)(1), the Board found that respondent's conduct violated additional disciplinary rules and each of these violations supports ordering an indefinite suspension in this matter. Respondent's false interrogatory response, false testimony at the probate court hearing and false statement to estate administrator Semple are a dishonest course of conduct. In *Disciplinary Counsel v. Fowerbaugh,* 74 Ohio St.3d 187, 189, 1995-Ohio-261, 658 N.E.2d 237 the Court held that "[w]hen an attorney engages in a course of conduct resulting in a finding that the attorney has violated DR 1-102(A)(4) the attorney will be actually suspended from the practice of law for an appropriate period of time."

Further, this Court has previously held that providing a false interrogatory response will result in an actual suspension from the practice of law. In *Cincinnati Bar Assn. v. Marsick,* 81 Ohio St.3d 551, 1998-Ohio-337, 692 N.E.2d 991, the Court held that Marsick engaged in dishonest conduct and suppressed evidence when he falsely responded to an interrogatory in a

civil lawsuit. The Court further held that "concealing evidence that is clearly requested is tantamount to deceiving both opposing counsel and the court." Id. at 553. In consideration of that conclusion, the Court ordered a six month suspension.

Finally, respondent violated DR 7-110(B) when he engaged in an ex parte conversation with Judge Costine, discussed the merits of a motion that respondent had filed and lobbied the judge to appoint respondent as executor. It is based upon this extensive and purposeful course of unethical and dishonest conduct that the Board recommended that respondent receive an indefinite suspension and it is for these reasons that this Court should adopt the Board's recommendation.

II.

THE BOARD CORRECTLY DETERMINED THAT RESPONDENT ENGAGED IN UNDUE INFLUENCE IN THE TRANSFER OF THE $1.6 MILLION IN ASSETS BELONGING TO KATHERINE RICE

After hearing all of the evidence in this matter, the Board concluded that respondent's actions in transferring over $1.6 million in Rice's assets into joint accounts constitutes undue influence. The starting point for the Board's analysis was the finding that "the attorney client relationship creates a presumption of undue influence where the attorney benefits from any financial transaction with the client" based upon this Court's prior holdings in *Krischbaum v. Dillon* (1991), 58 Ohio St. 3d 58, 567 N.E.2d 129. [Report at ¶ 66] The Board then fully considered all of respondent's arguments and found that "the presumption of undue influence exists and is not overcome by the evidence presented." [Report at ¶ 69]

Respondent now requests that this Court reverse the findings of the Board based upon the same arguments previously rejected by the Board. First, respondent asserts that Rice was not susceptible to undue influence. However, the facts illustrate that during the time period of these transactions, Rice was vulnerable, mentally diminished and dependent on others for everything. Rice was in her mid to late 90's, suffering from Parkinson's disease, depression and dementia, confined to a nursing home, dependent on others to conduct her personal and financial business, reliant on others for all of her personal care, bed bound and during the last year of her life, in hospice.

Next, respondent suggests that the Board failed to consider "crucial" testimony regarding Rice and her relationship with respondent. However, the Board's report makes clear that it fully considered respondent's evidence, but nonetheless found it to be unbelievable and unpersuasive. For example:

- The Board held that it did "not accept respondent's claim that it was Rice's idea to place her substantial assets in joint ownership form with respondent." Instead the Board held that the joint and survivorship accounts were "used as his substitute for a will which respondent admittedly knew he could not prepare if he were to be a beneficiary." [Report at ¶ 85]
- The Board further held that it did "not believe that a 96 year old woman, who was not shown to have had any prior joint bank deposits, would be expected to initiate this type of ownership transfer without the suggestion of some knowledgeable person such as respondent." [Report at ¶ 86]

- The Board found its conclusions to be "particularly true when the initial transfers to joint and survivor form took place shortly after Rice proposed naming respondent a beneficiary under her will which would have required the use of independent counsel." [Report at ¶ 86]
- The Board was also "unable to accept respondent's testimony to the effect that Rice feared a bank collapse and therefore thought it best to separate her funds into $100,000 increments, but also include respondent as joint owner, in order to satisfy deposit insurance requirements." [Report at ¶ 87]
- The Board noted that "there was no testimony from anyone other than Respondent as to his claimed conversations with Rice (or with Hill, her nephew) concerning her informed understanding of the effect of the transfers on her estate and the beneficiaries under her will." [Report at ¶ 90]
- The Board points out that respondent admitted that he did not ask Rice if she would "still make the transfers to him if outside advice and counsel were obtained." [Report at ¶ 88]

Next, respondent makes various broad and far reaching statements about the "undisputed" evidence that Rice wanted to give respondent "the benefit of her estate." However, the only person who specifically testified that Rice wanted to transfer these assets to the respondent was the respondent. Further, respondent's claims that he and Rice were like family are completely refuted by the evidence [see page 15]. Finally, respondent's after-the-fact assertion that he "genuinely believed that he did not try to and did not actually influence Rice" is self-serving, suspect and should be disregarded. It is clear that the Board did not believe respondent's assertion based upon the totality of facts and this Court should do likewise.

Respondent also cites the testimony of several witnesses regarding Rice's condition and her relationship with respondent. However, this testimony is contradictory, incomplete and irrelevant. Carol Wagner offered many outrageously broad statements regarding Rice's persona and mental and physical abilities, but on cross examination admitted that her position at the nursing home was supervisory, that she had no regular contact with Rice after February 2000 and no contact with Rice at all after January 2001. [Tr. at 582:19-585:22] In light of the fact that the time period in question is from June 1999 through December 2002, the value of her testimony is dubious. Hospice LPN Donna Brown also offered many suspiciously clear memories regarding Rice's persona and mental capacity in 2002. On cross examination, however, Brown was unable to even recall Rice's medical diagnosis and described it only as "shortness of breath." [Tr. at 677:17] Betty Lou Roth offered testimony about Rice to a reasonable degree of medical certainty, but under cross examination, was unable to define the terms "reasonable degree of medical certainty."

Respondent further asserts that no witnesses "disputed the fact that [Rice] truly wanted to" make the financial transfers to respondent. However, respondent misses the point. This entire proceeding is premised on the assertion [and the Board's conclusion] that respondent took advantage of an elderly and mentally diminished woman and then attempted to cover it up. From that perspective, respondent's own conduct, the testimony of several witnesses, Rice's prior conduct and other evidence clearly support the contention that respondent acted improperly in facilitating and then attempting to conceal these transfers.

Finally, respondent cites several disciplinary cases from other states in an attempt to support his assertion that undue influence is not present and to therefore justify a lesser sanction. However, a close reading of these cases shows the different result was based upon facts that are wholly different than the present matter.

The funds at issue in *In re Barrick* (1981), 87 Ill.2d 233, 429 N.E.2d 842 were minimal and the client's desire to make a gift was fully corroborated by several parties. The $12,000 annual annuity that was 4 ½ percent of the client's estate, equal to the amount of the annual retainer paid by the client to the attorney and was found to be a "small part" of the client's estate by the court. Id at 234. Further, the client advised her business manager and a local judge of her special feelings for the attorney, the business manager testified that he was involved in the creation of the gift and that the gift was the client's idea and three bank employees witnessed the signing of the will and heard the client reaffirm her independent intention to make the gift. Id. at 235, 237. Finally, in its analysis, the Barrick court pointed out that advising a client to seek independent counsel is a crucial factor in analyzing an undue influence claim. Id. at 240.

The court found no undue influence in *Disciplinary Board v. Amundson* (N.D. 1980), 297 N.W.2d 433, 438, in part, based upon the fact that a third party witnessed the transaction and because the attorney and client had a close personal relationship "akin to that of parents and child" that had existed since the attorney's childhood. Id. 435, 437. Finally, the bequest in *Conduct of Tonkin* (1982), 292 Or. 660, 662, 667, 642 P.2d 660 was $75,000 out of $6 million estate which the court found to be a "minor fraction of the estate." Clearly, respondent's conduct is dissimilar to the facts in these three cases.

Finally, respondent states that he is "sincerely remorseful," claims that "he candidly admitted his mistakes in judgment and apologized for them" at the hearing, again "acknowledges and apologizes for his mistakes in judgment" and states that he "accepts the Board's conclusion that he failed to comply with the Disciplinary Rules." Respondent's remorse is a new development in this matter that requires further examination.

Respondent's brief provides citations to the transcript that reveal the four "mistakes" respondent claims that he admitted during the hearing – his 16-month delay in filing Rice's estate, his ex parte conversation with Judge Costine, his false interrogatory response and his false testimony regarding the one $100,000 certificate of deposit. The first two "mistakes" respondent admitted only after lengthy questioning by the panel. [Tr. at 188:20, 944:24, 945:12] Further, the Board found respondent's so-called third and fourth "mistakes" to be purposeful false statements that it characterized as both "deceit" and "misrepresentation." [Report at ¶ 104] As such, respondent's remorse is insincere and his apology lacks the requisite candor to warrant consideration by this Court.

Further, despite respondent's present attempts to claim remorse, the Board report found that respondent "refuses to acknowledge the wrongful nature of his conduct" and noted at the hearing, respondent "den[ied] any violations," "claim[ed] that he provided no legal services to Rice" in connection with the asset transfers, claimed that the transfers were preceded by "adequate disclosures to Rice," and denied that he did anything "improper" by his actions regarding Rice's estate. [Report at ¶ 5, 13, 14, 114] Additionally, at the hearing, respondent argued that the disciplinary complaint should be dismissed. [Report at ¶ 116] Clearly,

respondent's new found remorse is solely directed at reducing the sanction that he previously argued was completely inapplicable to his behavior.

CONCLUSION

The evidence shows that respondent transferred nearly $1.7 million in assets, belonging to the elderly and mentally diminished Rice, into joint accounts without providing full disclosure of all material facts to Rice and without obtaining Rice's informed consent. Further, respondent engaged in repeated dilatory and dishonest conduct after Rice's death to conceal his actions and prevent discovery. The evidence shows that these were purposeful actions with the dishonest intent to facilitate respondent's improper and unethical asset transfers.

Based upon this evidence, in consideration of the injuries caused by respondent and the other aggravating factors present, and in light of the fact that respondent's misconduct most closely resembles the misconduct in the *Slavens* disciplinary case, relator requests respondent receive an indefinite suspension from the practice of law.

Respectfully submitted,

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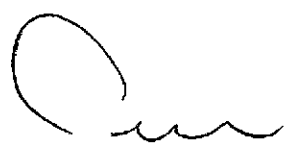
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Answer Brief was served via U.S. Mail, postage prepaid, upon Co-Counsel for Respondent Stuart G. Parsell, Zeiger, Tigges & Little LLP, 3500 Huntington Center, 41 South High Street, Columbus, OH 43215 and Co-Counsel for Respondent Terry Sherman, 52 West Whittier Street, Columbus, OH 43206 and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 41 S. High Street, Suite 2320, Columbus, Ohio 43215, this 23 day of October, 2007.



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