

**IN THE SUPREME COURT OF OHIO**

**Disciplinary Counsel,** : **CASE NO. 2007-1570**  
 :  
**Co-Relator,** :  
 :  
**v.** :  
 :  
**Clifford Scott Portman (0073390)** : **MEMORANDUM OF CO-RELATOR,**  
 : **DISCIPLINARY COUNSEL, IN**  
**Respondent.** : **OPPOSITION TO RESPONDENT'S**  
 : **MOTION TO SUPPLEMENT**  
 : **THE RECORD**  
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**MEMORANDUM OF CO-RELATOR, DISCIPLINARY COUNSEL, IN OPPOSITION  
TO RESPONDENT'S MOTION TO SUPPLEMENT THE RECORD**

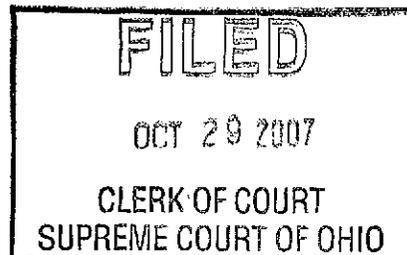
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	:	<b>OPPOSITION TO RESPONDENT'S</b>
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On October 17, 2007 respondent filed a "Motion to Supplement the Record" and objections to the report and recommendations of the Board of Commissioners on Grievances and Discipline ("board"). The board recommended that respondent be disbarred from the practice of law in the state of Ohio.

On December 26, 2006, co-relators, Disciplinary Counsel and the Butler County Bar Association, filed a six-count amended complaint against respondent alleging 18 violations of the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio<sup>1</sup>. The allegations included, inter alia, neglect, failure to return client funds, conduct adversely reflecting on respondent's fitness to practice law, conduct

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<sup>1</sup> Co-Relator, Butler County Bar Association, has not joined in this memorandum.

involving fraud, dishonesty, deceit, and misrepresentation, and failure to cooperate in co-relators' disciplinary investigations.

Respondent failed to file an answer to the amended complaint (as well as the original complaint filed on May 26, 2006), and never appeared in this matter until the notice to show cause was issued by this Court. Respondent now moves this Court to permit him to "supplement the record" with "mitigation evidence" for the Court to consider in its determination of what sanction to impose.

To his motion respondent has attached cover letters and copies of checks. These checks were allegedly sent to clients as refunds for fees the clients paid for cases in which respondent performed little or no work. Respondent also sent a cover letter and a check to the Butler County Auditor, which paid respondent an appointed counsel fee, despite the fact respondent also accepted a fee from the same client. All of the cover letters enclosed with these checks were dated October 16, 2007, one day before respondent's objections to the board's recommendations were to be filed.

Respondent also submits an affidavit indicating that he intends "to sign a contract with the Ohio Lawyers Assistance Program" to "begin the necessary treatment for the mental condition" from which respondent allegedly suffers. No documentation was submitted as to the nature of respondent's condition, nor has respondent submitted any diagnoses, treatment plan, or proved that the "mental condition" caused respondent's misconduct.

Contrary to respondent's arguments, there is no authority permitting a respondent in a disciplinary action to supplement the record and submit evidence for the first time to this Court.

Respondent argues that Gov. Bar R. V(11)(D) is applicable. This provision states in pertinent part:

The process and procedure under this rule and regulations approved by the Supreme Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report, or order to show cause may be made at any time prior to the final order of the Supreme Court. The party affected by the amendment shall be given reasonable opportunity to meet any new matter presented.

Respondent's argument is flawed however, because no answer was ever filed. There is thus nothing to amend and the foregoing provision is inapplicable.

Respondent does not dispute any of the allegations in the amended complaint, he only disagrees with the recommended sanction of disbarment. Therefore, pursuant to Civ. R. 8(D) all of the allegations are admitted:

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Civ. R. 8(D).

This court has explicitly held that a respondent may not submit evidence to the Court for the first time in a disciplinary matter. A case directly on point is *Columbus Bar Assn. v. Sterner*, 77 Ohio St.3d. 164, 1996-Ohio-324. In that case, this Court upheld the board's recommendation of disbarment upon a motion for default. In response to Sterner's attempt to introduce mitigation evidence for the first time in his objections to the board's recommendation, the *Sterner* Court held:

Respondent has attempted in his brief and in oral argument to introduce in mitigation evidence of his alleged attention deficit disorder, a psychological condition which respondent did not connect to his five-year pattern of neglect of duty. We decline to accept such evidence at this late date.

Disciplinary matters are original actions. Rule V of the Rules for the Government of the Bar of Ohio, setting forth detailed procedures for such matters, is promulgated pursuant to our constitutional power

to oversee all phases of the conduct of the bar. (Citation omitted). Under Rule V, the time for the production of evidence is at the formal hearing before a panel appointed by the Secretary of the Board of Commissioners on Grievances and Discipline. After the Board issues its findings and recommendations based on the certified report of the panel, this court issues an order to show cause to the respondent who then has an opportunity to object and to support that objection with a brief. Rule V has no provision for the introduction of evidence in the brief filed in this court, or in the oral argument to this court. Only in the most exceptional circumstances would we accept additional evidence at that late stage of the proceedings.

If respondent has any objection here, it must be to the findings and recommendations of the board. The entire record sent to us from the board consists of the pleadings, the default motion, the affidavits, and other material filed in support of the motion, and the findings of fact and recommendations of the board after respondent failed to answer, otherwise plead, or appear before the panel. Matters in excuse or mitigation do not appear in that record, nor do exceptional circumstances exist that would allow such evidence to be introduced for the first time by way of brief or oral argument in response to the order to show cause.

Id. at 167-168 (Emphasis added).

Likewise, in *Columbus Bar Assn. v. Finneran*, 80 Ohio St.3d. 428, 1997-Ohio-286, this Court held:

Moreover, respondent failed to respond to the complaint before this court. Neither in his brief nor in his oral presentation did respondent address either his failure to answer relator's complaint or his failure to respond to relator's motion for default. Instead, in replying to our order to show cause why the recommendation of the board should not be confirmed by the court, respondent filed a response and objections, a brief in support, and a motion requesting remand. To that document, respondent attached five exhibits. In oral argument before this court, respondent also sought to explain his actions in the various cases with new material. As we said in *Columbus Bar Assn. v. Sterner*, (citation omitted), "Rule V of the Rules for the Government of the Bar of Ohio, setting forth detailed procedures for [disciplinary] matters . . . has no provision for the introduction of evidence in the brief filed in this court or in oral argument to this court.

Id. at 432

At this late date, respondent not only seeks to have the Court consider evidence of his restitution made one day prior to the date his objections were due, but also that an undisclosed "mental condition" contributed to his misconduct. As this Court is aware, in order for a mental disability to qualify as a mitigating factor, all of the following must be present:

- i. A diagnoses of a chemical dependency or mental disability by a qualified healthcare professional or alcohol/substance abuse counselor
- ii. A determination that the chemical dependency or mental disability contributed to the cause of the misconduct.
- iii. . . . in the event of a mental disability, a sustained period of successful treatment.
- iv. A prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical, professional practice under specified conditions.

(BCGD Proc. Reg. 10(B)(2)(g)(i-iv). None of the foregoing factors have been established by proper or timely presented evidence.

Further, co-relator has had no opportunity to cross-examine respondent, any witnesses, or offer any evidence to refute respondent's "evidence" due to respondent's complete lack of cooperation and participation in this case. For that reason and in light of this Court's prior decisions, respondent's motion to supplement the record should be denied.

### **CONCLUSION**

Precise rules govern the procedures in a disciplinary action. The rules do not permit a party to supplement the record or present evidence in the first instance to this Court. Respondent did not respond to co-relators' amended complaint, nor did he

appear or argue in any fashion until he received the order to show cause. There are no exceptional circumstances which would permit respondent to supplement the record and present mitigation evidence almost one year after the amended complaint was filed. As this case is no different than *Stern*, supra, co-relator submits that respondent's Motion to Supplement the Record should be denied.

Respectfully submitted,

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Jonathan E. Coughlan (0026424)  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Memorandum of Co-Relator, Disciplinary Counsel, in Opposition to Respondent's Motion to Supplement the Record was served via U.S. Mail, postage prepaid, upon respondent's counsel, Alvin Mathews, Bricker & Eckler, 100 South Third Street, Columbus, Ohio, 43215, Co-Relator, Richard Hyde, Esq., Holcomb, Hyde & Gmoser, LLP, 311 Key Bank Building, 6 S. Second Street, Hamilton, Ohio, 45011, and via hand delivery upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio, 43215 this 29th day of October, 2007.



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Carol A. Costa  
Assistant Disciplinary Counsel