

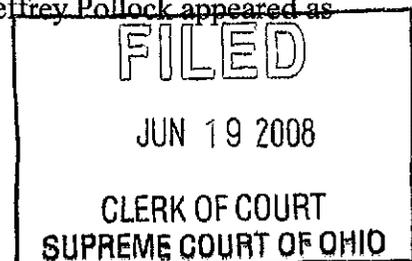
**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

08-1203

In Re:	:	
Complaint against	:	Case No. 07-084
Kevin T. McFaul	:	Findings of Fact,
Attorney Reg. No. 00335687	:	Conclusions of Law and
	:	Recommendation of the
<u>Respondent,</u>	:	Board of Commissioners on
	:	Grievances and Discipline of
Cleveland Bar Association	:	the Supreme Court of Ohio
	:	
<u>Relator.</u>	:	
	:	

BACKGROUND

1. The Cleveland Bar Association filed a complaint against Respondent on October 18, 2007. The complaint alleged three counts of misconduct. The Respondent filed an answer to the complaint on November 13, 2007.
2. The parties entered into a Consent to Discipline under Section 11 of the Board's Rules and Regulations. The Consent to Discipline was filed January 15, 2008, with the Board office. By entry dated February 11, 2008, the Panel rejected the Consent to Discipline, and the matter was scheduled for formal hearing.
3. The matter was heard on April 9, 2008, in Cleveland, Ohio, before a Panel composed of Lisa Lancione Fabbro, Stephen C. Rodeheffer, and Judge John B. Street, Chair. None of the Panel members was from the district from which the complaint arose, and none was a member of the probable cause panel that certified the matter to the board. R. Jeffrey Pollock appeared as



counsel for Relator, Cleveland Bar Association. Respondent, Kevin T. McFaul, was present for the hearing. He was represented by Mary Cibella.

4. At the hearing, the Relator offered the attached stipulations with one agreed correction. The stipulations as presented did not contain a stipulation that Respondent had violated DR 1-102(A)(4) in Count 1. The parties agreed that the stipulation should have included a DR 1-102(A)(4) violation. Relator called Respondent on cross-examination and then rested its case.

5. Respondent offered his own testimony and that of several character witnesses.

COUNT ONE

6. Respondent represented Jose Reyes in a criminal matter. Mr. Reyes's girlfriend, Whitney Matta, was familiar with and knew some of the people involved in the case, and she was helping Respondent gather and decipher information about the case. Ms. Matta was not paid by Respondent for her work, but he did give Mr. Reyes a \$250.00 credit on fees for the services she provided.

7. On September 6, 2006, Respondent visited Mr. Reyes at the Cuyahoga County Detention Center. Respondent took Ms. Matta along with him so she could visit with Mr. Reyes. As they entered the detention center, they passed two checkpoints. At the first checkpoint, Respondent wrote on the sign in sheet that Ms. Matta was his "legal assistant." At the second checkpoint, he wrote that she was his "paralegal." No one from the detention center questioned them. Respondent's designation of Ms. Matta allowed her to visit with Mr. Reyes in violation of a detention center rule allowing only attorneys to visit during designated visitation hours.

8. Based on his conduct, Relator alleged, and the parties stipulated, that Respondent had violated DR 1-102(A)(4) [engaging in conduct involving dishonesty, fraud, deceit, or

misrepresentation] and DR 1-102(A)(6) [engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law].

COUNT TWO

9. The Cleveland Bar Association determined that the allegations in Count Two lacked credibility. Relator, therefore, dismissed all of the allegations contained in Count Two.

COUNT THREE

10. Respondent has been addicted to alcohol and crack cocaine for many years. On November 17, 2006, he was indicted on two counts of possession of drugs in violation of R.C. 2925.11, both fifth degree felonies.

11. On May 15, 2007, Respondent pled guilty to a reduced charge of attempted drug possession, a first degree misdemeanor, and the other count was dismissed. Respondent was sentenced to jail for a term of six months, but the six month sentence was suspended, and defendant was placed on probation for five years. The terms of probation included that the Respondent perform fifty hours of Community Work Service, that he submit to random drug testing, that he successfully complete an inpatient treatment program, including a minimum of six months of inpatient treatment, and that he attend after care and outpatient treatment as designated. He was to pay a fine of \$500.00 and a supervision fee in the amount of \$200.00, along with court costs.

12. The parties agreed that Respondent's conduct pertaining to this criminal conviction violated DR 1-102(A)(6) [engage in any other conduct that adversely reflects on the lawyer's fitness to practice law]. An additional allegation from the complaint that his conduct also violated DR 1-102(A)(4) was dismissed by the Relator as part of the stipulations.

13. Based on the stipulations and testimony, the Panel finds by clear and convincing evidence that the Respondent violated the following disciplinary rules: DR 1-102(A)(4) as to Count One and DR 1-102(A)(6) as to Count One and Count Three.

MATTERS IN MITIGATION AND AGGRAVATION

14. The parties stipulated, and the Panel finds by clear and convincing evidence, that the following factors in mitigation have been established in this case:

a. Respondent has been diagnosed as suffering from chemical dependency to both alcohol and cocaine or crack cocaine. Respondent's misconduct was caused in part by his chemical dependence. On October 23, 2006, defendant was voluntarily admitted to the Ed Keating Center and treated for chemical dependency until his transfer on July 12, 2007, to the Alternatives Agency, Inc. Respondent successfully completed his treatment. Respondent has been subject to random drug testing since October 23, 2006, through the date of the hearing. None of the random drug tests has shown the presence of drugs, and Respondent has had a sustained uninterrupted period of sobriety and treatment. Respondent's prognosis is that he is able to return to the competent, ethical, professional practice of law.

b. Respondent, when he is clean and sober, has otherwise good character and reputation in the community.

c. Respondent entered into an OLAP contract and has been in compliance with that contract.

d. As part of his sentence for his misdemeanor conviction, Respondent will serve five years probation, perform fifty hours of community service, and pay a fine of \$500.

e. Respondent has acknowledged and accepted responsibility for his misconduct.

- f. Respondent has fully and completely cooperated in this disciplinary matter.
- g. Respondent has not had any prior discipline from the Supreme Court of Ohio.
- h. Respondent has shown sincere remorse.
- i. Respondent did not have a dishonest or selfish motive.
- j. Respondent voluntarily reduced his law practice by not representing clients in felony criminal cases after his arrest in October of 2006 with the exception of one probation violation case.

15. The parties stipulated, and the Panel finds by clear and convincing evidence, that the following factors in aggravation have been established.

a. Respondent did not have an IOLTA account at any time while he was a sole practitioner, including his representation of Mr. Reyes in Count One. Respondent has never carried legal malpractice insurance and has never notified any clients that he did not have malpractice insurance as required by DR 1-104. The parties agree to treat these matters in aggravation rather than as separate violations. No one has ever complained or filed a grievance based on these matters. They were discovered by the Relator during Respondent's deposition.

b. Initially, Respondent did not fully acknowledge how his alcohol and drug dependency affected his ability to represent clients.

c. Respondent has been diagnosed as being chemically dependent upon crack cocaine, a highly addictive drug.

d. Respondent has been chemically dependent upon alcohol, cocaine and crack cocaine for many years.

e. Respondent sought treatment in 2002-2003, but then had a relapse.

f. Relative to Count One, Respondent misrepresented Ms. Matta as his legal assistant and his paralegal when she was assisting Respondent only to help her boyfriend.

g. Respondent has committed multiple offenses.

SANCTION

16. The parties jointly recommended that an appropriate sanction in this matter would be a term suspension of two years, all stayed upon the following conditions:

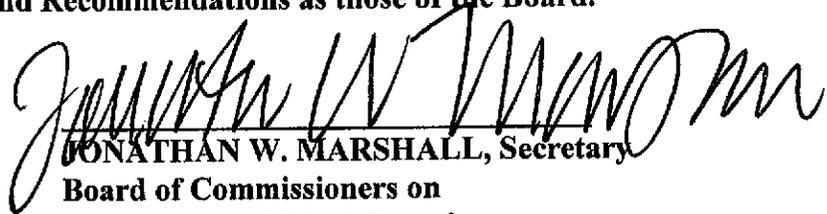
- a. Respondent shall be put on monitored probation for five years;
- b. Respondent shall successfully complete any outpatient treatment as required by his treatment provider or by the court in his criminal case;
- c. Respondent shall abide by the terms of his OLAP contract during the entire five year probation period including submitting to random drug testing;
- d. Respondent shall not plead guilty or no contest or be convicted of any drug or alcohol related offense;
- e. Respondent shall be supervised for the five year probation period by a monitoring attorney as appointed by the Cleveland Bar Association, who will be given periodic updates by OLAP and any outpatient treatment aftercare provider to insure that Respondent is abiding by his recovery program;
- f. Respondent shall open and maintain an IOLTA account; and
- g. Respondent shall either obtain professional liability insurance in the amount of at least \$100,000.00 per occurrence and \$300,000.00 in the aggregate, or he shall notify his clients as required by Ohio Professional Conduct Rule 1.4.

The panel agrees with the above sanction and recommends it to the Board.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 5, 2008. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Kevin McFaul, be suspended from the practice of law in the State of Ohio for two years with the entire two years stayed upon the Panel's conditions. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

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

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

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