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The board's report was certified to this court on June 19, 2008. A show cause order was filed on June 27, 2008. Respondent's objections were filed July 15, 2008. For the reasons set forth herein, this Court should overrule respondent's objections and adopt the Findings of Fact and Recommendation of the board.

### **STATEMENT OF FACTS**

As set forth in the report, respondent was not present at the hearing because he is in federal custody. Respondent was represented by counsel and through counsel, the parties entered into stipulations.

On March 8, 2002, a fire destroyed the Millersport, Ohio, lakeside residence of respondent, who was at that time a duly-elected sitting judge of the Fairfield County Municipal Court, Lancaster, Ohio. At the time of the fire, respondent was vacationing in the Virgin Islands. After the fire, respondent twice sent verified proof of loss claim forms to his insurer, Grange Mutual Casualty Company ("Grange"), via United States mail, representing in the forms that "the cause and origin of the said loss were: UNKNOWN TO CLAIMANT." Respondent eventually settled his insurance claim for \$235,000. See *United States v. McAuliffe* (2007), 490 F.3d 526, 529 (Stipulated Exhibit 4).

Respondent used the insurance proceeds to pay off the mortgage on the destroyed property and a car loan, as well as to make a down payment on another parcel of real estate. *Id.* at 530. Federal, state, and local authorities, however, became suspicious that the fire had been purposefully set by defendant and a business partner, Darrell Faller, as part of a scheme to defraud the insurance company. *Id.*

The parties stipulated that on April 24, 2003 respondent was indicted by a federal grand jury in the United States District Court for the Southern District of Ohio.<sup>1</sup> The six-count indictment is Stipulated Exhibit 1. The indictment sought forfeiture of the insurance proceeds, as well as the real and personal property acquired by respondent with those proceeds.

Respondent pled not guilty and was tried to a jury in a nearly three-week trial beginning on January 26, 2004. On February 13, 2004, the jury returned a verdict finding respondent guilty on all six counts, to wit:

<u>Count No.</u>	<u>Title &amp; Section</u>	<u>Offense</u>
One	18 U.S.C. §1341	Mail Fraud
Two	18 U.S.C. §1341	Mail Fraud
Three	18 U.S.C. §§844(h) and 2	Use of fire to commit mail fraud
Four	18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud <sup>2</sup>
Five	18 U.S.C. §1957	Money Laundering
Six	18 U.S.C. §1957	Money Laundering

Respondent was originally sentenced by entry filed December 16, 2004.<sup>3</sup>

Respondent filed a notice of appeal as to the December 16, 2004 judgment.<sup>4</sup>

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<sup>1</sup> Respondent was a sitting judge at the time of the fire and the time of the indictment.

<sup>2</sup> Initially, Count Four of respondent's indictment inadvertently referenced 18 U.S.C. 844(n). The district court allowed the Government to amend the indictment to substitute subsection (m) for (n).

<sup>3</sup> On September 14, 2004, the court issued an opinion and order granting the government's request for forfeiture and ordering respondent to forfeit the two parcels of real property and automobile described in the indictment.

By entry filed June 2, 2005, the Sixth Circuit Court of Appeals remanded respondent's case to the district court for re-sentencing pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621. By amended judgment entry filed December 20, 2005, the district court for the Southern District of Ohio committed respondent to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on counts one, two, four, five and six to run concurrently and 120 months on count three to run consecutive to counts one, two, four, five and six. Respondent filed a notice of appeal as to the December 20, 2005 judgment.

A corrected amended judgment entry was filed on January 11, 2006. This entry modified only the portion of the December 20, 2005 judgment entry pertaining to restitution. Pursuant to the amendment, respondent was ordered to pay a fine of \$150,000 immediately; make restitution of \$235,000 to Grange; and, forfeit two pieces of real estate and a vehicle. The district court ordered respondent to liquidate his accounts to satisfy these obligations.

By judgment filed June 22, 2007, the Sixth Circuit Court of Appeals affirmed respondent's convictions and sentences. See Exhibit 4. Respondent paid the fine (\$150,000) and restitution (\$235,000) plus interest. On August 10, 2007, the United States filed a "satisfaction of criminal judgment" authorizing cancellation of the judgment regarding monetary penalties.

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<sup>4</sup> On January 24, 2005, respondent's license to practice law in the state of Ohio was suspended pursuant to Gov. Bar R.V(A)(3) (interim suspension based upon a felony conviction). See *In re: Don S. McAuliffe*, Supreme Court of Ohio, Case No. 2004-2143.

On September 14, 2007, respondent filed a petition for certiorari in the United States Supreme Court. Respondent's petition for certiorari was denied on October 15, 2007.

As charged in the formal complaint and as determined by the board, respondent's conduct violates the Code of Judicial Conduct: Canon 2 (a judge shall respect and comply with the law and shall act at all times in a matter that promotes public confidence in the integrity and impartiality of the judiciary) and Canon 4 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities). In addition and as also determined by the board, respondent's conduct violates the Code of Professional Responsibility: DR 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude); DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonest, deceit, fraud, or misrepresentation); DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); and, DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects upon his fitness to practice law).

## **RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS**

### **I.**

**The imposition of the recommended sanction should not be delayed.**

In his first objection, respondent asks this Court to delay imposing a sanction until he has exhausted his efforts to obtain post-conviction relief. Respondent urges this Court to deviate from its holding in *Bar Assn. of Greater Cleveland v. Steele* (1981), 65 Ohio St.2d 1, 417 N.E.2d 104, 19 O.O.3d 130. Respondent specifically requests that

this Court defer its ruling on the board's recommendation until proceedings have been concluded on the motion to vacate his sentence that respondent filed pursuant to 28 U.S.C. §2255 (the "2255 motion").

After the hearing, respondent filed a pro se 2255 motion in the United States District Court for the Southern District of Ohio. See Report at 2, ¶4. Through counsel and also after the disciplinary hearing, respondent filed a motion to supplement the record in this case with his pro se 2255 motion. Respondent attached a photocopy of his 2255 motion to his motion to supplement the record. Relator filed a response in opposition to respondent's motion to supplement the record.

Respondent's motion to supplement the record is part of the record in this disciplinary case; however, the 2255 motion was not considered by the panel. See Report at 2, ¶4 ("The Section 2255 motion is therefore part of the record in this disciplinary proceeding but was not considered by the panel as admissible evidence in this proceeding.) (Emphasis added.) Nevertheless, relator does not dispute that respondent has filed a motion to vacate his sentence pursuant to 28 U.S.C. §2255. If this Court considers the contents of respondent's 2255 motion in the process of reaching its decision in this disciplinary case, relator respectfully requests leave of court to supplement the record with a photocopy of the government's brief in opposition to the 2255 motion.

Respondent was indicted in 2003 and convicted by a jury in 2004. A formal complaint was certified by the board on April 18, 2005. Pursuant to Gov. Bar R.V(5)(C), the disciplinary case was stayed for nearly three years pending the outcome of

respondent's direct appeals.<sup>5</sup> The stay was lifted on September 7, 2007. By consent of the parties, the matter was continued for a brief period of time while respondent pursued a petition for certiorari. This disciplinary matter was heard by the panel on April 10, 2008 and certified to this Court in June 2008 – five years after respondent's indictment.

At the hearing, respondent's counsel urged the panel to "recommend an indefinite suspension until judicial resolution of [respondent's] collateral attack of his conviction pursuant to 28 U.S.C. §2255." Report at 6, ¶ 21. In his objections, respondent asserts that he requested a "stay of the proceedings" until the resolution of his 2255 motion. The distinction between these requests is procedurally significant.

The suggestion that respondent's current "interim suspension" (aka "felony suspension") should be or could be "transformed" into an "indefinite suspension" is procedurally misplaced. If this Court delays resolution of this disciplinary case pending the outcome of respondent's quest(s) for post-conviction relief, respondent must remain "felony suspended" pursuant to Gov. Bar R.V(5). The ultimate sanction imposed for respondent's misconduct would then be determined at some future date after the exhaustion of all of respondent's post-conviction efforts. More importantly and for the following reasons, resolution of this matter should not be delayed and respondent should be disbarred.

In *Steele*, this Court rejected a nearly identical argument for a delay in the imposition of disbarment. *Steele*, 65 Ohio St.2d 1. To wit, Robert L. Steele argued that his disciplinary action should await final determination of his habeas corpus petition. *Id.*

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<sup>5</sup> Gov. Bar R.V(5)(C) provides: "Any disciplinary proceeding instituted against a justice, judge, or an attorney based on a conviction of an offense or on default under a child

at 2. Steele's petition raised constitutional claims that his Fifth and Sixth Amendment rights had been denied during his trial. Steele argued that the merits of his post-conviction petition warranted further deferment of the disciplinary process based upon a possibility that the federal court would overturn his conviction. *Id.* In rejecting Steele's request for a delay, this Court held, "It is theoretically possible for respondent to repeatedly file habeas corpus petitions. There must be some finality to our disciplinary process." *Id.* at 3.

In part, respondent argues that a deviation from the *Steele* decision is warranted because the federal law has changed and now mandates that a prisoner has one year to file a 2255 motion. See 28 U.S.C. §2255(f). Respondent further argues that other amendments to 28 U.S.C. §2255 have made it more difficult to file a second or successive motion(s) for post-conviction relief. See 28 U.S.C. §2255(h). Arguing against an application of the Court's reasoning in *Steele*, respondent asserts that because of changes in the law, it has become "theoretically impossible for anyone to prevail on a second or successive federal petition."

In support of his argument for a delay, respondent asserts that he is waiting for the federal district court to rule on the 2255 motion that he filed on or about April 11, 2008. Respondent does not proclaim that he will not file successive 2255 motions, appeals, or other collateral attacks. Respondent asks this court to conclude that since the new gate-keeping provision has made it "more difficult" to file successive 2255 petitions, this Court should not apply the *Steele* decision to this case.

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support order shall not be brought to hearing until all appeals from the conviction or proceedings directly related to the default determination are concluded."

A change in the federal law that imposes a “certification” requirement upon successive requests for post-conviction relief does not provide sufficient justification for this Court to deviate from *Steele* or to delay its decision in the present case. If respondent’s 2255 motion is rejected, respondent may appeal to the Sixth Circuit. See 28 U.S.C. §2255(d). Likewise, if the district court rules in favor of respondent, the government may appeal. If respondent’s first petition for post-conviction relief is denied by the federal court, there is nothing preventing him from filing a request to “certify” a succession of additional motions. Further, respondent has post-conviction remedies in addition to 28 U.S.C. §2255. The pattern of seeking post-conviction relief and taking an appeal from an adverse decision may repeat itself ad nauseam. Overall, any further delay flies in the face of this Court’s desire for finality.

As stipulated, respondent was convicted by a jury. Respondent’s conviction was affirmed by the Sixth Circuit Court of Appeals. Respondent’s petition for certiorari was rejected by the United States Supreme Court. In promulgating the Rules for the Government of the Bar of Ohio, this Court has expressly stated that disciplinary proceedings should be stayed only during the initial “guilt or innocence” phase and while a respondent pursues a direct appeal. Gov. Bar R.V(5)(C).

Respondent also argues that a delay is warranted because a 2255 motion may contain “significant information” that normally cannot be included in the direct appeal process. At the hearing, respondent’s counsel set forth this same assertion. Counsel for respondent explained that in a petition for post-conviction relief, respondent would, for example, for the first time, be permitted to raise an argument based upon the

“ineffective assistance of counsel.” It is apparent, therefore, that the panel and the board considered this argument and rejected it. This Court should do the same.

In Ohio and across the United States, a criminal conviction has been deemed conclusive evidence that a lawyer engaged in the underlying conduct. See, e.g. *Disciplinary Counsel v. Woods* (1986), 28 Ohio St.3d 245, 503 N.E.2d 746. See, also *In the Matter of Convery* (2001), 166 N.J. 298, 304, 765 A.2d 724 (“A criminal conviction of an attorney is conclusive evidence of guilt in a disciplinary proceeding. \* \* \* Once an attorney is convicted of a crime, the sole issue to be considered is the extent of discipline to be imposed.”) See also *Comm. on Legal Ethics v. Folio* (1990), 184 W.Va. 503, 401 S.E.2d 248 (evidence of a criminal conviction satisfies burden of proving ethics violation based on the conviction). Gov. Bar R.V(5)(B) expressly provides, “A certified copy of a judgment entry of conviction of an offense \* \* \* shall be conclusive evidence of the commission of that offense \* \* \* in any disciplinary proceedings instituted against a justice, judge, or an attorney based upon the conviction \* \* \*.” (Emphasis added). See, also *Woods*, 28 Ohio St.3d at 247.

Respondent’s conviction is conclusive evidence that he engaged in mail fraud, use of fire to commit mail fraud, conspiracy to use fire to commit mail fraud, and money laundering. As determined by the board, it amounts to clear and convincing evidence that respondent violated the Code of Professional Responsibility and the Code of Judicial Conduct. Respondent’s request to delay the imposition of a sanction for his misconduct should be denied.

## II.

### **Respondent should be disbarred by this Court.**

In his second argument, respondent objects to paragraph 20 of the board's report. Respondent asserts that the board should not have made recommendations and instead, should have "certified" to this Court the two questions raised by respondent in his pre-hearing brief.<sup>6</sup> Respondent argues that under the current status of Ohio law, a judge has "virtually no defense" to charges of misconduct "if he or she pursues the merits of the felony conviction." Respondent's argument must be rejected by this Court.

Notably, the time for respondent to defend himself was during his jury trial and his appeal. Respondent was convicted by a jury and was unsuccessful at the court of appeals. Under Gov. Bar R.V, respondent's time for a "defense" to the criminal charges expired with the exhaustion of his appeals.

Respondent asserts that because he was a judge at the time of the offenses, his disbarment is, in essence, a foregone conclusion and that there was no reason for him to contest the charges of misconduct. Respondent asserts that based upon previous rulings of this Court, respondent, relator, the panel, and the board "are left with no choice" regarding the recommended sanction.

Respondent argues that this Court has treated judges as a "special class, and/or category, and has ordered their disbarment, with no consideration of mitigating factors." Respondent's analysis of this Court's holding in *Disciplinary Counsel v. Gallagher*, 82

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<sup>6</sup> Respondent's two questions reiterate the arguments made in his second objection, i.e. is a sanction other than disbarment possible when a sitting judge is convicted of illegal conduct involving moral turpitude? As determined by the board, there are no provisions in Gov. Bar R.V or in the Procedural Rules and Regulations following Gov. Bar R.V to permit "certification" of a question from the board to this Court.

Ohio St.3d 51, 1998-Ohio-592, 693 N.E.2d 1078, is overbroad. Moreover, respondent's argument is inapplicable to this case given that respondent did not present any mitigation.

Respondent is correct that this Court ordered disbarment in the *Gallagher* case and that this Court considered that the respondent in *Gallagher* "held judicial office at the time of his arrest." Distinguishing *Gallagher* from the instant case is the fact that significant mitigating evidence was presented in *Gallagher*. It was in the process of considering the mitigation evidence that the *Gallagher* court stated, "Judges are subject to the highest standard of ethical conduct." *Id.* The *Gallagher* court went on to state, "Mitigating factors have little relevance, however, when judges engage in illegal conduct involving moral turpitude." *Id.*

There is a marked distinction between giving mitigation "little relevance," and announcing that mitigation evidence will not be considered. The *Gallagher* court did not hold that if a judge engaged in illegal conduct involving moral turpitude, mitigating factors would not be considered. In this case, given that respondent did not present mitigation evidence, the questions of whether mitigating evidence might warrant a sanction other than disbarment would be pure speculation.<sup>7</sup>

The Ohio disciplinary process is far more "gray" than the "black and white" envisioned by respondent. Respondent acknowledges that in *Gallagher*, the panel and the board recommended an indefinite suspension. Respondent allows that the

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<sup>7</sup> Relator does not dispute the mitigating factors noted by the board, i.e. there is no evidence of a prior disciplinary record, respondent made restitution in satisfaction of the criminal judgment, and, respondent displayed a cooperative attitude toward this disciplinary proceeding. Report at 5.

aggravating and mitigating factors in Section 10 of the BCGD Procedural Rules and Regulations “appear to present a fair criteria[.]” Nevertheless, respondent argues that this Court has mandated “automatic” disbarment for judges convicted of felony offenses involving moral turpitude. Respondent asserts that because he was a judge, there is simply no justifiable reason to present even compelling mitigation evidence.

Respondent’s arguments are simply not correct.

Pursuant to Gov. Bar R.V, relator, the panel, and the board had the option of recommending a sanction other than disbarment. However, given the nature of respondent’s criminal convictions combined with the lack of mitigation evidence, anything other than disbarment would have been an inappropriate recommendation. In the proper case, relator is certainly willing and able to make a recommendation of a sanction less than disbarment. Again, this is not such a case.

To be perfectly clear, respondent is not arguing that the board placed too much reliance upon aggravating factors. Respondent is not complaining that the board failed to give sufficient weight to mitigating evidence. Respondent stipulated to the existence of the conviction; however, respondent has not admitted that he committed misconduct. Respondent’s absence of acceptance of responsibility rightfully forecloses him from offering meaningful mitigation evidence.

The *Gallagher* case is not the only case contradicting respondent’s contention that relator and the board were foreclosed by this Court from seeking any sanction other than disbarment. In *Disciplinary Counsel v. Mosely* (1994), 69 Ohio St. 3d 401, 632 N.E.2d 1287, an East Cleveland Municipal Court judge was disbarred. Freddie Mosely was convicted of six federal felony counts of interfering with commerce by extortion in

that he conspired to use his judicial position to unlawfully obtain property not due him, three state charges of grand theft, and three state charges of theft in office. Mosely admitted to violating Canons 1 and 2 of the Code of Judicial Conduct as well as DR 1-102(A)(3), DR 1-102(A)(4), DR 1-102(A)(5) and DR 1-102(A)(6). *Id.* at 403. Although the *Mosely* court noted that relator and respondent had jointly recommended an indefinite suspension, this Court affirmed the board's recommendation of disbarment without further comment. *Id.*

In general and absent mitigating circumstances, disbarment is the recommended sanction for any attorney convicted of a felony offense of which a necessary element is fraud. See American Bar Association Center for Professional Responsibility, Standards for Imposing Lawyer Sanctions (1991 & Amend.1992), Standard 5.11. In *Disciplinary Counsel v. Stern*, 106 Ohio St.3d. 266, 2005-Ohio-4804, 834 N.E.2d 351, Ira Stern pled guilty to conspiracy to distribute heroin, maliciously damaging a building by fire, bank fraud, and money laundering. In a case decided on relator's motion for default, the only mitigating factor was that Stern had no previous discipline.

The *Stern* court summarized the criminal conduct as follows:

The crimes occurred between 1999 and 2001. The drug charge resulted from respondent's purchase of heroin with the intent to resell it to his girlfriend and others. The remaining charges are all connected to the following scheme: After the respondent purchased rental property in Columbus in 1999, he arranged to have the property damaged or destroyed by fire. After the fire, he obtained a check from an insurance company for the fire damage, then forged a signature for the other payee on the check and retained the proceeds. He also later forged a signature on another check, deposited it, and retained the proceeds.

*Id.* at 267.

Notably, respondent was convicted of similar fraud offenses. As set forth by the Court of Appeals in *United States v. McAuliffe* (2007), 490 F.3d 526, the mail fraud statute under which respondent was convicted prohibits:

\* \* \* the use of the mails by any person "having devised or intended to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises...." 18 U.S.C. §1341. "Mail fraud consists of (1) a scheme or artifice to defraud; (2) use of mails in furtherance of the scheme; and (3) intent to deprive the victim of money or property. \* \* \* Materiality of falsehood is a requisite element of mail fraud. \* \* \* The misrepresentation "must have the purpose of inducing the victim of the fraud to part with the property or undertake some action that he would not otherwise do absent the misrepresentation or omission." \* \* \* A misrepresentation "is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which is was addressed."

Id. at 531 (citations omitted).

"The requisite intent to defraud requires 'an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself.'" Id. (citations omitted). The Court of Appeals also noted that "[t]he bank, mail, and wire fraud statutes all employ identical 'scheme to defraud' language and thus are to be interpreted in *pari materia*." Id. at 532, footnote 2. Respondent was also convicted of using fire to commit mail fraud in violation of 18 U.S.C. §§844(h), conspiracy to use fire to commit mail fraud in violation of 18 U.S.C. §844(m), as well as a violation of 18 U.S.C. §1957, money laundering. The Court of Appeals noted that respondent could not successfully characterize his convictions as "arson," and emphasized that they were, in fact, convictions for using fire to commit mail fraud. Id. at 537.

The *Stern* court stated, "A lawyer who engages in the kind of criminal conduct committed by respondent violates that duty to maintain personal honesty and integrity, which is one of the most basic professional obligations owed by lawyers to the public. Respondent's misconduct was harmful to the legal profession, which is and ought to be a high calling dedicated to the service of clients and the public good." *Id.* Citing *Gallagher*, 82 Ohio St. 3d 51, the *Stern* court found that disbarment is appropriate for conduct that violates DR 1-102 and results in felony conviction. *Stern*, 106 Ohio St.3d at 267.

Stephany Tsanges was disbarred after a jury found her guilty of 14 counts of mail fraud and one count of wire fraud. *Disciplinary Counsel v. Tsanges* (1990), 49 Ohio St.3d 57, 550 N.E.2d 944. The convictions resulted from Tsanges faking motor vehicle accidents and fraudulently collecting insurance proceeds. The *Tsanges* court agreed with the board's recommendation of disbarment. *Id.* at 59. This Court stated:

After reviewing tapes of a telephone conversation between respondent a co-conspirator, a federal appeals court concluded that she seemed to be "running scared," aware that the authorities were closing in, and that the conversation "simply is not the conversation of an innocent, uninvolved person." The federal jury apparently believed the testimony of a co-conspirator that respondent masterminded these crimes, even in the face of her testimony denying culpability.

*Id.* This Court determined that Tsanges violated DR 1-102(A)(3), DR 1-102(A)(4) and DR 1-102(A)(6).

Antonio Sweeney was disbarred for his violations of DR 1-102(A)(3), DR 1-102(A)(4) and DR 1-102(A)(6). *Disciplinary Counsel v. Sweeney*, 84 Ohio St.3d 388, 1999-Ohio-486, 704 N.E.2d 248. Sweeney was convicted of mail fraud after he

defrauded four insurance companies by settling claims in the total amount of \$92,839 based upon false medical records that he had created.

In mitigation, this Court considered that Sweeney was remorseful, active in his church, served five months in federal prison, and that he was participating in OLAP and AA. In aggravation, this Court noted that Sweeney had been previously disciplined, that he had not made restitution to the insurance companies, nor had he made the restitution ordered in his first disciplinary case. Noting that it had considered the mitigation evidence, this Court nevertheless rejected the board's recommendation of an indefinite suspension and disbarred Sweeney.

As respondent pointed out, this case is distinguishable from *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235. It is distinguishable based upon the nature of the crimes committed. It is also distinguishable based upon Judge Connor's acceptance of responsibility and the significant mitigating evidence presented by Judge Connor. As stated by the *Connor* court, "Members of the judiciary have an even greater duty to obey the law, and the breach of that duty has been met with the full measure of our disciplinary authority." *Id.* at 103. The *Connor* court continued:

We sometimes temper the sanction, however, when illegal acts emanate from alcohol or chemical addictions and we believe that the judge or attorney is committed to recovery and no longer poses a threat to the public or the judicial system. \* \* \* In these circumstances, we tailor the sanction to assist and monitor the attorneys' recovery.

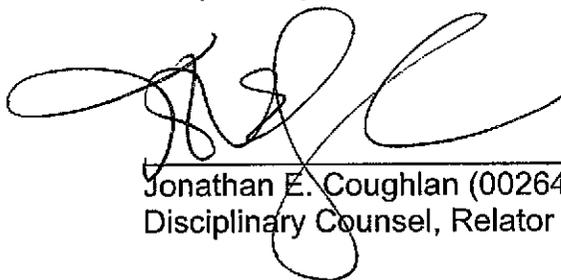
*Id.* (citations omitted). Again, it would be pure speculation to opine on the effect mitigation evidence would have had on the instant case.

In total, respondent has offered no compelling reasons why a decision in this matter should be deferred. Respondent's objections should be overruled and this Court should adopt the recommendation of the board.

### CONCLUSION

In light of the nature and level of the criminal offenses of which respondent was convicted, considering the absence of mitigating factors, the presence of aggravating factors, and the multiple disciplinary rule violations, respondent, Don S. McAuliffe, should be disbarred.

Respectfully submitted,



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Jonathan E. Coughlan (0026424)  
Disciplinary Counsel, Relator



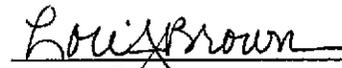
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Lori J. Brown (0040142)  
First Assistant Disciplinary Counsel  
Counsel of Record

Office of Disciplinary Counsel  
250 Civic Center Drive, Suite 325  
Columbus, Ohio 43215-7411  
614.461.0256

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, David J. Graeff, Post Office Box 1948, Westerville, OH 43081, and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 S. Front Street, 5<sup>th</sup> Floor, Columbus, Ohio 43215 this 28<sup>th</sup> day of July, 2008.

  
\_\_\_\_\_  
Lori J. Brown  
Counsel for Relator

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

**In Re:** :

**Complaint against** : **Case No. 05-037**

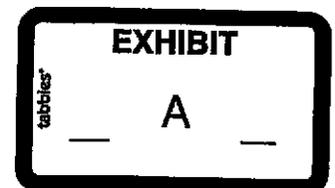
**Don S. McAuliffe** : **Findings of Fact,**  
**Attorney Reg. No. 0014629** : **Conclusions of Law and**  
: **Recommendation of the**  
**Respondent** : **Board of Commissioners on**  
: **Grievances and Discipline of**  
**Disciplinary Counsel** : **the Supreme Court of Ohio**

:  
**Relator** :  
:

1. This matter was heard on April 10, 2008, in Columbus, Ohio, before a panel consisting of members Judge Beth Whitmore, John H. Siegenthaler and Lawrence R. Elleman, Chair. None of the panel members was from the district from which the complaint arose or a member of the probable cause panel in this matter. Relator was represented by First Assistant Disciplinary Counsel, Lori J. Brown. Respondent was represented by David J. Graeff. Respondent was not present at the hearing because he is in federal custody, but his counsel represented to the panel that he was in contact with Respondent and authorized to speak for Respondent at the hearing.

**FINDINGS OF FACT**

2. At the hearing, Relator offered the Stipulations appended hereto as Exhibit 3. The panel unanimously adopts the Stipulations of the parties as part of its finding of fact in this matter. Relator also offered, without objection, the sentencing memorandum filed by Respondent's counsel



in the United States District Court for the Southern District of Ohio, Eastern Division, and the response thereto by the United States Attorney as Exhibits 1 and 2 respectively. Exhibits 1 and 2 were offered as background, but these exhibits were not given weight by the panel on the issues of aggravation and mitigation because they represented only arguments of counsel in a different proceeding.

3. Relator rested without presenting any witness testimony. Respondent rested without presenting any evidence and specifically declined to present any evidence of mitigation. The panel finds that the following facts were proved by clear and convincing evidence.

4. Subsequent to the hearing, Respondent filed a Motion to Supplement the Record with his motion filed in the United States District Court for the Southern District of Ohio to vacate his criminal sentence pursuant to 28 U.S.C. § 2255. A copy of the Section 2255 motion was attached to the motion filed with the Board. The Section 2255 motion is therefore a part of the record in this disciplinary proceeding but was not considered by the panel as admissible evidence in this proceeding.

5. At the time of the conduct leading to the allegations of misconduct, Respondent was subject to the Code of Judicial Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

6. On or about April 24, 2003, a federal grand jury indictment was filed against Respondent in the United States District Court for the Southern District of Ohio, Eastern Division. On February 13, 2004, the jury returned a verdict finding Respondent guilty of all counts in the indictment as follows:

<u>Count Number</u>	<u>Title &amp; Section</u>	<u>Offense</u>
One & Two	18 U.S.C. §1341	Mail Fraud

Three	18 U.S.C. §§844(h) and 2	Use of fire to commit mail fraud
Four	18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud
Five & Six	18 U.S.C. §1957	Money Laundering

Respondent appealed from the judgment of conviction, which judgment was modified in certain respects not relating to guilt or innocence and not material to the resolution of this disciplinary proceeding. The judgment of conviction, as modified, was affirmed by the Sixth Circuit Court of Appeals and *certiorari* was denied in the United States Supreme Court.

7. Counts One and Two of the indictment, pursuant to which Respondent was convicted, allege that, among other things, Respondent devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises; that as part of the scheme and artifice to defraud, he agreed with another person to damage or destroy, by means of fire, a dwelling and its contents for the purpose of collecting insurance proceeds; that he and another person did in fact damage or destroy, by means of fire, such dwelling and its contents; that he falsely represented to the insurance company that the fire was not caused by design or procurement on his part, although he well knew otherwise; and that he submitted two sworn statements of proof of loss to the insurance company which he knew to be false.

8. Count Three of the indictment, pursuant to which Respondent was convicted, alleges, among other things, that Respondent knowingly used fire to commit mail fraud, as more fully set forth in Counts One and Two.

9. Count Four of the indictment, pursuant to which Respondent was convicted, alleges, among other things, that Respondent knowingly, willfully and unlawfully combined and conspired

and agreed with at least one other person to use fire to commit mail fraud as more fully set forth in Counts One and Two.

10. Counts Five and Six of the indictment, pursuant to which Respondent was convicted, allege, among other things, that Respondent knowingly engaged and attempted to engage in certain monetary transactions constituting money laundering.

11. Respondent is currently serving a 36-month prison term on Counts One, Two, Four, Five and Six of the indictment to run concurrently, and 120 months on Count Three to run consecutive to Counts One, Two, Four, Five and Six. Upon release from prison, Respondent is subject to a three-year term of supervised release upon conditions.

12. Respondent was ordered to pay a fine of \$150,000 and make restitution to the Grange Insurance Company of \$235,000, which criminal judgment has since been satisfied.

13. On January 24, 2005, Respondent's license to practice law in the State of Ohio was suspended on an interim basis by the Supreme Court of Ohio pursuant to Gov. Bar R.V(A)(1)(a) (felony conviction).

### CONCLUSIONS OF LAW

14. Respondent's stipulation of a criminal conviction is conclusive evidence that he committed the crimes with which he was charged in the indictment. *Disciplinary Counsel v. Woods* (1986), 28 Ohio St.3d 245.

15. Respondent's conduct for which he was convicted violated the Code of Judicial Conduct: Canon 2 (a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary) and Canon 4 (a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities).

These canons relate to the conduct of a judge when acting in a private capacity as well as conduct of a judge in the course of official duties. *Disciplinary Counsel v. Gallagher* (1998), 82 Ohio St.3d 51, 1998-Ohio-592; *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902.

16. Respondent's conduct for which he was convicted violated the Code of Professional Responsibility: DR 1-102(A)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude); DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, deceit, fraud or misrepresentation); DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); and DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law).

#### AGGRAVATION AND MITIGATION

17. Aggravating Factors:

- a. Respondent acted with a dishonest and selfish motive.
- b. Respondent is guilty of multiple offenses.
- c. Respondent has refused to acknowledge the wrongful nature of his conduct.
- d. Respondent did not make restitution until ordered to do so.
- e. Respondent's conduct occurred at a time when he was a member of the

judiciary and has brought disrepute to the judicial system and constitutes a breach of the public trust.

*Disciplinary Counsel v. Gallagher, supra*, at 52.

18. Mitigating Factors: Respondent specifically declined to present evidence of mitigating factors. However, the record does reflect that Respondent cooperated in these disciplinary proceedings and that he made restitution in satisfaction of the criminal judgment against him to do so. There is no evidence of a prior disciplinary record.

## RECOMMENDATIONS

19. Relator recommended permanent disbarment.

20. Respondent recommended that instead of making a sanctions recommendation based on the aggravating and mitigating factors, the Board should "certify" to the Supreme Court the following questions:

"Does the board have any authority to recommend indefinite suspension when an elected Ohio judge is found guilty and sentenced pursuant to a felony conviction?"

Closely associated with the above would obviously be whether the relator-disciplinary counsel, has any authority, considering mitigating circumstances, to negotiate sanctions less than disbarment?"

The Board has no authority to certify questions regarding sanctions to the Supreme Court. The Board is required to make recommendations for sanctions against any justice, judge, or attorney found guilty of misconduct in accordance with Gov. Bar R. V(6)(B).

21. Alternatively, Respondent has urged the Board to recommend an indefinite suspension until judicial resolution of his collateral attack of his conviction pursuant to 28 U.S.C. §2255. This section of the federal law is the functional equivalent of *habeas corpus*. Respondent is already serving an interim suspension imposed by the Supreme Court. The Supreme Court has held that it is not necessary that the Board delay a decision on permanent disbarment pending final determination of post-conviction relief pursuant to a writ of *habeas corpus*. "It is theoretically possible for Respondent to repeatedly file *habeas corpus* petitions. There must be some finality to our disciplinary process." *Bar Association of Greater Cleveland v. Steele* (1981), 65 Ohio St.2d 1.

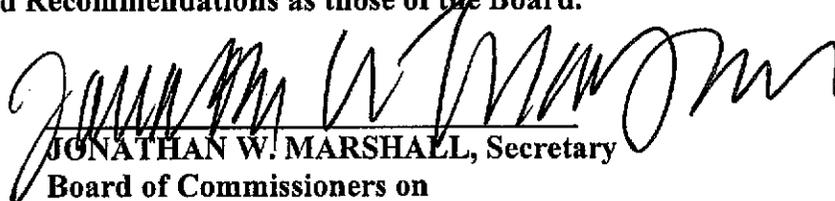
22. Based on the evidence before the panel, the nature of the misconduct involved and the fact that Respondent has breached the public trust in him as a judicial officer, the panel recommends that Respondent be permanently disbarred from the practice of law. *Disciplinary Counsel v.*

*Gallagher, supra; Disciplinary Counsel v. Stern*, 106 Ohio St.3d 266, 2005-Ohio-4804; *Disciplinary Counsel v. Tsanges* (1990), 49 Ohio St.3d 57; *Disciplinary Counsel v. Sweeney*, 84 Ohio St.3d 388, 1999-Ohio-486.

**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, Don S. McAuliffe, be permanently disbarred from the practice of law in the State of Ohio. 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.**

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

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

**FILED**

**Disciplinary Counsel**

**APR 07 2008**

Relator

BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

**AGREED  
STIPULATIONS  
BOARD NO. 05-037**

**Don S. McAuliffe**  
Atty. Reg. No.: 0014629

Respondent

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**AGREED STIPULATIONS**

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Relator, Disciplinary Counsel, and respondent, Don S. McAuliffe, do hereby stipulate to the admission of the following facts and to the authenticity and admissibility of the following exhibits:

**STIPULATED FACTS**

1. Respondent, Don S. McAuliffe, was admitted to the practice of law in the state of Ohio on November 4, 1972.
2. On or about February 22, 1997, respondent was sworn in as a judge of the Fairfield County Municipal Court.
3. At the time of the conduct leading to the allegations of misconduct set forth in the formal complaint, respondent was subject to the Code of Judicial Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

4. A federal grand jury indictment was filed against respondent in the United States District Court for the Southern District of Ohio on or about April 24, 2003.
5. Respondent pled not guilty to the charges in the indictment and was tried to a jury beginning on January 26, 2004.
6. On February 13, 2004, the jury returned a verdict finding respondent guilty on all counts in the indictment:

<u>Count Number</u>	<u>Title &amp; Section</u>	<u>Offense</u>
One & Two	18 U.S.C. §1341	Mail Fraud
Three	18 U.S.C. §§844(h) and 2	Use of fire to commit mail fraud
Four	18 U.S.C. §844(m)	Conspiracy to use fire to commit mail fraud
Five & Six	18 U.S.C. §1957	Money Laundering

7. On September 14, 2004, the court issued an opinion and order granting the government's request for forfeiture and ordering respondent to forfeit the two parcels of real property and automobile described in the indictment.
8. Respondent was originally sentenced by entry filed December 16, 2004.
9. Respondent filed a notice of appeal as to the December 16, 2004 judgment.
10. On January 24, 2005, respondent's license to practice law in the state of Ohio was suspended by the Supreme Court of Ohio pursuant to Gov. Bar R.V(A)(3) (felony conviction). See *In re: Don S. McAulliffe*, Supreme Court of Ohio Case No. 2004-2143.
11. By entry filed June 2, 2005, the Sixth Circuit Court of Appeals remanded respondent's case to the District Court for re-sentencing pursuant to *United States v. Booker* (2005), 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621.

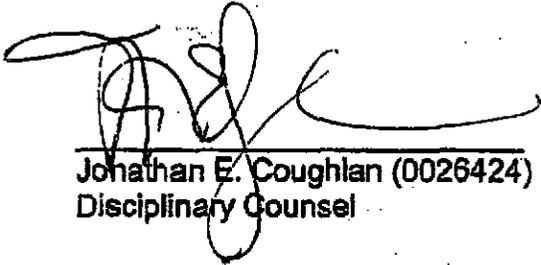
12. By amended judgment entry filed December 20, 2005, the District Court for the Southern District of Ohio committed respondent to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on counts one, two, four, five and six to run concurrently and 120 months on count three to run consecutive to counts one, two, four, five and six. Upon release from prison, respondent is subject to a three-year term of supervised release upon conditions.
13. Respondent filed a notice of appeal as to the December 20, 2005 judgment.
14. A corrected amended judgment entry was filed on January 11, 2006. This entry modified only the portion of the December 20, 2005 entry pertaining to restitution. Pursuant to the amendment, respondent was ordered to pay a fine of \$150,000 immediately; make restitution to Grange Insurance Co. of \$235,000; and, forfeit two pieces of real estate and a vehicle. The District Court ordered respondent to liquidate his accounts to satisfy these obligations.
15. By judgment filed June 22, 2007, the Sixth Circuit Court of Appeals affirmed respondent's convictions and sentences.
16. On August 10, 2007, the United States filed a "satisfaction of criminal judgment" authorizing the clerk to cancel the judgment against respondent regarding monetary penalties. In satisfaction of the judgment, respondent paid the fine (\$150,000) and restitution to Grange Insurance (\$235,000) plus interest.
17. On September 14, 2007, respondent filed a petition for certiorari in the United States Supreme Court. Respondent's petition was denied on October 15, 2007.

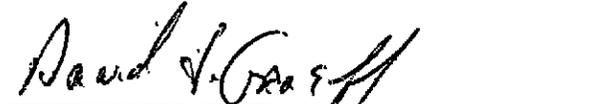
**STIPULATED EXHIBITS**

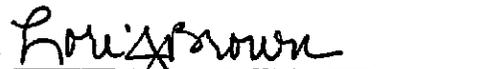
- Exhibit 1            Indictment, April 24, 2003
- Exhibit 2            Judgment Entry, ~~September 17, 2004~~ December 3, 2004
- Exhibit 3            Sentencing Entry, December 16, 2004
- Exhibit 4            Court of Appeals Judgment Entry, June 2, 2004
- Exhibit 5            Amended Judgment Entry, December 20, 2005
- Exhibit 6            Corrected Amended Entry, January 11, 2006
- Exhibit 7            Court of Appeals Entry and Opinion, June 22, 2007
- Exhibit 8            Satisfaction of Criminal Judgment, August 10, 2007

**CONCLUSION**

The above are stipulated to and entered into by agreement by the undersigned parties on this 7<sup>th</sup> day of April 2008.

  
Jonathan E. Coughlan (0026424)  
Disciplinary Counsel

  
David J. Graeff (0020647)  
Counsel for Respondent

  
Lori J. Brown (0040142)  
First Assistant Disciplinary Counsel

  
Don S. McAuliffe (0014629) *corpeny*  
Respondent