ORIGINAL

IN THE SUPREME COURT OF OHIO

Columbus Bar Association,	:	
Relator,	:	
	:	
v.		**Case No. 2005-1115**
	:	
Lawrence Edward Winkfield,	:	
Respondent.	:	

RELATOR'S ANSWER BRIEF IN RESPONSE TO RESPONDENT'S OBJECTIONS TO FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS

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STATEMENT OF FACTS

In 1996, this Court decided disciplinary cases arising from the same facts against Respondent and Walter G. Brooks, who had been partners in a Columbus law firm. Winkfield & Brooks Co., L.P.A. *Columbus Bar Assn. v. Winkfield* (1996), 75 Ohio St.3d 527, 1996-Ohio-458; *Columbus Bar Assn. v. Brooks* (1996), 75 Ohio St.3d 524, 1996-Ohio-457. The case involved a client of the firm that had been substantially overcharged in a contingent fee case because previously-advanced fees, which were to have been credited against the contingent fee, were not. Mr. Brooks represented the client in this matter, but Respondent had also represented him on other matters. Brooks failed to make complete restitution of the funds owed. Respondent denied prior knowledge of and responsibility for the default.

The Board found that Respondent did have prior knowledge of the default and, because of his "absence of remorse for his own misconduct," it recommended a one-year suspension. The Court declined to impose actual suspension and ordered a stayed one-year suspension contingent on full restitution. Chief Justice Moyer and Justice Cook dissented and opined that they would impose the sanction recommended by the Board.

This Court's next contact with Respondent was in *Columbus Bar Assn. v. Winkfield*, 91 Ohio St.3d 364, 2001-Ohio-70. The case involved two matters. In the first, Respondent had failed for a period of fourteen months to return unearned fees after he was discharged by his client.[1] In the second matter, Respondent had failed to respond to letters of inquiry by Relator. The Board found violations of the Code relating to fitness to practice, neglect, failing to deposit funds in trust, failing to render an accounting and

[1] An additional seven-month delay in returning the funds was occasioned by the failure of Respondent's own counsel to convey them to the client once they had been entrusted to him by Respondent.

pay over funds owing to a client, and non-cooperation. The Board recommended an indefinite suspension, but the Court chose a two-year suspension with the second year stayed on condition of restitution. Again, Chief Justice Moyer and Justice Cook dissented and said that they would impose an indefinite suspension.

In 2003, Relator initiated a third disciplinary case against Respondent. *Columbus Bar Assn. v. Winkfield*, 107 Ohio St.3d 360, 2006-Ohio-6. The case involved ten counts and nine clients. Respondent was charged with and found guilty of unfitness to practice, dishonesty, neglect, trust account violations, holding himself out as a lawyer during a period of suspension, not notifying clients of his suspension, and non-cooperation. Based on the testimony of Respondent's mental health counselor and a psychiatrist appointed by the Board, the Court concluded that Respondent had "presented proof of a diagnosed mental disability and the causal connection between his diagnosis and misconduct." Id, {¶ 56}. The Board recommended an indefinite suspension, and the Court unanimously agreed.

Respondent filed the Petition for Reinstatement now before this Court on July 7, 2008. The Board assigned a Hearing Panel, which heard the case on January 9, 2009. The Board certified to this Court its Findings of Fact, Conclusions of law and a Recommendation on June 18, 2009. The Board recommended that Respondent's Petition for readmission be denied.

The Court issued a Show Cause Order on July 1, 2009. Respondent timely filed Objections and a Brief in Support on July 27, 2009.

ARGUMENT

Relator's Proposition of Law No. I: A suspended lawyer seeking readmission must prove by clear and convincing evidence not only that he filled the enumerated requirements but also that the public interest will be protected if he is readmitted.

Respondent apparently contends that fulfillment of specific requirements of Gov Bar R. V §10(E) is sufficient unto itself to justify – perhaps even to require – readmission. Relator would suggest that this reading of the Rule and the case law glosses over the overriding concern in any such case, the protection of the public. While restitution may be proven, CLE quantified, mental health documented and reputation vouchsafed, there remains an intangible element that the Panel, the Board and, ultimately this Court must consider in determining whether "petitioner is now a proper person to be readmitted. . ." Gov Bar R. V §10(E)(4). That determination cannot be reduced to a pat formula. The Board clearly recognized this by saying, "Gov Bar R. V(10) does not state that a petitioner *must* be reinstated if he establishes by clear and convincing evidence that he meets all the conditions set forth therein; it states that he may not be admitted *unless* the panel so finds." Findings, Conclusions and Recommendation, 3-4.

The "primary issue in a reinstatement proceeding," according to Respondent, is the "rehabilitation" of the attorney. Resp. Brief 5[2]. Relator would suggest that the focus must be elsewhere. As this Court has recently reaffirmed, "[t]he primary purpose of the disciplinary process is to protect the public from lawyers who are unworthy of the trust

[2] The case cited for this proposition by Respondent, *In re Nevius* (1963) 174 Ohio St. 560, 191 N.E.2d 166, is inapposite. *Nevius* did not deal with the standards for readmission. "The single issue raised by this appeal is whether a procedure for reinstatement of a disbarred attorney is governed by the procedure in effect at the time of the disbarment or by the procedure in effect at the time the application for reinstatement is made." Id. at 561, . 191 N.E.2d 168.

and confidence essential to the attorney-client relationship and to allow us to ascertain the lawyer's fitness to practice law. *Cuyahoga Cty. Bar Assn. v. Veneziano*, 120 Ohio St.3d 451, 2008-Ohio-6789 {¶ 12}; Accord, *Cincinnati Bar Assn. v. Lawson*, 119 Ohio St.3d 58, 2008-Ohio-3340. While the Court in *Veneziano* was deciding what disciplinary sanction to apply, the principle remains the same for a decision on whether to readmit a suspended lawyer.

In deciding how best to insure the protection of the public, the Court is not confined to a checklist. "Because each disciplinary case is unique, we are not limited to the factors specified in the rule but may take into account 'all relevant factors' in determining what sanction to impose. BCGD Proc.Reg. 10(B)." Veneziano {¶ 9}. Accord, *Disciplinary Counsel v. Johnson*, 121 Ohio St. 3d 403, 2009-Ohio-1432.

An example of this Court's willingness to look to factors outside the four corners of the Rule is its decision in *Ohio State Bar Assn. v. Johnson*, 96 Ohio St.3d 192, 2002-Ohio-3998. There, in a case involving extremely serious ethical breaches by a public official, the Court decided to impose an indefinite suspension rather than disbarment, in part, because he had "at one time effectively served the community," {¶ 8}, and "may, with committed efforts to rehabilitate, someday be capable of contributing professionally to the community again." {¶ 1}; Accord, *Disciplinary Counsel v. Kelley*, 121 Ohio St. 3d 39, 2009-Ohio-317. Thus, the potential for future good work is a factor that may be examined. Respondent has not directly asserted this issue in his Objections and Brief, but his responses to questions during the hearing before the Panel may raise it by implication. (e.g. Trans. 91-94).

As to Respondent's fulfillment of the stated requisites in the Rule governing readmission (except as to restitution and CLE compliance), the case made by Respondent is certainly not as "clear and convincing" as Respondent paints it. The evidence presented on the record by Respondent regarding his current mental health and his future prospects for stability in this regard can only be described as equivocal.[3]

Respondent's primary mental health counselor over the period covering Respondent's disciplinary actions has been Richard Fetter, a licensed independent social worker with a master's degree. Mr. Fetter, testified that Respondent "appears ready andable to function and take on responsibilities to again practice his profession," Trans. 51, and that he has "taken responsibility for his actions rather than project blame or fault onto others." Trans. 5. Upon examination by Judge Vukovich of the Hearing Panel, however, he described Respondent as having a "borderline personality disorder" which makes it difficult for him to negotiate relationships, causes anxiety when in close interaction with people, creates conflict and depression and leads to isolation. Trans. 64-65. Mr. Fetter told Judge Vukovich that a person with this disorder "needs to focus on being intentional and accepting responsibility for their actions, and until they do that nothing is going to get better." Trans. 67. When the judge asked Mr. Fetter if he found statements made by Respondent in a deposition in October 2008 regarding an April 2008 OVI arrest indicated, "he [Respondent] was shifting the blame to other people for his

[3] The Affidavit and Objections of Richard J. Fetter, LISW-S submitted as Exhibits B to Respondent's Objections (as well as similar documents from other hearing witnesses, designated Exhibits A, C, D and E) are post-hearing attempts to reshape the record. They have not been subject to examination by the Relator, the Panel or the Board. No reason has been suggested why the testimony now offered was not presented at the hearing. These documents are not authorized by the Supreme Court Practice Rules for inclusion in a Brief. They should be disregarded.

problems," Mr. Fetter said that they did and that he had discussed this with Respondent. Trans. 69.

Psychiatrist, Jerry M. Zober, M.D. whose evaluation of Respondent in two one-hour sessions in February and March 2009 is reported in a letter accepted into evidence by the Panel subsequent to the hearing, without objection by Relator. Dr. Zober concludes that Respondent is not currently suffering from depression, Attention Deficit Disorder or any major mental illness. He notes, however, that recovery from personality disorders of the type discussed by Mr. Fetter, "even in the best of circumstances may be tenuous." Letter 3.

Relator does not take the position that these opinions by mental health professionals are not well founded or otherwise unpersuasive. It merely suggests that they sound notes of caution that should be considered.

Relator's Proposition of Law No. II: Conditions on readmission, while useful in some cases, may not always be sufficient to protect the public interest.

Respondent observes that "monitoring for reinstated lawyers fosters protection of the public." Resp. Brief 7. Relator endorses that sentiment as a general proposition, but it also believes that monitoring alone cannot guarantee that a suspended lawyer reentering the practice will adhere to an ethical course of conduct. The best of monitors can only exert so much influence and supervision.

There are at least three elements to this case that will necessitate monitoring, should the Respondent be reinstated: mental health, substance abuse and law practice management.

As Mr. Fetter and Dr. Zober agree, the mental health component will need to be monitored on a long-term basis by a qualified mental health professional to prevent Respondent from regressing in his attempt to come to grips with the disorders from which he has suffered and which have contributed to his past unethical conduct. Presumably, Respondent would continue to meet frequently with Mr. Fetter and to cooperate fully with any course of treatment the counselor recommends. He should also be required to obtain regular reports regarding his progress.

Substance abuse has not been a feature of Respondent's past encounters with the disciplinary system. His arrest for OVI in April 2008, *even as he contemplated filing his Petition for Readmission*, however, necessarily raises that issue here. It would need to be addressed in any set of conditions that would be placed on his return to practice. The obvious and most appropriate entity to monitor that aspect of Respondent's fitness is the Ohio Lawyers Assistance Program (OLAP). Respondent should, if his license is restored, be required to be assessed by OLAP, to sign a contract with that organization if that is deemed appropriate and to follow strictly the letter and spirit of that contract.

The final element of monitoring troika is perhaps the most difficult. Practice monitoring should include office procedures, trust account management, client communications, fee agreements and all the other things needed to keep a lawyer on an ethical and professional track. Monitoring is time-consuming work for a volunteer and may be complicated by confidentiality and conflict issues. Ideally, such a monitor should be easily accessible and have general familiarity with the areas of law practiced by the lawyer being monitored. Finally, the monitor needs to be a person of professional gravitas worthy of serving as role model and confidant for that individual.

The Court has in the past specified the appointment of multiple monitors for a Respondent. See for example, *Akron Bar Assn. v. Catanzarite*, 119 Ohio St.3d 313, 2008-Ohio-4063. It could do so here if it is otherwise disposed to grant Respondent's Petition, but monitoring alone will not be a perfect shield to protect the public. In the end, only Respondent's own ability to monitor himself will insure that.

Relator's Proposition of Law No. III: The Findings, Conclusions and Recommendation of the Panel and the Board are grounded in the record.

Relator does not presume to know whether the Board has made the appropriate choice by recommending denial of Respondent's Petition. Only this Court can answer that question. Relator does, however, take strenuous exception to Respondent's suggestion that the Board's recommendation to this Court "is tantamount to the proverbial 'moving the goalpost' and sets an unattainable bar for Mr. Winkfield's reinstatement." Resp. Brief 8. His further assertions that the Board's finding is "arbitrary," Ibid., and "unreasonable," Id. 9, do not do credit to his argument.

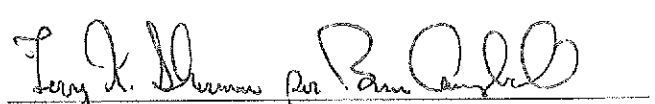
Taken as a whole, the evidence adduced in this matter is certainly sufficient to lead reasonable, well-intentioned people to the conclusion the Board reached here. Respondent's long history with the discipline system, the types and breadth of past misconduct involved, the second and third chances given him, the reckless personal conduct in which he engaged just as he was asking for yet another chance to practice – all of these combine to support the rationality of the Board's position. It may or may not be right decision, but it is certainly not in any sense an arbitrary or unreasonable decision.

Relator accepts that Respondent has struggled during his long period out of practice, that he has worked hard to remedy his problems, that he has matured, that he has made amends, that he does good work in the community, that he has the trust and confidence of worthy people, that he has greatly benefitted by his association with Attorney Wilber H. Flippin, Jr. from Mansfield, that he has maintained his contact with the law through work experience and CLE and that he deeply wants to be an active lawyer again. These indicators could lead a decision maker to a choice other than the one the Board has made. They cannot, however, support Respondent's conclusion that "the Panel's opposition [to reinstatement] flies in the face of clear and convincing evidence of Mr. Winkfield's mental preparedness and moral qualifications." They speak to *Respondent's interest* in being reinstated, but they do not necessarily or comprehensively speak to the *public interest,* which this Court is duty bound to protect.

CONCLUSION

This Court is free to accept or reject, in whole or in part, the Findings, Conclusions and Recommendation of the Board of Commissioners on Grievances and Discipline. There are equities supporting either position. Relator trusts that collective wisdom and macro perspective of seven Justices will yield a balanced, principled determination.

Respectfully submitted,



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CERTIFICATE OF SEVICE

The undersigned counsel for Relator certifies that on the 27th day of August, 2009 he mailed a true copy of Relator's Answer Brief, postage pre-paid to counsel for Respondent at the following address:

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