

ORIGINAL

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION : CASE NO. 2009-2302

Relator, : Before the Board of Commissioners on
Grievances and Discipline

v. :

PAUL J. KELLOGG :

Respondent. :

RESPONDENT'S BRIEF IN RESPONSE TO RELATOR'S OBJECTIONS
TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDATION OF BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

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The Respondent Paul Kellogg poses no objection to the Recommendations of the Board of Commissioners on Grievances and Discipline ("Board"). However, because the Relator Cincinnati Bar Association has filed objections to the decisions and recommendations of the Board, Mr. Kellogg submits the following brief in response to Relator's objections.

The objections posed by the Relator reflect a lack of measured consideration of the actual facts and circumstances that led to Mr. Kellogg's convictions. The Relator is asking this Court to adopt a formulaic standard whereby any lawyer with a federal felony conviction, particularly one involving money laundering, will necessarily be disbarred. The Findings of Fact, Conclusions of Law and Recommendation of the Board pay careful attention to the actual involvement of Mr. Kellogg in Berkeley, a business that was the

subject of a wide array of charges brought by the federal government. Mr. Kellogg was not alleged to have been a participant in the underlying business practices of the corporation. Instead, the actions for which he was convicted involved two discrete events in 2004, one involving an inspection of a company warehouse and the other involving his agreement to serve as trustee for two trusts that were the work product of attorneys in a respected regulatory law firm in Washington, D.C.

The Findings and Recommendations of the Board are not the product of sympathy for Mr. Kellogg's health problems, as the Relator suggests. While the Board did recognize that Mr. Kellogg was diagnosed with leukemia in 2004, it did so in recognition of the impact that those symptoms and that diagnosis had on Mr. Kellogg in the fall of 2004, the focal period for the obstruction of the FTC and the money laundering charges lodged against him.

The Respondent respectfully requests that this Court adopt the findings of fact, conclusions of law, and the recommended sanction of the Board.

STATEMENT OF FACTS

The Respondent Paul Kellogg was admitted to the practice of law in Ohio in November 1993 following his graduation from the University of Dayton School of Law. (Findings of Fact at 1). In 2003, Mr. Kellogg was working at a Cincinnati law firm, primarily handling estate planning and small business matters. (Findings of Fact at 1). One day in 2003, Mr. Kellogg and his childhood friend, Steve Warshak ("Warshak"), met for lunch to catch up on each other's lives. (Findings of Fact at 2). Warshak was the owner of a rapidly growing dietary supplement company, and complained to Mr. Kellogg that he

disliked dealing with legal issues and attorneys. (Id.). Mr. Kellogg then suggested that Warshak hire general counsel for his dietary supplement company. (Id.),

About two weeks later, Warshak sent Mr. Kellogg an e-mail offering him the position of general counsel with his company. (Id.). After a few weeks of evaluating his options, Mr. Kellogg accepted the position and began working for Berkeley Premium Nutraceuticals (“Berkeley”).¹ At that time, Berkeley employed about 1,500 people. (Findings of Fact at 2).

Mr. Kellogg’s workload at Berkeley was light until late in 2003, when the company was notified that they were being investigated by the Federal Trade Commission (“FTC”). (Findings of Fact at 2). Mr. Kellogg was responsible for providing all documents and information requested by the FTC. In light of his dearth of experience in this area, Mr. Kellogg immediately referred the matter to various attorneys at the Venable Law Firm in Washington, D. C. (Findings of Fact at 2). Shortly thereafter, seventeen state attorneys general also began an investigation of Berkeley. (Id.). In March 2004, the first of six class action lawsuits was filed against Berkeley. (Id.).²

On May 13, 2004, representatives from the Food and Drug Administration (“FDA”) came to the Berkeley facilities to conduct a no-notice inspection. (Findings of Fact at 2). The FDA informed Mr. Kellogg that they would be going to the company’s warehouse the following day. (Id.). Mr. Kellogg was given the responsibility for providing the investigators

¹ When Mr. Kellogg began his employment at Berkeley, the company was still operating under the names of three companies which later merged to form Berkeley.

² The primary focus of the investigation and complaints was the Berkeley continuity program. After receiving a “free sample” of nutritional supplements, monthly shipments were automatically sent to customers and billed to the customer’s credit card. Customers later found it difficult or near impossible to cancel the shipments and obtain refunds.

access to the company's facilities, including the warehouse. Shortly after being told of the impending inspection, Mr. Kellogg saw the operations manager of the company and told him that the warehouse would be inspected the following day. (Id. at 2, 3). Mr. Kellogg told that operations manager to "make sure the warehouse is in order" for the inspection. (Id. at 3). Mr. Kellogg acknowledges that there was testimony presented at the criminal trial indicating that he was informed about some misbranded nutritional supplements in the warehouse, and as a result he instructed others to "get rid of" the misbranded supplements. (Id. at 3). Mr. Kellogg admitted that he may have instructed someone to "get rid of it," but that he never would have instructed warehouse workers to simply hide the misbranded supplement. (Id. at 3).

As a result of Mr. Kellogg's warning regarding the impending warehouse inspection, a night warehouse manager had workers at the warehouse load all of the misbranded supplement into a truck and remove it from the warehouse. (Id. at 3). The nutritional supplement was then returned to the warehouse after the FDA inspection was completed.

In September 2004, as the investigations into Berkeley's business practices increased, the attorneys at Venable, in conjunction with Warshak's financial planner, encouraged Warshak to do some estate planning which would also have the effect of protecting personal assets from creditors. (Id. at 3). Accordingly, Christopher Segal, a well known attorney at the Venable firm who also then served as the ABA Chair of the Committee on Fiduciary Income Tax, prepared trust documents and counseled Mr. Warshak on the trusts that needed to be established for Warshak's wife and children. Mr. Segal and other attorneys at Venable prepared the documents, counseled Mr. Warshak, and recommended how much money should be transferred into the trusts. (Id. at 3). The

attorneys at Venable later asked Kellogg to review the trust documents to ensure that they were compliant with Ohio law, which Mr. Kellogg did. (Id. at 3).

On advice of his Venable counsel, Warshak eventually transferred \$13,000,000 to a trust for his wife and \$1,000,000 to a trust for his children. (Id. at 3). Originally, Warshak's financial planner was selected to serve as trustee; however, the financial planner was not able to do so because of a perceived conflict of interest. As a result, about one week before the trusts were to be executed, Mr. Kellogg was asked by the attorneys at Venable to serve as trustee of the trusts. (Id. at 3). Mr. Kellogg agreed to serve as trustee at that time. (Id. at 3).

Beginning in September 2004, when the trusts were being prepared by the attorneys at Venable, Mr. Kellogg began to notice he was experiencing fatigue and a lack of energy (Findings in Mitigation and Aggravation, at 6). After suffering vision loss, Mr. Kellogg sought medical attention in late September 2004. (Id. at 6). Shortly after the trusts were executed on October 1, 2004, Mr. Kellogg was admitted to a hospital where he was diagnosed with hairy cell leukemia, a form of blood cancer. (Id. at 6). While Mr. Kellogg was hospitalized, Warshak's financial planner transferred \$13,000,000 to the trust for Warshak's wife and \$1,000,000 to the trust for Warshak's children. At that time, Mr. Kellogg took a leave of absence from Berkeley until after Thanksgiving when he had completed his chemotherapy. (Id. at 6). Mr. Kellogg's leukemia went into remission in January 2005. (Id. at 6).

On February 22, 2008, as a result of his involvement of the removal of the nutritional supplement from the warehouse, Kellogg was convicted by a jury of conspiracy to obstruct proceedings before the FDA. Mr. Kellogg was acquitted of two counts involving the actual

misbranding of the product. (Id. at 4).

As a result of reviewing the trusts to ensure that they were in compliance with Ohio law and agreeing to serve as trustee, Kellogg was convicted of four counts of money laundering and one count of conspiracy to obstruct proceedings before the FTC. (Id. at 4). Mr. Kellogg was also acquitted of one count of making a false statement to a bank. (Id. at 4). At no time was Mr. Kellogg accused or indicted of any crime involving his alleged participation in wire fraud, mail fraud, bank fraud, or Berkeley's auto-ship or continuity program.

On August 26, 2008, a sentencing hearing was held before the Honorable Senior Judge S. Arthur Spiegel in the United States District Court for the Southern District of Ohio, Western Division in Cincinnati. At that hearing, Christopher Sega, the Venable attorney who prepared Warshak's trusts and counseled him regarding them, testified at great length regarding Mr. Kellogg's lack of involvement in the trust planning. After hearing this and other testimony, Judge Spiegel, despite Federal Sentencing Guidelines recommending a sentence of almost twenty years, sentenced Kellogg to one year and one day in federal prison. (Id. at 4). At Mr. Kellogg's sentencing, Judge Spiegel stated:

The evidence shows that Paul Kellogg's skills as a lawyer were tangential to the creation of the trusts, and he was in the hospital when the money was transferred into the trusts, and that he primarily served as a trustee, based on the last minute determination of Mr. William Bertemes [Warshak's financial planner] that he could not do so due to a conflict of interest. The evidence further showed other lawyers drafted the trust documents and that he merely reviewed them. The Court finds the recommended sentence of 188 months of confinement disproportionate and unjust. Considering all of the provisions of 18 U.S. Code § 3553, as they apply to this decision, the Court finds warranted a departure, or a variance, from the sentencing guidelines. First, the Court notes that Paul Kellogg

did not profit from the instant offense outside his salary. He lives modestly with his family. He followed the directions and advice of other lawyers who were not indicted. It is also *difficult to ascertain his involvement in the conspiracy to commit money laundering beyond his assistance in the creation of the two trusts.*

(Emphasis added).

Following his sentencing, Judge Spiegel granted Mr. Kellogg bail pending appeal. However, Mr. Kellogg ultimately elected to forego appeal of his conviction and accepted the consequences of his actions. As a result, Mr. Kellogg self-reported to the Ashland Federal Prison Camp on January 15, 2009 to begin serving his sentence. (Findings of Fact at 4). Because Judge Spiegel specifically sentenced Mr. Kellogg to a sentence of one year and one day in prison, Mr. Kellogg qualified for a fifteen percent reduction in his sentence. (*Id.* at 4).³ Mr. Kellogg was released from federal custody on November 27, 2009 and is currently subject to three years of supervised release by the United States Department of Probation. (*Id.* at 4).

Mr. Kellogg's disciplinary proceedings were initiated in November 2008. In late May 2009, a panel appointed by the Board of Commissioners on Grievances and Discipline held two days of hearings on this matter. The first day of hearings occurred in Cincinnati, where various documentary evidence was submitted and two character witnesses testified that Mr. Kellogg is a man of good character and reputation. The second day of hearings occurred at the Ashland Federal Prison Camp in Ashland, Kentucky, where Mr. Kellogg

³ In the federal sentencing system, any sentence over one year imprisonment makes a defendant eligible for a fifteen percent good time reduction in his prison sentence. Had Judge Spiegel sentenced Mr. Kellogg to one year in prison, the full twelve months of that sentence would need to have been served without the benefit of any good time reduction. In effect, a sentence of 1 year and 1 day in the federal system equates to an actual sentence of approximately 10 months.

testified at great length. Based on that testimony, the Panel found that Mr. Kellogg had accepted responsibility for his actions, expressed remorse for his conduct and accepted its consequences. The Relator Cincinnati Bar Association did not call any witnesses to testify at either day of the hearings. Following the hearings, the Relator requested a sanction of permanent disbarment. Mr. Kellogg suggested to the Panel that a two year suspension, with the second year stayed upon the condition that he complies with all the requirements of a supervised release, would be appropriate. Mr. Kellogg further requested that his suspension be retroactive to September 2, 2008, the date on which he voluntarily ceased practicing law after his sentencing, under the assumption that the Relator would immediately seek an interim suspension of his license.

On December 4, 2009, the Panel recommended to the Board of Commissioners on Grievances and Discipline that Mr. Kellogg be suspended from the practice of law for a period of two years, with the final six months of the suspension stayed upon the condition that he comply with the requirements of the supervised release. The Panel further recommended that the suspension be retroactive to January 15, 2009, when Kellogg began serving his prison sentence.

On December 22, 2009, the Board adopted the Finding of Fact, Conclusions of Law and Recommendations of the Panel. On January 19, 2010, Mr. Kellogg filed a brief with this Court accepting the recommendation of the Board. On January 28, 2010, the Relator Cincinnati Bar Association filed its Objections to the Board's Recommendation, which has necessitated this answer brief.

ARGUMENT

PROPOSITION OF LAW

Every disciplinary action against an attorney in the State of Ohio involving a criminal conviction must pay special attention to the unique facts and circumstances of the conduct underlying the conviction, and consider those circumstances with due regard to the aggravating and mitigating factors outlined in BCGD Proc. Reg. 10. No mechanistic rule is applied to particular convictions, be they state or federal, felony or misdemeanor. Instead, all relevant factors of the attorney's misconduct must be evaluated to arrive at a full understanding of the nature of the violation, the attorney's culpability, and the appropriate sanction for the misconduct.

It is well settled that when imposing sanctions for attorney misconduct, the Court is to consider all relevant factors, including the duties the lawyer violated and sanctions imposed in similar cases. See, Stark Cty. Bar Assn. v. Buttacavoli, 96 Ohio St. 3d 424, 2002 Ohio 4743, 775 N.E. 2d 818. In completing its analysis, the Court weighs evidence of aggravating and mitigating factors listed in BCGD Proc. Reg. 10. Because each disciplinary case is unique, the Court is not limited to the factors listed in the rule, but may take into account "all relevant factors" in determining what sanction to impose. BCGD Proc. Reg. 10(B). The Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline thoughtfully weighs all of these factors and applies them in a well reasoned manner in arriving at a recommended sanction for Mr. Kellogg. Accordingly, this Court should adopt the Board's recommended sanction of a two year suspension with six months stayed on conditions, retroactive to January 15, 2008.

This Court has held that “the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public.” Disciplinary Counsel v. O’Neill, 103 Ohio St.3d 204, 2004 Ohio 4704, 815 N.E. 2d 286, citing Ohio State Bar Assn. v. Weaver (1975) 41 Ohio St.2d 97, 100, 70 O.O.2d 175, 322 N.E.2d 665. The sanction recommended by the Board will unquestionably serve this fundamental purpose.

Sanctions Imposed in Similar Cases

A common theme throughout the Relator’s brief is the blanket assumption that any attorney convicted of a felony should necessarily be disbarred. This reflects a fundamental misunderstanding of the methods by which attorney misconduct is to be assessed. In arriving at a recommended sanction, the Panel and the Board undoubtedly reviewed the facts and sanctions imposed in similar cases. Even a cursory review of the case law results in a long list of disciplinary cases in which attorneys convicted of a felony were not disbarred, but instead received a two year suspension with a portion of that suspension stayed or made retroactive. See, e.g., Cuyahoga Cty. Bar Assn. v. Garfield (2006), 109 Ohio St.3d 103, 2006 Ohio 1935, 846 N.E.2d 45 (imposing an eighteen month suspension on an attorney with no history of disciplinary problems who had entered a plea of guilty to the crime of bank fraud); Akron Bar Assn. v. Meyer (1999), 87 Ohio St.3d 324, 325, 1999 Ohio 3, 720 N.E.2d 900 (attorney’s convictions for grand theft and trafficking in food stamps constituted illegal conduct involving moral turpitude as well as dishonest or fraudulent conduct that adversely reflected on the attorney’s fitness to practice law, warranting a two year suspension, with the second year stayed); Warren Cty. Bar Assn. v. West (1995), 73 Ohio St.3d 565, 567-568, 1995 Ohio 333, 653 N.E.2d 376 (a two year suspension with the second year stayed was the appropriate sanction after an attorney

pleaded guilty to the felony offense of carrying a concealed weapon); Disciplinary Counsel v. Blaszak (2004), 104 Ohio St.3d 330, 2004 Ohio 6593, 819 N.E.2d 689 (two year suspension and credit for interim suspension ordered for lawyer convicted of selling testimony). Akron Bar Assn. v. Peters (2002), 94 Ohio St.3d 215, 2002 Ohio 639, 761 N.E.2d 1038 (two year suspension and credit for interim suspension ordered for lawyer convicted of the felony of having an illegal interest in a public contract and related crimes). Disciplinary Counsel v. Dubyak (2001), 92 Ohio St.3d 18, 2001 Ohio 145, 748 N.E.2d 26 (two year suspension, with a six month stay and credit for interim suspension ordered for lawyer who obtained confidential information through a \$15,000.00 kickback and was then convicted of mail fraud for agreeing to pay a second kickback); Disciplinary Counsel v. Petroff (1999), 85 Ohio St.3d 396, 1999 Ohio 400, 709 N.E.2d 111 (one year suspension and credit for interim suspension ordered for lawyer convicted of attempting to evade federal income taxes); and Disciplinary Counsel v. Lash (1993), 68 Ohio St.3d 12, 1993 Ohio 157, 623 N.E.2d 28 (one year suspension and credit for interim suspension ordered for lawyer convicted of bank fraud based on \$10,000.00 misstatement of his income in mortgage loan application); Disciplinary Counsel v. Cook (2000), 80 Ohio St.3d 80, 2000 Ohio 447, 728 N.E.2d 1054 (six month suspension with credit for interim suspension ordered for lawyer convicted of felony for writing purchase contracts with reckless disregard for the fact that the buyer intended to pay for the purchases with profits from illegal drug sales); Dayton Bar Assn. v. Seall (1998), 81 Ohio St.3d 280, 1998 Ohio 630, 690 N.E.2d 1271 (one year suspension with credit for interim suspension ordered for lawyer convicted of conspiracy to commit federal tax fraud); Disciplinary Counsel v. Miller (1997), 79 Ohio St.3d 115, 1997 Ohio 24, 679 N.E.2d 1098 (one year suspension with credit for interim

suspension ordered for lawyer convicted of aiding and abetting the filing of false federal tax return); Disciplinary Counsel v. Smith (1994), 69 Ohio St.3d 475, 1994 Ohio 44, 633 N.E.2d 1117 (two year suspension with credit for interim suspension ordered for lawyer convicted of theft of government property). In reviewing this precedent, the Panel and the Board fairly concluded that Kellogg's recommended sanction was consistent with sanctions imposed in similar cases involving lawyers with felony convictions.

Earlier this year, this Court suspended an attorney who was convicted of felony tax evasion for two years. See, Toledo Bar Assn. v. Weisberg (2010), 210 Ohio 142, 2010 LEXIS 53. In Weisberg, the respondent became delinquent in the payment of his income taxes. Thereafter, the respondent entered into an installment agreement with the IRS to pay the delinquent taxes; however, he defaulted on this agreement and started depositing his personal funds in his IOLTA in an attempt to conceal his assets from the IRS. Eventually, respondent started using his IOLTA for virtually all of his business and personal funds. In adopting the Board's recommendation of a two year suspension, this court shared the Board's confidence in the rehabilitative measures respondent had undertaken since his criminal conviction. Id. This Court addressed several mitigating factors, including the absence of a prior disciplinary record, cooperation with the disciplinary process and evidence of good character of the respondent. Id. Moreover, the respondent had served the sentence for his crimes, a mitigating factor. Id. Both the Panel and the Board found these identical mitigating factors present in Mr. Kellogg's case.

As finder of fact, the Panel is best situated to evaluate all of the aggravating and mitigating circumstances present in this matter. In this case, the Panel held two full days of hearings in which it questioned witnesses and Mr. Kellogg in great detail. In mitigation,

the Panel found that Mr. Kellogg had no prior disciplinary record, has been cooperative throughout the proceedings and has made efforts to rectify the consequences of his actions. Additionally, the Board found that Mr. Kellogg has accepted responsibility for his actions, has expressed remorse and has otherwise been penalized for his misconduct.

As aggravating factors, the Panel found that Mr. Kellogg did act with a dishonest or selfish motive, although he did not profit financially from his actions. The Panel also found that Mr. Kellogg committed multiple offenses.

The Relator has challenged the Panel's conclusion that Kellogg has accepted responsibility because Kellogg did not receive a reduction in his sentence for acceptance of responsibility when he met with United States Probation prior to his sentencing. It must be clarified that Mr. Kellogg met with U. S. Probation within days after the verdict. This occurred over six months before he would have to make a decision on whether he would appeal. Any acceptance of responsibility at that time would have prematurely foreclosed his appeal rights. Therefore, on the advice of counsel, Mr. Kellogg declined to address the factual issues underlying his convictions at that time. After Judge Spiegel handed down Mr. Kellogg's sentence, he granted bail pending appeal so Mr. Kellogg could remain free at home with his family while appealing his convictions. Despite having the option to remain free during the appellate process, Kellogg elected not to appeal his convictions--thereby fully accepting the consequences of his actions and the sentence imposed.

The Relator has also argued that Mr. Kellogg has attempted to minimize his culpability for what took place at Berkeley and, therefore, has not accepted responsibility. This allegation could not be further from the truth. During these proceedings, Mr. Kellogg has not once argued or denied responsibility for his actions. Moreover, unless the record

weighs heavily against a Hearing Panel's findings, the Court generally defers to the Panel's credibility determinations, inasmuch as the Panel members saw and heard the witnesses firsthand. Cuyahoga Cty. Bar Assn. v. Wise (2006), 108 Ohio St. 3d 164, 2006 Ohio 550, 842 N.E. 2d 35, P24. The Panel members who were present during Mr. Kellogg's testimony correctly determined that he has accepted responsibility and shown remorse for his actions. This Court should defer to the Panel's determination as there is no evidence in the record to the contrary.

The Relator is attempting to elicit this Court's harshest sanction by arguing that the totality of the crimes charged against other defendants in Mr. Kellogg's criminal case should be the basis of Kellogg's sanction. This argument flies in the face of individual culpability and due process. The criminal charges in the Berkeley case are documented by an all encompassing 112 count indictment. None of the charges in the indictment charged Kellogg with mail fraud, wire fraud, bank fraud or any involvement with the operation of Berkeley's auto-ship program. Additionally, there was no finding that Kellogg was in any way responsible for the \$400 million loss number attributed to the company's mail fraud convictions. Berkeley, Steve Warshak and Harriet Warshak were convicted of participating in a large scale fraud and of causing a loss in excess of \$400 million, not Kellogg.⁴ Mr. Kellogg was not even employed by Berkeley until August 2003, several years after the company had been in business. For the Relator to now seek sanctions against Kellogg for crimes he was never even accused of committing and which in large

⁴ Defendants Berkeley, Steve Warshak and Harriet Warshak were convicted of mail fraud, wire fraud and bank fraud. The Court found the loss to be in excess of \$400 million. Steve and Harriet Warshak are currently appealing their convictions and the loss amount. Their appeals are currently pending in the United States Sixth Circuit.

part occurred before his employment at the company is disingenuous and contrary to basic principles of due process.

The Cases Cited by the Relator are distinguishable.

The Relator has argued that the cases discussed in its filing justify the imposition of the harshest possible sanction against Kellogg, as they all involve offenses that caused monetary harm to individuals through deception and all those respondents were disbarred for their misconduct. As discussed below, the cases cited by the Relator are distinguishable from the instant case.

The Relator cites Office of Disciplinary Counsel v. Jones (1993), 66 Ohio St.3d 74, 1993 Ohio 101, and Office of Disciplinary Counsel v. Williams (1993), 66 Ohio St.3d 71, 1993 Ohio 100, for the proposition that a conviction for money laundering warrants permanent disbarment. However, such a shotgun approach ignores the reality that each disciplinary case is unique and that facts and circumstances vary from case to case. Furthermore, the cases cited by the Relator are very different from this one.

Jones is plainly distinguishable from the instant case. First, the respondent in Jones engaged in laundering illegal drug proceeds for the sole purpose of personal gain. Id. at 74. The Panel in Jones stressed his active participation in the laundering scheme and his failure to acknowledge that his crime involved moral turpitude as aggravating factors. Id. at 75. In the instant case, Mr. Kellogg did not derive any personal gain from his involvement in the money laundering conspiracy. In Mr. Kellogg's case, other lawyers drafted the trust documents and advised Warshak on the legality of the trusts. Mr. Kellogg was in the hospital undergoing chemotherapy when the money was transferred into the trusts and only served as the trustee based on a last minute determination that Warshak's

financial planner could not because of a conflict of interest. Finally, the Panel found that Mr. Kellogg has accepted responsibility for his actions, has expressed remorse, and has otherwise been penalized for his conduct. The aggravating factors that resulted in the respondent in Jones being disbarred are completely absent in this matter.

Williams is also distinguishable from this case. The respondent in Williams “knowingly conspired to launder what he thought to be profits from illegal drug sales.” Office of Disciplinary Counsel v. Williams (1993), 66 Ohio St.3d 71, 1993 Ohio 100. Williams was also intimately involved in the review, execution and funding of the trusts. Mr. Kellogg’s case does not involve drug money, but instead revolved around the personal assets of Warshak and estate planning recommended by the Venable attorneys. Mr. Kellogg was only brought into the trust process upon the request of the attorneys at Venable when it was determined that Warshak’s financial planner could not serve as trustee due to a conflict of interest. Furthermore, the evidence is clear that Mr. Kellogg was not involved in the funding of the trusts because he was undergoing chemotherapy in the hospital when the trusts were funded. Kellogg did review the trusts to confirm they complied with Ohio law, but the trusts were conceived and drafted by the attorneys at the Venable firm. These factors distinguish the facts in Williams from the current matter.

The Relator’s reliance on Office of Disciplinary Counsel v. Bein (2004), 105 Ohio St. 3d 62, 2004 Ohio 7012 is also misplaced as it applies to Mr. Kellogg. In Bein, the Panel found numerous aggravating factors, such as the respondent’s lack of remorse for his crimes, his selfish motives, and his engagement in a pattern of misconduct that was reflected in the commission of multiple offenses over the course of several years. Id. at 64. As to Mr. Kellogg, the Panel found that he has accepted responsibility for his actions,

has expressed remorse and that he did not profit from his actions. It is also clear from the record in this matter that Kellogg did not engage in a long term pattern of misconduct, but that his violations arise from two distinct events during a six month period in 2004. The aggravating factors that led to Bein being disbarred are absent in this case.

The Relator cites Cincinnati Bar Assn. v. Banks, 94 Ohio St. 3d 428, 2002 Ohio 1236, for the proposition that a suspension is too lenient a sanction for a felony conviction. However, a closer look at the facts of Banks reveals that the respondent in that case received this Court's harshest sanction because he had stolen over \$500,000.00 and that he gave materially false testimony during his trial. Mr. Kellogg has never been accused of theft, never profited from his offenses and has never given false testimony before any tribunal. To the contrary, Mr. Kellogg was not charged with any crimes involving theft or fraud, has cooperated fully with these proceedings and has made efforts to rectify the consequences of his actions.

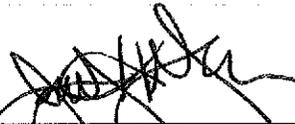
Finally, the Schott case cited by Relator simply has nothing in common with Kellogg's case. The respondent in Schott engaged in a long term Ponzi scheme, bilking individuals out of hundreds of thousands of dollars in the 1960s. Schott does not offer helpful precedent based on the facts of that case.

Conclusion

The Respondent would ask that this Court give deference to the factual findings of the Board, and give consideration to the recommended sanction, which reflects the Board's understanding of the unique facts of Mr. Kellogg's case. Since each disciplinary case is assessed on its own merits, Mr. Kellogg is appreciative of the fact that the Panel went to great lengths to uncover the specific facts underlying his conviction. The Panel reviewed

hundreds of pages of documents, held two full days of hearings and questioned witnesses and Mr. Kellogg at great length. They considered the sanctions handed down in similar cases, assessed the aggravating and mitigating factors listed in BCGD Proc. 10, and considered all other relevant factors. These efforts led the Board to issue a thorough and well-reasoned Report and Recommendation that should be adopted by this Court.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Respondent's Brief in Support of Recommendations of Board of Commissioners on Grievance and Discipline has been served upon Counsel for Relator by mailing a copy by First Class United States mail to Susan R. Bell, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202, and Peter Rosenwald, 114 East Eighth Street, Cincinnati, OH 45202, this 14th day of February, 2010.


for James P. Fleisher (0059509)