

ORIGINAL

IN THE
SUPREME COURT OF OHIO

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Respondent

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Relator

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CASE NO. 2009-2267

RELATOR'S ANSWER TO
RESPONDENT'S OBJECTIONS TO
THE BOARD OF COMMISSIONERS'
REPORT AND RECOMMENDATIONS

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS

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**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

On February 17, 2009, relator filed a one-count complaint against Respondent David J. Robinson alleging that he violated the ethical rules when he gave false and misleading testimony under oath at a deposition and during a court hearing and subsequently improperly destroyed documents that were the subject of his false testimony in the underlying litigation.

After a hearing on September 21, 2009, the panel found respondent violated all of the disciplinary rules alleged in the complaint and recommended respondent be suspended for 12 months. Upon review, the Board found that a two year suspension was appropriate "based upon

[respondent's] continuing course of misconduct and numerous false statements coupled with other aggravating factors." [Report at 10] For the reasons set forth herein, relator requests this Court overrule respondent's objections.

STATEMENT OF FACTS

Respondent joined the Schottenstein, Zox & Dunn (SZD) law firm as a partner in September 2000 to develop the law firm's government affairs practice. [Report at 9; Stip. 2] The government affairs practice was conducted by an SZD subsidiary company originally called SZD Government Advocates LLC and later SZD Whiteboard, LLC. [Report at 9; Stip. 3] Respondent's employment agreement required that he keep all SZD business information confidential during his employment and after his separation from employment. [Report at 9; Tr. at 26; Stip. Ex. 1]

In early 2007 respondent began to organize his own political campaign for his election to the Ohio General Assembly. [Report at 9; Stip. 6] He subsequently abandoned that effort after discussions with the SZD managing partners and others. [Report at 9] Later, in July 2007, the managing partner of SZD presented respondent with a revised employment agreement. [Report at 10; Stip. 11] Respondent did not like the terms of the new agreement. [Report at 10]

Contemporaneously, respondent began investigating other employment opportunities and collecting large amounts of SZD confidential business information for use in his job search and at any new employment. [Report at 11; Stips. 8, 10 and 12-16] In late July and early August 2007, respondent requested and received from SZD staff copies of four years of SZD

government affairs client billing records, copies of all SZD engagement letters for every current and former government affairs client for the past four years, copies of all of his power point presentations and a copy of the 77-page client and prospective client list. [Report at 12; Stips. 12-14; Tr. at 40, 49, 51 and 52]

Tim Eckenrode, the SZD Chief Technology Officer, testified at respondent's disciplinary hearing that on July 20, 2007, respondent accessed the SZD computer system from his home and printed a copy of the Government Advocates business plan. [Tr. at 130] This was two days after respondent began his job search. [Tr. at 32] Eckenrode further testified that on August, 1, 2007 respondent again accessed SZD data from his home computer and printed a copy of three different client billing reports, his employment agreement and a SZD client list. [Tr. at 133, 134]

After gathering these materials at work and home, respondent met with representatives of two different law firms to discuss potential employment opportunities on August 2, 2007. [Report at 13; Stip. 15] During these meetings, respondent provided these law firms with confidential information about SZD clients and billing. [Report at 13; Stip. 16] The confidential SZD client billing information that respondent shared with these two law firms contained information that is traditionally used to determine bonus and compensation levels for law firm partners. [Tr. at 46]

On Friday, August 3, and Saturday, August 4, 2007, SZD attorneys and staff attended a law firm retreat in Pennsylvania. [Report at 14; Stip. 17] Respondent did not attend the retreat. [Report at 14; Stip. 17] Instead, on both of these dates, respondent went into the SZD offices,

packed seven boxes of materials, removed them from the SZD offices and took them to his two residences. [Report at 14; Stips. 17-18] The removal of these boxes required respondent to make five trips to his vehicle with the boxes. [Relator's Ex. 5] Although he did not know it, respondent was videotaped by the SZD security system while he was removing the materials. [Report at 14; Relator's Ex. 5; Tr. at 135] Earlier that same week, respondent told his secretary Debra Harper to gather some boxes for him because he was leaving SZD and needed to pack up his things. [Tr. at 121]

On August 14, 2007, respondent's employment was terminated by SZD and the next day he was hired by the Porter, Wright, Morris & Arthur law firm. [Report at 15; Stip. 22] On August 23, 2007, SZD filed a civil complaint against respondent alleging that he had violated a non-solicitation provision of his employment agreement and seeking preliminary and permanent injunctive relief. [Report at 16; Stip. 23; Stip. Ex. 4]

As a part of this litigation, respondent's deposition was taken on August 27, 2007. [Report at 17; Stip. 24; Stip Ex. 6] During this deposition, respondent was asked if he had removed any documents from the offices of SZD and if he currently possessed any SZD documents. [Report at 18; Stip. 24] In response, respondent testified "not that I know of" and "not that I am aware of." [Stip. 24, Stip. Ex. 6 at 166-168] The hearing panel found "much of [respondent's] testimony concerning his removal and possession of SZD documents to be misleading and false." [Report at 18]

On August 29, 2007, a hearing was convened in Franklin County Common Pleas Court. [Report at 19; Stip 25] Respondent testified during that court hearing on SZD's complaint. [Report at 19; Stip 25] When asked if he took "information out of [his] office relating to either the law firm or Government Advocates after he began to have conversations with other law firms about joining their firms," respondent testified, in part "I do not recall." [Stip. 25; Stip Ex. 7 at 69-70] When asked "do you recall cleaning out your office or clearing out your office at any time before August 14 and after you began speaking with Porter, Wright, Morris and Arthur and Bricker and Eckler about job opportunities," respondent testified "you know, I might have. I just don't recall the specific date." [Stip. 25; Stip Ex. 7 at 72-73] [Emphasis added]

After respondent testified that he "would clear out [his] office on a regular basis" and that he "remember[ed] at some point in the summer going through different information," he was asked when that took place. [Stip. 25; Stip Ex. 7 at 74-75] Respondent testified "I don't recall." When he was subsequently asked if it happened "in the month of August" and/or whether it "was after [he] began with [his] conversations with Porter, Wright, Morris and Arthur and Bricker and Eckler," respondent testified "I don't recall." [Stip. 25; Stip Ex. 7 at 74-75]

When respondent was asked on August 29, 2007, if he came into the law firm on August 3 and/or August 4, he testified "I don't recall" six times. [Stip. 25; Stip Ex. 7 at 88-89] Additionally, respondent testified that he "didn't take" a copy of the SZD customer e-mail list, which was later discovered in his desk at his home. [Stip. 26; Stip Ex. 7 at 76] Finally, in response to an inquiry about what happened to the copies of all of the SZD engagement letters respondent had requested, respondent testified that "again to the best of my knowledge, I believe

they're in my [former] office [at SZD]." [Stip. 26; Stip Ex. 7 at 83-84] However, respondent's secretary Debra Harper testified she did not find any of these documents in respondent's office after he was terminated. [Tr. at 121] The hearing panel found "relevant parts of that testimony concerning [respondent's] removal and possession of SZD documents" as detailed in the above three paragraphs "to be misleading and false." [Report at 19]

Immediately after respondent's testimony in Franklin County Common Pleas Court denying he possessed SZD confidential information, respondent went into the courthouse cafeteria men's restroom and disposed of a confidential SZD client billing document in a trash receptacle. [Report at 20; Stip. 27-28] This particular confidential SZD client billing document had been part of the trial notebook respondent had created for himself. [Tr. at 84] This document was in respondent's possession in court at the time of his testimony stating otherwise. [Report at 20; Stip. 27-28]

After the court hearing ended for the day, respondent went home and loaded several boxes of confidential SZD documents into his vehicle. [Report at 21; Stip. 29-30] While driving toward downtown Columbus, respondent stopped three times and disposed of at least five confidential SZD documents into random trash receptacles. [Report at 21; Stip. 30] These documents are the same items about which respondent testified in court earlier the same day implying that he did not possess them. [Report at 21]

On September 6, 2007, the court ordered respondent to provide SZD with all of the firm's confidential information in his possession by September 7, 2007. [Report at 23; Stip. 32] On

September 7, 2007, respondent gave SZD three boxes of documents and on September 10, 2007, respondent supplemented this response and gave SZD numerous additional documents. [Report at 23; Stip. 33] The documents produced by respondent included materials respondent previously denied he had in his possession. [Report at 23; Stip. Ex. 12 at 28]

On September 11, 2007, respondent informed the court and SZD for the first time that he had destroyed SZD documents two weeks earlier on August 29, 2007. [Report at 24; Stip. 34] On September 20, 2007, respondent testified at a second court hearing where he admitted that his prior testimony at his deposition and in court about his possession of documents was not accurate. [Report at 25; Stip. 36, Stip. Ex. 11 at 4-5, 17, 37] However, respondent maintained that his prior testimony was not "intentionally" false. [Stip. Ex. 11 at 17, 37] But, at this time, his testimony directly contradicted his prior testimony about removal of boxes from SZD on August 3 and 4, 2007. [Report at 25; Stip. Ex. 12 at 28]

When entering a decision in the SZD case against respondent, the trial judge noted that he found respondent's conduct in the matter to be "troubling" and that respondent had removed "substantial amounts of material" from his office "under very suspicious circumstances." [Report at 26; Stip. 12 at 27] The trial judge also found that respondent returned to SZD "documents which in fact he had and knew he had when he testified he had no such documents" and that he had "destroyed documents which he denied were in his possession." [Report at 26; Stip. Ex. 12 at 28]

On the basis of these facts the hearing panel found “the evidence to be clear and convincing that respondent made repeated false statements under oath at his August 27, 2007, deposition and during an August 29, 2007 court hearing, violating Prof Cond. R. 8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; 8.4(d) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice]; and 8.4(h) [a lawyer shall not engage in conduct that adversely reflects upon the lawyer's fitness to practice law].” [Report at 27] The Board further found “the evidence to be clear and convincing that on August 29, 2007, subsequent to his testimony on that same date that he did not possess such documents, respondent destroyed documents having potential evidentiary value, violating Prof. Cond. R. 3.4(a) [a lawyer shall not unlawfully destroy or conceal a document or other material having potential evidentiary value].” [Report at 28]

RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS

I.

RESPONDENT’S FALSE AND MISLEADING TESTIMONY VIOLATES PROF. COND. R. 8.4(c), 8.4(d) AND 8.4(h)

The Board found “the evidence to be clear and convincing that respondent made repeated false statements under oath at his August 27, 2007, deposition and during an August 29, 2007, court hearing” in violation of Prof Cond. R. 8.4(c), 8.4(d) and 8.4(h). [Report at 27] Respondent now disputes this conclusion and asserts that he “testified truthfully based on his knowledge and ability at the time.”¹ [Respondent’s brief at 12] Despite respondent’s exhaustive hair-splitting of

¹ Throughout respondent’s objection brief, he cites his May 12, 2009 deposition taken by relator, as evidentiary support for various issues. However, relator filed this deposition for cross examination purposes only and it was never marked or admitted as an exhibit. As such, these references by respondent are inappropriate and the deposition testimony should not be given consideration as properly admitted evidence.

his testimony, nonsensical assertions about ‘what he meant’ versus ‘what he said’ and after-the-fact manufactured excuses, the evidence clearly shows that respondent’s testimony was both false and misleading.

Respondent’s August 27, 2007 Deposition

During respondent’s deposition in the litigation with SZD, respondent was asked if he had removed any documents from the offices of SZD and if he currently possessed any SZD documents. [Report at 18; Stip. 24] In response, respondent testified “not that I know of” and “not that I am aware of.” [Stip. 24, Stip. Ex. 6 at 166-168] Respondent made these statements three weeks after he came into SZD offices while the law firm was away at a retreat in Pennsylvania, and removed seven boxes of documents from his office. It was necessary for respondent to make five trips to his vehicle to remove all of the boxes. [Relator’s Ex. 5] As such, respondent’s claimed lack of memory three weeks later is not plausible.

In part, respondent attempts to explain away his misleading statements with a questionable explanation. Respondent claims that his responses to the deposition questions at issue were “given within the context framed by the initial question of whether he took any documents *after* he left SZD.” [Respondent’s brief at 12] A quick examination of the deposition transcript shows otherwise. For the question at issue, respondent was asked “So in your possession today either at your house, in your car, or in this law firm or somewhere else, do you have in your possession any documentation that relates to Government Advocates?” [Emphasis added] [Stip. Ex. 6 at 168] As such, respondent’s explanation strains at credibility and is yet another example of respondent failing to accept responsibility for his misconduct.

Respondent's August 29, 2007 Court Testimony

On August 29, 2007 when respondent was asked under oath if he took "information out of [his] office relating to either the law firm or Government Advocates after he began to have conversations with other law firms about joining their firms," respondent testified, in part "I do not recall." [Stip. 25; Stip Ex. 7 at 69-70] When asked "do you recall cleaning out your office or clearing out your office at any time before August 14 and after you began speaking with Porter, Wright, Morris and Arthur and Bricker and Eckler about job opportunities," respondent testified "you know, I might have. I just don't recall the specific date." [Stip. 25; Stip Ex. 7 at 72-73]

After respondent testified that he "would clear out [his] office on a regular basis" and that he "remember[ed] at some point in the summer going through different information," he was asked when he did that. [Stip. 25; Stip Ex. 7 at 74-75] Respondent testified "I don't recall." When he was subsequently asked if it happened "in the month of August" or whether it "was after [he] began with [his] conversations with Porter, Wright, Morris and Arthur and Bricker and Eckler," respondent testified "I don't recall." [Stip. 25; Stip Ex. 7 at 74-75]

Next, respondent was asked in a series of questions about whether he came into SZD on August 3 and/or August 4, 2007. In response to these simple and direct questions, respondent testified "I don't recall" six times. [Stip. 25; Stip Ex. 7 at 88-89] Additionally, respondent falsely testified that he "didn't take" a copy of the SZD customer e-mail list, which he later was forced to admit he had in his desk at his home. [Stip. 26; Stip Ex. 7 at 76] Finally, in response to an inquiry about what happened to the copies of all of the SZD engagement letters after

respondent's termination, respondent falsely testified that "again to the best of my knowledge, I believe they're in my office." [Stip. 26; Stip Ex. 7 at 83-84] At the disciplinary hearing, respondent's former secretary Debra Harper testified that she cleaned out respondent's office after he was terminated and she did not find the engagement letters. [Tr. at 121]

Despite respondent's lack of recollection in 2007, he testified in great detail at his 2009 disciplinary hearing about his memory of moving these seven boxes. Respondent recalled that there was no electricity in his new home and the basement was dark. [Tr. at 189] Respondent testified that the "temporary" basement staircase at his new home was "treacherous" and "rickety" and he "was concerned about falling." [Tr. at 61-62, 189] He also recalled that after carrying several heavy boxes down the basement stairs, he decided to dispose of a substantial amount of the materials from the remaining boxes into a dumpster at his new home to lessen the amount of materials that he needed to carry to the basement. [Tr. at 62] As such, respondent's 2007 deposition and hearing testimony "not that I am aware of," "not that I know of" and "I don't recall" is inconsistent with his actual recollections and clearly false and misleading.

Respondent next attempts to explain his false and misleading testimony with several rationalizations. Respondent asserts "the questions [were] confusing." [Respondent's brief at 13] Respondent states that his answers were not dishonest, but merely reflected that he did not recall the exact date he removed boxes from his office. [Respondent's brief at 13] Respondent suggests that his testimony was inaccurate because he did not have a calendar to refresh his memory while testifying. [Respondent's brief at 15] Finally, respondent states that he did not actually recall removing seven boxes of documents from SZD three weeks earlier, until his

recollection was “refreshed” with the security video tape of his actions. [Respondent’s brief at 14] One need only examine the transcript of respondent’s actual testimony stating six times that he did not recall removing seven boxes from SZD three weeks earlier, to conclude that respondent’s testimony was false and misleading and his explanations not reasonable.

Respondent also objects to the Board Report’s mention of the finding by the trial judge that respondent testified “that he did not currently possess any information/documents belonging to” SZD “which in fact he had and knew he had when he testified he had no such documents.” [Stip. Ex. 12 at 28] Respondent challenges the judge’s assessment of the credibility of respondent’s testimony by pointing out the fact that respondent admitted he had billing sheets, a contact list and other personal materials in his testimony. A simple review of the hearing transcript, shows that the judge’s conclusion was based upon the fact that respondent did not acknowledge all of the documents in his possession, after considering the numerous documents respondent had “suspiciously” amassed and removed prior to his termination.

In respondent’s direct examination at the disciplinary hearing, he repeatedly described his testimony at his deposition and the trial court hearing as “qualified answers.” Relator is unsure of respondent’s definition for these terms, but if he is suggesting that it was okay for him to purposefully provide less than complete testimony in an effort to mislead opposing counsel and the trial court, his “qualified answers” are clearly improper. In any case, respondent’s assertion that by giving these qualified answers he was merely “trying to be 110 percent accurate” is disingenuous at best. [Tr. at 199]

In conclusion, relator points out that the hearing panel considered respondent's explanations and observed respondent's testimony firsthand and found respondent's "failure of recollection to be incredible and intentionally misleading given the circumstances and the short period of time within which they occurred." [Report at 36] Additionally, this Court has routinely given deference to the hearing panel's better perspective in terms of assessing witness credibility. See, e.g., *Cincinnati Bar Assn. v Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶ 8; *Columbus Bar Assn. v. Willette*, 117 Ohio St.3d 433, 2008-Ohio-1198, 884 N.E.2d 581, ¶ 29. For these reasons, respondent's first objection should be overruled.

II. And IV.

"WILLFUL INTENT" TO VIOLATE A DISCIPLINARY RULE IS NOT REQUIRED TO FIND RESPONDENT VIOLATED PROF. COND. R. 3.4(a), 8.4(c), 8.4(d) AND 8.4(h)

In his second and fourth objections, respondent asserts that he cannot be found to have violated Prof. Cond. R. 3.4(a), 8.4(c), 8.4(d) and 8.4(h) because he did not have a "willful intent" to violate these disciplinary rules. Because of their overlapping similarity, respondent's arguments in objections II and IV will be addressed together.

First, respondent argues that relator must "prov[c] by clear and convincing evidence that [respondent] willfully intended to unlawfully destroy or conceal evidence and breach further disciplinary rules." In support of this premise, respondent refers this Court to *Ohio State Bar Assn. v. Reid*, 85 Ohio St.3d 327, 1999-Ohio-374, 708 N.E.2d 193 and Gov. Bar R. IV, Section 1. [Respondent's brief at 26] However, respondent misinterprets and misapplies both. *Reid* states in relevant part "In disciplinary proceedings, the relator bears the burden of proving the

facts necessary to establish a violation. The complaint must allege the specific misconduct that violates the Disciplinary Rules and relator must prove such misconduct by clear and convincing evidence.” *Reid* at 331. Gov. Bar R. IV(1), states in part “The willful breach of the Rules shall be punished by reprimand, suspension, disbarment or probation, as provided in Gov. Bar R. V.” As such, respondent’s objection is not supported by the resources upon which he relies.

In *Disciplinary Counsel v. McCord*, 121 N.E.2d 497, 2009-Ohio-1597, 905 N.E.2d 1182, ¶ 32, McCord made the same argument that “he never intended to deceive or mislead the public.” This Court considered the “intent” argument and held “the only relevant consideration is whether [McCord] performed the unethical acts; his subjective intent in doing so does not change the analysis. See *Disciplinary Counsel v. Bell* (1984), 15 Ohio St.3d 118, 120, 15 OBR 269, 472 N.E.2d 1069.” *Id.* This Court further held that “even if we believed that [McCord] did not intend to deceive the public, it is clear that he performed deceptive acts that violated the aforementioned Disciplinary Rules and Rules of Professional Conduct.” *Id.* Therefore, this Court has already decided that the standard respondent is requesting be applied to his unethical conduct is not appropriate.

Further, respondent’s proposed standard for ethical violations does not adequately protect the public. Allowing an attorney to assert that he or she did not intend to violate an ethical rule, creates another layer of unnecessary excuse-making. Additionally, respondent has not cited any authority showing that this Court has ever applied the requirement that it be proven a respondent had a willful intent to violate the ethical rules prior to finding such a violation.

Next, in support of respondent's "willful intent" argument, he states that he "was experiencing a significant amount of stress" and "this stress impaired his memory and his judgment." [Respondent's brief at 21] This murky explanation does not withstand close scrutiny. First, exactly how this purported stress impaired respondent's memory is not exactly clear. Respondent flatly denies making any false or misleading statements. Second, no medical testimony was given at the hearing that respondent was under stress and/or this purported stress impaired the respondent in any manner. Relator will concede that making false and misleading statements under oath and subsequently worrying about being caught could be stressful.

In further support of this "willful intent" argument, respondent states he testified he did not take the customer e-mail list during his court hearing testimony, because he "considered the question regarding the possession of the e-mail list in the context of what he took out of his office on August 3-4, 2007." [Respondent's brief at 20] However, this "explanation" is inconsistent with respondent's claims that he could not even recall when he removed seven boxes of documents from SZD and could not state with any certainty what documents he had taken because he did not have an "inventory" of what he took. Respondent is now asserting that he did not remember removing seven boxes and did not know what he took, but somehow remembered he did not take the customer e-mail list.

Next, respondent claims that he "did not intend to conceal the fact that he had the documents or to conceal the documents from the court or opposing counsel." [Respondent's brief at 26] However respondent's present self-serving claims are in direct contradiction to his prior intentional actions. First, respondent collected and removed large amounts of proprietary

information from SZD while law firm employees were at an out-of-state retreat, and under what the trial court described as “very suspicious circumstances.” Second, three weeks later, respondent professed that he did not know what, if any, documents he had in his possession while testifying under oath. Third, after being questioned under oath about these very same documents, respondent subsequently destroyed at least six documents that he had in his possession. Respondent’s destruction of these documents commenced immediately after his testimony and while he was still in the courthouse.

Respondent next argues that because he “almost immediately” informed the various parties to the litigation that he had destroyed documents, this somehow demonstrates his original intentions were not to conceal evidence. This argument is irrational. The best indicator of respondent’s original intentions regarding his destruction of documents is his conduct at the time the documents were destroyed. This conduct demonstrates respondent intended to conceal his possession of the records. Simply stated, just because a person later admits to misconduct, does not demonstrate the person did not “intend” to engage in the original misconduct.

For the foregoing reasons, this Court should reject respondent’s argument that “willful intent” is required before discipline is imposed upon an Ohio attorney for violating Prof. Cond. R. 3.4(a), 8.4(c), 8.4(d) and 8.4(h).

III.

RESPONDENT'S PURPOSEFUL DESTRUCTION OF RECORDS THAT WERE IN DISPUTE IN THE UNDERLYING LITIGATION VIOLATES PROF. COND. R. 3.4(a)

After respondent testified as a defendant in a court proceeding on August 29, 2007, he went to the courthouse cafeteria restroom and destroyed a confidential SZD document. Moments earlier, respondent had testified that he did not have and/or did not recall if he had this document. However, the document respondent destroyed in the restroom came from the trial notebook respondent had created for himself. Later that same day, respondent went to his two residences, collected several boxes of confidential SZD documents and loaded the boxes into his car. Respondent then drove around Columbus and disposed of at least five additional confidential SZD documents. These boxes contained some of the same materials that respondent had denied having and/or could not recall if he had in his possession during his testimony earlier the same day.

The hearing panel found that the “prospective evidentiary value of these documents in the litigation was not only their content, which might be supplied by copies, but, rather, the fact that respondent possessed them and had or intended to furnish them to others contrary to contract.” [Report at 22] The hearing panel further found that the “unlawful or improper act committed by respondent [in violation of the ethical rules] was destroying documents to conceal the fact that he had them.” [Report at 22]

Based upon these facts, the Board found that respondent violated Prof. Cond. R. 3.4(a). Respondent argues that there can be no violation because “Prof. Cond. R. 3.4 [(a)] applies only

to what lawyers do on behalf of others, not to what they do when they themselves are clients.”

[Respondent’s brief at 23] Respondent’s argument is not supported by the facts or the text of the rule.

In support of this objection, respondent relies on several unpersuasive arguments. First, respondent points out that Section III of the Rules of Professional Conduct is entitled “Advocate.” Therefore, respondent asserts, only attorneys acting on behalf of clients, are subjected to the requirements of Prof. Cond. R. 3.4(a). However, Prof. Cond. R. 3.4(a) and the comments that follow contain no such limitation. Additionally, as respondent points out, the comments to Prof. Cond. R. 3.3 limit that rule to “the conduct of a lawyer who is representing a client.” This further supports relator’s position that Prof. Cond. R. 3.4(a) contains no such limitation.

Next, respondent points out that one of the out-of-state disciplinary cases offered by relator in support of finding a violation involves an attorney representing a client. However, *The Florida Bar v. Forrester* (2002), 818 So.2d 477 does not state that Prof. Cond. R. 3.4(a) only applies to an attorney representing a client. Further, as respondent is forced to acknowledge, the second case relied upon by the Board, *In re Melvin* (2002), 807 A.2d 550, involves an attorney not representing a client who is disciplined for violating Prof. Cond. R. 3.4(a). Respondent attempts to distinguish *Melvin* by arguing that Melvin did not make this same argument and therefore that case is not dispositive on this issue. Regardless, relator notes that respondent has not produced one disciplinary case that stands for the proposition that he is asking this court to adopt.

V.

**RESPONDENT'S "CONTINUING COURSE OF MISCONDUCT
AND NUMEROUS FALSE STATEMENTS COUPLED WITH OTHER
AGGRAVATING FACTORS" SUPPORT A TWO YEAR SUSPENSION**

Respondent repeatedly gave false and misleading testimony under oath at a deposition and during a court hearing regarding his removal and retention of SZD documents. Respondent then improperly destroyed documents that were the subject of the underlying litigation, for the specific purpose of concealing the fact that he possessed the documents. In addition to this misconduct, the Board found four aggravating factors: a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and refusal to acknowledge the wrongful nature of his conduct. The Board then found that "the aggravating factors to be considered outweigh the mitigating factors." [Report at 43] It is clear from this finding that the Board had grave concerns about respondent's misconduct, his refusal to acknowledge the misconduct and disciplinary rule violations and his complete failure to take any responsibility for his repeated dishonest and misleading statements.

Respondent argues that the Board failed to weight the mitigating factors properly and ignored other mitigation that was present. First, respondent asserts that the Board did not consider his "mental state at the time of his actions," that his "mental state was impaired" and that this Court has previously found stress to be a mitigating factor. [Respondent's brief at 29] In support of this contention, respondent cites two disciplinary cases. In *Disciplinary Counsel v. Spencer*, 71 Ohio St.3d 316, 317, 1994-Ohio-252, 643 N.E.2d 1086, the Court decision mentions that "in mitigation, Spencer claimed extraordinary stress." However, the decision does not state what, if any, weight the court gave to this argument. Further, relator notes that *Spencer* differs

from the present matter in that Spencer admitted a pattern of dishonest conduct and nonetheless received a one year suspension.

In the second case cited by respondent, *Cincinnati Bar Assn. v. Fidler*, 83 Ohio St.3d 396, 1998-Ohio-39, 700 N.E.2d 323, Fidler was disciplined for two shoplifting convictions and Fidler's initial dishonesty about one of the convictions. Only one sentence in the opinion mentions stress and states "In mitigation, the panel received evidence that at the time of the thefts respondent was under great personal stress." *Id.* at 397. As such, it is unclear, what if any weight the court gave to this argument. Additionally, after holding "when an attorney withheld the truth during a disciplinary investigation, we imposed a definite suspension," the Court ordered Fidler suspended for 18 months, with 12 months stayed and one year of probation. *Id.* at 397. As such, the two cases cited by respondent demonstrate that even in circumstances in which an attorney engaged in a pattern of dishonesty, fully admitted the dishonesty and may have been given mitigation credit for stress, the attorney received an actual suspension from the practice of law.

Respondent next argues that "the Court has illustrated substantial leniency towards lawyers whose personal conduct illustrates an impairment of their normally sound judgment." [Respondent's brief at 29] In support of this point, respondent cites *Disciplinary Counsel v. Walker*, 119 Ohio St.3d 47, 2008-Ohio-3321, 891 N.E.2d 740. However, *Walker* does not mention normally sound judgment as a mitigating factor. Additionally, even though Walker "corrected his false statement to relator, admitted his [dishonest] misconduct, and apologized and

expressed remorse for his actions,” he received a two year suspension with 12 months stayed. *Walker* at ¶ 14.

Respondent next argues that this Court has accepted “that an attorney acted out of inexperience rather than ill will” as a relevant factor to be considered and suggests that respondent should receive credit for this concept. [Respondent’s brief at 30] In support of this contention, respondent refers to *Toledo Bar Assn. v. Hales*, 120 Ohio St.3d 340, 2008-Ohio-6201, 899 N.E.2d 130. In *Hales*, this Court stated “we accept that [Hales] acted out of inexperience rather than ill-will; however, to ensure that he does not do so again, we order a two-year suspension and stay the last 18 months on conditions of monitored probation and no further misconduct.” *Hales* at ¶ 3. Additionally, *Hales* differs from the present matter in several other important ways. Hales’ inexperience was in the representation of a client and the Court’s decision does not specifically list Hales’ inexperience as a mitigating factor. Hales fully admitted his misconduct. Further, the only evidence for respondent’s contention that he acted out of “inexperience rather than ill will” is respondent’s own after-the-fact self-serving testimony. Finally, an attorney does not require many years of experience in litigation to understand you must tell the truth under oath and that it is improper to destroy evidence.

Respondent argues the Board failed to properly consider “that no client was harmed or intended to be harmed” by respondent, as a mitigating factor. [Respondent’s brief at 31] This potentially mitigating factor is appropriate only when the underlying misconduct by an attorney involved the representation of a client. Because respondent’s misconduct did not involve his

representation of a client, this argument has no merit. Finally, respondent's argument also ignores the harm he caused to the judicial system and the profession.

Respondent next argues that "none" of the aggravating factors found by the Board are present in this matter. [Respondent's brief at 32] Respondent lied under oath and destroyed evidence to conceal the fact that he had possessed the documents in question. The dishonesty began with respondent's August 2007 deposition, continued through an August 2007 court hearing, and was restated again at his September 2007 trial court hearing. Respondent also destroyed six documents on August 29, 2007 and kept his actions a secret from the trial court, for two weeks, until September 11, 2007. Respondent then repeated his false and misleading testimony at his disciplinary hearing on September 21, 2009.

Respondent's assertion that his repeated false statements were merely an effort to try "to answer questions asked to the best of his ability and knowledge at the time" is a smokescreen intended to distract this Court. [Respondent's brief at 33] If respondent had answered questions "to the best of his ability and knowledge at the time," this disciplinary proceeding would not have been necessary. Instead he opted to make false and misleading statements about events for which he had recent specific personal knowledge. Based upon the statement of facts recounted above, there is ample evidence that respondent acted with a dishonest and selfish motive, engaged in a pattern of misconduct, committed multiple offenses, and, to date, still refuses to acknowledge the wrongful nature of his conduct.

Respondent next suggests that he “received no benefit from possessing the documents or discarding them.” [Respondent’s brief at 33] Respondent collected hundreds of pages of SZD confidential business information, some of which he admits he shared with two law firms with whom he was interviewing for a job. Large amounts of these documents were never located after respondent left SZD. Other documents were destroyed by respondent. Respondent had no reason to secretly take seven boxes of confidential business information from SZD, except to use that information in his job search and at his next employer. Additionally, as the Board found, the benefit to respondent for destroying the documents was concealing “the fact that he possessed the documents he had denied possessing in prior sworn testimony.” [Report at 41]

With regard to the Board’s finding that respondent refused to acknowledge the wrongful nature of his conduct, respondent misleadingly states that “over and over again [he] has admitted that the disposal of the documents was wrong,” “admitted the wrongfulness of his actions,” and “fully accepted responsibility for his actions.” [Respondent’s brief at 34 and 35] But determining exactly what conduct respondent is admitting was wrongful and accepting responsibility for is unclear and elusive. Respondent vehemently denies making any false or misleading statements. Respondent also states that he is “not admitting he willfully violated the rules” when he destroyed the six documents. [Respondent’s brief at 35] Respondent cannot have it both ways. Respondent cannot profess remorse for conduct that he denies committing and/or denies was improper.

Next respondent argues that the Board gave insufficient weight to the mitigating factors present. However, the Board report is clear. After reviewing the aggravating and mitigating

factors, it notes “the panel believes the aggravating factors to be considered outweigh the mitigating factors.” [Report at 43] Nonetheless, respondent’s explanations for his conduct in conjunction with his mitigation evidence demonstrate that respondent’s professions of accident or inexperience are hollow.

Respondent testified that he was student body president at Bowling Green State University and graduated magna cum laude. [Tr. at 173] He was a page at the Ohio Statehouse for several elected officials. [Tr. at 174] While in law school, respondent was a law clerk for the Columbus City Attorney and Chester, Wilcox & Saxbe. [Tr. at 174] He also served as a lobbyist for the Ohio Chamber of Commerce, the City of Columbus and Ameritech. [Tr. at 174] Respondent served as a state representative and is currently an adjunct professor at a law school. [Tr. at 175]. Respondent created a \$1 million lobbying business while a partner at SZD. [Tr. at 183] At the time of the litigation, respondent was a partner at a major law firm and had nine lawyers working on his defense team. [Tr. at 230] As such, respondent’s years of varied legal experience and numerous personal and professional relationships with people at the highest levels of state government, show that respondent is a highly educated, experienced and skilled attorney whose actions fell far below the ethical standards that are applied to all lawyers.

Furthermore, the Board found that respondent’s claims that he was “not a litigator and is unfamiliar with court proceedings and procedures” as an excuse for his actions to be without merit when considering “respondent has been a licensed attorney for fifteen years and for half that time was partner in a major law firm.” [Report at 37, 38]

Respondent next asserts that he “timely made a good faith effort to rectify the consequences of providing inaccurate testimony and disposing of documents.” [Respondent’s brief at 37] In support of this assertion, respondent points to an errata sheet he submitted for his deposition to correct his “inaccurate” testimony. Respondent’s errata sheet is attached to his August 2007 deposition marked as Stipulated Exhibit 6. The errata shows six clarifications or amendments, none of which directly relate to respondent’s destruction of SZD records or what the Board found to be respondent’s false and misleading testimony under oath at a deposition and during a court hearing. As such, the errata is not a timely good faith effort to rectify the consequences of his actions. With regard to respondent’s claim that he promptly advised the trial court after he destroyed at least six documents -- it was actually two weeks after he destroyed at least six SZD documents, that he informed the court of his actions.

Respondent next suggests that the fact that he made a self-report of potential misconduct to relator, demonstrates he made full and free disclosure and cooperated in the disciplinary proceedings. He further asserts that “but for [respondent’s] disclosure of his conduct, no one would have ever discovered it.” [Respondent’s brief at 39] However, respondent fails to advise this Court that he did not self-report his false and misleading statements and that these allegations were instead brought to the attention of relator by another party. Additionally, while respondent reported his document destruction to relator, his objection brief still maintains that his actions violated no ethical rules. As such, respondent’s continuing denials in the disciplinary proceeding cancels out any mitigative effect of a partial and disingenuous self-report.

Finally, respondent argues that the two year suspension recommended by the Board is not appropriate. In support of this contention, respondent cites several Ohio disciplinary cases where lesser sanctions were imposed. However, the cases cited by respondent are inapplicable. In *Disciplinary Counsel v. Niermeyer*, 119 Ohio St.3d 99, 2008-Ohio-3824, 892 N.E.2d 434, Niermeyer fully admitted his dishonest conduct and stipulated that he had committed dishonest conduct. Similarly, in *Dayton Bar Assn. v. Ellison*, 118 Ohio St.3d 128, 2008-Ohio-1808, 886 N.E.2d 836, Ellison admitted her dishonest actions and stipulated to a violation of DR 1-102(A)(4) for her dishonesty. In *Columbus Bar Assn v. Stubbs*, 109 Ohio St.3d 446, 2006-Ohio-2818, 848 N.E.2d 843, Stubbs likewise acknowledged her dishonesty and established additional mitigation with her depression. In *Columbus Bar Assn. v. Shea*, 117 Ohio St.3d 55, 2008-Ohio-263, 881 N.E.2d 847, ¶ 16, Shea acknowledged the misconduct and his misconduct “involved only a brief conversation, and he did not engage in a course of conduct.” No such admissions of dishonesty, stipulations to rule violations or depression mitigation are present in this matter.

Finally, respondent appears to suggest that if there is no other Ohio disciplinary case with the exact same facts, disciplinary rule violations and sanction as this matter, then the sanction proposed by the Board is improper. As this Court has held numerous times, all disciplinary cases are unique. For this reason, the absence of a similar case or similar sanction alone does not require the Board recommendation to be modified. The Board found that a two year suspension was appropriate “based upon [respondent’s] continuing course of misconduct and numerous false statements coupled with other aggravating factors.” [Report at 10] This Court should do likewise.

CONCLUSION

For the foregoing reasons, respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline should be overruled by this honorable Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Relator's Answer Brief was served via U.S. Mail, postage prepaid, upon Respondent's Counsel, E. Bruce Hadden, Esq., 132 Northwoods Blvd., Columbus, OH 43235-4726 and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431 this 26th day of February, 2010.



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