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## TABLE OF AUTHORITIES

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## DISCIPLINARY RULES

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## STATEMENT OF FACTS

Relator has attached the Board's report as Exhibit A, but Respondent will briefly supplement the Statement of Facts put forth by the Relator. On February 1, 2008, Respondent was charged in Butler County Common Pleas Court with Theft, a fifth degree felony, by way of an information. He was sentenced to three years of community control, fined the amount of \$1,000, and ordered to pay Lyons and Lyons Co., in West Chester, Ohio, his former employer, in the amount of \$7,157. The restitution amount was paid by the Respondent by time of sentencing. Further, the Respondent was able to provide the Board at time of hearing an entry terminating early his community control, including the payment of all fines and court costs. As a result of his felony conviction, and pursuant to Gov. Bar V(5)(A)(4), the Supreme Court of Ohio suspended the Respondent's license to practice law for an interim period on July 10, 2008. Further, the Respondent had suspended himself from the practice of law and had not represented anyone or advised anyone since February 1, 2008.

On June 29, 2009 a complaint was filed against the Respondent by the Relator alleging violations of the following rules of Professional Conduct: Prof. Cond. R. 8.4(b)(commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness); Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation; Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. R. 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law). Respondent filed an answer admitting the allegations contained in the complaint, and asked to present evidence and testimony in mitigation addressing the issue of credit for time served on his interim suspension. Respondent and Relator filed joint stipulations and the hearing was held on November 18, 2009.

The Board then issued their recommended sanction of a suspension for two years with both years stayed upon conditions contained in the panel report.

### MEMORANDUM OF LAW

It is clear from the Relator's Objection that they wish to establish a bright line precedent for all attorney discipline cases that involve theft or the misappropriation of money. Yet, in their haste to do so, they have attempted to equate the case at bar to several cases that are clearly not on point, while also criticizing the Board's decision as "absurd." Their effort to establish a bright line precedent also contradicts some of the most well established principles guiding disciplinary decisions and ignores the fact that there is ample authority to support the Board's decision.

The Board recommended that the Respondent be suspended from the practice of law for a period of two years with both years stayed upon conditions contained in the panel report (Board's Report, 9). The Board relied upon several cases in making their determination. The panel reviewed the cases of : *Akron Bar Association v. Carter*, 115 Ohio St. 3d 18, 2007, *Disciplinary Counsel v. Brenner* (2009) 122 Ohio St. 3d 523, 2009-Ohio-3602; and *Disciplinary Counsel v. Margolis*, 114 Ohio St. 3d 165, 2007-Ohio-3607. While the Court in *Carter* and *Brenner* imposed two year suspensions with the second year stayed for somewhat factually similar cases, the Board used the criteria set forth in those cases to craft their decision rather than relying upon the mere final decisions in those cases.

In the Relator's attempt to set a bright line precedent, the Relator lost sight of Section 10 Guidelines for Imposing Lawyer Sanctions in the Supreme Courts Rules for the Government of the Bar of Ohio which states that "Each disciplinary case involves unique facts and

circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.”

In Carter, the Board recommended a two year suspension with the second year stayed where an attorney was convicted of felony theft for using an employer’s credit card for almost Six Thousand Dollars in expenses and then not providing restitution. Further, Carter issued a check drawn on insufficient funds when confronted by a detective. When weighing the mitigating factors in Carter, the Board found that there was an absence of any prior disciplinary record, eventual repayment of restitution to his former employer, his cooperative attitude toward the disciplinary process, and the imposition of criminal penalties for his misconduct. Aggravating factors included the Respondent’s selfish motive, multiple offenses, and his refusal to acknowledge the wrongful nature of his conduct. In fact, Carter stated at the disciplinary hearing that his actions were not ‘unethical, \*\*\*illegal\*\*\*, (or) immoral,’ and he told the panel that he had pleaded guilty to the criminal charges despite his belief that he was not guilty.” *Id at 827*. The Board and the Court both were troubled by Carter’s failure to accept full responsibility for his unprofessional and criminal actions. *Id at 827*. Yet, despite this, the Court still felt that the mitigating factors required a two year suspension with the second year stayed.

Second, in Brenner, the Court found that a two year suspension with the second year stayed was appropriate where the Respondent converted several thousands of dollars of fees for his own personal use instead of paying it to his firm. This came about by having the firm writing him checks for expenses out of the fees collected. The Court, when weighing the mitigating and aggravating factors, found in mitigation that he had no prior disciplinary record, gavefull cooperation with disciplinary proceedings, made a good faith effort towards restitution and submitted approximately forty letters attesting to his good character. Aggravating factors found

included “an extended pattern of fraud and deception,” a dishonest or selfish motive, a pattern of misconduct and multiple offenses. *Id.*

Finally, the Board also relied upon the *Margolis* decision when making their recommendation. In *Margolis*, an attorney received a two year suspension for misconduct involving bid rigging and pricing practices for his father-in-laws company which resulted in two antitrust crimes. When looking at the mitigating factors involved, Respondent was found to have no disciplinary record prior to his convictions, cooperated during the disciplinary process, had already served his time and paid his court costs, and that he had submitted several letters of support, though they were not seen as especially persuasive. Aggravating factors were that the Respondent’s explanation was seen as an attempt to disclaim responsibility and minimize his conduct. *Id at 169.* The Supreme Court also commented on the fact that this case was distinguishable from most others due to the length of the misconduct which took place over several years and the financial magnitude of up to One Hundred Thousand Dollars in potential harm. However, the Court’s analysis of the Respondent’s minimization of his activities makes it clear that the failure to take responsibility was a heavy factor in deciding not to give him credit for time served and distinguished Respondent’s case from the several cases that he offered as a comparison.

What can be concluded from an analysis of previous cases and looking at the recommendation opined by the Board is that in the case at bar and in keeping with the principle that each of these cases is unique to its facts, is that the mitigating factors in this case make it distinguishable from those cases previously decided, including those used as a starting point by the Board for its recommendation. The recommendation is thus distinguishable from those cases. The Board in this case has issued a recommendation of a two year suspension with both years

stayed upon conditions and the sole issue objected to by the Relator is the staying of both years. When weighing the aggravating and mitigating factors, the Board found that the aggravating factors were a dishonest or selfish motive, a pattern of misconduct, and committed multiple offenses. (Board Report at 6). It is the mitigating factors found by the Board that makes this case unique and distinguishable and thus supports the Board's recommendation.

The parties stipulated in this case and pursuant to BCGD Proc. Reg. 10(B)(2) that there were mitigating factors of no prior disciplinary record, Respondent had made restitution, had displayed a cooperative attitude toward these proceedings and had had other penalties and sanctions imposed upon him as a result of the misconduct. In their analysis of the mitigating factors, Relator fails to mention that Respondent has already completed all of the penalties imposed upon him by the Butler County Common Pleas Court. Though he was sentenced to three years of community control, Respondent was able to provide the Board with an entry terminating his community control approximately a year and a half early. This included the payment of all restitution which was completely repaid before time of sentencing, as well as a one thousand dollar fine and court costs.

Although not stipulated the Board also found that, the respondent's character and reputation is a mitigating factor in this case. The Board made this determination from the joint submission by the parties of numerous letters of support from other lawyers, two judges, the county sheriff and even a letter from a prosecutor employed by the office that prosecuted him. All of these letters attested to his good reputation and character. Scott Mote, the executive director of OLAP, testified personally and eloquently about the Respondent's contrition, cooperation and rehabilitation. There were also local attorneys, including Myron Wolf, Esq, a former member of the Board, who appeared as witnesses requesting that the Respondent be

allowed to return to practice and giving the opinion that he would be welcomed back by the local bar.

Further, the Board found by clear and convincing evidence that the Respondent suffered from a mental disability under BCGD Proc. Reg. 10(B)(2)(g) at the time of violations. Further, Respondent presented uncontested testimony from Elizabeth Leslie Leshner, MSW, LISW, a clinical social worker, who diagnosed him with adjustment disorder with mixed disturbance of emotions and conduct. Respondent also presented testimony from Stephanie Krznarich, MSW, LISW-S, LCDC-III, a clinical social worker with the Ohio Lawyers Assistance Program who also independently diagnosed the Respondent with an adjustment disorder. Both further testified that the disorder was a contributing cause of Respondent's misconduct, that the disorder had resolved and that the Respondent was capable of returning to the practice of law in an ethical and professional manner.

While the Relator argues that the case law does not support the Board's recommendation of a completely stayed suspension, it is clear that when weighing the mitigating factors, the Respondent presents with more mitigating factors in his favor than the Respondents in the cited cases by the Relator. Relator's approach of only analyzing the end results of those cases is a distraction from the analysis required of aggravating and mitigating factors. Relator only pays lip service to the discussions and criteria set forth in the cases. If the Court were to accept Relator's approach to case analysis, then there would be no need to write decisions from an analysis of facts and circumstances. Relator thus attempts to rely on the Court's statement in *Carter* to establish that there is a hard line precedent for an actual suspension. The Court held that "A violation of Disciplinary rules barring conduct involving fraud, deceit, dishonesty, or misrepresentation ordinarily calls for the actual suspension of an attorney's law license." *Carter*,

155 Ohio St. 3d 18, 2007-Ohio-4262. Yet, what Relator fails to grasp is that there has been an actual suspension in this case.

The Supreme Court placed the Respondent on an interim felony suspension on July 10, 2008. Further the Respondent had voluntarily suspended himself from the practice of law on February 1, 2008. Thus, the Respondent has not practiced law in over two years and from the date of the interim suspension to the argument of this case, the length of the interim suspension is twenty months and twenty one days. It is akin to when a Defendant is criminally charged and is held in custody pending trial. If the Defendant is eventually convicted of the crime, he may be sentenced to serve jail or prison time as a consequence. If he is ordered incarcerated, then he will receive credit for time already served. Further, it is the equivalence of a suspended jail or prison sentence. Just because that sentence is not immediately imposed, does not mean that there has not been an actual sentence imposed.

The Relator also relied upon the *Bennett* case, 2010-Ohio-313, in its results driven review of recent case law. The attorney, in *Bennet*, received an indefinite suspension after being convicted of a felony for unlawfully structuring financial transactions to avoid tax consequences. There are numerous factors that distinguish this case from that of the Respondent. Relator is quick to dismiss this case as a victimless crime, but at first blush it involves a much greater sum of money. The Respondent did not accept responsibility for the full magnitude of his offenses, his plea only accounted for a small portion of the funds involved and the Respondent had not yet made reparations with the IRS for his evasion of proper taxes.

Finally, if the Court is inclined to accept the Relator's opinion that there should be an actual suspension, then the Respondent should be entitled to credit for time served under the unique mitigating circumstances of this case. The Relator surmises that it is plausible that the

Board was attempting to justify the Respondent's immediate return to the practice of law. The Board's recommendation, relying upon *Margolis*, states that a lawyer should be given credit for time served under an interim suspension when the disciplined lawyer presents credible evidence of remorse and acceptance of responsibility. *Id at 169*. Further, Relator provides a litany of cases where the Respondent received credit for time served towards their suspension after the commission of a felony. In *Disciplinary Counsel v. Cook*, 89 Ohio St. 3d 80, 2000-Ohio-47, the respondent received a six month suspension with credit for time served after pleading guilty to a felony for assisting his client in obtaining financing when the funds were from illegal drug transactions. That case is just one of many that illustrate that Respondent in this case is entitled to credit for time served on his interim suspension.

Finally, the Relator makes the statement that the facts in *Cincinnati Bar Assn. v. Schweiterman*, 115 Ohio St. 3d 1, 2007-Ohio-4266, are "directly on point with the case at bar" which is a statement that is terribly misleading and patently false. The only similarities between that case and the instant case are that Schweiterman was found guilty of one count of theft and was cooperative during disciplinary proceedings. There are numerous aggravating factors present in *Schweiterman* that are not present in the case at bar. First, Schweiterman had a prior disciplinary history for failing to register with the Supreme Court of Ohio, for which he was fined Two Hundred Fifty Dollars. To further aggravate that situation, Respondent failed to pay the fine. Second, Respondent neglected several client matters. This involved activities such as obtaining continuances without client knowledge, not returning phone calls, to failing to answer pleadings resulting in a default judgment. Third, Respondent failed to notify clients when he was suspended from the practice of law. Fourth, though he was found to be genuinely remorseful, the Board found that Respondent did not fully appreciate the wrongful nature of his

own misconduct. Finally and perhaps, most disturbing is Relator's attempt to draw a correlation between Schweiterman's attempt to use depression as a defense and Respondent's diagnosis in the case at bar. Schweiterman was diagnosed with depression and entered the Mennenger Clinic for treatment. Yet, five of the instances of misconduct that the Respondent admitted to occurred after he received treatment. Further, there was testimony from psychiatrist at the hearing who stated that "the respondent was not suffering from any mental disorder or mental illness that so impaired him as to cause or contribute to the misconduct." *Id at 5*. Not so in the instant case

Relator also attempts to equate Schwieterman's debunked defense of depression with the Respondent at bar because Respondent's diagnosis was termed a minimal diagnosis. Yet, Relator, in his attempts to further mislead the Court, fails to reveal the rest of the testimony. Respondent presented testimony as stated earlier from OLAP's Stephanie Krznarich who responded to a question concerning whether a minimal disorder can impact a person's otherwise clear and honest judgment by stating: "It can impact their mood. People can result with depression. They can present with anxiety. It can impact their conduct. And in Mr. Kraemer's case, it impacted both—some anxiety, some depression and some conduct." (emphasis added) (Transcript at 37). She then later testified that this disorder was a contributing factor to his conduct. (Transcript at 52). Further, Mr. Kraemer's Licensed Independent Social Worker, Elizabeth Leslie Leshner, testified concerning the disorder and that it rendered Mr. Kraemer to "sort of like a train wreck waiting to happen, .... And it caused him to make judgments that he normally would not make." She then affirmed that those judgments would include "the specific judgment to take the money that he did in the Lyons case." (Transcript at 70).

The Board in its reasoning to award the Respondent credit for time served found that the Respondent held that similar to the attorney in *Margolis*, the Respondent had made "a one time,

out of character mistake.” Yet, maybe most importantly, the Respondent has accepted responsibility and expressed sincere remorse at every step of these proceedings. The Respondent admitted to all of his misconduct as soon as he was confronted by the West Chester Police Department. Instead of contesting the criminal charge against him, he immediately entered a guilty plea to a bill of information. He served his sentence and completed all requirements placed on him, including full restitution and court costs, with restitution paid immediately. And finally, most importantly, the Board cites a conversation that the Respondent had with his young son which was elicited by questioning by a member of the panel:

I took him to a park by himself because he was five or five and a half at the time. I sat him down and explained to him that his Daddy had screwed up; that I had made some mistakes; that sometimes people do that; that sometimes people make bad judgments, but the character of a person is determined by what they do once they make that mistake. And that if he ever makes a mistake, that the best way to handle it is to take responsibility for what he did and stand up and be a man....

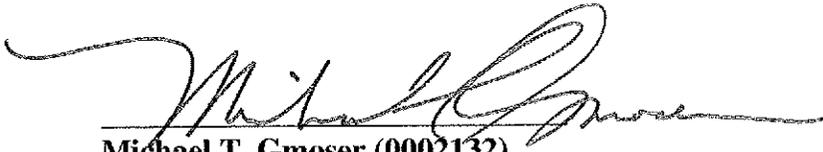
But to say that talking to him was the most humbling thing I've ever been through that would be an understatement. You know, everything else that has happened to me doesn't- there's no comparison to having that conversation with that little boy. You know, I hope that, you know, he understood what I was saying. I really don't want to have that conversation with him again. (Transcript 151-153).

The Respondent has sincere and genuine remorse which should lead him to receive credit for time served should any time of suspension be imposed.

### CONCLUSION

Relator has taken a narrow and results oriented only approach to the Board's recommendation. In the Relator's effort to criticize the Board's findings, the Relator has failed to analyze usable criteria that was available to the Board when it made its recommendation. The mitigation factors in this case far outweigh those given in *Brenner*, *Carter*, and *Margolis*. The attempt of the Relator to equate the facts of this case to those of *Schweiterman* is misguided and can only be seen as an attempt to mislead this honorable Court.

Respectfully Submitted,



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### **CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Response has been served upon the Board of Commissioners on Grievances and Discipline, c/o Jonathan W. Marshall, Secretary, 65 South Front Street, 5<sup>th</sup> Floor, Columbus, Ohio 43215-3431 and upon Joseph Caliguri, Senior Assistant Disciplinary Counsel, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411, via regular mail this 1<sup>st</sup> day of March, 2010.



**Michael T. Gmoser (0002132)**