

**ORIGINAL**

IN THE  
SUPREME COURT OF OHIO

JOSEPH ANTHONY PFUNDSTEIN :  
Respondent :  
CASE NO. 2010-1243  
OFFICE OF DISCIPLINARY COUNSEL :  
Relator :

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

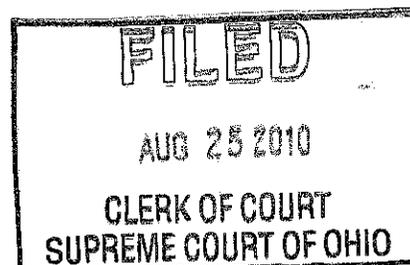
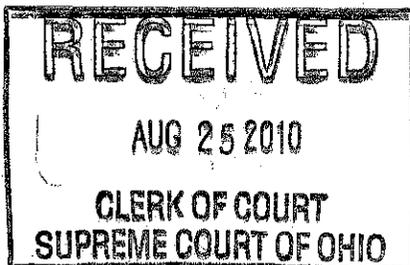
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## ANSWER BRIEF

### **I. Introduction**

After a review of the evidence presented at the hearing of the instant matter, including evidence of factors mitigating and aggravating, the Board of Commissioners on Grievance & Discipline of the Supreme Court of Ohio (hereinafter "Board") recommended that Mr. Pfundstein be suspended from the practice of law for twelve (12) months, with the entire suspension conditionally stayed. As will be discussed at length below, the Board's recommendation was consistent with similar cases previously decided by this Honorable Court.

Most, if not all, of the underlying facts relevant to this matter were stipulated to by Mr. Pfundstein and the Relator, and were found by the Board to be supported by the evidence presented. In addition, the vast majority of the Ohio Rules of Professional Misconduct which Mr. Pfundstein was found to have violated were also so stipulated; specifically, two counts of violations of Rule 1.4(a)(4) [a lawyer shall comply as soon as practicable with reasonable requests for information from his client], Rule 8.4(c) [a lawyer shall not engage in conduct involving fraud, deceit, dishonesty or misrepresentation] and Rule 8.4(h) [a lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law]. The Board further found that Mr. Pfundstein violated two counts of Rule 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client] and Rule 1.4(a)(3) [a lawyer shall keep the client reasonably informed about the status of the matter].

As will also be discussed below, in addition to the many factors of mitigation found by the Board, the Board further found that Mr. Pfundstein suffered from a mental disability, depression, which contributed to the misconduct.

This finding addressed the only real issue in dispute between the parties below which was whether or not sufficient evidence was introduced at the hearing of the instant matter that Mr. Pfundstain's depression "*contributed to the cause*" of his misconduct. Mr. Pfundstein called as witnesses his treating psychologist, Psychologist Roger N. Hess, Ph.D., and Paul A. Caimi, his Ohio Lawyers Assistance Program (hereinafter "OLAP") monitor who is also the OLAP Associate Director in Northeast Ohio. Both Dr. Hess and Mr. Caimi testified that the mental disability of suffering from depression contributed to the cause of why Mr. Pfundstein made false statements to his former client, Philip Einhorn, regarding the status of his legal matters.

At the hearing, Relator offered no expert witness or any other evidence to rebut that Mr. Pfundstein's depression contributed to his acknowledged misconduct. Rather, Relator simply relied on it's cross-examination of Mr. Pfundstein, Dr. Hess and Mr. Caimi to counter the evidence actually presented.

Based upon the entirety of the evidence actually submitted as part of the record in the instant matter, this Honorable Court should accept the Board's Findings of Fact, Conclusions of Law and Recommendations that Mr. Pfundstein be suspended from the practice of law for twelve (12) months, with entire suspension conditionally stayed.

## **II. Facts**

Joseph A. Pfundstein has been licensed to practice law since 1991. [Stip. ¶1.] After being affiliated with several law firms at the inception of his practice, Mr. Pfundstein has been self-employed, as a solo practitioner, since 2000, representing clients in both civil and criminal matters. [Hrg. Trans. p. 153.] In addition to his private practice, Mr. Pfundstein has been employed as a part-time magistrate for the Bedford Municipal Court since 2000. [Hrg. Trans. p. 153.]

During the course of his almost nineteen (19) years of practice, as stipulated by Relator, Mr. Pfundstein has not previously been subject to any professional disciplinary proceeding and has fully cooperated in the instant matter. [Stip. ¶¶ 25, 26.]

Over and above his career as attorney and magistrate, Mr. Pfundstein is married to his wife, Kelly, with whom he has two young daughters, Gretchen and Emma. [Hrg. Trans. pp. 140, 154.] Mr. Pfundstein is, also, a very active and valued community volunteer. [Hrg. Trans. pp. 155-157.]

Mr. Pfundstein, then a partner of Wise, Malek, Pfundstein & Dean, began representing Philip Einhorn over (10) ten years ago. [Hrg. Trans. pp. 157.]

#### **A. The Leonette Cicirella Matter**

In 1998, Mr. Einhorn requested that Mr. Pfundstein pursue a claim for legal malpractice against attorney Leonette Cicirella for acts of negligence that Mr. Einhorn believed she had committed relative to various credit issues encountered by he and his wife. Mr. Einhorn provided only bare bone information about the matter, but insisted that Mr. Pfundstein proceed with filing a complaint and became very hostile with Mr. Pfundstein when Mr. Pfundstein told him things he did not want to hear.

Unfortunately, against the exercise of his better judgment, Mr. Pfundstein filed a complaint for legal malpractice on September 16, 1998 against Ms. Cicirella in the matter captioned as *Einhorn v. Cicirella*, before the Cuyahoga County Court of Common Pleas which was assigned Case No. 98 365184. This representation was undertaken by Mr. Pfundstein pursuant to a straight contingent fee agreement. [Stip. ¶¶ 2-3.]

Realizing that there was an a statute of limitations issue relative to Mr. Einhorn's legal malpractice claim which issue was noticed by the judge, Mr. Pfundstein filed a notice of voluntary dismissal on September 8, 1999. Despite the existence of the statute of limitations defense, Mr. Einhorn insisted that his claims be advanced. [Stip. ¶ 4.]

Unfortunately due to his now diagnosed condition of dysthymic disorder, Mr. Pfundstein was unable to tell Mr. Einhorn “no”, that he would not pursue the claim against Ms. Cicirella. This ill-advised action by Mr. Pfundstein arose out of his inability to cope with Mr. Einhorn’s bullying tactics and out of fear of Mr. Einhorn’s demonstrated past history of filing a grievance against his former attorney and now, seeking to sue Ms. Cicirella for legal malpractice. Mr. Pfundstein did not, at that time, fully understand or appreciate that he was in fact, depressed, and that his depression prohibited him confronting Mr. Einhorn by telling him “no.” [Hrg. Trns., pp. 158-161].

Utilizing a different legal theory, breach of contract which carried a longer statute of limitations, Mr. Pfundstein filed a second action on May 25, 2000 on behalf of Mr. Einhorn against Ms. Cicirella in the matter captioned as *Einhorn v. Cicirella*, before the Cuyahoga County Court of Common Pleas and which was assigned Case No. CV 00 408582. [Stip. ¶ 5.]

Mr. Pfundstein successfully obtained a default judgment on Mr. Einhorn’s behalf against Ms. Cicirella on April 13, 2001 in the amount of \$3,906.52, and agreed to pursue collection efforts on the aforementioned judgment. However, Mr. Pfundstein did not successfully collect on the amount of the judgment. [Stip. ¶¶ 6, 7.]

#### **B. The See Bee Brush Matter**

Mr. Einhorn had been employed and ultimately, terminated by See Bee Brush Co, Inc. He believed that he had been illegally discriminated against due to the fact that he was Jewish and believed he had an employment discrimination claim against See Bee Brush. [Stip. ¶ 14; Hrg. Tran., p. 35.] Mr. Einhorn had previously filed a complaint with the Ohio Civil Rights Commission which claim was dismissed. Mr. Einhorn failed to advise Mr. Pfundstein of the findings of the Ohio Civil Rights Commission. Nonetheless, Mr. Einhorn was adamant that he had a valid claim against See Bee Brush and insisted that Mr. Pfundstein file a civil action against the company.

Yet again, Mr. Pfundstein, being completely overwhelmed with the potential consequences of telling Mr. Einhorn “no”, acquiesced and entered into a 25% contingency fee agreement to pursue the employment discrimination claim. [Stip. ¶ 14; Hrg. Trans. pp. 172] On May 25, 2000, Mr. Pfundstein filed the matter captioned as *Einhorn v. See Bee Brush Co., Inc.*, before the Cuyahoga County Court of Common Pleas which was assigned Case No. CV 00 408583. [Stip. ¶ 15.]

After the filing of the complaint, discovery proceeded in the matter. Mr. Einhorn did not cooperate with Mr. Pfundstein in that he refused to provide the necessary information, which failure prevented Mr. Pfundstein from having the ability to respond to the defendant’s discovery requests and production of the requested information. As a result, motions to compel and requests for sanctions were filed by the defendant against Mr. Einhorn. In response, the court informed Mr. Pfundstein that he had thirty (30) days to comply with the discovery requests or that the matter would be dismissed with prejudice. [Hrg. Trans. pp. 164-167.]

Upon the expiration of the thirty (30) day period, and due to Mr. Einhorn’s non-compliance in providing all the required information, Mr. Pfundstein, on February 5, 2001, filed a notice of voluntary dismissal without prejudice in an effort to avoid dismissal with prejudice by the court in order to avoid a prejudicial dismissal by the court. [Stip. ¶16.] Mr. Pfundstein performed no further legal work relative to the See Bee Brush matter on behalf of Mr. Einhorn, but did author correspondence informing Mr. Einhorn that he had one (1) year to re-file the lawsuit. [Stip. ¶117; Hrg. Trans. pp. 166-167.]

**C. Misrepresentations relative to the Status of the Cicirella and See Bee Brush Matters.**

In 2000, unbeknownst to Mr. Pfundstein, the Einhorns moved to Michigan. Following both issuance of the judgment in the Cicirella Matter and the dismissal of the See Bee Brush Matter in early 2001, Mr. Pfundstein took no further affirmative measures to pursue those matters. Around this same time, Mr. Pfudstein also represented the Einhorns in a bankruptcy proceeding which was ultimately dismissed (to their knowledge) after an adversary proceeding had been filed against them based upon the

Einhorn's misrepresentations to the court of their residence. (Mr. Pfundstein, based upon his clients' representation, filed the bankruptcy matter in the Northern District of Ohio.) [Hrg. Trans. pp. 162-164.]

There was little, if any, communication between Mr. Einhorn and Mr. Pfundstein following the related activity above. However, sometime in 2005 or 2006, Mr. Einhorn began contacting Mr. Pfundstein ranting that he was having problems being contacted by past creditors. During these conversations, Mr. Einhorn was very demanding of and intimidating towards Mr. Pfundstein, and would also inquire as to the status of the Cicirella collection efforts and the status of the See Bee Brush Matter. [Hrg. Trans. pp. 47, 170-172, 184-186].

Throughout his entire representation of Mr. Einhorn and through the time he was terminated, Mr. Pfundstein's unrecognized and undiagnosed depression precluded him from coping with Mr. Einhorn's aggressive behavior appropriately. As a result of his depression, Mr. Pfundstein was unable to tell Mr. Einhorn "no" or provide him with any other information which might invite further aggression. As a result of this disability, Mr. Pfundstein made the false statements to Mr. Einhorn via e-mail and during telephone conversations relative to the status of the Cicirella and See Bee Brush Matters as fully set forth in the Agreed Stipulations filed in the instant matter by the parties. [Stip. ¶¶ 8-12, 17-19.] All of the false statements to Mr. Einhorn were made within an approximate eleven (11) month window of time between years 2007 and 2008.

Mr. Einhorn terminated Mr. Pfundstein as his counsel in August, 2008. [Stip. ¶¶ 13, 20.] Mr. Einhorn, who lives outside Ohio, was not called as a witness at the hearing of the instant matter by Relator.

**D. Mr. Pfundstein is diagnosed with dysthymic disorder and life long low grade depression with anxiety features.**

Following the commencement of the investigation giving rise to the instant matter, Mr. Pfundstein recognized that he needed professional help and guidance. Mr. Pfundstein first sought

assistance from the Ohio Lawyers Assistance Program (hereinafter "OLAP") and entered into a contract with OLAP on March 25, 2009, availing himself of the benefits provided by that outstanding organization.

As evidenced by the February 10, 2010 correspondence from Paul A. Caimi, the OLAP Associate Director in Cleveland and Mr. Pfundstein's monitor, Mr. Pfundstein is in full and complete compliance with his OLAP contract terms including, but not limited to, following "a therapist's treatment recommendations and to regularly contact [Mr. Caimi], all of which Mr. Pfundstein has done." [Hrg. Trans. pp. 61-65; Hrg. Resp. Ex "A".]

In complying with the terms of his OLAP contract, Mr. Pfundstein was referred to and began meeting with a Psychologist Roger N. Hess, Ph.D. to have a Psychological Assessment conducted and, as a result of that assessment, to undergo psychotherapy treatment. Mr. Pfundstein, to this day, continues his treatment with Dr. Hess. [Hrg. Trans. pp. 94-98.]

On February 1, 2010, Dr. Hess provided Mr. Pfundstein's counsel with a Psychological Assessment of Mr. Pfundstein [Resp. Hrg. Ex. "C"] in which he provides his diagnosis of his depression. In his report, and as he further testified at the hearing, Dr. Hess explains in detail his assessment of Mr. Pfundstein and his resulting diagnosis of: Axis I, Dysthymic Disorder, 300.4 agitation; Axis IV, Life long low grade depression with anxiety features, aggravated by the Incident [previously defined therein as the incident that is the subject of his disciplinary situation] and resultant legal matters; and Axis V, a current Global Assessment of functioning equal to 65. [Resp. Hrg. Ex. C, p. 3.]

Dr. Hess further explained that Mr. Pfundstein's involuntary symptoms of depression include, but are not limited to, his sense of vulnerability, low self-esteem, insecurity, inner agitation, stiff sociability, emotional withdrawal, overcompensation for felt inadequacies, ... as well as Mr. Pfundstein's inability to say "no" or ask others for help as evidenced in his dealings with Mr. Einhorn. [Resp. Hrg. Ex. C, p. 3.]

Specifically, in finding a contributory causal connection between Mr. Pfundstein's depression and the "Incident", Dr. Hess writes, "Indeed it was his encounters/work with Mr. Einhorn that in my opinion, directly exacerbated his depressive behaviors ..." [Resp. Hrg. Ex. C, p. 2.; Hrg. Trans., pp. 100-102, 116-120.] In addition to Dr. Hess' written report which was admitted into evidence, he testified (for only the second time in his very long career) as a witness at the hearing on behalf of Mr. Pfundstein. (Hrg. Trans., p. 91).

During his testimony, and while acknowledging that he cannot point out "dishonesty" as a specific symptom of dysthymia in the Diagnostic and Statistical Manual of Mental Disorders (hereinafter, "DSM"), Dr. Hess explained why Mr. Pfundstein's depression led him to be dishonest with Mr. Einhorn, but not with other people in other situations in his life:

11       "\*\*\* The real short answer is that  
12       Mr. Einhorn found [Mr. Pfundstein's] Achilles' heel. Under  
13       sufficient pressure, stress, whatever you want to  
14       call it, aggression, demandingness, the underlying  
15       dysthymic symptoms were triggered.  
16                There's a spectrum from low levels of  
17       stress to very, very severe. Once you get past a  
18       certain level, a higher level, you're going to  
19       trigger different behaviors in many people. You get  
20       to extreme stress, you're going to definitely  
21       trigger different behaviors than someone who has  
22       been steady Eddie, you know, through most of their  
23       experiences." [Hrg. Trans., p. 116.]

Dr. Hess further described how Mr. Pfundstein's dysthymia would cause Mr. Pfundstein to be dishonest and to do things that he didn't particularly want to do, but did anyway where other people not affected by the disorder could simply say "no" or "I am not going to do that." [Hrg. Trans. pp. 100-101, 119.]

However, Dr. Hess opined and testified, to a reasonable scientific certainty, that Mr. Pfundstein is responding to his treatment sessions, and that he is creating a "tool box" by learning tools to identify, combat, manage and respond to situations comparable to those experienced with the likes of Mr. Einhorn. [Resp. Hrg. Ex. C; Hrg. Trans., pp. 98-103, 106-108.]

While recommending "ongoing therapy to further solidify current gains", Dr. Hess concludes that Mr. Pfundstein, at his current level of functioning, "can make a positive, ethical and appropriate contribution in his law practice and in the community" and "has improved enough so he will not act as he did during the Incident." [Resp. Hrg. Ex. C, p. 4; Hrg. Trans, pp. 104-105.]

Other than a brief cross-examination of Dr. Hess, the Relator offered no rebuttal, or indeed, any evidence or testimony at the hearing to contest Dr. Hess' diagnosis and opinions.

Upon his review of Dr. Hess' Psychotherapy Assessment and Diagnosis of Mr. Pfundstein, and drawing from his own background, training and experience, Mr. Caimi of OLAP testified at the hearing of the instant matter that Mr. Pfundstein's depression contributed to the cause of his professional misconduct in making the false representations to Mr. Einhorn. [Hrg. Trans. pp. 67-70.]. Mr. Caimi further testified that he believes Mr. Pfundstein has undergone successful treatment for his mental disability and that Mr. Pfundstein is able to competently, ethically and professionally practice law. [Hrg. Trans. pp. 70-72.]

### **III. Law and Argument**

While positing that his actions were the result of his depression, as explained in Dr. Hess' report and by his testimony, which were found to be persuasive, Mr. Pfundstein fully admits and

is extremely apologetic for making the untruthful statements to Mr. Einhorn and for the misconduct arising from these statements, both stipulated prior to the hearing and for those additional violations found against him by the Board. The Board found Mr. Pfundstein to be, “forthright, apologetic and very remorseful in his testimony and throughout the proceedings.” [Bd. Rep. ¶ 39; *See Hrg.Trns.*, pp. 181-182].

The Hearing Panel and Board also found and considered other mitigating and aggravating evidence in making its recommendation of a conditionally stayed twelve (12) month suspension, which counsel for Mr. Pfundstein reasonably believes to be both appropriate and just.

**A. Multiple Mitigation Factors, and one Aggravating Factor**

As this Honorable Court is well aware, the Ohio Rules for Government of the Bar, Appendix II, Section 10(A) provides:

*“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.”* Ohio Rev Code Ann Gov Bar R, Appendix II, §10(A) (Baldwin 2009) (emphasis added).

A number of mitigating factors identified in Appendix II, §10(B)(2) of the Ohio Rules of the Government of the Bar are present in the instant matter that should be considered by this Honorable Court in favor of affirming the Board’s recommended sanction including, but not limited to:

1. **Mr. Pfundstein has no prior disciplinary record.** See Agreed Stipulations ¶ 25; Bd. Rep. at ¶34(a). Ohio Rev Code Ann Gov Bar R, Appendix II, §10(B)(2)(a) (Baldwin 2009).

2. **Mr. Pfundstein had no dishonest or selfish motive.**

Mr. Pfundstein acknowledges and is extremely remorseful for the dishonest comments which he made to Mr. Einhorn. He has also stipulated that those comments rise to the level of professional misconduct. However, Mr. Pfundstein had no exploitive *motive* to make the dishonest comments.

Rather, as explained by Dr. Hess during his testimony, those comments were made as an involuntary symptom of his dysthymic disorder to avoid further aggression made towards him by Mr. Einhorn. Ohio Rev Code Ann Gov Bar R, Appendix II§10(B)(2)(b) (Baldwin 2009). Further, Mr. Pfundstein not only realized absolutely no monetary remuneration from the Einhorns, he was not even reimbursed for his cash advances for court filing fees. [Hrg Trans., pp. 157-158, 171.]

Here, there simply was no conversion of monies or financial exploitation of a client as is found in many of the cases involving lawyer dishonesty towards a client as cited by Relator in support of its contention for an actual suspension from the practice, even when there is a question as to a causal contribution between the mental disability and misconduct.

**3. At all times, Mr. Pfundstein has *fully and freely displayed a cooperative attitude toward these disciplinary proceedings*; See Agreed Stipulations ¶ 26; Bd. Rep. at ¶34(b). Ohio Rev Code Ann Gov Bar R, Appendix II§10(B)(2)(d) (Baldwin 2009).**

**4. Mr. Pfundstein has exemplary character and an excellent reputation.**

Mr. Pfundstein's outstanding character and reputation should be considered in mitigation and in support of the sanction recommended by the Board. Ohio Rev Code Ann Gov Bar R, Appendix II§10(B)(2)(e) (Baldwin 2009). As the members of this Honorable Court are aware, the practice of law, particularly a practice which is litigation oriented, carries with it a necessary interaction with not only other members of the Bar, but also judges, and of course, clients.

At the hearing, the Board admitted into evidence and considered as mitigation twenty-three (23) letters "attesting to [Mr. Pfundstein's] good character and reputation, community service and legal service over his 18 years of practice." [Bd. Rep. ¶39.]

The letters are uniform in their characterization of Mr. Pfundstein as an attorney of the utmost integrity and professionalism as exemplified in the quality of his representation, his demeanor from the bench as a magistrate of the Bedford Municipal Court, and his concern for his clients' matters.

Particularly telling of Mr. Pfundsteins character and reputation, as well as his ability as an attorney and magistrate was the testimony of the Hon. Brian J. Melling of the Bedford Municipal Court. The Board weighed Judge Melling's testimony, which opined that:

Mr. Pfundstein "has a very good temperament, is smart, hard working, dilligent and fair. (Tr. 128-129) He said [Mr. Pfundstein] is 'even,' a wonderful citizen and a conscientious father. (Tr. 129, 130) Judge Melling said [Mr. Pfundstein] volunteered to him that he had lied to a client and had a resulting grievance pending. The judge advised [Mr. Pfundstein] to get a lawyer but said that it never crossed the judge's mind that Respondent should not be sitting as a magistrate in his court. [Bd. Rep. ¶ 41.]

**5. Mr. Pfundstein suffers from Dysthymic Disorder which contributed to the misconduct.**

Pursuant to Appendix II, §10(g)(i)-(iv) of the Ohio Rules for Government of the Bar, and as was found by the Board, Mr. Pfundstein's mental disability (Dysthymic Disorder) should be strongly considered in mitigation as was found by the Hearing Panel and Board. The evidence supports all of the following elements necessary to meet this burden:

- (i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional; Ohio Rev Code Ann Gov Bar R, Appendix II, §10(B)(2)(g)(i) (Baldwin 2009); *See* Agreed Stipulations ¶ 27,(i); Bd. Rep. ¶34(c).

As stipulated by Relator, Dr. Hess is a licensed psychologist who has diagnosed Mr. Pfundstein with Dysthymic Disorder as discussed at length, above.

- (ii) A determination that the chemical dependency or mental disability *contributed* to cause the misconduct; Ohio Rev Code Ann Gov Bar R, Appendix II, §10(B)(2)(g)(ii) (Baldwin 2009) (emphasis added);

Opining that a causal connection existed between Mr. Pfundstein's depression and the "Incident", Dr. Hess wrote in his assessment of Mr. Pfundstein, "Indeed it was his encounters/work with Mr. Einhorn that in *my opinion, directly exacerbated his depressive behaviors ...*" [Hrg. Ex. C, p. 2] (emphasis added); Dr. Hess continued writing, "... from Mr. P's description, this led to dysphoric and agitated moods and [m]ore involuntary behaviors *such as an urge to escape from his client and to take steps to buy peace at almost any price, especially to avoid the client's aggression.*" [Hrg. Ex. C, p. 2] (emphasis added).]

The Board found that Dr. Hess' "uncontroverted" testimony met the evidentiary standard that Mr. Pfundstein's dysthymia *contributed* to his misconduct. [Hrg. Trans., pp. 100, 101; Bd. Rep. ¶36.]

Again, Relator did not introduce any evidence, let alone a professional expert opinion or independent psychological examination of Mr. Pfundstein. Relator simply relies on its arguments that the DSM does not list dishonesty as a symptom of dysthymia. However, in so doing, the Relator now wants this Honorable Court to ignore the evidence and testimony provided by Dr. Hess (Mr. Pfundstein's treating psychologist who disclosed he does not have much experience testifying in court as to his professional diagnosis of clients) as well as the opinion of the associate director of OLAP, who has directly interacted with Mr. Pfundstein for over one year.

Simply, the record does not support the contentions of Relator.

In addition, the Relator appears to put too strict of a standard on the "causal" requirement of considering mental disability as mitigation. The causation prong as set forth by BCGD Proc. Reg. §10(B)(2)(g)(ii) states that the "mental disability *contributed to cause* the misconduct." Ohio Rev Code Ann Gov Bar R, Appendix II, §10(B)(2)(g)(ii) (Baldwin 2009) (emphasis added). The test is not proximate causation, or a "but for" standard that the mental disability the misconduct would not have occurred, but simply calls for contribution to the cause of misconduct.

Mr. Pfundstein, through counsel, respectfully submits that the evidence present herein not only meets the burden of this element, but clearly exceeds the evidentiary burden required.

Therefore, whether or not the DSM identifies “dishonesty” as a symptom or trait caused by dysthymia is irrelevant and immaterial to considering the mental disorder in mitigation of a sanction. Clearly, Dr. Hess’ testimony explains how dysthymia can cause different individuals to act or behave differently depending on the severity of the stressor. In Mr. Pfundstein’s situation in dealing with Mr. Einhorn’s verbal abusiveness, Mr. Pfundstein’s higher stressors were triggered by Mr. Einhorn and the dishonest statements were the way in which Mr. Pfundstein, in his compromised position, could avoid Mr. Einhorn’s anger and increasing the stressors which exacerbated mental disability.

Therefore, as the evidence and testimony at the hearing demonstrated and as subsequently, found by the Hearing Panel and Board, Mr. Pfundstein’s dysthymia *contributed* to the cause of his misconduct, thereby satisfying the second prong necessary for this finding.

- (iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment; Ohio Rev Code Ann Gov Bar R, Appendix II, §10(B)(2)(g)(iii) (Baldwin 2009); *See* Agreed Stipulations ¶ 27,(ii).

Dr. Hess and Mr. Pfundstein testified at trial that they have met and continue to meet. Dr. Hess has opined and testified at the hearing, to a reasonable scientific certainty, that Mr. Pfundstein is successfully responding to his treatment sessions, and is learning tools to identify, combat, manage and respond to situations comparable to those he experienced with Mr. Einhorn. Recognizing this fact, Relator has also stipulated to the foregoing. In addition, Mr. Caimi of OLAP testified that Mr. Pfundstein has met the threshold, continues to attend their meetings and is in full compliance of his OLAP contract, exemplifying his commitment.

- (iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions. Ohio Rev Code Ann Gov Bar R, Appendix

II,§10(B)(2)(g)(iv) (Baldwin 2009); *See* Agreed Stipulations ¶ 27,(iii) (stipulation as to the opinion Dr. Hess will testify).

Dr. Hess concluded in his report and testified at trial that Mr. Pfundstein, at his current level of functioning meets this standard, can make a positive, ethical and appropriate contribution in his law practice and in the community and has improved enough so he will not act as he did during his incident with Mr. Einhorn. [See Hrg. Ex. C, p. 4.]. Mr. Caimi and Judge Melling both agreed that Mr. Pfundstein meets this standard.

Therefore, and based upon his professional opinion, training and experience, Dr. Hess' testimony at the hearing of the instant matter satisfied all four prongs of Appendix II§10(B)(2)(g)(i)-(iv) of the Ohio Rules for the Government of the Bar. Based upon Dr. Hess' opinion which is echoed by Mr. Caimi, Mr. Pfundstein's diagnosis of Dysthymic Disorder, contributory causation of the issue which brings him before this Honorable Panel, his successful treatment regimen, and his current ability to competently and ethically engage in the practice of law, Mr. Pfundstein's mental disability should be considered in mitigation in support of the less severe disciplinary sanction objected to by Relator and as was recommend by the Panel, Board and which should ultimately, be approved by this Honorable Court.

**6. Mr. Pfundstein has and continues to comply with his OLAP contract, or has participated in "other interim rehabilitation".** Ohio Rev Code Ann Gov Bar R, Appendix II,§10(B)(2)(h) (Baldwin 2009).

Paul A. Caimi, the OLAP Associate Director in Cleveland and Mr. Pfundstein's monitor, has reported and testified at the hearing in the instant matter that Mr. Pfundstein is in compliance with his OLAP contract terms including, but not limited to, following Dr. Hess' treatment recommendations and to regularly contact Mr. Caimi. Mr. Caimi is further of the opinion that Mr. Pfundstein is presently able to competently, ethically and professionally practice law. [Bd. Rep. ¶ 40; *See* Hrg. Trans.. pp. 67-68, 76.]

**7. No lasting harm was done to Mr. Einhorn.**

Relative to the Cicirella Matter, Mr. Pfundstein successfully secured a judgment on behalf of Mr. Einhorn. Despite the delay in taking any collection efforts and the falsehoods Mr. Pfundstein told Mr. Einhorn about his efforts to collect on the judgment, Mr. Einhorn still possesses a valid judgment against Ms. Cicirella and has been caused no harm, financial, or otherwise. In retrospect, given what he knew about Ms. Cicirella's collectability, there were no further actions that Mr. Pfundstein could have taken to successfully collect upon the judgment. [Hrg. Trans., p. 179.]

In the See Bee Brush Matter, the case had long been dismissed and the ability to pursue the action had expired a number of years prior to Mr. Pfunstein's false statements. At the time Mr. Pfundstein made the false statements relative to the status of the case and discovery efforts, there was no way to preserve the claim. Moreover, in consideration of Mr. Einhorn's failure to comply with discovery while the matter was pending and in light of the Ohio Civil Rights Commission's prior dismissal of Mr. Einhorn's complaint against See Bee Brush, there is considerable doubt that Mr. Einhorn would have ever prevailed upon his claims. [Hrg. Trans., pp. 164-165.]

As a result of these facts, counsel represents that Mr. Einhorn was caused no harm, financial, or otherwise by the misrepresentations made as to the status of the case.

**8. The Single, Stipulated Aggravating Factor found by the Board**

Mr. Pfunstein and Relator stipulated, and was found to be supported by the evidence by the Hearing Panel and Board, Mr. Pfundstein engaged in a pattern of misconduct and multiple offenses, but that they involved the same client on two separate matters. [Stip ¶ 29; Bd. Rep. ¶42.]

**B. This Honorable Court should Approve and Uphold the Recommended Sanction of the Board – a Twelve (12) Month conditionally stayed suspension.**

“In determining the appropriate length of the suspension and any attendant conditions, we must recognize *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) (emphasis added).

When imposing sanctions for attorney misconduct, all relevant factors should be considered, including the duties violated, the mental state of the attorney, and sanctions imposed in similar cases. Stark Cty. Bar Assn. v. Buttacavoli, 96 Ohio St.3d 424 (2002). In making a final determination, evidence of the aggravating and mitigating factors should be weighed. Disciplinary Counsel v. Broeren, 115 Ohio St.3d 473 (2007). “Because each disciplinary case is unique, *we are not limited* to the factors *specified in the rule* but may take into account “*all relevant factors*” in determining what sanction to impose.” Disciplinary Counsel v. Taylor, 120 Ohio St. 3d 366 (2008) *citing* BCGD Proc.Reg. 10(B) (emphasis added).

In light of the *actual* evidence and testimony provided at the hearing of the violations of the Ohio Rules of Professional Conduct, the facts giving rise thereto and the mitigation discussed above, counsel to Mr. Pfundstein, through counsel, reasonably believes the recommendation of the Hearing Panel and Board to be appropriate and just and in the best interest of the public of the State of Ohio.

This Honorable Court, through a number of recent cases, provides precedent which supports the foregoing recommended sanction that a stayed suspension would be just and appropriate in the instant matter. The Hearing Panel and Board’s reliance on Disciplinary Counsel v. Fumich, 116 Ohio St.3d 257 (Ohio 2007), and Dayton Bar Ass’n v. Ellison, 118 Ohio St. 3d 128, is correct and should be well-taken by this Honorable Court.

In Disciplinary Counsel v. Fumich, 116 Ohio St.3d 257 (Ohio 2007), the attorney was also suspended for one year, with the entire suspension stayed. Mr. Fumich had filed a medical malpractice case and failed to oppose motions for summary judgment or to take any further action, and the court dismissed the case. When the client contacted Mr. Fumich to inquire as to the status of the case, he failed

to inform the client that the matter had been dismissed. In a subsequent conversation with the client, Mr. Fumich fabricated a settlement offer and paid funds from his IOLTA to satisfy the fictitious settlement when the client accepted the offer.

The Ohio Supreme Court agreed with the Board's findings of multiple violations including, but not limited to, a violation of DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), but stated that while they did not condone the dishonesty, there was no evidence that the attorney acted with motive to exploit the client. Id. In addition, and while there was no mitigation evidence of the attorney suffering from a mental disability, there was other sufficient mitigating evidence (as present herein, no prior disciplinary record, fully cooperated in the disciplinary process, and accepted responsibility for wrongful conduct) all of which weighed against the imposition of an actual suspension. Id.

Relator's attempt to distinguish Fumich on the basis that the attorney in that matter paid restitution is inapplicable. In neither the Cicirella or See Bee Brush Matters did Mr. Pfundstein's deceptive remarks cause any financial harm to Mr. Einhorn for which Mr. Pfundstein could make restitution. Mr. Einhorn still has a valid judgment against Ms. Cicirella despite the fact that she has been uncollectable since obtaining the judgment and Mr. Einhorn's claims in See Bee Brush had long expired prior to the false statements about the status of those claims. Moreover, it was Mr. Einhorn's refusal to comply with discovery which initially led to the dismissal of the See Bee Brush claims. Therefore, the Hearing Panel's and Board's reliance on Fumich is not only proper, but counsel would submit, the evidence herein supporting a stayed suspension is far more compelling.

In Ellison, relative to the second count of a two count complaint, the lawyer lied to her client about the status of her employment discrimination case. Dayton Bar Ass'n v. Ellison, 118 Ohio St. 3d 128 (2008). Although the lawyer had prepared a response to the opposition's motion for summary judgment motion and served it upon opposing counsel, the attorney failed to file the response and the

motion for summary judgment was granted as unopposed. Id. Thereafter, the attorney lied to her client for a period of several months regarding the status of the case and did not admit her mistake until confronted by the client in her office. Id. Despite the fact that the attorney had previously been publicly reprimanded, the court found sufficient mitigation evidence in her community service, her cooperation and remorse, and personal problems arising from her divorce, this Honorable Court imposed a stayed suspension of one (1) year rather than an actual suspension. Id.

Here, like in Ellison, Mr. Pfundstein has presented mitigation evidence of community service, and demonstrated cooperation with the disciplinary process and remorse. However, unlike in Ellison, there is additional mitigation evidence of mental disability. Moreover, despite Relator's attempt to distinguish Ellison from the present matter in claiming that there is no indication of repeated false statements, the opinion in Ellison states that the client "*checked back periodically*, the respondent did not tell her of the adverse judgment until ... some six months after the decision. Dayton Bar Ass'n v. Ellison, 118 Ohio St. 3d at 129. Moreover, Relator's distinguishable reading of Ellison presumes that there was no contributing cause between Mr. Pfundstein's untruthfulness and his misconduct as supported by the evidence at hearing (again, there was no evidence in Ellison that the attorney in that matter suffered from a mental disability which could have contributed to the cause of her deception in that case.) Therefore, counsel for Mr. Pfundstein believes that the facts of that case support the Board's finding. As in Fumich, counsel would submit that Mr. Pfundstein's circumstances are more compelling than those which led this Honorable Court to stay Ms. Ellison's suspension.

In addition to Fumich and Ellison, the following precedents of this Honorable Court support the recommended sanction of the Hearing Panel and Board of a stayed suspension, as opposed to an actual suspension under the evidence present herein:

In Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207 (2009), the Ohio Supreme Court held the following in imposing a one year, conditionally stayed suspension to an attorney who had committed

several violations including, but not limited to, DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation):

“Although “ [d]ishonest conduct on the part of an attorney generally warrants an actual suspension from the practice of law,” *Disciplinary Counsel v. Rooney*, 110 Ohio St.3d 349, 2006-Ohio-4576, 853 N.E.2d 663, ¶ 12, this court has previously explained that the type of mitigating evidence introduced in this case can justify imposing a lesser sanction. See *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510, 858 N.E.2d 368, ¶ 14 (holding that mitigating evidence demonstrating that Agopian had no prior disciplinary record, had fully cooperated with the disciplinary process, had accepted responsibility for his conduct, and had provided over 40 character references counseled against imposing a greater sanction).”

While Mr. Pfundstein has presented mitigation evidence similar to that in *Kimmins* and *Agopian*, there was *no mitigating evidence* presented in the *Kimmins* and *Agopian* cases of the attorney suffering from a *mental disability* (or chemical dependency) as in the instant matter.

In *Disciplinary Counsel v. Niermeyer*, 119 Ohio St. 3d 99 (2008), an attorney failed to timely file a client’s worker’s compensation claim and presented a fabricated time-stamped document to the Ohio Bureau of Worker’s Compensation in an effort to create the appearance that a document had been timely filed, attempting to take advantage of the Bureau’s staff being overwhelmed or that it had just implemented a paperless system. The attorney was found to have violated DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). However, in light of the mitigation evidence presented, i.e. no prior disciplinary record, full cooperation with the disciplinary process, self-reporting and good character and reputation apart from the subject incident (*and again, no evidence of mental disability, as here*), the Ohio Supreme imposed a one year suspension, conditionally stayed in its entirety.

In *Disciplinary Counsel v. Taylor*, 120 Ohio St. 3d 366 (2008), the undersigned was counsel to Mr. Taylor and thus, is uniquely familiar with the facts present therein. In that matter, Mr. Taylor stipulated to and the Ohio Supreme Court found that he had violated DR 1-102(A)(4) (a lawyer shall not

engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) in Counts I and III of a four count Complaint, amongst other violations. Mr. Taylor falsely purported to be acting in a fiduciary capacity in an effort to have one client transfer her interest in her home for the benefit of another client. While the Relator objected to the Board's recommendation of a stayed suspension under the theory that violations DR 1-102(A)(4) require an actual suspension, this Honorable Court disagreed, finding that the good faith efforts of Mr. Taylor and other mitigation evidence presented (however, once again, *no evidence of mental disability* as present in the instant matter) warranted the lesser sanction of a conditionally stayed suspension of one (1) year.

In Columbus Bar Association v. Stubbs, 109 Ohio St.3d 446 (2006), Ms. Stubbs was charged with driving without automobile insurance which led to the suspension of her driver's license. In an effort to falsely prove that she had insurance, she submitted a fabricated document to the Ohio Bureau of Motor Vehicles which subsequently led to her being convicted of the criminal charge of falsification. The Ohio Supreme Court found the existence of various mitigating factors and, in light of those factors, imposed a conditional stayed suspension of six (6) months, rather than an actual suspension for violation of DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Those factors included remorse for her actions, imposition of other penalties, no prior disciplinary record, cooperative attitude towards the disciplinary process, good character and reputation, and also as present in this matter ... her suffering from depression and her involvement in and positive response to her participation in the OLAP program.

Recently, in Disciplinary Counsel v. Potter, 126 Ohio St. 3d 50 (2010), this Honorable Court found that the attorney acted with a selfish or dishonest motive in conduct involving client and thereby violated Prof. Resp. Rule 8.4(c). However, in light of the significant mitigating factors present leading to the conclusion that the respondent is unlikely to commit future misconduct, a stayed suspension of one (1) year was imposed.

In the instant matter, the evidence supports, as the Hearing Panel and Board found, that significant mitigation evidence exists as discussed above (including, but not limited to, Mr. Pfundstein's dysthymia) and that he is unlikely to commit future misconduct thereby warranting a stayed suspension as recommended by the Board.

All of the cases cited by Relator in its Objections and Brief can easily be distinguished and are unlike the facts and evidence in the instant matter. There was *no evidence of mental disability* (as there is here) in many of the cases cited by Relator for the proposition that attorney deceit requires an actual, rather than stayed, suspension. See Disciplinary Counsel v. Fowerbaugh, 74 Ohio St. 3d 187 (1995) (therein, unlike here, the respondent also failed to take personal responsibility for his actions and attempted to justify his conduct); Disciplinary Counsel v. Stollings, 111 Ohio St. 3d 155 (2006); Toledo Bar Ass'n v. Hickman, 107 Ohio St. 3d 296 (2005); Disciplinary Counsel v. King, 103 Ohio St. 3d 438 (2004) (attorney therein had been subject to two previous disciplinary cases and the court found the aggravating factors outweigh the evidence of mitigation).

In addition, the Hearing Panel and Board were correct in not relying upon the cases cited by Relator for the proposition of an actual suspension is warranted for attorney deceit even when there is evidence of chemical dependency or mental disability as the cases cited involved other substantial misconduct, financial harm caused to the clients, and in some case multiple clients. [Bd. Rep. ¶ 49.]

The Board noted that in Disciplinary Counsel v. Keller, 110 Ohio St. 3d 240 (2006), the attorney was suspended for two (2) years with eighteen (18) months conditionally stayed for lying to an eighty-two (82) year old client about the status of her case, missing the statute of limitations for the clients claims which resulted in an unpaid \$102,800.00 legal malpractice judgment being rendered against the attorney. [Bd. Rep. ¶ 49.] Likewise in Disciplinary Counsel v. Grdina, 101 Ohio St.3d 150 (2004), Board recognized that the attorney caused financial harm to clients by failing to file estate tax returns or probate papers in two estates resulting in penalties, failed to cooperate with the disciplinary process,

failed to register his license and comply with CLE, and used IOLTA funds for personal expenses. [Bd. Rep. ¶ 49.] Finally, in Disciplinary Counsel v. Jaffe, 102 Ohio St. 3d 273 (2004), the Board distinguished that case by pointing out that the attorney was suspended for two (2) years with one (1) year conditionally stayed for lying to four (4) different clients, failing to perform the work for which he was retained, practicing in a jurisdiction where the attorney was not licensed, misusing Iolta funds, and failing to return client files. [Bd. Rep. ¶ 49.]

Lastly, this Honorable Court should not be persuaded by Relator's argument of a lack of causal link between the misconduct and the lawyer's mental disability/chemical dependency by Relator's reliance and citation to Disciplinary Counsel v. Hunter, 106 Ohio St. 3d 418 (2005), Cleveland Bar Ass'n v. Dixon, 95 Ohio St.3d 490 (2002), the Michigan case of Grievance Administrator v. Londer, Case N. 07-127-JC, and the Minnesota case of Disciplinary Action Against Mayne, 783 N.W.2d 153 (2010). Each of the foregoing cases involved extremely serious allegations of the theft, misappropriation of very large amounts of money taken from clients and others and/or criminal convictions of the attorneys in those actions. Mr. Pfundstein, not only was not being paid for the work he actually did and reimbursed for expenses advanced, he took no money from anyone much less committed a criminal act. These cases have no baring or relevance, whatsoever, upon the present matter.

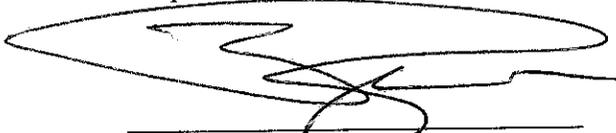
Simply, the facts herein demonstrate that there is both sufficient and ample evidence in the record, that Mr. Pfundstein's dysthymia *contributed* to the cause of his misconduct in deceiving Mr. Einhorn in order to properly consider his mental disability as mitigation evidence; however, and despite the opportunity to introduce its own independent evidence at the hearing, Relator seemingly is just not satisfied with the findings based upon the actual evidence that was, in fact, presented and asks this Honorable Court to follow harsh and bright-line rules without considering the unique facts and circumstances of the instant matter involving Mr. Pfundstein's mental disability, which this Honorable Court's long-standing precedent requires.

It is respectfully submitted that, in consideration of the stipulated violations, the mitigation evidence presented under the conditions set forth above, and the foregoing precedent, that the Recommendation of the Board is both just and appropriate and be accepted by this Honorable Court.

#### **IV. Conclusion**

In light of the foregoing facts and precedent, Respondent Joseph A. Pfundstein respectively requests that this Honorable Court duly consider this Answer Brief, in addition to any and all of the actual evidence and testimony adduced at the hearing of this matter, and that after weighing all of the evidence adduced therein, approve the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances & Discipline of the Supreme Court of Ohio thereby suspending him from the practice of law for twelve (12) months, with the suspension stayed on conditions that: (a) Mr. Pfundstein remain in compliance with OLAP and therapy as directed by Dr. Roger Hess during the period of stayed suspension; (b) he serves a term of probation to run concurrently with his OLAP program until completion in March, 2012; and (c) he pays all costs related to these proceedings.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been sent via regular U.S. mail to Robert R. Berger, Senior Disciplinary Counsel and Jonathan A. Coughlan, Disciplinary Counsel, Office of Disciplinary Counsel of the Supreme Court of Ohio, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-5454 on this 24th day of August, 2010.



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