

ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215

Case No. 10-1601

Relator

Case No. 08-081

vs.

VINCENT A. STAFFORD, ESQ.
Stafford & Stafford Co., L.P.A.
2105 Ontario Street
Cleveland, Ohio 44115

Respondent

**RESPONDENT'S OBJECTIONS TO, AND BRIEF IN SUPPORT OF THE FINDINGS OF
FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON GRIEVANCES OF THE SUPREME COURT OF OHIO**

George S. Coakley (0020419)
John P. O'Neil (0067893)
REMINGER CO., L.P.A.
1400 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115
Tel: (216) 687-1311 / Fax: (216) 687-1841

Jonathan E. Coughlan (0026424)
Lori J. Brown (0040142)
Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Tel: (216) 687-1311 / Fax: (216) 687-1841

Email: gcoakley@reminger.com
joneil@reminger.com
Attorneys for Respondent Vincent A. Stafford

Email: Jonathan.Coughlan@sc.ohio.gov
Lori.Brown@sc.ohio.gov
Attorneys for Relator

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Appendix

I. INTRODUCTION

Respondent, Vincent A. Stafford, by and through counsel, and pursuant to this Honorable Court's Order to Show Cause filed on September 17, 2010, respectfully submits his Objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline ("Board Opinion") which were filed with this Court on or about September 13, 2010.

This case involves Relator's Amended Complaint consisted of five counts, 46 pages and 182 paragraphs of alleged misconduct. The counts relate to four domestic relations cases and one legal malpractice case in which Vincent A. Stafford represented litigants. The Panel and Board unanimously recommended dismissal of nearly all of Relator's allegations, including all allegations of misconduct contained in Counts III, IV and V; and partially dismissing the two remaining counts of alleged misconduct contained in Counts I and II. The Board Opinion found that Relator failed to establish virtually all of the alleged misconduct by clear and convincing evidence, despite a three year investigation and 22 days of trial.

As discussed more fully herein, in regard to Count I, (*Radford v. Radford*), Mr. Stafford objects to the findings in the Board Opinion that he violated any provisions of the Ohio Code of Professional Responsibility or Ohio Rules of Professional Conduct. In regard to Count II, (*Muehrcke v. Housel*), Mr. Stafford objects to the findings in the Board Opinion that he violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law).

Mr. Stafford objects to the analysis in the Board Opinion in the section entitled "The Appropriate Sanction" based upon the foregoing belief that no violation of the Ohio Code of Professional Responsibility or Ohio Rules of Professional Conduct was committed, and that Relator

failed to meet its burden to prove the alleged misconduct by clear and convincing evidence. Mr. Stafford objects to the sanction recommended in the Board Opinion: an 18 month suspension from the practice of law, with 12 months stayed, subject to conditions, including monitoring by an attorney selected by Relator; and the assessment of all costs, in the amount of \$63,342.86.

Although Relator's Amended Complaint contained five counts, the Board Opinion dismissed nearly all of Relator's claims. Even in regard to *Radford* and *Muehrcke*, the Board Opinion struggled to find any disciplinary violation by Mr. Stafford given Relator's failure to demonstrate the alleged misconduct by clear and convincing evidence. (Board Opinion, p. 11). Based on the content of the Board Opinion as well as the evidence at trial, any measure of sanction imposed would be contrary to the purpose of attorney discipline proceedings in the State of Ohio, i.e., to protect the public and not punish the attorney, as well as violate the law which controls the imposition of attorney discipline in Ohio.

II. STATEMENT OF FACTS

Mr. Stafford at all times disputed the allegations of misconduct charged by Relator in the five count Amended Complaint. Mr. Stafford objected to the initial Notice of Intent to File Draft Complaint, and as a result, the Probable Cause Panel dismissed much of Relator's Draft Complaint. Mr. Stafford filed a motion to dismiss the original Complaint which consisted of four counts. Several months after the filing of the original Complaint and without any review by a Probable Cause Panel, Relator filed an Amended Complaint adding Count V, (*Kostya*).¹

Mr. Stafford repeatedly demanded the dismissal of Relator's unfounded allegations of misconduct, including: the filing of motions to dismiss and five separate motions for summary judgment. After a three year investigation, lengthy discovery including approximately 16

¹ Relator's Amended Complaint was filed approximately one month before the discovery deadline imposed by the Panel.

depositions; Relator refused to dismiss any of the counts, resulting in a long, costly and arduous twenty-two day trial. Mr. Stafford was forced to endure the crucible of the trial process, including slanderous, misleading and inaccurate testimony by past opposing litigants and their attorneys, and even clients who engaged in revisionist accounts in an attempt to avoid the payment of outstanding attorney fees (Telerico and Kostya). Mr. Stafford requested a directed judgment at the end of all evidence presented in Count I (*Radford*); Count II (*Muehrcke*); Count III (*Janosek*); Count IV (*Telerico*); and Count V (*Kostya*). At the end of a three year disciplinary investigation, 16 discovery depositions, and the twenty-two day trial, and after expending hundreds of thousands of dollars in attorney fees resulting from Relator's Amended Complaint, nearly all of the charges set forth in Relator's Amended Complaint were dismissed.

It is evident from a review of the Board Opinion and the evidence presented at trial that Relator failed to meet its burden on each of the counts. Yet the Board Opinion, despite findings and conclusions of law which are contrary to its final analysis and recommendation of a sanction (*and which in fact warrant the dismissal of all counts*), recommended a sanction against Mr. Stafford. Such a recommendation is contrary to Ohio law and precedent and the purpose of the disciplinary system.

III. LAW AND ARGUMENT

Relator bears the burden of establishing the allegations set forth in its Amended Complaint by clear and convincing evidence. *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605. As stated by this Court in *Findlay/Hancock Cty. Bar Assn. v. Filkins*, 90 Ohio St.3d 1, 2000-Ohio-491, “[w]hile the Board of Commissioners on Grievances and Discipline makes recommendations, *it*

is the Supreme Court of Ohio that renders the final determination of the facts and conclusions of law in disciplinary proceedings.” Id. (emphasis added).²

Relator did not prove its allegations of misconduct in any Count by clear and convincing evidence, including the alleged misconduct outlined in the Board Opinion relating to Count I (*Radford*) and Count II (*Muehrcke*). There is insufficient evidence to prove that Mr. Stafford committed any alleged misconduct and Mr. Stafford respectfully requests that this Honorable Court sustain these objections, and dismiss Relator’s Amended Complaint in its entirety.

A. OBJECTIONS RELATING TO COUNT I (RADFORD)

Mr. Stafford represented Diana Radford, the mother of two small children and a homemaker who only worked part-time, in her divorce action against Bruce Radford (“Radford”). Throughout the *Radford* divorce proceedings, Radford engaged in a campaign of continuous and vicious attacks against Diana Radford, her family and Mr. Stafford.

Radford was found to have committed acts of physical abuse and domestic violence against his children. Radford was found in contempt of court for failing to pay his court-ordered obligations. (Respondent’s Exhibit A). Trial Court Judge Timothy M. Flanagan incarcerated Radford for seven days in jail for committing perjury during the fourteen day *Radford* divorce trial in October, 2007. (Respondent’s Exhibit L).

OBJECTION 1: Mr. Stafford Did Not Violate Prof. Cond. R. 3.4(a) In Count I Since There Was No Obstruction To Or Access To Evidence.

A. Mr. Stafford Did Not Unlawfully Obstruct Bruce Radford’s Access To Evidence In The Radford Divorce Matter.

Relator did not prove by clear and convincing evidence that Mr. Stafford violated Prof. Cond. R. 3.4(a), which provides that a lawyer “shall not unlawfully obstruct another party’s access

² In *Filkins*, this Court set aside Board recommendation, finding that relator did not meet its burden, where relator’s witnesses were not credible and evidence was not clear and convincing.

to evidence, unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act.” There is no clear and convincing evidence to support a finding that Mr. Stafford obstructed Radford’s access to evidence. The facts of the *Radford* divorce clearly demonstrate Radford’s full access to discovery, subpoenas, depositions, witnesses, documents and his full ability to litigate his case at trial.³

The Board Opinion did not find that Mr. Stafford unlawfully altered, destroyed, or concealed any documents or materials or counseled another to do so in the *Radford* divorce; or that Mr. Stafford engaged in any misrepresentations, fraud, or concealment. The Board Opinion does not enumerate what, if any, evidence which was obstructed by Mr. Stafford during the *Radford* divorce; nor does it enumerate any acts in which Mr. Stafford engaged to “obstruct” Radford’s access to evidence. The Board Opinion fails to cite to one scintilla of evidence which would support its conclusion that Mr. Stafford was “obstructionist” in the *Radford* divorce matter. Instead, the Board’s Opinion made contrary findings, including: “the panel cannot point *with any degree of confidence* to a single document that Radford’s lawyers requested and that respondent failed to produce;” and acknowledged that it did not find that Mr. Stafford failed to fulfill his discovery obligations. (Id. at 13-16) (emphasis added).

1. Judge Timothy M. Flanagan Found That Mr. Stafford Complied With Discovery In *Radford v. Radford*.

Judge Flanagan testified before the Panel that “they [Radford and his attorneys] were prepared for the trial, there was nothing that was denied from anybody. I believed the

³ Radford litigated the child abuse and domestic violence charges against him; litigated the issue of custody of his two minor children despite his physical abuse, restricted parenting time, and protective orders; and litigated the issues of spousal and child support.

discovery was provided.”⁴ (Tr. 1128) Radford had physical possession of the parties’ personal, financial and business records at all times relevant to the divorce proceeding. Diana Radford testified that prior to the divorce, the parties kept their financial documents in their home office, which was also Radford’s business office. (Tr. 1201) Diana Radford testified that Radford removed virtually all documents from the marital residence including tax returns, bank statements, trust documents, and other records and that after she filed for divorce he “put a deadbolt lock on the door and forbade my entrance.” (Tr.1201-1202) Further, Radford owned his own business and he controlled all financial records of the business.

Mr. Stafford did not obstruct Radford’s access to witnesses; subpoenaed information; or third party defendants’ disclosure of records or other evidence. Radford had full access to all available financial records, access to witnesses, the ability to join third party defendants,⁵ issue discovery, depose witnesses⁶, file pretrial motions, adjudicate disputed issues and had full access to the trial court, including acting as a *pro se* litigant. Radford had four different attorneys represent him, who issued two nearly identical sets of Request for Production of Documents and Request for Interrogatories, joined Diana Radford’s parents as third party defendants, issued multiple subpoenas,⁷ and issued discovery to third party financial institutions and obtained certified financial records. Diana Radford’s financial accounts were known, identified and disclosed to Radford and

⁴ Judge Flanagan was the Administrative Judge of the Domestic Relations Court for twenty-six years, had been on the bench for twenty-seven years, and had heard thousands of contested divorce trials when he heard the *Radford* divorce matter.

⁵ Charles Schwab, MFS Investment Management, and USAA Investment Management

⁶ Radford noticed four depositions to Diana Radford and third party defendants, Alan Diamond, Lori Diamond and Scott Klement, but cancelled all of them.

⁷ Radford issued subpoenas to Diana Radford’s financial accounts at Sky Bank and Charter One Bank. Radford issued subpoenas to the Northfield Police Department, Pepper Pike Police Department, and the Sagamore Hills Police Department.

his legal counsel. Radford's Exhibit List, which he filed prior to trial, enumerated and demonstrated his possession of all of Diana Radford's financial accounts and statements.

B. Mr. Stafford Was Not Obstructionist On Cross-Examination Or In Discovery During The Radford Divorce.

Relator failed to prove by clear and convincing evidence that Mr. Stafford obstructed the trial court's process to ascertain Diana Radford's compliance with discovery. There were no findings by Judge Flanagan that Mr. Stafford had failed to comply with discovery requests or orders. Judge Flanagan testified that he found Mr. Stafford's testimony on cross-examination to be truthful:

"There was nothing that came out against what he [Stafford] was saying. We're talking about things that had occurred in front of me. At the very end, Mr. Kubyn said it's not a problem when Mr. Stafford asked bring the other witnesses in, something I heard over and over throughout this trial, many times my saying it...Kriwinsky and Kubyn. If there's no discovery, if you haven't had discovery and he's [Stafford] saying it was given to the earlier lawyer, bring them in, let them tell me that and then you may have a case for that, but if you don't do that, and you don't get on the stand yourself even, in support of the discovery issue and in front of me, on the record, say it's not a problem, I take – make the assumption I was correct all along that discovery had occurred." (Tr. 1019-1020)

The entire rationale in the Board Opinion for finding misconduct in Count I is based upon its hindsight review of Mr. Stafford's testimony while on cross-examination during the *Radford* divorce matter. The conclusion in the Board Opinion that Mr. Stafford's testimony while on cross-examination during the *Radford* divorce matter was obstructionist does not square with the Board Opinion's finding that there were no misrepresentations by Mr. Stafford. (Board Opinion p.12) Kubyn's cross-examination of Mr. Stafford was difficult to decipher.⁸ (Id. at 12-13) Kubyn asked Mr. Stafford vague, ambiguous and compound questions. Mr. Stafford properly objected to questions which Judge Flanagan sustained. Mr. Stafford answered all questions of Kubyn and followed all judicial instructions of Judge Flanagan while testifying.

⁸ Kubyn was sanctioned by the Supreme Court for conduct that occurred during his representation of Mr. Radford. Kubyn admitted that he was psychologically unable to handle his cases.

Mr. Stafford testified on the last day of the Radford divorce trial when the only issue remaining for trial was in regard to Diana Radford's attorney fee request. Mr. Stafford marked his attorney fee bill as an exhibit and voluntarily testified regarding the reasonableness of the fees given the nature of the divorce matter and Radford's conduct during the litigation. During cross-examination, Mr. Stafford produced proof that none of Radford's attorneys had requested any documents demonstrating Diana Radford's separate property, which formed the basis of Kubyn's discovery dispute.⁹ Judge Flanagan ordered Mr. Stafford to immediately step down while testifying and retrieve Palkovitz's Request for Production of Documents and Interrogatories. Mr. Stafford immediately obtained a copy of Palkovitz's discovery requests and provided it to Kubyn and the trial court.¹⁰ This is not obstruction but instead demonstrates Mr. Stafford's cooperation with the Judge Flanagan's directives while testifying.

A review of the entire exchange between Kubyn and Mr. Stafford reveals that Mr. Stafford's claims were vindicated after the trial court and Kubyn could not find any request for separate property documentation in the Palkovitz or Laubacher formal discovery requests. Mr. Stafford accurately, honestly and properly defended the false accusations of Kubyn. Kubyn admitted the issue of any alleged noncompliance was rendered moot since the documents never were requested:

"During the trial, when Mr. Stafford called himself as a witness to establish his claim for attorney fees, I was able to examine him, on this matter. Mr. Stafford testified that he provided discovery to both Mr. Palkovitz and Mr. Laubacher but, most importantly, that the specific documents regarding wife's premarital interest in these funds was never requested.

At that point (either on or off the record, I don't recall) we went excruciatingly through the 15 or so pages or boilerplate requests, and found that indeed neither Mr. Palkovitz nor

⁹ Kubyn and Kriwinsky did not even know that Palkovitz had issued Request for Production of Documents and Interrogatories since Kubyn, Kriwinsky and Laubacher did not have Palkovitz's file nor did they ever talk to Palkovitz.

¹⁰ The evidence revealed that the documents related to Diana Radford's separate property had not been requested by any attorney representing Radford.

Mr. Laubacher had requested these specific documents in their formal requests. With that, my questioning of Mr. Stafford discontinued as the issue of alleged noncompliance was rendered moot. (Respondent's Exhibit P)¹¹

Further, Mr. Stafford and Diana Radford's testimony was unimpeached concerning service of the interrogatory responses to Palkovitz and the documentation delivery to Laubacher and Kubyn. Both Mr. Stafford and Diana Radford independently testified to such service before it even became an issue with Disciplinary Counsel.

Prof. Cond. R. 3.4(a) does not impose upon a lawyer a duty to volunteer all relevant information. Annotated Model Rules of Conduct, 6th Ed., American Bar Association, p.325. The Rule prohibits a lawyer from unlawfully concealing potential evidence. Id. Here, Mr. Stafford complied with all discovery requests. The alleged "discovery dispute" was definitively determined to be the result of Radford's failure to request Diana Radford's separate property documentation. Therefore, Mr. Stafford did not violate Prof. Cond. R. 3.4(a).

Judge Flanagan clearly was interested in Mr. Stafford's compliance with discovery as Judge Flanagan stopped trial and took a multi-day recess to afford Kubyn and Kriwinsky time to obtain Palkovitz's file and to have Palkovitz and Laubacher testify on behalf of Radford. In fact, Mr. Stafford asked the trial court to require Kriwinsky to testify concerning the alleged discovery noncompliance. Radford's attorneys refused to testify under oath regarding the discovery issue. Judge Flanagan testified that his original opinion that Mr. Stafford had provided discovery was confirmed by "Mr. Kubyn's statement in front of me 'That's not a problem.' That to me said it's done. It's not a problem, not an issue." (Tr. 1158)

¹¹ Kubyn's letter (Respondent's Exhibit P) demonstrates that the trial court and Kubyn went "excruciatingly through" the discovery issues to verify Mr. Stafford's discovery compliance and the accuracy of Mr. Stafford's testimony.

Mr. Stafford answered Mr. Kubyn's questions as put forth to him in an honest and direct manner. Judge Flanagan testified that Mr. Stafford's testimony was the only testimony regarding the discovery issue. (Tr.1115) Kubyn did not call any witnesses, did not testify himself or call Palkovitz, Laubacher, or Kriwinsky to testify, and did not present any evidence at trial in reference to the discovery dispute. Kubyn could not testify or present any contrary evidence because Mr. Stafford and Diana Radford's testimony was accurate.

Judge Flanagan's findings refute any notion that Mr. Stafford obstructed Radford's access to evidence. (Respondent's Exhibit N) The Judgment Entry of Divorce states:

"The Court further finds that during this case the Defendant has employed four different attorneys to represent him and has incurred attorney fees which are at least as great as the Plaintiff. Instead of using loans that he received to further his business **he elected to pay substantial amounts to his attorneys as he relentlessly slandered and attacked everyone in this case and as he continued in his presentation of false and misleading testimony.**" (Respondent's Exhibit N p.3-4).

Judge Flanagan unequivocally testified that the only person responsible for the difficulties in the Radford divorce matter was Bruce Radford and that neither the delay in, nor the length of, the Radford divorce trial was the fault of Mr. Stafford. (Tr.995). The trial court made no findings that Mr. Stafford was obstructionist during his cross-examination and in fact awarded Diana Radford attorney fees because of Radford's egregious and outrageous conduct.

OBJECTION 2: Mr. Stafford Did Not Violate Prof. Cond. R. 3.4(C) In Count I Because Mr. Stafford Did Not Disobey Any Obligations Under The Rules Of A Tribunal.

Relator did not prove by clear and convincing evidence that Mr. Stafford violated Prof. Cond. R. 3.4(c) which prohibits a lawyer from knowingly disobeying an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists. Prof. Cond. R. 1.0 (g) defines "knowingly" as actual knowledge of the fact in question. The Board Opinion fails to state the obligation or rule that it found was knowingly disobeyed or violated by Mr.

Stafford in regard to the *Radford* divorce matter. The Board Opinion specifically states that Mr. Stafford did not fail to fulfill his discovery obligations. (Board Opinion p. 21)

At all times in the *Radford* divorce matter, Mr. Stafford operated under a good faith belief that he had fully complied with all discovery obligations and court orders. It is significant that the Board Opinion fails to cite any order or obligation under the rules of the trial court that Mr. Stafford allegedly violated in the *Radford* divorce matter. The evidence presented demonstrates that Mr. Stafford complied with all obligations, court orders, and rules of the tribunal in the *Radford* divorce matter; and that Relator failed to meet its burden to prove any alleged misconduct by clear and convincing evidence.

Mr. Stafford complied with Civ.R. 33 by providing Diana Radford's interrogatory responses to Palkovitz. (Board Opinion p. 9) Diana Radford testified that her written interrogatory answers were provided to Palkovitz at the August 15, 2006 pretrial. (Tr. 1208) Diana Radford verified her interrogatory answers at trial which the trial court accepted. Mr. Stafford operated under a good faith belief that Diana Radford was not required to answer interrogatories which exceed forty questions, when Laubacher issued identical Request for Interrogatories to Diana Radford. The trial court specifically acknowledged that there was no dispute between the parties regarding interrogatories until after the trial commenced.¹² (Tr.973, 1054) The Board Opinion correctly noted Radford's suspicious access to his files held by his attorneys. (Board Opinion, p. 11, 12)

Mr. Stafford complied with Civ. R. 34 by providing the requested documents to Radford's multiple counsel, including Laubacher on October 30, 2006, *and* by supplying supplemental discovery documents to Kriwinsky and Kubyn on March 7, 2007. Diana Radford witnessed Mr. Stafford hand-deliver the documents she assembled to Laubacher in response to Radford's Request

¹² Laubacher, Kubyn and Kriwinsky did not even know that Palkovitz had issued written discovery since all three attorneys never bothered to talk to Palkovitz or to obtain Palkovitz's file.

for Production of Documents on or about October 30, 2006. (Tr. 1186; 1194, 1225) Diana Radford's un rebutted testimony corroborated Mr. Stafford's testimony that he had provided discovery documents to Laubacher. (Board Opinion p.7) Laubacher did not dispute Diana Radford's testimony.¹³ (Board Opinion p.7) Judge Flanagan participated in an "in chambers" discussion on October 30, 2006 between Mr. Stafford and Laubacher, during which Mr. Stafford told Laubacher that he had documents to give him in the hallway. (Tr. 961, 1160) Laubacher admitted to Relator that he could not specifically recall if he did or did not receive the documents. (Board Opinion p.7) Diana Radford further testified that Radford had her financial records, which were given to Laubacher on October 30, 2006, in his possession at the trial table during a contempt hearing before Magistrate Tanner on June 18, 2007. (Tr. 1191-1192)

After receiving supplemental documentation from Diana Radford, Mr. Stafford **again** provided a three inch stack of financial documents to Kubyn and Kriwinsky on March 7, 2007, which occurred in front of Judge Flanagan in his chambers. (Tr. 983) At the March 7, 2007 pretrial, Judge Flanagan also overheard Mr. Stafford tell Kubyn that he could come to Mr. Stafford's office to review the documentation given to prior counsel, but that Mr. Stafford was not going to make additional copies for the second or third time. (Flanagan Tr. 984,1057, 1131). Civ. R. 34 allows a responding party to make available documents for inspection and copying. Neither Kubyn nor Kriwinsky ever attempted to inspect any of the records previously provided to Laubacher on October 30, 2006. Judge Flanagan agreed that if discovery is provided to one attorney, there is no duty to continue to resubmit production of documents or interrogatories every time a party changes counsel. (Tr.1063)

¹³ It is important to note that Diana Radford's testimony was given at least one year prior to any disciplinary investigation.

Judge Flanagan testified that if you have cases with boxes and boxes of exhibits, reduplicating them can place an undue burden on a party and that the new lawyer should get the materials from the discharged lawyer. (Tr. 1132)

Importantly, Judge Flanagan testified that his ruling on Bruce Radford's Motion to Compel was not a finding that discovery was not complied with; it was "just ordering a new discovery date." (Tr.970) Ohio courts have the inherent power to deal with abuses arising in pretrial practice such as discovery.¹⁴ Judge Flanagan testified that there are "discovery disputes" in eighty to ninety percent of the domestic relations cases; and that both parties usually claim that the other party has the documents, as was the case in the *Radford* matter. (Tr. 946, 948)

The evidence demonstrated that Radford's numerous successor attorneys never obtained Palkovitz's file prior to the *Radford* divorce trial. Laubacher, Kriwinsky, and Kubyn never knew that Palkovitz had issued a Request for Production of Documents and Request for Interrogatories to Diana Radford. Laubacher, Kriwinsky, and Kubyn were unaware that Mr. Stafford had served Diana Radford's written answers to the Request for Interrogatories to Palkovitz on August 15, 2006. In fact, Kriwinsky and Kubyn only learned that Palkovitz had issued and received written discovery responses when Mr. Stafford testified on cross-examination at trial.¹⁵ Judge Flanagan testified that at the start of the *Radford* divorce trial, he did not believe that there were any outstanding discovery

¹⁴ *Cincinnati Bd. of Educ. v. Armstrong World Indus., Inc.* (October 28, 1992), Hamilton App. No. C-910803, 1992 WL 314206 (where Civ.R. 37 sanctions were unavailable in absence of motion to compel, trial court nevertheless had inherent authority to impose sanctions for discovery abuse consisting of bad-faith misrepresentation in interrogatory answers; argument that "the trial court lacked the authority to award sanctions for discovery abuse except as specifically provide in the civil rules" expressly rejected).

¹⁵ Mr. Stafford produced a copy of Palkovitz's Request for Production of Documents and Request for Interrogatories, because Kubyn and Kriwinsky did not have them when he was directed by the Court to step down from the witness stand and immediately produce a copy of Diana Radford's written discovery.

issues.¹⁶ (Tr.998, 1062, 1135). The parties stipulated to all property division and only had four issues to litigate: (1) spousal support; (2) child support; (3) pension division; and (4) Diana Radford's request for attorney fees. Any issue of discovery compliance was adjudicated by Judge Flanagan in the *Radford* divorce matter. Judge Flanagan determined that Palkovitz, Laubacher, Kriwinsky, and Kubyn all failed to request discovery concerning any aspect of Diana Radford's separate property or separate assets. Judge Flanagan agreed that neither Diana Radford nor Mr. Stafford is obligated to produce documentary discovery which had never been requested by Radford's four attorneys. Judge Flanagan testified that in his experience Mr. Stafford complied with discovery, stating "you're only going to get, though, what you asked for from him. He's not going to give you any more than that, just what's asked." (Tr. 978)

Judge Flanagan was active in resolving the discovery issue and in fact relayed a similar false allegation made against Mr. Stafford in another divorce matter, stating that he told both lawyers that he would put them under oath and take their testimony to find out which lawyer was lying and report the offender to Disciplinary Counsel. *Id.* When the lawyer challenged that Mr. Stafford had failed to produce a document in discovery that he was introducing as evidence at the trial, the lawyer could not demonstrate that he had requested that document. (Tr.978-979). Such was the case in the *Radford* matter.

Judge Flanagan challenged Kubyn to present witnesses or facts to refute Mr. Stafford and Diana Radford's testimony. A multi-day recess from trial was taken by the trial court to allow Kubyn and Kriwinsky to demonstrate any and all alleged discovery non-compliance by Diana Radford and/or Mr. Stafford, including (1) calling Palkovitz and Laubacher to testify in support of

¹⁶ "We were very narrow in what we were going to talk about. We had a custody issue which wrapped up fairly early in the case. We had a question of support, spousal support, child support, a small little IRA and attorney's fees. That's all we had to deal with." (Tr. 998).

their bald assertions; and (2) allowing Radford's counsel to obtain Palkovitz's file. **Kubyn and Kriwinsky did neither.**¹⁷

Judge Flanagan testified that in his opinion Kubyn had an affirmative obligation to present the evidence regarding any discovery dispute. (Tr.1007) Judge Flanagan testified that he indicated to Kubyn that he should call Laubacher and Palkovitz to testify to resolve any outstanding discovery issues but that Kubyn failed to do so. (Tr.1004) Judge Flanagan testified to the following:

Q Did you ever do anything to prevent him from bringing Laubacher in?

A No.

Q Did you encourage him to bring Laubacher in?

A Absolutely, and Palkovitz.

Q Why didn't you order Laubacher and Palkovitz into trial?

A Because awarding attorney's fees or sanctions is not part of the responsibility to put on me. That's the lawyer's job to bring these people in. I assumed they were coming in. (Tr.1005).

Judge Flanagan testified that Kubyn was "free to bring in any witnesses he felt were necessary to support his claims. He was encouraged to and didn't." (Tr. 1112)

After realizing that the documents were never requested, Kubyn indicated that the alleged discovery dispute was a non-issue and rested his examination of Mr. Stafford. The issue was moot because Mr. Stafford served Palkovitz with Diana Radford's Interrogatory responses; Laubacher had received the requested documents; Kubyn had received supplemental discovery documents; and Kubyn finally realized that all four of Radford's attorneys failed to request documents of Diana Radford's separate property. Judge Flanagan testified that he based his conclusions as set forth in the *Radford* Judgment Entry of Divorce upon what he had observed during the course of the pretrial conferences and Diana Radford and Mr. Stafford's testimony at trial. (Tr. 1136)

¹⁷ Such a failure provides evidence of the hollow and baseless claims by Kubyn, Kriwinsky and Radford.

The Board Opinion supports these facts, including that Radford's actions and those of his counsel "planted an undeniable seed of doubt in the panel member's minds" to Radford's claims of discovery noncompliance and that "the panel cannot point with any degree of confidence to a single document that Radford's lawyers requested and that respondent failed to produce" and acknowledged that it did not find that Mr. Stafford failed to fulfill his discovery obligations. (Board Opinion p. 11, 16) Therefore, there is no clear and convincing evidence that Mr. Stafford obstructed the overall discovery process or Radford's access to evidence in the *Radford* matter.

OBJECTION 3: Mr. Stafford Did Not Violate Prof. Cond. R. 8.4(D) And (H) And DR 1-102(A)(5) And (6) In Count I.

The Board erred by charging Mr. Stafford with a violation of the Disciplinary Rules of the Code of Professional Responsibility and the Rules of Professional Conduct. This Court has held that when both the former and current rules are cited for the same act, the allegation constitutes a single ethical violation. *Disciplinary Counsel v. Hoff*, 124 Ohio St.3d 269, 2010-Ohio-136; *Disciplinary Counsel v. Freeman*, 119 Ohio St. 3d 330, 2008-Ohio-3836.

A. Mr. Stafford Did Not Engage In Conduct Which Is Prejudicial To The Administration Of Justice.

Relator did not prove by clear and convincing evidence that Mr. Stafford violated Prof. Cond. R. 8.4(d), which provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice. Such misconduct usually falls into one of several broad categories, including: misconduct directed to a tribunal; misconduct by adjudicatory officials or other agents of government; and misconduct directed at clients.

As set forth above, Mr. Stafford did not violate Prof. Cond.R. 3.4(a) or 3.4(c). The Board Opinion failed to make any findings of any specific evidence Mr. Stafford obstructed in the *Radford* divorce matter. No evidence was presented that Radford had been denied evidence or obstructed

from obtaining any evidence for the divorce matter. In fact, the evidence demonstrated that Mr. Stafford complied with all discovery obligations and court orders and that Radford and his four lawyers obtained all evidence, joint third party defendants, subpoenaed records, and litigated all issues.

The Board Opinion interpretation of Mr. Stafford's testimony on cross-examination contradicts the trial court's decision and the Board Opinion's findings. Judge Flanagan was in the best position to assess the credibility of the witnesses. Judge Flanagan decisively and unequivocally determined that there had been no obstruction of evidence or noncompliance with discovery.

Mr. Stafford's testimony on cross-examination is in no way comparable to the attorney's actions in *Cincinnati Bar Ass'n v. Marsick* (1998), 81 Ohio St.3d 551. In *Marsick*, the attorney repeatedly failed to reveal in discovery a witness's statement that the defendant admitted at the scene of the accident that he had dozed off, resulting in the death of the parked car's passenger and injuring its driver. The attorney eventually revealed the witness's statement and the underlying judgment against the defendant was vacated. The *Marsick* attorney deliberately concealed relevant evidence in a wrongful death action. These facts and circumstances are not analogous to Mr. Stafford's actions as charged herein. There is no evidence related to Mr. Stafford regarding the concealment of relevant and discoverable information. Instead, the evidence demonstrated that Mr. Stafford complied with all discovery requests and orders in the Radford Divorce matter. In fact, the trial court and the Board found that discovery was provided to Radford.

B. Mr. Stafford Did Not Engage In Conduct That Adversely Reflects On The Lawyer's Fitness To Practice Law.

Relator did not prove by clear and convincing evidence that Mr. Stafford violated Prof. Cond. R. 8.4(h), which prohibits a lawyer from engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law. *Dayton Bar Assn. v. Korte*, 111 Ohio St.3d 273, 2006-Ohio-

5705, supports the proposition that proceeding in accordance with one's own best professional judgment, even if that judgment turns out to be wrong, does not constitute conduct adversely reflecting on fitness to practice.

The Board Opinion fails to enumerate exactly what conduct engaged in by Mr. Stafford adversely reflects on his fitness to practice law. There are no findings that Mr. Stafford failed to disclose that which he was required to reveal. At all times, Mr. Stafford had a good faith belief that he had complied with all discovery obligations and court orders as stated above. Mr. Stafford steadfastly stated as such throughout the pretrial proceedings and the *Radford* divorce trial. Mr. Stafford invited his "accusers" to bring forth those who could challenge his credibility. No such testimony was put forth by any attorney representing Radford. Importantly, in the end, Kubyn admitted that the documents he claimed to never have received were never requested.

Mr. Stafford's testimony on cross-examination did not adversely reflect on Mr. Stafford's fitness to practice law. The Board Opinion recognized that Kubyn's questions were difficult to decipher. The trial court found no obstruction as it related to Mr. Stafford's testimony. Judge Flanagan unequivocally stated that he believed Mr. Stafford testified truthfully. Relator did not meet its burden by clear and convincing evidence that Mr. Stafford engaged in any conduct which adversely affects his fitness to practice law.

B. OBJECTIONS RELATING TO COUNT II (MUEHRCKE v. HOUSEL)

OBJECTION 4: Mr. Stafford Did Not Violate Prof. Cond. R. 8.4(D) And (H) And DR 1-102(A)(5) And (6) In Count II.

OBJECTION 5: Mr. Stafford Did Not Violate DR 1-102(A)(5) (Conduct That Is Prejudicial To The Administration Of Justice) And DR 1-102(A)(6) (Conduct That Adversely Reflects On The Lawyer's Fitness To Practice Law) In Count II As The Facts And Law Establish That Mr. Stafford Had A Good Faith Basis To Raise Arguments Of Privilege.

OBJECTION 6: Mr. Stafford Did Not Violate DR 1-102(A)(5) (Conduct That Is Prejudicial To The Administration Of Justice) And DR 1-102(A)(6) (Conduct That Adversely Reflects On

The Lawyer's Fitness To Practice Law) In Count 2 As Ohio Law Provides That As Long As An Attorney Has Some Viable Legal Support For His Action Or Argument, There Is No Misconduct – Even Where The Legal Argument May Be Viewed In Hindsight As Flawed.

OBJECTION 7: Mr. Stafford Did Not Violate DR 1-102(A)(5) (Conduct That Is Prejudicial To The Administration Of Justice) And DR 1-102(A)(6) (Conduct That Adversely Reflects On The Lawyer's Fitness To Practice Law) In Count II As The Factual Findings And Conclusions Of The Panel And Board Are Contrary To The Record, And Relator Failed To Meet Its Burden Of Clear And Convincing Evidence In Regard To Count II, *Muehrcke V. Housel*.

Relator failed to meet its burden of proving the allegations of misconduct against Mr. Stafford in Count II, and the Board Opinion properly dismissed nearly of the allegations of misconduct. In regard to the sole findings of misconduct, the Board Opinion relies upon a flawed and erroneous premise. For the reasons set forth herein – which clarify the misconceived premise of the Board Opinion – this Court must reach the conclusion that based upon the merits, Count II must be dismissed in its entirety.

Count II (*Muehrcke v. Housel*) relates to a legal malpractice action which Mr. Stafford prosecuted on behalf of Robert C. Muehrcke, M.D., against Dr. Muehrcke's former attorney, Robert V. Housel. After surviving three motions to dismiss, two motions for summary judgment, and two motions for directed verdict; and after being litigated in front of three trial judges, a jury returned a verdict in favor of Dr. Muehrcke, finding that Housel committed malpractice and awarding Dr. Muehrcke damages in the amount of \$179,166.66. Within two months, Housel directed his attorneys to send documents to Jonathan Marshall, Secretary of Board of Commissioners on Grievances and Discipline.

The Panel properly dismissed the following allegations in Count II: (1) filing a frivolous appeal; (2) making false and misleading statements and obstructing discovery; and (3) taking action

merely to harass.¹⁸ (See Amended Complaint at ¶ 54) The issues addressed in the Board Opinion relate to a discovery dispute that arose during the *Muehrcke v. Housel* matter. The dispute arose when Housel's counsel posed questions to Dr. Muehrcke at a deposition, seeking information relating to expenses and attorney fees which Dr. Muehrcke had incurred relating to a Probate Court proceeding and the legal malpractice action against Housel. Mr. Stafford objected to these questions on the basis of privilege and relevancy and indicated on the record that such expenses and attorney fees would not be claimed as part of Dr. Muehrcke's damages in the legal malpractice action. (Relator's Exhibit 43 at p. 123) Mr. Stafford requested the opportunity to brief the issue for the trial court, but the trial court denied the request, stating that she (the trial court Judge) could be wrong. (Id. at 166) Thereafter, *despite the fact that it was specifically indicated that Dr. Muehrcke was not claiming the expenses and attorney fees as damages*, Housel submitted two separate and additional requests for production of documents. (Relator's Exhibits 44 and 45) Housel's requests sought attorney fee bills, payments, checks, expenses, stored electronic data, information, communications and documentation between Dr. Muehrcke and his attorneys and other law firms.¹⁹ (Relator's

¹⁸ These same issues were litigated in the *Muehrcke v. Housel* matter prior to the jury trial, after the jury trial, and in two appeals. The same allegations raised by Relator in Count II have been directly litigated and decided, by three trial court judges and two separate court of appeals panels, in favor of Mr. Stafford and his client. This Court previously declined jurisdiction in Supreme Court Case No. 2007-0420 to review the Court of Appeals decision denying a Motion for Sanctions filed by Mr. Housel raising the very same issues as contained in Count II.

¹⁹ "Donald Caranova, Esq.; Joan Ford, Esq.; John Heutsche, Esq.; Robert V. Housel, Esq.; Richard Koblentz, Esq.; A. J. Lepri, Esq.; Porter Wright Morris & Arthur, LLP; Stafford & Stafford Co., LPA; Taft, Stettinius & Hollister, LLP; **and** any other attorneys . . . persons, entities and/or professionals, including, but not limited to, Shalek & Associates C.P.A.s, Inc." (Relator's Exhibit 44) The Board Opinion sets forth that the 2nd Request for Production of Documents sought **only** "Any and all documents demonstrating and/or evidencing any and all expenses you have incurred or claim to have incurred, including, but not limited to, attorney fee bills from ... Stafford & Stafford Co., L.P.A., ... in connection with the [probate proceedings]." Relator's Exhibit 44, p. 4. (Id. at p. 28) Housel's requests related to eight other attorneys and/or law firms, **not** just Stafford & Stafford Co. LPA.

Exhibit 44) Housel was not just seeking records of expenses and attorney fees between Dr. Muehrcke and Stafford & Stafford Co., LPA, but from eight other attorneys and/or law firms.

Mr. Stafford attempted to resolve the issue, requesting that Housel's counsel reconsider the improper request, arguing that the requested information was not relevant to the determination of the malpractice action, and was protected by privilege. (Relator's Exhibits 48, 59; Tr. 2571; 3425-26, 3433) This request was refused, necessitating the filing of a motion for protective order relating to each of the two additional requests for production of documents. Additionally, a third motion for protective order was filed by Dr. Muehrcke in regard to specific deposition questions by Housel's legal counsel of Laura Muehrcke, Dr. Muehrcke's wife, based upon the spousal privilege.

The trial court denied all three motions for protective orders. (Relator's Exhibit 50) Dr. Muehrcke sought an interlocutory appeal of the trial court's decision pertaining to the attorney-client privilege as well as the spousal privilege. When the trial court's decision was affirmed by the court of appeals, the documents (attorney fee bills, payments, checks, invoices and records of expenses) were provided to the trial court for an in camera inspection. (Exhibit 65) The trial court provided the documents to Housel's counsel at an attorney conference on June 21, 2006. (Exhibit 70) The Board Opinion correctly concluded that at no point in time did Mr. Stafford obstruct discovery, make false statements, file a frivolous appeal, or engage in action merely to harass. The Board Opinion properly dismissed those unsupported allegations of Relator's Amended Complaint.

Mr. Stafford objects to the findings made in the Board Opinion that he violated DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on the lawyer's fitness to practice law). The findings and conclusions in the Board Opinion are based upon at least three flawed premises. First, it appears that the Board Opinion relies upon an inaccurate premise that the only "documents" being requested by Housel

were attorney fee bills between Dr. Muehrcke and Stafford & Stafford Co., LPA; second, that the only issue on appeal was the attorney-client privilege relating only to the attorney fee bills between Dr. Muehrcke and Stafford & Stafford Co., LPA.²⁰ The third inaccurate premise upon which the Board Opinion relies is the mistaken belief that “documents” relating to expenses and attorney fees between Dr. Muehrcke and Stafford & Stafford Co., L.P.A. (and other documents argued to be privileged) did not exist at the time of the filing of the motions for protective order and the appeal.

The evidence at trial demonstrated that multiple attorney fee bills and documents were requested; and that such requested documents did exist (including those between Dr. Muehrcke and Stafford & Stafford Co., LPA). In addition, there were at least three separate appellate issues. For these reasons, the arguments advanced in filings in the trial court and the court of appeals were accurate. Therefore, Mr. Stafford had no obligation to clarify arguments advanced in the filings, and did not violate any disciplinary rules.

1. The Legal Position And Arguments Advanced By Mr. Stafford Were Supported By Ohio Law And/Or By A Good Faith Argument For An Extension, Modification, Or Reversal Of Existing Law.

Ohio law supports this Court finding and concluding that Mr. Stafford made a good faith argument in regard to the discovery issues in the *Muehrcke* matter, including the arguments his firm advanced relating to the attorney-client privilege, work product and the spousal privilege; and that Mr. Stafford had an arguable basis in law and fact that was not frivolous. The Board Opinion also improperly assigns culpability to Mr. Stafford for actions taken by his law firm and others.

²⁰ The appellate issues involved (1) attorney-client privilege, (2) work product privilege, (3) spousal privilege, and (4) documents requested of Dr. Muehrcke relating to numerous attorneys and law firms, not just Stafford & Stafford Co., LPA. The discovery dispute in the appeal also involved the deposition questioning of Dr. Muehrcke’s wife, Laura Muehrcke, necessarily invoking the spousal privilege.

The arguments Mr. Stafford's firm advanced are supported by Ohio law in regard to the attorney-client privilege, work product and spousal privilege. As lawyers may advance such claims in attempting to extend, modify, or reverse existing law, this Court must hold, as it did in *Toledo Bar Assn. v. Rust*, 124 Ohio St.3d 305, 2010-Ohio-170, that Mr. Stafford committed no ethical impropriety, and dismiss the Amended Complaint against him. Even if the legal argument advanced by Mr. Stafford's law firm was flawed or incorrect, and the Board Opinion does not agree with it, this does not constitute misconduct. A disagreement over legal strategy does not amount to misconduct, and an incorrect or flawed legal argument made in good faith does not constitute a disciplinary violation. *Rust, supra.*²¹ This Court must determine that based upon Ohio law, Mr. Stafford did not violate any disciplinary rule and dismiss Count II. In *Rust* this Court held the following:

“Without deciding the viability of his legal strategy, we find that respondent initiated the wrongful-death action in good faith and that he had an arguable basis in law and fact that was not frivolous for filing the claim. Because lawyers may advance such claims in attempting to extend, modify, or reverse existing law, we hold that respondent committed no ethical impropriety and dismiss the complaint against him. *** As stated in Prof.Cond.R. 3.1, lawyers are permitted to advance claims and defenses for which ‘there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.’ *** ***Respondent's strategy may have been flawed, but the fact that he had some arguably viable legal support for his actions is enough to avoid disciplinary sanction. We therefore find no violation of the ethical standards incumbent upon Ohio lawyers. The complaint against respondent is dismissed.***” *Rust, supra.* (Emphasis added.)

The arguments advanced by Mr. Stafford's firm (attorney-client privilege, work product, spousal privilege, and relevance) are supported by and recognized by Ohio law. See, Civil Rule 26; R.C. 2317.02. Mr. Stafford fully outlined to the Panel his basis for asserting the privilege arguments

²¹ Additionally, this Court's decision in *Dayton Bar Assn. v. Korte*, 111 Ohio St.3d 273, 2006-Ohio-5705, supports the proposition that proceeding in accordance with one's own best professional judgment, even if that judgment turns out to be wrong, does not constitute conduct adversely reflecting on fitness to practice.

and filing the appeal, including important policy considerations. (Tr. 3438-40, 3450, 3457-58) Mr. Stafford also advanced the argument that none of the documents requested by Housel were relevant to the proceedings, as Dr. Muehrcke was not claiming the expenses and fees as damages in the underlying malpractice action. Housel's legal counsel, Alan Petrov, admitted to the trial court that the documents and attorney fees requested, which gave rise to the appeal, were not relevant to the legal malpractice action.²²

Even where arguments are not supported by law, attorneys have the freedom to raise claims or defenses not presently recognized in the law, as long as the lawyer reasonably believes there is a good faith argument for the position. This freedom is necessary for the advancement of the law and to assure the proper representation of one's client. See comment to Prof.Cond.R. 3.1. Instructive in this regard is *Disciplinary Counsel v. Pollock*, 100 Ohio St.3d 280, 2003-Ohio-5752, where, although the respondent was found to have violated a number of disciplinary provisions for his vendetta against multiple defendants in multiple lawsuits, this Court reasoned as follows:

“[W]e decline to find specifically unethical what respondent insists is creative precedent and argument to advance his clients' causes. It is true that various courts, including this one, have found his claims meritless and, at times, frustratingly repetitious. However, those findings do not necessarily mean that the arguments are so far-fetched that professional discipline is in order. Attorneys must be given rein to experiment in groundbreaking legal pursuits, and here, respondent researched and supplied precedent (however tenuous) for his controversial claims. We will not foreclose the assertion of novel legal theories through the disciplinary process unless they are absolutely specious.” (Id. at ¶ 45).²³

²² The discovery issues were created by the discovery requests made by Housel and his legal counsel, Alan Petrov, whom after two years, admitted on the first day of trial (December 4, 2006) **that the records of expenses and attorney fees Housel sought through discovery were not relevant to the issues at trial.** (Ex. E, Muehrcke Trial Transcript at p. 6; Tr. 3465-66) **The Board Opinion pointed out that Petrov misrepresented the fact that he did not receive attorney fee statements from Stafford & Stafford Co., LPA that were provided to the trial court.** (Board Opinion p. 33)

²³ Similar sentiments were expressed in a case arising under R.C. 2323.51, *Riston v. Butler* (2002), 149 Ohio App.3d 390, quoting from *Passmore v. Greene County Bd. of Elections* (1991), 74 Ohio App.3d 707, 713-14.

The advancement of unwarranted claims or defenses is policed by means *other than the disciplinary rules*, including Civil Rule 11, R.C. 2323.51, Appellate Rule 23, Supreme Court Rule XIV(5), which all deal with frivolous claims, and provide means for addressing such conduct. In fact, Housel's counsel filed numerous motions for sanctions with the trial court, the Eighth District Court of Appeals, and even sought a discretionary appeal to this Court (Case No. 200-0420) in regard to the very same issues addressed in Count II of Relator's Amended Complaint. The issues in Count II have been litigated in favor of Dr. Muehrcke and Mr. Stafford's firm in the trial court and court of appeals on numerous occasions. (Tr. 2680-84; 2926-28; 3466-67) Housel's grievance was little more than a vendetta by Housel to disbar Mr. Stafford.

2. ***The Board Opinion Ignores The Substantial Evidence Presented At Trial Establishing That Documents Existed Which Fully Supported The Privilege Arguments Advanced By Mr. Stafford When the Appeal Was Taken.***

The evidence at trial establishes that *at the time the appeal was filed relating to the discovery dispute, the following information and documents were in existence*: (1) payments, checks, invoices, litigation expenses and attorney fee bills between Dr. Muehrcke and the attorneys and/or law firms, other than Stafford & Stafford Co., LPA²⁴ (this fact is ignored by the Board Opinion); (2) written communications had been *sent to* Dr. Muehrcke from Stafford & Stafford Co., L.P.A., including enclosure letters and correspondences, invoices and bills for litigation expenses²⁵ (this fact is ignored by the Board Opinion); (3) payments and checks paid by Dr. Muehrcke to Stafford & Stafford Co., LPA for attorney fees and litigation expenses, as well as payments and checks paid by Dr. Muehrcke to third party providers for invoices and bills for litigation expenses (this fact is ignored by the Board Opinion); (4) contemporaneous time and billing records which were maintained by each attorney at Stafford & Stafford Co., LPA in regard to the matters in which they

²⁴ See, FN 19, for the entire list of attorneys, law firms, and other professionals. (Relator's Ex. 44)

²⁵ Such expenses included expert fees, deposition costs, copying costs, accountant fees.

represented Dr. Muehrcke; and (5) electronic data of stored time and billing records or attorney fees maintained at Stafford & Stafford Co., LPA in regard to the matters for which Dr. Muehrcke was being represented; all of which had been requested by Housel.²⁶ The Board Opinion which claims that the requested documents did not exist at the time of the appeal is erroneous.

Petrov admitted that it was not just itemized bills that were being requested but that “it was all bills”. (Tr. 2621) Although Petrov initially claimed that the requested records between Dr. Muehrcke and Stafford & Stafford Co., LPA did not exist; on cross-examination he admitted that at the time of the appeal numerous documents existed and that he received from Stafford & Stafford Co., LPA documents responsive to Housel’s requests for production of documents. (Tr. 2612, 2636, 2638, 2690-91, 2692-96) Housel’s other legal counsel, Monica Sansalone, admitted that at the time of the appeal there existed numerous documents (including, but not limited to, attorney fee bills, checks for payments, and litigation expenses) responsive to Housel’s requests for production of documents. (Tr. 2929-30; 2966-73; 3096-97) Mr. Stafford’s testimony established the fact that documents (“filing fees, deposition costs, transcript costs, expert fees, [checks for]payment of [attorney] fees”) responsive to Housel’s Second and Third request for production of documents existed at the time the appeal was filed. (Tr. 3427-31; 3449-50; Relator’s Ex. 65, 127)

3. ***The Expert Testimony Presented At Trial Established That Documents Existed Which Fully Supported The Privilege Arguments Advanced By Mr. Stafford; And That The Arguments Advanced To The Trial Court And Court Of Appeals Were Reasonable, Made In Good Faith, And Supported By Law.***

Mr. Stafford called an expert, civil trial attorney Dave Kamp, to testify during the trial of this matter.²⁷ Kamp testified that Housel’s Second and Third request for production of documents

²⁶ (Relator’s Exhibits 65, 77, 127; Respondent’s Exhibit F-15; Tr. 2929-30; 2966-73; 3096-97; 2612, 2636, 2638, 2690-91, 2692-96; 3427-31, 3449-50; Board Opinion at p. 34, 35).

²⁷ Dave Kamp was awarded the designation of Top Super Lawyer in the State of Ohio for 2009, by Super Lawyer’s Magazine.

defined the term “document” to include “graphs, receipts, canceled checks, invoices, bills, draft bills, time records, electronic media used to generate time records or used to generate fee bills” (Tr. 3290-2) Kamp testified that at the time of the appeal, there were documents in existence responsive to both of Housel’s document requests, some of which had been produced, and some which were in electronic form. (Tr. 3292, 3301-2; Relator’s Exhibit 65, 127) Kamp’s testimony established that documents existed at the time of the appeal, including payments and checks from Dr. Muehrcke to Stafford & Stafford Co., LPA (Ex. 65, 127, Tr. 3302, 3309); attorney fee bills relating the other attorneys and/or law firms (Ex. 65, 127Tr. 3309-12); and electronic data, time records and time sheets of Stafford & Stafford Co., LPA on matters in which they represented Dr. Muehrcke (Tr. 3301, 3312-13). Kamp testified that Housel’s document requests called for producing potential attorney-client privileged information and work product material. (Tr. 3295) Kamp testified that in his experience he had never seen a document request for attorney fees in a case where the attorney fees were not at issue. (Tr. 3297)

Kamp further testified that the arguments advanced to the trial court and the court of appeals on behalf of Dr. Muehrcke were made in good faith, and that based upon the documents and information requested by Housel, there existed a good faith basis to argue privilege and relevance, and it was reasonable for Mr. Stafford to take the appeal. (Tr. 3304) **Kamp testified that the appeal was based upon legitimate attorney-client and spousal privilege issues.** (Tr. 3315)

Kamp testified that it was reasonable and necessary to continue to assert privilege even after the appeal, to assure that there is not an inadvertent waiver of the privilege. (Tr. 3307-8) This testimony was un rebutted, as Relator did not call an expert to testify in this matter.

Contrary to Relator’s claims and the Board Opinion’s erroneous premise that the requested documents did not exist when the appeal was filed, the overwhelming evidence reveals that the

requested documents upon which the privilege arguments were made did exist at the time of the appeal. All the witnesses, including Mr. Stafford, Petrov and Sansalone testified that attorney fee bills, electronic data of attorney fee records, cancelled checks, expenses, litigation cost records and documents all existed at the time the appeal was filed.

4. **Mr. Stafford Did Not Argue And Dr. Muehrcke Did Not Testify That Attorney Fee Bills Had Been Sent To Dr. Muehrcke By Stafford & Stafford Co., LPA.**

On August 27, 2004, Dr. Muehrcke was deposed by Petrov in the *Muehrcke v. Housel* matter. (Relator's Exhibit 43, Dr. Muehrcke depo) Dr. Muehrcke was questioned about "costs" incurred relative to the Probate Case. (*Id.* at pp. 113-114, 117-120) Dr. Muehrcke *never* stated that attorney fee bills had been presented to him by the law firm of Stafford & Stafford Co., L.P.A.; and testified only that bills for litigation expenses such as "copying charges, things like that" had been presented to him by Stafford & Stafford Co., L.P.A. (*Id.* at pp. 171: 9-22) Dr. Muehrcke testified that he incurred attorney fees, accountant fees and other costs, e.g., copying fees. (*Id.* at p. 114) As to attorney fees, Dr. Muehrcke testified he incurred fees relative to several individuals and/or entities, including, but not limited to, Stafford & Stafford Co., LPA, Richard Koblentz (who was appointed guardian), John Heutsche, A.J. Lepri, Carl Murway, Porter Wright and Taft Stettinius. (*Id.* at pp. 117-120) Dr. Muehrcke testified to "**bills** and **charges** relating to this case" and testified that he "paid . . . about ten, 15,000. It's a guesstimate." (*Id.* at 175-76; emphasis added) Petrov's questions to Dr. Muehrcke during the deposition, were vague, unclear and contained numerous compound questions, such as "how much money have you **paid or been billed**" and "what are the **bills** and the **charges** relating to this case." (*Id.* at 174: 18-19; 176: 5-8; emphasis added) *Dr. Muehrcke never testified that he was sent attorney fee bills by Stafford & Stafford Co., L.P.A. in regard to any matter.* (*Id.*)

As determined by the Board Opinion, in both discovery requests, "The term 'document' was

defined to include ‘every ... form of stored or recorded information’ and ‘the contents of storage media used in data processing systems.’” (Id. at pp. 28, 30) Petrov admitted that “electronically stored information would . . . fall within the definition of documents.” (Tr. 2775) This is significant as such records of contemporaneous time and billing records were maintained by attorneys at Stafford & Stafford Co., LPA and stored electronically at the firm, and existed at the time of the discovery dispute. (Board Opinion p. 34; Tr. 2776-77; 3301, 3312-13, 3430-31) Kamp verified that this material is subject to the overbroad discovery requests of Housel. The findings and conclusions in the Board Opinion that such documents did not exist is fundamentally erroneous; and contrary to the substantial evidence presented at trial. As the documents existed at the time of the appeal, the findings of misconduct in the Board Opinion must be disregarded by this Court.

5. ***The Motions For Protective Order And Appellant Brief(s) To Which The Board Opinion Cites Are Not Misleading and Were Filed In Good Faith, Supported By Authority, And A Good Faith Basis Or Argument.***

Separate motions for protective orders were filed in regard to Housel’s Second and Third Request for Production of Documents based upon relevance, attorney-client privilege, and work product privilege, pursuant to Civil Rule 26 and O.R.C. §2317.02(A). (Relator’s Exhibits 48, 49) It is undisputed that Mr. Stafford did not author, sign, or specifically ratify any of the Stafford & Stafford Co., LPA filings in the trial court or the court of appeals. (Board Opinion at pp. 29-31, 34) Civil Rule 26 provides in part: “*The parties may obtain discovery regarding any matter, **not privileged which is relevant to the subject matter involved in the pending action.***” (Emphasis added). Ohio clearly recognizes that documents and communications between attorneys and their clients and/or their agents are specifically protected by the attorney-client privilege under Ohio Revised Code §2317.02(A). The attorney-client privilege bestows upon the client a privilege to refuse to disclose and to prevent others from disclosing confidential communications made between

the attorney and the client (and/or their agents).²⁸ The information sought by Housel's counsel was reasonably believed, by Mr. Stafford, to be privileged or otherwise outside of the scope of discovery; and not to be disclosed.²⁹ Additionally, the Board Opinion recognizes the fact that the information sought, including the stored electronic data of contemporaneous time and billing records maintained by attorneys at Stafford & Stafford Co., LPA, in regard to matters on behalf of Dr. Muehrcke is work product.³⁰

"Housel's document requests covered actual "attorney fee bills," but they were "not limited to" such bills. Their scope was much broader than that, encompassing "[a]ny and all documents demonstrating and/or evidencing any and all expenses" that Muehrcke had "incurred ... in connection with" the probate proceedings and the malpractice action. Given that Housel's document requests defined "document" as including electronic data, the time and billing records that the Stafford firm maintained in electronic form on its computer system fell within the ambit of the document requests because those records "evidenc[ed]" the Stafford & Stafford attorney fees that continually were accruing. Because access to these records would have given Housel and his lawyers an incredible glimpse into the Stafford firm's work in *Muehrcke v. Housel* and its attorney client relationship with Muehrcke, **the panel cannot blame respondent and his firm to the extent they maintained that the firm's electronically stored time and billing records, as requested in Housel's second and third sets of document requests, were at least to some degree subject to the attorney client privilege and/or protected as work product. The vast majority of civil litigators would instinctively raise such objections as grounds for refusing to turn over contemporaneously maintained time and billing records to an opponent in ongoing litigation. The best evidence that this is the classic litigator's response is the fact that Housel and his lawyers reacted in precisely this way when the Stafford firm - in attempting to prove "what's sauce for the goose is sauce for the gander" - served a document request on-them for their fee bills to Housel.**" (Board Opinion at pp. 35-36; emphasis added.)

The evidence clearly demonstrates that correspondences, bills and invoices for litigation expenses (expert fees, deposition costs, copying costs, filing fees, etc.) were sent to Dr. Muehrcke by

²⁸ *Frank W. Schaffer, Inc. v. Sea Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329.

²⁹ *Schaffer, supra*; *State v. Hoop* (1999), 134 Ohio App.3d 624, 643.

³⁰ Civ.R. 26(B)(3) codifies what is commonly referred to as the work-product doctrine. The discovery of attorney work product under Civ.R. 26(B)(3) requires a showing of either exceptional need or substantial need. *Grace v. Mastruserio* (2007), 182 Ohio App.3d 243; *Hickman v. Taylor* (1946), 3929 U.S. 495; *Jerome v. A-Best Prod., Co.* (April 18, 2002), Cuyahoga App. Nos. 79139-79142, 2002 WL 664027.

Stafford & Stafford Co., LPA, and that payment and checks were paid by Dr. Muehrcke for attorney fees and litigation expenses sent to Dr. Muehrcke by Stafford & Stafford Co., LPA. (Ex. 65, 127; Moore depo at Ex. 14, p. 2). Housel's counsel admitted that such billing records were received from Dr. Muehrcke and his counsel. Petrov testified that he wanted to know what Dr. Muehrcke had received by way of expenses, including attorney fee bills. (Tr. 2570) Petrov and Sansalone admitted during their testimony before the Panel that documents, checks, expenses, attorney fee bills, and other records responsive to Housel's Second and Third Requests existed at the time of the appeal. See, infra.

It is undisputed that records of contemporaneous time and billing records were maintained by attorneys at Stafford & Stafford Co., LPA, and stored electronically at the firm, and existed at the time of the discovery dispute. (Board Opinion at p. 34; Tr. 3430-31) This evidence further exonerates Mr. Stafford, and reveals that the Board Opinion is not accurate in its premise, analysis and findings of misconduct. As these documents³¹ existed at the time of the discovery dispute and the filings with the trial court and the court of appeals, the filings themselves are not misleading (as erroneously found by the Board Opinion at pp. 35-38) and there was no obligation for Mr. Stafford to "dispel misimpressions created by Stafford & Stafford's misleading court filings." Mr. Stafford was candid with the courts in advancing such arguments – the documents existed at the time of the discovery dispute and the arguments advanced by Mr. Stafford in regard to Housel's discovery requests, had a good faith basis in law and fact.

6. ***The Appeals Were Filed And Argued In Good Faith; And The Issues On Appeal Included More Than Attorney Fee Bills Between Stafford & Stafford Co., L.P.A. and Dr. Muehrcke.***

³¹ Expense invoices, bills, checks for attorney fee payments, checks for payments of litigation expenses (expert fees, deposition costs, copying costs, filing fees, etc.) and attorney fee bills for other attorneys and law firms other than Stafford & Stafford Co., LPA, and time and billing records for Stafford & Stafford Co., LPA.

7. **Mr. Stafford Did Not Delay Or Obstruct Discovery By His Law Firm Filing An Appeal And The Position Advanced In Defense Of Housel's Discovery Requests Was Made In Good Faith And Supported By Ohio Law And A Good Faith Argument For The Extension, Modification, Or Reversal Of Existing Law.**

The trial court's denial of the motions for protective orders constituted a final appealable order under Ohio Revised Code §2505.02, and Dr. Muehrcke had the absolute right to file an immediate appeal. Even Housel's counsel admitted that "we all have a right to file an interlocutory appeal if there are privilege issues at stake." (Sansalone depo at p. 32; Petrov depo at p. 31)³² Dr. Muehrcke had the option to submit the records to the trial court for an in camera inspection or to exercise his immediate right to appeal the trial court's decision.³³ On December 9, 2004, two interlocutory appeals of the trial court's orders were filed relating to the issues of attorney-client privilege, work product, spousal privilege and relevancy.³⁴ (Relator's Exhibit 51) In the appeal, the filings of Stafford & Stafford Co., LPA, advanced the following arguments: (1) *the requested information relating to fees and expenses had absolutely no relevancy to the case as Dr. Muehrcke was not claiming fees and expenses as damages*; (2) *the attorney-client privilege applied to communications and billing between Dr. Muehrcke and Stafford & Stafford Co., LPA*; (3) *the requests sought work product material*; (4) *the attorney-client privilege applied to the communications and billing relating to eight other attorneys and law firms identified in the*

³² When a similar document request was made for Housel's attorney fees paid, "Housel objected based in part on the argument that 'the documents requested ... are protected from discovery by the attorney-client privilege and work product doctrine.'" (Board Opinion at p. 32)

³³ See, *Everage v. Elk & Elk* (2004), 159 Ohio App.3d 220 (disclosure of records argued to be privileged could not be meaningfully appealed after the trial court's in camera inspection).

³⁴ Dr. Muehrcke filed two separate appeals addressing the trial court's finding that fees and expenses were not protected from disclosure by the attorney-client and work product privilege (Case No. CA-04-85643); and the finding that the spousal privilege was inapplicable (Case No. CA-04-85644). Yet the Board Opinion makes the mistaken premise that the appeal only involved an appeal of the trial court's order in regard to the request made by Housel for attorney fee bills between Dr. Muehrcke and Stafford & Stafford Co., LPA.

Requests; and (5) *the spousal privilege applied between Dr. Muehrcke and his wife. (Id.)* Even Petrov and Sansalone admitted the appeal did not only involve the issue of the trial court's order relative to the request made by Housel for attorney fees and expenses between Dr. Muehrcke and Stafford & Stafford Co., LPA. (Tr. 2581, 2696, 2930, 3092)

The attorney-client privilege issues on appeal did not only involve billing between Dr. Muehrcke and Stafford & Stafford Co., LPA,³⁵ but also involved billing of eight other individual attorneys and/or firms. (FN 3, *supra*; Tr. 3092) The disclosure of Taft Stettinius, Porter Wright, John Heutsche and other attorney fee bills; payments of attorney fees and litigation expenses, and the time records and litigation costs of Stafford & Stafford Co., LPA, all of which existed at the time of the appeal, were all properly argued to be privileged, by Stafford & Stafford Co., LPA. Further, the disclosure of such information raised issues of work product privilege. Additionally, the appeal also involved, and the court of appeals addressed, the trial court's denial of the motion for protective order relative to the spousal privilege. Although the Eighth District Court of Appeals affirmed the trial court's orders, it specifically stated: "***The court finds that there were reasonable grounds for this appeal.***" (Relator's Exhibit 56, at p. 11) When the matter returned to the trial court in 2006, the documents were provided to the trial court for an *in camera* inspection. (Board Opinion at p. 32) Contrary to the Board Opinion there were reasonable grounds for the appeal, and, no unreasonable costs or delays associated with the appeal or to Housel's defense.

³⁵Although Stafford & Stafford Co., LPA, had not yet sent its attorney fee bills to Dr. Muehrcke at the time of the appeal, it had in fact tracked all time and billing relative to the representation of Dr. Muehrcke, and had sent Dr. Muehrcke correspondences, letters and bills and invoices for litigations expenses. (Ex. 77, Stafford affidavit; Tr. 3430-31). When the Eighth District Court of Appeal's affirmed the trial court's order, the recorded billing was generated into an itemized statement and submitted to the court for an *in camera* inspection. Contrary to Relator's claims, billing entries; and other documents which had been sent to Dr. Muehrcke; did exist at the time the appeal was taken.

Relator's claim that Stafford & Stafford Co., LPA delayed or obstructed discovery by filing an appeal on behalf of Dr. Muehrcke is without merit for several reasons. Mr. Stafford testified that he did not file the appeal to delay the matter, but to protect Dr. Muehrcke's privilege; and that he was ready to try the case in December 2004. (Tr. 3458-59) Kamp testified that the appeal was reasonable and necessary to protect the privilege issues. (Tr. 3304, 3307-08, 3315) There were numerous privilege issues on appeal, apart from the documents requested by Housel relating to expenses and attorney fees between Dr. Muehrcke and Stafford & Stafford Co., LPA. ***The court of appeals specifically found that there were reasonable grounds for the appeal.*** After the case was remanded, Mr. Stafford promptly provided the documents to the trial court for an *in camera* inspection, after being instructed to do so at the May 24, 2006 pretrial. (See Moore depo at Ex. 15; Board Opinion at p. 32) Further, Housel and his counsel would have continued to demand discovery of the remaining issues on appeal, regardless of the attorney fee bills between Dr. Muehrcke and Stafford & Stafford Co., LPA. (Tr. 3456-57)

8. **Mr. Stafford Never Indicated That There Was A Contingency Fee Agreement.**

The evidence at trial revealed that neither Mr. Stafford nor Dr. Muehrcke ever indicated that there was a contingency fee agreement between Dr. Muehrcke and Stafford & Stafford Co., LPA in regard to the Probate Court proceedings or the legal malpractice action. The only evidence in the record which even remotely suggests that Mr. Stafford indicated that there was a contingency fee agreement is the unsubstantiated testimony of one of Housel's counsel, Monica A. Sansalone. Sansalone, in fact, submitted the grievance against Mr. Stafford.

Sansalone's testimony is simply not credible. In December 2006, Housel, Petrov and Sansalone lost a \$179,166 jury trial in the *Muehrcke v. Housel* matter to Mr. Stafford. In February 2007, Sansalone – ***at Housel's request*** – sent correspondence to Jonathan Marshall, Secretary of the

Board of Commissioners on Grievances and Discipline, containing substantial documentation involving the *Muehrcke v. Housel* matter in order to have Mr. Stafford investigated. (Tr. 2999-3008) Sansalone refused to reveal why the material was sent to Board Secretary Marshall, rather than to Disciplinary Counsel. The evidence revealed that after that time Sansalone continuously communicated directly with Lori J. Brown of Disciplinary Counsel without a grievance even being submitted against Mr. Stafford. (Respondent's Exhibit K; Tr. 2997-3002; 3008-13)³⁶ Sansalone and Lori J. Brown orchestrated and "strategized" the timing of the filing of Mr. Stafford's grievance in order to "lock in" Mr. Stafford to his appellate arguments, all during a pending appeal in the *Muehrcke v. Housel* matter. (Tr. 3008-12) Lori J. Brown critiqued and assisted Sansalone on appellate briefs and motions while the appeal was pending, and prior to any grievance being submitted against Mr. Stafford. (*Id.*)

The overwhelming evidence in the record contradicts Sansalone's sole testimony, and proves that there was no such contingency fee agreement. Dr. Muehrcke testified during his deposition that there is no contingency component or contingency fee with Stafford & Stafford Co., L.P.A. (Relator's Exhibit 43 at p. 174-176.) Petrov and Sansalone admitted that Dr. Muehrcke testified under oath that there was no contingency fee agreement. (Tr. 2564, 2949, 2952) Checks for payments of litigation expenses and attorney fees existed from Dr. Muehrcke to Stafford & Stafford Co., LPA.³⁷ Certainly cancelled checks of payment of tens of thousands of dollars from Dr. Muehrcke to Stafford & Stafford Co., LPA contradict Sansalone's baseless contingency fee

³⁶ Evidence was submitted including 30+ emails between Lori J. Brown and Sansalone. (*Id.*) Sansalone admitted that she expressed Housel's sentiments to Lori J. Brown. (Tr. 2999)

³⁷ (Relator's Exhibit 65, 127; Tr. 2972-73).

allegation. Various representatives of Stafford & Stafford Co., LPA, submitted sworn affidavits to the trial court,³⁸ outlining the attorney fee bills which were prepared and sent to Dr. Muehrcke.

During the litigation of the *Muehrcke v. Housel* matter, Gallagher Sharp (Petrov and Sansalone's law firm and Housel's counsel) and Stafford & Stafford Co., LPA (Muehrcke's counsel) were involved in another matter of litigation known as *Miller v. Bassett*, 2006-Ohio-3590.³⁹ Stafford & Stafford Co., LPA represented its client in *Miller* pursuant to a contingency fee agreement. Mr. Stafford testified that at no time did he indicate to Sansalone or anyone that he was representing Dr. Muehrcke on a contingency fee basis. (Tr. 3453-55) Mr. Stafford testified that he had discussed both appellate matters (*Muehrcke* and *Miller*) with Sansalone on certain occasions, and had disclosed to Sansalone the fact that he represented his client in *Miller* on a contingency fee basis and that her request for attorney client material in *Miller* was a dead end because it was a contingency fee basis, and it was not going to be like her request in *Muehrcke*. (Tr. 3453) Sansalone admitted that she was involved in *Miller* during the same timeframe when the *Muehrcke v. Housel* matter was pending. (Tr. 2992-93) It was clear that Sansalone either confused the two cases or fabricated the issue.

9. ***The Issues Addressed In Count II Of Relator's Amended Complaint Have Been Previously Addressed And Determined By Numerous Courts In Favor Of Mr. Stafford.***

Housel filed numerous motions to dismiss and motions for sanctions, alleging the same misconduct as that contained in Count II, and which were all denied by the trial court and the court

³⁸ See, Plaintiff's Memorandum In Opposition To Defendants' Renewed Motion To Dismiss And For Other Sanctions.

³⁹ *Miller* was an accountant malpractice case, which was pending at the same time as *Muehrcke v. Housel*. Mr. Stafford and Sansalone were both involved as opposing advocates in the *Miller* matter, and had discussions in regard to that matter. During discovery in *Miller*, Gallagher Sharp requested attorney-client communications (including documents between Miller and Stafford & Stafford) which was ordered over objections of Stafford & Stafford Co., LPA. The court of appeals vindicated Mr. Stafford's position by reversing the trial court's order of disclosure. (2006-Ohio-3590). (Tr. 3452-53)

of appeals. (Tr. 3466-67) Petrov and Sansalone admitted the prior adjudication of these allegations. (Tr. 2680-84, 2926-28) On January 16, 2007, Housel filed a Motion for Sanctions with the Eighth District Court of Appeals, *fifteen months after the interlocutory appeal issues in Case Nos. 85643 and 85644 had been already been decided, and which also asserted the same allegations of misconduct raised in Count II.* (Ex. J) Specifically, Housel argued that Stafford & Stafford Co., LPA should be sanctioned because: (1) the interlocutory appeal was frivolous; and (2) Stafford & Stafford Co., LPA allegedly made numerous false representations and misleading statements and arguments about fee billing being privileged when in fact actual bills did not exist. (*Id.* at p. 1) ***On January 23, 2007, the Eighth District Court of Appeals denied Housel's Motion for Sanctions.*** (Ex. H) On March 14, 2007, Housel sought a discretionary appeal with this Court in Case No. 2007-0420, which was denied on June 22, 2007. The exact same issues argued by Relator in Count II of its Amended Complaint were argued by Housel in the numerous requests for sanctions, including the discretionary appeal, and were rejected by the respective court each time. Mr. Stafford respectfully sets forth that principles of *res judicata* and collateral estoppel should preclude Relator's prosecution of the same. Housel's fifteen month delay in requesting sanctions after the court of appeals rendered a decision is a testament to the relentless pursuit of Housel and his counsel to have Mr. Stafford sanctioned / disbarred.

10. **Mr. Stafford Did Not Have A Dishonest Or Selfish Motive In Advancing Good Faith Arguments Of Privilege In Reference To Housel's Discovery Requests.**

The Board Opinion failed to recognize that there were numerous documents (electronic and otherwise) that were in existence in regard to litigation expenses and time and billing records between Stafford & Stafford Co., LPA and Dr. Muehrcke; Dr. Muehrcke had in fact paid attorney fees to Stafford & Stafford Co., LPA by check for attorney fees and litigation expenses; and Stafford & Stafford Co., LPA had, in fact, sent various correspondences and letters to Dr. Muehrcke

containing litigation expenses, expert fees, costs; there were records of actual expenses, invoices, checks; attorney fee bill for other attorneys and law firms (other than Stafford & Stafford Co., LPA); all of which were in existence at the time of the filings in the trial court and court of appeals in regard to the discovery dispute. Therefore, the arguments advanced in the filings made by Stafford & Stafford Co., LPA, were not misleading, were made in good faith, were supported by the facts and law (or a good faith argument for an extension, modification or reversal of existing law), and did not need clarification. Mr. Stafford testified that he did not file the appeal to delay the matter, but to protect Dr. Muehrcke's privilege; and that he was ready to try the case in December 2004. (Tr. 3458-59) Moreover, Mr. Stafford cannot be said to have a dishonest or selfish motive as there was nothing to gain by the misconduct alleged in the Board Opinion. Even after the appeal, the requested records were never utilized by Housel. In fact, Petrov told the trial court that the requested records were irrelevant to the trial; and misled the trial court indicating that he had not received attorney fee bills from Stafford & Stafford Co., LPA. (Relator's Exhibit E, pp. 6-7)

OBJECTION 7: The Board's Recommendation Is Contrary To The Purpose Of Attorney Discipline Proceedings In Ohio; And The Recommended Sanction Appears To Be Centered Solely On Respondent's Prior Disciplinary History, Which Is More Than Ten Years Old.

The purpose of disciplinary actions, Lord Mansfield wrote in 1778, 'is not by way of punishment; but the courts on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.' [Citation omitted.] The guiding principle in this case, as in all our disciplinary proceedings is the public interest in an attorney's right to continue to practice a profession imbued with public trust. We have previously emphasized that respect for the law and our legal system is the *sine qua non* of that right to continuance on the rolls. *Disciplinary Counsel v. Trumbo* (1996), 76 Ohio St. 3d 369, 372-373.

It is well settled that "the primary purpose of the disciplinary system is not to punish the offender, but to protect the public." *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074 citing *Disciplinary Counsel v. O'Neil*, 103 Ohio St.3d 204, 2004-Ohio-4704. This Court explained in *Ohio State Bar Assn. v. Weaver* (1975), 41 Ohio St.2d 97, "[i]n a disciplinary matter,

the primary purpose is not to punish an offender; it is to protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client; it is to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so to deprive him of his previously acquired privilege to serve as an officer of the court." *See also, Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510.

Moreover, this Court recently modified the pronouncement articulated in *Trumbo supra*, to state that "[W]e are always mindful that the disciplinary process exists not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship and to allow us to ascertain the lawyer's fitness to practice law." *Akron Bar Assn. v. Catanzarite*, 119 Ohio St. 3d 313, 319, 2008-Ohio-4063.

There is no evidence to suggest that the public should be protected from Mr. Stafford. The Board Opinion appears to be centered on a prior occasion in the year 2000 when Stafford was publicly reprimanded. *Cuyahoga Cty. Bar Assn. v. Gonzalez*, 89 Ohio St.3d 470, 2000-Ohio-211. The Board Opinion states "It weighs heavily in our sanction recommendation that Respondent fears discipline for a second time, for conduct not altogether different from the first time" (Id. at 78). In *Gonzalez*, Mr. Stafford was called a "piece of sh * t" by an opposing attorney, Gonzalez, to which Mr. Stafford responded, you're "a total ass ****" This event occurred in January 1998, and was the basis of the public reprimand.

It is imperative for this Court to note that the conduct alleged which resulted in the prior public reprimand is neither related to, nor the same as the alleged conduct found by the Panel, in this matter, to constitute misconduct; nor does the prior public reprimand have any relation to this matter (other than as a potential aggravating factor). The Board Opinion which focuses on what it terms as "bullying" or the Gonzalez issue. . . entirely disregards what the Board Opinion found Mr. Stafford

violated. Yet the Board Opinion incorrectly stated that “[w]e therefore find commonality his first offense and the instant violations”. (Id. at 76) Reviewing the prior offense, and what the violations which the Panel determined in this matter, there is no such commonality. While the Board Opinion did not always approve of, or care for Stafford’s style, this does not equate to a disciplinary violation. See, Filkins, supra (“While Baumgartner-Novak and other witnesses challenged respondent’s style of practice, neither she nor any of relator’s witnesses presented any evidence to attack respondent’s credibility, the issue at stake here.”) Further, pursuant to this Court’s decision in *Rust, supra*, as Mr. Stafford demonstrated that he advanced arguments in *Muehrcke* and *Radford* in good faith, and that he had an “arguable basis in law and fact that was not frivolous” for advancing such arguments; this Court must find, based upon its precedent, that Mr. Stafford committed no ethical impropriety or disciplinary violation, and dismiss Relator’s Amended Complaint in its entirety.

The fact that this matter involved a three year investigation by Disciplinary Counsel, twenty days of trial, 16 depositions and substantial costs, does not mean that misconduct “must” be found, and that punishment “must” be dealt. The facts and the evidence, and even the findings made in each count do not warrant the alleged misconduct eventually arrived at by the Board Opinion, nor the sanction recommended.

This Court must be mindful that just because someone has prior disciplinary history does not relieve Relator of its burden in proving the alleged misconduct in this case by clear and convincing evidence.

Again, it is clear on the record of the instant matter, whether by documentary or testimonial evidence, that Relator did not prove by clear and convincing evidence that Mr. Stafford engaged in any misconduct. Simply put, Mr. Stafford, despite the contrary and internally inconsistent findings

and conclusions contained in the Board Opinion, did not commit any manner of sanctionable misconduct. As such, and as the record of this case more than amply demonstrates, Mr. Stafford is in fact worthy "of the trust and confidence essential to the attorney-client relationship" and **clearly possesses the requisite character and fitness to practice law in the State of Ohio.** Id.

OBJECTION 8: The Board's Recommended Sanction Is Not Warranted And Is Unreasonably Punitive And Contrary To Law.

Because each disciplinary case involves "unique facts and circumstances," BCGD Proc.Reg. 10(A), this Court is not limited to the factors specified in the rule and may take into account "all relevant factors" in determining which sanction to impose. BCGD Proc.Reg. 10(B); *Cincinnati Bar Assn. v. Farrell*, 119 Ohio St.3d 529, 2008-Ohio-4540.

A. Mitigating Factors

This Court considers mitigating factors on a case-by-case basis. Mr. Stafford fully cooperated with an unprecedented investigation and crusade by Disciplinary Counsel for over three years. Mr. Stafford has been under the microscope and investigation of Disciplinary Counsel since 2006, which has included an exhaustive analysis of Mr. Stafford's pending cases and matters of litigation in Cuyahoga County, Ohio by personnel of Disciplinary Counsel. Despite unprecedented scrutiny, Mr. Stafford properly challenged the false allegations. Mr. Stafford has been highlighted numerous times in the Cleveland Plain Dealer concerning the false allegations raised by Disciplinary Counsel. Mr. Stafford has steadfastly asserted his objection and has not waived in his defense of his personal and professional reputation and services. Mr. Stafford could have easily succumb to the pressures of the investigation. Instead he mounted and put forth his defense, expending hundreds of thousands of dollars in attorney fees, litigation expenses, to defend his name and reputation.

There was no evidence that Mr. Stafford has any alcohol, drug, or other mental health issues. Mr. Stafford has not sought protection from any of the traditional safe harbor of those under

disciplinary scrutiny. Mr. Stafford is a Certified Specialist in Family Law by the Ohio State Bar Association. He has been a practicing attorney for nearly eighteen years. Mr. Stafford and his brother employ dozens of employees at Stafford & Stafford Co., L.P.A.

Mr. Stafford put forth mitigating evidence in the testimony of Judge Timothy M. Flanagan.

Judge Flanagan testified that Mr. Stafford is always prepared for trial:

Q How about Mr. Stafford, can you describe generally what it's like to have a case with Vince Stafford in your courtroom?

A You better be ready and at the top of your game.

Q And why do you say that?

A **He knows the law, he knows procedure, he knows how to try a case, and probably most important, he is prepared, completely and totally prepared.** If a question is asked that is objectionable, you can count on an objection being made. If someone has gone too far, an objection is going to be made. So you have to be really on the top of you game. **Some lawyers are sloppy, they'll come in and whatever comes out, comes out and that's it. He's not like that.** (Tr. p. 947).

The Board Opinion repeatedly found that Mr. Stafford had not engaged in any conduct involving dishonesty, fraud, deceit, or misrepresentation; and that he had not made a false statement of law or fact, or counseled or assisted his client in conduct that he knew to be illegal or fraudulent. There are numerous decisions cited below where the respondent(s) were found to have lied to a court, misrepresented facts, lied to clients, fabricated evidence, and/or destroyed evidence, and in some of the cases, the respondent(s) had prior disciplinary history. In almost all of the cases cited below, any disciplinary sanction or suspension from the practice of law was altogether stayed. The misconduct cited was far more egregious than that alleged against Mr. Stafford.

B. Cases cited by the Board Opinion

The cases cited and relied upon by the Panel and Board are distinguishable from and inapposite of the within matter. In fact, the reliance of the Board Opinion on *Cincinnati Bar Assn. v. Wallace* (1998), 83 Ohio St.3d 496, supports the conclusion that the sanction recommended by the Panel and Board is too severe and not supported by the evidence presented at trial. In *Wallace*, the respondent

received a public reprimand for submitting an unverified interrogatory answer. This Court found that the attorney's conduct did not obstruct the discovery process. Here, this Court should make a similar finding as Relator did not establish the alleged misconduct by clear and convincing evidence, that Mr. Stafford obstructed the discovery process or engaged in conduct prejudicial to the administration of justice, or that adversely reflects on the lawyers' fitness to practice law. In *Muehrcke*, Mr. Stafford advanced a legal argument as to privilege(s) based upon Ohio law [Civ. R. 26; O.R.C. 2317.02(A) and (D)] and based upon documents and information which existed at the time the arguments were advanced. The appeal was filed and argued in good faith. The court of appeals found that there were reasonable grounds for the appeal. Upon remand, the requested documents were provided to the trial court for an in camera inspection. Mr. Stafford did not engage in conduct prejudicial to the administration of justice, or that adversely reflects on the lawyers' fitness to practice law.

Mr. Stafford's actions are not analogous to the respondent's actions in *Cincinnati Bar Assn. v. Marsick* (1998), 81 Ohio St.3d 551. **In Marsick the respondent deliberately concealed relevant evidence, which resulted in judgment against the other party.** When a witness statement exonerating the defendant was revealed, the judgment against the defendant was vacated. The respondent was suspended for an actual six months. Mr. Stafford did not conceal, alter or destroy any evidence. The alleged misconduct charged by the Panel in Counts I and II do not rise to this level, and there are no such findings by the Panel or Board. Yet the Board Opinion recommended the same sanction as *Marsick*.

In this matter, the issues raised in Counts I and II have been litigated in front of trial courts and courts of appeals and decided in favor of Mr. Stafford and his clients. None of the courts found Mr. Stafford engaged in any discovery misconduct, abuse or violations of a court order. The Board

Opinion acknowledges that Mr. Stafford used his understanding of domestic relations law to “fulfill the needs and protect the interests of those he represents, particularly wives, who are confronting the pain, pressure, and loss involved in ending a marriage.” (Board Opinion at p.77)

The Board Opinion’s finding that Mr. Stafford “took advantage of his opponents’ lack of knowledge under circumstances where they could not disprove or effectively challenge his claims is unsupported by its conclusions in *Radford*. The Board Opinion’s specifically concluded that Mr. Radford’s trial counsel could have called Mr. Radford’s numerous prior counsel, Laubacher and Palkowitz, to testify and attempt to refute Mr. Stafford’s testimony regarding his compliance with discovery, but failed to do so. It is simply incredible and blatantly unfair that the failure of Mr. Radford’s attorneys is somehow reversed and utilized to make a suggestion that Mr. Stafford took advantage of them. The evidence presented at trial in this matter does not support this finding and conclusion, which essentially re-writes the specific determination and judgment of the trial court in *Radford* who actually heard and determined the testimony and evidence.

While the Board Opinion may disagree with Mr. Stafford’s style of practice, Relator did not present, by clear and convincing evidence, the violations alleged or found by the Panel. In *Radford*, the Panel’s findings of fact, and seventeen paragraphs of conclusions of law contradict Paragraph (18), wherein the Panel finds that Relator presented clear and convincing evidence that Mr. Stafford displayed a lack of diligence and therefore obstructed discovery in the *Radford* matter. In *Muehrcke*, the findings and conclusions in the Board Opinion are based upon the incorrect premise that documents did not exist at the time when the appeal was filed (arguing that such documents were privileged and not discoverable). As demonstrated by the evidence at trial, such documents did exist and, as such, there is no misconduct. Moreover, Mr. Stafford at all times advanced the privilege arguments in good faith and premised upon a reasonable basis in law and fact.

C. Case Law in Support of No Sanctions or Stay of Entire Suspension

This Court has issued less severe sanctions in cases involving more egregious violations. For example, in *Dayton Bar Assn. v. Ellison*, 118 Ohio St.3d 128, 2008-Ohio-1808, the respondent was found to have engaged in misconduct, including lying to a client about the status of a case. The respondent had previously been disciplined for similar conduct, receiving a public reprimand. In *Ellison*, the respondent failed to respond to a summary judgment motion, and her client's case was dismissed; and then lied to the client to conceal the fact that the case had been dismissed. Despite the finding of misconduct involving fraud, deceit, dishonesty, or misrepresentation; **and the prior discipline of a public reprimand**; this Court suspended the respondent from the practice of law for one year, **and stayed the entire suspension on the condition that the respondent serve a one year probation, be monitored for the one year period by an attorney, and attend a continuing education legal course.**

In *Pollock, supra*, the respondent was found to have crossed the line and engaged in substantial misconduct, frivolous conduct, and was sanctioned one year with six months stayed, the same sanction as in this matter.

The respondent in *Disciplinary Counsel v. Rohrer*, 124 Ohio St.3d 65, 2009-Ohio-5930, was found to have **violated court orders and then lied to the court, and made statements which were found to be false and misleading.** This Court stated of the respondent's conduct, "[d]eliberately disobeying a court order, then lying about it to the judge during a court hearing on the matter, is not justified by an otherwise commendable desire to protect a client and engage in zealous advocacy. This Court held that the **respondent's conduct warranted an actual six month suspension,** and stated "we have held, 'When an attorney engages in a course of conduct resulting in a finding that the attorney has violated [the rule prohibiting dishonesty, fraud, deceit, or misrepresentation], the

attorney will be actually suspended from the practice of law for an appropriate period of time.’

Fowerbaugh, 74 Ohio St.3d at 190, 658 N.E.2d 237.” This Court suspended the respondent for an actual six months.

The respondent in *Disciplinary Counsel v. Robinson*, 2010-Ohio-3829, was found to have violated the disciplinary rules by giving false and misleading testimony and by destroying documents that had potential evidentiary value. This Court suspended the respondent for one year from the practice of law.

The Respondent in *Disciplinary Counsel v. Niermeyer*, 119 Ohio St.3d 99, 2008-Ohio-3824, was found to have violated DR 1-102(A)(4) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation) and 7-102(A)(6) (prohibiting a lawyer from creating or preserving evidence when the lawyer knows or it is obvious that the evidence is false). The respondent failed to re-file a workers’ compensation claim, and then fabricated a new, purportedly timely filed, document. This Court suspended the respondent from the practice of law for one year, **with the entire suspension stayed on the condition that he committed no further misconduct**.

The respondent in *Disciplinary Counsel v. Taylor*, 120 Ohio St.3d 366, 2008-Ohio-6202, sought a continuance in a matter but failed to disclose that his client was deceased; and also obtained a client’s signature on a quitclaim deed and other documents without explaining their significance to one of the clients, who was bedridden and could not read English. This Court concluded that the respondent had acted out of a desire to advance what he believed to be his client’s interests but nonetheless had violated the Disciplinary Rules, including DR 7-102(A)(5) (knowingly making a false statement of fact). Because of the lawyer’s “undoubtedly sincere and selfless” efforts on behalf of his clients, and due to other mitigating factors, including his cooperation in the disciplinary

process, this Court ordered a one-year suspension, stayed on the conditions of successfully completing a one-year probation and committing no further misconduct.

In *Stark County Bar Assn. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, the respondent was found to have deliberately violated several orders of the court. While this Court found that the respondent violated DR 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), and 7-102(A)(1), and condemned the respondent's decision to disobey court orders, this Court suspended the respondent for six months, with the entire suspension stayed, upon the condition that he commit no further misconduct.

In *Office of Disciplinary Counsel v. Wrenn*, 99 Ohio St.3d, 2003-Ohio-3288, an assisting prosecuting attorney was found to have "failed to disclose discoverable information that was relevant, exculpatory, and not privileged and he failed to do so on more than one occasion." Yet, this Court suspended the respondent for six months with the entire six month suspension stayed.

In *Toledo Bar Assn. v. Rust, supra*, the panel found that the attorney violated Prof. Cond.R. 1.16(a)(1) and recommended that the respondent be suspended from the practice of law for one year. The board adopted the panel's findings of misconduct but recommended a six-month suspension, stayed on the conditions. This Court held that where an attorney initiated an action in good faith and had an "arguable basis in law and fact that was not frivolous for filing the claim;" the attorney committed no ethical impropriety and dismissed the complaint against him. This Court stated that "Lawyers may advance such claims in attempting to extend, modify, or reverse existing law." *Id.* This Court found that it did not need to decide whether respondent correctly interpreted precedent because lawyers are permitted to advance claims and defenses for which "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." (Prof. Cond.R. 3.1)

In *Filkins, supra*, this Court held that relator did not establish by clear and convincing evidence the misconduct alleged, despite the panel finding otherwise. This Court found that while the panel contained “conscientious and dedicated individuals who had an opportunity to see and hear the witnesses and to judge their credibility... we also recognize that we must make the final determination using the clear-and-convincing evidence standard.” This Court found that because the charges relied solely on the credibility of the witnesses and the evidence in the record undermined their credibility, the clear-and-convincing standard was not met. This Court disregarded the testimony of an attorney/witness offered by the relator in an attempt to discredit the respondent wherein the attorney claimed that the respondent “can be difficult at times and will fight in cases where others would settle.” This Court concluded that while the witnesses “challenged respondent’s style of practice, neither she nor any of relator’s witnesses presented any evidence to attack respondent’s credibility, the issue at stake here.”

Based upon this Court precedent in *Rust*, this Court should find that the misconduct alleged in *Muehrcke* has not been proven by clear and convincing evidence, and that the arguments advanced by Mr. Stafford do not constitute misconduct as “there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.” Based upon this Court’s precedent in *Filkins*, and the evidence presented at trial, this Court should find that the witnesses and evidence presented by Relator in *Radford* did not prove the alleged misconduct by clear and convincing evidence; and that while Relator and the Panel may disagree with and/or have challenged Mr. Stafford’s style of practice, such arguments do not amount to disciplinary violations.

The sanction recommended by the Panel and Board is punitive and contrary to Ohio law and case law dealing with similar alleged misconduct and circumstances.

OBJECTION 9: The Board's Recommendation As To Costs Must Be Set Aside, Out Of Principles Of Equity Sanction Is Not Warranted And Is Unreasonably Punitive And Contrary To Law.

Although the award of costs does not require a complete victory, the party being awarded such costs must obtain a substantial victory. *Parker v. I &F Insulation Co., Inc.*, 89 Ohio St.3d 261, 2000-Ohio-151; *Korn v. Ohio State Medical Bd.* (1991), 71 Ohio App.3d 483, 594 N.E.2d 720.

In this case, Disciplinary Counsel did not obtain a substantial victory. Disciplinary Counsel failed to establish three of the Counts in their entirety. In addition, the Board Opinion partially dismissed the two remaining counts of alleged misconduct. The Board Opinion found that Relator failed to establish virtually all of the alleged misconduct by clear and convincing evidence, despite a three year investigation and 22 days of trial. Thus, Disciplinary Counsel cannot be deemed to have obtained a substantial victory in this matter.

Not only did Disciplinary Counsel fail to obtain substantial victory, the assessment of all costs in this matter to Mr. Stafford is extremely prejudicial, punitive and fundamentally unfair. The statement of necessary expenses as submitted to this Court on September 13, 2010, indicates that costs of this matter being taxed to Mr. Stafford are in the amount of \$63,342.86 with \$44,354.65 of such costs relating to court reporter fees. The fact that Relator filed an Amended Complaint, adding Count V – without obtaining any review or approval from a probable cause panel – substantially increased the attorney fees and litigation expenses in this matter.

Mr. Stafford, however, was successful in obtaining the dismissal of nearly all of the allegations set forth in Relator's Amended Complaint. As evidenced by the record in this matter, Mr. Stafford filed motions to dismiss, filed five separate motions for summary judgment, and continually requested dismissal of all claims by Relator. Relator refused, despite the existence of overwhelming

evidence supporting dismissal. Mr. Stafford requested directed verdict on at least five separate occasions during trial.

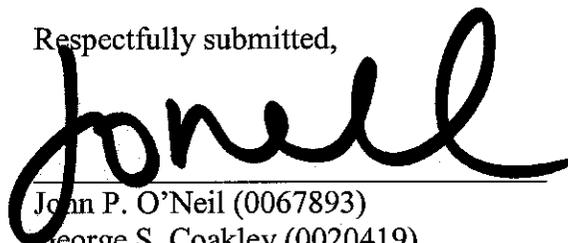
Relator's adamant refusal to dismiss any of its claims in this matter was not supported by the facts and circumstances resulting in the unnecessary incurrence of excessive costs and expenses. For example, approximately sixteen depositions were taken in regard to each of the five counts with almost half of the deposition related to the three Counts that were dismissed in their entirety. Further, approximately two-thirds of the 22 day trial was dedicated to the three Counts dismissed in their entirety. Mr. Stafford has been forced to incur hundreds of thousands of dollars in this matter in attorney fees and litigation expenses to defend his name and reputation against this unprecedented disciplinary investigation.

Considering the facts and circumstances of this case, it is simply inequitable and fundamentally unfair that all of the costs associated with this matter in the amount of \$63,342.86, be levied solely against Mr. Stafford.

IV. CONCLUSION

Based upon the foregoing, the Respondent, Vincent A. Stafford, respectfully requests that this Honorable Court sustain his objections and dismiss Relator's Amended Complaint, Counts One through Five, in its entirety, at Relator's costs.

Respectfully submitted,



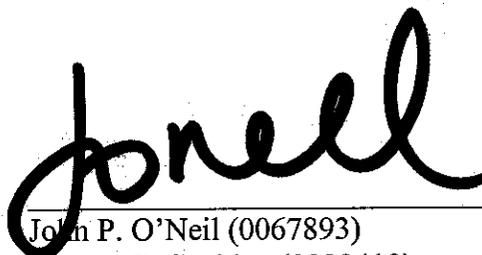
John P. O'Neil (0067893)
George S. Coakley (0020419)
REMINGER CO., LPA
101 Prospect Avenue
1400 Midland Building
Cleveland, Ohio 44115
(216) 687-1311
(216) 687-1841

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was forwarded via U.S. Mail on this 6th day October, 2010 to the following:

Lori J. Brown
Jonathan E. Coughlan
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

Disciplinary Counsel

A handwritten signature in black ink that reads "John P. O'Neil". The signature is written in a cursive style with a large, prominent "J" and "O".

John P. O'Neil (0067893)
George S. Coakley (0020419)