

ORIGINAL

**IN
THE SUPREME COURT OF OHIO**

Disciplinary Counsel, Relator	:	:	:	:	:
					CASE NO. 2010-1601
Vincent A. Stafford (0059846), Respondent	:	:	:	:	:
					RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT

**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
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AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT**

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Disciplinary Counsel
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Relator

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**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO
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INTRODUCTION

Now comes relator, Disciplinary Counsel, and hereby submits the following answers to respondent, Vincent A. Stafford's, objections to the report of the Board of Commissioners on Grievances and Discipline (the board). Many of the relevant facts of this matter are set forth in the board's Findings of Fact, Conclusions of Law, and Recommendation ("the report") that was attached to the objections that were filed by relator.

Based upon the clear and convincing evidence of misconduct presented at the disciplinary hearing, the board determined that respondent violated the Ohio Rules of

Professional Conduct and the Disciplinary Rules. The board's report was certified to this court and a show cause order was issued September 17, 2010. Both parties timely filed objections to the board's report.

BACKGROUND INFORMATION AND OTHER RELEVANT FACTS

In his introduction and statement of facts, respondent tries to persuade this Court that "nearly all" of the allegations of misconduct against him were dismissed. Respondent claims that relator "failed to establish virtually all of the alleged misconduct" and that the board "struggled" to find violations of the disciplinary rules. Respondent's descriptions and assertions are troubling mischaracterizations of the board's 81-page report.

Contrary to respondent's claims, the board determined that as to Count One (*Radford v. Radford*), respondent, Vincent A. Stafford, violated DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (a lawyer shall not engage in conduct that adversely reflects upon the lawyer's fitness to practice law); Ohio Prof. Cond. Rule 3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence); Prof. Cond. Rule 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Prof. Cond. Rule 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. Rule 8.4(f) (conduct that adversely reflects on the lawyer's fitness to practice law). As to Count Two, the board determined that respondent violated DR 1-102(A)(5) and DR 1-102(A)(6) during *Muehrcke v. Housel*.

The board dismissed additional violations charged in Count One and Count Two and relator has objected to those dismissals. The board dismissed Counts Three, Four, and Five and relator has not objected. In failing to sustain some of the violations in Counts One, Two, Three and Four, the board did “so not because the panel believed respondent behaved well or appropriately in the circumstances relevant to the alleged violations – indeed, in many instances, the panel [did] not – but simply because [the panel was] not satisfied that relator presented clear and convincing evidence establishing the disciplinary violations alleged.” Report at 3.

The board recommended that respondent be suspended from the practice of law for 18 months with 12 months of the suspension stayed, accompanied by monitored probation. Report at 80. Relator has objected to the recommended sanction and has asserted that an actual 18-month suspension is warranted. Relator has also objected to the board’s recommendation that an attorney be appointed to monitor respondent.

Respondent’s characterization of this disciplinary case as one in which he was the “victim” of “the crucible of the trial process” combined with his pointed efforts to blame others for the breadth of this disciplinary proceeding is consistent with the fact that respondent has yet to accept responsibility for his misconduct. In contrast, the board’s recommended sanction is on a par with the board’s findings of fact and conclusions of law. Accordingly and for all of the reasons set forth herein, this Court should reject all of respondent’s objections and enter an order consistent with the recommendations in the board’s report and relator’s objections.

RELATOR'S ANSWERS TO RESPONDENT'S OBJECTIONS

Answer to Objection 1

Respondent Violated Prof. Cond. Rule 3.4(a)

The tenor of respondent's objections indicates that respondent has not fully grasped the magnitude of the evidence or the substance of the findings of misconduct against him. Instead, respondent has continued to ignore his own conduct in favor of propagating insults against Bruce Radford and others. In arguing against the board's conclusions, respondent has offered this Court little more than sentiment without evidentiary or legal support.

Contrary to respondent's first objection, the panel in this disciplinary case was not called upon to decide whether Bruce Radford was "prepared" for trial in *Radford v. Radford*. The issue was not whether respondent and Judge Flanagan believed Bruce Radford was "prepared" for trial.¹ The board's findings of misconduct do not stem from allegations that respondent denied Bruce Radford access to witnesses, subpoenaed information, or evidence from third party defendants.

In reality, the issues in Count One are three-fold. The first issue is whether respondent was truthful and whether he testified candidly during *Radford v. Radford*. Correspondingly, the board was asked to decide whether respondent fully, timely, and in compliance with the disciplinary rules, responded to Bruce Radford's discovery requests. Finally, the board was asked to determine whether as an attorney at law and

¹ At the time he was called to testify on respondent's behalf, Timothy Flanagan was a judge on the Cuyahoga County Court of Common Pleas, Domestic Relations Division. Judge Flanagan retired shortly thereafter.

an officer of the court, respondent was honest and forthcoming to Bruce Radford's counsel with information about Diana Radford's discovery responses.

In deciding those issues, the board found that respondent's actions "showed contempt for the discovery process" and violated the Rules of Professional Conduct including Prof. Cond. Rule 3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence), Rule 3.4(c), Rule 8.4(d), and Rule 8.4(h). Report at 21. The board also found that respondent's misconduct began before February 1, 2007; therefore, respondent also violated the Code of Professional Responsibility. *Id.* at 22. The board concluded that respondent's lack of diligence in responding to discovery in the *Radford* case prior to February 1, 2007 "falls within the ambit of obstructing discovery" and violates DR 1-102(A)(5) and DR 1-102(A)(6). *Id.*

The tenor of respondent's first objection makes it clear that respondent does not accept or realize that an attorney can commit misconduct including the violation of Prof. Cond. Rule 3.4(a), even if the opposing party has access to "some" evidence. In contrast to respondent's assertions, "the ethical rules do not tolerate such hair-splitting." *In the Matter of Estrada* (2006), 140 N.M. 492, 503, 143 P.3d 731. "When requests are made to admit the existence of identifiable records or to produce identifiable documents, attorneys have an obligation under the rules to do so. Our system of justice is built on the assumption that trials are fair." *Id.*

As we stated in *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 169, 629 P.2d 231, 245 (1980), in construing our discovery rules, "we must begin with the notion that discovery is designed to 'make trial less a game of blindman's buff (sic) and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.'" *Id.* (quoted authority omitted). Thus, when attorneys do not comply with the rules of discovery, rather than engaging in

zealous advocacy for their clients, they are violating their professional obligations to the system of justice itself.

Id. at 504. See also *Cincinnati Bar Assn. v. Marsick*, 81 Ohio St.3d 551, 1998-Ohio-337, 692 N.E.2d 991 (Marsick violated three disciplinary rules by failing to reveal certain information in response to interrogatories propounded by the opposing party in a personal injury case).

Despite respondent's representations to this Court, the board did not conclude that Bruce Radford had "full access" to information. In fact, the board found "that respondent's evasive and obstreperous conduct in the [*Radford*] proceedings was prejudicial to the administration of justice, adversely reflected on his fitness to practice law, and substantiated relator's contention that he obstructed the overall discovery process in *Radford v. Radford*." Id. at 12, ¶18.

Moreover, respondent was Bruce Radford's opposing counsel. It was not for respondent to decide what constituted "full access to discovery" for Bruce Radford. Through his counsel, Bruce Radford asked interrogatories and asked for documents from respondent's client. Under the law, answers to those interrogatories and responses to his document requests is what Bruce Radford was entitled to receive. Relator established by clear and convincing evidence that respondent obstructed Bruce Radford's access to both of those things and that respondent obstructed opposing counsel's access to "facts about respondent's compliance with his discovery obligations." Id. at 16.

As the board determined, Bruce Radford's first attorney, Herb Palkovitz, issued discovery to respondent in July 2006. Id. at 6, Rel. Exb. 5 and 6. Respondent read the discovery requests and sent them to his client on July 20, 2006. Rel. Exb. 3 at 2. In the

absence of valid objections, a protective order, or an extension of time, Bruce Radford was entitled to receive complete, verified responses to his interrogatories and to a response to his request for production of documents within 28 days after July 20, 2006. See Civ. R.33 and Civ. R.34. Even if one believes that respondent actually gave Palkovitz the handwritten, unverified, incorrect and incomplete interrogatory responses in August 2006 (as respondent claims), respondent never fully complied with Civ. R.33 nor did he ever give Palkovitz formal responses to the document requests as required by Civ. R.34. Tr. at 137:5.

Bruce Radford's second attorney, Eric Laubacher, issued interrogatories and requests for production of documents to respondent on October 3, 2006. Report at 7. Without valid objections, a protective order, or an extension of time, Bruce Radford was entitled to a complete, verified response to those interrogatories as well as a formal response to the request for production of documents. Civ. R.33 and Civ. R.34. Laubacher received neither and as a result, Laubacher filed a motion to compel on November 17, 2006. Rel. Exb. 13; Tr. at 376:23; 394:18.

In December 2006 and after Laubacher's motion to compel was granted, respondent told Laubacher that Diana Radford's discovery responses would be forthcoming. Report at 8, ¶22 (emphasis added). See, also Tr. at 382:14; 386:22. Clear and convincing evidence establishes that at no point during that December conversation did respondent tell Laubacher that he had already provided documents to Laubacher nor did respondent ever tell Laubacher that he gave interrogatory responses to Palkovitz. Id. at 383:10.

Facts such as the foregoing are precisely what led to the board's determination that respondent was not fair to his opposing party and his opposing counsel in violation of Rule 3.4. If respondent really had provided interrogatories to Palkovitz, it would have been "fair" for respondent to share that information with Laubacher. By failing to do so, respondent obstructed Bruce Radford's access to information having potential evidentiary value in violation of Rule 3.4(a).

If respondent really had given Laubacher some *Radford* documents before their December telephone conversation, it would have been "fair" for respondent to have reminded Laubacher of that rather than to simply claim that documents "would be" forthcoming. By failing to do so and as determined by the board, respondent obstructed discovery in *Radford v. Radford*.² Report at 21-22.

Without quoting a single word of his *Radford* testimony, respondent asserts that he was "not obstructionist" and that he "answered all questions" in an "honest and direct manner" while being cross-examined during *Radford*.³ Respondent's argument is entirely unsupportable. Respondent also complains to this Court about Russell Kubyn's cross-examination as if to suggest that the questions should excuse the evasiveness

² As this Court is aware, in his objections, relator has asserted that the reason respondent did not tell Laubacher that he gave interrogatory answers to Palkovitz is because it never happened. Relator has also asserted that respondent did not "remind" Laubacher of a previous document exchange because that too, never happened. Regardless of which conclusion is reached by this Court, respondent violated Rule 3.4.

³ For reasons set forth in relator's objections, relator agrees with respondent's assessment that the board's conclusion that respondent "was obstructionist does not square with the [board's] finding that there were no misrepresentations by [respondent]." Respondent's Brief at 7.

and deception in respondent's replies.⁴ Respondent's arguments and complaints are hollow and without merit.

At no time while he was being cross-examined did respondent ask Kubyn to clarify his questions. Rel. Exb. 30. At no time prior to this disciplinary case did respondent claim that he did not understand a question. Id. Instead, an analysis of the *Radford* record confirms precisely what the board found – respondent “intentionally was attempting to obfuscate and hinder the truth-seeking process” while Kubyn was questioning him. Report at 16. See, also Rel. Exb. 30. The board further noted that respondent responded to Kubyn with “vague claims [and] only a few definitive assertions concerning his compliance with discovery.” Id. at 11.

As described by the board, respondent's *Radford* testimony was composed of “purposeful obfuscations[.]” Id. at 21. During his testimony, respondent was “engaged in a determined game of ‘hide the ball,’ designed to obfuscate rather than illuminate.” Id. at 20. Respondent “erected a smokescreen so dense that his [testimony] at times resembled a replay of ‘Who’s on First?’ rather than a search for the truth.” Id. The board concluded that respondent's conduct during his testimony was “totally unacceptable for an officer of the court.” Id. at 21. See *Marsick*, 81 Ohio St.3d at 555 (citation omitted) (holding that “[o]ur system of discovery was designed to increase the

⁴ Respondent's description of Russell Kubyn that appears in footnote number eight is needlessly offensive and misleading. Contrary to the implication in respondent's brief, the case involving Mr. Kubyn had nothing to do with Mr. Kubyn's representation of Bruce Radford. See *Lake Cty. Bar Assn. v. Kubyn*, 121 Ohio St.3d 321, 2009-Ohio-1154, 903 N.E.2d 1215. Contrary to respondent's claim, Mr. Kubyn never “admitted that he was psychologically unable to handle his cases.” See Tr. at 823:18 to 825:2. It is precisely this kind of unwarranted insolence and disrespect that led the board to point out that respondent must learn to “control his own behavior.” Report at 78.

likelihood that justice will be served in each case, not to promote principles of gamesmanship and deception in which the person who hides the ball most effectively wins the case.”)

Respondent’s first objection also ignores evidence that respondent offered during the disciplinary hearing. At the hearing, respondent repeatedly testified to the panel that his *Radford* testimony was fraught with “mistakes.” See, e.g. Tr. at 79:14; 116:9; 137:1; 148:2; 186:2; 220:10. For example, respondent told the panel that during his *Radford* testimony he “may have been mistaken,” “he may have misspoken,” he may have made “errors,” and that he made “simple mistakes[.]” See, e.g. id. at 220:10. Respondent’s claims are inconsistent and irreconcilable.

In his arguments to this Court, respondent also demonstrates his well-recognized pattern of erecting “smokescreens.” See, e.g. Report at 20. For example, respondent’s discussion of “Diana Radford’s separate property” in his first and second objections is nothing more than a “smokescreen.” All of respondent’s references to the issue of “separate property” are a ruse designed to overshadow his repeated violations of the Code of Professional Responsibility and the Ohio Rules of Professional Conduct.

Respondent raised the alleged “separate property” issue at the disciplinary hearing and tried unsuccessfully to convince the panel that it was Bruce Radford’s lawyers who were being disingenuous about discovery compliance. Respondent’s ploy resulted in the issue of “separate property” being ignored by the panel and the board. See, Report at 4-22. In sum, the concept of separate property was of no moment in the board’s decision and simply has nothing to do with whether respondent appropriately provided answers to Bruce Radford’s discovery. More importantly, the issue of

“separate property” has nothing whatever to do with whether respondent gave false and misleading testimony during the *Radford* trial.

Respondent’s repeated efforts to perpetuate this “separate property” ruse include but are not limited to his references to the letter from Kubyn that is Respondent’s Exhibit P. Kubyn’s letter does not provide support for respondent’s claim that he did not commit misconduct. Exhibit P has nothing whatever to do with whether discovery was provided and/or whether respondent’s *Radford* testimony was truthful.⁵ Tr. at 828:21. It is notable that respondent’s on-going efforts to disparage Laubacher and Kubyn resulted in the board concluding that all Laubacher and Kubyn did was “act civilly toward [respondent] and insist he play by the rules[.]” Report at 78. The board observed that in response, respondent reacted “by trying to bully or take advantage of them.” Id. at 79.

Respondent’s argument that excerpts of Judge Flanagan’s hearing testimony exonerate him must be also rejected. After evaluating respondent’s *Radford* testimony and all of the disciplinary hearing testimony, the board concluded that:

Kubyn simply was unable to pin respondent down, and Judge Flanagan did little to intervene and compel exact answers concerning which documents [respondent] produced and when (and, by inference, which he failed to produce). That Judge Flanagan showed relatively little interest in respondent’s compliance with discovery perhaps was due to the fact the primary question then before him was whether Bruce Radford should pay Diana Radford’s attorney fees and in what amount. So, to Judge Flanagan,

⁵ Kubyn drafted Exhibit P at respondent’s request. Tr. at 830:7. Respondent asked Kubyn for a letter on the Schwab account. Id. at 830:10. Kubyn was not shown a copy of the grievance and when he asked for a copy, respondent claimed that “it was confidential.” Id. at 829:4.

the question of respondent's alleged non-compliance with discovery might have seemed a subsidiary issue.

Report at 15 (emphasis added).⁶

Respondent's wholesale reliance on Judge Flanagan is out of place. As a witness in this disciplinary hearing, Judge Flanagan was excluded from the hearing room during all testimony other than his own. Judge Flanagan did not hear respondent testify to the panel that his *Radford* testimony was filled with "mistakes." See, e.g. Tr. at 220:10. Judge Flanagan did not hear respondent admit that despite his repeated claims under oath during *Radford* that he gave Bruce Radford's lawyer's "formal responses," that, in fact, formal discovery responses never existed and were never provided. Tr. at 137:5. Judge Flanagan did not hear Eric Laubacher testify that he would never have filed the motion to compel on November 17, 2006 if he had received discovery responses from respondent prior to that date. Tr. at 376:23; 394:18. Judge Flanagan did not hear Laubacher testify that when Laubacher withdrew as counsel for Bruce Radford in January 2007, he had not received responses to his interrogatories or requests for production of documents from Diana Radford. Report at 8, ¶23; Tr. at 396:3. Accordingly, respondent's efforts to convince this Court that Judge Flanagan made any relevant or cognizable findings about disciplinary rule violations, his *Radford* testimony, and/or his compliance with discovery should be rejected.

⁶ Respondent's assertion that Judge Flanagan "stopped [the *Radford*] trial and took a multi-day recess" to address the discovery issues lacks candor. As respondent well knows, after his testimony on October 9, 2007, the trial was in recess until October 30 while Bruce Radford served a jail sentence for contempt. See, e.g. Rel. Exb. 1. There is no evidence that the recess was taken to give Kubyn the opportunity to get Palkovitz or Laubacher to testify. In fact, as Kubyn testified to the panel, at the conclusion of respondent's testimony on October 9, Kubyn believed he had proved that respondent lied about giving discovery responses to Bruce Radford's counsel. Tr. at 911:23.

Rule 3.4 requires lawyers to display fairness to opposing parties and opposing counsel. As determined by the board, Rule 3.4 required respondent to conduct himself much differently than he did in *Radford v. Radford*. See, e.g. Report at 21. The clear and convincing evidence established that by failing to respond to discovery, by failing to be honest with Bruce Radford's counsel regarding those responses, and by giving testimony during *Radford* that was filled with "purposeful obfuscations," respondent unlawfully obstructed Bruce Radford's access to evidence in violation of Prof. Cond. Rule 3.4(a). Respondent's first objection should be overruled by this Court.

Answer to Objection 2

Respondent Violated Prof. Cond. Rule 3.4(c)

Like his first objection, respondent's second argument is filled with immaterial and conclusory claims. Respondent fails to offer this Court ample support for his assertion that the board erred in finding a violation of Prof. Cond. Rule 3.4(c). This Court should affirm the board's conclusion that by obstructing the process by which the court and opposing counsel were seeking to ascertain respondent's compliance with discovery, respondent knowingly disobeyed an obligation under the rules of a tribunal in violation of Prof. Cond. Rule 3.4(c).

Respondent begins his argument with the meaningless assertion that he "operated under a good faith belief that he had fully complied with all discovery obligations and court orders." Not only is that statement unsupported by the record,⁷

⁷ For example, the *Radford* court ordered him to provide discovery responses to Eric Laubacher by December 1, 2006. The clear and convincing evidence is that respondent did not comply with that court order and instead called Laubacher and told

what does respondent mean when he tells this Court that he “operated?” What was his supposed “good faith belief” based upon? Respondent’s obfuscations to this Court mimic his efforts to play “hide the ball” from Bruce Radford’s lawyers. Respondent’s argument about his “good faith belief” is as unclear as the dense smokescreen that was his testimony in *Radford*.

As he did throughout *Radford*, respondent fails to acknowledge that his “obligations” as an officer of the court extend much farther than he realizes. This Court has repeatedly held that the practice of law is “a learned profession grounded on integrity, respectability, and candor.” *Disciplinary Counsel v. Clafflin*, 107 Ohio St.3d 31, 34, 2005-Ohio-5827, 836 N.E.2d 564. As determined by the board, during *Radford*, respondent demonstrated a lack of candor. Report at 79. “A person must be able to trust a lawyer’s word as the lawyer should expect his word to be understood, without having to search for equivocation, hidden meanings, deliberate half-truths or camouflaged escape hatches. That trustworthiness is the essential principle embodied in [Rule 8.4(c)].” *In re Hiller* (1985), 298 Or. 526, 534, 694 P.2d 540.

An examination of the record in this disciplinary case confirms the board’s conclusion that notwithstanding his obligations as an officer of the court, “respondent’s actions showed contempt for the discovery process.” Report at 21. Respondent’s conduct was “totally unacceptable for an officer of the court.” *Id.* at 20. Respondent demonstrated “obstructive behavior” and a “lack of candor.” *Id.* at 79. Nothing

him that the responses “would be” coming. See, e.g. Tr. at 382:14; 386:22. It is impossible to square that evidence with respondent’s professed “good faith belief” that he complied.

respondent did during *Radford* bears even a modicum of resemblance to acting in “good faith.”

Moreover and as determined by the board, during *Radford*, “respondent intentionally was attempting to obfuscate and hinder the truth-seeking process, thereby preventing [opposing counsel] from eliciting facts about respondent’s compliance with his discovery obligations.” *Id.* at 16. Respondent’s *Radford* testimony was filled with “purposeful obfuscations[.]” *Id.* Throughout his testimony, respondent “engaged in a determined game of ‘hide the ball,’ designed to obfuscate rather than illuminate.” *Id.* at 20. Respondent “erected a smokescreen so dense that his [testimony] at times resembled a replay of ‘Who’s on First?’ rather than a search for the truth.” *Id.*

All of the board’s findings that respondent acted “purposefully” or “intentionally,” are findings that he “knowingly” acted to disobey his obligations to the tribunal in violation of Rule 3.4(c). See, e.g. *id.* at 16, 21. Prof. Cond. Rule 1.0(g) defines “knowingly,” “known,” or “knows” as denoting “actual knowledge of the fact in question.” Prof. Cond. Rule 1.0(g) further provides that “[a] person’s knowledge may be inferred from circumstances.” Likewise, Black’s Law Dictionary defines “knowingly” as, “With knowledge; consciously; intelligently; willfully; intentionally.” BLACK’S LAW DICTIONARY 872 (6th ed. 1990).

For the following reasons and those that are more fully set forth in relator’s objections, respondent’s assertions that he “complied” with Civ. R.33 and Civ. R.34 should be rejected by this Court. For example, respondent begins this argument with the claim that he “complied with Civ. R.33 by providing the interrogatory responses to Palkovitz.” Respondent follows that statement with a citation to page nine of the board’s

report. Respondent's citation to the report is entirely disingenuous. What the report really says at page nine, ¶34, is that "respondent testified [during the *Radford* trial] that he provided" the responses to Palkovitz. Moreover, it is clear that the panel did not place unqualified reliance on respondent's *Radford* testimony or upon his testimony at the disciplinary hearing. In contrast to respondent's assertions, the panel actually concluded that it was "unable to say with any degree of confidence whether or not respondent really did serve the formal responses on Palkovitz." Report at 13.

More importantly, the board did not find that respondent "complied" with Civ. R.33 or Civ. R.34. On the contrary, the board found just the opposite. Report at 22.

The board stated:

The panel does not believe respondent was reasonably diligent in responding to the discovery requests propounded by Palkovitz and Laubacher. However, it appears this conduct occurred before the effective date of Prof. Cond. R. 3.4(d) (a lawyer shall not in pretrial procedure, intentionally or habitually fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party). So the panel does not conclude that respondent violated Prof. Cond. R. 3.4(d). Rather, the panel concludes that his lack of diligence in responding to discovery propounded by Palkovitz and Laubacher falls within the ambit of obstructing discovery, which the panel believes constitutes violations of DR 1-102(A)(5) and DR 1-102(A)(6).

Id.

On the whole, respondent's position during this disciplinary case is in sharp contrast to his *Radford* testimony. Tellingly, respondent entirely fails to account for that distinction. To wit, if respondent had fully and completely complied with Bruce Radford's discovery requests, why did respondent fail to provide consistent, honest, and forthcoming testimony about that compliance? The answer to that question is fully

addressed in relator's objections, i.e. respondent's *Radford* testimony was false. Respondent did not respond to Bruce Radford's discovery requests and he could not and did not truthfully answer questions on the subject during the *Radford* trial. In truth, respondent "obstructed the overall discovery process in *Radford v. Radford*" and displayed a "mental state * * * of deliberate avoidance of discovery, a critical piece of the litigation machinery." *Id.* at 12 and 74.

As he did in his first objection, respondent relies heavily upon Judge Flanagan to support his contention that someone else is to blame for the circumstances in which he finds himself. Without any evidentiary support, respondent claims to this Court that "[a]ny issue of discovery compliance was adjudicated by Judge Flanagan in the *Radford* divorce matter." Respondent has apparently forgotten that the only "adjudication" by Judge Flanagan of a discovery issue during *Radford*, was his issuance of an order granting Laubacher's motion to compel.

In contrast to respondent's presentation to this Court, Judge Flanagan's actual role in the real issues facing this disciplinary panel was nil. Despite respondent's efforts, it is obvious that nothing about Judge Flanagan's testimony during this disciplinary hearing convinced the board that respondent conducted himself ethically during *Radford v. Radford*. As the board concluded, "[t]he fact that Kubyn was unable to pierce respondent's smokescreen and the Judge Flanagan did not deal effectively with respondent's evasiveness cannot change the character of respondent's obfuscations. The panel finds this conduct totally unacceptable for an officer of the court." *Id.* at 21. Moreover, it was never within Flanagan's province to determine

whether respondent violated the Ohio Rules of Professional Conduct or the Code of Professional Responsibility. See, Ohio Cons. Art. IV(2)(B)

Respondent's first two objections to the board's conclusions in Count One ignore his obligations under the Ohio Rules of Civil Procedure as well as his duty of candor and his duties as an officer of the court. As with his first objection, this Court should overrule respondent's second objection that affirm the board's conclusion that respondent violated Prof. Cond. Rule 3.4(c).

Answer to Objection 3

During *Radford*, Respondent Engaged in Conduct that was Prejudicial to the Administration of Justice and Conduct that Adversely Reflects Upon His Fitness to Practice Law

In deciding Count One, the board concluded that in addition to Rules 3.4(a) and 3.4(c) and beginning on February 1, 2007, in showing contempt for the discovery process during his *Radford* testimony, respondent also violated Rule 8.4(d) (conduct prejudicial to the administration of justice) and 8.4(h) (conduct that adversely reflects upon a lawyer's fitness to practice law). The board further held that respondent's showing of contempt for the discovery process was "a continuation of a course of conduct that respondent began to exhibit before February 1, 2007" and, therefore, respondent also violated DR 1-102(A)(5) and DR 1-102(A)(6). Report at 21, ¶18. In addition, the board determined that for the period of time before February 1, 2007, respondent's "lack of diligence in responding to discovery propounded by Palkovitz and Laubacher" fell within the ambit of obstructing discovery, which the board determined constitutes violations of DR 1-102(A)(5) and DR 1-102(A)(6). Id. at 22, ¶19. This Court

should overrule respondent's argument that the board erred by finding a violation of the foregoing Disciplinary Rules and the Ohio Rules of Professional Conduct for "the same act[.]"

In its report, the board was very clear in pronouncing each rule violation in Count One. First, the board found violations based upon respondent's *Radford* testimony. Then, the board found additional violations based upon a determination that respondent's "contempt for the discovery process" was part of a continuing course of conduct that began before February 1, 2007. Finally, the board found violations based upon respondent's lack of diligence in responding to discovery before February 1, 2007. Accordingly, the violations of Prof. Cond. Rules 8.4(d), 8.4(h) and DR 1-102(A)(5) and DR 1-102(A)(6) correspond to different acts of misconduct and to misconduct occurring on different occasions.

In arguing against the board's finding that he engaged in conduct that was prejudicial to the administration of justice and adversely reflects on his fitness to practice law, respondent overlooks clear and convincing evidence and the board's determination that his *Radford* testimony was composed of "purposeful obfuscations[.]" Report at 21. Respondent ignores the board's conclusion that during his testimony, he was "engaged in a determined game of 'hide the ball,' designed to obfuscate rather than illuminate." Id. at 20. Respondent's objection does not account for the fact that the board concluded that respondent's testimony was "totally unacceptable for an officer of the court." Id. at 21. Clearly, respondent's conduct was overtly and inherently prejudicial to the administration of justice and adversely reflects upon his fitness to practice law.

In *Cleveland Bar Assn. v. Cleary*, 93 Ohio St.3d 191, 2001-Ohio-1326, 754 N.E.2d 235, this Court was asked to define the phrase “prejudicial to the administration of justice” in a judicial discipline case. In setting the parameters for determining when a judge acts in a manner that is prejudicial to the administration of justice, the *Cleary* court observed that other states’ high courts had defined the phrase for attorneys. The *Cleary* court stated:

As the Supreme Court of Minnesota has observed, however, DR 1-102(A)(5) is sufficiently well defined because it “do[es] no more than reflect the fundamental principle of professional responsibility that an attorney * * * has a duty to deal fairly with the court and the client.” *In re Charges of Unprofessional Conduct Against N.P.* (Minn. 1985), 361 N.W.2d 386, 395; see also, *State v. Nelson* (1972), 210 Kan. 637, 640, 504 P.2d 211, 214 (“It cannot be seriously contended that ‘prejudicial’ does not sufficiently define the degree of conduct which is expected of an attorney”).

Id. at 206.

Two years later, this Court followed the pronouncements in *Cleary* in an attorney discipline case, *Cuyahoga Cty. Bar Assn. v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, 798 N.E.2d 369. In *Hardiman*, this Court held that an attorney engages in conduct that is prejudicial to the administration of justice “when he or she breaches his or her professional responsibility to deal fairly with the court and the client.” Id. at 264 (citing *Cleary*, 93 Ohio St.3d at 206).

In the present case, the board determined and the clear and convincing evidence establishes that respondent repeatedly engaged in conduct that violated Ohio Prof. Cond. Rule 3.4, i.e. the rule requiring an attorney to demonstrate fairness toward opposing parties and counsel. Inter alia, respondent violated that rule by displaying a lack of candor, obstructing the process by which a court seeks to ascertain his

compliance with discovery, and obstructing the discovery process. Correspondingly, respondent violated DR 1-102(A)(5) and Prof. Cond. Rule 8.4(d).

Similarly, it is evident that the board undertook a comprehensive evaluation of respondent's behavior in deciding that his conduct during *Radford* adversely reflects on his fitness to practice law. In reaching that conclusion, the board found that respondent's conduct was "totally unacceptable for an officer of the court." Report at 20. It is hard to imagine a conclusion that more clearly supports the board's finding that respondent violated Prof. Cond. Rule 8.4(h) and DR 1-102(A)(6).

The board further concluded that during *Radford*, "respondent intentionally was attempting to obfuscate and hinder the truth-seeking process, thereby preventing [opposing counsel] from eliciting facts about respondent's compliance with his discovery obligations." *Id.* at 16. It is beyond question that an attorney who engages in conduct that operates to "hinder the truth-seeking process," engages in conduct that adversely reflects on his fitness to practice law in the state of Ohio. See, e.g. *Disciplinary Counsel v. Robinson*, 126 Ohio St.3d 371, 2010-Ohio-3829, 933 N.E.2d 1095.

As determined by the board, relator presented clear and convincing evidence that respondent engaged in conduct that was prejudicial to the administration of justice and adversely reflects upon his fitness to practice law. Accordingly, this Court should overrule respondent's third objection.

Answers to Objections 4, 5, 6, and 7

Respondent Committed Misconduct During His Representation of Robert Muehrcke in *Muehrcke v. Housel*

Respondent's four objections to the board's findings regarding Count Two amount to little more than assertions that the board held him to an unreasonably high standard. Respondent asks this Court to find that his approach was simply "good enough" and that he had "no obligation to clarify [the] arguments" that he made on behalf of Dr. Muehrcke. Despite his protestations, respondent does not offer this Court any valid or compelling reasons to overturn the board's findings that he violated DR 1-102(A)(5) and DR 1-102(A)(6). Accordingly, this Court should overrule respondent's objections with regard to Count Two.⁸

The supposedly "good faith arguments" respondent offers to this Court and likewise offered to the panel, were never articulated while *Muehrcke v. Housel* was pending.⁹ Respondent is trying to erase his misconduct by changing history. In contrast, the arguments that were actually advanced by respondent during *Muehrcke v. Housel* were never "made in good faith." As determined by the board:

The common thread running through [respondent's] violations is respondent's palpable indifference to discovery directed at his clients. In each instance, had respondent been even slightly more forthcoming in responding to the discovery – whether by producing what he could of the requested discovery, demonstrating (as he claimed) that he already had complied with it, and/or making clear to opposing counsel and the judges involved which requested documents existed and which did not – he could have spared the courts, his opposing counsel and their clients,

⁸ Relator has objected to the board's dismissal of DR 1-102(A)(4), DR 7-102(A)(1), DR 7-102(A)(5), DR 7-102(A)(7), and DR 7-106(C)(1) in Count Two.

⁹ It is evident that respondent believes that regardless of the facts, if he labels his position "a good faith argument," that must simply make it so. Such is not the law.

and his own clients needless controversy, time, and expense. Because respondent did not take these relatively easy steps, but instead used his considerable abilities as a lawyer to stake out positions that he knew or must have known would needlessly escalate and prolong the proceedings, the panel concludes that his conduct was prejudicial to the administration of justice, reflects adversely on his fitness to practice law, and obstructed his opponents' access to evidence, and that this conduct warrants suspension of respondent's license to practice law[.]

Report at 3.

According to the board, “[k]nowing full well that the firm had never sent any written fee bills to Muehrcke for work done on the malpractice action, Stafford & Stafford nevertheless implied in court filings that they in fact had sent such bills to Muehrcke.” Id. at 36, ¶4 (emphasis provided). Despite respondent's protracted efforts to convince them otherwise, the board could not find any “legitimate excuse for making this misleading suggestion, not just once but over and over” in pleadings filed on behalf of Muehrcke. Id. at 37, ¶5. In toto, the facts of *Muehrcke v. Housel* just do not match respondent's arguments.

For almost two years from October 2004 until May 30, 2006, respondent “did not fulfill his duty of candor toward the trial court or the court of appeals.” Report at 37, ¶6 and 38, ¶7. The board stated:

On May 30, 2006, [Greg] Moore's letter [to Judge McDonnell] openly acknowledged that the firm never had sent Muehrcke any fee bills for work done in the malpractice action prior to May 27, 2006. There is absolutely no reason respondent could not have been just as candid about this fact in October 2004, when Housel first request[ed] attorney fee bills from Stafford to Muehrcke. For that matter, there is no reason respondent could not have corrected other misimpressions created in 2004, such as that engendered by Muehrcke's “guesstimate” [at his deposition] that he already had paid the Stafford firm “about ten, 15,000” for its work on

the malpractice action. Nor is there any reason respondent could not have cleared up the confusion engendered by the three extant descriptions of the Stafford-Muehrcke fee agreement – i.e., (1) that there was no contingent fee component, Relator’s Exhibit 43, 176; (2) that there was a contingent fee (which Sansalone claims respondent told her about on may 23, 2006); and (3) that there was a “handshake” deal [between Stafford and Muehrcke].

Id. at 37, ¶6 (emphasis added). The board concluded that “respondent’s lack of candor” warranted a finding that he violated DR 1-102(A)(5) and DR 1-102(A)(6). Id. at 38, ¶8. Clearly, conduct like respondent’s which is likely to impair public confidence in the profession, impact the image of the legal profession and engender disrespect for the court is conduct that is prejudicial to the administration of justice. *Attorney Grievance Comm. v. Child[ress]* (2000), 360 Md. 373, 758 A.2d 117.

In an effort to excuse his misconduct, respondent makes claims to this Court that are simply unsupportable. Although divided into numerous subsections, respondent’s claims can be distilled into a few topics. Respondent argues that certain material or information was “in existence” at the time of the offending arguments and, therefore, the board’s conclusion that the requested documents “did not exist” at the time of the appeal is erroneous. Respondent claims that the privilege issues on appeal involved more records than just the non-existent billing statements between Dr. Muehrcke and Stafford & Stafford. Finally, respondent claims that the legal issues on appeal included “more” than arguments about fee bills between Muehrcke and Stafford & Stafford. All of respondent’s claims were rejected by the board and should be rejected by this Court.

Respondent asserts that “contemporaneous time and billing records” and “electronic data of stored time” existed at the time of the appeal. Based upon the foregoing assertion, respondent claims that there was a “good faith basis” upon which to

advance Muehrcke's attorney-client privilege argument. This Court should reject respondent's contentions.

First, relator does not accept respondent's claim that the purported electronic records existed.¹⁰ Moreover, if "contemporaneous time and billing records" and "electronic data of stored time" were "responsive" to Housel's discovery requests, why were they never mentioned in any of the motions or briefs filed on behalf of Dr. Muehrcke during *Muehrcke v. Housel*? See, Rel. Exbs. 46, 48, 49, 52, 55. If "contemporaneous time and billing records" and "electronic data of stored time" are, in fact, responsive to Housel's requests, why were they never produced to Housel? See Rel. Exb. 127 and 65. If this electronic data exists, why was it not produced or introduced into evidence at the disciplinary hearing? If they exist and if they are responsive, respondent should have disclosed those "records" in their "raw data" format long, long ago.¹¹

The answer to the foregoing questions is actually very simple. Regardless of whether the records exist, respondent has invented this after-the-fact "electronic data" argument in an effort to convince this Court that he did nothing unethical. Respondent has invented facts, relied on a record that does not exist, and continued his pattern of failing to observe "his duty of candor to the courts." Report at 38. Moreover, even after considering the very same newly-minted claims, the board determined that during

¹⁰ The board apparently accepted respondent's claim that Stafford & Stafford maintained "contemporaneous records of their time and billing relative to the prosecution of *Muehrcke v. Housel*["] Report at 34, 36.

¹¹ Relator asserts that this alleged "raw data" is not responsive to Housel's requests. Stafford & Stafford's internal time-keeping records were not in Dr. Muehrcke's possession at the time of the requests and the request was served upon Dr. Muehrcke as the plaintiff in *Muehrcke v. Housel*. Civ. R.34.

Muehrcke v. Housel, respondent filed motions and briefs filled with “misleading suggestions” and in doing so created “misimpressions” that led to “almost two years of needless, acrimonious, and costly litigation.” Report at 37-38.

At no time while *Muehrcke v. Housel* was pending did respondent tell Housel’s attorneys that he was claiming privilege for Stafford & Stafford’s “records of time spent working on legal matters” or “internal billing records.” Tr. at 2647:14. At no time did respondent explain to Housel’s counsel that Dr. Muehrcke was claiming privilege for some data or records that were not even in his possession or control. See, e.g. Tr. at 3328:5. At no time did respondent argue that the definition of “documents” requested by Housel was overly broad. Tr. at 3330:25.

Respondent’s claim that he did not act unethically because Muehrcke’s appeals involved more than privilege arguments for the non-existent fee bills should also be rejected by this Court. Notwithstanding his efforts to expand his *Muehrcke v. Housel* arguments, respondent single-handedly narrowed the scope of his “privilege” claims in August 2004 during Dr. Muehrcke’s deposition. During that deposition, respondent repeatedly objected and obstructed Housel’s efforts to discover information from Dr. Muehrcke about Dr. Muehrcke’s fees and expenses. See, Rel. Exb. 43. Shortly after that deposition, respondent filed motions for protective orders arguing that Dr. Muehrcke’s Stafford & Stafford’s fee bills were “privileged.” Rel. Exb. 48 and 49. Respondent did the same during the interlocutory appeal in 2005. Rel. Exb. 52 and 55.

If respondent was really arguing that “enclosure letters” or “bills for litigation expenses” were “privileged” as he now claims, respondent should have referenced the same in his briefs. Moreover, bills for litigation costs, bills for expenses, and checks are

not secret, confidential, or “privileged.” R.C. 2317.02(A). Further, if respondent was really arguing that the material requested was somehow protected by the “attorney work product,” then one would expect to see more than brief, passing references to that phrase during the nearly two years these issues were pending.

Respondent’s claims that the “Taft Stettinius, Porter Wright, [and] John Heutsche” bills existed at the time of the appeal and are “privileged” is also unsupportable. As was repeatedly pointed out during the hearing, those were Laura Muehrcke’s attorney fee bills and respondent did not represent Laura Muehrcke in *Muehrcke v. Housel*. See, e.g. Tr. at 2650:19 and Report at 24.

Respondent’s oft-repeated claim that allegations of his wrongdoing in *Muehrcke v. Housel* have been addressed by other courts and decided in his “favor” was rejected by the board and should be soundly rejected by this Court.¹² Not until a formal complaint was filed with the Board of Commissioners on Grievances and Discipline, had a judicial entity with the authority to consider evidence of respondent’s misconduct been asked to determine whether respondent violated the Code of Professional Responsibility in *Muehrcke v. Housel*.

Respondent’s assertions that res judicata and collateral estoppel apply are in direct conflict with the decisions of this Court. In 2004, this Court held:

Beginning with the adoption of Supreme Court Rule XXVI in February 1875 . . . [and] culminating in the adoption of Section 2(B)(1)(g), Article IV of the Ohio Constitution in 1968, it has been methodically and firmly established that the power and responsibility to admit and discipline persons admitted to the practice of law, to promulgate and enforce professional standards and rules of conduct, and to

¹² Respondent made this claim ad nauseam to the hearing panel. See, e.g. Tr. at 3244:24.

otherwise broadly regulate, control, and define the procedure and practice of law in Ohio rests inherently, originally, and exclusively in the Supreme Court of Ohio. See *Smith v. Kates* (1976), 46 Ohio St.2d 263, 265-266, 75 O.O.2d 318, 348 N.E.2d 320; *Mahoning Cty. Bar Assn. v. Franko* (1958), 168 Ohio St. 17, 5 O.O.2d 282, 151 N.E.2d 17; *Cleveland Bar Assn. v. Pleasant* (1958), 167 Ohio St. 325, 4 O.O.2d 433, 148 N.E.2d 493; *In re McBride* (1956), 164 Ohio St. 419, 58 O.O. 242, 132 N.E.2d 113; *Judd v. City Trust & Sav. Bank* (1937), 133 Ohio St. 81, 10 O.O. 95, 12 N.E.2d 288, paragraph one of the syllabus; *In re Thatcher* (1909), 80 Ohio St. 492, 89 N.E. 39; Swisher, Professional Responsibility in Ohio (1981) 1.15-1.35.

Shimko v. Lobe, 103 Ohio St.3d 59, 62, 2004-Ohio-4202, 813 N.E.2d 669, 673.

The Supreme Court of Washington rejected a collateral estoppel argument advanced in a disciplinary case by now-disbarred attorney, Joseph P. Whitney. *In re Whitney* (2005), 155 Wash.3d 451, 120 P.3d 550. As the *Whitney* court observed, the issues presented to the disciplinary board were not identical to those in the underlying trial relied upon by Whitney. *Id.* at 464. The court pointed out that whether Whitney violated the Washington Rules of Professional Conduct was not an issue before the trial court and stated that the record in the disciplinary case was “devoid of any documentation that a final judgment was reached at superior court on the matter of misconduct.” *Id.* The *Whitney* court held that it was clear that the bar association was “not a party or privy to” the underlying trial. *Id.* According to the Supreme Court of Washington, the “application of the principles of collateral estoppel would likely work an injustice to the [bar association] and its ability to regulate attorney conduct.” *Id.*

Based upon its exclusive jurisdiction to hear attorney disciplinary matters, this Court adopted the Rules for the Government of the Bar. These rules designate the board to hear evidence in all attorney discipline cases. As such, respondent’s claim that

another court could determine whether he committed misconduct during *Muehrcke v. Housel* is totally without merit.

Respondent's unfortunate efforts to degrade Housel's attorneys, Alan Petrov and Monica Sansalone, mimic his baseless efforts to blame Russell Kubyn and Bruce Radford for the board's conclusions in Count One. Just like his futile references to "separate property" in his first and second objections, respondent's comments about Petrov's remarks to the court on day one of the *Muehrcke v. Housel* trial in 2006 are entirely inconsequential to this Court's determinations in this disciplinary case.

As Petrov explained to the hearing panel:

Q: (by respondent's counsel) And, you told Judge Lawther the reason you weren't going to use the attorney fee bills was because the plaintiffs had established or told you that they were not going to use them as exhibits, so they were irrelevant, correct?

A: (by Petrov) Yes.

Q: Not because you thought they were some type of bills that weren't bills, but because you said they weren't a measure of damages and they weren't going to be used at trial?

A: I wasn't going to pursue the theory I explained here during this [disciplinary] hearing. Since I wasn't going to pursue that theory and the only other theory of relevancy that I could imagine was as a measure of damages, and if plaintiffs weren't going to claim them as a measure of damages, and I had abandoned my theory, then they would have been irrelevant.

* * *

Q: And if you wanted to pursue whatever theory you wanted to have, you certainly had those documents to pursue that theory, correct?

A: I had the documents, but they didn't support the theory.

Tr at 2768:9. See, also id. at 2815:5. There is nothing about Petrov's remarks that has anything to do with the allegations of misconduct against respondent or the arguments respondent made in motions filed in 2004 or in briefs filed at the court of appeals in 2005.

Respondent's criticism of Sansalone focuses on his dispute with the board's conclusion that he failed to clear up "the confusion caused by the three extant descriptions of the Stafford-Muehrcke fee agreement." Report at 37, ¶6. Respondent fails to realize that even without Sansalone's testimony he brought all of "the confusion" upon himself by perpetuating a privilege claim for non-existent attorney fee bills. For example, respondent does not dispute the board's conclusions that Dr. Muehrcke testified in August 2004 that "there was no contingent fee component" and that in May 2006, it was revealed "that there was a 'handshake' deal" for fees between Muehrcke and Stafford & Stafford. Id. See, also, e.g. Tr. at 2902:2 to 2903:20.

At page 32, ¶27, the board recounted the testimony given by Sansalone about her conversation with respondent on May 23, 2006. The board noted that respondent denies telling Sansalone that Muehrcke was being represented on a contingency fee basis. Report at 32, ¶27. Despite respondent's assertion to this Court that Sansalone's testimony is "simply not credible," it was the panel's province to evaluate the credibility of witnesses in this disciplinary case. As this Court has held on numerous occasions, it will defer to the panel's credibility determinations unless the record weighs heavily against those findings. See, e.g. *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117. Although respondent criticizes Sansalone for other

baseless reasons, he offers no evidence whatever that weighs against the board's finding that he told Sansalone that there was a contingent fee agreement.¹³

In arguing against the board's conclusions, respondent claims that the board is mistaken because the court of appeals found "that there were reasonable grounds for [the 2004] appeal." Rel. Exb. 56 at 11, Report at 31. It is well-established that while the converse of that phrase has legal significance and often results in sanctions against the offending party,¹⁴ the fact that the court of appeals opinion states that "there were reasonable grounds," is, with all due respect to the court of appeals, entirely immaterial to this Court's consideration of respondent's conduct.

More importantly, respondent misses the entire point of the board's conclusions about his conduct in *Muehrcke v. Housel*. The board concluded that respondent gave "misleading" information about Dr. Muehrcke's fee bills to the court of appeals. The board stated that "respondent did not fulfill his duty of candor toward the trial court or the court of appeals." Report at 38. The court of appeals was misled and the court's declaration that "there were reasonable grounds," was based on misleading information supplied by respondent.

¹³ Respondent combines his disparagement of Sansalone with continued criticism of relator's counsel. See Report at 76. Respondent's representations to this Court are inaccurate and misleading. For example, respondent claims that relator's counsel "critiqued and assisted Sansalone on appellate briefs and motions while the appeal was pending, and prior to any grievance being submitted against Mr. Stafford." Brief at 35. The claim that relator's counsel "assisted" or influenced Housel's counsel with anything is markedly false. Tr. at 3069:5 to 3070:19. Moreover, the "grievance" was submitted to relator in July 2007, more than two years after the motions and briefs were filed for which respondent is facing discipline. Respondent appears to now be referencing briefs that are irrelevant to the charges of misconduct and that were filed by Housel's counsel months after the grievance was filed. See, e.g. Tr. at 3001, 3041, 3052, and 3094.

¹⁴ See, e.g. *State v. Senk*, 8th Dist. App. No. 88524, 2007-Ohio-3414 and *Cardone v. Cardone* (August 30, 2000), 9th Dist. App. No. 19867.

Respondent asks this Court to reject the board's conclusions based upon the testimony of David Kamp, a lawyer from Cincinnati. Offered to the panel over relator's objection as an "expert," on direct examination, Kamp simply tried to support every theory advanced by respondent.¹⁵ On examination by relator and the panel, Kamp admitted that he would have handled the entire dispute differently. See, e.g. Tr. at 3335:19 and 3377:4.

Notably, the board's 81-page opinion does not mention Kamp's testimony. Presumably the panel found itself to be more than capable of understanding the issues and the evidence in arriving at a correct determination without Kamp's assistance. See, e.g. *State v. Daws* (1994), 104 Ohio App.3d 448, 462, 662 N.E.2d 805 (finding that if the trier of fact can understand the issues and the evidence and arrive at a correct determination, expert testimony is unnecessary and inadmissible).

In sum, respondent's arguments about the attorney-client privilege in *Muehrcke v. Housel* were not made "in good faith." As determined by the board, during Dr. Muehrcke's deposition, he testified, over respondent's objections, that he had paid

¹⁵ Notably, courts across the country have rejected the use of expert testimony in attorney discipline cases. See, e.g. *In re Disciplinary Action Against Boulger*, 2001 ND 210, 637 N.W.2d 710 (expert testimony regarding the interpretation of the rules of professional conduct and whether a rule has been violated is inappropriate in a disciplinary proceeding); *In the Matter of Potts*, 336 Mont. 517, 2007 MT 81, 158 P.3d 418 (expert opinion that Potts did not violate the Rules of Professional Conduct excluded as improperly offering an opinion on a legal question); *Hawkins v. Comm'n for Lawyer Discipline* (Tex.App. 1999), 988 S.W.2d 927 (interpretation of the rules of professional conduct, like the interpretation of statutes, is a question of law for the court to decide); *In re Masters* (1982), 91 Ill.2d 413, 438 N.E.2d 187 (the hearing panel considered itself to be a body of experts and well able to resolve the issues before it); and, *In re Conduct of Leonard* (1989), 308 Or. 560, 784 P.2d 95, 100 (expert witness testimony at a disciplinary hearing "amount[s] to nothing more than an oral brief as to why one particular construction of the governing disciplinary rule would not be violated

respondent's firm for representation during the probate proceedings and during *Muehrcke v. Housel*. Report at 26-28. When Housel requested documents evidencing those payments, respondent resisted and argued to the trial court that evidence could not be produced because it was protected by the attorney-client privilege. Rel. Exb. 48 and 49. In December 2004 and when the trial court ordered respondent to produce the evidence, respondent filed an appeal. Report at 30. At the time of that appeal, the trial was scheduled to begin one week later. Rel. Exb. 62; Tr. at 2555:8. Respondent argued to the court of appeals that attorney fee bills sent to Dr. Muehrcke by Stafford & Stafford were privileged. Rel. Exb. 52 and 55. After this Court denied jurisdiction and long after the court of appeals affirmed the trial court's judgment entry, respondent then professed that there were no Stafford & Stafford fee bills and claimed that legal services for Dr. Muehrcke were performed on "a handshake." Report at 32. Shortly thereafter and almost two years after Dr. Muehrcke's deposition, Stafford & Stafford reconstructed time records for the legal services performed for Dr. Muehrcke and turned them over to the trial court. Report at 32.

According to the board, "[k]nowing full well that the firm had never sent any written fee bills to Muehrcke for work done on the malpractice action, Stafford & Stafford nevertheless implied in court filings that they in fact had sent such bills to Muehrcke." Id. at 36, ¶4 (emphasis provided). Despite respondent's protracted efforts to convince them otherwise, the board could not find any "legitimate excuse for making this misleading suggestion, not just once but over and over" in pleadings filed on behalf of

by a particular hypothetical set of facts. The accused was able to make the same legal arguments through counsel and did so. The evidence was not admissible.")

Muehrcke. *Id.* at 37, ¶5. This Court should reject respondent's objections and affirm the board's conclusion that respondent violated DR 1-102(A)(5) and DR 1-102(A)(6).

Relator's Answers to Objections 7 (sic) and 8¹⁶

**The Board's Recommended Sanction is
Not Unreasonably Punitive or Contrary to Law**

Respondent's complaints about the board's recommended sanction establish that respondent fails to see the damage his misconduct has caused to the administration of justice. Respondent's arguments also confirm that he has not accepted responsibility for his misconduct.

Playing the role of "victim," respondent argues that he did not commit misconduct and that he should not be sanctioned. In an alternative argument, respondent claims that this Court's precedent supports a "less severe" sanction than that recommended by the board. Respondent's arguments should be rejected by this Court and the 18-month actual suspension advocated by relator in his objections should be imposed.¹⁷

Respondent quotes from *Disciplinary Counsel v. Trumbo*, 76 Ohio St.3d 369, 372, 1996-Ohio-386, 667 N.E.2d 1186. Every word of the quote is apt and applicable to this disciplinary case – especially the Court's pronouncement that "[t]he 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." *Id.* Respondent violated that public trust in *Radford v. Radford* and *Muehrcke v. Housel*.

¹⁶ In the body of his brief, respondent has two objections bearing "number 7." One is on page 19 and addresses *Muehrcke v. Housel*. The second "number 7" is on page 38 of respondent's brief and addresses the recommended sanction.

In violating the public's trust during *Radford and Muehrcke v. Housel*, respondent caused harm by taking advantage of his opponent's lack of knowledge under circumstances where they could not disprove or effectively challenge his claims. Report at 79. Respondent's misconduct resulted in harm to others and to the justice system. *Id.* at 79, 80. Respondent's misconduct resulted in long and costly delays. See, e.g. *id.* at 38, 74. Respondent's mental state was one of deliberate avoidance of discovery, a critical piece of the litigation machinery." *Id.* at 74. Further, despite the fact that the board did not find clear and convincing evidence establishing every violation charged by relator, the board also did not believe that "respondent behaved well or appropriately in the circumstances relevant to the alleged violations[.]" Report at 3.

As this Court recently stated:

The law demands that all counsel foster respect and dignity for those who administer and enforce the law. Conduct that is degrading and disrespectful to judges and fellow attorneys is neither zealous advocacy nor a legitimate trial tactic. Lying to a tribunal and making false accusations against judges and fellow attorneys can never be condoned. Attorneys must advocate within the rules of law and act with civility and professionalism. "Counsel must recognize that in every trial, the integrity of the process is as much at stake as are the interests of the accused."

Columbus Bar Assn. v. Vogel, 117 Ohio St.3d 108, 112, 2008-Ohio-504, 881 N.E.2d 1244 (quoting *Disciplinary Counsel v. LoDico*, 106 Ohio St.3d 229, 2005-Ohio-4630, 833 N.E.2d 1235, citing *Mayberry v. Pennsylvania* (1971), 400 U.S. 455, 468, 91 S.Ct. 499, 27 L.Ed.2d 532 (Burger, C.J., concurring)). "When an officer of the legal system improperly thwarts the mechanisms within it, he improperly shows a disrespect for that

¹⁷ The board recommended that respondent be suspended from the practice of law for 18 months with 12 months of the suspension stayed.

system and the public confidence in the legal profession as a whole necessarily suffers a devastating blow.” *Attorney Grievance Comm. v. Sheinbein* (2002) 372 Md. 224, 254, 812 A.2d 981.

Respondent’s relationship with and conduct toward the courts and his “fellow practitioners has been so abysmally low in quality as to reflect adversely upon the legal profession.” *Ohio State Bar Assn. v. Talbott* (1979), 59 Ohio St.2d 76, 80, 391 N.E.2d 1028, 13 O.O.3d 64. “At this juncture in the history of the legal profession, when so many members of the bench and bar are striving to upgrade the reputation of the profession, we must not be hesitant to invoke the full measure of censure for those who flagrantly violate the standards of professionalism designed to protect the public.” *Id.* An actual suspension of respondent’s license is appropriate to protect the public and to stop respondent from “toying with the administration of justice.” Report at 79.

In arguing for a less severe sanction, respondent complains that the board made too much of his previous discipline, *Cuyahoga Cty. Bar Assn. v. [Gonzalez and] Stafford*, 89 Ohio St.3d 470, 2000-Ohio-221, 733 N.E.2d 185. Respondent argues that his first discipline was “the center” of the board’s opinion and asserts that the previous discipline has no “relation to this matter (other than as a potential aggravating factor).”

In contrast to respondent’s assertions, an analysis of the report indicates that it was actually respondent’s misconduct rather than his previous discipline that was the “center” of the board’s opinion. In considering all relevant factors in arriving at a recommended sanction, the board could not escape the inevitable comparisons between respondent’s misconduct during *Radford* and *Housel* and his verbal brawl with

opposing counsel during a domestic relations case that was the subject of his first disciplinary case. See BCGD Proc. Reg.10(B).

In the instant case, the board observed that when confronted with hostility from an opponent, respondent reacted in kind rather than “ris[ing] above such hostility.” Report at 76. For example, evidence of respondent’s willingness to badger Housel showed the panel that respondent “remains insufficiently mindful and respectful of his distinct role as an officer of the court, a role that demands dignified conduct.” Report at 76. As Alan Petrov explained to the panel:

Well, this is my belief, I believe that Mr. Stafford knew how to push Mr. Housel’s buttons. Mr. Stafford wanted Mr. Housel to lose his [composure] and act out and that Mr. Stafford knew how to do that, you know, the reference to the past criminal proceeding, even with a glance or a kind of little smile directed to Bob Housel would set him off and I * * * think Mr. Stafford knew how to do that with Mr. Housel, knew how to get a reaction and wanted that – wanted the chaos to occur. And I felt Mr. Stafford felt comfortable in these chaotic situations, that because they – I don’t know if he feels comfortable, but disrupt my deposition and make it harder for the deposition to proceed. And I do think that it was intended.

Tr. at 2788:15.

Respondent’s assertion that his previous discipline should play less of a role because it occurred 10 years ago should be rejected. Gov. Bar R.V(6)(C) provides that “[p]rior disciplinary offenses shall be considered as a factor that may justify an increase in the degree of discipline to be imposed for subsequent misconduct.” See, also BCGD Proc. Reg.10(B)(1)(a). Gov. Bar R.V(6)(C) does not have a “statute of limitations” and any previous discipline “shall be considered[.]”

Respondent's efforts to convince this Court that he possesses mitigation evidence must be soundly rejected. As the board determined, "[r]espondent did not formally present any evidence of mitigating factors, nor did relator bring any to our attention." Report at 77.

Respondent's offer of mitigation is out of place in light of the fact that respondent has neither admitted nor accepted responsibility for his misconduct. Respondent's baseless claims about the length of relator's investigations and his description of relator's activities as a "crusade" are entirely irrelevant. The record is closed and respondent now endeavors to offer claims "in mitigation." All of respondent's assertions are offered far too late for consideration by this Court.

Respondent's contention that part of Judge Flanagan's testimony was offered in mitigation is troubling. Judge Flanagan testified that respondent "knows the law, he knows procedure, he knows how to try a case, and probably most important, he is prepared, completely and totally prepared." While the presence or absence of those traits was not expressly before this panel and relator cannot confirm or deny the accuracy of Judge Flanagan's testimony, it is notable that all of Judge Flanagan's observations are simply what is expected of Ohio's attorneys. Not being "sloppy" is not mitigation. Likewise, being a certified specialist, practicing for 18 years, and employing dozens of people are not mitigating factors.

In opposing the board's recommendation of an actual suspension, respondent offers a collection of cases starting with *Dayton Bar Assn. v. Ellison*, 118 Ohio St.3d 128, 2008-Ohio-1808, 886 N.E.2d 836. In sharp contrast to this case, in *Ellison*, there was evidence that the respondent's practice served "an important purpose in her

community.” This Court further observed that in *Ellison*, the respondent had acknowledged her wrongdoing, expressed remorse, and the parties agreed upon the recommended sanction. None of those factors are present here.

In *Disciplinary Counsel v. Niermeyer*, 119 Ohio St.3d 99, 100, 2008-Ohio-3824, 892 N.E.2d 434, this Court held that “[a]n attorney who engages in conduct that violates DR 1-102(A)(4) will ordinarily be suspended from the practice of law. * * * We have found, however, that a lesser sanction may be warranted depending on the presence of mitigating factors.” The mitigating factors present in *Niermeyer* are not present in this case, i.e. lack of a disciplinary record, full cooperation in the disciplinary process, reporting his own misconduct, good character and reputation, willingness to accept responsibility for his mistake, and, the fact that the misconduct was an isolated instance rather than a course of conduct. Based upon the mitigation evidence, the *Niermeyer* Court was persuaded that the respondent was “unlikely to commit future misconduct.” In the present case, the board reached precisely the opposite conclusion. See, e.g. Report at 78-79.

In another case relied upon by respondent, *Disciplinary Counsel v. Taylor*, 120 Ohio St.3d 366, 370, 2008-Ohio-6202, 899 N.E.2d 955, this Court found itself again faced with a respondent who “typically represents clients of modest means for little or no fee” and “attributed mitigating effect in recognition of such service.” That characteristic is not at hand in the present case and respondent does not pretend that it is. See, e.g. Report at 2. Like *Niermeyer*, by a vote of 4-3, the respondent in *Taylor* was credited by this Court with acknowledging the wrongfulness of his conduct, no prior

discipline, and no selfish or dishonest motive. None of those mitigating factors are present in the instant case.

Respondent's effort to equate this case to *Stark Co. Bar Assn. v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, 855 N.E.2d 1206, should also be rejected. David S. Ake represented himself during proceedings to dissolve his marriage. This Court agreed with the board's observation that "[t]his controversy is an excellent example why no one should ever represent himself or herself in a domestic relations action." Ake's misconduct was dishonest and self-serving yet by a 4-3 vote, this Court recommended a stayed suspension because it was convinced that Ake "would not disobey a court order in any situation other than the charged atmosphere of his own marriage."¹⁸ *Id.* at 272. This Court was convinced that Ake would "never repeat his transgressions." *Id.*

The *Wrenn* case cited by respondent is also factually distinguishable. *Disciplinary Counsel v. Wrenn*, 99 Ohio St.3d 222, 2003-Ohio-3288, 790 N.E.2d 1195. Thomas C. Wrenn was an assistant prosecuting attorney in Trumbull County. Finding that Wrenn's failure to disclose exculpatory evidence violated four disciplinary rules including DR 1-102(A)(4), in a 5-2 decision, this Court entered a stayed suspension based upon its determination that Wrenn had no previous discipline and that he was well-suited to prosecute child abuse cases.

In the present case, the board found that respondent's "obstructive behavior and lack of candor struck at the heart of the discovery processes in *Radford* and *Muehrcke*,

¹⁸ Like *Taylor*, the dissenting justices would have suspended Ake from the practice of law.

violated three (sic) disciplinary rules,¹⁹ and in each case hindered and prolonged the actions to the detriment of the judges, parties, and counsel involved. His mental state was one of deliberate avoidance of discovery, a critical piece of the litigation machinery. ‘Abuses of an attorney’s obligations during the discovery process will not be tolerated.’” Report at 74 (citing *Cincinnati Bar Assn. v. Wallace*, 83 Ohio St.3d 496, 500, 1998-Ohio 1, 700 N.E.2d 1238). The board stated that “respondent’s obstructive behavior and lack of candor in *Radford* and *Muehrcke* were just as disruptive to the administration of justice as outright misrepresentations would have been” and concluded that his misconduct warranted a sanction tantamount to that mandated for misrepresentations, i.e. an “actual [six month] suspension.” Id. at 80.

As the board so eloquently stated at page three of its report:

The common thread running through [respondent’s] violations is respondent’s palpable indifference to discovery directed at his clients. In each instance, had respondent been even slightly more forthcoming in responding to the discovery – whether by producing what he could of the requested discovery, demonstrating (as he claimed) that he already had complied with it, and/or making clear to opposing counsel and the judges involved which requested documents existed and which did not – he could have spared the courts, his opposing counsel and their clients, and his own clients needless controversy, time, and expense. Because respondent did not take these relatively easy steps, but instead used his considerable abilities as a lawyer to stake out positions that he knew or must have known would needlessly escalate and prolong the proceedings, the panel concludes that his conduct was prejudicial to the administration of justice, reflects adversely on his fitness to practice law, and obstructed his opponents’ access to evidence, and that this conduct warrants suspension of respondent’s license to practice law[.]

¹⁹ The board actually found that respondent violated six rules in Count One and two rules in Count Two.

In contrast to respondent's arguments, there is clear and convincing evidence that respondent committed all of the violations found by the board as well as multiple violations of DR 1-102(A)(4) and Prof. Cond. Rule 8.4(c). Respondent's misconduct in combination with the aggravating factors and lack of mitigation warrants an actual suspension from the practice of law.

Relator's Answer to Objection 9 (sic)

Respondent is responsible for Board's Costs

Respondent's complaints about the costs of this case are legally incorrect, factually unsupported, and should be rejected by this Court. First, relator was not "awarded" costs. See, Gov. Bar R.V(8)(D). Second, the costs identified by the board have nothing to do with relator's expenses. *Id.* Third, the board recommended to this Court that "the costs of these proceedings be taxed to Respondent" and respondent has not offered sufficient reason or analysis for this Court to overturn or modify the board's recommendation. Report at 80.

As the board observed, respondent is prone to "stake out positions" that he knows or should know will needlessly escalate and prolong proceedings. See Report at 3. Respondent's attitude toward this disciplinary case is and was no different. In fact, respondent singlehandedly affirms the foregoing observation by proclaiming to this Court that he "filed motions to dismiss [and] filed five separate motions for summary judgment[.]" Respondent further proclaims that he "continually requested dismissal of all claims" and that he "requested directed verdict on at least five separate occasions during trial." All of respondent's efforts to prematurely end this disciplinary proceeding

were denied and yet respondent fails to realize that his own actions expanded and prolonged every phase of the disciplinary process.²⁰

Notwithstanding his failure to convince the panel to dismiss this case before the evidentiary hearing, respondent nevertheless refused to enter into any factual or evidentiary stipulations before the start of the hearing.²¹ More than 5,500 pages of transcript and an 81-page board report later, respondent wants this Court to believe that someone else “forced” him to incur enormous amounts of attorney fees and litigation expenses in order to defend himself. Again, respondent inaccurately portrays himself as the “victim” of his own transgressions.

Gov. Bar R.V(8)(D) provides no support for respondent’s effort to apportion costs on a count-by-count or day-by-day basis nor would it be realistic or practicable to do so. Further, it is evident that the board considered evidence of respondent’s conduct as a whole in arriving at its conclusions and recommended sanction. Any suggestion that respondent should not be responsible for the costs of the entire proceeding should also

²⁰ For example, respondent’s incessant and meritless argument that is based on relator’s filing of an amended complaint typifies his mind-set. As relator has repeatedly explained, unless the disciplinary proceeding is within 30 days of a scheduled hearing date, relator is not required to obtain leave from the panel prior to filing an amended complaint. BCGD Proc. Reg.9(D). See, also Gov. Bar R.V(11)(D). As a hearing had not been scheduled in this case when the amended complaint was filed, the 30-day restriction did not apply. Moreover, it is axiomatic that a formal complaint pending before the Board of Commissioners on Grievances and Discipline (“the board”) may be amended by the relator without presenting the additional count(s) to a probable cause panel. See, e.g. Board of Commissioners on Grievances and Discipline, Advisory Opinion 90-18, August 17, 1990. Despite an absence of distinguishing facts, respondent has continued to make the same baseless argument about the amended complaint for well more than a year.

²¹ During the hearing, respondent agreed to a total of three factual stipulations all related to Count One of the complaint.

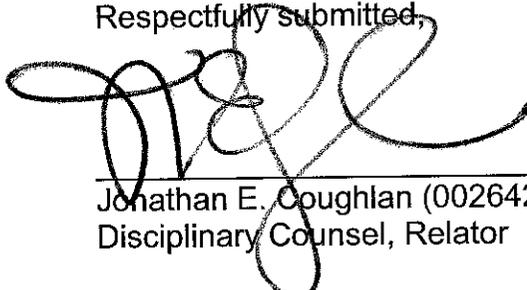
obviate any "credit" the panel gave him for "behaving appropriately" during most of the 22-day panel hearing.

Respondent has not offered this Court any support whatever for his assertions regarding the apportionment of costs in this disciplinary proceeding. Accordingly, this Court should overrule respondent's final objection and affirm the board's recommendation that "the costs of these proceedings be taxed to Respondent[.]" Report at 80.

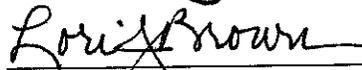
CONCLUSION

This Court should overrule all of respondent's objections and adopt the report and recommendations of the board and in accordance with the arguments set forth in relator's objections. In conjunction with relator's objections, respondent should be suspended from the practice of law in the state of Ohio for 18 months.

Respectfully submitted,



Jonathan E. Coughlan (0026424)
Disciplinary Counsel, Relator

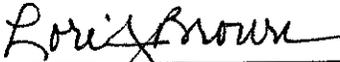


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CERTIFICATE OF SERVICE

I hereby certify that photocopies of the foregoing Relator's Answers to Respondent's Objections to the Board's Report have been served upon the Board of Commissioners on Grievances and Discipline, c/o Jonathan W. Marshall, Secretary, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431, and respondent's counsel John P. O'Neil and George S. Coakley, Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Ave., West, Cleveland, OH 44115-1093, via regular U.S. mail, postage prepaid, this 20th day of October, 2010.



Lori J. Brown (0040142)