

ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL : **Case No. 10-1601**
Relator : **Case No. 08-081**
vs. :
: **VINCENT A. STAFFORD, ESQ.** :
Respondent :

**RESPONDENT'S ANSWER TO RELATOR'S OBJECTIONS TO THE
BOARD OF COMMISSIONERS' FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND BRIEF IN SUPPORT**

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I. INTRODUCTION AND STATEMENT OF FACTS

Respondent, Vincent A. Stafford, by and through counsel, respectfully submits his Answer to Relator's Objections. This case involves Relator's Amended Complaint consisting of five counts, 46 pages and 182 paragraphs of alleged misconduct. The matter was heard on twenty-two (22) days of trial, before the Panel consisting of Paul DeMarco, Esq., Roger Gates, Esq. and Nancy Moore, Esq. Despite a three (3) year disciplinary investigation, approximately one year of trial (spanning twenty-two (22) days), sixteen (16) discovery depositions, nearly thirty (30) trial witnesses, nearly all of the charges set forth in Relator's Amended Complaint were dismissed. 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 (2) remaining counts of alleged misconduct contained in Counts I and II.

Relator did not at trial, and cannot now, prove by clear and convincing evidence any alleged misconduct on the part of Mr. Stafford, especially those argued in its Objections. Relator's Objections are merely a regurgitation of failed allegations, misconceptions and suspicions of Relator, which were ultimately rejected by the Panel and Board. Multiple recitations of the allegations, misconceptions and suspicions of Relator does not change the factual basis of the proper dismissal of Relator's Amended Complaint.

Relator has objected to the fact that the Board Opinion found that Relator did not prove by clear and convincing evidence in Count I (*Radford*), that Mr. Stafford violated Prof. Cond. Rule 3.3(a)(1), 4.1 (a), and 8.4(c). Relator has objected to the Board Opinion finding that Relator did not prove by clear and convincing evidence in Count II (*Muehrcke*), that Mr. Stafford violated 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 its Objections, Relator now attempts to create new a standard, substantially less than clear and convincing evidence. Such

an argument must be rejected as it is contrary to Ohio law. Relator also argues in its Objections that Mr. Stafford's license should be actually suspended for 18 months and that a monitoring attorney should not be appointed.

II. LAW AND ARGUMENT

Contrary to Relator's argument or cited authority, this Court has defined Relator's burden as follows: 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 437.¹ Every material fact in attorney disciplinary cases must be supported in the record by sworn testimony from persons with firsthand-not hearsay-knowledge of the facts alleged. *Northwestern Ohio Bar Ass'n v. Lauber* (2006), 108 Ohio St.3d 143.

Relator's continued allegations set forth in its Objections are based upon Relator's unsupported "suspicions" and were not proven by clear and convincing evidence. As stated by this Court in *Reid, supra*, suspicion alone is insufficient to establish a violation of the disciplinary rules. 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*).² There is insufficient evidence to prove that Mr. Stafford committed any alleged misconduct and Mr. Stafford respectfully requests that this Honorable Court overrule Relator's objections, sustain Mr. Stafford's Objections, and dismiss Relator's Amended Complaint in its entirety.

¹ "Clear and convincing evidence" is defined as "that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Ohio State Bar Association v. Reid* (1999), 85 Ohio St.3d 327; *Russo, supra*.

² Mr. Stafford's Objections filed on September 6, 2010, are incorporated herein by reference in support of this Answer Brief and further illustrates the lack of clear and convincing evidence presented by Relator at trial.

Relator's Objections in regard to *Radford* essentially argue that there was circumstantial evidence upon which multiple lawyers of inferences should be drawn, and that should lead to findings of misconduct. However, the circumstantial evidence theory advanced by Relator truly involves Relator's suspicions resulting from a lack of proper investigation into its allegations (i.e. failing to contact or inquire of Herbert Palkovitz, Esq., Bruce Radford's first counsel in the *Radford v. Radford* matter, and refusing to have Bruce Radford, the grievant, testify). Moreover, Relator demands that this Court draw inferences based solely upon other inferences which courts have universally determined to be improper and not permitted, given the lack of accuracy and probative value. *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329. The true purpose of the rule against pyramiding inferences is to prevent verdicts based on mere speculation or conjecture. 1A Wigmore, Evidence (Tillers Rev.1983) 1106, Section 41. This Court has held:

“ ‘For the purpose of supporting a proposition, it is not permissible to draw an inference from a deduction which is itself purely speculative and unsupported by an established fact. * * * Such a process may be described as drawing an inference from an inference, and is not allowable. *At the beginning of every line of legitimate inferences there must be a fact, known or proved.*’ ” See, *Hurt, supra.* (Emphasis added.)

Ohio Jury Instructions 305.01 provides the following: “Direct evidence” is the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during the trial. “Circumstantial evidence” is the proof of facts or circumstances by direct evidence from which you may reasonably infer other related or connected facts which naturally and logically follow, according to the common experience of mankind. “Inference” – to infer, or to make an inference, is to reach a reasonable (conclusion) (deduction) of fact which you may, **but are not required to, make** from other facts which you find have been established by direct evidence. There are no legal definitions of legal suspicions because they are improper under the law.

Response To Relator's Objection 1: In Regard To Count I, The Board Correctly Found No Clear And Convincing Evidence That Respondent Violated Prof. Cond. Rule 8.4(c).

Relator failed to establish by clear and convincing evidence that Mr. Stafford violated Prof. Cond.R. 8.4(c) in regard to Count I – *Radford*. The Board Opinion found that Mr. Stafford's testimony in the Radford divorce matter was not false or deceitful and properly concluded that it was not convinced that Mr. Stafford "made any outright misrepresentations" while on cross-examination in the Radford divorce matter. (Board Opinion p.12). The Panel found that the "peculiar circumstances"³ and Bruce Radford's motives combined to make it impracticable for the Board to determine by clear and convincing evidence that Mr. Stafford violated Prof. Cond. R. 8.4(c).

Mr. Stafford testified in the Radford divorce matter in support of Diana Radford's request for an award of attorney fees.⁴ Mr. Stafford was the last witness to testify on the last day of the Radford trial. There were no discovery compliance issues when Mr. Stafford testified. The trial court had previously addressed all discovery issues, including the denial of Bruce Radford's Motion in Limine. Relator incorrectly states that the cross-examination of Mr. Stafford included an effort by Bruce Radford's attorneys to "present evidence in support of" Bruce Radford's motions. Bruce Radford did not have any motions pending before the trial court when Mr. Stafford testified. Bruce Radford's attorneys presented no evidence, exhibits, testimonial, or otherwise, in support of any motions during the Radford trial or Mr. Stafford's testimony. Bruce Radford's attorneys did not present evidence, call witnesses, or present any information in regard to any discovery issue. The Board Opinion

³ The Panel found it significant that Bruce Radford had repeatedly replaced his attorneys; that Laubacher never requested Palkovitz's file; that Bruce Radford and Paul Kriwinsky "suspiciously" handled Bruce Radford's file; and that Kubyn failed to call Palkovitz and Laubacher to testify before Judge Flanagan. (Board Opinion p.12).

⁴ The Trial court awarded Diana Radford Twenty-Five Thousand Dollars in attorney fees due to the misconduct of Bruce Radford during the divorce matter.

specifically found that Judge Flanagan had “invited both Kubyn and Kriwinsky to take the witness stand themselves or present other witnesses, in order to refute respondent’s testimony regarding his compliance with discovery.” (Board Opinion p.10). However, Radford’s attorneys ignored Judge Flanagan’s directives and failed to call any witnesses to dispute, contradict, or advocate for their claims regarding discovery compliance. (Tr. 1005; 1008). The only relevance the cross examination of Mr. Stafford was an attempt to mitigate Diana Radford’s request for attorney fees.⁵

Mr. Stafford did not go out of his way to avoid answering Kubyn’s questions and did not attempt to obfuscate or hinder the truth seeking process. “Obfuscate” is defined by the Merriam-Webster’s Dictionary as “to obscure, to be evasive, unclear, or confusing.” A review of the relevant Radford divorce transcript supports the Board’s determination that Kubyn’s questions of Mr. Stafford were difficult to decipher. Kubyn asked Mr. Stafford vague, ambiguous and compound questions to which Mr. Stafford properly objected and Judge Flanagan sustained. Mr. Stafford answered Kubyn’s questions as they were put to him and properly defended his discovery compliance.

Importantly, during Mr. Stafford’s testimony, he effectively refuted Radford’s claims of discovery noncompliance by producing 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. Both 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 Kubyn’s false accusations, which resulted in Kubyn admitting that the issue of any alleged noncompliance was rendered moot. (Exhibit P) The alleged “discovery dispute” was definitively determined to be the result of Radford’s failure to request Diana Radford’s

⁵ Radford’s attorney fee exposure was significant due to his outrageous conduct during the Radford divorce trial which included his seven (7) day incarceration for committing perjury while testifying. (Exhibit L)

separate property documentation. Mr. Stafford and Diana Radford testified concerning the production of documents to Laubacher on October 30, 2006 and to Kubyn on March 7, 2007. Judge Flanagan was aware of the discovery exchanges. (Tr. 983). Further, Mr. Stafford and Diana Radford testified concerning the written Interrogatory responses provided to Palkovitz on August 15, 2006.

Relator claims Mr. Stafford made misleading distinctions between formal response and the actual production of documents under Civ.R. 34. Civ.R. 34(B)(1) provides that the party upon whom the request is served shall serve a written response and the response shall state the inspection and related activities permitted with respect to each item or category. Kubyn failed to understand the Civ. R. 34 distinction between providing a formal response to a request for production of documents and the actual production of the documents in his questioning of Mr. Stafford. Mr. Stafford continually asserted this distinction throughout his testimony therefore was asserting a good faith argument pursuant to Civ.R. 34. This is not "being unclear, evasive or confusing" as alleged by Relator. Mr. Stafford properly objected and Judge Flanagan sustained Mr. Stafford's objections to Kubyn's improper questions.

Kubyn also generically referred to "discovery responses" when questioning Mr. Stafford. Mr. Stafford's answers were responsive to the question put to him. Kubyn's references to "discovery responses" included all of the following: Diana Radford's written responses to Interrogatories propounded upon her, the responses to Radford's request for production of documents, and the actual production of documents. The trial court clearly understood the distinction Mr. Stafford was making throughout his testimony. Kubyn, however, could not and would not distinguish formal discovery responses from the physical production of discovery documents.

Relator advocates that Mr. Stafford was deceitful in his testimony in the Radford matter. Mr. Stafford did not intend to, nor did he provide any false impression about Diana Radford's compliance

with discovery. As set forth above, Mr. Stafford was answering inartful, compound, and confusing questions while on cross-examination in the Radford trial. Judge Flanagan had been intimately involved in all aspects of discovery in the Radford divorce and had first had knowledge of Mr. Stafford's discovery compliance. Judge Flanagan found Mr. Stafford's testimony to be credible and truthful.

Relator failed to present any evidence that Mr. Stafford intentionally gave a false impression regarding his discovery compliance. When Mr. Stafford testified in the Radford divorce matter, he testified based on a good faith belief that he had fully complied with Bruce Radford's discovery requests. At all times relevant, Mr. Stafford indicated to the trial court and to Bruce Radford's numerous counsel, that Diana Radford was under no duty to answer identical, multiple, and duplicative discovery requests. The trial court judge 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)

The direct evidence presented at trial supports Mr. Stafford's position and demonstrates that Relator failed to meet her burden of proof of clear and convincing evidence. Direct evidence is defined as "the testimony given by a witness who has seen or heard the facts to which he testifies. It includes exhibits admitted into evidence during trial." Ohio Jury Instruction 305.01. Mr. Stafford unequivocally testified that he provided Diana Radford's written Interrogatory responses to Palkovitz at a pretrial on August 15, 2006.⁶ Diana Radford testified in the Radford divorce trial and the disciplinary trial that she witnessed Mr. Stafford hand-deliver her Interrogatory responses to Palkovitz in August 15, 2006. (Tr. 1208) Diana Radford first testified to this during the Radford

⁶ Mr. Stafford operated under a good faith belief that Diana Radford was not required to answer interrogatories which exceed forty (40) questions, when Laubacher issued nearly identical Interrogatories to Diana Radford.

divorce matter in 2007, prior to the Radford grievance. There is no testimony or evidence refuting the testimony of Diana Radford or Mr. Stafford regarding this issue. Mr. Stafford also testified that the answers to Diana Radford's Interrogatories demonstrate that the Interrogatory responses were given to Palkovitz at the August 15, 2006 pretrial because Diana Radford indicated that parties were still residing together in the marital residence in her written responses. (Tr. 110) Bruce Radford was vacated from the marital residence on August 22, 2006 pursuant to a Civil Protection Order, just one week after the August 15, 2006 pretrial.

Mr. Stafford testified that he provided Diana Radford's documents responsive to Bruce Radford's request for production of documents to Laubacher on October 30, 2006. Diana Radford testified that she witnessed Mr. Stafford hand a stack of documents to Laubacher in the hallway during the October 30, 2006 pretrial. (Tr. 1186; 1194, 1225) Diana Radford's unrebutted testimony corroborated Mr. Stafford's testimony that he had provided discovery documents to Laubacher on October 30, 2006. (Board Opinion p.7) Judge Flanagan testified that he heard Mr. Stafford tell Laubacher that he had documents for him in the hallway at the October 30, 2006 pretrial. (Tr. 961, 1160) Judge Flanagan testified that Laubacher never came back in after the October 30, 2006 pretrial to tell the court that Mr. Stafford did not provide documents as he just indicated he would. (Tr. 964) This Court can infer, as Judge Flanagan did, that Laubacher's failure to immediately bring it to the trial court's attention meant that the document exchange occurred. Additionally, 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 Bruce Radford had her financial records given to Laubacher on October 30, 2006, in his possession during a contempt hearing before Magistrate Tanner on June 18, 2007. (Tr. 1191-1192) This direct evidence proves that Relator's argument is flawed and not supported by clear and convincing evidence. Further, Bruce Radford's Exhibit List

listed Diana Radford's financial documents. This Court can infer from the direct evidence of Bruce Radford's Exhibit list that Radford had possession of Diana Radford's financial records.

Thereafter, Mr. Stafford provided Diana Radford's supplemental discovery documents to Kubyn and Kriwinsky on March 7, 2007, as he had indicated to Laubacher he would do before Laubacher was terminated by Bruce Radford. This discovery exchange occurred in front of Judge Flanagan in his chambers. (Tr. 983, 1057) Mr. Stafford also informed Kubyn that, pursuant to Civ.R. 34, he would make Diana Radford's discovery documents available for inspection at his office but that he would not make additional copies for the second or third time. Judge Flanagan testified that he overheard this exchange between Mr. Stafford and Kubyn. (Tr. 984, 1131)

The direct evidence presented in this matter demonstrates that Mr. Stafford complied with all obligations, court orders, and rules of the tribunal in the *Radford* divorce matter. 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. When Mr. Stafford testified in the Radford divorce matter, the trial court was not "seeking to ascertain respondent's compliance with discovery" as alleged by Relator. The trial court had already determined that there had been discovery compliance prior to Mr. Stafford's testimony.⁷ If anything, the trial court entertained Bruce Radford's discovery allegations by allowing Kubyn to cross-examine Mr. Stafford concerning Diana Radford's separate property discovery, even though Bruce Radford had no pending discovery motions before the trial court. In fact, the trial court recessed trial to allow Bruce Radford's attorneys to obtain Laubacher and Palkovitz to refute Mr. Stafford's testimony, and/or testify themselves. Despite being provided the opportunity to obtain witnesses to contradict Mr. Stafford, Radford did not have any witnesses

⁷ 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 discovery was provided." (Tr. 1128)

(Kubyn, Kriwinsky, Laubacher or Palkovitz) to contradict Mr. Stafford or Diana Radford's direct testimony and documentary evidence. This Court should infer as "circumstantial evidence", as the trial court did, that this failure to present any evidence demonstrates that Kubyn determined that Palkovitz and Laubacher's testimony was adverse to their position and that there was no contradictory evidence to be presented.

There simply was no obstruction to the discovery process by Mr. Stafford. The Board Opinion found 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) Relator failed to meet her burden that Mr. Stafford engaged in any conduct involving dishonesty, fraud, deceit, or misrepresentation.

Relator's argument that there was sufficient circumstantial evidence in this matter to support a violation of Prof. Cond. R. 8.4(c) must be rejected. Relator failed to interview or otherwise preserve Palkovitz's testimony in regard to this issue, just like Kubyn and Kriwinsky failed to do in the Radford trial. Using Relator's logic of "circumstantial evidence" and inference, this Court should infer that Palkovitz did not support Relator's suspicion. Diana Radford's un rebutted testimony, both in the Radford trial and the disciplinary trial, supported Mr. Stafford's testimony. Laubacher did not refute Diana Radford's testimony and in fact told Relator that he could not definitively say whether or not he received the documents.⁸

The most compelling circumstantial evidence involved the fact that Bruce Radford's lawyers refused to call Palkovitz or Laubacher at trial to refute Mr. Stafford's testimony, despite being

⁸ This Court must note that Laubacher only served as counsel for Bruce Radford from September, 2006 and was terminated by the end of December, 2006. Mr. Stafford testified that he provided the supplemental discovery requested by Laubacher to Kubyn and Kriwinsky in March, 2007.

directed to do so by Judge Flanagan. (Tr. 1005;1008). This Court should also circumstantially infer that Relator's refusal to call the grievant, Bruce Radford, to testify in this matter is directly related to Bruce Radford's manipulation of the Palkovitz file, his theft of Diana Radford's records, and Mr. Stafford's discovery compliance.

Relator called Palkovitz's secretary, Ms. Lanzilotta, as a witness in an attempt to establish that Mr. Stafford did not provide Diana Radford's interrogatory responses to Palkovitz. However, this Court should disregard Ms. Lanzilotta's testimony as the Board Opinion did. First, Lanzilotta testified that Palkovitz surrendered his entire file to Bruce Radford in September, 2006, therefore Lanzilotta no longer had access to Palkovitz's Radford file after that date. This is three (3) years before her testimony before the Panel. Ms. Lanzilotta testified that she could not recall the contents of the file. Second, Lanzilotta mistakenly claimed that Palkovitz could not have attended the August 15, 2006 pretrial with Judge Flanagan because Palkovitz was out of town. Mr. Stafford and Judge Flanagan testified that Palkovitz attended the August 15, 2006 pretrial. Additionally, the *Gambetta v. Gambetta* court docket demonstrated that Palkovitz was engaged in trial before Judge Flanagan in that matter during the week of August 15, 2006, refuting Lanzilotta's testimony. (Exhibit U). Third, the Radford divorce docket demonstrates the scheduling of new trial dates the day after the August 15, 2006 pretrial. (Exhibit A). Fourth, Lanzilotta and Judge Flanagan both testified that if any discovery was overdue, Palkovitz would automatically file a motion to compel within one to two days of said discovery being due. A review of the Radford divorce docket demonstrates that no motion to compel was filed by Palkovitz. Fifth, Lanzilotta testified unequivocally that Relator's purported Palkovitz file contained documents (such as the stolen attorney-client communications between Mr. Stafford and Diana Radford) were not part of Palkovitz's Radford file and that she did not recall seeing numerous documents purporting to constitute Radford's file. Finally, Lanzilotta testified that

she never checked the *Gambetta* file to see if Diana Radford's Interrogatory responses were mistakenly misplaced by Palkovitz.

In contrast, Judge Flanagan unequivocally testified that at the start of the *Radford* divorce trial, he did not believe that there were any outstanding discovery issues. (Tr.998, 1062, 1135). The trial court was in the best position to evaluate the facts and credibility of the witnesses. Judge Flanagan conducted numerous pre-trials, heard the issues as presented by counsel, and witnessed the actual discovery exchange between Mr. Stafford, Laubacher, Kubyn, and Kriwinsky. Judge Flanagan investigated Bruce Radford's allegations, despite there being no discovery compliance motion before the court. This included a multi-day recess to allow Bruce Radford to obtain Palkovitz and Laubacher to testify on the issue. Judge Flanagan testified that Bruce Radford and his attorneys were prepared for trial and that discovery was provided to them. (Tr. 1128) Judge Flanagan testified that he found Mr. Stafford's testimony on cross-examination to be truthful. (Tr. 1019-1020) The trial court clearly understood the issues before it and rendered its decision based upon the competent, credible evidence presented, determining that discovery had been provided and that any alleged discovery noncompliance was the result of Radford and his numerous counsels' failure to request Diana Radford's separate property documentation.

Mr. Stafford was honest and forthright in his testimony before the Panel. Mr. Stafford admitted that there could have been a mistake in his testimony in the Radford divorce matter, especially in regard to specific dates of discovery compliance. During Kubyn's cross-examination, Mr. Stafford testified that he believed that he provided the discovery to Laubacher on October 31, 2006, however Mr. Stafford now acknowledges that it actually occurred on October 30, 2006.⁹ Mr. Stafford testified that any mistake in his testimony in the Radford divorce matter regarding Diana Radford's discovery

⁹ In fact, Mr. Stafford repeatedly stated that he was unsure of the exact date while testifying in the Radford trial on at least three occasions in the transcript.

compliance “wasn’t material and it wasn’t designed to deceive and it wasn’t designed to mislead, and I would never, ever dishonor that oath I just took.” (Tr. 76). Mr. Stafford testified that he had not reviewed or prepared to testify regarding any discovery issues prior to his testimony in the Radford divorce matter. (Tr. 74). Mr. Stafford testified that “I got up from the trial table, I stepped into the witness stand. I testified as honestly and as truthfully as I could possibly testify to. If I made a mistake, it wasn’t designed to mislead. I can assure you of that.” (Tr. 75).

Mr. Stafford admitted that he may have mistaken the exact date of when he provided Diana Radford’s responses pursuant to Civ.R. 34 as it was actually done on October 30, 2006. (Tr. 76). Mr. Stafford was, however, consistent in regard to the timeline of his discovery compliance, both to the trial court and to the Panel. Mr. Stafford’s testimony is supported by the testimony of Diana Radford and Judge Flanagan. Relator’s attempts to use Mr. Stafford’s fee bill to contradict his testimony is unfounded.¹⁰ Mr. Stafford testified to the Panel that his bills for clients may contain clerical mistakes regarding dates and that he often does not bill his clients for all of his time spent on their case. (Tr. 75) However the fee bill did record the discovery turnover on October 31, 2006, instead of October 30, 2006. This is a simple, nonmaterial error.

There is simply no evidence that any alleged misrepresentations made by Mr. Stafford benefited him or that he had a selfish motive. Mr. Stafford admitted to the Panel that when he testified in the Radford matter, “I had no[t] reason to mislead, misjudge or anything. The trial was going very well from my perspective.” (Tr. 75) Mr. Stafford testified that “I am mainly concerned did I do the best effort that I could do for my client. Money is not my objective in these cases. It is to do a nice job for my client, to get them in the system, get them out of the system, guide them through this awful time in their lives and try and do the best that I possible can.” (Tr.92)

¹⁰ A one-day error does not constitute fraud, deceit, or intentional misrepresentation.

Relator's reliance on case law established by other states is not applicable to the within matter and demonstrates the lack of authority and applicable case law under Ohio law. The Ohio case law cited by Relator is equally inapplicable to the within matter. In *Cincinnati Bar Assn. v. Statzer*¹¹ (2003), 101 Ohio St.3d 14, the attorney induced her secretary to execute a false affidavit to avoid discipline and intentionally displayed what she knew to be blank tapes at a deposition in an attempt to intimidate her formal legal assistant to illicit favorable testimony for the attorney's disciplinary proceeding. *Statzer's* actions were intentional, deceptive, and were for the sole benefit of the attorney in a disciplinary proceeding. Such facts are simply not present in this matter. Most importantly, the Radford trial court found that Mr. Stafford testified truthfully. (Tr. 1019-1020).

Response To Relator's Objection 2: In Regard To Count I, The Board Correctly Found No Clear And Convincing Evidence That Respondent Violated Prof. Cond. Rule 8.4(c); 3.3(a)(1) and 4.1(a).

Relator did not establish by clear and convincing evidence that Mr. Stafford violated Prof. Cond.R. 8.4(c); 3.3(a)(1); and 4.1(a). in regard to Count I – Radford. Mr. Stafford's testimony in the Radford divorce matter was not deceitful in violation of Prof. Cond. R. 8.4(c) as set forth above. Mr. Stafford's testimony in the Radford divorce matter did not contain false statements in violation of Prof. Cond. R. 3.2(a)(1). Mr. Stafford did not knowingly make a false statement of a material fact or law to a third person during the Radford matter in violation of Prof. Cond. R. 4.1(a).

The Board Opinion unanimously found that Relator did not meet the requisite proof as to violations of Rules 8.4(c); 3.3(a)(1); and 4.1(a). The Board Opinion found that Relator faced "insurmountable obstacles" in her ability to prove the alleged misrepresentations. (Board Opinion p.12). Relator fails to point to any fact or law which warrants this Court to disregard the findings and

¹¹ It must be noted that Relator urged the Court to find that the attorney lied during Disciplinary Counsel's investigation. The *Statzer* Panel rejected Relator's argument as did this Court, even though inconsistencies existed, and this Court deferred to the Panel's findings.

conclusions in the Board Opinion. This Court has held that it ordinarily defers to a panel's credibility determinations unless the record weighs heavily against those findings because the Panel observed the witnesses firsthand and "thus possessed the enviable vantage point in assessing the credibility and weight of testimony." *Statzer, supra*; 17; *Cleveland Bar Assn v. Cleary* (2001), 93 Ohio St.3d 191, 198.

Relator claims that it is "highly probable" that Mr. Stafford's testimony in the Radford matter was false and misleading. This is based solely upon Relator's suspicions and not based upon facts. "Highly probable" is not the applicable standard in Ohio and in fact, does not exist under Ohio law. Relator, attempting to circumvent its burden under Ohio law, cites to a Kansas case which applied a different burden of proof standard. Here, the trier of fact firmly determined that it could not "**point with any degree of confidence to a single document that Radford's lawyers requested and that responded failed to produce. Therefore, the panel cannot find, by clear and convincing evidence, that respondent made any outright misrepresentations about his compliance with his discovery obligations.**" (Board Opinion p.16) The trial court concluded that discovery had been produced; that Mr. Stafford testified truthfully; and that Kubyn represented to the trial court that the discovery dispute was rendered moot due to Bruce Radford's attorney(s) failure to request discovery concerning Diana Radford's separate property.

Relator argues that the "board focused on the alleged actions or motives of persons other than respondent." This Court did the same thing when it overruled the Board's recommendation in *Findlay/Hancock Cty. Bar Assn. v. Filkins*, because the panel had relied largely on the uncorroborated testimony of a witness who had admitted to lying often, including lying under oath. In the same manner, this Court must take note that the grievant in this matter, Bruce Radford, was incarcerated for seven (7) days by the trial court during the Radford divorce matter for giving false and perjured

testimony. Bruce Radford had unfettered access to his file throughout the Radford matter. Kriwinsky admitted that he and Bruce Radford are personal friends.

The Board Opinion properly weighed these factors in rendering its decision. The Board Opinion found that Bruce Radford's unusual access to his file, his propensity for deceit and misrepresentation and his motive "**planted an undeniable seed of doubt in the panel member's minds as they listened to Mr. Radford's lawyers accuse respondent of not producing documents in discovery and of misrepresenting his discovery compliance.**" (Board Opinion p.11).

Relator attempts to argue that the circumstantial evidence presented to the Panel met her burden. In *State v. Kulig* (1974), 37 Ohio St.2d 157, this Court held that "[c]ircumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt." This Court further concluded that " * * * [i]t is settled that where circumstantial evidence alone is relied upon to prove an element essential to a finding of guilt, it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence. * * * " *Id*, 160. Here, Relator's circumstantial evidence was refuted and is irreconcilable with the direct evidence presented at trial. Diana Radford unequivocally testified both before Judge Flanagan and before the Panel that she witnessed Mr. Stafford hand-deliver her Interrogatory responses to Palkovitz on August 15, 2006. Diana Radford testified that she witnessed Mr. Stafford hand-deliver her documents to Laubacher at the October 30, 2006 pretrial. Judge Flanagan testified that he overheard Mr. Stafford tell Laubacher during the October 30, 2006 pretrial that he had discovery documents for him in the hallway. Diana Radford testified that she observed the documents, which had been provided to Laubacher on October 30, 2006, in Bruce Radford's possession at the trial table at the June 7, 2007 hearing before Magistrate Tanner. Judge Flanagan also testified that he witnessed Mr. Stafford provide Kubyn and Kriwinsky supplemental

discovery documents on March 7, 2007. Laubacher testified that he could not state with any certainty whether or not he received the documents and refused to refute Diana Radford's testimony. No witness refuted Mr. Stafford's testimony of discovery compliance during the Radford trial or before the Panel. The direct evidence presented at trial supported the Board Opinion's conclusion that Mr. Stafford did not fail to produce a single document requested by Radford's lawyers. (Board Opinion p.16)

Relator's claim that Mr. Stafford violated Prof. Cond.R. 3.3(a)(1) by making misstatements or false statements to Judge Flanagan were flatly and firmly rejected by Judge Flanagan's direct testimony before the Panel. Judge Flanagan testified that he believed that Mr. Stafford's testimony was truthful. (Tr. 1019-1020) Judge Flanagan was in the best position to judge the validity of the discovery noncompliance and any alleged obstruction to access to evidence in the *Radford* divorce matter. Diana Radford and Mr. Stafford testified truthfully before Judge Flanagan and the Panel. 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.

Relator's cited authority and case law is inapplicable to the within matter, and includes *In the Matter of Balliro* (2009), 453 Mass. 75, (an attorney committed perjury during a criminal trial and gave false information in a police investigation of a crime), and *Disciplinary Board of North Dakota v. Lamont* (ND, 1997), 561 N.W.2d 650, (the trial court judge found that the attorney testified falsely).¹² The Board and the trial court found that Mr. Stafford testified truthfully, that discovery

¹² Interestingly, despite the finding that the attorney testified falsely, the attorney was only suspended for sixty days. *Id.*

had been complied with, and that Bruce Radford was not denied any documents in the Radford divorce matter.

Mr. Stafford provided Diana Radford's Interrogatory responses to Palkovitz on August 15, 2006. Mr. Stafford admitted he could not recall exact dates but that he remembered the approximate timeline when he testified in the Radford Trial. The Radford trial court docket evidences the actual pretrial and hearing dates. (Exhibit A) Mr. Stafford did tell Laubacher that he would not be providing duplicative discovery responses to identical, duplicative discovery requests. Judge Flanagan testified that he supported Mr. Stafford's position that an attorney is not required to provide multiple discovery requests to successor legal counsel. (Tr.1063) Mr. Stafford testified that he did not file a response to Laubacher's motion to compel because he had provided the documents on October 30, 2006, and because the trial court had granted the motion within two (2) days of its filing.¹³ (Tr. 156) Mr. Stafford was not given the requisite seven (7) days to respond as provided under the Local Rules of Court before the trial court routinely granted the motion. Further, Mr. Stafford and Laubacher both testified to a telephone conference in December, 2006, where Mr. Stafford indicated that he would get more documents to Laubacher.

Relator argues that if Mr. Stafford had provided Diana Radford's interrogatory responses to Palkovitz on August 15, 2006, then he should have made it clear that he had done so and made a copy for Bruce Radford's successive counsel. Mr. Stafford testified that he repeatedly informed Laubacher that he should obtain Palkovitz's file. Laubacher, Kubyn and Kriwinsky did not even know that Palkovitz had issued written discovery since all three (3) attorneys never bothered to talk to Palkovitz or to obtain Palkovitz's file and talk to Palkovitz about discovery. It is patently unfair to hold Mr.

¹³ 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) Judge Flanagan also testified that he changed his policy regarding rulings on motions to compel because of this controversy and instead sets them for hearing. (Tr. 950-953)

Stafford to some type of higher standard as a redress for the failure and ineptitude of Bruce Radford's attorneys.

The Board properly rejected Relator's representation of the circumstantial evidence and properly determined that Mr. Stafford did not violate Prof. Cond.R. 8.4(c); 3.3(a)(1); and 4.1(a) in regard to Count I – *Radford*.

Response To Relator's Objection 3: In Regard To Count II, The Board Correctly Found No Clear And Convincing Evidence That Respondent Violated 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).

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. Housel was represented by attorneys Alan M. Petrov and Monica A. Sansalone. After surviving three (3) motions to dismiss, two (2) motions for summary judgment, and two (2) motions for directed verdict; and after being litigated in front of three (3) trial judges, a jury returned a verdict finding that Housel committed malpractice, and awarding Dr. Muehrcke damages in the amount of \$179,166.66. Dr. Muehrcke's claims also survived a motion for judgment notwithstanding the verdict and a motion for new trial. Within two months after the \$179,166.66 jury verdict, Housel directed his attorneys to send information and documents to Jonathan Marshall, Secretary of the Board of Commissioners on Grievances and Discipline against Mr. Stafford.¹⁴ (Tr. 2999-3008) In reference to Count II, the Panel and Board properly determined that Relator failed to prove by clear and convincing evidence its allegations that Mr. Stafford violated DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation); DR 7-102(A)(1) (in his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on

¹⁴ Robert V. Housel was a member of the Board of Commissioners on Grievances and Discipline at that time, and repeatedly threatened during the trial of the *Muehrcke v. Housel* matter to use his position on the Board to have Mr. Stafford sanctioned or disbarred.

behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another); DR 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence). The Board Opinion properly dismissed the following allegations of misconduct in Count II: (1) filing a frivolous appeal; (2) making false and misleading statements and obstructing discovery; and (3) taking action merely to harass.¹⁵ (See, Amended Complaint at ¶ 54) Yet Relator continues to argue otherwise.

Key to this Court's determination of Relator's Objection in regard to Count II; and, in fact, dispositive of the same; is the specific findings and conclusions in the Board Opinion outlining why it dismissed Relator's allegations. Specifically, the Board Opinion found that *Mr. Stafford did not author, sign, or specifically ratify any of the Stafford & Stafford Co., LPA ("Stafford & Stafford") filings in the trial court or the court of appeals.* (Board Opinion at pp. 29-31, 34) These findings and conclusions are based upon and fully supported by the evidence at trial. It was Relator's burden to prove otherwise at trial, by clear and convincing evidence

It must be noted by this Court that Relator fails to cite to a single Ohio disciplinary case which would support the arguments set forth in its Objection. Relator's Objection does not accurately or fairly disclose to this Court all the facts relevant to Count II; and instead has omitted significant and material facts which must be known and considered by this Court.

The evidence at the disciplinary hearing established that (1) multiple attorney fee bills and other documents were requested by Housel, not just those between Dr. Muehrcke and Stafford & Stafford

¹⁵ 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, Dr. Muehrcke. In fact, this Court declined jurisdiction in Supreme Court Case No. 2007-0420 to review the Court of Appeals' decision denying Housel's motion for sanctions which raised the very same issues as contained in Count II.

Co., LPA; (2) such requested documents **did** exist (including those between Dr. Muehrcke and Stafford & Stafford Co., LPA) at the time of the appeal; (3) there were at least three (3) separate appellate issues appealed by Dr. Muehrcke, including attorney-client privilege, work product, spousal privilege and relevancy; and (4) neither Dr. Muehrcke nor Mr. Stafford ever indicated that Stafford & Stafford was representing Dr. Muehrcke on a contingency fee basis. For these reasons, the arguments advanced by Stafford & Stafford on behalf of Dr. Muehrcke in filings in the trial court and the court of appeals were accurate.

1. Relator's Argument Is Not Supported By The Evidence And Its Cited Authority Is Not Applicable To This Matter.

Relator requests that this Court infer that Mr. Stafford “ratified” the filings by Stafford & Stafford made in the trial court and the court of appeals. However, Relator has failed to cite to a single Ohio disciplinary case which would support its argued concept of “ratification”. Relator cites to numerous filings (at p. 35 of its Objections) in an attempt to blur the record before this Court; and have this Court believe that Mr. Stafford “ratified” the filings made by Stafford & Stafford because his full name and attorney registration number appear on the filings.

First, as demonstrated below, there were no misimpressions created by the Stafford & Stafford filings and no misleading suggestions or arguments were made in the filings. Second, the evidence at trial revealed that, despite Relator’s arguments to the contrary, neither Dr. Muehrcke nor Mr. Stafford ever indicated that Stafford & Stafford was representing Dr. Muehrcke on a contingency fee basis. As the “documents” which Housel requested in discovery and which Relator continuously claims are “non-existent”, **did** exist at the time of the discovery dispute and the interlocutory appeal filed in the *Muehrcke v. Housel* matter, and no representations were made by Dr. Muehrcke or Mr. Stafford in regard to a contingency fee agreement, there was no need for Mr. Stafford to “correct [or] dispel misimpressions”, or “clear up confusion” which Relator alleges was caused by filings made by

Stafford & Stafford. Third, as properly found by the Board Opinion, the evidence at trial revealed 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) Relator's argument in this regard was made to and was specifically rejected by the Panel and Board.

Relator's reliance upon *Gross v. Weiner* (1913), 34 Ohio C.D. 349, is misplaced and inapplicable to this matter. *Gross v. Weiner* does not involve a disciplinary matter or an attorney "ratifying" filings in court, but did involve representations made between friends involved in a land purchase contract. The *Weiner* court stated that ratification has been defined to be the approval by act, word or conduct of that which was improperly done, or of a wrong which was committed. In the *Muehrcke v. Housel* matter there was no wrong committed nor anything that was improperly done. Arguments were advanced in good faith, and grounded in law and fact, and as such cannot be found to be disciplinary violations. See, *Toledo Bar Assn. v. Rust* (2010), 124 Ohio St.3d 305 (*infra*). *Hampshire Cty Trust Co. v. Stevenson* (1926), 114 Ohio St. 1, cited by Relator similarly involves a real estate transaction in which it was argued that PARTIES to an action (not their attorneys) may be held to have ratified conduct (in reference to certain estoppel claims in a dispute involving a purchase agreement). Neither *Gross* nor *Hampshire* stands for the proposition that an attorney should be sanctioned for filings which the attorney did not author, sign, or specifically ratify. There is authority in the law, however, for the proposition or safe harbor that an attorney may rely upon other attorneys for factual assertions made in filings, if that reliance is reasonable. *See Unioil, Inc. v. E.F. Hutton & Co., Inc.*, 809 F.2d 548, 558 (9th Cir. 1986) (an attorney may rely on another attorney's inquiry if the signing attorney "acquire[s] knowledge of facts sufficient to enable him to certify that the paper is well-grounded in fact."); *Refac Int'l, Ltd. v. Hitachi Ltd.*, 1991 U.S. Dist. LEXIS 20733, at *3 (C.D. Cal. Dec. 23, 1991) (denying Rule 11 motion and holding that, where reasonable, "counsel should be

permitted to rely upon other attorneys”). Further, attorney Dave Kamp provided expert testimony at trial that the grounds upon which the appeal was taken and the arguments advanced by Stafford & Stafford on behalf of Dr. Muehrcke were grounded in fact and law and based upon a good faith argument. (Tr. 3304, 3307-8, 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) Therefore, contrary to Relator’s claims, Mr. Stafford did undertake “the level of self-examination required of Ohio’s lawyers”. The filings made by Stafford & Stafford on behalf of Dr. Muehrcke were based in fact, supported by law and pursued in good faith.

Relator’s reliance on *Cincinnati Bar Assn. v. Marsick* (1998), 81 Ohio St.3d 551 is equally misplaced and inapplicable. **In Marsick the respondent deliberately concealed and suppressed relevant evidence, which resulted in judgment against the other party.** Mr. Stafford’s actions are not analogous to the respondent’s actions in *Marsick*. Mr. Stafford did not conceal, alter or destroy any evidence. Neither the trial court nor the court of appeals in the *Muehrcke v. Housel* matter made any judicial findings such as those made in *Marsick*. In fact, unlike *Marsick*, the same issues raised in Count II have been previously raised by numerous motions to dismiss and for sanctions filed by Housel, and adjudicated by the trial court and the court of appeals in favor of Dr. Muehrcke and Stafford & Stafford. (Tr. 2680-84; 2926-28; 3466-7)

Relator also cites to *Disciplinary Counsel v. Clafin* (2005), 107 Ohio St.3d 31 (where the respondent misappropriated client funds), *Disciplinary Counsel v. Rohrer* (2009), 124 Ohio St.3d 65 (where the respondent violated court orders and then lied to the court, and made statements which were found to be false and misleading), and *Cincinnati Bar Assn. v. Nienaber* (1997), 80 Ohio St.3d 534 (where the respondent made false statements of law and fact to the trial court claiming that his

client did not have a prior criminal record). Neither of these cases is applicable to the facts and circumstances of this matter.

In an effort to confuse the matters being argued, Relator claims that Mr. Stafford signed some of the “offending filings”, but fails to articulate what offending filings are alleged to be signed. Instead Relator hollowly and desperately argues “[i]n Exhibit 64, respondent expressly adopted and referenced the preceding arguments.” This is contrary to and not supported by the Board Opinion or the evidence presented at trial. Contrary to Relator’s assertions, there is no authority nor evidence supporting its argument that respondent repeatedly failed to be candid with the trial court and the court of appeals, that respondent filed, authored or otherwise ratified the arguments set forth in the motions and filings made on behalf of Dr. Muehrcke.

2. Relator’s Objection Does Not Accurately Set Forth The Facts of Count II And, In Fact, Omits Significant And Material Facts Which Must Be Known And Considered By This Court.

Relator’s Objection glosses over salient facts in *Muehrcke v. Housel*; and, as a result, omits significant and material facts and information necessary for this Court’s determination. For instance, Relator’s Objections state the following:

“The facts establish that during Dr. Muehrcke’s deposition in August 2004, he testified, over respondent’s objections, about “fee bills” and about the attorney fees that he had paid to Stafford & Stafford. Report at 26-28, ¶¶10-13. When Housel requested the “fee bills,” respondent argued to the trial court that the documents could not be produced because they were privileged. Id. at 28-30, ¶¶14-19. When the trial court ordered respondent to produce the fee bills, respondent filed an appeal. Id. at ¶¶20-21. Respondent argument to the court of appeals that the fee bills were privileged. Id. at ¶22. In October 2005, the court of appeals rejected all of respondent’s arguments. Id. at 31, ¶24. After this Court refused jurisdiction, respondent professed in various forms and forums that there were no bills. Id. at ¶¶25, 27. Inter alia, respondent claimed that legal services for Dr. Muehrcke were performed by Stafford & Stafford based upon a handshake. Id. at 32, ¶28.” (Relator’s Objections at 33)

It is clear from a review of Relator’s stated facts is that even Relator vacillates in its representations. First, Relator references the documents at issue to be “fee bills”, not specifying if

they are attorney fee bills, or other bills or invoices for litigation expenses *which is what Dr. Muehrcke testified to during his deposition*. Next, Relator states that “respondent argued to the trial court that the ‘documents’ could not be produced because they were privileged” and, then, “respondent professed in various forms and forums that there were ‘no bills’”. These representations are inconsistent and inaccurate; and, most importantly, fail to disclose to this Court the full extent of “documents” and other information requested by Housel in discovery (Exhibits 44 and 45), which gave rise to the discovery dispute and the interlocutory appeal. The facts as stated by Relator would make it appear as though the only documents being requested by Housel were attorney fee bills between Dr. Muehrcke and Stafford & Stafford; and that the only issues in the interlocutory appeal was the attorney-client privilege solely relating to attorney fee bills between Dr. Muehrcke and Stafford & Stafford. The facts as evidenced at trial reveal that (1) Housel’s request was not only for “documents” between Dr. Muehrcke and Stafford & Stafford, but also between Dr. Muehrcke and eight (8) other attorneys and/or law firms; (2) the issues on appeal included attorney-client privilege, work-product privilege, spousal privilege and relevancy. Relator’s representation of facts must be carefully scrutinized by this Court, as even based upon a review of Exhibits 44 and 45, and the broad definition of “documents” contained therein, it is clear that Relator has not accurately represented the facts of *Muehrcke v. Housel*; and has instead attempted to shape the issues, in an effort for this Court to overrule the Board.

3. *Relator’s Objection And The Board Opinion Ignores The Fact That 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 Stafford & Stafford made a good faith argument in regard to the discovery issues in the *Muehrcke* matter, including the arguments advanced relating to the attorney-client privilege, work product privilege and spousal privilege; and that

Stafford & Stafford had an arguable basis in law and fact to assert these argument to the trial court and the court of appeals that was not frivolous. The Board Opinion also improperly assigns culpability to Mr. Stafford for actions taken by his law firm and others. In *Rust, supra*, 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 Stafford & Stafford (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. As lawyers may advance such claims in attempting to extend, modify, or reverse existing law, this Court must hold, as it did in *Rust, supra*, that Mr. Stafford committed no ethical impropriety, and dismiss the Amended Complaint against him. Mr. Stafford fully outlined to the Panel his basis for asserting the privilege arguments 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.¹⁶ Dave Kamp unequivocally testified to

¹⁶ 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***

the propriety of the filings of Stafford & Stafford on behalf of Dr. Muehrcke in the trial court and court of appeals.

Even if the legal argument advanced by Stafford & Stafford was flawed or incorrect, 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.*¹⁷ This Court must determine that based upon Ohio law, Mr. Stafford did not violate any disciplinary rule and dismiss Count II. 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* (2003), 100 Ohio St.3d 280, 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.

issues at trial. (Ex. E, Muehrcke Trial Tr. 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)

¹⁷ Additionally, this Court's decision in *Dayton Bar Assn. v. Korte*, 111 Ohio St.3d 273, 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.

We will not foreclose the assertion of novel legal theories through the disciplinary process unless they are absolutely specious.” (Id. at ¶ 45).¹⁸

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. 2007-0420) 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)

4. Relator’s Objection And 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., LPA¹⁹ (this fact is ignored by the Board Opinion); (2) written communications had been *sent to* Dr. Muehrcke from Stafford & Stafford, including enclosure letters and correspondences, invoices and bills for litigation expenses²⁰ (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

¹⁸ 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 Cty Bd. of Elec.* (1991), 74 Ohio App.3d 707.

¹⁹ See, (Relator’s Ex. 44)

²⁰ Such expenses included expert fees, deposition costs, copying costs, accountant fees.

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 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.²¹

Petrov admitted that it was not just itemized [attorney fee] 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)

5. Mr. Stafford Presented Expert Testimony At Trial Establishing 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.

²¹ (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).

Mr. Stafford called an expert witness, civil trial attorney Dave Kamp, to testify during the trial of this matter.²² Kamp testified that Housel's Second and Third request for production of documents 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

²² Dave Kamp was awarded the designation of Top Super Lawyer in the State of Ohio for 2009, by Super Lawyer's Magazine.

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.

As determined by the Board Opinion, in both discovery requests, “[t]he 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 and the interlocutory appeal.** (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.

Contrary to Relator’s claims and the Board Opinion’s erroneous premise that the requested documents were “non-existent” (Relator’s Objections p. 37) or 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.**²³ As such, the allegations by Relator and findings of misconduct in the Board Opinion must be disregarded by this Court.

6. *The Evidence At Trial Revealed, Contrary To Relator’s Claims And The Board Opinion, That 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 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; ***and testified only that bills for litigation***

²³ All the witnesses, including Mr. Stafford, Kamp, 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. *See, infra.*

expenses such as “copying charges, things like that” had been presented to him by Stafford & Stafford (*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 in regard to any matter.* (*Id.*)

7. 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 after numerous communications with Lori Brown.

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. (Exhibit "O"; Tr. 2997-3002; 3008-13)²⁴ 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. (Exhibit 43 at pp. 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.²⁵ Certainly cancelled checks of payment of tens of thousands of dollars from Dr. Muehrcke to Stafford & Stafford contradict Sansalone's baseless contingency fee allegation. Various representatives of Stafford & Stafford, submitted sworn affidavits to the trial court,²⁶ outlining the attorney fee bills which were prepared and sent to Dr. Muehrcke.

²⁴ 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)

²⁵ (Exhibit 65, 127; Tr. 2972-73).

²⁶ See, Plaintiff's Memorandum In Opposition To Defendants' Renewed Motion To Dismiss And For Other Sanctions.

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-3590.²⁷ 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.

8. *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 relevancy, attorney-client privilege, and work product privilege, pursuant to Civil Rule 26 and O.R.C. §2317.02(A).²⁸ (Relator's Exhibits 48, 49) 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

²⁷ *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. The court of appeals vindicated Mr. Stafford's position by reversing the trial court's order of disclosure. (2006-Ohio-3590). (Tr. 3452-53)

²⁸ It is undisputed that Mr. Stafford did not author, sign, or specifically ratify any of the Stafford & Stafford filings in the trial court or the court of appeals. (Board Opinion at pp. 29-31, 34)

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).²⁹ The information sought by Housel's counsel was reasonably believed, by multiple attorneys of Stafford & Stafford, to be privileged or otherwise outside of the scope of discovery; and not to be disclosed.³⁰ 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, in regard to matters on behalf of Dr. Muehrcke is work product:³¹

"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**

²⁹ *Frank W. Schaffer, Inc. v. Sea Garfield Mitchell Agency, Inc.* (1992), 82 Ohio App.3d 322, 329.

³⁰ *Schaffer, supra*; *State v. Hoop* (1999), 134 Ohio App.3d 624, 643.

³¹ 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.

"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 Stafford & Stafford, and that payment and checks were paid by Dr. Muehrcke for attorney fees and litigation expenses sent to Dr. Muehrcke by Stafford & Stafford. (Exhibits 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. See, infra. 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 documents responsive to Housel's Second and Third Requests existed at the time of the appeal (including documents between Dr. Muehrcke and Stafford & Stafford). See, infra.

It is undisputed that records of contemporaneous time and billing records were maintained by attorneys at Stafford & Stafford, 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 Relator's argument and the Board Opinion is not accurate in its premise, analysis and findings of misconduct. As these documents³² 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 argued by Relator and 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

³² 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.

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.

9. ***The Appeals Were Filed And Argued In Good Faith; And The Issues On Appeal Included More Than Attorney Fee Bills Between Stafford & Stafford and Dr. Muehrcke.***
10. ***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)³³ 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.³⁴ 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.³⁵ (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***

³³ 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)

³⁴ *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).

³⁵ Dr. Muehrcke appealed the trial court's order 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 trial court's order finding that the spousal privilege was inapplicable (Case No. CA-04-85644). The two appeals were consolidated for briefing and disposition. Yet the Board Opinion seems to be based upon 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.

between Dr. Muehrcke and Stafford & Stafford; (3) the requests sought work product material; (4) the attorney-client privilege applied to the communications and billing relating to eight (8) other attorneys and law firms identified in the 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. (Tr. 2581, 2696, 2930, 3092)

The attorney-client privilege issues on appeal did not only involve billing between Dr. Muehrcke and Stafford & Stafford,³⁶ but also involved billing of eight (8) other individual attorneys and/or firms. (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

³⁶Although 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.

Board Opinion, there were reasonable grounds for the appeal, and, no unreasonable costs or delays were associated with the appeal or to Housel's defense.

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) All witnesses and experts were prepped and ready to testify against Housel. 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, Stafford & 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)

11. *The Issues Addressed In Count II Of Relator's Amended Complaint Have Been Previously Addressed And Determined By Numerous Courts In Favor Of Dr. Muehrcke and Stafford & Stafford.*

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

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

Relator's arguments and the Board Opinion fail 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. When reviewing **all** the evidence presented, there are no misimpressions created by Stafford & Stafford's filings; or in the arguments advanced by Stafford &

Stafford on behalf of Dr. Muehrcke. 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. (Exhibit E, pp. 6-7)

13. The Evidence In The Record Reveals That Mr. Stafford Did Not Take Actions Merely To Harass Or Injure Housel.

Relator's continued argument that Mr. Stafford "violated DR 7-102(A)(1) (asserting a position, delaying a trial, or taking other action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another) during his representation of Robert Muehrcke" (Relator's Objection at p. 39) is simply not supported by the record or the evidence presented at trial. Mr. Stafford did not make any "false arguments designed to harass and injure Robert Housel".

The claims asserted by Stafford & Stafford on behalf of Dr. Muehrcke were sufficient to and did survive three (3) motions to dismiss, two (2) motions for summary judgment, and two (2) motions for directed verdict. Two (2) experts, who issued three (3) reports, indicated that Housel committed malpractice which proximately caused damages to Dr. Muehrcke, supporting the claims asserted by Dr. Muehrcke through Stafford & Stafford. After a six day jury trial, a verdict was rendered in favor of Dr. Muehrcke for \$179,166.66. Dr. Muehrcke also prevailed in the determination of Housel's motions for judgment notwithstanding the verdict and for a new trial. Further, in regard to the appeal, the evidence reveals that Stafford & Stafford had a good faith basis to advance the arguments contained in the filings in the trial court and the court of appeals: (1) Housel's discovery attempts

were improper (and even later admitted by Housel's counsel to be irrelevant to the determination of the legal malpractice action); (2) claims for the attorney fees and expenses as damages in the legal malpractice action were waived by Dr. Muehrcke on August 27, 2004; (3) Mr. Stafford attempted to resolve the discovery dispute; (4) Housel's counsel refused to resolve the dispute, necessitating the filing of three (3) separate motions for protective order, authorized by Civil Rule 26 and Ohio Revised Code §2317(A) and (D); (5) when the trial court denied the motions, Dr. Muehrcke had an immediate right to appeal pursuant to Ohio Revised Code §2505.02; and (6) when the trial court's judgment was affirmed, the remaining documents were provided to the trial court for an in camera inspection. The evidence at trial, including but not limited to, Kamp's expert testimony provides that the appeal was taken in good faith, supported by Ohio law in regard to privilege, and that there were good grounds for the appeal; that the requested "documents" existed at the time of the appeal; that the discovery attempts by Housel were not in good faith; and that court of appeals and trial court have adjudicated the exact same issues raised in Count II, in favor of Dr. Muehrcke and Mr. Stafford.

14. Relator's Arguments Are Exaggerated, Misleading, And Not Supported By The Record.

Relator sets forth numerous arguments which are just that, arguments, without any citation to the record or actual evidence.

- "If respondent had given an honest answer to the discovery requests, he would not have been able to obstruct discovery and delay the trial" and "Every argument respondent made during the interlocutory appeal was unsupportable" (Relator's Objection at p. 40)

Relator's basic premise is the unsupported belief that "documents" did not exist. First, the evidence at trial as set forth above clearly reveals the fallacy in Relator's position, as the requested "documents" did exist. Relator's own witnesses, Petrov and Sansalone admitted extensive documentation existed when the appeal was taken. Second, Relator fails to acknowledge over and over again that there were numerous issues on appeal **other** than "documents" relating solely to

attorney fee bills between Dr. Muehrcke and Stafford & Stafford. Petrov and Sansalone also agree with this fact. Moreover, the evidence at trial revealed that Stafford & Stafford did not file the appeal to delay the matter, but to protect Dr. Muehrcke's privilege; and that Mr. Stafford was ready to try the case in December 2004. (Tr. 3458-59)

- “Respondent did not make a good faith effort to convince the court of appeals that it should deviate from previously established law” (Relator’s Objection at p. 40)

The record reveals otherwise, and as set forth in *Rust, supra*, even if it is found that a legal argument is flawed or incorrect, where the argument is made in good faith and supported by good grounds, it is not and cannot be a disciplinary violation. Kamp testified and the Board Opinion and the court of appeals all found that there were good or reasonable grounds for the appeal. (Tr. 3304, 3307-8, 3315; Exhibit 56 p. 11; Board Opinion p. 31)

- “Many of the documents ultimately produced by respondent were not even arguably privileged” (Relator’s Objection at p. 41)

Relator provides no analysis of this argument, and unbelievably cites to the very evidence (Exhibits 65 and 127) which provide support for the fact that the arguments advanced by Stafford & Stafford in regard to privilege and work product, based upon Ohio law (R.C. §2317.02(A) and Civil Rule 26), were made in good faith.

In regard to the relevancy argument (Relator’s Objection at p. 41), the record speaks for itself, as even Housel’s counsel admitted to the trial court on December 4, 2006, that the “documents” which Housel sought in his 2nd and 3rd requests for production of documents were irrelevant to the determination of the legal malpractice action. (Exhibit E, Muehrcke Trial Tr. at p. 6; Tr. 3465-66)

Relator claims “Housel’s defense spent valuable time and resources combating the appeal”. (Relator’s Objection at p. 41) No evidence was ever submitted to the trial court or the Panel to make

this speculative assertion. The trial court and the court of appeals denied Housel's arguments and requests for sanctions setting forth the same issues as raised in Count II by Relator.

Relator claims "[f]or more than a year, respondent deliberately misled opposing counsel as to the nature of his fee arrangement with Muehrcke". (Relator's Objection at p. 41) This argument is completely false and rebutted by the evidence at trial in regard to Relator's and Sansalone's misleading or false claim alleging that Mr. Stafford indicated that Stafford & Stafford was representing Dr. Muehrcke on a contingency fee basis. See, Section 7, *supra*.

Response To Relator's Objection 4: Respondent's License Should Not Be Suspended For Any Period Of Time, Actual Or Stayed, As Relator Failed To Prove Its Allegations Of Misconduct. A Monitoring Attorney Should Not Be Appointed.

Mr. Stafford agrees that there should not be a monitoring attorney appointed, and that this Court should not accept the Board's recommendation in regard to the appointment of a monitoring attorney. Mr. Stafford incorporates his Objection 7 and 8 from his Objections filed on September 7, 2010, as if fully rewritten herein, in support of the fact that no suspension is appropriate in this matter, stayed or otherwise. This is based upon the analysis set forth above and in Mr. Stafford's Objections, that Relator did not prove its allegations by clear and convincing evidence against Mr. Stafford. However, if this Court finds any violation, no actual suspension from the practice of law is appropriate, given the facts and circumstances of this matter, mitigating factors and the relevant case law.

Relator continuously alleges that since Mr. Stafford's sanction should be increased to 18 months due to his failure to "accept responsibility for his misconduct". Relator fails to cite any authority for this position. Justice Pfeifer recently indicated the following, during oral argument in the matter of *Disciplinary Counsel v. Judge Daniel Gaul*, Case No. 2010-0062, in response to Disciplinary

Counsel's argument that a sanction should be increased based upon a respondent's failure to accept responsibility or show any remorse for the alleged misconduct:

"We all on this court have different views of remorse, and how much or important that is. We don't impose or crank up discipline, do we, just because someone is defiant in their belief that they haven't violated the rules . . . I guess I just don't believe that . . . If the person believes that they did not violate the law, then why should a judge step up the punishment . . . because they were adamant in that position and weren't contrite and remorseful. That seems to be a dilemma."
(April 20, 2010 Oral Argument)

It should be alarming to this Court after a three (3) year investigation, a twenty-two day trial spanning a year; thirty (30) witnesses, sixteen (16) discovery depositions, that Relator's Amended Complaint was nearly universally rejected and dismissed unanimously by the Panel and Board. Mr. Stafford has been vindicated by his defense of Relator's unbridled crusade to discipline Mr. Stafford. Mr. Stafford should not be remorseful or contrite to Relator's false assertions.

Mitigating Factors

Evidence presented demonstrated that Mr. Stafford is married and has two young children. Mr. Stafford fully cooperated with an unprecedented investigation by Disciplinary Counsel for the last four (4) 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. There was no evidence that Mr. Stafford has any alcohol, drug, or other mental health issues. Evidence presented Mr. Stafford as one of the premier divorce attorneys in the State of Ohio. Mr. Stafford is a Certified Specialist in Family Law by the Ohio State Bar Association. He has been a practicing attorney for nearly eighteen (18) years. Mr. Stafford and his brother employ dozens of employees at Stafford & Stafford and have built one of Ohio largest domestic relations law firms. Judge Flanagan testified at length to the superlative trial preparation and presentation of Mr. Stafford. (Tr. p. 947) If this Court adopts the Board Opinion, this disciplinary process will last from 2006 until 2012. Six years of

disciplinary investigation, trial, and sanction is grossly disproportionate to any violation found by the Panel. This does not include the cost of the proper defense to the dismissed allegations.

Relator takes great liberties in alleging what the Board Opinion found as aggravating factors, and its argument at p. 44 contains numerous inaccuracies. Relator's argument and the Board's recommendation is contrary to the purpose of attorney discipline proceedings in Ohio; and appears to be centered solely on Mr. Stafford's prior disciplinary history, which occurred approximately thirteen (13) years ago and involved Mr. Stafford using a vulgar word in a pretrial.

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, citing *Disciplinary Counsel v. O'Neil*, 103 Ohio St.3d 204. 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.

Moreover, in *Akron Bar Assn. v. Catanzarite*, the Court stated "[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. Uncontroverted testimony reveals Mr. Stafford's relentless commitment to his clients.

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 Mr. Stafford was

publicly reprimanded. *Cuyahoga Cty. Bar Assn. v. Gonzalez*, 89 Ohio St.3d 470. 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).

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.

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 depositions; Relator refused to dismiss any of the counts, causing 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.

III. CONCLUSION

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

Respectfully submitted,



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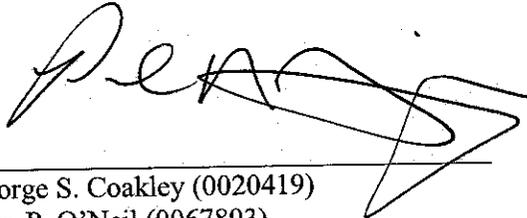
Attorneys for Respondent Vincent A. Stafford

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Respondent's Answer to Relator's Objections to the Board of Commissioners' Findings of Fact And Conclusions of Law and Brief in Support* was served by regular mail on this 22nd day of October to:

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