ORIGINAL

IN THE

SUPREME COURT OF OHIO

In re:	:	
Richard Vincent Hoppel **Attorney Registration No. (0063000)**	:	
	:	**CASE NO. 2010-1805**
	:	**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**
Respondent	:	
Disciplinary Counsel 250 Civic Center Drive, Suite 325 Columbus, OH 43215-7411	:	
Relator	:	

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

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TABLE OF CONTENTS

DESCRIPTION	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF FACTS	2
RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS	14
I. THE BOARD REPORT IS SILENT AS TO THE CONSIDERATION GIVEN RESPONDENT'S CHARACTER LETTERS	14
II. THE BOARD REPORT IS SILENT REGARDING RESPONDENT'S SUBMISSION OF CASE LAW OR THE WEIGHT AFFORDED TO IT	15
III. THE BOARD GAVE APPROPRIATE WEIGHT TO RESPONDENT'S MITIGATION IN DETERMINING THE APPROPRIATE SANCTION	20
IV. RESPONDENT'S EVIDENCE OF RESTITUTION IS NEW EVIDENCE AND SHOULD NOT BE CONSIDERED	25
CONCLUSION	27
CERTIFICATE OF SERVICE	28

TABLE OF AUTHORITIES

CASES	PAGE(S)
Akron Bar Assn. v. Goodlet, 99 Ohio St.3d 355, 792 N.E.2d 1072	18
Cincinnati Bar Assn. v. Deaton, 102 Ohio St.3d 19, 806 N.E.2d 503	19
Cincinnati Bar Assn. v. Grote, 127 Ohio St.3d 1, 935 N.E.2d 832	23
Cincinnati Bar Assn. v. Lawson, 119 Ohio St.3d 58, 891 N.E.2d 749	24
Cleveland Bar Assn. v. Dixon, 95 Ohio St.3d 490, 769 N.E.2d 816	22, 23
Cleveland Bar Assn. v. Fleck, 172 Ohio St.467, 178 N.E.2d 782	15, 16
Cleveland Bar Assn. v. Witt, 85 Ohio St.3d 8, 706 N.E.2d 763	25
Cleveland Metro. Bar Assn. v. Gottehrer, 124 Ohio St.3d 519, 924 N.E.2d 825	20
Columbus Bar Assn. v. Allerding, 123 Ohio St.3d 382, 916 N.E.2d 808	17
Columbus Bar Assn. v. Chasser, 124 Ohio St.3d 578, 925 N.E.2d 595	20
Columbus Bar Assn. v. Kiesling, 125 Ohio St.3d 36, 925 N.E. 2d 970	19
Columbus Bar Assn. v. Potts, 65 Ohio St.3d 297, 603 N.E.2d 986	24
Columbus Bar Assn. v. Sterner, 77 Ohio St.3d 164, 672 N.E.2d 633	25

Columbus Bar Assn. v. Winkfield,
107 Ohio St.3d 360, 839 N.E.2d 924 — 24

Dayton Bar Assn. v. Stephan,
108 Ohio St.3d 327, 843 N.E.2d 771 — 25

Disciplinary Counsel v. Chambers,
125 Ohio St.3d 414, 928 N.E.2d 1061 — 17

Disciplinary Counsel v. Greco,
107 Ohio St.3d 155, 837 N.E.2d 369 — 18, 19

Disciplinary Counsel v. May,
106 Ohio St.3d 385, 835 N.E.2d 372 — 16

Disciplinary Counsel v. Nicks,
124 Ohio St. 3d 460, 923 N.E.2d 598 — 17

Disciplinary Counsel v. Ridenbaugh,
122 Ohio St.3d 583, 913 N.E.2d 443 — 16

Disciplinary Counsel v. Wise,
85 Ohio St.3d 169, 707 N.E.2d 852 — 24

Stark County Bar Assn. v. Watterson,
103 Ohio St. 322, 815 N.E.2d 386 — 22

Toledo Bar Assn. v. Weisberg,
124 Ohio St.3d 274, 921 N.E.2d 641 — 16

RULES, STATUTES AND OTHER AUTHORITIES — **PAGE(S)**

Ohio Rules of Evidence

Rule 405 — 15

DISCIPLINARY RULES

Ohio Rules of Professional Conduct

Professional Conduct Rule 1.1 — 1

Professional Conduct Rule 1.3 — 1

Professional Conduct Rule 1.4(a)(1) — 1

Professional Conduct Rule 1.4(a)(2) 1

Professional Conduct Rule 1.4(a)(3) 1

Professional Conduct Rule 1.5 1

Professional Conduct Rule 3.3(a)(1) 1, 18

Professional Conduct Rule 8.4(c) 1

Professional Conduct Rule 8.4(d) 1

Professional Conduct Rule 8.4(h) 1

The Rules And Regulations Governing Procedure On Complaints And Hearings Before The Board Of Commissioners On Grievances And Discipline Of The Supreme Court

BCGD Prod. Rule 10(B)(1) 1,2

BCGD Prod. Rule 10(B)(2) 1, 21

BCGD Prod. Rule 10(B)(2)(c) 21, 22

BCGD Prod. Rule 10(B)(2)(e) 14

BCGD Prod. Rule 10(B)(2)(g) 1, 17, 18, 21

IN

THE SUPREME COURT OF OHIO

Disciplinary Counsel, Relator	:	
	:	**CASE NO. 2010-1805**
Richard Vincent Hoppel Respondent	:	
	:	**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**
	:	
	:	

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline.

By clear and convincing evidence the board found violations in fifteen counts, including: three violations of Prof. Cond. Rule 1.1, fourteen violations of Prof. Cond. Rule 1.3, two violations of Prof. Cond. Rule 1.4(a)(1), one violation of Prof. Cond. Rule 1.4(a)(2), ten violations of Prof. Cond. Rule 1.4(A)(3), thirteen violations of Prof. Cond. Rule 1.5, three violations of Prof. Cond. Rule 3.3(a)(1), fifteen violations of Prof. Cond. Rule 8.4(c), six violations of Prof. Cond. Rule 8.4(d), and fifteen violations of Prof. Cond. Rule 8.4(h).

The board found mitigation pursuant to BCGD Prod. Rule 10(B)(2) of no prior discipline and full and free disclosure to the disciplinary board or cooperative attitude toward proceedings. The board also unanimously found that respondent presented mitigation of chemical dependency pursuant to BCGD Prod. Rule 10(B)(2)(g).

The board found aggravation of a dishonest or selfish motive, a pattern of misconduct, multiple offenses, vulnerability of and resulting harm to victims of misconduct, and failure to make restitution. BCGD Proc. Rule 10(B)(1).

The board recommended an indefinite suspension with full restitution as a condition for reinstatement.

The board's report was certified to this Court on October 20, 2010. This Court issued a Show Cause Order on October 26, 2010. Respondent's objections were filed on December 6, 2010. It is to those objections that relator now responds.

STATEMENT OF FACTS

COUNT I- Contempt

In 2007, respondent began to appear late or not appear at all for hearings in the Columbiana County Court of Common Pleas. (Jt. Stip. 5). In June 2008, Judge Tobin cited respondent for contempt after he missed two hearings in Judge Tobin's courtroom on April 2, 2008 and June 13, 2008. (Jt. Stip. 6; Jt. Ex. 1). Around this same time, respondent missed a domestic relations hearing before Magistrate Colleen Hall Dailey. (Jt. Stip. 7).

Judge Tobin's Order of June 27, 2008, found respondent in contempt and ordered him to pay a fine and court costs. Payment of the fine and court costs was suspended on the condition that respondent continue to exhibit good behavior. (Jt. Stip. 8; Jt. Ex. 1). The contempt charges were later dismissed.

On October 16, 2008, respondent again missed two hearings in Judge Tobin's courtroom. On October 17, 2008, Judge Tobin issued a show cause order requiring respondent's appearance at a hearing on October 23, 2008. (Jt. Stip. 9, 10; Jt. Ex. 2).

On October 23, 2008, Judge Tobin found that respondent had exhibited intent to defy the court's orders and had a blatant disregard for the authority of the court. Respondent was sentenced to two separate sixty day jail sentences to run consecutively and ordered to pay court costs. (Jt. Stip. 11; Jt. Ex. 3).

Judge Tobin suspended the remainder of respondent's sentence after 13 days on the condition that respondent would immediately report to inpatient drug rehabilitation at the Keating Center in Lakewood, Ohio. (Jt. Stip. 12; Jt. Ex. 4). Respondent was at the Keating Center until approximately February 8, 2009.

On June 13, 2008, Judge Pike of the Columbiana County Court of Common Pleas cited respondent for contempt after he missed a hearing in Judge Pike's courtroom. A December 15, 2008 hearing was scheduled. The matter was eventually heard in July 2009 by Judge Tobin. (Jt. Stip. 13). On February 22, 2010, Judge Tobin purged respondent of contempt in both cases. (Jt. Stip. 14).

COUNT II- Gloria Hawkey

On March 29, 2007, Gloria Hawkey hired respondent to file a Chapter 7 bankruptcy on her behalf. Hawkey paid respondent's former law firm, Hoppel & Yajko, $1,200 in attorney fees and filing fees. (Jt. Stip. 16, Jt. Ex. 5).

Hawkey was part owner in a home that was in foreclosure. Hawkey intended to discharge her share of the home in bankruptcy. (Jt. Stip. 17).

Respondent never filed bankruptcy on behalf of Hawkey and did not refund any of the fees to her. (Jt. Stip. 18, 19).

COUNT III- Anthony Romano

In or about May 2008, Anthony Romano hired respondent to file a Chapter 13 bankruptcy on his behalf. Romano paid respondent $1,474 in attorney fees and filing fees. (Jt. Stip. 21).

On October 10, 2008, respondent filed bankruptcy on behalf of Romano. At the same time, respondent filed a motion to pay the filing fee in installments. The motion proposed to pay the filing fee in four installments and contained the electronic signature of Romano. (Jt. Stip. 22, 23; Jt. Ex. 6, 7). The motion states "I am unable to pay the filing fee except in installments." (Jt. Ex. 7).

At the time respondent filed the motion, he had already spent the attorney fee and filing fees paid to him by Romano. (Jt. Stip. 24).

Romano terminated the services of respondent on or about November 12, 2008. Romano was unable to reach respondent because he was in jail on the contempt of court finding. (Jt. Stip. 25).

COUNT IV- David Fusco

In or about October 2007, David Fusco hired respondent to file a Chapter 13 bankruptcy in an effort to save Fusco's home from foreclosure. Fusco paid respondent's former law firm, Hoppel & Yajko, $650, which included attorney fees and filing fees. (Jt. Stip. 27).

In February 2008, respondent left the law firm of Hoppel & Yajko to practice law out of his home. (Jt. Stip. 28).

Respondent failed to notify Fusco that he was leaving the firm. Respondent did not provide Fusco with a new telephone number or means to contact him other than the number listed in the East Liverpool, Ohio white pages for respondent's residence. (Jt. Stip. 29). In or

about March 2008, Fusco wrote respondent a letter at his home address. Respondent then contacted Fusco. (Jt. Stip. 30).

Respondent repeatedly told Fusco that he needed more time to file the bankruptcy petition. Respondent could not file the bankruptcy petition because he had spent the filing fee. (Jt. Stip. 31, 32). On October 9, 2008 Fusco received a notice of sheriff's sale for his home. (Jt. Stip.33).

Respondent never filed bankruptcy for Fusco and did not refund the fee. (Jt. Stip. 34).

COUNT V- Cynthia Robb

In October 2007, Cynthia Robb hired respondent to file a Chapter 7 bankruptcy on her behalf. Robb paid respondent $1,275 in cash for both attorney fees and filing fees on November 8, 2007. (Jt. Stip. 37, Jt. Ex. 8). On March 13, 2008, respondent filed a bankruptcy petition on behalf of Robb. (Jt. Stip. 39; Jt. Ex. 9).

Between March and July 2008, respondent was very hard to reach and his voicemail was often full. Robb left several messages that went unreturned. (Jt. Stip. 38).

Robb was receiving treatment for cancer and was scheduled to undergo a stem cell transplant at the Cleveland Clinic. Respondent was aware of Robb's medical condition. (Jt. Stip. 40; Tr. 24).

On April 23, 2008, Beneficial, the mortgage holder for Robb's house, filed a motion for relief from stay to permit it to file for foreclosure in state court. Robb called respondent about the motion for relief but could not reach him. Respondent did not file a response to the motion for relief from stay and Beneficial's motion was granted on May 27, 2008. (Jt. Stip. 41, 42, 43; Tr. 24-25).

Robb called respondent when she found out that the motion for relief from stay had been granted. Respondent told Robb not to worry about it and that it would be "taken care of at the hearing." (Jt. Stip. 44).

The first §341 meeting of creditors was scheduled for May 13, 2008; however, Robb was in the Cleveland Clinic for a stem cell transplant and unable to attend. Respondent did not attend the meeting and it was rescheduled. (Jt. Stip. 45; Tr. 25; Jt. Ex. 10). Respondent testified that he called the trustee to inform him of Robb's condition. The trustee provided respondent with interrogatories that Robb could fill out and have notarized, alleviating the need for Robb's appearance. (Tr. 25-26).

A second §341 meeting of creditors was scheduled for May 27, 2008. Robb was still in the Cleveland Clinic and unable to attend. (Jt. Stip. 46; Tr. 27). Respondent did not attend this meeting either. (Tr. 27). Again, respondent testified that he called the trustee, informed him that Robb was still in the hospital and asked for a two week continuance. (Tr. 26-27). The trustee continued the hearing for tax returns and answers to the interrogatories. (Jt. Ex. 11).

A third §341 meeting of creditors was scheduled for June 24, 2008. Robb was again unable to attend due to her medical condition. (Jt. Stip. 47). Respondent did not attend this meeting.. (Tr. 30; Jt. Ex. 12). The Minutes of the Meeting of Creditors recommends that a show cause be set for the petitioner to "produce tax returns and testimony." (Jt. Ex. 12).

The show cause hearing was held July 22, 2008, as was a fourth §341 meeting of creditors. Robb was again in the Cleveland Clinic. (Jt. Stip. 48).

Respondent testified that he attended the July 22, 2008 meeting of creditors and that he had a copy of Robb's tax returns and a copy of Robb's answers to the interrogatories that were not notarized. (Tr. 29-30). Respondent testified that he attempted to give the tax returns to the

trustee, who would not accept them without Robb present. (Tr. 32). The Minutes of the Meeting of Creditors do not reflect respondent's attendance and state that respondent was not there. (Jt. Ex. 13). The trustee ultimately recommended that Robb's bankruptcy petition be dismissed. (Jt. Stip. 48; Tr. 34; Jt. Ex. 13).

Respondent did not meet with Robb to have her sign the interrogatories. Instead, respondent sent the interrogatories to Robb's mother in the mail because Robb was in the hospital. Respondent testified that Robb was to get someone at the hospital to notarize them for her. (Tr. 32).

At no time during the pendency of Robb's bankruptcy did respondent file a motion notifying the court of Robb's medical condition or asking for a stay of the proceedings until she could attend. (Tr. 33).

Robb's bankruptcy was dismissed on July 31, 2008, for failure to appear at the §341 meeting of creditors. (Jt. Stip. 49; Tr. 34; Jt. Ex. 14).

Robb was able to obtain new counsel who was able to have her bankruptcy reinstated. (Jt. Stip. 50; Tr. 34).

COUNT VI- Nadene Dorsey

On March 17, 2008, Nadene Dorsey hired respondent to file bankruptcy on her behalf. She paid respondent $1,275 in both attorney fees and filing fees. (Jt. Stip. 52; Jt. Ex. 16, 17).

Respondent testified that he would keep in contact with Dorsey when he walked his dogs past her house. If she was outside, they would talk "every now and again." (Tr. 36). Respondent testified that he told her that he would have things ready in "30 days or so." (Tr. 36).

Dorsey contacted respondent in May 2008 and terminated his services. Dorsey requested the return of the fees that she had paid to him. (Jt. Stip. 53; Tr. 37). Respondent no longer had the fees to return to Dorsey. (Jt. Stip. 54; Tr. 37).

Because respondent could not return her money, Dorsey told him to proceed with the bankruptcy. (Jt. Stip. 55; Tr. 37). However, respondent never filed bankruptcy for Dorsey and, at the time of the hearing, had not returned the fees paid. (Jt. Stip. 56. 57; Tr. 37).

COUNT VII- Tammy Bauer

In July 2007, Tammy Bauer hired respondent to file a Chapter 7 bankruptcy on behalf of her mother, Betty Caulkins. Bauer paid respondent $1,100 in attorney fees and filing fees. (Jt. Stip. 58; Tr. 38; Jt. Ex. 18).

Respondent did not file the bankruptcy. (Tr. 38). In May 2008, respondent told Bauer that he had spent the filing fee. Bauer gave respondent another $300 for filing fees. (Jt. Stip. 59,60; Tr. 38-39).

Respondent testified that he told Bauer that he spent the filing fee on crack cocaine. Respondent testified that Bauer was "disappointed" but also "concerned about getting her mother's case filed." (Tr. 39).

Respondent never filed bankruptcy on behalf of Betty Caulkins and did not return the fee paid to him by Bauer. (Jt. Stip. 62; Tr. 39).

COUNT VIII- Marsha Watson

In March 2008, Marsha Watson hired respondent to file bankruptcy on her behalf. Watson paid respondent $1175 in attorney fees and filing fees. (Jt. Stip. 63; Jt. Ex. 19).

Respondent never filed bankruptcy for Watson, nor did he refund the fees to her. (Jt. Stip. 65, 66).

COUNT IX- Derek Carter

On June 28, 2008, Derek Carter hired respondent to file bankruptcy for him. Carter paid respondent $1,225 in attorney fees and filing fees between June and August 2008. (Jt. Stip. 68; Jt. Ex. 20).

Respondent never initiated contact with Carter after August 2008, but did meet with Carter because he would stop by respondent's office. (Jt. Stip. 70).

Respondent prepared a bankruptcy petition for Carter but was unable to file it because he had spent the filing fee. (Jt. Stip. 69). Respondent did not return any of the fees paid to him by Carter. (Jt. Stip. 71).

COUNT X- David Miller

David Miller hired respondent to file Chapter 13 bankruptcy on his behalf and paid respondent $2,500 in attorney fees and filing fees. Miller's bankruptcy was complicated by several rental properties and a business in which Miller had incurred personal debt. (Jt. Stip. 73).

On February 26, 2008, respondent filed bankruptcy on behalf of Miller. (Jt. Stip. 74; Jt. Ex. 21). On the same date, respondent filed a motion to pay the filing fee in installments. The motion contained the electronic signature of Miller. (Jt. Stip. 75; Jt. Ex. 22). The motion to pay the filing fee in installments states "I am unable to pay the filing fee except in installments." (Jt. Ex. 22). The motion was granted on March 6, 2008. (Jt. Stip. 75; Jt. Ex. 21).

At the time respondent filed the motion to pay the filing fee in installments, he had already spent the filing fee paid to him by Miller. (Jt. Stip. 76).

Respondent filed Miller's bankruptcy petition as an emergency filing without the required schedules as Miller's real property was scheduled for Sheriff's sale the next day. (Jt. Stip. 77).

On March 27, 2008, the United States Bankruptcy Court, Northern District of Ohio, issued an order to show cause why the schedules had not been filed. Respondent attended the hearing and was given until March 28, 2008 to file the schedules and declarations page. (Jt. Stip. 78, Jt. Ex. 24).

On March 28, 2008, respondent filed schedules A-J but did not file the declaration page. He also paid the first installment of the filing fee. (Jt. Stip. 80, 81; Jt. Ex. 21, 24).

On May 7, 2008, an order to show cause was issued for respondent's failure to pay the second installment of the filing fee. (Jt. Stip. 81; Jt. Ex. 27).

The Court dismissed Miller's bankruptcy on May 14, 2008 for failure to file the declarations page. (Jt. Stip. 82; Jt. Ex. 29)

Miller had to hire another attorney to refile his bankruptcy petition. (Jt. Stip. 83).

At the time of the hearing, respondent had not refunded any of the fees paid to Miller. (Jt. Stip. 84).

COUNT X- Brian Grimm

On March 19, 2008, Brian Grimm hired respondent to file bankruptcy on his behalf. Grimm paid respondent $1,200 in attorney fees and filing fees. (Jt. Stip. 86).

After their initial meeting, respondent was not responsive to Grimm's voice mail messages and in July 2008 respondent's telephone number was disconnected but was soon afterwards reconnected. (Jt. Stip. 87).

Respondent did not file bankruptcy on behalf of Grimm and at the time of the hearing, has not refunded any fees paid by Grimm. (Jt. Stip. 88, 89).

COUNT XII- Donald Cusick

Respondent properly filed a Chapter 13 bankruptcy on behalf of Donald Cusick on October 12, 2005. (Jt. Stip. 90). On January 17, 2007, the trustee filed a Motion to Dismiss the bankruptcy because Cusick was in default on his repayment plan payments (Jt. Stip. 91; Jt. Ex. 31, 32). On February 16, 2007, an Agreed Order was filed by the trustee. Respondent, on behalf of Cusick, negotiated a new repayment plan to cure the delinquency of payments. (Jt. Stip. 92; Jt. Ex. 33).

On September 5, 2007, the trustee filed an affidavit recommending dismissal of Cusick's bankruptcy without hearing because Cusick failed to make the payments in accordance with the Agreed Order. Cusick's bankruptcy was dismissed on September 6, 2007. (Jt. Stip. 93, 94; Jt. Ex. 34, 35).

At the time, respondent was still attorney of record for Cusick and would have received a copy of the September 6, 2007 Order of Dismissal. (Tr. 41; Jt. Ex. 35).

In October 2007, Cusick called respondent to say that he could no longer afford the payments under his Chapter 13 repayment plan. (Jt. Stip. 95). Respondent agreed to convert the Chapter 13 to a Chapter 7 bankruptcy. Respondent advised Cusick that because the Chapter 13 had been dismissed it would have to be reinstated before it could be converted to a Chapter 7. (Jt. Stip. 96; Tr. 45).

On October 31, 2007, Cusick paid respondent $665 to file the motion to reinstate the Chapter 13 and convert the bankruptcy. (Jt. Stip. 97; Tr. 43,44).

Respondent did not file the motion to reinstate the Chapter 13 and did not convert the bankruptcy to a Chapter 7. At the time of his discipline hearing, respondent had not refunded any of the fees paid to him by Cusick. (Jt. Stip. 98,99,100; Tr. 46).

COUNT XIII- Richard McCauley

In November 2007, Richard McCauley hired respondent to file Chapter 7 bankruptcy on his behalf. McCauley paid respondent $1,200 in attorney fees and filing fees between November 2007 and February 4, 2008. (Jt. Stip. 101; Jt. Ex. 36).

After February 2008, McCauley had a difficult time contacting respondent. Respondent rarely returned telephone messages and his voice mail was often full. (Jt. Stip. 102).

Respondent did not file bankruptcy on behalf of McCauley and, as of the time of his discipline hearing, had not refunded any of the fees paid to him by McCauley. (Jt. Stip. 103, 104).

COUNT XIV- Dale and Betty Blazer

Dale and Betty Blazer were clients of respondent who had been in a Chapter 13 repayment plan since January 10, 2005. In June 2008, the Blazers contacted respondent and stated that they could no longer afford the Chapter 13 repayment plan payments. (Jt. Stip. 106, 107; Tr. 48).

Respondent agreed to dismiss the Chapter 13 and file a Chapter 7 bankruptcy in an attempt to discharge some of the debt. The Blazer's main goal was to save their home. (Jt. Stip. 108; Tr. 47, 48).

Over a period of time beginning June 17, 2008, the Blazers paid respondent $1324 in attorney fees and filing fees to dismiss the Chapter 13 and refile a Chapter 7 bankruptcy. (Jt. Stip. 109; Jt. Ex. 37).

On July 17, 2008, Tamarac Corporation, the mortgage holder for the Blazer's home, filed a motion for relief from stay so that it could pursue foreclosure proceedings in state court. Respondent did not file a response to this motion because respondent and the Blazers agreed that

they would allow the foreclosure case to go forward and refile a Chapter 7 on the eve of the Sheriff's sale to allow the Blazers the opportunity to save up money to redeem their home. (Jt. Stip. 110, 111; Tr. 47, 48; Jt. Ex. 39). Tamarac Corporation's motion for relief from stay was granted on August 27, 2008. (Jt. Stip. 112; Jt. Ex. 38).

Respondent never dismissed the Chapter 13 bankruptcy, nor did he file a Chapter 7 bankruptcy on behalf of the Blazers. (Jt. Stip. 113). On January 9, 2009, the Blazers dismissed their Chapter 13 bankruptcy pro se. (Jt. Stip. 114; Jt. Ex. 38).

At the time of the hearing, respondent had not returned any of the fee paid to him by the Blazers. (Jt. Stip. 115).

COUNT XV- Douglas & Rebecca Reckner

On October 17, 2008, respondent filed a Chapter 7 bankruptcy on behalf of Douglas and Rebecca Reckner. (Jt. Stip. 117; Jt. Ex. 40).

On October 21, 2008, respondent filed an application to waive the filing fee in its entirety. (Jt. Stip. 118; Jt. Ex. 41). The application asks "Have you paid an attorney any money for services in connection with this case, including the completion of this form, the bankruptcy petition, or schedules?" Respondent checked "no", even though the Reckners has already paid him the filing fee. (Jt. Ex. 41). The court denied the motion on the same date because the Reckners were above the income limit for a waiver of the filing fee. (Jt. Stip. 118, 119; Jt. Ex. 42).

Because the filing fee was not paid, the U.S. Bankruptcy Court, Northern District of Ohio, Eastern Division, issued a show cause order to respondent and the Reckners to appear on November 13, 2008. (Jt. Stip. 120; Jt. Ex. 43).

The Reckners appeared before Judge Kay Woods; however, respondent did not appear. (Jt. Stip. 121; Jt. Ex. 45). The Reckners were able to provide Judge Wood with a receipt from respondent for the filing fee. (Jt. Stip. 121: Jt. Ex. 45). Judge Woods ordered respondent to disgorge the entire fee paid to him by the Reckners, including the filing fee. The Reckners were then ordered to pay the entire filing fee to the court. (Jt. Stip. 122: Jt. Ex. 45). Respondent's electronic filing (ECF) privileges were suspended until he could prove that he disgorged the fee. (Jt. Stip. 123; Jt. Ex. 45).

The Reckners did not pay the filing fee and their bankruptcy was dismissed on December 10, 2008. (Jt. Ex. 46).

At the time of his discipline hearing, respondent had not disgorged the fee paid to him by the Reckners. (Jt. Stip. 124).

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I.

THE BOARD REPORT IS SILENT AS TO THE CONSIDERATION GIVEN RESPONDENT'S CHARACTER LETTERS

Respondent states that the board erred in failing to consider evidence of character in determining mitigation in this matter. Unfortunately, the board report is silent on this issue. Although the report mentions that respondent submitted exhibits, it does not specifically mention the character letters. (Report at 2). This court can presume that the board gave the character letters the appropriate weight toward mitigation and did not find that they constituted mitigation of character under BCGD Proc. Rule 10(B)(2)(e).

At the hearing, relator objected to three of respondent's character letters marked as respondent's exhibits 20, 22 and 24. Relator objected to respondent's exhibits 20 and 22 because

they are testimonial in nature and provide information related to specific counts in the complaint. The testimonial portions of the letters were not redacted. Relator objected to respondent's exhibit 24 because it is the same document as respondent's exhibit 4 which was admitted as a factual exhibit regarding respondent's successful treatment at the Keating Center. A letter in support of character cannot be both testimonial in nature and also be in support of character.

Ohio Rules of Evidence Rule 405 states that there are two methods of proving character: testimony of reputation or testimony of opinion. In matters where character is an essential element of the "charge, claim or defense," proof of specific instances of conduct related to character may be admitted. Respondent's exhibits 20, 22 and 24 do not comport with Evid. R. 405. Additionally, respondent's exhibit 24 is duplicative.

This Court conducts a de novo review of disciplinary cases and is able to review the evidence submitted to the panel. *Cleveland Bar Assn. v. Fleck*, 172 Ohio St.467, 178 N.E.2d 782. This Court can review respondent's character letters and afford them the appropriate weight toward mitigation of good character. However, relator would urge the Court not to give any weight to respondent's exhibits 20, 22, and 24 based on the foregoing objections.

II.

THE BOARD REPORT IS SILENT REGARDING RESPONDENT'S SUBMISSION OF CASE LAW OR THE WEIGHT AFFORDED TO IT

At the end of the hearing, the panel chair offered respondent the opportunity to submit cases in support of sanction. On May 25, 2010 respondent provided a letter that set forth seven cases, which he has now cited to this court.

The board report mentions that cases cited by relator at the hearing but fails to mention the cases submitted by respondent. It is unclear from the report what weight, if any, was afforded the cases submitted by respondent.

Because the Court conducts a de novo review of disciplinary cases, it is able to review the evidence submitted to the panel. *Cleveland Bar Assn. v. Fleck*, supra. This Court may review the case law submitted by respondent and determine whether or not those cases are appropriate given respondent's misconduct. However, relator would urge that the cases cited by respondent are not analogous to respondent's misconduct.

Respondent states that all of the cases he submitted are in support of his recommended sanction of a two-year suspension with the last eighteen months stayed on conditions. This is not the sanction respondent recommended at the hearing. In fact, as noted in the board report, respondent did not recommend a specific sanction but stated that some type of suspended suspension with conditions would be appropriate. The cases cited by respondent do not contain a consistent sanction. The sanctions in the cases range anywhere from a two-year suspension, fully stayed, to a one-year suspension with six-months stayed.

In determining the appropriate sanction, this Court reviews the misconduct committed by the respondent, actual or potential injury caused, the respondent's mental state, mitigating and aggravating factors and the sanctions imposed in similar cases. *Disciplinary Counsel v. Ridenbaugh*, 122 Ohio St.3d 583, 913 N.E.2d 443. The cases cited by respondent are neither similar in facts, mitigating and aggravating factors, nor in the harm caused to clients in the instant case.

Respondent cites two cases that do not involve clients: *Toledo Bar Assn. v. Weisberg*, 124 Ohio St.3d 274, 921 N.E.2d 641, and *Disciplinary Counsel v. May*, 106 Ohio St.3d 385, 835

N.E.2d 372. Neither case is similar to the instant case. Respondent stipulated to, and was found, to have committed misconduct in connection with 14 clients from whom he accepted fees to file or convert a bankruptcy and failed to perform the work.

The remainder of the cases cited by respondent involves misconduct involving clients, however, none of the cases contain the extensive misconduct committed by respondent. The only similarity is mitigation pursuant to BCGD Proc. Rule 10(B)(2)(g).

One case cited by respondent is *Disciplinary Counsel v. Chambers*, 125 Ohio St.3d 414, 928 N.E.2d 1061, wherein this Court gave an attorney a one-year suspension stayed on conditions. Chambers accepted $500 from a client and failed to perform the work. Chambers also attempted to have a neighbor dismiss a grievance that he filed against Chambers. There was one aggravating factor found: that Chambers conduct involved multiple offenses. In mitigation, Chambers was found to be chemically dependent but in treatment.

In *Disciplinary Counsel v. Nicks*, 124 Ohio St. 3d 460, 923 N.E.2d 598, the Court gave Nicks a two year suspension with 18 months stayed. Nicks misconduct involved 2 clients, both estate clients from whom he took fees without court approval, failed to timely file estate tax returns and other probate documents, and was found in contempt in relation to one estate. In *Nicks*, the board found just two aggravating factors and three mitigating factors, one of which was that respondent was chemically dependent but in treatment.

Respondent also cited *Columbus Bar Assn. v. Allerding*, 123 Ohio St.3d 382, 916 N.E.2d 808, in which the court issued a two year fully stayed suspension. Allerding was found to have committed one ethical violation as he was charged for the same conduct under the former and current disciplinary rules. The misconduct involved Allerding's failure to refund fees to the

client but did not involve dishonesty. Only one aggravating factor; multiple offenses, was found. The board found three mitigating factors, including chemical dependency.

Another case cited by respondent involves an attorney whose misconduct involved one client and did not involve an excessive fee or dishonesty. *Akron Bar Assn. v. Goodlet*, 99 Ohio St.3d 355, 792 N.E.2d 1072. The board found one aggravating factor of prior discipline but it was 21 years before. In mitigation the board found that Goodlet had been diagnosed and was treated for severe depression. The court issued a one year suspension stayed on conditions.

The above cited cases are not analogous to respondent's situation other than that the respondents involved were found to have mitigation pursuant to BCGD Proc. Rule 10(B)(2)(g). Factually, the cases are completely distinct from respondent's case. The misconduct does not involve nearly the same number of clients and is not so far reaching in scope. Many of the cases cited do not involve accepting a fee for services not performed, neglect or dishonesty. Respondent also engaged in multiple violations of Prof. Cond. Rule 3.3(a)(1) for making false statements to a tribunal by filing the applications to pay a filing fee in installments or to waive the filing fee completely when the clients had already paid him the filing fee. Each of these violations is worthy of an actual suspension.

The only case cited by respondent that is somewhat similar to the instant case is *Disciplinary Counsel v. Greco*, 107 Ohio St.3d 155, 837 N.E.2d 369. Greco committed misconduct related to 6 separate clients, and involving many of the same violations as respondent. The court found aggravating factors such as a pattern of misconduct, multiple offenses, dishonest or selfish motive, and the vulnerability of and resulting harm to victims of the misconduct. Greco was found to have been cooperative, submitted evidence of good character and was found to be chemically dependent upon cocaine, alcohol and marijuana. The court

found that Greco had successfully completed a treatment program and could return to the competent, ethical practice of law. The Court issued a two year suspension with 18 months stayed.

Although *Greco*, supra, concerns more than one client and many of the same violations and aggravation, the instant case involving respondent is much more severe. Respondent's conduct involved 14 clients who were seeking bankruptcy protection to save their home or financial futures. Respondent accepted attorney and filing fees and either failed to file the bankruptcy at all or complete the bankruptcy. He filed documents in the clients cases with the United States Bankruptcy Court, Northern District of Ohio, Eastern Division purporting that the clients could not pay the filing fee at once or at all when respondent had already spent the filing fee. Respondent made representations to his clients that he would complete the bankruptcies. One client, Nadene Dorsey, even fired respondent but when he could not return the fees he had accepted, Dorsey told respondent to just file the bankruptcy, which he failed to do.

Paul Caimi of OLAP testified that respondent's ability to competently and ethically practice law depends on respondent continuing to go to meetings and stay sober. (Tr. 72, 73). Mr. Caimi also testified that it is his opinion that respondent should have some continued accountability to insure that he continues to attend meetings. (Tr. 76).

Relator cited several cases at the hearing wherein the attorney engaged in misconduct similar to that of respondent. Relator cited to two cases where the respondent was permanently disbarred for misconduct involving multiple clients. *Cincinnati Bar Assn. v. Deaton*, 102 Ohio St.3d 19, 806 N.E.2d 503, and *Columbus Bar Assn. v. Kiesling*, 125 Ohio St.3d 36, 925 N.E. 2d 970. Both cases involve attorneys who accepted fees from multiple clients and failed to perform

the contracted services, neglected client cases, failed to refund fees, and made misrepresentations to clients.

Relator also cited two cases involving attorneys who were indefinitely suspended due to various mitigating factors found for similar behavior.

In *Columbus Bar Assn. v. Chasser*, 124 Ohio St.3d 578, 925 N.E.2d 595, the attorney represented a client in a personal injury case. Chasser failed to honor the fee agreement, overcharging the client, improperly divided fees with another attorney, failed to pay a subrogation claim and misappropriated the funds and made misrepresentations to the client.

In *Cleveland Metro. Bar Assn. v. Gottehrer*, 124 Ohio St.3d 519, 924 N.E.2d 825, the attorney received an indefinite suspension for accepting retainers from clients, failing to perform the work or return the fee, and neglecting cases. Gottehrer also failed to cooperate in the board case.

The cases cited by respondent are not analogous to respondents conduct and do not justify a reduction in the board's recommended sanction.

III.

THE BOARD GAVE APPROPRIATE WEIGHT TO RESPONDENT'S MITIGATION IN DETERMINING THE APPROPRIATE SANCTION

Respondent claims that he wasn't given enough credit for the mitigation he presented at the hearing. Respondent states that the board must not have considered all available mitigation because they recommended an indefinite suspension. In support of this assertion, respondent does not point to any provision of the board's report to show that he was not given mitigation credit. Respondent believes that his mitigation negates his misconduct and should result in a sanction that does not involve an actual suspension of respondent's license to practice law.

In fact, the board report lists the multiple mitigating factors that were found, including the unanimous finding that respondent presented mitigation of chemical dependency pursuant to BCGD Proc. Rule 10(B)(2)(g). (Report at 7-8). Because the board found mitigating factors outside of those stipulated to by the parties, it appears that the board considered all mitigating factors in BCGD Proc. Rule 10(B)(2) and did not find any additional mitigation.

Respondent is mistaken in his belief as to what constitutes mitigation pursuant to BCGD Proc. Rule 10(B)(2) in some instances. For example, respondent appears to argue that because he signed an OLAP contract and went to treatment he should be given mitigation credit for BCGD Proc. Rule 10(B)(2)(c): a timely good faith effort to make restitution or rectify the consequences of misconduct. Respondent does not explain how engaging in an OLAP contract is a timely, good faith effort to make restitution or rectify the consequences of his misconduct. It does not count as mitigation under BCGD Proc. Rule 10(B)(2)(c). In fact, the board found as aggravation that respondent did not make a timely, good faith effort at restitution.

Respondent further claims that he suffered "other penalties or sanctions" as a result of his actions. Respondent claims that being jailed for contempt counts, that having his ECF privileges suspended and losing his home to foreclosure all count as other penalties or sanctions.

Respondent's contempt is actually part of his misconduct. It is a result of his failure to show up at court when he was supposed to. Respondent's ECF privileges were suspended because he took money from his clients, the Reckners, and filed a false application to waive the filing fee. Respondent then failed to appear at the show cause hearing. Even if the court found that the suspension of respondent's ECF privileges is a mitigating factor, it does not outweigh the aggravating factors found.

Further, the fact that respondent lost his own home to foreclosure was a result of the fact that he failed to make his payments or administer his own bankruptcy. (Tr. 129). It was not a consequence of the misconduct but a separate matter relating to respondent's personal life only.

Respondent also wants mitigation consideration for making restitution after the hearing. In doing so, respondent is submitting new evidence to this court which relator addresses later in this brief. Notwithstanding the appropriateness of submitting new evidence attached to a brief, respondent's argument for mitigation credit is misplaced.

This Court has often rejected restitution made after a grievance has been filed.

In *Stark County Bar Assn. v. Watterson*, 103 Ohio St. 322, 815 N.E.2d 386, this Court held that Watterson failed to make a timely good faith effort at restitution because he returned some, but not all, fees after the clients filed grievances and relator told Watterson to make restitution.

In *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 769 N.E.2d 816, this Court discounted the mitigating value of Dixon's claim to have made restitution before a court ordered her to do so, despite the board's acceptance of the restitution as a mitigating factor. This Court found that although Dixon made restitution before being ordered, it took her over a year after learning of the grievance to do so - and only after the grievant initiated legal proceedings to reclaim the funds. This Court found that since Dixon knew how much she owed her client, an estate, she should have made restitution on her own and not waited until the conservator determined the amount due. This Court specifically found that Dixon's delay in making restitution counted for less than a "timely, good faith effort to make restitution" pursuant to BCGD Proc. Rule 10(B)(2)(c).

Another case where the court gave little mitigating value to restitution is *Cincinnati Bar Assn. v. Grote*, 127 Ohio St.3d 1, 935 N.E.2d 832. In this case, Grote returned the $500 retainer to the client. However, it was given little mitigating value when Grote failed to render the legal services she had been paid to perform, the retainer was not timely returned, and was only then returned after Grote was contacted by the Cincinnati Bar Association.

In the instant case, respondent did not pay restitution until after the board report was issued on October 20, 2010. According to respondent, restitution was not made until November 12-13, 2010, after the Court's show cause order came out. Surprisingly, respondent was able to get his father to make restitution for him (respondent's father actually wrote the checks directly to each grievant) after he saw that the recommended sanction in this matter was indefinite suspension with full restitution as a condition of reinstatement.

Not only should this court not accept respondent's evidence of restitution for reasons discussed later, it should see it for what it is - evidence of respondent's continued self-interest.

Further, indefinite suspension is the appropriate sanction in this matter. The board found that respondent committed 82 total violations involving fifteen counts and 14 clients. Among those violations, the board found 13 clients from whom respondent accepted attorney fees and filing fees and failed to perform the contracted services. In addition, the board found that respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in all 15 counts.

This Court has found that misappropriation of client funds carries a "presumptive sanction of disbarment." *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 769 N.E.2d 816. In *Dixon* the attorney misappropriated $252,406 from an estate and did not pay any portion back

until after the disciplinary proceedings had begun. Dixon presented mitigation evidence including mental illness, which the court discounted. Dixon was permanently disbarred.

Although the presumptive sanction for misappropriation of client funds is permanent disbarment, and any analysis of sanction in this matter should start there, mitigation can warrant a lesser sanction. *Disciplinary Counsel v. Wise*, 85 Ohio St.3d 169, 707 N.E.2d 852.

In *Columbus Bar Assn. v. Winkfield*, 107 Ohio St.3d 360, 839 N.E.2d 924, this court issued an indefinite suspension rather than permanent disbarment based on Winkfield's mitigation of mental health problems. Winkfield misappropriated funds from multiple clients, neglected client matters, failed to deliver a client's file to client's new attorney, and practiced while his license was suspended. This Court acknowledged that permanent disbarment was the presumed sanction but due to Winkfield's history of mental issues, an indefinite suspension was the appropriate sanction.

This Court conducted the same analysis in *Cincinnati Bar Assn. v. Lawson*, 119 Ohio St.3d 58, 891 N.E.2d 749. Lawson committed multiple acts of misconduct including misappropriation of funds from both his law firm and clients, neglect, failure to provide competent representation, and failure to carry out a contract of employment. Despite the level of misconduct and significant aggravating factors, this Court recommended an indefinite suspension due to respondent's mitigating evidence of drug addiction.

In *Columbus Bar Assn. v. Potts*, 65 Ohio St.3d 297, 603 N.E.2d 986, attorney Potts engaged in multiple acts of misconduct involving five clients. Potts' conduct including misappropriating client funds, failing to competently handle a matter, failing to carry out contracted employment, failing to withdraw when requested, and prejudicing or damaging a client during the course of representation. Although this court acknowledged that permanent

disbarment was the presumed sanction, due to Potts' mitigation evidence of his addiction to crack cocaine and his treatment thereof, a sanction of indefinite suspension was imposed.

Although respondent urges this court to reduce his sanction, the sanction recommended by the board is appropriate in this instance and takes into account not only respondent's mitigation but the significant aggravating factors that were found. This court should adopt the recommended sanction of indefinite suspension.

IV.

RESPONDENT'S EVIDENCE OF RESTITUTION IS NEW EVIDENCE AND SHOULD NOT BE CONSIDERED

Attached to respondent's brief are letters and copies of checks that he sent or delivered to the grievants in this matter. The letters and checks are dated November 12-13, 2010. The restitution was not made until after the board report was filed with this court on October 20, 2010 and this court issued a show cause order on October 26, 2010.

Respondent filed a separate Motion to Supplement the Record on December 6, 2010. Relator filed a Motion in Opposition to Respondent's Motion to Supplement the Record on December 10, 2010. To date, no decision has been rendered by this Court.

This Court has previously stated that it will accept supplements to the record only in the most "exceptional circumstances." *Dayton Bar Assn. v. Stephan*, 108 Ohio St.3d 327, 843 N.E.2d 771. In *Stephan*, this court did not find exceptional circumstances existed and stated that "the record should be developed in the answers and hearings prior to reaching this court." *Stephan, Id.* at 328, 774. See also: *Cleveland Bar Assn. v. Witt*, 85 Ohio St.3d 8, 706 N.E.2d 763.

In *Columbus Bar Assn. v. Sterner*, 77 Ohio St.3d 164, 672 N.E.2d 633, Sterner engaged in misconduct over a five-year period wherein he, among other violations, neglected client matters, engaged in conduct involving moral turpitude, failed to seek the objectives of his clients, failed to refund client fees, and failed to carry out contracts of employment. Before the court, Sterner attempted to submit evidence that his psychological condition contributed to the misconduct and that he had made restitution. This Court did not accept the new evidence, saying "...the time for the production of evidence is at the formal hearing before a panel appointed by the Secretary of the Board of Commissioners on Grievances and Discipline." *Id.* at 167, 635. This Court went on to state that Gov. Bar Rule V does not include a provision for the "introduction of evidence in the brief filed in this court or in the oral argument to this court. Only in the most exceptional circumstances would we accept additional evidence at that late stage of the proceeding." *Id.* at 167-168, 635. This court permanently disbarred Sterner.

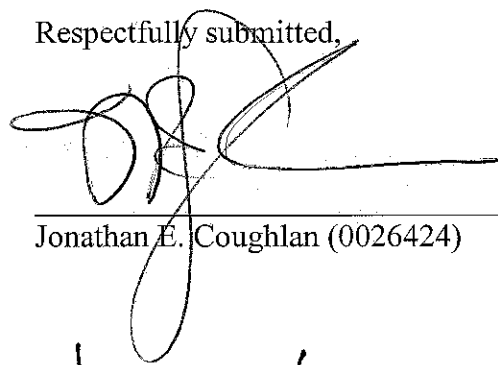
In the instant case, respondent has not pled any exceptional circumstances as to why the evidence should be admitted at this stage. Many of the grievants in this matter paid attorney and filing fees to respondent in 2007. There was no effort made at restitution prior to respondent receiving the board's report and this court's show cause order. It is inappropriate to submit mitigation evidence at this time.

This Court should not give respondent's restitution any weight and should require that he comply with the board's recommended sanction - an indefinite suspension with full restitution as a condition of reinstatement. Respondent can submit proof of restitution in his reinstatement petition as recommended by the board.

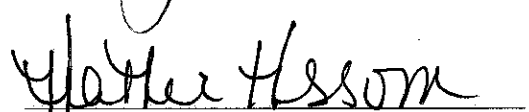
CONCLUSION

This Court should not modify the recommended sanction in this matter. The board heard all evidence and found that, despite respondent's mitigation of chemical dependency, an indefinite suspension with conditions was still the appropriate sanction.

Respectfully submitted,



Jonathan E. Coughlan (0026424)



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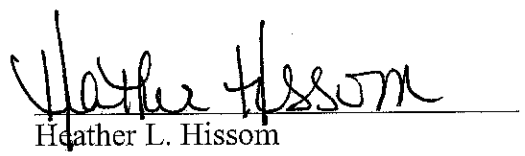
CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Harry Joseph DePietro, Esq., 920 Washington Avenue, Girard, OH 44420, and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 41 S. High Street, Suite 2320, Columbus, Ohio 43215 this 20th day of December, 2010.



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