

**THE SUPREME COURT OF OHIO**

**CASE NO.  
2011-0299**

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**MAHONING COUNTY BAR ASSOCIATION,**

**Relator,**

**-vs-**

**JAMES VIVO,**

**Respondent.**

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**ANSWER BRIEF OF RELATOR, MAHONING COUNTY BAR ASSOCIATION**

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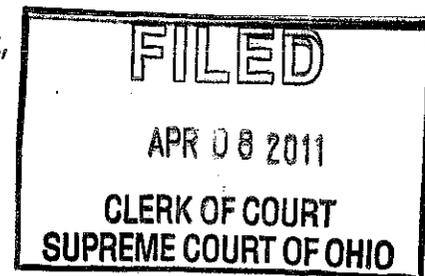
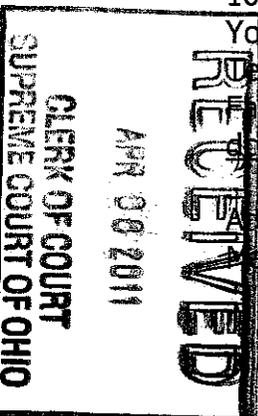
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## **STATEMENT OF THE CASE AND FACTS**

This matter is before the this Court pursuant to the Order to Show Cause filed on March 4, 2011.

That Order is the result of the filing of Amended Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio also filed on March 4, 2011. The findings granted relator, Mahoning County Bar Association, default judgment and recommended that respondent, James Vivo, be suspended from the practice of law for two (2) years with one (1) year stayed in favor of two (2) years probation and CLE conditions.

Respondent has filed Objections asking that this Court not accept the recommendation of the Board.

In response, relator has filed a Motion to Remand and an Answer Brief.

## **ANSWER TO OBJECTIONS**

This matter should be remanded to the Board of Commissioners on Grievances and Discipline to determine whether or not respondent was disabled from responding to the allegations against him. Alternatively, the "evidence" submitted by respondent should not be considered by this Court and the Board's recommendation should be adopted.

Respondent, James Vivo, in his Objections to the final report of the Board of Commissioners on Grievances and Discipline ("Board"), has presented three (3) separate issues to this Court. The first relates to an alleged psychiatric condition which

respondent claims compromised his ability to deal with the grievance which was filed against him, and which is the underlying subject of this case. Second, respondent challenges the findings of fact made by the Board by proffering his affidavit. Last, respondent challenges the sanction recommended by the Board.

Relator, Mahoning County Bar Association, suggests that the second and third issues (findings of fact and sanctions) cannot be addressed without resolving the first issue raised by respondent, i.e. did he have a psychiatric condition that inhibited his ability to deal with the grievance filed against him and/or the subsequent proceedings before the Board?

In an effort to resolve the mental health issue, relator has filed a motion contemporaneously with this Answer Brief asking this Court to remand this matter to the Board of Commissioners on Grievances and Discipline for a determination as to whether or not respondent's psychiatric condition prevented him from responding to the grievance against him.

In his affidavit, attached to his Objections as Exhibit C, respondent states:

Affiant has been treating with a psychiatrist, Dr. Vincent Paolone, and a counselor for his depression. However, until recently, Affiant was unable to face responding to this disciplinary matter, despite understanding the consequences thereof.

(Respondent's affidavit, paragraph 16, Exhibit C to Respondent's Objections).

Unfortunately, respondent has filed nothing from Dr. Paolone.

In paragraph 15 of his affidavit, respondent states that he "has been suffering from depression *for quite some time.*" (emphasis added). Again, respondent has not submitted any evidence to establish how long he has suffered from depression and whether or not his depression inhibited his ability to respond to the grievance or attend to the proceedings before the Board.

The only "evidence" submitted to support respondent's representations that he suffers from a medical condition is a case summary of information signed by a Professional Clinical Counselor and dated March 23, 2011. (Exhibit D, respondent's Objections). Counselor Kupec's summary indicates that respondent does suffer from major depressive disorder, recurrent, without psychotic features. However, it also indicates that Counselor Kupec first met with respondent at his agency on February 11, 2011, approximately one (1) month ago. It does not indicate how long respondent's condition has existed or whether it inhibited respondent's ability to respond to a grievance filed with relator on or about September 21, 2009, and the subsequent proceedings before the Board.

For the foregoing reasons, relator has moved this Court to remand this matter to the Board of Commissioners on Grievances and Discipline for a specific determination as to whether or not respondent suffers from a psychiatric condition that would have prohibited him from responding to the grievance filed against him on or about September 21, 2009. See *Cleveland Metropolitan Bar Association v. Saylor*, 2010-Ohio-1810, 125 Ohio St.3d 403, 928 N.E.2d 724.

Relator asks that, if this matter is remanded and if the Board determines that, in fact, respondent was incapable of responding to the grievance, a further determination be made as to whether or not he can now effectively assist in preparing his response to the grievance. If he can, relator asks that the Board appoint a hearing panel and have this matter proceed in due course.

If the Board determines that respondent was able to competently respond to the grievance filed against him, relator asks that this matter be returned to this Court for further proceedings on the Board's original report and recommendation. Relator suggests that, in that event, the additional evidence submitted by respondent should be stricken from the record as untimely.

Second, respondent challenges the factual findings made by the Board. He does so by submitting his affidavit. As indicated above, if this matter is remanded, there is no need to address this issue here. If this matter is not remanded, relator asks that the exhibits submitted by respondent and attached to his Objections be stricken from the record. Simply put, relator has not had the opportunity to investigate the facts set forth in respondent's affidavit or to cross-examine the same. Relator also asks that any reference made to those exhibits in respondent's Objections be stricken from the record. Respondent was given the opportunity to submit evidence. He failed to do so. Based upon the record, the Board has made findings of fact. Significantly, respondent does not challenge the findings of fact made by the Board based upon the record before the Board, but only upon the basis of his affidavit dated March 23, 2011. Contrary to respondent's suggestions, the affidavits submitted to the Board were

prepared and submitted in good faith based upon representations made by affiants, not "by [Bar Counsel's] negligence or design".

Last, respondent challenges the recommended sanction. If this matter is remanded, the sanction need not be addressed now. If this matter is not remanded, relator submits that the Board has recommended the appropriate sanction.

The Ohio Supreme Court has recognized that "[a] lawyer's neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation generally warrant an indefinite suspension from the practice of law in Ohio." *Cleveland Metro. Bar Assn. v. Kaplan*, 124 Ohio St.3d 278, 2010-Ohio-167, 124 Ohio St.3d 278, 921 N.E.2d 645.

In addition, relator offers the following: *Cleveland Metro. Bar Assn. v. Gottehrer*, 2010-Ohio-929, 124 Ohio St.3d 519, 924 N.E.2d 825, indefinite suspension for violations of Gov. Bar R. V(4)(G) and Prof. Cond. R. 1.3, 1.4(a)(3)(4), 1.5, 1.15(d), and 8.1(b); *Cleveland Metro Bar Assn. V. Kaplan, supra*, indefinite suspension for violations of Gov. Bar R. V(4)(g) and Prof. Cond. R. 1.3, 1.4(a)(3), 1.4(a)(4), 1.15(a), and 8.1(b); *Disciplinary Counsel v. Nicks*, 2010-Ohio-600, 124 Ohio St.3d 460, 923 N.E.2d 598, two (2) year suspension with eighteen (18) month stayed on conditions for violations of Prof. Cond. R. 1.3, 3.4(c), 8.4(c), 8.4(d) and 8.4(h); *Columbus Bar Assn. v. Kizer*, 2009-Ohio-4763, 123 Ohio St.3d 188, 915 N.E.2d 314, eighteen (18) months suspension for violations of Prof. Cond. R. 1.1, 1.3, 1.4(a)(3), 1.15(c) and (d), and 8.4(h).

In *Warren County Bar Association v. Lieser*, 1997-Ohio-161, 79 Ohio St.3d 488, 490, 683 N.E.2d 1148, the Court explained:

When we have found repeated failures to carry out entrusted legal matters, we have imposed a sanction of an indefinite suspension from the practice of law [citation omitted]. We believe that this sanction is especially fitting in situations such as this where neglect of a legal matter is coupled with a failure to cooperate in the ensuing disciplinary investigation. [citations omitted].

Based upon the above, the recommended sanction is appropriate.

## **CONCLUSION**

For the foregoing reasons, relator, Mahoning County Bar Association, respectfully requests that this matter be returned to the Board of Commissioners on Grievances and Discipline for a determination as to whether or not respondent, James Vivo, suffered from a medical condition that disabled him from responding to the grievance filed against him and the subsequent proceedings before the Board. Relator requests that, if the Board determines that relator was disabled, the Board further determine whether or not respondent is able to assist in a defense of the allegations against him and that the Board proceed accordingly.

If the Board determines that the respondent was not disabled from responding to the grievance filed against him and/or the subsequent proceedings before the Board, relator asks that this matter be returned to this Court for proceedings with regard to the Board's original report.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Answer Brief of Relator, Mahoning County Bar Association has been sent via regular U. S. mail on this 7<sup>th</sup> day of April, 2011, to JOHN B. JUHASZ, 7330 Market Street, Youngstown, OH 44512-5610 and LYNN MARO, Maro & Schoenike Co., 7081 West Boulevard, Suite No. 4, Youngstown, OH 44512-4362, Attorneys for Respondent, James Vivo.

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