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## **I. INTRODUCTION**

The Respondent, Joseph G. Stafford, by and through counsel, formally files objections to the Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Recommendations”). The Board correctly determined that the Relator had failed to provide clear and convincing evidence to establish eleven allegations in Count I, every allegation contained in Count II, and five allegations contained in Count III. Unfortunately, the Board lost its way and incorrectly determined that four of the remaining allegations were sustainable. Such a finding is contrary to the evidence before the Board, unsupported by the testimony and submissions of the Relator, and contrary to Ohio law. The Respondent hereby objects to each and every adverse recommendation contained therein.

Moreover, the Recommendations are deficient in that they do not appropriately set forth the Findings of Fact and Conclusions of Law. The Findings of Fact, themselves, rarely cite to the transcript of the hearing. In paragraph 3 of the Recommendations, the Panel mentions “[t]he Panel heard the testimony of Respondent and of 12 other witnesses, all on direct and cross examination. A forest of documentation was received into evidence.” Despite this finding, the Recommendations make little reference to the witnesses that have testified and only refer to one exhibit from the twelve volumes of exhibits submitted to the Panel by the Respondent. The Respondent’s testimony is only specifically cited once in the Recommendations, and that reference pertains to the fact that the Respondent is the managing partner of the law firm. (Rec. ¶5.) The only actual references to the testimony of Respondent are set forth in paragraphs 5, 68, and 69. In truth, the “Findings of Fact” contain almost no “facts” and fewer recorded cites. They are, instead, a meandering set of statements that appear to be nothing more than unproven

allegations. **Alarminglly, a comparison between the Recommendations and the Relator's Trial Brief reveals that the "Findings of Fact" mirror Trial Brief. In fact, eight of the paragraphs are direct quotes from the Relator's Trial Brief without any citation to the transcript.**<sup>1</sup> Such allegations by Relator were not supported by evidence presented at the hearing and Relator failed to prove any alleged misconduct by clear and convincing evidence.

Likewise, the Conclusions of Law do not relate back to the Findings of Fact. A review of the pleading filed by the Board makes it nearly impossible to determine how the Board is applying factual findings to the applicable law or if such an analysis was even conducted. The Respondent would suggest that this has been done because sufficient facts do not exist in the record to support a single adverse finding.

## **II. STATEMENT OF FACTS**

### **A. Count I: *Tallisman v. Tallisman***

The allegations related to Count I of the Relator's Amended Complaint arose from a colossal legal battle that developed as a result of the divorce of Susan and Alan Tallisman. The Tallismans were married for a short period of time but the total assets involved ranged in the tens of millions of dollars. (Tr. 52) The Respondent represented the wife, Susan Tallisman, and filed a Complaint on her behalf. (Tr. 75) The Relator's primary witness, James Cahn, represented Alan Tallisman. (Tr. 291)

The Tallismans entered into a Prenuptial Agreement which limited Mrs. Tallisman's recovery to a little more than \$700,000.00 in the event of a divorce. (Tr. 53) At the conclusion of the Respondent's representation of Mrs. Tallisman, he was able to procure a settlement on her behalf for more than ten times that amount, in the neighborhood of \$8 million. (Tr. 53, 343) (Ex.

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<sup>1</sup> See, Findings of Fact and Conclusions of Law ¶8 compared to pg. 2 of the Relator's Trial Brief, ¶9 compared to pg. 2, ¶42 compared to pg. 16, ¶45 compared to pg. 17, ¶46 compared to pg. 17, ¶47 compared to pg. 17, ¶50 compared to pg. 18, and ¶51 compared to pgs. 18-19.

9A-9C) Neither Tallisman filed an ethical complaint against the Respondent. Neither Tallisman gave a statement or deposition in this matter. Neither Tallisman testified before the Panel on behalf of the Relator. **The trial court never sanctioned nor admonished the Respondent.** An ethical Complaint was filed by James Cahn, the attorney representing Mr. Tallisman.

As stated above, Susan Tallisman filed the original domestic relations Complaint. Subsequent to her filing, Alan Tallisman's attorneys filed an Answer and Counterclaim as well as a Motion for Summary Judgment based solely upon the Prenuptial Agreement. (Tr. 353; Ex. 7) The Motion for Summary Judgment filed on April 8, 2005, was unique as it was one paragraph in length and was being filed in a divorce action. A copy of the Prenuptial Agreement was attached to the Motion for Summary Judgment. (*Id.*)

Thereafter, on June 13, 2005 the Respondent filed a response to the Motion for Summary Judgment. This responsive pleading put forth sworn testimony disputing the validity of the Prenuptial Agreement. (Ex. 000) Mrs. Tallisman submitted a signed Affidavit stating that the Prenuptial Agreement was the product of fraud, duress, and coercion. (Tr. 379) 2005 and 2006 encompassed two years of intense litigation wherein the sole battle between the parties raged over discovery; the circumstances surrounding the Prenuptial Agreement; and the information that had been, or more importantly not been, disclosed at the time of execution of the Prenuptial Agreement. (Tr. 355-356)

In 2007, after two years of litigating the validity of the Prenuptial Agreement, counsel for Alan Tallisman discovered that no Reply had been filed to his Counterclaim. (Tr. 311-312) Although Ohio Civ. R. 75(F) expressly prohibits default judgments in domestic relations matters, Mr. Cahn attempted to use the failure to file a responsive pleading to his advantage. Mr. Cahn attempted to circumvent the Civil Rules by filing a motion for default and mis-captioning the

pleading as a “Motion for Judgment on the Pleadings”. He asked the Court for a default judgment. (Tr. 311-312) He also sent the Respondent a letter demanding settlement on terms extremely favorable to his client.

As is appropriate under the Ohio Civil Rules in such a circumstance, the Respondent filed a Motion for Leave to File Reply to Counterclaim *Instanter*. (Ex. 6-L) The Court granted the Respondent’s Motion. (Ex. 6-N) The appropriate responsive pleading was subsequently filed with the Court. (Ex. 6-M) It was in these motions that the parties aired out their differences concerning proper service of the Answer and Counterclaim. A multitude of motions and pleadings were filed by both parties related to this issue. Although the subject of the Counterclaim was fully briefed in the Motion for Judgment on the Pleadings and the Motion for Leave to File Reply to Counterclaim *Instanter*, Mr. Cahn focused his attention on an unrelated set of pleadings filed by the Respondent. Mr. Cahn took issue with Respondent’s filing related to Mr. Tallisman’s failure to honestly disclose marital assets, the Motion for Leave to File an Amended Complaint and the Motion for Leave to File a Second Amended Complaint. It is Mr. Cahn’s theory that Respondent had a secret ulterior motive that fueled this ethical matter. (Tr. 495-496)

The record is replete with evidence of Mr. Tallisman’s failure to fully disclose premarital, marital and personal assets. (Tr. 364-375, 396-449) Discovery Responses on these topics were either partial or incomplete. (*Id.*) A Pretrial Statement, which was required to be submitted under oath, was incomplete and unverified. (Tr. 468) Mr. Tallisman ultimately admitted to withholding information throughout the case when he was confronted with the discovery responses during his deposition. (Tallisman depo. Ex. 4-P, pp. 121; 127-128; 140-141, 152, 161, 163, 183-185, 252-254, 267-269, 291)

Based upon these recurring and blatant discovery abuses, the Respondent realized that he needed to amend the original Complaint and name multiple account holders as named Defendants. (Tr. 1125-1139) Past experience told him that by naming these financial institutions as parties, he stood a far better chance of discovering hidden accounts and financial data. (Tr. 1139-1141) As a result, the Respondent filed a Motion for Leave to Amend Mrs. Tallisman's Complaint to add various account holders as named Defendants. (Tr. 1146-1147) The Court granted this Motion, as well as a subsequent Motion for Leave to file a Second Amended Complaint. (Ex. 5-B to 5-E) Eight additional Defendants were added to the matter and several additional accounts were discovered. (Tr. 434-449) Millions of dollars in previously undisclosed premarital and marital assets were brought to light. (*Id.*)

Despite Respondent's using the Amended Complaints to discover the previously withheld assets, Mr. Cahn approached the Office of the Disciplinary Counsel claiming that the Respondent had ulterior motives for filing the amended pleadings. It was Mr. Cahn's position that the Respondent filed the documents in order to defeat the aforementioned "Motion for Judgment on the Pleadings" which was, in fact, a disguised motion for default.

It is undisputed in this case that Mr. Cahn's fears were unfounded, unsupported and untrue. The Respondent never attempted to use any portion of either the Amended Complaint or the Second Amended Complaint as a defense to the Motion for Judgment on the Pleadings. There was never reference in a brief, notation in a memorandum, mention in a correspondence or statement made in an oral argument by the Respondent along these lines. (Tr. 1148-1149) There is no testimony, exhibit, or reference in the record of this matter that would, in any fashion, justify a finding that the Respondent had any other motive in filing the motions to amend other

than to add additional party defendants, identify hidden assets and represent the interests of his client.

Count I was never more than a fiction in the mind of James Cahn. No evidence ever came to light in this matter to support the claim. No testimony or exhibit was offered that supported the claim that the Respondent had any motive in filing the motions to amend other than to identify undisclosed marital assets.

**B. Counts II and III: *Rymers v. Rymers***

Counts II and III of the Relator's Amended Complaint arise from the Lake County, Ohio Domestic Relations case of *Rymers v. Rymers*. The parties to the Rymers' divorce action are Amy L. Rymers and Jeffery G. Rymers, both of whom testified before the Panel. The evidence reveals that Eugene A. Lucci, who sits as a Common Pleas Court Judge in Lake County, Ohio (Tr. 733), attempted to intervene in his live-in girlfriend's divorce matter without legal basis. (Ex. 10-I; and *Rymers v. Rymers*, 2010-Ohio-4289) It is absolutely imperative for this Court to note the fact that at no point in time was Eugene Lucci the presiding judge in the Rymers' divorce action, nor was he acting in his official capacity as a judge or judicial officer in the Rymers' divorce action. It is not, nor can it be disputed, that, at all relevant times, Eugene Lucci was acting as an individual, attempting to intervene as a *party litigant* in the Rymers' divorce action. (Tr. 779)

Eugene Lucci sought to intervene in the Rymers' divorce action (1) to attempt to disqualify the Respondent from representing Jeffery G. Rymers; and (2) to attempt to file a complaint against Jeffery G. Rymers (in the divorce matter) for the repayment of a loan in the amount of approximately \$4,662.92 which Eugene Lucci alleged he gave to Mr. Rymers, *with Mr. Rymers' knowledge*. Judge Judith A. Nicely, the presiding judge in the Rymers' divorce action, denied

Eugene Lucci's motions, and specifically found "[t]here are no facts or law to support Applicant's Motion to Intervene." (Ex. 10-I) The Court of Appeals agreed with the trial court's determination. *Rymers v. Rymers*, 2010-Ohio-4289.

Eugene Lucci separated from Deborah Lucci, his wife on November 20, 2007. Eugene Lucci represented himself in the dissolution. During the pendency of that matter, Eugene Lucci made an appointment to see the Respondent. Eugene Lucci paid no retainer to Respondent. No retainer agreement was signed. Respondent furnished no letter of undertaking. Eugene Lucci consulted with Respondent no further. And, Respondent took no part in the Lucci's dissolution proceeding. Eugene Lucci never contacted Respondent again, and Lucci never held Respondent out as his lawyer in that case. At no time did Respondent ever make an appearance in the matter.

In September 2008, concurrent with his divorce proceedings, and while legally married to another woman, Eugene Lucci began cohabiting with Amy Rymers. (Tr. 744, 789, 1347) Mrs. Rymers was married to Jeffery G. Rymers and the couple has separated. (Tr. 736) In addition to living with Amy Rymers, Eugene Lucci had Mrs. Rymers move her three (3) children into his home. (Tr. 744) In March 2009, Amy Rymers filed a complaint for divorce against Jeffery G. Rymers in the Lake County Common Pleas Court. At that point in time, Mrs. Rymers was residing with Lucci, and as Lucci is a judge in the Lake County Court, a visiting judge, Judith A. Nicely was assigned to preside over the divorce action. Respondent was retained by Jeffery G. Rymers to represent him in the divorce action; and Respondent filed an Answer on behalf of Mr. Rymers.

Subsequently Eugene Lucci had his counsel, Walter McNamara, forward correspondences to Respondent demanding Respondent's withdrawal from the Rymers' divorce matter. The May 19, 2009, correspondence specifically referenced Eugene Lucci as a "Common

Pleas Judge in Lake County” and demanded Respondent’s withdrawal, alleging a conflict of interest. (Ex. 10-P; Tr. 1334-1334) A May 28, 2009 correspondence (e-mail) specifically indicated “[i]f you refuse to withdraw, he [Lucci] shall take such action as is appropriate . . . [t]his conflict requires your immediate withdrawal from Mr. Rymers’ case.” (Ex. 10-Q; Tr. 1335) Although Eugene Lucci had absolutely no standing to do so (Ex. 10-I; *Rymers v. Rymers*, 2010-Ohio-4289), he attempted to intervene in the *Rymers v. Rymers* divorce. In so doing, Eugene Lucci, by his own testimony, was acting as and attempting to become a litigant. (Tr. 779)

In his attempt to intervene, Eugene Lucci filed two separate affidavits. In the first affidavit (Ex. 10-U) filed on June 3, 2009, Eugene Lucci averred the following:

**2. I was elected judge of the Court of Common Pleas, General Division, and took office on January 6, 2001, and have served in that capacity ever since. I am the presiding judge of the court.**

It was Eugene Lucci who introduced the issue of being a “presiding judge” in Lake County, Ohio. The Board seemed to indicate that it was Respondent who introduced the issue of Lucci being a judge. In fact, at the hearing, Lucci testified that he chose to identify himself as the presiding judge. (Tr. 800-801)

In the same affidavit, Eugene Lucci claimed he had personally loaned money to Jeffery Rymers relating to the closing on the sale of the Rymers’ prior residence and that he had done so for Mr. Rymers’ benefit with Mr. Rymers’ knowledge. (Ex. 10-U) However, Eugene Lucci’s second affidavit filed June 25, 2009, contradicted his first affidavit. Despite Eugene Lucci’s claims of Mr. Rymers’ knowledge of the loan, Mr. Lucci’s testimony at the hearing confirmed that he had never met, spoken with, or even laid eyes on Jeffery Rymers. (Tr. 803-804)

As part of his legal strategy, Eugene Lucci decided to have his Motions personally served upon Jeffery Rymers when Mr. Rymers attended a pretrial in the *Rymers* divorce case. (Tr. 755) Eugene Lucci decided to have the Motions served upon Jeffery Rymers, while Mr. Rymers was right outside of Eugene Lucci's chambers. (Tr. 777) During this process, an individual repeatedly came out of the doorway of Judge Lucci's chambers and was staring at Mr. Rymers. (Tr. 653) Mr. Rymers unequivocally identified that person as Eugene Lucci, the man who was currently living with his wife. (Gallo Deposition Transcript p. 23; Tr. 660)

The incident was witnessed by an associate in the Respondent's office, Nicholas Gallo. (Tr. 662) Mr. Gallo conveyed to the Respondent that the client (Mr. Rymers) believed Eugene Lucci was in the corridor of the courthouse and was acting in a fashion that made Mr. Rymers feel intimidated. (Tr. 662) When Mr. Gallo returned to the office, he looked up Judge Lucci's picture on the internet. (Tr. 653, 661) After reviewing the picture, he confirmed that he believed the individual in the hallway was, in fact, Judge Eugene Lucci. (Tr. 654) Mr. Gallo then documented the events on June 3, 2009 in a memorandum. (Ex. 11-L) Based upon the good faith belief in Mr. Rymers' eye-witness identification and upon his own memorandum, Mr. Gallo then drafted a Motion to Strike Lucci's Motion to Intervene, as well as the affidavits attached thereto. (Tr. 659-660) Mr. Gallo prepared, signed and filed the Motion. (Tr. 650, 652, 653) There is no evidence that the Respondent "ordered" or "instructed" Mr. Gallo's work in reference to the Motion to Strike and accompanying affidavits.

Eugene Lucci responded to the Motion to Strike with a vague second affidavit indicating that "he" was not in the hallway on the morning of the pretrial. No further information was provided. No mention was made as to who the individual was or how Eugene Lucci knew that he was not the individual referenced in the affidavits of Mr. Rymers and Mr. Gallo.

Several months later, after the Rymers' divorce case was dismissed, (Ex. 10-X) Eugene Lucci revealed for the first time that he had obtained copies of the video surveillance cameras from Courthouse security. (Tr. 815) Those videos showed that the individual identified in the affidavits of Mr. Rymers and Mr. Gallo was Eugene Lucci's bailiff, Charles Ashman. (Tr. 654) Once the information in the videos was presented, the affidavits of Mr. Rymers and Mr. Gallo were withdrawn. (Tr. 1350, Ex. 10-Y)

Eugene Lucci confirmed during the course of the hearing that his purpose for attempting to intervene into the *Rymers* case was to create a conflict of interest for the Respondent. (Tr. 745) Eugene Lucci was attempting to force the Respondent to withdraw from the representation of Jeffery Rymers. In short, Eugene Lucci's sole purpose in filing the Motion to Intervene was to prevent his live-in girlfriend's husband from having adequate counsel in their divorce case. (Tr. 789) See also, *Rymers v. Rymers*, 2010-Ohio-4289.

The presiding judge was the Honorable Judith Nicely. Judge Nicely is an extremely well respected judge, formerly a member of the bench of the Summit County Court of Common Pleas, who was sitting by assignment as a visiting judge. Judge Nicely considered Mr. Lucci's claims and issued an Order in the *Rymers* case denying his Motion to Intervene and expressly finding that no attorney-client relationship existed between Mr. Lucci and Respondent. (Ex. 10-I) The Order also provides that there are no facts or law to support Eugene Lucci's Motions. (*Id.*) The Court of Appeals agreed with the trial judge regarding Eugene Lucci's claims on appeal. *Rymers v. Rymers*, 2010-Ohio-4289. It is uncontroverted at this point in the litigation, that Eugene Lucci had no valid legal grounds to attempt to intervene. Eugene Lucci had other avenues to pursue his creditor claim. (*Id.*) No Ohio Civ. R. 75(B) exception was available.

Eugene Lucci was in no fashion acting in his capacity as a judge of a common pleas court in the *Rymers* matter. He was a private citizen who was attempting to improperly enter an appearance in a case without any legal basis. (Tr. 779) His motives were purely selfish and geared to give his live-in girlfriend an advantage in her domestic relations case. (Tr. 798) See also, *Rymers v. Rymers*, 2010-Ohio-4289.

The Board apparently believes that a sitting judge who voluntarily enters a civil case for his own personal interest has greater rights and privileges than an ordinary citizen. The Board afforded the same rights and privileges to Eugene Lucci that he would have been afforded had he been wearing a black robe while attempting to intervene. There is no basis in the law to uphold the Board's clearly erroneous position.

### **III. LAW AND ARGUMENT**

#### **A. Objections to the Adverse Findings Related to Count I of the Relator's Complaint**

Joseph Stafford did not violate Prof. Cond. R. 8.4(c). There is no evidence in the record supporting the Board's Recommendations that this Court determine Respondent violated Prof. Cond. R. 8.4(c) and 3.3(d). None. The only evidence in the record is that the Respondent filed a Motion to Amend in an effort to add defendants who were financial institutions holding accounts for Mr. Tallisman. These accounts had been previously undisclosed; disclosed without account balances; accounts for which documentation had never been produced; or, accounts identified as Mr. Tallisman's personal property and not as marital assets.

The record contains a mountain of documentation and days of testimony painstakingly explaining the state of the discovery prior to the filing of the Motion for Leave to File an Amended Complaint and the Motion for Leave to File a Second Amended Complaint. The documentation and testimony unequivocally establishes that millions of dollars in assets were

discovered as a result of those pleadings. Yet, the Relator submitted a theory that the true motive for the Motions to Amend was to counter a Motion for Judgment on the Pleadings. This “Motion for Judgment on the Pleadings” was nothing more than a motion for default judgment given a different name. The Motion asked the Domestic Relations Court to deem all the averments in the Counterclaim as admitted and enter judgment on behalf of the Defendant because no reply had previously been filed.

There is no evidence before this Court that the Respondent had an ulterior motive. There are accusations. There is speculation. There are arguments by counsel. But there is no testimony or documentation supporting the allegations. This blatant error on behalf of the Board arises from a complete misunderstanding of domestic relations law in the State of Ohio. Unlike other types of civil litigation, a default judgment for failure to respond to a Complaint or Counterclaim is not an available remedy in a domestic relations case. Ohio Civ. R. 75(F) expressly prohibits such a finding. Default judgments do not exist in a domestic relations case in the State of Ohio. During the pendency of this case, the ramifications of Ohio Civ. R. 75(F) were expressly discussed in a multitude of pleadings, as well as during the directed verdict motions argued before the hearing panel. (Tr. 968-971) Yet despite multiple attempts to explain the status of the law to the Board, the Recommendations completely ignore Ohio Civ. R. 75(F). The rule prohibiting the very pleading that forms the foundation of Count I is never even mentioned in the Recommendations.

In order to accept the Board’s Recommendations on Count I, this Court would have to conclude that the Respondent feared a default judgment would be granted and acted in a fashion to avoid the ramifications. There is no evidence in the record such a fear existed or a default was remotely possible. Ohio Civ. R. 75(F) prevents that result. No Ohio court has ever granted a

motion for judgment on the pleadings in a domestic relations case under these or similar circumstances.

In fact, counsel for Alan Tallisman conceded during the hearing, that he was aware that even if no reply had been filed to the Answer and Counterclaim, a default judgment was not an appropriate remedy in a domestic relations matter. (Tr. 454) He conceded that he filed a “Motion for Judgment on the Pleadings” because he knew a default judgment was not available. (Tr. 311-312, 454-455) He conceded that he asked for a default judgment remedy in this pleading titled in an evasive fashion to try to side-step the prohibition against default judgments. (Tr. 454-456) He conceded that in his thirty-seven years of practice, he had never obtained a default judgment when a party had failed to respond to a complaint or counterclaim. He also advised that he had never heard of a domestic relations court who had ever granted any litigant that type of relief. (Tr. 456)

Yet, the Board has hinged its entire findings in Count I on the unsupported allegation that the Respondent filed a Motion for Leave to Amend the Complaint in order to avoid the results of this legal impossibility. There is no credible evidence in the record to support this absurd conclusion. There is no testimony, no exhibit, no documents, and no evidence to support this claim.

The Board seems to have misunderstood the sequence of events that took place in this matter. The Complaint was filed in January, 2005. (Ex. AAA) The Answer and Counterclaim were filed in February, 2005. The Defendant filed a Motion for Summary Judgment on April 8, 2005. (Ex. 7) The singular argument in the one paragraph Summary Judgment Motion was that there was a Prenuptial Agreement in place that controlled. That motion had nothing to do with

the issue related to the filing of the Respondent's Motion for Leave to Amend. The Motion for Leave was not even filed until two years later.

This disconnect is clearly outlined in ¶13 of the Findings of Fact wherein the Board states:

Respondent did not file a reply or otherwise respond to the counterclaim, and after the time for filing a reply to the counterclaim had elapsed, in June 2005, Alan's counsel filed a motion for summary judgment that the parties' prenuptial agreement controlled the division of the parties' property. Alan asked in the alternative that should his motion for summary judgment be denied, the court bifurcate the proceedings to permit a separate and earlier hearing on the issues of the validity of the prenuptial agreement and its enforceability. (Emphasis added.)

As well as ¶14:

On June 13, 2005, Respondent submitted a memorandum opposing the Motion for Summary Judgment reciting that Susan Tallisman filed a Complaint for Divorce on January 27, 2005; that the Defendant filed an Answer and Counterclaim on February 18, 2005; and that the document attached to the Motion entitled Prenuptial Agreement was, "allegedly executed by the parties' (sic) on December 11, 1993, which is the Defendant's sole basis in moving this Court for summary judgment in his favor." Arguing against enforcement of the Prenuptial Agreement, Respondent urged the Court to deny Defendant's Motion for Summary Judgment and to bifurcate the proceedings. (Ex. 9) No issue was made regarding the certification and service of the Answer and Counterclaim. (Emphasis added.)

It appears from a review of these two paragraphs, that the Board misunderstood the pleadings and failed to review the actual documents before rendering its Recommendations. Alan Tallisman's Motion for Summary Judgment made no argument related to the failure to respond to the Counterclaim. (Ex. 7) In the Motion for Summary Judgment there was no attempt by Alan Tallisman to have the allegations deemed admitted or otherwise obtain relief related to the failure to respond to the Counterclaim. The Motion for Summary Judgment sounded singularly in contract and attempted to have the Prenuptial Agreement enforced. (*Id.*) The sole issue in the Motion for Summary Judgment was the validity of the Prenuptial

Agreement. No pleading filed by either party in 2005 discussed the Answer and Counterclaim, service of process or the failure to file a response.

The issue relating to service did not develop until April of 2007. At that point, James Cahn discovered a reply had not been filed to his Counterclaim two years previous. It was then that Mr. Cahn decided to file his misnamed pleading, the "Motion for Judgment on the Pleadings". Immediately upon receiving the Motion, the Respondent began his search for the Answer and Counterclaim in his office. After completing the extensive investigation, the Respondent filed his Motion for Leave to File a Reply to the Counterclaim *Instantly* and brought the lack of service to the Court's attention.

The parameters for this issue were quite simple. On one hand, Mr. Tallisman's counsel was arguing that he had mailed the pleadings to the Respondent. However, Mr. Cahn discovered he had a problem establishing that he had followed Ohio Civ. R. 5 and 13. Mr. Cahn's office discovered a deficiency in their own pleading when they went to the Clerk's Office to obtain a certified copy. This error was brought to the Court's attention by Mr. Cahn and not the Respondent.

Moreover, an additional oddity developed when Mr. Cahn attempted to replace the original pleading with a copy. It was represented to the Court that this copy was an exact replica of the original. However, this particular pleading contained an anomaly when compared with all the other pleadings filed by Mr. Cahn's office. In every pleading filed by the office of James Cahn, the documents were set up in the same order. The pleading is set forth to its completion and a signature page follows. Immediately after the signature page, is a Certificate of Service. Immediately after the Certificate of Service, any exhibits that are referenced in the pleading are attached. This setup is used in every single pleading filed in this case and in every other

pleading that was set forth in the record as filed by Mr. Cahn in any of his other matters. (Tr. 556-559; 1409-1410) Yet, the Answer and Counterclaim, were set up in an entirely different fashion. The Answer and Counterclaim contained the pleading to its conclusion and a signature page. But, unlike all the other pleadings, this document attached the exhibits next and then, tacked to the very end of this “replacement pleading”, was the Certificate of Service. No rational explanation was provided as to why this document deviated from the norm.

On the other hand, the Respondent offered the Board overwhelming evidence that the Answer and Counterclaim were never served upon his office. The Respondent testified that he personally oversaw an investigation into the matter to determine whether the Answer and Counterclaim was ever received by his office. (Tr. 1245-1248) Included in this investigation was a complete review of the file by two attorneys, Gregory Moore and John McCarty, as well as a member of his staff, Amir Saleem. (Tr. 1041) These three gentlemen examined all boxes, folders, and pleadings to determine if there was any evidence of the pleading. (Tr. 1041) Additionally, the Respondent contacted his client to determine whether she had ever received a copy of the pleading, either from his office or from other sources. (Tr. 1248) The Respondent also reviewed all correspondence in his file in order to determine whether there was a copy of a transmittal letter from Mr. Cahn’s office enclosing the Answer and Counterclaim or whether there was a transmittal letter from his office to his client sending a copy of the pleading. (Tr. 1042-1043) No evidence existed anywhere within the Respondent’s office that the pleading was ever received. (Tr. 1245-1247)

The Respondent’s version of the events was supported by the testimony of Gregory Moore and Amir Saleem at the hearing. (Tr. 1012-1014, 1040-1042) Both individuals testified

as to the depth of their search and the lack of any documents or evidence that the pleading had ever been received. (Tr. 1245-1246)

In what appears to be an attempt to side step this testimony, the Recommendations of the Board in ¶31 cites to a pleading titled “Notice of Filing Replacement Certificate of Service Page” and relies upon affidavits filed by Attorneys Cahn and Lane in support of their claim that the Respondent was served with the Answer and Counterclaim. Paragraph 31 seems to ignore the sworn testimony of these very same witnesses during the hearing wherein they admitted they had no personal knowledge as to whether there had been service of the pleading. (Tr. 258-259, 453) These two witnesses could only testify as to what was the normal custom and practice of their office. In contradiction to the affidavits, neither individual had any personal knowledge of the pleading being mailed or delivered. (*Id.*)

Further, the individual identified as the person responsible for perfecting service upon the Respondent, Karen Truax, conceded during her testimony that she had no recollection of the cover letter, the actual pleading, or the process that she actually used for that specific pleading. (Tr. 257-258) The best she could offer was that she had a normal process for sending out pleadings such as this, and that she had no recollection of acting otherwise. (*Id.*) There was absolutely zero testimony provided by the Relator in this matter that service was perfected.

The Relator attempted to solve this deficiency by relying on a notation in one of the Respondent’s earlier brief’s wherein the Answer and Counterclaim had been listed in a procedural history section. Again, the Respondent answered the challenge with testimony from Gregory Moore. Mr. Moore explained he had drafted the brief in question, and he had merely pulled up the Court’s online docket and copied the procedural history identified by the docket. (Tr. 1034)

When the clear and convincing standard is applied to the facts in this matter, a reasonable mind cannot conclude that the Relator offered the requisite proof to establish a disciplinary violation. Ms. Truax admitted that she lacked any memory relating to the specific pleading, the specific transmittal letter, and had no explanation for the missing certificate of service. (Tr. 257) There was also no explanation as to why this particular pleading was organized in an order completely different than all other pleadings in this case. (Tr. 556-559) Each of these facts alone cast doubt upon the claim. Combined, one would have a difficult time claiming that a preponderance of the evidence standard was met, much less clear and convincing.

When one then considers the overwhelming evidence set forth by the Respondent, the fallacy of the Board's Recommendations comes further to light. The Respondent explained in detail the steps taken by his office to confirm lack of receipt of the pleading. Two additional witnesses independently verified Respondent's version of the events. No challenge was made to this testimony. There was no evidence of receipt of the pleading. Additionally, no challenge was made to Mr. Moore's explanation of the notation in a brief relating to the pleading. Mr. Moore provided a sound and reasonable explanation as to how he obtained the list of pleadings and transferred that information into the body of his brief. Based upon the state of the record, it is inconceivable the Board could recommend anything but a dismissal.

Unfortunately, it appears the Board ignored this definitive evidence as set forth during the hearing and instead became bogged down in a pleading that was completely unrelated to the appropriate service of process of the Answer and Counterclaim. Because of the state of discovery and Mr. Tallisman's admitted failure to disclose assets, the Respondent made the strategic decision to file Motions to Amend to bring in several account holders as party Defendants. (Tr. 1122-1132). Many times, lawyers prepare and collect information on their cases, then as the trial

date approaches, they concentrate and devote significant time to the preparation for trial: The Respondent, in his trial preparation, realized he needed to amend the Complaint in the *Talisman* proceedings because, with two years of discovery, several new assets had been disclosed and new parties needed to be added. (Tr. 1137-1138)

As outlined above, there was a two year battle related to the discovery of marital assets. Discovery had been propounded in 2005 to Mr. Tallisman asking him to identify any marital assets. (Tr. 364-447, Ex. KKK, 8-G, 5-G, 5-H, 5-I, 5-K, 5-Q, 5-R) In response to those discovery requests, Mr. Tallisman withheld vast amounts of information. For banks or other financial institutions that were identified, multiple accounts were not listed. For those accounts that were listed, the account balances were not listed. On many requests, Mr. Tallisman merely indicated that the answers would be supplemented, but no additional information followed. (Tr. 384-385, 447-448, 594; (See also, Defendant's Responses to Interrogatories, Ex. III, questions 14, 15, and 16.)

Through tenacious investigation and discovery, the Respondent was able to identify multiple account holders for which information was either missing or inadequate. (Tr. 1130-1132, 1137-1138) In order to alleviate this problem and discover information that was not properly disclosed at the time of the execution of the Prenuptial Agreement, the Respondent requested that the Court permit him leave to amend his Complaint. All of the appropriate procedures for the Cuyahoga County Court of Common Pleas Domestic Relations Division were followed. Mr. Cahn even admitted that Respondent followed the trial court's local rules. (Tr. 360). The Respondent filed his Motion to Amend, the document was submitted to the Legal Department for review and approval, the document was initialed by a judicial attorney and then sent upstairs for the judge's signature. (Tr. 1146-1147) In the Motion for Leave to Amend, the

Respondent correctly noted that Mr. Tallisman had repeatedly failed to properly turn over documentation and supply proper information regarding the party's assets. The Respondent in his second motion for leave to amend further explained that he had recently taken the deposition of Mr. Tallisman and during the course of that deposition, additional facts were revealed relating to the validity of the financial disclosures made at the time of the execution of the Prenuptial Agreement.

There is no question that the discovery responses, Tallisman's falsely labeled "updated" pretrial statement, and a subsequent letter supplementing discovery signed by James Lane, co-counsel for Mr. Tallisman, exhibited the fact that Mr. Tallisman had fraudulently withheld critical information necessary for full and complete disclosure. The failure of Mr. Tallisman and his attorneys to properly produce discovery which led to the amended complaints is supported by the documents Mr. Tallisman and Mr. Cahn were ordered to provide to the trial court. By court order, Exhibit 7Q, all previously produced documents had to be scanned onto a cd-rom, Bates-stamped, and identify when the documents were produced. Exhibit 8-E is the listing of documents produced by Mr. Cahn, which indicates the dates documents were produced to Respondent. Thereafter, Exhibit 8G, is the additional listing of documentation that Allan Tallisman and Mr. Cahn produced on December 20, 2007. **A simple review of these two (2) exhibits clearly demonstrates Respondent's basis for amending the Complaints.**

Respondent specifically testified that Exhibit 4-R (dated May 9, 2007) identified documents produced by Mr. Cahn after the deposition of Allan Tallisman (Ex. 4-P) and led to a list of entities which required the Complaint to be amended for the second time. (Tr. 1296-1297)

There is a vast difference between having a list of entities that are holding assets versus having the records which indicate the nature and the complexities of the assets. (Tr. 1170-1171)

Moreover, concurrent with the filing of the Second Motion for Leave to Amend the Complaint, the Respondent filed a copy of the deposition of Alan Tallisman. Contained within the deposition were multiple admissions by Mr. Tallisman that he had failed to provide the appropriate responses to discovery.

In addition, in the Tallisman divorce proceedings, the parties were required to file a signed Pretrial Statement under oath which identifies the assets and liabilities of the parties. At Mr. Tallisman's April 21, 2007 deposition, just four days after the first Motion to Amend, there was a litany of new information provided that led to the filing of the Second Amended Complaint. (Ex. 4-P) The failure of Alan Tallisman to present an accurate Pretrial Statement is set forth in the following pages of his deposition; to wit: pp.120-121; 141; 143; 152; 183; 184; 185; 229; 247; 250; 251-253; and 254-256. The issues of the Prenuptial Agreement executed by the Tallismans was also explored in the deposition of Mr. Tallisman on pages 81-86; 88-89; 93; 99-100; 102-104; 106-108; and 117-118. Mr. Tallisman was questioned in detail about the facts surrounding the Prenuptial Agreement. During his deposition, Mr. Tallisman acknowledged he had not been forthcoming with the production of documentation that had been requested. A simple review of the deposition on pages 121; 127-128; 141-142; 162; 163; 201; 224-225; 238-239; 241; 267-269; 271-273; 276; 277; and 287, demonstrates the failure of Mr. Tallisman and his attorneys to properly present documentation that had been requested. All of this information was submitted to the trial court and explained to the panel. No contradictory testimony was offered.

One need only look at the results of the Amended Complaint in order to fully ascertain the success that the Respondent believed by proceeding in this fashion. Exhibit 5-F, an Answer by CitiGroup, clearly indicates twelve different accounts, many of which were not disclosed.

(Tr. 1180-1181; 1197-1198) Exhibit 5-G is an Answer for Key Corp. which set forth seven (7) different accounts. (Tr. 1200-1201)

In fact, Mr. Cahn, on cross-examination, admits there were numerous assets which were not properly identified or documentation produced to the Respondent. (Tr. 396-449) Mr. Cahn admitted in his testimony that attorneys in domestic relations cases file amended complaints to name asset holders or parties after they get information they had not previously received. (Tr. 434) Mr. Cahn further admitted that after CitiGroup was added as a party, their Answer identified multiple accounts of Alan Tallisman worth more than 8.5 million dollars. Mr. Cahn acknowledged that CitiCorp identified twelve million dollars (\$12,000,000.00) in assets. (Tr. 435) Mr. Cahn further testified that the Answers of Key Bank, Exhibits 5-G and 5-H, identifies numerous accounts with substantial assets. (Tr. 436-437)

Prior to filing the first Amended Complaint, there was the issue of Mr. Tallisman's "updated Pretrial Statement". Mr. Cahn admitted during the hearing that he never filed an original Pretrial Statement. (Tr. 469) He conceded that his attempt to file an updated Pretrial Statement was improper. (Tr. 469-470) Mr. Cahn acknowledged that this was a misrepresentation to the Court. (Tr. 470) Mr. Cahn acknowledged that it could not have been possible for the original Pretrial Statement to be in his file since 2005 since the values on the assets listed on the Pretrial Statement were values for the year 2007. (Tr. 471-477)

Mr. Cahn testified before the Panel that the issue of the Prenuptial Agreement was "in play for the entire two years that the case was pending". (Tr.352-357) Mr. Cahn admits that the Prenuptial Agreement was a major focus throughout the case. (Tr. 356-357) Mr. Cahn acknowledged he knew from the beginning of the case that Mrs. Tallisman was claiming fraud, coercion and duress pertaining to the Prenuptial Agreement. (Tr. 380) Mr. Cahn further

acknowledged that various Court Orders required that his client comply with discovery requests. (Tr. 382-388) On cross-examination, Mr. Cahn explained to the Panel that six months after the Motion for Leave of Court to File the Amended Complaint was filed in April, 2007, there were still ongoing discovery issues. (Tr. 389) Mr. Cahn admitted that in the months prior to the First Amended Complaint he was still providing documentation to the Respondent. (Tr. 408-412) Mr. Cahn sets forth that there were three more substantial productions of documentation on April 11, April 18, and June 6, 2007. (Tr. 413-416, Ex. 8-E and 8-G)

The Respondent specifically testified (Tr. 1212-1213) that Exhibit 5-K was the key piece of evidence that he was able to obtain from amending the Complaint in the *Talisman* matter which produced the sensational result for Susan Tallisman. The Respondent testified that he obtained various Orders from the Trial Court to obtain compliance with discovery requests. (Ex. 7-C; 7-D; and 7-E) The Respondent testified at length about the problems pertaining to discovery and the need to name additional parties in order to obtain documentation. The Respondent testified the reasons why he named the new parties and the documentation that he did obtain. (Tr. 1234-1243) This mountain of testimony and documentary proof through exhibits was not only ignored by the Board, but the reverse conclusion was reached without any evidentiary support.

Perhaps the most troubling aspect of the Recommendations is that the Board not only ignored the above cited testimony and exhibits but chose to violate the Respondent's due process rights to substantiate their position. The Board based its conclusion that the Respondent had misrepresented his true intentions that an account at Fifth Third Bank had been disclosed in discovery responses in 2005. (Recommendations, ¶42) The brief was prepared by an associate

of Stafford & Stafford Co., L.P.A. (Tr. 141) The problem is that these same allegations; related to Fifth Third Bank, had been specifically rejected by the Probable Cause Panel.

The Relator submitted a Draft Complaint to the Probable Cause Panel requesting certification of seventy-one (71) averments. On February 17, 2009, the Probable Cause Panel determined that paragraphs 67, 69, and 71 would not be certified as the Relator had failed to establish probable cause.<sup>2</sup> Paragraph 69 relied upon alleged misconduct arising from the very finding of the Board that the Fifth Third account had been disclosed in discovery. The Probable Cause Panel determined there was no probable cause for these issues and the allegations had no probative value.

That allegation stated:

69. Respondent's conduct in *Tallisman v. Tallisman* violates the Ohio Rules of Professional Conduct: As alleged in paragraph 56, respondent violated ORPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); ORPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice); and ORPC 8.4(h) (it is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law). In a response brief filed on June 27, 2007, respondent made several misleading statements and attached exhibits designed to deceive the court. For example, respondent falsely claimed that did not learn about Alan Tallisman's Fifth Third Bank account until April 13, 2007. In contrast, the Fifth Third Bank account was actually disclosed in June 2005. The exhibits attached to respondent's motion were designed to mislead the court in that respondent included some of the materials provided by Alan Tallisman but he did not include the June 2005 discovery response in which the Fifth Third Bank account was originally disclosed. (Emphasis added)

Despite the probable cause hearing's prohibition against pursuing for claims related to the Fifth Third bank account, in Paragraph 56 of the Amended Complaint, the Relator stated as follows:

56. In his June 27, 2007 response to Alan Tallisman's June 13, 2007 "Motion to Vacate Order Granting Plaintiff's 'Motion for Leave of Court [to File Second

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<sup>2</sup> This was the second time Relator was ordered to redraft the Complaint. On December 9, 2008, Relator was ordered to "set forth with specificity the act or acts on part of respondent" that allegedly violate the Rules of Professional Conduct.

Amended Complaint]” and “Motion to Strike Plaintiff’s Second Amended Complaint from the Court’s Record,” respondent filed a brief containing false statements and exhibits designed to mislead the court. For example, respondent expressly claimed that he learned on April 13, 2007 (a date one week before the deposition referenced in his motion for leave) “of numerous other assets and/or entities which the Defendant failed to previously disclose – including but not limited to, an account at Fifth Third Bank in the amount of [\$1,004,932.13].” Respondent falsely claimed:

Despite counsel or the Defendant’s misrepresentations to the contrary, such information was not previously disclosed or produced by the Defendant in his Responses to the Plaintiff’s First Set of Interrogatories and Request for Production of Documents of June 23, 2005.

The first time that the Defendant disclosed the Fifth Third Bank account was on April 13, 2007 – no information or records were provided by the Defendant on June 12, 2005 or otherwise. See, Exhibit “2”. An inventory of the information and documents provided by Defendant on June 23, 2005 is attached as Exhibit “3” and was previously attached to the Plaintiff’s second Motion to Compel Discovery, et al., filed with this court on November 9, 2005. (Emphasis added)

Likewise, Paragraph 57 contains the same, improper allegations:

57. Contrary to the representations made by respondent in his June 27, 2007 response, the Fifth Third Bank account was first disclosed on June 23, 2005 at page seven of defendant’s response to plaintiff’s Interrogatory No. 10. (Emphasis added)

On March 17, 2009, Respondent filed a Motion to Strike the Complaint due to Relator’s noncompliance with the directive of the Probable Cause Panel. On April 6, 2009, the Motion to Strike was summarily denied. Respondent filed an Answer and in the offending paragraphs noted the findings of the Probable Cause Panel rejecting these allegations. Relator moved to strike Respondent’s Answer and, in an incredible turn of events, the Panel Chair granted the Relator’s motion.

The Panel Chair found that the proceedings of the Probable Cause Panel and their rulings are not before the Hearing Panel, are not part of the record before the panel, are “irrelevant and impertinent” to the proceedings of the Hearing Panel. (Panel Ruling Order, July 13, 2009) He further opined that the findings of the Probable Cause Panel do not constitute a defense to an

allegation of the Complaint. (*Id.*) That ruling by the Panel Chair was contrary to Ohio law and a violation of the Respondent's due process rights as guaranteed by the Ohio and United States Constitutions.<sup>3</sup> This error was a recurring factor in this litigation.

The Panel Chair repeatedly refused to allow the Respondent to use the Probable Cause Panel findings as a sword while allowing the Relator to use them as a shield. Later in the proceedings, the Panel Chair denied Respondent's Motion for Summary Judgment premised upon rulings of a Probable Cause Panel. (See, Judgment Entry of April 8, 2010) On February 10, 2010, Respondent filed a Motion *in Limine* regarding reference to allegations that were not certified by the Probable Cause Panel. Specifically, the motion addressed that it was improper to raise any issues pertaining to the Fifth Third account since the Probable Cause Panel refused to certify allegations pertaining to the claim. On April 1, 2010, the Motion *in Limine* was denied. Not only did the Panel Chair allow evidence specifically prohibited by the Probable Cause Panel into evidence, but the Board cited the Fifth Third account alone as the basis for its Recommendations.

The Board referenced Mr. Tallisman's response to interrogatory number ten. That discovery request inquires about personal assets, not marital assets. In response to the interrogatory asking Tallisman to identify marital assets, the Fifth Third account was not identified. Further, the testimony before the Hearing Panel indicated that attorneys for Mr. Tallisman first presented evidence (one account statement) of the amount in the Fifth Third

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<sup>3</sup> The Probable Cause Panel is an impartial body that views the evidence to determine if there is credible evidence for the filing of a Complaint. *The Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, OH Adv. Op. 90-18, 1990 WL 640513, (Ohio Bd.Com.Griev.Disp.), August 17, 1990.* Consequently, a grievance is only certified as a formal complaint upon two probable cause findings of misconduct. The first finding is by an investigating body under Gov. Bar R. V, Section 4(C). The second finding is by a Probable Cause Panel of the Board under Gov. Bar R. V, Section 6(A) and (D). *Board of Commissioners on Grievances and Discipline, OH Adv. Op. 98-2, 1998 WL 184424, (Ohio Bd.Com.Griev.Disp.), April 3, 1998.*

account in April of 2007. (Tr. 419, 1137-1139, Ex. 4-A) The actual complete records of the account were not presented until after the filing of the Amended Complaints in December, 2007. (Tr. 421) Mr. Cahn testified on cross-examination that the Fifth Third Bank records were not produced until December 17, 2007. (Tr. 421-422; Ex. 8-G p.3) More importantly, the actual disclosure of the documentation was not produced until two and a half years later. Exhibits ZZZ and 4A clearly indicate that the listing of the account and the account statement were provided on April 13<sup>th</sup> and 14<sup>th</sup> of 2007. Nevertheless, there is no evidence in the record that the Fifth Third account was identified as a marital asset in 2005. The Board is simply wrong.

The claims against the Respondent related to the Motions to Amend were based upon the unsubstantiated and purely speculative allegations cast by the Respondent's opponent in the *Tallisman* case, James Cahn. Mr. Cahn presented a theory to the panel that the hidden motivation behind the filing of the Amended Complaint was in order to interject a denial of the validity of the Prenuptial Agreement into the pleadings. Mr. Cahn's irrational fear was apparently based upon his unrealistic hope that he would somehow succeed in his "Motion for Judgment on the Pleadings".

This paranoia of Mr. Cahn should have been put to rest by one simple fact: the Respondent never made the argument that by filing the Amended Complaint, the validity of the Prenuptial Agreement had been addressed in the pleadings. (Tr. 312-316) That argument was not made in response to the Motion for Judgment on the Pleadings or any other pleading filed in this case. The Respondent never made that argument in writing, in correspondence, or orally to the Court. That issue never came before the Court and was never a concern to the judge or anyone associated with this matter, with the exception of Mr. Cahn. Despite this exculpatory fact, the Board somehow reaches the conclusion that the Respondent "surreptitiously" included

one statement in the Amended Complaint denying the validity of the Prenuptial Agreement. This one statement is a direct quote from the Affidavit of Susan Tallisman that had been filed almost two years prior in the response to Alan Tallisman's Motion for Summary Judgment.

First, there is nothing "surreptitious" about including a sentence in black and white in a paragraph in a pleading. Second, there is nothing "surreptitious" about bringing the Court's attention to a two-year battle over discovery relating to the validity of the Prenuptial Agreement. (Tr. 1148-1149) Third, the question of the validity of the Prenuptial Agreement had been before the Court during the entire duration of the case as admitted by James Cahn. (Tr. 352-357) Fourth, the mere fact that a new sentence is included in an amended pleading should come as no surprise to anyone. The term "amended" indicates that a change has been made to the original. There would be no reason to amend the Complaint if it were identical to the original. Fifth, how can one reasonably argue the sentence was "surreptitious" when Mr. Cahn recognized the statement in the pleadings and immediately began his protest? (Tr. 319)

Moreover, the mere inclusion of different wording in an amended pleading is not clear and convincing evidence of misconduct. The question is whether such a change in the pleading was used in a fashion that unethically altered the litigation. The resounding answer to that question is "no". Again, that the Amended Complaint contained allegations that the Prenuptial Agreement was invalid was never used as an argument to counter the Motion for Judgment on the Pleadings. As a result, the additional statement was nothing more than an accurate statement as to the status of the case. No more, no less.

Perhaps the best example of the dearth of evidence supporting this Board's recommendation found in paragraph 98. That Paragraph merely states a conclusion that the Respondent had included an allegation regarding the Prenuptial Agreement, which was "critical

to his client's interest". (Rec. ¶98) No record site was provided. There is no correlating evidence in the record sustaining that conclusion. Paragraph 20 of the Findings of Fact is the only item remotely suggestive of this position.

On April 17, 2007, in a disguised attempt to place the validity and enforceability of the prenuptial agreement in issue, Respondent filed on plaintiff's behalf a "Motion for Leave of Court to File Amended Complaint." In his motion for leave, Respondent claimed that it was necessary to amend the divorce complaint to have all necessary parties before the court. Respondent did not mention the prenuptial agreement in his motion for leave nor did he attach a copy of the proposed amended complaint to the motion. The Court granted leave *ex parte* by entry filed the same day the motion was filed, all without an opportunity for response from Alan Tallisman.

However, Paragraph 20 contains no cite to the transcript, no cite to an exhibit and provides no explanation as to where in the record any support can be found. Again, there is no evidence anywhere in the record that the Respondent used the Amended Complaint as a shield against the Motion for Judgment on the Pleadings.

As this Court is aware, the Relator bears the burden of setting forth facts and evidence to prove the allegations contained within its Amended Complaint by clear and convincing evidence. *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605. Fortunately, it is this Court and not the Board which makes the ultimate recommendations relating to attorney discipline. It is the Supreme Court of Ohio that renders the final determination of the facts and the conclusions of law in disciplinary cases. *Findlay/Hancock Cty. Bar Assn. v. Filkins*, 90 Ohio St.3d 1, 2000-Ohio-491. The *Filkins* case is especially relevant in that, just as in this case, the Court held that the Relator did not meet its burden due to the fact that the Realtor's witnesses were not credible and that the evidence did not meet the clear and convincing standard. (*Id.*)

To reach the conclusion that the Respondent had an ulterior motive in his mind that was never acted upon is pure unadulterated speculation. There is no evidence in the record to support

that conclusion. This Court cannot allow this recommendation to stand, and should dismiss Count I in its entirety.

**B. The Board's Recommendation of Violation of Prof. Cond. R. 3.3(d) is Contrary to the Findings of Fact and Unsupported by the Record.**

The Board's Recommendation that this Court find a violation of Prof. Cond. R. 3.3(d) is unsupported by the record. The Conclusion of Law in Paragraph 98 states in relevant part:

Respondent's violation consists of misleading the court to grant relief ex parte without the court's full knowledge of the extent and purpose of the relief sought and by taking advantage of the local rules not designed for the purpose to do so.

This Recommendation is directly contradictory to the Board's own Findings of Fact.

Paragraph 61 of the Findings of Fact states as follows:

The entry of the numerous ex parte orders of which the Relator complains does not appear from the evidence to have been the result of some arcane conduct of the Respondent to obtain judgments without input from opposing counsel, but rather, resulted from opportunities presented by the peculiarities of practice in the Cuyahoga County Common Pleas Court, Division of Domestic Relations, and from the application of local rules of court that may conflict with the Ohio Rules of Civil Procedure.

The Board's own entry admits to the fact that there is no evidence to reach such a conclusion. This is not a matter of whether the clear and convincing standard has been met. This is a case where the Board's own findings do not support the conclusions. This Court has no option but to dismiss this aspect of the claim.

Furthermore, Respondent testified that opposing counsel in the *Tallisman* case obtained *ex parte* orders in a similar fashion that is customary in Domestic Relations Court. Mr. Cahn and Mr. Lane had motions granted on the same day that they were filed throughout the case. (Tr. 1261-1262) Exhibit 6-P, is Defendant's Motion for Ex Parte Restraining Order filed on March 4, 2005, which was granted on March 7, 2005. (Ex. 6-Q) Mr. Tallisman's Motion to Vacate was filed July 21, 2005 (Ex. 6-R) and the Judgment Entry granting the Motion to Vacate is dated

June 21, 2005. (Ex. 6-S) On February 22, 2007, Mr. Tallisman filed a Motion to Name New Parties (Ex. 6-T), which was granted on February 27, 2007. (Ex. 6-U) (See, also Ex. 6-V; 6-W; 6-X; 6-Y; 6-Zp; and 7-A) Mr. Cahn confirmed the testimony of the Respondent regarding Mr. Cahn's use of *ex parte* orders. (Tr. 459-463)

The trial court judge, James Celebrezze, testified as a witness for the Relator. Missing from that testimony is any support for the Relator's claims against the Respondent. The mere fact that the Relator called the trial judge as a witness on their behalf and never asked whether the judge witnessed any misconduct by the Respondent speaks volumes. That glaring omission is yet another example of the failure of the Relator to enter sufficient evidence into the record to sustain the charges in this matter.

It is essential to note that the trial court in *Tallisman* did not find that the Respondent engaged in any wrongdoing. The Respondent was neither sanctioned nor admonished pertaining to any conduct in the *Tallisman* case. The ultimate ruling by the trial court indicated that James Cahn did not properly serve his Answer and Counterclaim, and he was not entitled to judgment as a matter of law pursuant to the arguments made by the Respondent. (Tr. 1260-1261; Ex. 6-O) The trial court completely put aside all of the issues pertaining to the Amended Complaint and concentrated merely upon the Answer and Counterclaim, and ultimately made a decision as advocated by the Respondent originally: that Mr. Cahn did not properly plead his Answer and Counterclaim. **Hence, all of the issues raised by Relator pertaining to the *Tallisman* case neither affected the parties nor the outcome of the case.**

**C. Specific Objections to Count I**

- 1. The Board of Commissioners failed to comprehend the sequence of the filing of the pleadings and incorrectly reached the conclusion that the Motion for Summary Judgment filed by Mr. Tallisman was based upon the failure to file a reply to the Counterclaim.**

2. **The Board's recommendation incorrectly reaches the conclusion that the issue of the appropriate service of process was addressed in the Motion for Summary Judgment filed by Mr. Tallisman and in the responsive pleading filed by the Respondent.**
3. **The Board failed to take into account the fact that the Motion for Leave to Reply to the Counterclaim was granted by the trial court.**
4. **The Board fails to take into account the fact that the Motion(s) for Leave to Amend the Complaint(s) was granted by the trial court. At that time this ruling negated any concern that the "Motion for Judgment on the Pleadings" would be granted.**
5. **The Board ignored the overwhelming evidence of discovery abuses by Mr. Tallisman in this matter.**
6. **The Board failed to understand the wealth of additional information gained by the filing of the Amended Complaint(s) and the discovery of theretofore improperly withheld asset information.**
7. **The Board reached the conclusion that Respondent had an ulterior motive for filing of the first Motion for Leave to Amend without any evidence supporting this conclusion.**
8. **The Board completely disregarded the provisions of Ohio Civ. R. 75 as it relates to domestic relations cases.**
9. **The Board disregarded a mountain of evidence clearly demonstrating the vast amount of assets that had been improperly withheld by Mr. Tallisman which were ultimately discovered through the Respondent's use of the Amended Complaint(s).**
10. **The Board violated the Respondent's due process rights as guaranteed under the Ohio and United States Constitutions in failing to comply with the findings of the probable cause panel as it relates to allegations arising from the Fifth Third bank account.**
11. **The Board completely ignored the fact that the Respondent never made any argument in any pleading or at any step in the litigation relating to the fact that averments contained in the Amended Complaint would have defeated the Motion for Judgment on the Pleadings.**

**D. Objections to Count II and Count III**

The Board properly recommended Count II of the allegations be dismissed in their entirety. Additionally, the Board recommended five allegations contained in Count III also be dismissed. The Respondent hereby formally objects to the Board's Recommendations that this Court find ethical violations related to Count III.

This matter was originally scheduled for hearing in January, 2010. In December, 2009, Relator sought a continuance to complete discovery on the *Tallisman* matter. However, once the continuance was granted, Relator immediately amended the Complaint. Because of a quirk in

Ohio law, the Relator avoided the vetting of these new claims by the Probable Cause Panel. The result was that two thirds of the Complaint went forward without the procedural safeguard outlined in the Gov. Bar R. V.

1. **The Board's Conclusion That Respondent Violated Prof. Cond. R. 5.1(c) Is Erroneous And Is Not Supported By The Record In This Matter.**

The first problem with the Board's Recommendations is that a condition precedent is missing in the record. The Respondent is accused of failing to provide proper supervision of a subordinate pursuant to Prof. Cond. R. 5.1(c). Prof. Cond. R. 5.1(c), requires actual knowledge of specific misconduct.<sup>4</sup>

It is undisputed that the evidence at trial revealed that Gregory J. Moore, and not Respondent, was the immediate supervisor of Nicholas M. Gallo. (Tr. 641, 1019, 1052-1054) No other witnesses presented any evidence to the contrary.

The following finding by the Board is not supported by the record, "[a]lso at the direction of Respondent, Gallo prepared his own affidavit and that of the client Jeffrey(sic) Rymers to be attached in support of Respondent's motions. (Tr. 652-53) **It is clear from a review of pages 652-653 that Mr. Gallo does not testify that it was "at the direction of Respondent"**. The Panel's finding is plain error. The record reveals that Respondent did not prepare, draft, sign or file the Motion to Strike or the affidavits of Mr. Gallo and Mr. Rymers.

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<sup>4</sup> The Ohio Supreme Court follows the "plain language" of disciplinary rules. *Cincinnati Bar Assn. v. Young* (2000), 89 Ohio St.3d 306, 314. Comment Five (5) to Prof. Cond. R. 5.1(c) provides "[a] supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor *knows* that the misconduct has occurred. Thus, if a supervising lawyer *knows* that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension. Here, at the time the Motion to Strike and the affidavits of Mr. Gallo and Mr. Rymers were prepared and filed by Mr. Gallo there was no knowledge of misconduct or any misconduct. The affidavits of Mr. Gallo and Mr. Rymers were prepared in good faith based upon the eye-witness identification by Mr. Rymers and the observations and investigation by Mr. Gallo, all of which were memorialized in Mr. Gallo's June 3, 2009 Memorandum. (Ex. 11-L)

Obviously, in order to prosecute a claim under Prof. Cond. R. 5.1(c), there needs to be evidence that another lawyer committed a violation of an ethical rule. In this matter, all allegations against Respondent stemmed from the actions of Mr. Gallo, and the eye witness accounts of Mr. Gallo and Mr. Rymers. The fundamental requirement for a charge against Respondent is a finding that Mr. Gallo violated one of the Rules of Professional Conduct. No such evidence was offered. At the time of the hearing and at the time of the submission of this brief, there has been no finding by this Court that Gallo violated a disciplinary rule. Nor has there been any evidence that the Board recommended that this Court so find. There have been accusations and allegations, but no proof.

The improper nature of such a finding is self evident. First, one may not assume Mr. Gallo will be held to have violated a Rule of Professional Conduct. The burden of proving that element was on Relator. In light of the current status of the case against Mr. Gallo, it was impossible for Relator to meet this requirement, and impossible for the Board to offer this Court a recommendation to find against Respondent.

This Court has never held a lawyer to have violated Prof. Cond. R. 5.1(c) without a showing that the subordinate attorney violated a Rule of Professional Conduct. A survey of case law from around the country fails to bring to light any other jurisdiction that would allow such a finding. There is no legal precedent that supports the Board's position.

Further, there was no knowledge on the part of Respondent of any misconduct or reckless/false allegations, being made by Mr. Gallo or Mr. Rymers. The Motions and Affidavits were prepared and filed by Mr. Gallo in good faith, based upon the events which Mr. Gallo and Mr. Rymers witnessed and observed on June 3, 2009. (Ex. 11-L)

The failure to require a condition precedent to be established to justify a violation under Prof. Cond. R. 5.1(c) was not the only glaring error the Board committed in the analysis of Count III. The Board also attempted to expand Prof. Cond. R. 8.2(a) to provide members of the judiciary, who are parties to litigation, with advantages above and beyond those afforded to non-judicial officer litigants. Even Eugene Lucci testified that "I'm the litigant." (Tr. 779)

The Board would have this Court create new law in the State of Ohio giving a sitting judge special consideration when he is a party to or attempting to become a party to litigation. If upheld, the Recommendations of the Board would provide special privileges and considerations to a member of the judiciary whenever they were a private party in litigation against other citizen of this State. This holding is not only contrary to Ohio law, but would be in violation of both the Constitution of the State of Ohio and the Constitution of the United States.<sup>5</sup>

In the *Rymers v. Rymers* case, Eugene Lucci attempted to personally intervene as a creditor in his girlfriend's divorce case. He did so with full knowledge that creditors are prohibited from doing so in a domestic relations case. See Ohio Civ. R. 75(B). He did so as a litigant, not in his capacity as a judge. Eugene Lucci admitted that his true purpose was to create a conflict of interest for the Respondent and force him off the case. (Tr. 798-799) The trial court in the *Rymers v. Rymers* case issued a Judgment Entry denying Eugene Lucci's Motion to Intervene on August 6, 2009 and specifically denied his Motion to Disqualify Joseph G. Stafford. (Ex. 10-I) Judge Nicely specifically ruled that there existed no attorney-client relationship

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<sup>5</sup> It is axiomatic that no individual stands in a greater position in civil litigation than another. The foundation of our system requires that all individuals stand on equal footing. A person is treated the same as a corporation or business. Likewise, the mere measure of a person's success does not provide it with any advantages against those less fortunate. Despite these concepts that are well founded in both our Nation's and State's Constitutions, the Board in this matter has chosen to give special privileges to a member of the judiciary when that person willingly becomes a party in civil litigation.

between Lucci and Respondent and that there was “no facts or law to support [Lucci’s] Motion to Intervene.” (*Id.*) Likewise, the Court of Appeals found that Ohio Civ. R. 75(B) of the Ohio Rules of Civil Procedure could not be utilized by Eugene Lucci to enter the case. (Respondent’s Supplement to the Record) *Rymers v. Rymers*, 2010-Ohio-4289.

Even more alarming is the fact that Mr. Lucci filed an affidavit claiming he had personally loaned Jeffery Rymers money. Mr. Lucci subsequently filed an affidavit indicating he had never met Mr. Rymers. While he refused to concede that his first affidavit was false or misleading, there is no question that his veracity was in question as a result of the deviation between the two affidavits. (Tr. 799-806, 819-824, Ex. 10-U)

In addition to the problems related to the misrepresentations contained in the affidavit, the affidavit was improper due to the fact that Lucci interjected the fact that he was not just a judge, but the Presiding Judge in Lake County into the case:

**2. I was elected judge of the Court of Common Pleas, General Division, and took office on January 6, 2001, and have served in that capacity ever since. I am the presiding judge of the court.**

This statement had no bearing on the *Rymers* litigation and one can only conclude that the information was submitted to gain a tactical advantage with the Court.

Added to the situation was the decision made by Eugene Lucci to have Mr. Rymers served with his Motion to Intervene while Mr. Rymers was at the Courthouse for his pretrial. Service was made in the hallway outside of Eugene Lucci’s chambers by a woman who came out of Eugene Lucci’s doorway. Mr. Rymers testified unequivocally that he was intimidated by this conduct. (Tr. 696-697)

A man then came out of Eugene Lucci’s chambers and stared at Jeffery Rymers. (Ex. 11-L) This happened repeatedly. (*Id.*) Mr. Rymers reported the incident to Mr. Gallo, the associate

from the Respondent's office who was attending the pretrial. Mr. Gallo also observed the man coming and going from Eugene Lucci's chambers. Mr. Rymers indicated that the man involved was Eugene Lucci, the man who was living with his wife (Amy) and his children.

Mr. Gallo returned to the office and wrote a comprehensive memorandum to Gregory J. Moore outlining what had occurred on June 3, 2009. (Ex. 11-L) A Motion to Strike and affidavits were prepared by Mr. Gallo in reference to Mr. Lucci's Motion to Intervene. The Affidavits prepared by Mr. Gallo for himself and Mr. Rymers outline what occurred on June 3, 2009. The Motion was signed and filed by Mr. Gallo. (Ex. 96)

In response to the Motion to Strike, Eugene Lucci filed a second affidavit. This statement merely denied that Lucci was in the hall on the morning of the pretrial. It offered no proof or evidence. It did not identify the fact that the person involved was Eugene Lucci's bailiff.

Mr. Gallo had in his possession the prior affidavit of Eugene Lucci filed on June 3, 2009, in which Mr. Lucci claimed to have loaned money to Mr. Rymers – which Mr. Rymers specifically denied. Therefore, the Respondent reasonably relied upon Mr. Gallo's investigation and the sworn representations of Mr. Gallo and Mr. Rymers. Further, the testimony from trial in the Rymers' divorce action on October 7, 2009 revealed that Eugene Lucci's claims in his affidavit regarding a loan were false and misleading. (Ex. 11-A, pp. 117-118; 11-B, 11-C; Tr. 1340-1341)

Based upon the facts and circumstances on June 3, 2009, no reasonable attorney would take additional steps to determine if the person in the hall was his client's wife's boyfriend. Ordinarily, the client's eyewitness account could be relied upon by itself, but Respondent

additionally had his associate's account of the events, as well as sworn affidavits and a memorandum supporting the Motion to Strike.

Respondent's testimony before the Panel clearly demonstrates that he had two individuals making sworn declarations that Eugene Lucci was in the hallway on June 3, 2009, i.e., Mr. Rymers and Mr. Gallo. Respondent also knew of misleading statements in the affidavits of Eugene Lucci pertaining to his loaning of money to Mr. Rymers as the basis to intervene into the divorce case. (Tr. 1338-1341) Respondent had in his possession a detailed memorandum from Nicholas Gallo. Exhibit 11-L detailed specifically what Nicholas Gallo indicated he observed:

I arrived at the Courthouse at 9:35 a.m. and found Mr. Eugene Lucci milling around the hallway outside of the Courtroom. Mr. Lucci came out of his chambers and surveyed the waiting area no less than five times before Mr. Rymers or Ms. Cooper arrived.

Ms. Cooper entered Lucci's chambers and immediately handed me a Motion to Intervene that was filed by Mr. Lucci on June 3, 2009 (the date of the hearing) at 9:20 a.m. Mr. Lucci made several more appearances in the waiting area before we were called into Court. (Note: Lucci made a point of staring/glaring at Mr. Rymers before we went into Court, and Mr. Rymers stated that he was intimidated by the ordeal.)

Respondent further testified that he received video disks of the events of June 3, 2009, in January of 2010. (Tr. 1348) Upon review of the video disks, the prior Affidavits of Mr. Gallo and Mr. Rymers were withdrawn. (Tr. 1348, Ex. 10-Y) This was the earliest possible time to correct any inaccuracies contained in the affidavits, as Eugene Lucci was in possession of the videos intentionally failed to disclose the videos. (Tr. 815-816)

The Board chose to allow Mr. Lucci to hide behind the protection of the Prof. Cond. R. 8.2(a). This is a wholly inaccurate application of this Rule of Professional Conduct. The purpose of this Rule is to protect the judiciary while they are in their official capacity. The Rule itself states "*...Judges and Justices, not being wholly free to defend themselves...*" clearly does not apply to a judge who has voluntarily made himself a party in civil litigation. When an

individual who happens to be a judge is a party, they have every right and opportunity to defend themselves. In fact, in this case Eugene Lucci filed numerous pleadings and affidavits attempting to prosecute his claims and defend his actions.

There is not a single case in Ohio wherein Prof. Cond. R. 8.2(a) was applied when a judge was a party to the litigation. There is not a single case outside of the state of Ohio where Prof. Cond. R. 8.2(a) was applied when a judge was a party to the litigation. This Rule does not apply under these circumstances.

Moreover, the Board's conclusion that the proper remedy for Respondent would have been to file a disciplinary action seems to ignore that Mr. Rymers was the client in this case and that he too has a right to be defended. Filing an ethical complaint would not have in any fashion aided in the representation of Jeffery Rymers. Eugene Lucci had filed a motion in Rymers' divorce action and Mr. Gallo had a duty and no choice but to file a response to Eugene Lucci's Motions. Eugene Lucci was seeking relief from the trial court which was not supported by the facts or the law, and was, at least in part, based upon misleading and false statements made in Eugene Lucci's affidavit. Mr. Rymers only redress against Eugene Lucci was to respond to Mr. Lucci's Motion to Intervene.

The more important aspect of the Board's Recommendations is that if upheld, the Recommendations would confer upon a sitting judge special rights and privileges as a party in civil litigation. There is no basis in law for this Recommendation.

**E. Allegations Relating to Prof. Cond. R. 8.2(a), 8.4(c), and 8.4(d)**

In what can only be described as a confusing turn of events, the Board's Recommendations transition from its prior recommendation, that Respondent was responsible for the acts of Mr. Gallo in drafting, signing, and submitting the Motion to Strike and

accompanying affidavits, to find that Respondent is personally responsible for the actual filing as if he prepared and signed the documents. The Respondent cannot be held responsible both for improperly supervising the work of a subordinate and responsible for the final work product. Those two concepts are mutually exclusive. Yet, it appears that the Board's Recommendations appear to request that this Court so hold.

As outlined in detail above, the overwhelming evidence in this matter is that Respondent did not draft, prepare, revise or even sign the Motion to Strike in question. (Tr. 1340, Ex. 10-V) Mr. Gallo testified that he was supervised in this matter by a senior associate at the firm. At no point in the record is there any indication that Respondent was the supervisor for Mr. Gallo on this project. (Tr. 641)

However, the Board goes on to recommend to this Court that it hold the Respondent responsible, personally, under Prof. Cond. R. 8.2(a), 8.4(c) and 8.4(d), for the content of motion.

Rule 8.2(a) provides "[a] lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

First, Lucci was not acting as a judge in the Rymers' divorce matter, so this Rule does not apply to these facts and circumstances. Second, Respondent did not make the statement, Mr. Gallo and Mr. Rymers made the statement(s). Third, Section 1.0(g) of the Ohio Rules of Professional Conduct defines "knows" as "actual knowledge of the fact in question". Section 1.0(a) defines "belief" or "believes" as "the person actually supposed the fact in question to be true." Respondent's, Mr. Rymers' and Mr. Gallo's beliefs were all reasonable and in good faith.

It is self evident that the Board cannot recommend to this Court alternative theories of ethical violations. It was the job of the Board, as directed by the Rules for the Governance of the Bar, to find facts to support their conclusion. The mere fact that the Board's Recommendations

are completely contradictory is an excellent example of the failure of the record to establish by clear and convincing evidence any violation of the rules, either under Prof. Cond. R. 5.1, 8.2, or 8.4. Moreover, the Board's Recommendations completely overlook essential portions of the record.

The Board's Findings of Fact and Conclusions of Law appear to be based singularly on one quotation contained in Mr. Gallo's brief relating to a letter received from Walter McNamara. **Missing in the Board's Findings of Fact is the fact that the entire letter was attached to the Motion to Strike as Exhibit 2.** (Ex. 10-V) There was no misrepresentation as to what was contained in the letter as the letter, in its entirety, was attached to the pleading. A finding to the contrary defies common sense. Mr. Gallo was merely responding to Lucci's allegations filed on June 3, 2009.

Respondent was contacted by an attorney, Walter McNamara, who represented Eugene Lucci. Respondent received correspondence from Walter McNamara which he viewed as a failed attempt to remind the Respondent of the fact that Eugene Lucci was a judge. (Tr. 1334-1335) The record also indicates that Respondent took part in telephone conversations wherein McNamara repeatedly used threats implying that Eugene Lucci was a sitting judge. (Tr. 1335-1336) In fact, Respondent specifically testified that Walter McNamara indicated to the Respondent that Eugene Lucci was a judge and that Walter McNamara made it painfully apparent to Respondent that the issue of Eugene Lucci being a judge was an issue that was going to be addressed one way or another. (Tr. 1336)

Respondent attempted to have Walter McNamara testify in this proceeding, but the Panel Chair granted a Motion *in Limine* preventing Respondent from calling Walter McNamara as a witness. The Panel Chair held that because Walter McNamara was personal counsel to Eugene

Lucci and would be representing Mr. Lucci during the Panel hearing, that it would be improper for Mr. McNamara to appear as a witness. (Tr. 752) (See Relator's Motion *in Limine* of June 14, 2010 at p. 4. and Orders of July 16, 2010 and July 20, 2010)

When this Court reviews the totality of the circumstances involved in this scenario, it is impossible to reach the conclusion that Respondent violated Prof. Cond. R. 8.2(a), 8.4(c) or 8.4(d). Respondent had an obligation to represent Jeffery Rymers in this matter. Eugene Lucci, the litigant, personally and through his counsel, interjected the fact that he was a common pleas court judge into the Rymers' divorce matter.

**F. Specific Objections as to Counts II and III**

1. **The Board improperly granted Eugene Lucci additional rights and benefits because of the fact that he holds a judiciary position, even though he was a party litigant in civil litigation.**
2. **The Board fails to take into account the fact that Lucci's attempts to intervene into his live-in girlfriend's domestic relations case were rejected by the trial court and that the decision of the trial court was affirmed on appeal.**
3. **Counts II and III of the Relator's Amended Complaint were not submitted to the probable cause and properly vetted prior to the hearing.**
4. **The Board incorrectly found that the Respondent was Nicholas Gallo, Supervisor in the *Rymers v. Rymers* case despite uncontroverted evidence of the record to the contrary.**
5. **The Board ignored the fact that a condition precedent to a violation under Prof. Cond. R. 5.1(c) requires that there be a showing of a disciplinary violation on behalf of the subordinate attorney.**
6. **The Recommendations allow a judge, acting as a litigant in litigation, to attack the veracity and integrity of an attorney but prevent the attorney from attacking the veracity and integrity of the judge.**
7. **The Panel Chair erred in excluding the testimony of Walter McNamara, counsel for Eugene Lucci, who had been identified as a witness and whose correspondence and discussions form the basis of the Respondent's Motion to Strike.**

**G. Respondent's Objections to the Panel Chair's Pretrial Rulings**

The record in this matter is replete with rulings against the Respondent that were contrary to Ohio law. These rulings permeated the litigation and prevented the proper administration of justice. The one sided history of the pretrial rulings by the Panel Chair were such that the

Respondent had no choice but to attempt to file an Affidavit of Disqualification with this Court. Unfortunately, and in violation of the Respondent's Constitutional rights of due process, there is no provision under the Rules for the Governance of the Bar to file such a pleading. The Respondent was forced to file a Motion to Recuse, which was overruled by the very judge who the Respondent moved to replace.

### **1. Timeliness**

This matter should have been dismissed due to the blatant disregard of the rules relating to amount of time allowed for an investigation. Relator's actions in this matter are *prima facie* evidence of unreasonable delay. Gov. Bar R. V, Section 4(D) provides that the investigation of a grievance shall be completed within sixty days within receipt, and a recommendation as to the disposition of the grievance shall be made within thirty days after the conclusion of the investigation.

Relator opened its file for Respondent's case on June 4, 2007. By that time, Relator had been in contact with the Complainant, James Cahn for a month. As evidenced by correspondence dated May 2, 2007, Cahn had already met with Disciplinary Counsel by that date and provided her with information. (Ex. MM) Relator's Response to Interrogatory No. 5.

According to Gov. Bar R. V, Section 4(D), Relator was required to complete its investigation within sixty days after receiving a grievance. Instead, Relator delayed the matter by requesting and receiving four extensions of time, requested on August 6, 2007; October 3, 2007; November 5, 2007; and January 31, 2008. The Probable Cause Panel reviewed the Draft Complaint of the Relator on February 17, 2009. Relator's Complaint was certified and filed on February 23, 2009. The Amended Complaint was filed on January 26, 2010 without approval from the Probable Cause Panel.

The specific time requirements set forth in Gov. Bar R. V, Section 4(D)(2) “*No investigation shall be extended beyond one year from the date of the filing of the grievance.*” (Emphasis added.) *Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.* (Emphasis added.) Based on the delay in the investigation and filing of the formal Complaint, Respondent filed a Motion to Dismiss pursuant to Gov. Bar R. V on February 26, 2010. The Board denied this Motion on April 13, 2010.

## 2. Discovery

The disclosure of Alan Tallisman’s assets was materially relevant to Respondent’s defense that the untimely disclosure was the basis for amending the Complaint and not some effort to include allegations of a Prenuptial Agreement. Relator absolutely refused to provide proper discovery responses about this very issue which was the primary basis of Count I of the Complaint and Amended Complaint.

Respondent filed two Motions to Compel proper discovery responses. On January 25, 2010, Respondent filed a Motion to Compel Discovery Responses or in the Alternative Deem Request for Admissions Admitted Based on Relator’s Failure to Provide Proper Answers. This motion was denied in its entirety on April 8, 2010. Respondent filed a Motion to Compel Responses to Respondent’s Third Request for Production, Second Set of Interrogatories and Second Set of Requests for Admission. This motion was also denied on June 11, 2010. The result was improper and incomplete responses to pertinent questions, to the detriment of the Respondent.

Respondent propounded specific discovery on Relator requesting answers and supporting evidence regarding asset disclosure, as alleged in the Amended Complaint. Relator was consistently allowed to ignore the Rules of Civil Procedure and provide incomplete and

nonresponsive answers. Respondent's Motion to Compel noted multiple deficient answers where Relator claimed that the admissions requested regarding the asset disclosure, were not reasonably calculated to lead to admissible evidence and that Alan Tallisman's conduct was not the subject of the formal Complaint. These very questions were the basis of Relator's own Complaint. However, Relator was not required to answer the Request for Admissions and Respondent's Motions to Compel were wholly denied. Yet, when Relator filed a Motion to Compel on April 2, 2010, despite argument and objections from Respondent, the Motion was granted in majority on May 3, 2010.

### 3. Motion Practice

On January 15, 2010, Relator filed a Motion *in Limine* to preclude Respondent from offering testimony, argument or evidence of the motive and bias of the complainant, Attorney James Cahn. Motive and bias are always relevant as noted in the Ohio Rules of Evidence. Yet, this motion was granted on March 30, 2010 despite Respondent's obvious right to point out that the very person claiming he was unethical in the *Tallisman* matter had committed malpractice in that same case. Mr. Cahn's motives were based on the same motions and pleadings used to assert impropriety on behalf of Respondent. Respondent should have been allowed to expose Mr. Cahn's motives in filing a grievance. Consequently, Respondent's defense was surely crippled by the Board limiting relevant facts from the cross examination of one of the Relator's most important witnesses.

The January 26, 2010 Amended Complaint added two additional counts. Count II was properly dismissed by the Board. Count III sought to impart the actions of attorney Nicholas Gallo to Respondent. Nicholas Gallo is the subject of *Disciplinary Counsel 09-087* for the exact same allegations asserted against Respondent.

On February 17, 2010, the Relator filed a Motion for Separation of Witnesses. This was primarily to exclude Respondent from the deposition of Nicholas Gallo. The Motion was made pursuant to Ohio Evid. R. 6.15 which applies to hearings or trial. However, this motion was filed to request that the witnesses be separated during the discovery phase. This motion was granted on February 22, 2010, before Respondent was afforded an opportunity to respond. As a result, Respondent was prohibited from investigating the statements, testimony or potential evidence to be presented by Relator's witnesses. This surely violated the Respondent's procedural due process rights.

On June 14, 2010, Relator filed a Motion to Preclude Respondent from calling Walter McNamara, who is Judge Eugene Lucci's lawyer, John P. O'Neill and Lori Brown as witnesses during the hearing. This motion was granted on June 30, 2010 although per request for leave, Respondent was granted the opportunity to respond. The order specifically called upon Respondent to provide the basis of the testimony and its relevance to the proceedings.

On July 6, 2010 Respondent filed a Brief in Opposition with the anticipated testimony of the witnesses and its relevance. The Relator's Motion to Exclude these witnesses was granted a second time on July 16, 2010, and the testimony of all three witnesses was excluded. The Board unilaterally held that the testimony of these witnesses was not relevant to issues before the Disciplinary Counsel.

In furtherance of the prejudicial rulings in discovery, Respondent vehemently argued with motion after motion that the Board should strike the allegations that had not been certified by the Probable Cause Panel. The Board deemed the Probable Cause Panel's determinations "irrelevant and impertinent" when the Respondent asked for relief in a Motion for Summary Judgment, 12(C) and 12(B)(6) Motion, Motion to Dismiss Gov. Bar R. V, and 12(F) Motion.

Yet, the Probable Cause Panel's findings were often used to support Relator's motions and arguments.

Respondent filed a Motion to Dismiss Counts II and III and in the alternative, a Motion in *Limine* on July 14, 2010. Without any objection or response from Relator, this Motion was denied on July 22, 2010 partly because the Board claimed "before the legal issues argued by Respondent can be reached, the alternative motions require fact finding that can be made only by the whole panel after hearing."

When put into context, the record establishes that all of Relator's Motions were granted. On the contrary, every substantive motion filed by the Respondent was denied. The rulings on the pleadings obviously determine the evidence to be presented at the disciplinary hearing. Despite clear law and evidence in support of Respondent; testimony contradicting the very basis of Relator's Complaint; rulings by the Probable Cause Panel; the delay in the investigation; and Relator's obvious discovery deficiencies, the Board ruled against Respondent on every substantive motion. These actions resulted in improper arguments before the Hearing Panel and unfair prejudice to the Respondent, which led to the Board's incorrect Findings of Fact and Conclusions of Law.

#### **H. Specific Objections as to Pretrial Rulings**

- 1. The Respondent objects to the form and format of the Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners in that the Findings of Fact do not contain recorded sites and are not findings of fact pursuant to Ohio law.**
- 2. The Conclusions of Law section of the Findings of Fact, Conclusions and Recommendations of the Board of Commissioners fail to incorporate any facts or provide any analysis as to support their findings.**
- 3. The panel chair erred according to Gov. Bar R. V, Section 4(2) in not dismissing this matter due to violations arising from the extended time period that the Office of Disciplinary Counsel took in filing the Complaint.**
- 4. The panel chair erred in not granting the Motions to Compel filed by the Respondent in light of the Relator's inadequate discovery responses.**

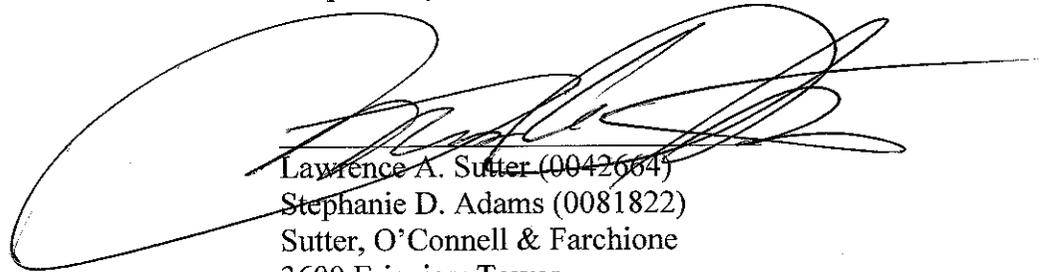
5. **The panel chair erred in failing to even consider the Respondent's Motion for Summary Judgment.**
6. **The panel chair erred in failing to grant the Respondent's Motions to Dismiss.**
7. **The panel chair erred in failing to grant the Respondent's Motion in *Limine* to preclude evidence of the Fifth Third bank accounts.**
8. **The panel chair erred in granting the Relator's Motion in *Limine* to preclude evidence relating to the motive and bias of the complaining witness in this case, James Kahn.**
9. **The panel chair erred in granting the Relator's Motion to Preclude the Respondent from calling witness Walter McNamara who had personal knowledge as to the events and would have been provided exculpatory evidence on behalf of the Respondent.**
10. **The current status of the Rules for Governance of the Bar violate the Respondent's due process rights in that there is no avenue for a litigant to object to the bias and prejudices of a judge through an affidavit of disqualification or similar pleading.**
11. **The panel chair repeatedly failed to apply the Ohio Rules of Civil Procedure as mandated by the rules for the governance of the bar.**

#### **IV. CONCLUSION**

As is obvious from the record in this matter, the Respondent has adamantly defended his right to practice law throughout the course of this disciplinary matter. A distinctly uncommon approach was taken in this matter as it related to multiple issues in the well settled procedure for disciplinary actions in this state. Despite the fact that the Probable Cause Panel rejected several of the arguments in this Draft Complaint, the Realtor was permitted by the Panel Chair to continue to prosecute those very same issues. Motions to Dismiss, Motions for Summary Judgment, and Motions *in Limine* attempting to preclude this obviously prejudicial evidence fell upon deaf ears. Discovery requests directly intended to draw out the actual allegations in this case were never answered and Motions to Compel those issues were denied by the Panel Chair. Ultimately, the Relator was permitted to take this matter all the way to a Hearing by never having to actually produce evidence contrary to Motions for Summary Judgment or other dispositive pleadings.

Once the hearing in this matter commenced and the evidence was presented, it became blatantly clear that sufficient evidence did not exist in the record in order to justify any disciplinary action against the Respondent. Ultimately, the Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners was submitted to this Court. The "Findings of Fact" did not contain but the bare minimum number of actual references to the record. Instead, it matched the Relator's Trial Brief which contained unsupported allegations of misconduct. The Respondent respectfully requested this Court look at the record, and not the recommendations, in order to fairly and accurately determine the appropriate outcome in this matter. The facts do not exist to substantiate any claims of misconduct on the part of the Respondent. A fair and honest review of the record will leave this Court with no choice other than to grant a full dismissal to the Respondent.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

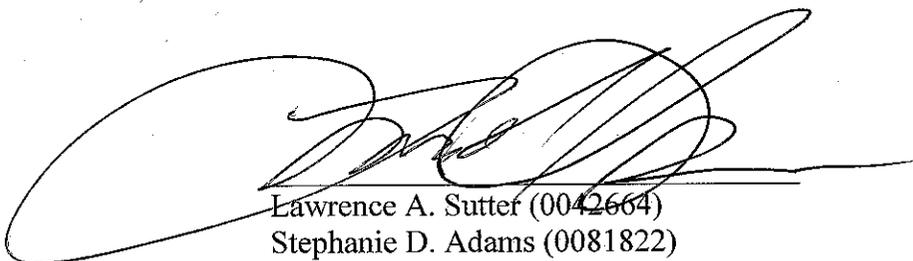
I hereby certify that the following was mailed via regular, U.S. mail this 2<sup>nd</sup> day of May

2011 to the following:

Jonathan E. Coughlan  
Lori J. Brown  
Karen H. Osmond  
Disciplinary Counsel  
250 Civic Center Drive, Suite 325  
Columbus, Ohio 43215-7411

And hand delivered to:

Jonathan W. Marshall  
The Supreme Court of Ohio  
Board of Commissioners on Grievances and Discipline  
65 South Front Street, 5<sup>th</sup> Floor  
Columbus, Ohio 43215-3431



Lawrence A. Sutter (0042664)  
Stephanie D. Adams (0081822)