

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel
Relator

Joseph G. Stafford (0023863)
Respondent

CASE NO. 2011-0408

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

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

JONATHAN E. COUGHLAN (0026424)
Disciplinary Counsel, Relator

LORI J. BROWN (0040142)
Chief Assistant Disciplinary Counsel
Counsel for Relator

KAREN H. OSMOND (0082202)
Staff Attorney, Counsel for Relator

OFFICE OF DISCIPLINARY COUNSEL
250 Civic Center Dr., Suite 325
Columbus, Ohio 43215
(614) 461-0256
(614) 461-7205 - FAX

JOSEPH G. STAFFORD (00023863)
Respondent

LAWRENCE A. SUTTER III (0042664)
STEPHANIE D. ADAMS (0081822)
Counsel for Respondent

SUTTER, O'CONNELL, & FARCHIONE
2600 Erieview Tower
1301 E. Ninth Street
Cleveland, OH 44114

(216) 928-2200
(216) 923-3645 - FAX

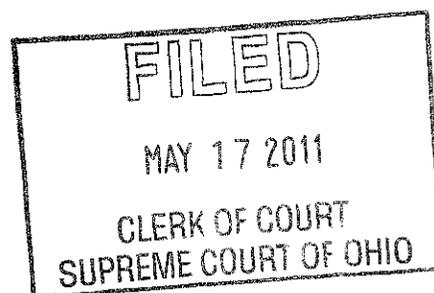


TABLE OF CONTENTS

| <u>DESCRIPTION</u> | <u>PAGE NUMBER</u> |
|---|--------------------|
| Table of Authorities | iv |
| Introduction | 1 |
| Background Information and Other Relevant Facts | 2 |
| Relator's Answers to Respondent's Objections | 4 |
| A. There is Clear and Convincing Evidence that Respondent Violated Rules 8.4(c) and 3.3(d) during <i>Tallisman v. Tallisman</i> | 4 |
| 1. The board did not misunderstand the sequence of events in <i>Tallisman</i> nor did it conclude that the motion for summary judgment was based upon respondent's failure to file a reply to the counterclaim. | 5 |
| 2. The board did not conclude that the issue regarding service of the answer and counterclaim was addressed in the motion for summary judgment or in respondent's response to the motion for summary judgment. | 5 |
| 3. The board was fully aware that the <i>Tallisman</i> court granted respondent's motion for leave to reply to the counterclaim. | 5 |
| 4. The <i>Tallisman</i> court's ruling on the motion for leave to amend the complaint supports the board's findings of misconduct in Count One. | 5 |
| 5. There was no evidence of "discovery abuse" by Alan Tallisman, and if there had been, it would be irrelevant. | 12 |
| 6. Respondent's claims about "additional" defendants and "additional" information were correctly rejected by the board. | 12 |
| 7. The evidence support the board's conclusions regarding the misleading nature of respondent's motion for leave to file an amended complaint. | 12 |
| 8. Civ. R. 75 is entirely unrelated to this disciplinary case. | 23 |

| | |
|---|----|
| 9. Respondent's claims about the alleged reason for filing the amended complaint were considered and rejected by the board. | 12 |
| 10. Respondent's due process rights were not violated regarding the "Fifth Third" bank account nor for any other reason. | 24 |
| 11. Respondent never offered any reason for adding the new language to the amended complaint. | 12 |
| B. Clear and convincing evidence supports the board's conclusion that respondent violated Ohio Prof. Cond. Rule 3.3(d). | 27 |
| D. Respondent's Objection to Counts Two and Three | 29 |
| 1. Respondent violated Rule 5.1(c)(1) during <i>Rymers v. Rymers</i> . | 30 |
| E. Respondent violated Rules 8.2(a), 8.4(c), and 8.4(d) during <i>Rymers v. Rymers</i> . | 36 |
| G. The pretrial rulings by the panel were in accord with Ohio law. | 41 |
| 1. There was no delay in the filing of the Complaint and Respondent's Motion to Dismiss Count One was appropriately denied. | 42 |
| 2. Relator never ignored the Rules of Civil Procedure Respondent's Motions to Compel were appropriately Overruled by the panel. | 45 |
| 3. Respondent has provided no basis for this Court to overrule panel rulings. | 46 |
| Conclusion | 49 |
| Certificate of Service | 50 |

TABLE OF AUTHORITIES

| <u>CASE LAW</u> | <u>PAGE NUMBER(S)</u> |
|--|-----------------------|
| <i>Anderson v. Highland House Co.</i> (93 Ohio St.3d 547, 2001-Ohio-1607, 757 N.E.2d 329 | 48 |
| <i>Beard v. Meridia Huron Hosp.</i> , 106 Ohio St.3d 237, 2005-Ohio-4787 834 N.E.2d 323 | 45 |
| <i>Blakemore v. Blakemore</i> (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140 | 45 |
| <i>Cleveland Bar Assn. v. Mallin</i> , 86 Ohio St.3d 310, 1999-Ohio-106, 715 N.E.2d 122 | 44 |
| <i>Columbus Bar Assn. v. Ewing</i> , 75 Ohio St.3d 244, 1996-Ohio-317, 661 N.E.2d 1109 | 46 |
| <i>Continental Ins. Co. v. Whittington</i> , 71 Ohio St.3d 150, 1994-Ohio-362, 642 N.E.2d 615 | 47 |
| <i>Cincinnati Bar Assn. v. Backsman</i> (May 25, 1983), D.D. No. 83-7 Ohio Official Reports Advance Sheets, Vol. 5, No. 3 | 44 |
| <i>Disciplinary Counsel v. Baumgartner</i> , 100 Ohio St.3d 41, 2003-Ohio-4756, 796 N.E.2d 495 | 38 |
| <i>Disciplinary Counsel v. Conese</i> , 96 Ohio St.3d 458, 2002-Ohio-4797, 776 N.E.2d 13 | 44 |
| <i>Disciplinary Counsel v. Gardner</i> , 99 Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425 | 36 |
| <i>Disciplinary Counsel v. Heiland</i> , 116 Ohio St.3d 521, 2008-Ohio-91, 880 N.E.2d 467 | 29, 30 |
| <i>Disciplinary Counsel v. Johnson</i> , 113 Ohio St.3d 344, 2007-Ohio-2074, 865 N.E.2d 873 | 44 |
| <i>Disciplinary Counsel v. Zingarelli</i> , 89 Ohio St.3d 210, 2000-Ohio-140, 729 N.E.2d 1167 | 15 |
| <i>Findlay/Hancock Cty. Bar Assn. v. Filkins</i> , 90 Ohio St.3d 1, 2000-Ohio-491, 734 N.E.2d 764 | 15 |

| | |
|---|--------|
| <i>First Merit Bank, N.A. v. Wilson</i> , 9 th Dist. No. 23363, 2007-Ohio-3239 | 48 |
| <i>In the Matter of Anonymous Member of the South Carolina Bar</i> (2001), 346 S.C. 177, 552 S.E.2d 10 | 32 ,36 |
| <i>Shimko v. Lobe</i> , 103 Ohio St.3d 59, 2004-Ohio-4202, 813 N.E.2d 669 | 28 |
| <i>Stark Cty. Bar Assn. v. Watterson</i> , 103 Ohio St.3d 322, 2004-Ohio-4776, 815 N.E.2d 386 | 15 |
| <i>Statewide Grievance Comm. v. Spierer</i> (March 12, 1996), 16 Conn. L. Rptr. 299, No. CV 950147662S | 32 |

OTHER AUTHORITIES

PAGE NUMBER(S)

| | |
|--|--------|
| BCGD Proc. Reg. (2)(B) | 42 |
| BCGD Proc. Reg. 9(D) | 29 |
| BCGD Advisory Opinion 90-18, August 17, 1990 | 29 |
| Civ. R.12(A)(2) | 7 |
| Civ. R.7(A) | 7 |
| Civ. R. 75 | 23 |
| DR 8-102(B) | 36, 38 |
| Gov. Bar R.IV(2) | 39 |
| Gov. Bar. R.V(4) | 42, 43 |
| Gov. Bar R.V(4)(D)(2) | 42 |
| Gov. Bar R.V(4)(D)(3) | 42, 44 |
| Gov. Bar R.V(6)(D)(3) | 41 |
| Gov. Bar R.V(11)(D) | 29, 30 |
| Gov. Bar R.V(11)(E) | 25, 43 |

| | |
|----------------------------|--------------------------|
| Prof. Cond. Rule 1.0(g) | 34 |
| Prof. Cond. Rule 3.3(d) | 2, 4, 10, 16, 26, 27 |
| Prof. Cond. R. 5.1 | 31, 32 |
| Prof. Cond. Rule 5.1(c)(1) | 2, 30, 31, 36 |
| Prof. Cond. R. 8.2(a) | 2, 30, 36, 37, 39, 41 |
| Prof. Cond. Rule 8.4(c) | 2, 4, 10, 16, 26, 30, 41 |
| Prof. Cond. Rule 8.4(d) | 2, 3, 30, 39, 41 |

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, OH 43215
Relator

CASE NO. 2011-0408

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

Joseph G. Stafford
Reg. No. 0023863
2105 Ontario Street
Cleveland, OH 44115
Respondent

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

INTRODUCTION

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

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

Professional Conduct. The board's report was certified to this Court and a show cause order was issued. On May 2, 2011, both parties filed objections to the board's report.

BACKGROUND INFORMATION AND OTHER RELEVANT FACTS

In his introduction, respondent proclaims that he is objecting to "each and every adverse recommendation" in the board's report. If nothing else, respondent's approach is consistent with his efforts before the board.

As to Count One, the board concluded that respondent violated Ohio Prof. Cond. Rule 3.3(d) (in an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision) and Prof. Cond. Rule 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation).

As to Count Three, the board concluded that respondent violated Prof. Cond. Rule 5.1(c)(1) (a lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved); Prof. Cond. Rule 8.2(a) (a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the integrity of a judicial officer); Prof. Cond. Rule 8.4(c) (conduct involving dishonesty, deceit, fraud or misrepresentation); and, Prof. Cond. Rule 8.4(d) (conduct that is prejudicial to the administration of justice). The board dismissed additional violations that were charged in Count One and Count Three. Count Two was dismissed by the panel at the close of the evidence.

The board recommended that respondent be suspended from the practice of law for 12 months with the entire suspension stayed. Relator objected to the recommended sanction and asserted that an actual suspension of at least 12 months is warranted. Relator has also objected to the board's conclusion that respondent did not violate Rule 8.4(d) in Count One.

In arguing that there should not be a "single adverse finding," respondent tediously overemphasizes the board's dismissal of some of the violations charged by relator. Contrary to respondent's assertions, the sheer number of separate violations found is not determinative of whether the board correctly determined that there was clear and convincing evidence of misconduct. Respondent's claim that the board determined that relator "failed" to provide clear and convincing evidence to establish "eleven allegations" in Count One and "five allegations" in Count Three as if that means there were no violations, is a startling oversimplification of the board's conclusions.

Respondent laments that his testimony is cited only once in the board's report. Respondent protests that the report does not rely upon more of his exhibits. Respondent is disregarding the obvious. Based upon the board's conclusions, it is evident that in its role as the trier of fact, the panel observed the witnesses, evaluated the evidence and determined that the testimony and evidence offered by relator in support of the violations found should be accepted as the truth.

Throughout his objections, respondent offers what purport to be factual statements fastened together by biased and conclusory remarks. Respondent's objections provide further evidence that as the board concluded, respondent "has refused to acknowledge the wrongful nature of his conduct." Report at 25.

Accordingly and for all of the reasons set forth herein, this Court should reject all of respondent's objections and enter an order that is consistent with the findings and recommendations in the board's report and relator's objections.

RELATOR'S ANSWERS TO RESPONDENT'S OBJECTIONS

COUNT ONE

A. There is Clear and Convincing Evidence that Respondent Violated Rules 8.4(c) and 3.3(d) during *Tallisman v. Tallisman*

Respondent's objections to the board's conclusions in Count One display his unrelenting efforts to make the *Tallisman* matter much more complicated than it really is. As he has throughout this disciplinary case, respondent offers arguments that amount to little more than an effort to deflect this Court's attention away from his misconduct. Respondent chooses to ignore or misconstrue crucial facts while dwelling on issues that are insignificant and irrelevant. Respondent is entirely unwilling to accept that the board rejected his claims about what happened during *Tallisman*.

Respondent's arguments are a tired replication of many of the same claims that respondent imposed upon the *Tallisman* court and upon the hearing panel during this disciplinary case. When all was said and done, neither the *Tallisman* court nor the hearing panel accepted respondent's arguments or assertions. First, in January 2008, the *Tallisman* court concluded that it should "undo" the deception that had been perpetrated upon it by respondent since April 2007. See Rel. Exb. 86. Likewise, after a five-day disciplinary hearing, the panel and the board concluded that during *Tallisman*, respondent engaged in conduct involving fraud, deceit, dishonesty or misrepresentation

and that during an ex parte proceeding, he failed to inform the *Talisman* court of all material facts that would enable it to make an informed decision.

At page 31 of his objections, respondent has listed 11 statements that he has delineated as “specific objections” to the board’s conclusions regarding Count One. It appears that the assertions on pages 11-30 of the brief are intended to support those “specific objections.” Due to the structure of this portion of respondent’s brief, relator has answered each of these “specific objections.” Relator’s answers are presented in an order intended to coincide with the subject matter of the arguments offered by respondent.

- 1. The board did not misunderstand the sequence of events in *Talisman* nor did it conclude that the Motion for Summary Judgment was based upon respondent’s failure to file a reply to the counterclaim.**
- 2. The board did not conclude that the issue regarding service of the answer and counterclaim was addressed in the motion for summary judgment or in respondent’s response to the motion for summary judgment.**
- 3. The board was fully aware that the *Talisman* court granted respondent’s motion for leave to reply to the counterclaim.**
- 4. The *Talisman* court’s ruling on the motion for leave to amend the complaint supports the board’s findings of misconduct in Count One.**

Although respondent’s first objection states that the board “misunderstood the sequence of events” in *Talisman*, his actual arguments do not lend any support to that claim. Instead, respondent has focused upon his disagreement with the board’s determinations regarding the significance of various events rather than the order of events.

Overall, respondent provides a hyper-technical analysis of the *Talisman* proceedings in an effort to support his recitation of how various events are connected to each other. Just as he did unsuccessfully before the panel, respondent asserts that this Court should simply believe his self-serving elucidations about those events rather than consider the entirety of the evidence.

As an example, respondent agrees that Susan Tallisman filed a complaint for divorce. Respondent acknowledges that in February 2005 Alan Tallisman filed an answer and a counterclaim. Respondent then skips from February 2005 to the motion for summary judgment filed by Alan Tallisman in April 2005. Respondent's "jump" from February to April allows him to ignore the undisputed fact that between the filing of the counterclaim and the motion for summary judgment, he failed to file a response to the counterclaim. It was the discovery of such failure in 2007 that launched the misconduct that constitutes Count One.

Similarly, respondent admits that when Alan Tallisman's counsel discovered that no reply to the counterclaim had been filed, counsel filed a motion to have averments deemed admitted and for judgment on the pleadings. See Rel. Exb. 23. Again respondent skips important events in his effort to lead this Court to incorrectly conclude that the next thing that happened was a search of his office and then the filing of a motion for leave to reply to the counterclaim. Respondent ignores the April 16, 2007 letter he received from James Cahn that pointed out respondent's failure to file a reply to the counterclaim. Rel. Exb. 26. Respondent ignores the fact that before he filed his motion for leave to reply, he filed a motion for leave to file an amended complaint and he filed an amended complaint in which he "surreptitiously include[ed] an additional

allegation regarding the prenuptial agreement [that he had] omitted [from] the original complaint but [was] critical to his client's interests." Report at 21 and Rel. Exbs. 28, 30.

Respondent also asserts that the board concluded that Alan's motion for summary judgment was "based upon" respondent's "failure to reply to the counterclaim." Respondent's assertion is incorrect. The board reached no such conclusion.

At ¶13 of its report, the board set forth the following undisputed facts: 1) respondent did not file a reply or otherwise respond to the counterclaim and, 2) Alan's counsel filed a motion for summary judgment. Review of the motion for summary judgment indicates that it does not reference the lack of a reply to the counterclaim and, correspondingly, the board did not state that it did. Rel. Exb. 7.

As the board also observed, the motion for summary judgment was filed "after the time for filing a reply to the counterclaim had elapsed[.]" The board's statement about the timing of the motion for summary judgment is entirely accurate. The answer and counterclaim was filed February 18, 2005. In accord with the Ohio Rules of Civil Procedure, respondent had 28 days to file a reply to the counterclaim.¹ The motion for summary judgment was filed April 8, 2005. Clearly, by April 8th the time for filing a reply to the counterclaim had elapsed.

At ¶14 of its report, the board recited a series of events beginning with respondent's June 13, 2005 memorandum opposing the motion for summary judgment. Rel. Exb. 9. The board aptly observed that the memorandum acknowledged Alan Tallisman's answer and counterclaim. Id. The board accurately observed that

¹ Civ. R.7(A) requires that there be a reply to a counterclaim and Civ. R.12(A)(2) provides that the "plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer[.]"

respondent's memorandum argued against enforcement of the prenuptial agreement, the motion for summary judgment, and the request to bifurcate the divorce proceedings. *Id.* In contrast to respondent's second objection, the board also found that in his memorandum opposing the motion for summary judgment, respondent did not make an issue "regarding the certification and service of the Answer and Counterclaim." A review of respondent's response to the motion for summary judgment confirms that the board's conclusions about respondent's memorandum are entirely accurate.² *Id.*

In his third and fourth objections, respectively, respondent claims that the board failed to take into account that the *Tallisman* court granted his motion for leave to reply to the counterclaim and his motion for leave to amend the complaint. Respondent's claims are erroneous.

Notably, respondent repeatedly refers to those two motions out of chronological order. The actual sequence of events is immensely important in this disciplinary case. In contrast to respondent's presentation, the motion for leave to amend the complaint was filed first. The motion for leave to amend the complaint and the amended complaint (including the new language regarding the prenuptial agreement) were filed the day before respondent filed his motion for leave to reply to the counterclaim. Respondent could not risk exposing his failure to reply to the counterclaim to the *Tallisman* court before he filed an amended complaint. The complaint had to be successfully amended before respondent could acknowledge that no reply had been filed to the counterclaim.

² It appears that respondent may have misread or misunderstood several portions of the board's report. Respondent's assertions about ¶¶13-14 are but one example.

Respondent's claim that the board "failed to take into account" that the *Tallisman* court granted his motions for leave is entirely perplexing. Unfortunately, the structure of respondent's objections makes it impossible to relate these objections to a particular factual argument. It appears that respondent may be contending that because the *Tallisman* court initially granted his motions for leave, the board cannot find misconduct based upon the content of those motions. That argument ignores the obvious. The *Tallisman* court ruled in respondent's favor on the motions for leave because it was misled by respondent. Moreover and as the board set forth at ¶¶50-54, Judge Celebrezze's January 3, 2008 judgment entry vacated his previous orders granting respondent's requests for leave. Rel. Exb. 86.

Finally and in complete contrast to respondent's claim that the board "failed to account" for the ruling on the motion for leave to amend the complaint, the board found that the *Tallisman* court's ruling on the motion for leave to amend was the foundation of the findings of misconduct in Count One. At ¶¶20-23 of its findings of fact, the board stated:

{20} 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.

{21} The amended complaint filed by Respondent included all of the original defendants and added five new defendants[.] All of the parties added to the amended

complaint were disclosed to Respondent before April 13, 2007, in the 1993 prenuptial agreement, in Alan Tallisman's interrogatory answers, and in document production responses. ([Rel.] Ex. 10, 11)

{22} Although the prenuptial agreement was not mentioned in the original Complaint for divorce or in Respondent's motion for leave to amend the complaint, paragraph three of the amended complaint, states: "The Plaintiff sets forth that the parties executed a Pre-nuptial agreement which was the result of fraud, coercion [sic], and duress created by the Defendant, Alan Gregg Tallisman." ([Rel.] Ex. 30)

{23} It is evident that Respondent was taken unaware by the motion [for judgment on the pleadings] and letter from Alan's counsel asserting Respondent's failure to plead the unenforceability of the prenuptial agreement in either the original complaint or by reply to the counterclaim. Although the advantage Respondent gained by addition of previously known stakeholders in the filing of his amended complaint as new parties is doubtful, considering alternative discovery procedures available, the surreptitious inclusion of the paragraph amending the complaint to include a new claim for relief after the issues were drawn can have been done only to mislead the court into granting leave without full knowledge of the extent and purpose of the relief sought. Because leave to amend was granted by *ex parte* order, defendant had no opportunity to supply the additional information until after the claim was part of the record.

Report at 4-6.

In its conclusions of law, the board again accounted for the *Tallisman* court's ruling on the motion for leave to amend the complaint. To wit:

{98} The panel finds by clear and convincing evidence one violation by Respondent of Prof. Cond. R. 8.4(c). Respondent intentionally misled the [*Tallisman*] court by filing his motion for leave to file an amended complaint on specific grounds stated and then surreptitiously including an additional allegation regarding the prenuptial agreement omitted in the original complaint but critical to his client's interests. The panel also finds one violation by Respondent of Prof. Cond. R. 3.3(d). 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 local rules not designed for the purpose to do so.

Id. at 21.

After the divorce complaint had been amended, then respondent filed his motion for leave to file a reply to the counterclaim instanter. Likewise, the board accounted for the court's 2007 ruling on that motion for leave. The board stated:

{24} On April 18, 2007, Respondent filed a "Motion for Leave to File Reply to Counterclaim Instanter (Limited Appearance)" on behalf of Susan Tallisman: "The Plaintiff, Susan Marie Tallisman, by and through her authorized counsel, Joseph G. Stafford, and the law firm of Stafford & Stafford Co., L.P.A., enters a limited appearance to the answer and counterclaim of the Defendant and respectfully requests this court to permit her to file her Reply to the Counterclaim Instanter pursuant to Rule 6 of the Ohio Rules of Civil Procedure. The request is premised upon issues regarding service of the answer and counterclaim." The vague reference to issues regarding service is unexplained.

{25} Again the court ex parte signed a judgment entry granting Respondent's motion for leave to reply instanter to the counterclaim of the defendant. ([Rel.] Ex. 33) The entry was filed on April 18, 2007 and at the same time a judgment entry bearing Judge Celebrezze's signature dated October 20, 2005, denying Alan Tallisman's motion for summary judgment, was also filed. ([Rel.] Ex. 32)

{26} The "Reply to Answer and Counterclaim (Limited Appearance)" filed on behalf of Susan Tallisman, in paragraph three states, "The Plaintiff, Susan M. Tallisman, specifically sets forth that the pre-nuptial agreement, attached as Exhibit A to the Answer and Counterclaim of the Defendant, Alan G. Tallisman, is premised upon fraud, coercion, and duress." ([Rel.] Ex. 34)

Report at 6.

Accordingly and for all of the reasons set forth herein, this Court should overrule respondent's first four "specific objections."

5. **There was no evidence of “discovery abuse” by Alan Tallisman and, if there had been, it would be irrelevant.**
6. **Respondent’s claims about “additional” defendants and “additional” information were correctly rejected by the board.**
7. **The evidence supports the board’s conclusions regarding the misleading nature of respondent’s motion for leave to file an amended complaint.**
9. **Respondent’s claims about the alleged reason for filing the amended complaint were considered and rejected by the board.**
11. **Respondent never offered any reason for adding the new language to the amended complaint.**

In objections five, six, seven, and nine, respondent complains about the board’s reaction to his self-described “mountain of testimony and documentary proof” pertaining to alleged problems with discovery during *Tallisman* and his alleged need to add additional defendants in order to obtain information about those entities. Respondent complains that “the reverse conclusion was reached” by the board and asserts that the board’s “conclusion” is without evidentiary support.

That “reverse conclusion” is in part, as follows:

{20} 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.

{21} The amended complaint filed by Respondent included all of the original defendants and added five new defendants[.] All of the parties added to the amended complaint were disclosed to Respondent before April 13,

2007, in the 1993 prenuptial agreement, in Alan Tallisman's interrogatory answers, and in document production responses. ([Rel.] Ex. 10, 11)

Report at 4-5, ¶¶20-21 (emphasis added).

In reaching its conclusion that the newly added defendants had been disclosed to respondent before April 2007, it is apparent that the panel was cognizant and chose to reject the testimony offered by respondent. At ¶55, the board stated, “[m]uch of Respondent’s testimony in defense concerns the failure of [Alan Tallisman] to provide accurate discovery and Respondent’s efforts by his amended pleadings to gain meaningful discovery of the nature and value of Alan Tallisman’s assets from sources other than Alan Tallisman.” Report at 12. Clearly, the board heard and rejected respondent’s claims that while conducting “trial preparation” he “realized that he needed to amend” the *Tallisman* complaint because “several new assets had been disclosed and new parties needed to be added.” Objections at 19. Respondent’s “mountain of testimony” did not convince the panel.³

Evidence about the allegedly tardy disclosure of Alan Tallisman’s “assets” was offered in hair-splitting detail throughout this case. For example, respondent claims that the disclosure was somehow incomplete because additional Tallisman accounts held by CitiGroup had not been disclosed even though the stakeholder (CitiGroup) was identified. Respondent also now claims that the Fifth Third Bank account was originally

³ From day one, respondent has endeavored to wrestle the focus of this disciplinary case away from himself and onto others. Respondent’s efforts to convince the board that Alan Tallisman or his counsel did anything improper were rejected by the board and should be similarly be rejected by this Court.

disclosed as a “personal asset” when respondent apparently believes it should have been identified by Alan Tallisman as “marital property.”⁴

Respondent’s contention appears to be that he did not commit misconduct because additional “information” about several stakeholders was in fact discovered as the case progressed. That is not the same argument that respondent made to the *Tallisman* court when he asked for leave to amend his complaint. Notably, that argument also ignores the insertion of the language about the prenuptial agreement into the amended complaint.

In his motion for leave to amend, respondent said simply: “The Plaintiff, Susan Marie Tallisman, sets forth to this Court that a Leave of Court to File Amended Complaint is necessary, premised upon assets of the Defendant, Alan Gregg Tallisman. The Plaintiff, Susan Marie Tallisman, sets forth to this Court that on April 13, 2007, for the first time, a pre-trial statement was sent to her counsel. (See Exhibit “A”). The Plaintiff sets forth that it is necessary for this Court to have all parties properly before this Court for a just and equitable determination of the issues before this Court.” As the board concluded, “In his motion for leave, Respondent claimed that it was necessary to amend the divorce complaint to have all parties before the court.” Report at 4, ¶20. The board further found that “All of the parties added to the amended complaint were disclosed to Respondent before April 13, 2007[.]” Report at 5, ¶21 (emphasis added).

As the trier of fact, the hearing panel was free to give the weight and value to the evidence as it saw fit. In contrast to the *Filkins* decision cited by respondent, proof in

⁴ Relator’s evaluation of the *Tallisman* pleadings that are part of the record in this disciplinary case indicates that respondent did not start claiming there was some

this case was not based solely upon the credibility of the witnesses. *Findlay/Hancock Cty. Bar Assn. v. Filkins*, 90 Ohio St.3d 1, 2000-Ohio-491, 734 N.E.2d 764. Much of this case was based entirely upon the board's interpretation of the plain meaning of documents presented to the *Talisman* court by respondent.

Moreover, as this Court has stated in numerous disciplinary cases, "Contrary to respondent's arguments, it is of no consequence that the board's findings of fact are in contravention of respondent's or any other witness's testimony. 'Where the evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false.'" *Disciplinary Counsel v. Zingarelli*, 89 Ohio St.3d 210, 217, 2000-Ohio-140, 729 N.E.2d 1167 (citations omitted). Similarly, this Court has held that the board is "well within its authority to credit the witnesses and exhibits it did over respondent's explanations and excuses[.]" *Stark Cty. Bar Assn. v. Watterson*, 103 Ohio St.3d 322, 331, 2004-Ohio-4776, 815 N.E.2d 386. In *Watterson*, this Court stated:

Respondent objects at length to the board's findings of fact and law. We are not persuaded by his arguments. This record contains testimony or documentary proof to establish all of respondent's misconduct and the underlying facts. And by adopting the panel's findings wholesale, the board was well within its authority to credit the witnesses and exhibits it did over respondent's explanations and excuses for his excessive fees and neglect. See *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117, ¶8 ("we ordinarily defer to a panel's credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings").

Id. (emphasis added).

allegedly relevant distinction between the disclosure of "marital" and "separate" property until the disciplinary case.

Most importantly, and as set forth above, on April 17, 2007, respondent asked the *Talisman* court for leave to amend the complaint because “it is necessary for this Court to have all parties properly before this Court for a just and equitable determination of the issues before this Court.” Rel. Exb. 28. See also Report at 4, ¶20. As the board concluded, “[r]espondent 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.” *Id.*

Even if respondent could support his claims about the new defendants, respondent never, ever explained why he added language about the prenuptial agreement to paragraph three of the amended complaint or why he did not mention the new language in his motion for leave. The panel heard all of the evidence including respondent’s claims about the motion for leave. The panel gave respondent’s words the meaning that the evidence supports.

In reaching the conclusion that respondent violated Rule 8.4(c), the board held that “[r]espondent intentionally misled the [*Talisman*] court by filing his motion for leave to file an amended complaint on specific grounds stated and then surreptitiously including an additional allegation regarding the prenuptial agreement omitted in the original complaint but critical to his client’s interests.” Report at 21, ¶198. The board also found a violation of Rule 3.3(d). According to the board, “[r]espondent’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 local rules not designed for the purpose to do so.” *Id.*

Although his arguments about the alleged lack of service of the counterclaim are not referenced in any of his “specific objections,” respondent devotes substantial effort

to contending that the board should have believed that he was not served with the answer and counterclaim when it was filed in 2005. To be brief and perfectly clear – respondent is claiming that he was not served with a counterclaim to which he failed to reply. Candidly, respondent’s assertion can be described as a face-saving claim of convenience.

More importantly, respondent’s claim that he was not served with the answer and counterclaim is immaterial in light of the board’s conclusions. At ¶62 the board stated:

It is unimportant to a finding of misconduct whether or not Alan Tallisman’s answer and counterclaim were certified as served upon Respondent at the time of filing, or whether they were actually served, considering that Respondent’s intentionally misleading pleadings were drawn and filed in the court when everyone believed the counterclaim had been properly served and before the matters of law of certification of service or of actual service of process were discovered and became issues and alternative defenses to the claim of Respondent’s failure to answer defendant’s counterclaim.

Report at 14. The board further found, “There has been no allegation and no evidence has been presented that Respondent was untruthful in stating that a search of his office did not discover a copy of defendant’s answer and counterclaim said to have been served upon Respondent near the outset of the proceedings. It is noteworthy that the document was not missed for nearly two years until Respondent’s lack of filing a reply to that pleading became an issue.” Id. at 13, ¶58 (emphasis added).

Obviously, respondent’s efforts to prove “lack of service” directly relate to his attempts to prove that his failure to file a timely reply to the counterclaim and his need to amend the complaint were unrelated. In fact, the clear and convincing evidence shows that it was not until respondent was made acutely aware not only of his failure to file a

reply to the counterclaim but also of his failure to plead the affirmative defenses of fraud, duress, coercion and overreaching that he immediately filed a motion for leave to amend the “complaint on specific grounds stated and then surreptitiously includ[ed] an additional allegation regarding the prenuptial agreement omitted [from] the original complaint but critical to his client’s interests.” Report at 21.

Respondent was made aware of his failure to file a reply to the counterclaim and his failure to plead affirmative defenses regarding the prenuptial agreement in Alan Tallisman’s April 12, 2007 motion for judgment on the pleadings. Rel. Exb. 23. The motion for judgment of the pleadings further stated that such a “failure to plead amounts to a waiver of these defenses to the enforcement of the Prenuptial Agreement.” Id. On April 16, 2007, respondent received a letter from Alan’s attorney, James Cahn. Rel. Exb. 26. That letter stated, “The answer and counterclaim were properly served on your office, and you were well aware of them as is evidences by your reference to them in the oppositional brief you filed on June 13, 2005.” Id. at 2. The letter further states, “You failed to deny the averments of the counterclaim and failed to raise any affirmative defenses to them. Under the civil rules, your failure to deny is deemed an admission by Susan of the averments not denied.” Id. at 3. “Ohio law is clear on these procedural issues. Because you did not file a reply to the counterclaim or raise any affirmative defenses, Judge Celebrezze has no option other than to order that Susan’s rights are limited to what the agreement provides. She will not be able to challenge any aspect of the agreement, including making an argument that the support provisions are unconscionable.” Id.

One day later, April 17, 2007, respondent filed his motion for leave to amend the complaint.⁵ Rel. Exb. 28. Respondent did not mention the alleged lack of service of the counterclaim in his motion for leave to amend. Respondent claimed only that he needed to amend “the divorce complaint to have all necessary parties before the court.” Report at 4, ¶20. In other words, the clear and convincing evidence shows that the two events, respondent’s discovery of his failure to file a reply to the counterclaim and his filing a motion for leave to amend the complaint, are inextricably related.

In arguments pertaining to his eleventh objection, respondent asserts that despite the board’s conclusion, it was not “surreptitious” to include a new sentence in “black and white” in a pleading. Respondent points out that Alan Tallisman’s counsel “recognized” the new paragraph and “immediately began his protest.”

Notwithstanding his numerous opportunities to do so, respondent still does not explain why the sentence was added. Respondent would like this Court to believe the board was wrong when it concluded that he added the language because it was “critical to his client’s interests” yet respondent offers no alternative justification for adding the language. Report at 21, ¶98. If respondent did not add the language “in a disguised attempt to place the validity and enforceability of the prenuptial agreement in issue,” then why did he add it? Respondent never answers that question.

During the final hours of the week-long disciplinary hearing, even Hon. John Street, a member of the hearing panel, was unable to obtain an answer to that very question:

⁵ As noted by the board, the counterclaim was not missed by respondent for nearly two years until respondent’s lack of filing a reply to that pleading became an issue. Id. at 13, ¶58.

Q [by Judge Street]: Your testimony throughout this week of trial has been that that amended complaint was – well, that document – the Complaint was amended to add additional defendants –

A [by respondent]: Correct.

Q: -- that have been brought to your knowledge?

A: Correct.

Q: So why add in the language about the prenuptial agreement?

A: Because the issues are being addressed before the Court. There is new motions being filed, there is new issues being raised. It's added in. I signed the document. It's filed with the Court.

Q: Is it added in because you are concerned that you are going to lose the issue about being precluded by not answering the Counterclaim?

A: No. We never make that argument.

Q: I know you don't make it.

A: We never make the argument. There is this issue that has been raised that somehow it relates back on things, that they said something about the Civil Rule 15(C), which is an issue of statute of limitations and documents relating back in time.

We never took that position never argued the position. That was the position that was raised that somehow that we were doing this, and we indicated that's not our case in reference to this.

Q: So when you first read that document and signed your name to it and had it filed, you didn't even ask the associate about that?

A: Correct. I'm there trying to get this thing filed. If you notice, it's basically Susan Tallisman is there. This stuff was filed, and it's done.

Then when this issue then becomes more of an issue, then on the Second Amended Complaint, I took more time and addressed the issues in the Second Amended Complaint concerning the issues of physical violence between the Tallismans that came out during the deposition of Susan Tallisman and Alan Tallisman. And there were additional paragraphs added at that period of time.

Q: You still can't remember who actually drafted [the amended complaint]?

A: It would have to be – the associates at that time would be John McCarty, Kristen Crane or Greg Moore in terms of drafting with a secretary. The document is not different, terrible different that the first Complaint as far as the formatting of the document and whatever.

So they did it in such a way that they – looking at this, they did it in such a way they didn't really have to change things very much to add things. So, in other words, they take whatever they have on the system and then they just changed it and added it.

Q: Right. It's not terribly different. The differences are that you added new defendants and you put in that one – or whoever drafted it put in that one sentence. And, frankly, it seems to me that we are here, we spent a whole week here because of that one sentence.

A: I agree with you.

Q: And I'm surprised that I can't get a better answer of why that one sentence is in there[.]

A: I basically signed the document not realizing it was in there. I then – when they raised these issues, you go and you say to yourself, now we have another issue that we are going to be sidetracked in dealing with these issues in reference to this.

It's added in there we took the position, that it doesn't really matter in reference to it's added in there or not. We took the – I took the position that the issue of Leave of Court settled the issue of Answer and counterclaim.

I wish I could go back and spend more time when these things occur, that I can devote all my time to make sure associates have everything done right. I've spent two-and-a-half years of my life in reference to this, with these issues being addressed. I agree with you, Judge Street, we're here because that that one sentence, including the typographical error that's in there.

Tr. at 1360-1364 (emphasis added).

Notwithstanding his claim that he signed the amended complaint without noticing that language about the prenuptial agreement had been included, when Alan Tallisman objected to the new language after the amended complaint was filed, respondent's reaction was not to tell the *Tallisman* court, "that's a mistake" or "I never saw it." When respondent filed a second amended complaint, the new language remained. Rel. Exb. 56.

Further, respondent's is the only name and attorney registration number on the amended complaint. Rel. Exb. 30. Only respondent is referred to as Susan's attorney. Id. See, also Rel. Exb. 28. Another *Tallisman* pleading filed the very same day bears the names of both respondent and Moore. Rel. Exb. 27. See, also Rel. Exb. 9 (response to Alan Tallisman's motion for summary judgment that respondent claims was drafted by Moore bears both names).⁶ See, e.g. Rel. Exb. 70.

⁶ Throughout this disciplinary case, when it is necessary to support his arguments, respondent has no trouble identifying his associates. For example, underplaying the language in the June 2005 response to Alan Tallisman's motion for summary judgment that expressly refers to the existence of the answer and counterclaim, respondent claimed that in drafting that response, his long-time associate Greg Moore looked at the docket on the computer and merely "copied" the procedural history identified by the

In evaluating respondent's credibility in light of his answers to Judge Street's questions, it is significant that respondent never offered to "withdraw" the new language or the entire amended complaint after Alan Tallisman objected to it. It is also significant that when respondent filed a second amended complaint, the language that he testified he "did not realize was there" remained. Rel. Exb. 56. The fact that respondent has never offered a reason for adding the language supports the board's conclusion that the inclusion of that language was "surreptitious" and "critical to his client's interests."

8. Civ. R. 75 is entirely unrelated to this disciplinary case.

In his eighth objection, respondent claims that it was improper for the board to disregard his arguments regarding Civ. R. 75. Respondent asserts that the board ignored the rule that prohibits the "very pleading that forms the foundation" of the allegations in Count One. Respondent has missed the point.

In contrast to respondent's argument, the pleading that actually "forms the foundation" of Count One is his motion for leave to amend the complaint. It is not Alan Tallisman's motion to have averments deemed admitted and motion for judgment on the pleadings.

In April 2007, Alan Tallisman's counsel was faced with a situation in which no reply had been filed to a counterclaim that had been filed more than two years earlier. The caption or character of the pleading filed by Alan Tallisman is irrelevant. What is relevant to this case is respondent's reaction to that pleading. Respondent's reaction was to file a motion for leave to amend the complaint. His reaction was to insert a

docket. It is evident that the panel found respondent's explanation and Moore's

challenge to the prenuptial agreement into the amended complaint without mentioning it in his motion for leave. Respondent's next reaction was to file a motion for leave to reply to the counterclaim and to claim there were "issues" regarding service of that counterclaim.

10. Respondent's due process rights were not violated regarding the "Fifth Third" bank account nor for any other reason.

In his objections, respondent offers this Court a multitude of arguments based upon the alleged violation of his due process rights. Although many of his arguments are of a generalized nature, his tenth objection is narrowly focused upon the Fifth Third bank account. Not only is respondent's due process argument baseless, his claim that the board "based its conclusions" about respondent's misrepresentation on that Fifth Third account is erroneous. Likewise, respondent's claim that the probable cause panel "prohibited" relator from "pursuing claims related to the Fifth Third bank account" is simply not correct. The bottom line is that respondent was given notice of and an opportunity to defend against every allegation of misconduct in the amended formal complaint including every issue regarding the Fifth Third Bank account.

In asserting this objection, respondent chronicles a portion of the laborious history of his previously unsuccessful arguments about the "probable cause panel." Respondent admits that he filed a motion in limine raising this very same issue about the Fifth Third bank account with the hearing panel.

Respondent admits that the panel chairman ruled that the proceedings of the probable cause panel were not before the hearing panel, were not part of the record

testimony immaterial. See, e.g. ¶¶14, 48.

before the panel, and were “irrelevant and impertinent” to the proceedings before the panel.⁷ Panel Order, July 13, 2009. Despite the foregoing, respondent insists upon repeating his arguments about the probable cause panel.⁸

Respondent appears unwilling to accept that pursuant to Gov. Bar R.V, nothing about the deliberations of the probable cause panel is ever before the hearing panel, the board, or this Court. Gov. Bar R.V(11)(E). At the formal hearing, the panel hears evidence regarding the complaint, or in this case, the amended complaint. What was originally presented to the probable cause panel or what happened with the probable cause panel is never before the hearing panel.

What was allegedly “in” versus what was “out” of the complaint is not part of the record. Furthermore, respondent ignores the obvious, i.e. every paragraph in Count One of the amended complaint passed probable cause. The very panel that respondent claims eliminated various allegations actually permitted the hearing panel to hear factual evidence about the Fifth Third Bank account. See, ¶¶ 31, 32, 56, 57, 61, Amended Formal Complaint.

Regarding those allegations, the board made the following findings:

{¶41} Respondent’s June 27, 2007 response to the foregoing motions contained untrue statements. Respondent [claimed that he] first learned on April 13, 2007 “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].”

⁷ Respondent claims that ruling was “contrary to Ohio law” yet respondent does not explain what “law.” Respondent also claims that ruling violates his right to due process but he does not provide substantive proof for his claim.

⁸ Relator will respond to respondent’s arguments about the panel’s pre-hearing orders later in this answer.

{¶42} Contrary to the foregoing misrepresentations, the Fifth Third Bank account was first disclosed on June 23, 2005 at page seven of [Alan Tallisman's] response to plaintiff's Interrogatory No. 10.

Respondent does not distinguish between the board's factual findings and the conclusions of law and asserts that the board "cited the Fifth Third account alone as the basis for its recommendations." Brief at 26. Respondent's claim is unsupported. In the section of its final report titled "conclusions of law," the board held that respondent committed one violation of Rule 8.4(c) when he "intentionally misled the [Tallisman] court by filing his motion for leave to file an amended complaint on specific grounds stated and then surreptitiously including an additional allegation regarding the prenuptial agreement omitted in the original complaint but critical to his client's interests." Report at 21, ¶98. The board further concluded that respondent violated Rule 3.3(d) because he misled "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 local rules not designed for the purpose to do so." *Id.*

In reaching the conclusions set forth above, the board determined that "[a]ll of the parties added to the amended complaint were disclosed to Respondent before April 13, 2007[.]" *Id.* at 5, ¶21. Fifth Third Bank was one of the eight new defendants that respondent added to the amended complaint. *Id.* Accordingly, the basis for respondent's assertion that the board "based its conclusion" that respondent committed misconduct on the Fifth Third account "alone" is contradicted by the board's report and should be rejected by this Court.

B. Clear and convincing evidence supports the board's conclusion that respondent violated Ohio Prof. Cond. Rule 3.3(d).

In finding that respondent violated Rule 3.3(d), the board concluded that in filing his motion for leave to amend the complaint, respondent misled the *Tallisman* court into granting relief ex parte. Report at 21, ¶98. The board stated that respondent did not provide the court with “full knowledge of the extent and purpose of the relief sought” and that respondent took “advantage of local rules not designed for the purpose to do so.” *Id.* Like respondent's Rule 8.4(c) violation, the violation of Rule 3.3(d) is based upon leading the court to believe there were newly discovered stakeholders and the surreptitious insertion of the language about the prenuptial agreement. *Id.*

In part, respondent bases his objection upon a comparison of apples and oranges, i.e. paragraphs 61 and 98 of the board's report. The fact that not every ex parte motion filed in *Tallisman* was found to support the allegations of misconduct in Count One does not diminish the fact that one particular ex parte motion (the motion for leave to amend) was deceitful and misleading. The panel's conclusion that the entry of numerous ex parte orders was a result of “opportunity” rather than “some arcane conduct” of respondent does not lessen the nefarious character of respondent's ex parte motion for leave to amend the complaint.

In the second half of this objection, respondent contends that the *Tallisman* court did not find that respondent “engaged in any wrongdoing.” Although respondent does not explain the significance of his assertion, the inference that the *Tallisman* court could determine whether respondent committed misconduct should be soundly rejected by this Court. Not until a formal complaint was filed with the Board of Commissioners on Grievances and Discipline, had a judicial entity with the authority to consider evidence

of respondent's misconduct been asked to determine whether respondent violated the Ohio Rules of Professional Conduct in *Tallisman*.

In 2004, this Court held:

Beginning with the adoption of Supreme Court Rule XXVI in February 1875 . . . [and] culminating in the adoption of Section 2(B)(1)(g), Article IV of the Ohio Constitution in 1968, it has been methodically and firmly established that the power and responsibility to admit and discipline persons admitted to the practice of law, to promulgate and enforce professional standards and rules of conduct, and to otherwise broadly regulate, control, and define the procedure and practice of law in Ohio rests inherently, originally, and exclusively in the Supreme Court of Ohio. See *Smith v. Kates* (1976), 46 Ohio St.2d 263, 265-266, 75 O.O.2d 318, 348 N.E.2d 320; *Mahoning Cty. Bar Assn. v. Franko* (1958), 168 Ohio St. 17, 5 O.O.2d 282, 151 N.E.2d 17; *Cleveland Bar Assn. v. Pleasant* (1958), 167 Ohio St. 325, 4 O.O.2d 433, 148 N.E.2d 493; *In re McBride* (1956), 164 Ohio St. 419, 58 O.O. 242, 132 N.E.2d 113; *Judd v. City Trust & Sav. Bank* (1937), 133 Ohio St. 81, 10 O.O. 95, 12 N.E.2d 288, paragraph one of the syllabus; *In re Thatcher* (1909), 80 Ohio St. 492, 89 N.E. 39; Swisher, Professional Responsibility in Ohio (1981) 1.15-1.35.

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

As set forth herein, many of the arguments offered by respondent are an attempt to deflect attention from his conduct. Respondent chooses to minimize crucial facts and dissect issues that are insignificant. Respondent appears to be entirely unwilling to accept that the board rejected his claims about his conduct during *Tallisman*. After a five-day hearing in this matter and after hearing the witnesses and examining the documents, the panel and the board concluded that during *Tallisman*, respondent engaged in conduct involving fraud, deceit, dishonesty or misrepresentation and that he failed to inform the court of all material facts that would enable it to make an informed decision about his motion for leave to amend. This Court should overrule respondent's

objections regarding Count One and affirm the board's conclusion that respondent violated the Ohio Rules of Professional Conduct.

D. Respondent's Objections to Counts Two and Three Should Be Overruled by this Court

Respondent opens this argument by observing that Count Two of the complaint was dismissed and urging this Court to dismiss Count Three. Next, respondent complains about relator's "amended complaint." The argument about the amended complaint was heard and rejected by the hearing panel.

Describing the well-established procedure set forth in Gov. Bar R.V as a "quirk in Ohio law," respondent claims that relator should have been required to present Counts Two and Three to a probable cause panel. Respondent's argument should be rejected by this Court.

As this Court is aware, unless the disciplinary proceeding is within 30 days of a scheduled hearing date, relator is not required to obtain leave from the panel prior to filing an amended complaint. BCGD Proc. Reg.9(D). See, also Gov. Bar R.V(11)(D). Moreover, a formal complaint that is already pending before the board is amended by the relator without presenting the additional count(s) to a probable cause panel. See, e.g. Board of Commissioners on Grievances and Discipline, Advisory Opinion 90-18, August 17, 1990.

In *Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, 880 N.E.2d 467, the panel granted relator's motion to file an amended complaint within 20 days of the hearing date. In agreeing with the panel's decision, this Court noted that "Gov. Bar R.V(11)(D) states that complaints may be amended at any time prior to final

order of this court and that the party affected by the amendment ‘shall be given reasonable opportunity to meet any new matter presented.’” Id. at 526 (emphasis added). Quoting Gov. Bar R.V(11)(D), the *Heiland* court stated, “Gov. Bar R.V and the regulations relating to investigation and proceedings involving complaints of misconduct are to be construed liberally for the protection of the public, the courts, and the legal profession.” Id. at 527.

In the present case, respondent had more than ample opportunity to respond to the additional claim. Accordingly, respondent’s argument that Count Three should be dismissed because it was not presented to the probable cause panel should be overruled.

1. Respondent Violated Rule 5.1(c)(1) during *Rymers v. Rymers*

In this objection, respondent urges this Court to overturn the board’s determination that he violated Rule 5.1(c) during his representation of Jeffery Rymers. Rule 5.1(c)(1) provides that “[a] lawyer shall be responsible for another lawyer’s violation of the Ohio Rules of Professional Conduct if . . . the lawyer orders or, with knowledge of the specific conduct ratifies the conduct involved[.]” Respondent advances three theories in urging this Court to overturn the board’s recommendation regarding Rule 5.1: (1) he was not Nicholas Gallo’s “immediate supervisor;” (2) he did not draft or file the motion to strike; and, (3) there was no evidence that Nicholas Gallo violated the Rules of Professional Conduct.⁹

⁹ Respondent makes only a limited argument about Rule 5.1. The majority of this section is devoted to respondent’s overall disagreement with the board’s conclusions regarding Count Three. The board concluded that in filing the motion to strike Eugene

In his first argument, respondent claims that it was undisputed that his associate Gregory Moore was the “immediate supervisor” of another Stafford & Stafford associate, Nicholas Gallo. Respondent makes this statement and then claims that there is no evidence that respondent “directed” Gallo to prepare his own affidavit and Jeffery Rymers’ affidavit. Respondent’s argument is far too narrow and ignores the plain language of Rule 5.1(c)(1).

Although Associate Moore may have “supervised” Associate Gallo during the five months that Gallo worked at Stafford & Stafford, Gallo’s role in the *Rymers*’ case was framed by respondent and not by Moore. Respondent’s responsibility for *Rymers* and for Gallo’s conduct in *Rymers* is further confirmed by Jeffery Rymers’ testimony that respondent is his attorney. Tr. at 680.

Associate Nicholas Gallo ended up in the Lake County Courthouse on June 3, 2009 because respondent was busy with “other matters” and because respondent thought that *Rymers v. Rymers* was “a perfect case for a young lawyer to handle.” Tr. at 1342. At that time, respondent, the managing partner of Stafford and Stafford, was “trying to get [Nicholas Gallo] to start doing cases himself.” Id. Respondent believed that *Rymers* was “an ideal case for Nicholas Gallo to handle.” Id.

On the other hand, Moore was “not originally involved in the [*Rymers*] case.” Id. at 1052. According to Moore, the *Rymers* case was “something that I believed was our firm’s case.” Id. The first time that Moore became involved in *Rymers* was after Gallo “came back from a pretrial early on in the case with kind of a bizarre story of certain

Lucci’s motion to intervene in *Rymers v. Rymers*, respondent violated Rules 5.1(c)(1), 8.2(a), 8.4(c), and 8.4(d). Relator will address only respondent’s arguments about Rule

events that had occurred that day.” Id. Moore did not believe that he had any knowledge of the case prior to that day other than perhaps “general conversation” in the office. Id.

Rule 5.1(c)(1) does not require respondent to have been Gallo’s “immediate supervisor” in order for respondent to be responsible for Gallo’s misconduct. The title of Rule 5.1 is “Responsibilities of Partners, Managers, and Supervisory Lawyers.”

Respondent is a partner and a manager. Rule 5.1 imposes responsibility for the “ethical atmosphere of a firm” upon lawyers with “managerial authority.” See, e.g. Rule 5.1,

Comment [3]. According to the Superior Court of Connecticut:

A lawyer’s duty, as a partner in a law firm, to prevent unethical behavior by other lawyers in the firm, cannot be minimized. It is simply not enough to disavow the offending behavior of which he had become aware, or look the other way. If he cannot prevent these practices and the firm refuses to terminate the unethical conduct, his duty is to remove himself from that firm. [* * *] A lawyer must find the time and the strength to see that he is always acting ethically, and if a partner in a law firm, that the firm is doing so as well.

Statewide Grievance Comm. v. Spirer (March 12, 1996), 16 Conn. L. Rptr. 299, No. CV 950147662S.

“Rule 5.1 does not require that an attorney be the day-to-day supervisor of the attorney committing the misconduct to create liability. The key to liability is whether there was authority over the violating attorney.” *In re Anonymous Member of the South Carolina Bar*, 346 S.C. 177, 185, 552 S.E.2d 10 (citation omitted). It is clear that respondent had authority over Gallo at the time of the misconduct.

5.1 in answering this particular objection. Relator will address the remaining arguments in Section E infra.

As a lawyer with managerial authority at Stafford & Stafford, respondent also had a responsibility to make sure that Gallo was properly supervised. The supervision of attorneys by other attorneys in a firm is one of the most effective methods of preventing attorney misconduct. *Id.* More importantly, “that supervision must be reasonably competent or it is meaningless and that failure in itself can encourage unethical behavior. In situations where supervising attorneys fail to make reasonable efforts to ensure their subordinates follow the Rules of Professional Conduct, if the disciplinary proceedings only punished the individual attorney who committed the violation, the environment that fostered the attorney’s unethical conduct would be allowed to continue.” *Id.* (footnote omitted).

Respondent and his brother, Vincent A. Stafford, are the only partners of Stafford & Stafford Co., L.P.A. *Tr.* at 72. Respondent is the sole shareholder. *Id.* Gregory Moore is an associate. *Id.* at 1017. Moreover, according to Moore, because Stafford & Stafford is a small firm, the bulk of his responsibility is “help[ing] out with Joe Stafford’s cases, Vincent Stafford’s cases and the firm’s cases.” *Id.* at 1017-1018. In the firm that is Stafford & Stafford Co., L.P.A., respondent is at the top of the managerial hierarchy.

Regardless of whether respondent drafted or filed the motion to strike, it is evident that respondent had knowledge of the offending motion.¹⁰ Respondent executed an affidavit that is Exhibit 1 to the motion to strike. Respondent’s affidavit is expressly relied upon in the motion to strike to dispute Lucci’s claims of a conflict of interest. The motion bears the names of two attorneys: respondent and Nicholas Gallo. Respondent was Jeffery Rymers’ attorney. The motion to strike expressly includes

respondent as an alleged “victim” of Lucci’s “harassing and threatening conduct.” Rel. Exb. 96 at 21. Respondent admits that he received and read Lucci’s response to the motion to strike.¹¹ Tr. at 1344. According to respondent, he “just put [the response] aside” and “figured the [Rymers] Court would sort it out at some point[.]” Id.

After evaluating respondent’s level of authority and responsibility, the board concluded:

Regardless of what Respondent thought about Eugene Lucci’s motives for filing his motion to intervene in the Rymers Divorce matter, and regardless of what Respondent thought of Lucci’s arguments in his motion and the basis for them in law, he nevertheless had a duty to ensure that the motion to strike was factually accurate, directed to the legal issues, and that the statements therein were not made maliciously or with reckless disregard as to their truth of falsity concerning the integrity of a judicial officer.

Report at 25, ¶111.

In the third segment of this objection, respondent makes two distinctive arguments. Initially, respondent claims that in order to find a violation of Rule 5.1(c), there must be “evidence that another lawyer committed a violation of an ethical rule.” In the alternative, respondent claims that in order to find that respondent violated Rule 5.1(c), there must be “a finding” that Gallo violated the Rules of Professional Conduct. Respondent’s first claim is correct; however, respondent’s second claim is unsupportable.

The record in this case and the board’s report confirm that Nicholas Gallo engaged in misconduct. For example, the evidence presented to the panel established

¹⁰ “‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Ohio Prof. Cond. R. 1.0(g).

that the affidavit executed by Gallo in support of the motion to strike contains false statements about Eugene Lucci. To wit:

- Gallo claimed that he observed Lucci standing in the hallway outside of his chambers on June 3, 2009 before the pretrial in *Rymers v. Rymers*.
- Gallo claimed that he observed Lucci staring at Jeffery Rymers in the hallway before the June 3, 2009 pretrial.
- Gallo claimed that Jeffery Rymers became more distraught after Lucci stared at Rymers for a “considerable amount of time.”

Rel. Exb. 96 at Exb. 6. As the board determined, the person Gallo saw in the hallway was not Eugene Lucci. Report at 17, ¶182.

In another affidavit attached to the motion to strike signed and filed by Gallo, respondent’s client, Jeffery Rymers falsely claimed that Lucci was present in the courthouse hallway prior to the June 3, 2009 pretrial and that Lucci was staring at Rymers making him feel “threatened and intimidated[.]” Rel. Exb. 96 at Exb. 5. With regard to Rymers’ claim, the board concluded that “there [was] no independent evidence that anyone threatened or took any menacing action toward Jeffrey (sic) Rymers in the Lake County Courthouse.” Report at 17, ¶182.

The Gallo and Rymers affidavits were attached to and expressly relied upon in the body of the motion to strike. For example:

- “[A]s set forth in the Defendant, Jeffery G. Rymers’ Affidavit, he is intimidated and threatened by the conduct of the Applicant in this matter, including but not limited to, his threats and his conduct at the most recent pretrial in this matter. This is especially so, given the Applicant’s position as a presiding judge in the Lake County Court of Common Pleas.”

¹¹ Nicholas Gallo was no longer an associate at Stafford & Stafford at that point. Report at 20, ¶¶92,93.

- “In this matter, the Applicant and his legal counsel have engaged in a pattern of harassing and threatening conduct toward the Defendant, Jeffery G. Rymers, and Joseph G. Stafford; and have intimated on numerous occasions these threats, based upon the Applicant’s position as a presiding Judge in the Lake County Court of Common Pleas.” 21

Rel. Exb. 96 at 17, 21. The board concluded that claims made with reliance upon Rymers’ affidavit were “completely false as well as irrelevant to the legitimate legal issues presented.” Report at 24, ¶107. See, also id. at 22-25, ¶103-112. Accordingly, there was evidence presented to this panel that respondent’s associate, Nicholas Gallo, violated an ethical rule.

There is no support for respondent’s claim that a “finding” of a violation by Gallo is a “condition precedent” to this Court determining that respondent violated Rule 5.1. As managing partner and sole shareholder of Stafford & Stafford Co., L.P.A., respondent simply had ethical responsibilities superior to those of Matthew Gallo and Gregory J. Moore. See *Anonymous Member of the South Carolina Bar* (2001), 346 S.C. at 183 (“Rule 5.1(c)(1) and (2) create a heightened form of liability for attorneys”).

E. Respondent violated Rules 8.2(a), 8.4(c), and 8.4(d) during *Rymers v. Rymers*.

Respondent’s effort to absolve himself of responsibility for the misconduct in Count Three includes the claim that this Court cannot hold him “responsible” for Nicholas Gallo’s misconduct and also find him ethically accountable for the “final work product.” Respondent’s claim that the two concepts are “mutually exclusive” should be rejected by this Court.

The unique facts and circumstances of this matter include but are not limited to the fact that respondent decided that he wanted his newly hired associate Nicholas Gallo to “start doing cases.” The case that respondent decided Gallo would “start” on was *Rymers v. Rymers*. Without the level of examination that would have been appropriate under the circumstances, Gallo executed an affidavit and incorporated that affidavit into the motion to strike. Report at 17, ¶81. As the partner handling the *Rymers*’ case, respondent is ethically liable for Gallo’s misconduct. See, Rule 5.1(c). Moreover, as Jeffery Rymers’ attorney and counsel of record, respondent is ethically responsible for the content of the motion to strike regardless of whether respondent personally drafted, signed or filed the motion.

Arguing against the conclusion that he violated Rule 8.2(a), respondent asserts that the board improperly “expanded” the rule to provide judges, “who are parties to litigation with advantages above and beyond those afforded to non-judicial officer litigants.” An evaluation of the record indicates that in contrast to respondent’s contentions, the board did not “create new law” or give “special consideration” to Eugene Lucci by finding a violation of Rule 8.2(a).

Respondent’s arguments overlook crucial facts and are premised upon an inaccurate assessment of the relevant facts surrounding the violations in Count Three. Further, respondent’s arguments also include an unending repetition of claims that were soundly rejected by the board.

First and foremost, a determination that respondent violated Rule 8.2(a) in this case does not “expand” Ohio law. As this Court is well aware, the seminal Ohio case regarding violations of Prof. Cond. Rule 8.2(a) is *Disciplinary Counsel v. Gardner*, 99

Ohio St.3d 416, 2003-Ohio-4048, 793 N.E.2d 425.¹² Consistent with a majority of other state courts, this Court adopted “an objective standard to determine whether a lawyer’s statement about a judicial officer is made with knowledge or reckless disregard of its falsity.” Id. at 422 (citation omitted). The objective standard:

Assesses an attorney’s statements in terms of “what the reasonable attorney, considered in light of all of his professional functions, would do in the same or similar circumstances” * * * [and] focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made.

Id. (emphasis added).

The *Gardner* decision was followed in *Disciplinary Counsel v. Baumgartner*, 100 Ohio St.3d 41, 2003-Ohio-4756, 796 N.E.2d 495. The *Baumgartner* case is particularly applicable to the present case given that some of Elsebeth Baumgartner’s violations of DR 8-102(B) were based upon statements she made about judicial officers in their capacity as Ohio citizens rather than with reference to a particular case or decision rendered by that judge or judicial officer. Likewise, respondent was not attacking a particular decision or holding set forth by Lucci; however, he made false statements concerning Lucci’s integrity and the board’s conclusions are in line with *Gardner* and *Baumgartner*.

In contrast to respondent’s claims, the evidence establishes that it was respondent and not Eugene Lucci, who made Lucci’s judicial status an issue in *Rymers*

¹² *Gardner* was decided before February 1, 2007; therefore, all references in *Gardner* are to the Code of Professional Responsibility and DR 8-102(B) (a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer). Prof. Cond. “Rule 8.2(a) is comparable to DR 8-102 and does not depart substantively from that rule.” Prof. Cond. Rule 8.2(a), Comparison to former Ohio Code of Professional Responsibility.

v. Rymers. Nowhere in the body of Lucci's motion to intervene is his judicial status mentioned. Rel. Exb. 95.¹³ Respondent acknowledges that Lucci's judicial status had "no bearing on the *Rymers* litigation." Nevertheless, it was the motion to strike that unethically attacked Lucci because he is a judge.¹⁴ Rel. Exb. 96 and Report at 18, ¶85.

According to the board, the motion to strike addresses "not only the merit or lack of merit of Lucci's motion to intervene and to disqualify Respondent, but also repeatedly refers to Lucci as Judge Lucci, and as a judge, attacking his integrity, wisdom, and ethics and recklessly accusing Lucci of threatening conduct toward Jeffrey (sic) Rymers in person and toward Respondent in writing. The memorandum accuses Lucci of specifically violating Jud. Cond. Rule 1.3 [Avoiding Abuse of the Prestige of Judicial Office]." Report at 18, ¶86. The board concluded that "[t]he statements made in Respondent's pleadings impugning Eugene Lucci's judicial integrity were made in violation of Prof. Cond. Rule 8.2(a). If Respondent truly believed Judge Lucci had violated Jud. Cond. Rule 1.3, Gov. Bar R.IV(2) provided the appropriate means of bringing an abuse of judicial prestige to the attention of a disciplinary authority." Id. at 24, ¶107. The board further found that respondent "unnecessarily rais[ed] and belabor[ed] issues regarding Eugene Lucci's alleged abuse of his prestige as a judge [and thereby] violated Proc. Cond. R. 8.4(d)." Id. at 25, ¶112.

¹³ In his affidavit, Lucci acknowledged that he is a judge. That statement is no different from respondent's self-identifying statement in his affidavit, i.e. "Affiant states that he is an attorney licensed to practice law in the State of Ohio, in good standing, and a partner at the law firm of Stafford & Stafford Co., LPA." Rel. Exb. 96, Exb. 1.

¹⁴ The statements about Lucci being in the hallway and trying to intimidate Jeffery Rymers were false regardless of whether Lucci was a judge. The fact that Lucci is a judge heightened respondent's ethical responsibilities with regard to ensuring the accuracy and truthfulness of the claims made about Lucci. Gov. Bar R.IV(2).

Respondent also objects to the board's findings that the incomplete quote in the body of the motion to strike was misleading. Respondent asserts that the motion was not misleading because the entire letter was "attached to the pleading" as an exhibit. Respondent's argument is insulting.

As recognized by the board, the motion to strike leaves out a critical sentence of Walter McNamara's letter in an effort to claim that Lucci was using his position as a judge to "threaten" respondent. See, e.g. Report at 19, 24. The motion to strike quotes only part of McNamara's May 19, 2009 letter, to wit, "In addition, in earlier discussions between the Rymers, Mr. Rymers claimed that, among the issues he intends to raise in his custody fight, is the danger of Mrs. Rymers being involved with Mr. Lucci, **who as you know is a Common Pleas Judge in Lake County.**"¹⁵ The very next sentence of the letter was omitted from the motion to strike.¹⁶ That sentence reads: "Mr. Rymers said he is concerned for the children's safety if potential transgressors, etc. seek revenge against a judge." Obviously, the statement in the letter that Lucci is "a Common Pleas Judge" was a reference to the basis for Jeffery Rymers' concerns but one would know that only by reading the very next sentence. Leaving out the very next sentence pushes the letter out of context for anyone reading the motion to strike. Report at 24, ¶109. As the board concluded, McNamara's letter was not a "threat" to respondent and the characterization of it as a "threat" is a misrepresentation and entirely false.¹⁷ Report at 25, ¶110.

¹⁵ The bold face type and underlining appear only in the motion to strike.

¹⁶ Any suggestion that attaching the entire letter as an exhibit obviates respondent's violations must be rejected.

¹⁷ Respondent's testimony about statements allegedly made to respondent by Walter McNamara during a telephone call is suspect at best. Nothing about that telephone call

The board concluded that by relying “on a truncated excerpt from a letter from Lucci’s counsel and present[ing] that excerpted statement out of context and in a deliberately misleading matter [implied] a threatened abuse of judicial status that was not made.” *Id.* at ¶109. According to the board, “by deliberately misrepresenting Lucci’s conduct and that of his attorney to the domestic relations court as evidence intended to deceive the court, Respondent violated Prof. Cond. R. 8.4.(c).” *Id.* at ¶110.

In *Rymers*, respondent’s accusations of judicial impropriety in the motion to strike were made without any reasonable factual basis. As determined by the board, the attacks on Lucci’s integrity violate Prof. Cond. Rule 8.2(a) (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 integrity of a judicial officer) as well as Rules 8.4(c), and 8.4(d) and this Court should overrule respondent’s objections.

G. The pretrial rulings by the panel were in accord with Ohio law.¹⁸

The final section of respondent’s brief is devoted entirely to respondent’s dissatisfaction with the panel chairman’s rulings on issues raised by the parties prior to the hearing.¹⁹ Although relator presumes that this Court can review respondent’s

is mentioned in the motion to strike notwithstanding the fact that respondent is asking the *Rymers* court to sanction Lucci and McNamara. The telephone call was never mentioned when presenting the *Rymers* court with what is described as the offending conduct of Walter McNamara. See, e.g. Rel. Exb. 96 at 22. The motion refers only to a May 19 email and the May 28 letter without any mention of a telephone call. *Id.*

¹⁸ Section “F” of respondent’s brief is a list of “specific objections” to Count Three. Those objections were previously addressed in the sections of relator’s answer labeled “D” and “E.”

¹⁹ Gov. Bar R.V(6)(D)(3) states that “[t]he panel chair shall rule on all motions and interlocutory matters, and no ruling by the panel chair on motions and interlocutory

motions, the substance of relator's responses, and the panel's orders, as they are part of the record in this case, relator will provide sufficient information to answer respondent's objections.

1. There was no delay in the filing of the Complaint and Respondent's Motion to Dismiss Count One was appropriately denied.

Arguing exclusively that there had been a delay in the filing of the original complaint, respondent filed one of his motions to dismiss on February 26, 2010. Respondent's motion to dismiss claimed that as to Count One (*Tallisman v. Tallisman*) the time requirements of Gov. Bar R.V(4)(D)(2) had not been satisfied. In essence, respondent has merely offered this Court a summary of his motion to dismiss. Relator filed a response and respondent's motion to dismiss was denied on April 13, 2010. It is presumed by relator that this Court will conduct a de novo review of the panel's denial of the motion to dismiss.

While Gov. Bar R.V(4)(D)(2) provides that no investigation may extend beyond a year, Gov. Bar R.V(4)(D)(3) states that the time limits of Gov. Bar R.V(4) are not jurisdictional. More importantly, the rule states that no grievance will be dismissed unless there has been an unreasonable delay and the respondent's right to a fair hearing has been violated. *Id.* In this case there was no "delay" and the panel correctly determined that respondent had not met the two-prong test.

matters may be appealed prior to entry of the final order." See, also BCGD Proc. Reg.(2)(B) (the chairman or a member of the panel shall rule on all motions subsequent to the appointment of a panel). Relator will refer to the pre-hearing rulings as having been made by "the panel."

Respondent's claims of "delay" are contradicted by the following facts. On January 25, 2008 and after gathering documents and information related to *Tallisman v. Tallisman*, relator sent respondent a detailed Letter of Inquiry asking for information regarding *Tallisman*. On January 31, 2008, respondent submitted a letter requesting additional information from relator. In response to the January 31, 2008 letter, relator explained that the file regarding the *Tallisman* matter was opened on June 4, 2007.²⁰

Ultimately, on March 25, 2008, respondent submitted a 25-page, single-spaced response to relator accompanied by a banker's box filled with documents. Respondent requested that his response not be shared with the grievant, Attorney James Cahn. See Gov. Bar R.V(11)(E)(3). The breadth of respondent's response combined with relator's inability to share the actual response required relator to evaluate the veracity of respondent's claims through an additional time-intensive investigation. Relator did not "delay" its investigation and took an appropriate amount of time to determine whether there was substantial, credible evidence of misconduct.

Immediately upon determining that there was probable cause that misconduct had been committed, a formal complaint was drafted. On November 10, 2008, respondent was provided with Notice of Intent including a photocopy of the draft complaint. Obviously, relator's investigation ended before respondent was provided with Notice of Intent. Any suggestion that relator continued to "investigate" this matter until the complaint was certified by a probable cause panel in February 2009 is simply inaccurate.

²⁰ Gov. Bar R.V(4) does not require that a respondent be contacted or asked for information within any specified time period after the commencement of an investigation.

None of the cases that have been dismissed by this Court based upon delay are factually similar to the instant situation. See, e.g. *Cleveland Bar Assn. v. Mallin*, 86 Ohio St.3d 310, 1999-Ohio-106, 715 N.E.2d 122. In *Mallin*, nine years passed from when the grievance was received by the bar association and when the formal complaint was filed. In *Cincinnati Bar Assn. v. Backsman* (May 25, 1983), D.D. No. 83-7, Ohio Official Reports Advance Sheets, Vol. 5, No. 3, five years passed between the filing of the grievance and the filing of the disciplinary complaint.

This Court has more recently determined that investigations lasting longer than relator's investigation of the *Talisman* matter did not qualify as prejudicial delay. See, e.g. *Disciplinary Counsel v. Conese*, 96 Ohio St.3d 458, 2002-Ohio-4797, 776 N.E.2d 13 at ¶ 10 (although the investigation lasted 20 months, respondent's claim that he had difficulty recalling what happened to his client's money did not establish prejudicial delay). Similarly, in *Disciplinary Counsel v. Johnson*, 113 Ohio St.3d 344, 2007-Ohio-2074, 865 N.E.2d 873, this Court emphasized that none of the time limits in Gov. Bar R.V(4)(D)(3) are jurisdictional and held that the rules require a showing of prejudice to the respondent in addition to unreasonable delay for dismissal. Declining to dismiss the *Johnson* case, the Court found no prejudice even though the incidents underlying the charges of misconduct ended four years before the panel hearing. *Id.* at ¶79.

At no time did respondent offer proof that any relevant evidence had been destroyed or that anyone's "recollection" about pertinent events was "hazy." More importantly, no proof exists. Just like the fee bills in the *Johnson* case, the *Talisman* pleadings and documents are self-evident. While the passage of time is an unavoidable by-product of litigation, the documents are at the heart of this disciplinary case.

The panel's decision denying respondent's motion to dismiss Count One based upon an alleged delay in relator's investigation was supported by Ohio law and the evidence. Respondent's objection to the panel's ruling should be overruled.

2. Relator never ignored the Rules of Civil Procedure and Respondent's Motions to Compel were appropriately overruled by the panel.

Respondent filed two motions to compel relator to submit what respondent calls "proper" discovery responses. The first motion was denied on April 8, 2010; the second motion was filed May 24, 2010 and denied June 7, 2010. Pretrial evidentiary rulings are reviewed by this Court under an "abuse of discretion standard." See, e.g. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 239, 2005-Ohio-4787, 834 N.E.2d 323. "The term 'abuse of discretion' connotes more than an error of law of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (citations omitted).

In denying the first motion to compel, the panel held:

The chair has considered the respondent's motion and memorandum, the exhibits submitted, relator's response to respondent's motion, [and] the requests for admission and responses complained of. It appears that many of respondent's requests are vague, disputatious, and seem to be based on unsupported assumptions, accusations, and conclusions of disputed facts. Moreover, none of the requests appears to be calculated to lead to the narrowing of issues before the panel for hearing but, rather, to widen them with matter irrelevant to proof or defense of legitimate issues raised by the relator's complaint. In this latter regard the chair notes that this disciplinary case is not an appeal or rehearing of the domestic relations case in which it is alleged by relator that respondent engaged in specific misconduct. The ultimate issue is whether or not respondent engaged in that conduct and if so, whether the Ohio Code of Professional responsibility (sic) was violated. Relator's

investigation is not at issue. In the circumstances, all relator's responses of which respondent complains are proper and in compliance with the governing rules and principles related by the authorities cited by counsel.

To place respondent's second motion to compel into perspective, it is undisputed that by the time that motion was filed, relator had among other discovery requests, responded to 223 requests for admission. Ruling on the second motion to compel, the panel stated that based upon a review of "the prior entries and orders in this cause respecting the scope of relevant discovery and the recognition of the issues to be tried in this disciplinary proceeding" the motion was denied.

The panel's evidentiary rulings appropriately confined respondent to relevant matters. See, e.g. *Columbus Bar Assn. v. Ewing*, 75 Ohio St.3d 244, 252, 1996-Ohio-317, 661 N.E.2d 1109. Relator submits that a review of the discovery requests, relator's responses, the motion to compel, and relator's responses in opposition will lead this Court to conclude that the panel did not abuse its discretion in denying respondent's motions to compel.

3. Respondent has provided no basis for this Court to overrule panel rulings.

In his final objection, titled "Motion Practice," respondent disputes every pretrial ruling that he believes was adverse to his interests. From the granting of relator's motions in limine to the denial of his motions to dismiss, respondent argues that the pretrial rulings resulted in "improper arguments" at the hearing and "incorrect" findings in the board's report. Respondent's arguments are hollow and unconvincing. For example, in arguing about the panel's order precluding respondent from calling Walter

McNamara, John P. O'Neil and Lori J. Brown as witnesses²¹ during the hearing, respondent complains about the panel's determination that "the testimony of these witnesses was not relevant[.]" Despite his assertion, respondent does not offer anything to this Court in an effort to convince it that the panel abused its discretion.²² Accordingly, the panel's order should be affirmed.

Respondent's argument that the panel erred in denying his motions for summary judgment should also be rejected by this Court. This Court has held that any error by a trial court in denying a motion for summary judgment is rendered harmless if a trial on the merits involving the same issues demonstrates that there were genuine issues of material fact and results in judgment in favor of the party against whom the motion for summary judgment was made. *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150, 156, 1994-Ohio-362, 642 N.E.2d 615. A reviewing court need not determine whether the trial court committed any error in denying a motion for summary judgment. The reviewing court need only determine whether genuine issues of material fact were raised at trial. *First Merit Bank, N.A. v. Wilson*, 9th Dist. No. 23363, 2007-Ohio-3239, at ¶24. Clearly, respondent and relator engaged in a trial on the merits. Accordingly and despite respondent's contention that there were no genuine issues of material fact, his

²¹ McNamara provided legal representation to Eugene Lucci in matters pertaining to Lucci's motion to intervene; O'Neil represented respondent's brother, Vincent A. Stafford, in relator's case against Vincent A. Stafford; and, Brown is relator's lead counsel in this case. As one example of respondent's irrelevant offerings, respondent claimed he was going to call O'Neil as a witness to authenticate written communication between Brown and two of the witnesses in his brother's disciplinary case.

²² Throughout this case, nearly every argument set forth by respondent confirmed his palpable inability to recognize or accept that the disciplinary case was about his conduct.

motions for summary judgment were not an appropriate resolution of this disciplinary case.

To the extent that respondent's motions for summary judgment were decided upon procedural issues and/or pure questions of law, this Court's review of the panel's decisions should de novo. See, e.g. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 2001-Ohio-1607, 757 N.E.2d 329. In assisting this Court in any review, relator stands by the arguments made in opposition to the motion for summary judgment and incorporates those arguments and the panel's ruling into this answer by reference.

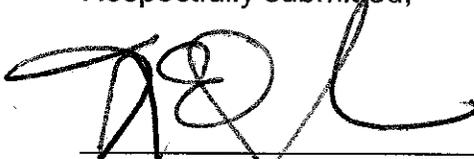
As to respondent's motions to dismiss that were filed under various sections of Civ. R.12, relator stands by his argument that the motions were procedurally improper; contra to the express provisions of Gov. Bar R.V; and, in direct opposition to the goals of the attorney discipline system in the state of Ohio. A de novo review of respondent's motions, relator's responses, the panel's rulings, and the board's report finding that relator presented clear and convincing evidence of misconduct should lead to this Court to conclude that every motion to dismiss filed by respondent was properly denied.

Respondent's final objection should be overruled and each panel ruling should be affirmed by this Court.

CONCLUSION

Accordingly and for all of the reasons set forth herein, this Court should reject all of respondent's objections and enter an order that is consistent with the findings and recommendations in the board's report and relator's objections. In conjunction with relator's objections, respondent should be suspended from the practice of law in the state of Ohio for at least 12 months.

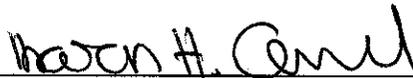
Respectfully submitted,



Jonathan E. Coughlan (0026424)
Disciplinary Counsel, Relator



Lori J. Brown (0040142)
Chief Assistant Disciplinary Counsel
Counsel for Relator

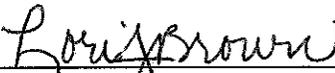


Karen H. Osmond (0082202)
Staff Attorney, Counsel of Record

250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
614.461.0256

CERTIFICATE OF SERVICE

I hereby certify that photocopies of the foregoing Relator's Answers to Respondent's Objections to the Board's Report have been served upon the Board of Commissioners on Grievances and Discipline, c/o Jonathan W. Marshall, Secretary, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431, and respondent's counsel Lawrence A. Sutter and Stephanie D. Adams, Sutter, O'Connell, & Farchione, 3600 Erieview Tower, 1301 East Ninth Street, Cleveland, OH 44114, via regular U.S. mail, postage prepaid, this 17th day of May, 2011.



Lori J. Brown (0040142)