

BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO

11-1047

<b>In Re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 10-033</b>
<b>Gerald Wayne Cowden, et al.</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0024360</b>	:	<b>Conclusions of Law and</b>
	:	<b>Recommendation of the</b>
<b>Respondent</b>	:	<b>Board of Commissioners on</b>
	:	<b>Grievances and Discipline</b>
<b>Disciplinary Counsel</b>	:	<b>of the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	

This matter was heard on November 16, 17, 18 and 19, 2010, in Cleveland, Ohio and on December 13, 2010, in Columbus, Ohio before a panel consisting of members Judge Otho S. Eyster, Janica Pierce Tucker and Bernard K. Bauer, Chair. None of the panel members is from the appellate district from which the complaint arose or was a member of the probable cause panel in this matter.

Relator was represented by Joseph M. Caligiuri. Respondent, Gerald Wayne Cowden, was represented by Deborah A. Colman, and was present at the hearing. Respondent, Frank P. Nagorney, was represented by Richard C. Alkire, and was present at the hearing. Respondent, Terrence Steel, was represented by F. Thomas Vickers, and was present at the hearing until the allegations of misconduct against him were dismissed by the panel at the close of Relator's case.

Relator filed a four-count complaint against Respondents.

<b>FILED</b>
JUN 21 2011
CLERK OF COURT SUPREME COURT OF OHIO

In Count One, Relator alleged that Respondent Cowden had acquired an interest in a business owned by Brian Stuffleben in violation of DR 1-102(A)(6), DR 5-101(A)(1), DR 5-104 and DR 5-105(A).

In Count Two, Relator alleged that Respondents Cowden, Nagorney and Steel violated various disciplinary rules in connection with a factoring agreement that Respondent Nagorney drafted. Specifically, Count Two alleged that Respondent Cowden violated DR 1-102(A)(6), DR 5-101(A)(1), DR 5-104 and DR 5-105(A); that Respondent Nagorney violated DR 1-102(A)(6), DR 4-101(A), DR 5-101(A)(1) and DR 5-105(A); and that Respondent Steel violated DR 1-102(A)(6), DR 4-101(A), DR 5-101(A)(1) and DR 5-105(A). As a result of a failure of proof, the panel unanimously dismissed the violations claimed against Respondent Steel at the close of Relator's case.

In Count Three, Relator alleged that Respondents Cowden, Nagorney and Steel violated DR 6-102 by attempting to limit their liability to Stuffleben. Respondents moved for judgment on the pleadings regarding this count because Stuffleben was represented by counsel at the time these negotiations took place. Relator did not object to the motion and, before proceeding with hearing testimony in the case, this count was unanimously dismissed by the panel.

In Count Four, Relator alleged that Respondent Nagorney violated DR 1-102(A)(6), DR 4-101(A), DR 5-101(A)(1) and DR 5-105(A) regarding the dealings with the IRS by another client of the Cowden firm regarding Stuffleben's failed company.

For the reasons that follow, the panel recommends:

As to Count One, Respondent Cowden be found to have violated DR 1-102(A)(6), DR 5-101(A)(1), DR 5-104 and DR 5-105(A) and receive a one-year suspension with the entire suspension stayed.

As to Count Two, Respondent Nagorney be found to have violated DR 1-102(A)(6), DR 4-101(A) and DR 5-105(A) and receive a six-month suspension with the entire suspension stayed.

The allegations of violations contained in Court Four be dismissed.

#### FINDINGS OF FACT

Based upon the stipulations of the parties, the testimony, and the exhibits, the panel makes the following findings based upon clear and convincing evidence:

1. Respondent Cowden was admitted to practice law in the State of Ohio on November 7, 1975 and is subject to the Code of Professional Responsibility, the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.
2. Respondent Nagorney was admitted to practice law in the State of Ohio on November 7, 1975 and is subject to the Code of Professional Responsibility, the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.
3. At all times relevant to this action, Respondent Cowden was a named partner in the law firm known as Cowden, Humphrey & Sarlson ("CHS").
4. At all times relevant to this action, Respondent Nagorney was Respondent Cowden's law partner in CHS.
5. CHS provided a variety of legal services, but concentrated in the areas of corporate and business law with its motto being "Entrepreneurs Advising Entrepreneurs."
6. Lou Fisi was a long-time client of CHS and a director of ADLT, a publicly traded company.
7. ADLT was CHS's largest client.
8. Dean Ganzhorn owned a company called Ganzcorp Investments ("Ganzcorp").

9. Ganzcorp was also a client of CHS, and Respondent Cowden owned a 7.5% interest in Ganzcorp.

10. Also, Respondent Cowden personally owed Ganzhorn \$205,000.

11. Brian Steffleben was the President, majority owner, and sole director of Technology Strategies, Inc. ("Old TSI"), a software technology company that provided registration information and services to Fortune 500 companies.

12. In about February 1999, Stuffleben met and retained Respondent Cowden to represent Old TSI.

13. Before meeting Stuffleben, Respondent Cowden had long planned to start a venture capital firm to invest in technology companies in northeast Ohio.

14. After he began representing Old TSI, Respondent Cowden began to view Old TSI as an investment for a venture capital group.

15. While representing Old TSI, Respondent Cowden, Fisi and Ganzhorn formed a venture capital firm call Hockey Stick Investments ("Hockey Stick").

#### Count One

16. Stuffleben founded Old TSI in 1995.

17. Old TSI remained profitable through 1997. However, after borrowing \$1.1 million from Huntington National Bank ("Huntington") to purchase Brubaker & Associates, a marketing firm, Old TSI began losing money, in part because a large amount of Brubaker's receivables were uncollectible.

18. In 1998 and 1999, Old TSI lost \$1 million and \$800,000 respectively.

19. During this time period, another company, TMSI, expressed interest in purchasing Old TSI. TMSI submitted a letter of intent to purchase Old TSI, subject to various conditions.

20. Due to the acquisition of the marketing firm, a number of creditor lawsuits were filed against Stuffleben and Old TSI.

21. Dissatisfied with his lawyer's services, Stuffleben met with Respondent Cowden in February 1999 to obtain advice regarding the viability of Old TSI.

22. During the initial consultation, Stuffleben informed Respondent Cowden of his discussions with TMSI regarding the possible sale of the company and provided Cowden with a copy of TMSI's letter of intent.

23. Respondent Cowden explained to Stuffleben that he had access to investors and that Cowden's firm could handle all of Stuffleben's legal needs.

24. Almost immediately, Respondent Cowden negotiated a series of forbearance agreements relating to Stuffleben's \$1.1 million personal guaranty to Huntington.

25. Respondent Cowden advised Stuffleben not to sell Old TSI, stating that TMSI's letter of intent, which could have resulted in an \$8 million deal if certain conditions were met, was not a good deal for Old TSI and explained that Old TSI had much more value than TMSI's intended offer.

26. In September 1999, Stuffleben and Respondent Cowden were in discussions with Stonehenge Investments ("Stonehenge") regarding a \$250,000 bridge loan to Old TSI along with the potential for a \$5 million equity infusion into Old TSI.

27. During this time period, Stuffleben was still in talks with TMSI regarding the possible sale of Old TSI to TMSI.

28. However, neither the TMSI deal nor the Stonehenge financing materialized.

29. In or around January 2000, Respondent Cowden introduced Stuffleben to Fisi and Ganzhorn.

30. Respondent Cowden told Stuffleben that Fisi was experienced in taking companies public.

31. With Old TSI in financial distress, Respondent Cowden recommended to Stuffleben that Old TSI enter into a secured party sale with Huntington as a way to reduce Stuffleben's debt, maintain control of the company, and start over with an infusion of capital.

32. Respondent Cowden explained to Stuffleben the parameters of the secured party sale. Huntington would foreclose on the assets of Old TSI. At the closing, Huntington would immediately sell the assets of Old TSI to TSI Holdings, Limited ("Limited"), which was owned by Hockey Stick. In return for the assets of Old TSI, Limited would pay \$50,000 cash to Huntington at closing, with the promise to pay an additional \$50,000 in two \$25,000 installments, and execute a note for \$250,000 personally guaranteed by Stuffleben. Limited would then sell the assets to TSI Holdings, Inc ("New TSI") in return for a warrant for 30 percent of the stock in New TSI and a \$300,000 note. The warrant gave Limited the right to obtain 30 percent of New TSI's stock.

33. The secured party sale effectively reduced Stuffleben's personal guaranty to Huntington from \$1.1 million to \$250,000.

34. Respondent Cowden explained and Stuffleben understood that Stuffleben's personal ownership interest in New TSI would be reduced from 94 percent to 64 percent as a result of Limited's 30 percent warrant.

35. Respondent Cowden explained to Stuffleben that through his connections, he could bring investment capital to New TSI and guide the company through a public stock offering.

36. As counsel for Old TSI, New TSI, Limited, and Hockey Stick, Respondent Cowden negotiated the terms of the secured party sale with Huntington.

37. In April 2000, the terms of the secured party sale were agreed upon.

38. After the terms were agreed upon, Respondent Cowden instructed Stuffleben to speak with Attorney Robert Vilsack, whom Cowden was recruiting to work for CHS.

39. Stuffleben apparently met with Vilsack one time before the closing.

40. For purposes of the closing, Respondent Cowden represented Old TSI and Limited, while Vilsack represented New TSI.

41. Stuffleben claimed that before the closing, Respondent Cowden never disclosed to him that he owned a one-third interest in Hockey Stick (which owned Limited) and that his ownership interest in Hockey Stick would make Respondent Cowden an owner of New TSI. However, that allegation simply was not credible when considering the testimony of Cowden and Fisi and Respondents' Exhibit 677 attached to this report.

42. Despite the fact that Stuffleben undoubtedly knew that Respondent Cowden was obtaining an ownership interest in New TSI, Cowden failed to fully disclose the potential conflicts of interest inherent with investing in a client's business and failed to strongly advise Stuffleben to seek independent counsel.

43. Respondent Cowden continuously assured Stuffleben that Hockey Stick would fund New TSI.

44. On May 18, 2000, the closing on the secured party sale took place at Respondent Cowden's office, and the other transactions regarding the restructuring of the corporations took place around that time.

45. Within months, Limited defaulted on the \$25,000 payment to Huntington and this default eventually allowed Huntington to take a \$227,000 judgment against Stuffleben.

#### Count Two

46. In December 2000, New TSI needed working capital and Hockey Stick was apparently unwilling to invest more money, having already invested more than \$900,000.

47. In mid-December 2000, Fisi, in conjunction with Ganzhom, directed Respondent Cowden's law partner, Respondent Nagorney, to draft a factoring agreement between New TSI and Ganzcorp, in which New TSI's receivables were sold to Ganzcorp for five percent of all amounts factored.

48. In essence, the factoring agreement afforded New TSI a short-term loan.

49. Even though CHS represented New TSI, Respondent Cowden did not disclose to Stuffleben on behalf of New TSI that he had an ownership interest in Ganzcorp and stood to profit from the factoring agreement. Respondent Nagorney was unaware of Respondent Cowden's relationship to Ganzcorp.

50. With respect to the factoring agreement, Respondent Nagorney represented New TSI, and Ganzhorn negotiated the agreement on behalf of Ganzcorp.

51. During a Christmas party in 2000, Respondent Nagorney presented the factoring agreement to Stuffleben and instructed him to sign the agreement.

52. When Stuffleben became aware the factoring agreement required that Stuffleben personally guarantee the loan to Ganzcorp, he questioned Respondent Nagorney about the guarantee.

53. Respondent Nagorney told Stuffleben that it was the only way the deal could be done.

54. With no other alternative, Stuffleben signed the agreement and received the loan from Ganzcorp.

55. With the infusion of cash from Ganzcorp, New TSI was able to meet its short-term obligations and continue operations for a short period of time.

56. In February 2001, New TSI was again having difficulty raising capital.

57. Fisi suggested that Stuffleben issue some of Stuffleben's stock to New TSI's employees as an incentive for their work, Stuffleben refused, as he was concerned that such a sale would cause him to lose control of his company.

58. In March 2001, the investors became aware of the fact that New TSI had not been withholding and remitting payroll liabilities to the federal, state, and local taxing authorities of more than \$237,000.

59. In late March 2001, Stuffleben consulted with and retained Attorney Louis Licata's law firm to represent him regarding the difficulties New TSI was having.

60. On that same day, Respondent Cowden called Stuffleben and told him that Hockey Stick would no longer invest in New TSI; that Stuffleben was on his own; and that Stuffleben would need to get a new lawyer since Respondent Cowden now had a conflict and could not help Stuffleben.

61. Almost immediately, the landlord began taking steps to evict New TSI.

62. On April 4, 2001, Ganzcorp forwarded a letter that was drafted by Respondent Nagorney demanding that New TSI and Stuffleben pay Ganzcorp \$151,900.53 under the factoring agreement that Respondent Nagorney had prepared while representing New TSI.

63. On behalf of Ganzcorp, Respondents Nagorney and Steel of CHS contacted the law firm of Guy, Lammert & Towne ("GLT") to represent Ganzcorp against New TSI and Stuffleben for breach of the factoring agreement.

64. Attorney E. Jane Taylor of GLT testified she did not recall what was discussed with any of the attorneys of CHS. Steel was never called as a witness by any party. Respondent Cowden was not questioned about any conversations he may have had with Taylor.

65. Respondent Nagorney testified he had discussed with Taylor the contents of the factoring agreement that he had drafted on behalf of New TSI.

66. Within a few days, GLT secured a cognovit judgment and lien in favor of Ganzcorp against New TSI and Stuffleben in the amount of \$151,900.53 plus ten percent interest.

67. On May 3, 2001, GLT submitted a bill to Ganzcorp for \$1,493.

68. On May 7, 2001, Old TSI received a jury verdict for \$750,000 resulting from unrelated litigation.

69. Under the terms of the factoring agreement that Respondent Nagorney drafted on behalf of New TSI, New TSI was responsible for all costs and expenses associated with obtaining the cognovit judgment.

70. On May 9, 2001, CHS submitted a bill to Ganzcorp for \$18,500 with the following description:

For legal services rendered in connection with preparation of Factoring Agreement and collateral documents; enforcement of lien rights against TSI Holdings, Inc. and Brian Stuffleben; negotiation with Edison Properties, landlord, regarding recovery of collateral. (Rel. Ex. 92)

71. On behalf of Ganzcorp, Respondent Nagorney sought to obtain a portion of the \$750,000 proceeds in order to satisfy the Ganzcorp cognovit judgment and CHS's legal fees.

72. Respondent Nagorney negotiated with Ganzhom that any moneys received from New TSI in excess of \$158,596.48, which included the amount of the cognovit judgment, Ganzcorp's moving expenses incurred while removing New TSI's equipment from the premises, and the \$1,493 in legal fees paid to GLT would be used to pay CHS's May 9, 2001 invoice.

73. After negotiating the settlement on behalf of Ganzcorp, Respondent Nagorney requested that Ganzcorp remit \$6,507 of the settlement proceeds to CHS for legal fees in assisting Ganzcorp in its suit against New TSI and Stuffleben.

#### Count Four

74. When New TSI ceased operations in March 2001, New TSI had a substantial amount of unpaid employment taxes.

75. Consequently, on August 8, 2001, the IRS sent a letter regarding the unpaid taxes to Fisi and other officers of New TSI.

76. The letter from the IRS stated, in relevant part, "We are attempting to collect an unpaid employment tax from the following business: TSI Holdings, Inc (New TSI) .... Preliminary information shows that you may have some responsibility." (Rel. Ex. 103)

77. The IRS required that Fisi complete a Form 418 regarding Fisi's involvement with New TSI.

78. Fisi filled out the form and sent it to Respondent Nagorney along with a note that stated, "Attached is a draft of response to IRS inquiry re: TSI Holdings (New TSI) tax delinquency. Please give it a hard read as I hated completing it. I need your counsel in answering questions: 4h ... 8 ... Lou F." (Rel. Ex. 105)

79. Question 4a asked, "How were you associated with the corporation?" Fisi responded, "Lead member of an investment group. Did serve as asst. corporate secretary for an incorporating activity."

80. Respondent Nagorney changed Fisi's response so that it read, "Lead member of an investment group. Did serve as asst. corporate secretary solely for incorporation purposes." (Rel. Ex. 106)

81. Fisi was not asking Respondent Nagorney to verify the accuracy of the information he was providing.

82. Fisi made the suggested change to his response, provided the completed Form 4180 to Respondent Nagorney, and Nagorney returned the Form 4180 to the IRS.

83. Even though the Form 4180 was inaccurate, in that Fisi was both the Secretary and Treasurer under New TSI's operating articles, there is no indication that Respondent Nagorney had knowledge of the inaccuracy.

#### CONCLUSIONS OF LAW

As to Count One, Relator alleges Respondent Cowden violated DR 1-102(A)(6) (A lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law); DR 5-101(A)(1) (Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests); DR 5-104 (A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure); and DR 5-105(A) (A lawyer shall decline proffered employment if the exercise of his independent

professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment).

Based upon clear and convincing evidence, the panel concludes Respondent Cowden violated DR 1-102(A)(6), DR 5-101(A)(1), DR 5-104 and DR 5-105(A).

As to Count Two, Relator alleges Respondent Cowden violated DR 1-102(A)(6) (A lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law); DR 5-101(A)(1) (Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests); DR 5-104 (A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure); and DR 5-105(A) (A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment).

Based upon the evidence submitted, the panel cannot conclude Respondent Cowden violated DR 1-102(A)(6), DR 5-101(A)(1), DR 5-104 or DR 5-105(A) and recommends these allegations of misconduct be dismissed.

As to Count Two, Relator alleges Respondent Nagorney violated DR 1-102(A)(6) (A lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law); DR 4-101(A) (A lawyer shall not use a confidence or secret of his client to the disadvantage of the client); DR 5-101(A)(1) (Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of a client will be

or reasonably may be affected by the lawyer's financial, business, property, or personal interests); and DR 5-105(A) (A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment).

Based upon clear and convincing evidence, the panel concludes Respondent Nagorney violated DR 1-102(A)(6), DR 4-101(A) and DR 5-105(A).

However, based upon the evidence submitted, the panel cannot conclude Respondent Nagorney violated DR 5-101(A)(1) and recommends this allegation of misconduct be dismissed.

As to Count Four, Relator alleges Respondent Nagorney violated DR 1-102(A)(6) (A lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law); DR 4-101(A) (A lawyer shall not use a confidence or secret of his client to the disadvantage of the client); DR 5-101(A)(1) (Except with the consent of the client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of a client will be or reasonably may be affected by the lawyer's financial, business, property, or personal interests); and DR 5-105(A) (A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment).

Based upon the evidence submitted, the panel cannot conclude Respondent Nagorney violated DR 1-102(A)(6), DR 4-101(A), DR 5-101(A)(1) or DR 5-105(A) and recommends these allegations of misconduct be dismissed.

### AGGRAVATION AND MITIGATION

BCGD Proc. Reg. 10(B)(1) lists aggravating factors that may be considered by the Board in recommending a sanction for professional misconduct. The panel finds the existence of the following aggravating factors in this matter:

- As to Respondent Cowden there is a pattern of misconduct and he committed multiple offenses.
- As to Respondent Nagorney there is a pattern of misconduct and he committed multiple offenses.

BCGD Proc. Reg. 10(B)(2) lists factors that may be considered by the Board in mitigation. The panel finds the following mitigating factors are present in this case:

- As to Respondent Cowden, there is an absence of a prior disciplinary record, an absence of dishonest or selfish motive, an acknowledgement of his wrongful conduct, a cooperative attitude toward the proceedings, and an otherwise outstanding reputation in the legal community and the community at large.
- As to Respondent Nagorney, there is an absence of a prior disciplinary record, an absence of dishonest or selfish motive, an acknowledgement of his wrongful conduct, a cooperative attitude toward the proceedings, and an otherwise outstanding reputation in the legal community and the community at large.

Further, both Respondents have taken steps within their practices to ensure the misconduct presented here is not likely to be repeated.

### RECOMMENDED SANCTION

Relator recommends that both Respondents receive one-year suspensions with each suspension stayed in its entirety.

Respondent Cowden suggests that, at most, he should receive a six-month suspension with the entire suspension stayed.

Respondent Nagorney suggests that, at most, he should receive a public reprimand.

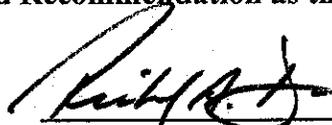
The panel recommends that Respondent Cowden receive a one-year suspension with the entire suspension stayed.

The panel recommends that Respondent Nagorney receive a six-month suspension with the entire suspension stayed.

#### BOARD RECOMMENDATION

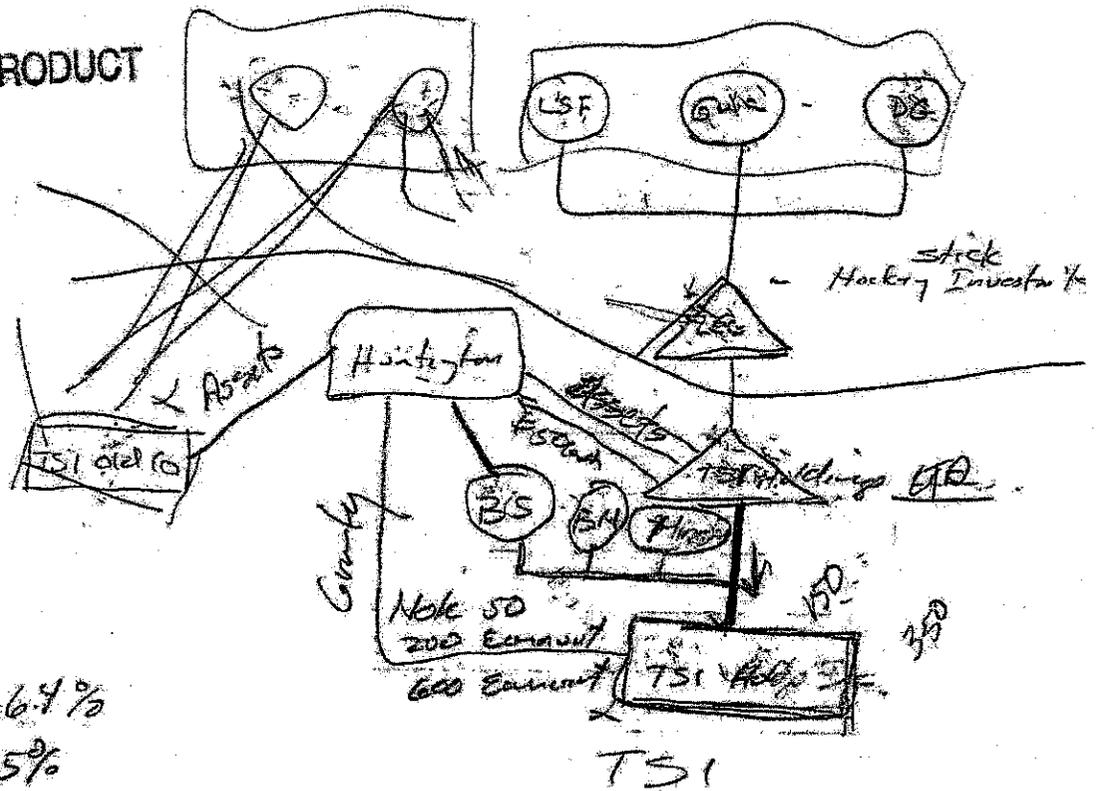
Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 9, 2011. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the Panel and recommends that Respondent, Gerald Wayne Cowden, be suspended from the practice of law for a period of one year with the entire year stayed and that Respondent, Frank P. Nagorney, be suspended for six months with the entire six months stayed. The Board further recommends that the cost of these proceedings be taxed to Respondents in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**



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**RICHARD A. DOVE, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
the Supreme Court of Ohio**



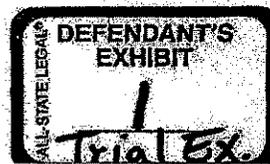
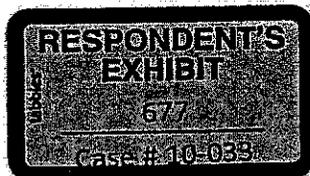
BS = 6.4%  
 BM = 5%  
 Minutes = 1%  
 70%  
 TSI HLLH 30  
 100

Meeting w/  
 BS re secured  
 party sale

\$1000 - 700 -  
 250 -  
 50 -

Note + Warrant  
 +  
 Assets - TSI Holding LLC

TSI Holding for



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