

No. 2011-1049

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**In The Supreme Court of Ohio**

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APPEAL FROM THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE  
CASE No. 10-090

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CLEVELAND METROPOLITAN BAR ASSOCIATION,  
*Relator,*

v.

Robert J. Berk,  
*Respondent.*

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**RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S ANSWER BRIEF  
TO OBJECTIONS OF RESPONDENT ROBERT J. BERK**

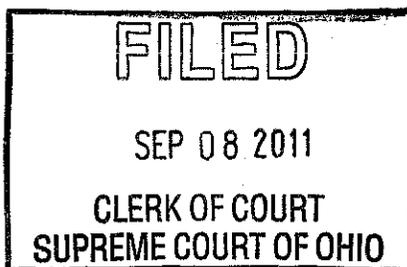
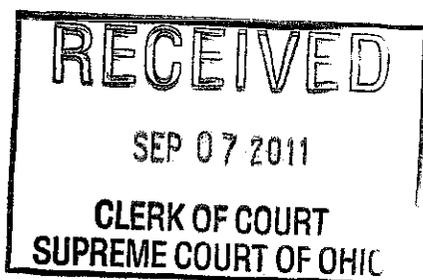
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## **I. INTRODUCTION**

Respondent Robert J. Berk's ("Respondent") objections concern the findings of fact and conclusions of law of the Board of Commissioners on Grievances and Discipline ("Board") and the Board's recommended sanction. As discussed more fully below, the Board's recommended sanction of eighteen (18) months suspension with twelve (12) months stayed is appropriate and not unreasonable based on all the facts and circumstances.

## **II. COUNTERSTATEMENT OF FACTS**

### **A. Count I – Respondent Violated Rule 1.3 of the Ohio Rules of Professional Conduct**

Respondent is a sole practitioner. He was admitted in 1969 and has practiced law full time from 1969 to the present. Since the middle 1990's, Respondent's practice has focused on bankruptcy work and debt defense (Transcript of Proceedings before the Board of Commissioners on Grievances and Discipline, May 6, 2011, hereinafter "Tr.," p. 54, 56).

Respondent stipulated that he neglected two bodily injury cases filed in common pleas court, resulting in the dismissal of both matters (Respondent's Amended Objections to Findings of Fact, Conclusions of Law and Recommendations of The Board of Commissioners on Grievances and Discipline, And Respondent's Brief in Support of Objections, hereinafter "Obj.," p. 1).

In one matter, Respondent represented Rachel Lewis, Winston Lewis, and Irene Papadelis (hereinafter, "Lewis Case") in a personal injury case arising from an automobile accident (Tr. 16, 57-58). Although Respondent's practice centered on bankruptcy and debt relief work at the time, Respondent agreed to accept the Lewis Case because of a longstanding personal and professional relationship with the clients (Tr. 58). In spite of that close relationship, Respondent failed to attend two case management conferences in March and April 2009 (Tr. 21).

The missed appearances occurred while Respondent was under a two year probationary period stemming from a prior disciplinary sanction issued in August 2007<sup>1</sup> (Tr. 19-21). The August 2007 disciplinary action against Respondent included a 12-month stayed suspension, on the conditions that he be monitored for two years, complete six hours of CLE, and that he refrain from any further misconduct (Tr. 20-21). Nonetheless, Respondent stated that he missed the two appearances because he neglected to record them in his calendar (Tr. 22). Respondent attempted to remedy his neglect by hiring an attorney to appeal the dismissal, but the Court of Appeals ultimately upheld the dismissal of the Lewis Case and Respondent referred the matter to his malpractice insurance carrier (Tr. 61).

In the second matter, Respondent represented Kenneth Render (hereinafter, “Render Case”) in an action for damages resulting from an automobile accident (Tr. 58-59). Again, Respondent agreed to represent Render because of a previous relationship with him. *Id.* In October 2007, just two months after the Court imposed a stayed suspension against Respondent, Respondent missed a case management conference in the Render Case (Tr. 20). Additionally, Respondent missed a settlement conference in the Render Case in February 2008 (Tr. 21). Due to Respondent’s missed appearances, the trial judge dismissed the case with prejudice (Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, June 22, 2011, hereinafter “Board Recommendation”, p. 3).

Respondent testified that his neglect in both the Lewis Case and the Render Case involved conduct similar to that which led to his August 2007 sanction and confirmed that his

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<sup>1</sup> *Cleveland Bar Assn. v. Berk*, 114 Ohio St.3d 478, 2007-Ohio-4264, 873 N.E.2d 285.

stayed suspension included a condition that he abstain from any further misconduct (Tr. 20, 59, 96).

**B. Count II – The Board’s Recommended Sanction of an 18 Month Suspension with 12 Months Stayed is Appropriate**

Respondent’s testimony before the Board conveyed a clear understanding that his actions violated the conditions of his stayed suspension and acknowledged that his misconduct is strikingly similar to that which led to his August 2007 sanction (Tr. 20, 59, 96). Further, Respondent described the 400-500 cases per year that he handles with the assistance of a part-time secretary (Tr. 66). Respondent also acknowledged that although he was provided with a monitoring attorney as a result of his August 2007 sanction, he failed to disclose the missed appearances in the Lewis Case and Render Case to the monitor (Tr. 86).

During the hearing before the Board, Respondent testified as to the timeline of events and stated that he filed a complaint in the Lewis Case in April 2007 (Tr. 16). The complaint was voluntarily dismissed in October 2007, but later re-filed in August 2008. Respondent admitted that he missed case management conferences in March and April of 2009 (Tr. 17). Regarding the Render Case, Respondent testified that he filed a complaint on behalf of Render in July 2007 (Tr. 18). Respondent admitted that he missed a settlement conference in the Render Case in February 2008. *Id.* Finally, Respondent also admitted that he was previously sanctioned by this court in August 2007 for, among other things, failing to attend two case management conferences (Tr. 18-19).

As mitigation evidence, Respondent offered the testimony of three character witnesses who testified about Respondent’s history of doing pro bono work and representing indigent clients (Tr. 31, 38, 45). However, Respondent’s testimony also depicted a law practice that, as a

result of his combined altruistic and enterprising pursuits, is overwhelmed, disorganized and needlessly exposes clients to potential neglect (Tr. 65-66, 81-84, 90-91).

Respondent also testified that the missed appearances in the Lewis Case and Render Case occurred after the issuance of his stayed suspension and during his probation, which included a period of time where Respondent was reporting to a monitoring attorney (Tr. 20-21). Although Respondent completed six hours of CLE as a condition of his stayed suspension and had regular meetings with his monitor, Respondent failed to implement any meaningful measures to prevent similar neglect from occurring (Tr. 84-85). Furthermore, Respondent failed to alert his monitor of his missed appearances (Tr. 86, 97). Although Respondent had the knowledge, tools, and resources necessary to prevent such oversights from reoccurring, Respondent committed the same type of neglect that gave rise to his previous disciplinary action (Tr. 52, 59, 83). Nonetheless, Respondent asserted that similar neglect is unlikely to occur in the future (Tr. 88-89). Such an assertion is made all the more unbelievable given the fact that Respondent neglected the cases of close personal and professional acquaintances shortly after he was sanctioned by the court and while under probation. Respondent also testified that he has not taken any steps to terminate his probation to the court (Tr. 89).

In addition to the misconduct charged in Relator's complaint, Respondent admitted to other instances of neglect and ethical violations. Respondent acknowledged that he willfully and knowingly ignored two court orders (Tr. 92). In one matter, Respondent represented a party in a bankruptcy proceeding (Tr. 79). Respondent stated that Judge Pat E. Morganstern-Clarren issued a show cause order due to his failure to appear in a final pretrial hearing (Tr. 77-78). Just one day before his disciplinary hearing before the Board, Respondent appeared in Judge Morganstern-Clarren's courtroom to explain his decision to ignore an order from the court (Tr.

78). Respondent rationalized his knowing violation of the court order by stating that his client in the matter was merely a “stakeholder” and therefore did not have to comply with the court order as he had nothing to add to the proceeding (Tr. 80). Moreover, a show cause order was issued for yet another instance of neglect when Respondent failed to file a document with the court in another bankruptcy matter (Tr. 86-87). Respondent filed the document but then failed to attend the show cause hearing, believing instead that his unilateral action in filing the missing document had concluded the matter (Board Recommendation, p. 5).

The facts outlined above highlight a pattern of neglect and misconduct which occurred after this court had provided Respondent with an opportunity to improve his office management practices. Of particular concern is the fact that Respondent’s continued inability to correct scheduling oversights has not affected the volume of his practice (Tr. 88, 91). Respondent has failed to recognize the seriousness of his tendency to ignore court orders and miss appearances and has resisted employing meaningful measures to redress this ongoing concern. Given Respondent’s continuing pattern of neglect and disregard for court orders following his August 2007 sanction, a suspension of 18 months with 12 months stayed is appropriate.

### III. LAW AND ARGUMENT

Respondent's misconduct, which included violations of Prof. Cond. R. 1.3, justified the Board's sanction of an 18-month suspension from the practice of law with a 12-month stay. The Board found clear and convincing evidence that Respondent's misconduct occurred from two separate instances: (i) the Lewis Case; and (ii) the Render Case.

When determining an appropriate sanction for attorney misconduct, the Ohio Supreme Court considers “the duties violated, the actual or potential injury caused, the attorney's mental state, and sanctions imposed in similar cases.” *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d

473, 2007-Ohio-5251, 875 N.E.2d 935, at ¶ 21 (citing *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, at ¶ 16). The court must weigh both aggravating and mitigating factors to ascertain whether a greater, or lesser, sanction is warranted. BCGD Proc. Reg. 10(B)(1); *Cleveland Bar Assn. v. Jimerson*, 113 Ohio St.3d 452, 2007-Ohio-2339, 866 N.E.2d 495. In this case, both case law and the cumulative aggravating factors militate in favor of the Board's recommended sanction.

**A. Respondent's Missed Appearances and Violations of Court Directives in Both the Lewis Case and Render Case Warrant an Actual Suspension.**

The Board found by clear and convincing evidence that Respondent committed the following violation in both the Lewis and Render Cases: (i) failure to act with *reasonable* diligence and promptness in representing a client, in violation of Prof. Cond. R. 1.3.

This court has consistently held that in cases involving repeated instances of neglect and prior disciplinary offenses, the second case often results in a more severe sanction. *See Akron Bar Assn. v. Holda*, 125 Ohio St.3d 140, 2010-Ohio-1469, 926 N.E.2d 626; *Cleveland Metropolitan Bar Assn. v. Freeman*, 128 Ohio St.3d 416, 2011-Ohio-1447. In *Holda*, the relator alleged that the respondent neglected two cases, an estate matter and a custody case, and respondent stipulated to the violations of Prof. Cond. R. 1.3. The Board found that the respondent also violated Prof. Cond. R. 1.16 for failing to return client property after termination. The court found that the sole aggravating factor was the respondent's prior discipline in which he received a public reprimand for neglect, an IOLTA violation, and failing to properly return client funds after termination. The court suspended respondent for one year, all stayed on conditions, for essentially the same conduct as the respondent's previous case.

Likewise, in *Cleveland Metropolitan Bar Assn. v. Freeman*, the court suspended the respondent for one year, stayed on conditions, for violations of Prof. Cond. Rules 1.3 and 1.4. In

*Freeman*, the court considered the respondent's prior public reprimand and respondent's multiple offenses to impose the more severe sanction of a stayed suspension.

Respondent's conduct and history in this case are similar to those of *Holda* and *Freeman*. Additionally, Respondent's multiple offenses and prior discipline merit a more severe sanction than the one given in his previous case. *Holda* and *Freeman* were publicly reprimanded the first time each was sanctioned by the court. When they were sanctioned a second time, stayed suspensions were imposed. Here, Respondent received a stayed suspension in August 2007, not a public reprimand. Therefore, an actual suspension should be imposed in this case. It is evident that Respondent has not improved his practice to prevent further instances of neglect despite having been given the opportunity to do so by this court. Accordingly, in the interest of protecting the public, Respondent should receive an actual suspension for continuing to neglect his clients' cases.

**1. Respondent Has Engaged in a Continued Pattern of Similar Misconduct.**

Respondent stipulated to the neglect at issue here, but asserts that case law dictates that his level of misconduct does not warrant a suspension. Respondent offers *Disciplinary Counsel v. Doellman*, 127 Ohio St.3d 411, 2010-Ohio-5990, for the proposition that an actual suspension is not appropriate simply because more than one instance of misconduct has been found. In *Doellman*, this court concluded that although respondent's conduct was wrong, "it was not deceptive or dishonest. Accordingly, we are not constrained to impose an actual suspension." *Doellman* at ¶ 52. Although *Doellman* did not receive an actual suspension for misconduct that was more severe than the misconduct at issue here, Respondent ignores the fact that the court relied on the isolated nature of respondent's neglect as a substantial mitigating factor.

In *Doellman*, the court relied on *Stark Cty. Bar Assn v. Ake*, 111 Ohio St.3d 266, 2006-Ohio-5704, 855 N.E.2d 1206, in concluding that the respondent was not likely to repeat the neglect and therefore did not merit an actual suspension. *Doellman*, ¶ 55. In *Ake*, the court emphasized that where a respondent engages in “the knowing violation of a court order or rule that causes injury or potential injury or interferes or potentially interferes with a legal proceeding...a suspension from the practice of law is generally appropriate...” *Ake*, at ¶ 45. However, the court did not ultimately impose an actual suspension because it was confident that Respondent “would not disobey a court order in any situation other than the charged atmosphere of ending his own marriage. We are therefore confident that respondent will never repeat his transgressions.” *Id* at ¶ 46 (*Contra Id.* at ¶ 52, “Our system of justice rests upon respect for judicial tribunals and their orders. Lawyers may not choose which orders they will respect. I would suspend respondent from the practice of law...” (Moyer, C.J., dissenting)).

The circumstances surrounding Respondent’s continued misconduct do not suggest that his instances of neglect were atypical and extraordinary deviations akin to those in *Doellman* and *Ake*. Instead, Respondent’s failure to represent clients diligently reoccurred shortly after this court issued a stayed suspension for similar misconduct. Furthermore, the nature of the misconduct at issue here, coupled with the additional instances of neglect explored by the Board, highlight Respondent’s consistent failure to carry out his professional obligations. As Chief Justice Moyer emphasized in his dissent in *Ake*, discharging responsibilities and complying with court orders is not a matter of attorney discretion. The facts here indicate that Respondent’s failure to represent clients diligently has become an unfortunate pattern that is unlikely to be addressed until Respondent is actually suspended from the practice of law.

Respondent dismisses the Board's rationale for imposing its sanction by arguing that an actual suspension from the practice of law is warranted only in matters involving attorney deceit and dishonesty. Respondent is correct in asserting that *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 199-Ohio-261, 658 N.E.2d 237, and its progeny stands for the proposition that "dishonest conduct on the part of an attorney generally warrants an actual suspension from the practice of law." *Disciplinary Counsel v. Rooney*, 110 Ohio St.3d 349, 2006-Ohio-4576, 853 N.E.2d 663, at ¶12. However, *Fowerbaugh* and its progeny do not restrict the appropriateness of an actual suspension to such narrow situations. Instead, *Fowerbaugh* emphasized that "an attorney's conduct may constitute neglect when the attorney 'fails to advance a client matter for which he has been retained. Neglect is different from negligence and usually requires a pattern of disregarding obligations or repeated omissions by an attorney.' [Citation omitted]." *Fowerbaugh*, at 191. (See Also *Id.*, "It is the responsibility of this court to give guidance as to what conduct constitutes a violation of the Disciplinary Rules...The sanction in each individual's case should be determined based upon the unique facts and circumstances of that case." (Robie, J., concurring)) Therefore, *Fowerbaugh* recognizes that consistent attorney neglect is sufficient to impose an actual suspension, even in the absence of dishonesty or deceit.

Respondent has displayed a pattern of consistently failing to fulfill his professional duties, both toward his clients and to the court. In his testimony before the Board, Respondent acknowledged that his neglect in the Lewis Case and Render Case occurred shortly after this court sanctioned him for similar misconduct. Additionally, Respondent admitted to additional instances of neglect that, although uncharged in this matter, magnify the regularity of his professional shortcomings. Based on *Fowerbaugh* and its line of cases, Respondent has therefore displayed a pattern of neglect, not mere negligence. Evaluated in light of the unique

facts and circumstances of this case, Respondent's consistent failure to satisfy his obligations warrants an actual suspension. Further, Respondent's decision not to disclose his neglect to his monitoring attorney could be perceived as dishonest and deceitful behavior calculated to shield the court from learning of the new misconduct. Overall, it is clear that Respondent has refused to address the problems in his practice and has continued to engage in the very type of misconduct that this court intended for him to avoid.

**2. Although The Court Provided Respondent With an Opportunity to Address His Deficiencies, Respondent Has Failed to Implement Any Meaningful Improvements to His Practice.**

Respondent also argues that this court has refused to impose an actual suspension in two similar cases involving lack of attorney diligence, even when faced with additional aggravating factors. In one case, the court concluded that even when the respondent engaged in misconduct for his own financial interest, the misconduct was sufficiently mitigated by his remorse, lack of prior disciplinary record, and good character. *Cleveland Bar Assn. v. Norton*, 116 Ohio St.3d 226, 2007-Ohio-6038, 877 N.E.2d 964, at ¶ 22. The court adopted the Board's recommendation and sanctioned respondent to a six-month suspension, stayed on the conditions that respondent complete six hours of CLE in law-office and case-file management and that he commit no further misconduct. *Id.* at 24.

Additionally, Respondent offers a case where the court considered an attorney's neglect attributable to a busy practice, poor office management, and a lack of guidance. *Allen City Bar Assn. v. Brown*, 2010-Ohio-580 at ¶ 6. There, the court relied on *Dayton Bar Assn. v. Sebree*, 96 Ohio St.3d 50, 2002-Ohio-2987, 770 N.E.2d 1009, in which an attorney was issued a six-month suspension, stayed on the conditions that respondent attend a seminar to improve office-management skills, and work closely with a monitoring attorney. *Brown*, at 4. The court in

*Brown* issued a one year suspension, stayed on the conditions that respondent complete CLE in office-management, participate in a mentoring program, and commit no additional misconduct. *Id.* at 6.

Although Respondent is correct that *Norton* and *Brown* received stayed suspensions, the respondents in those matters were not afforded opportunities to remedy their transgressions prior to being sanctioned. Here, the court imposed on Respondent a stayed suspension for similar conduct, on the conditions that he commit no further misconduct, attend a six hour CLE on office-management practices, and work with a monitoring attorney during a two year probation period. *Cleveland Bar Assn v. Berk*, 114 Ohio St.3d 478, 2007-Ohio-4264, 873 N.E.2d 285, at ¶ 13. The court granted Respondent an opportunity to modify his management and organizational practices and illuminated a path he could follow to implement the necessary improvements. Nonetheless, Respondent testified that he rebuffed the chance to employ the knowledge gained from his CLE programs and instead decided to utilize the very office and calendaring procedures that resulted in the several missed appearances (Tr. 98). Moreover, Respondent's testimony reveals that although he had access to a monitoring attorney, Respondent failed to disclose the missed appearances at issue here (Tr. 97-98). Therefore, Respondent has already received and rejected the chance to modify his practices that the court afforded in *Norton* and *Brown*. Because the previous stayed suspension on conditions has proved to be inadequate to spurn Respondent into meaningfully addressing his conduct, an actual suspension from the practice of law is warranted.

**3. Respondent's History of Service to Indigent Individuals Does Not Mollify His Continued Pattern of Neglect.**

Respondent argues that his history of providing legal services to underserved clientele is a factor that weighs against the imposition of an actual suspension. Respondent believes that his

experience representing those who otherwise could not afford legal representation mitigates his continued pattern of neglect. Respondent seems to argue that he should be held to a lower standard because of his service to the public.

Although this court has looked favorably upon attorneys who represent pro bono or low-income clients, this court has also emphasized that “service to indigent clients, while mitigating, does not immunize a lawyer from discipline for misconduct.” *Disciplinary Counsel v. Rohrer*, 124 Ohio St.3d 65, 2009-Ohio-5930, 919 N.E.2d 180, at ¶51. Similarly, Chief Justice Moyer recognized contributions to the community as a mitigating factor, yet cautioned that “any mitigating factor must be weighed against the seriousness of the rule violations that the lawyer has committed.” *Cincinnati Bar Association v. Lawson*, 119 Ohio St.3d 58, 2008-Ohio-3340, 891 N.E.2d 749, at ¶ 80, (Moyer, C.J., dissenting) (quoting *Disciplinary Counsel v. Phillips*, 108 Ohio St.3d 331, 2006-Ohio-1064, 843 N.E.2d 775, at ¶13). Above all, this court has underscored that “the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public.” *Disciplinary Counsel v. O’Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, at ¶53.

While it is clear that Respondent has performed a substantial amount of pro bono work for low-income clients, it is also apparent that the current state of his law practice places both his paying and pro bono clients in jeopardy. Respondent testified that he handles 400-500 cases per year, that he has made no real changes to his office practices, and that he does not view his procedures or caseload as an issue (Tr. 66, 84). The net result of the state of Respondent’s practice is that he is ill-equipped to diligently represent this volume of clients without taking comprehensive measures to reduce the likelihood that he will overlook court orders or appearances.

Respondent acknowledged neglecting the Lewis Case and Render Case, representations he accepted because of personal relationships with the parties. Moreover, the neglect in those cases occurred during a period of probation to this court. Therefore, it is evident that the terms of the stayed suspension were not a sufficient impetus to prevent Respondent from continuing to neglect legal matters entrusted to him.

Respondent seems to believe that because he has made amends for neglecting his clients' cases, whether by paying for their appeals or turning a matter over to his malpractice insurance carrier, he should not receive an actual suspension for the new misconduct (Tr. 65). Instead of implementing more efficient ways of operating his practice, Respondent has simply decided to hire appellate counsel or make a report to his insurance carrier when he neglects a client matter. Respondent is apparently unwilling to do what is necessary to ensure that his clients are served and their interests protected. Having appellate counsel on hand and malpractice insurance are poor substitutes for the high standards that members of the public should expect when they hire a lawyer in Ohio.

**B. Respondent's Stipulated Misconduct Is Sufficient to Find that Respondent Violated the Terms of His Stayed Suspension.**

As noted above, the terms of Respondent's stayed suspension issued in 2007 contained conditions that he refrain from any additional misconduct during the suspension period and that that he comply with the terms of his two year probation. *Cleveland Bar Assn. v. Berk*, at ¶ 13. The court also stated that "if Respondent violates any of the conditions of the stay or terms of the probation during the stayed portion of his suspension, the stay will be lifted, and respondent will serve the entire term as a period of actual suspension." *Id.* Therefore, if the court finds that Respondent did in fact commit the misconduct at issue here, an actual suspension from the

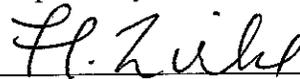
practice of law will be imposed in Respondent's first disciplinary case because he remains on probation for that case.

Respondent's testimony before the Board in this matter included admissions of neglect that occurred while Respondent was still under the terms of his stayed suspension and probation. Respondent acknowledged that he missed court appearances in both the Lewis Case and Render Case. Additionally, Respondent admitted to other instances of misconduct involving violations of two court orders. While Respondent argues that he should not receive an actual suspension for the new misconduct at issue here, the fact remains that, he still faces an actual suspension on his first disciplinary case for neglecting the Lewis and Render Cases during the period of his stayed suspension. Following a finding by this court that Respondent has violated Rule 1.3, Relator will file a motion to show cause in Respondent's first disciplinary case and seek to have the stay lifted.

#### IV. CONCLUSION

For the foregoing reasons, Relator urges this court to adopt the recommendation of the Board regarding the sanction against Robert Berk. The recommendation of the Board of an 18-month suspension with 12-months stayed is appropriate and reasonable, given the facts and circumstances discussed above.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Relator Cleveland Metropolitan Bar Association's Answer Brief To Objection of Respondent Robert J. Berk was served via regular mail this 6 day of September 2011, upon the following:

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