ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel	:	
	:	
Relator,	:	**Case No. 2011-1426**
	:	
v.	:	
	:	
Christopher James Burchinal	:	
	:	
Respondent.	:	
	:	

RESPONDENT CHRISTOPHER BURCHINAL'S OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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Now comes Christopher J. Burchinal ("Mr. Burchinal" or "Respondent"), by and through counsel, and hereby objects to the Findings of Fact, Conclusions of Law and Recommendation of The Board of Commissioners on Grievances and Discipline filed with this court on August 31, 2011. *See*, Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline (Board Report), Appendix A.

I. STATEMENT OF THE CASE

This matter arises from Respondent's self-reported misconduct, including diverting fund intended to pay third-party creditors for personal injury clients to pay his own personal expenses and covering up a missed statute of limitations. After self-reporting his conduct to the Office of Disciplinary Counsel (Relator), Respondent entered a four-year recovery contract with the Ohio Lawyers Assistance Program. Thereafter, Mr. Burchinal

began attending counseling sessions with Judith Fisher, MSW, LISW who (a) diagnosed him, during the relevant period, as having an adjustment order with mixed emotional features (depression and anxiety), and (b) opined that his mental condition was causally related to his misconduct and that under prescribed conditions, Mr. Burchinal can now return to the competent, ethical and professional practice of law. Importantly, Mr. Burchinal always intended to make those who were harmed by his conduct whole. And after he self-reported his misconduct, he promptly paid full restitution to the victims of his misconduct.

Despite Mr. Burchinal's recommendation of a fully stayed license suspension, and Relator's recommendation of a two-year license suspension with eighteen months stayed, the panel and the board recommended a two-year license suspension with one year stayed. Respondent objects to the board's report, urging this Court to adopt Relator's recommended sanction (a two-year suspension with eighteen months stayed, with conditions, including monitoring of his practice).

II. STATEMENT OF FACTS

Mr. Burchinal is a third generation Eagle Scout, growing up in a family with strong values. (*See*, Board Report at 2.) He earned his bachelor degree in economics and was admitted to the practice of law in Ohio in November 1999. (*Id.*) While he was a law student, Mr. Burchinal worked as a law clerk in a personal injury law firm, and for two city attorney offices. (*Id.*) After he was admitted to practice of law, he worked two years as an associate in a law firm defending insurance cases, and later as a solo practitioner. (*Id.*)

In late 2004, Mr. Burchinal joined the law partnership of Firestone, Brehm, Hanson, Wolf, and Burchinal, LLP, in Delaware, Ohio. (*See*, Board Report at 3.) About

three months after he joined the firm, he was made a full partner. (*Id.*) Thereafter, he also gained financial responsibility for his share of the firm's overhead. (*Id.*) His monthly share of partnership expenses was $3,800.00. (*Id.*)

Mr. Burchinal had monthly personal expenses, including his home mortgage payment and child care expenses, according to his household financial arrangements with his wife who also worked outside the home in banking. (*Id.*) The $8,000 monthly total of his partnership contribution and household expenses sometimes exceeded his monthly income. (*Id.*) In those months Mr. Burchinal incurred a debt to the firm to be paid in the future. Unfortunately, he did not try to make adjustments for this shortfall with any of his partners or with his wife. (*Id.*)

Because of personal injury law experience, other partners in the firm referred such cases to Mr. Burchinal. (*See*, Board Report at 4.) When those personal injury cases were settled, disbursements were handled through the firm's IOLTA account, and all disbursements were supposed to be made by Mr. Burchinal. (*Id.*) Mr. Burchinal took the IOLTA funds set aside to pay the client's bills associated with those settlements, and misused to pay his personal bills. (*Id.*) It was always Mr. Burchinal's intention to repay the money to take care of the client expenses once he was able to catch up on his own expenses. (*Id.*)

Mr. Burchinal fully admitted and expressed remorse for diverting client funds, including funds set aside for (1) the 2007 Molly Davis personal injury settlement ($6,141 for the Rawlings Co. subrogation claim); (2) the 2008 Getena Hartman personal injury settlement ($303.25 payable to Riverside Methodist Hospital for medical records); and (3)

the 2009 Shannon Scott personal injury settlement [$7,435.02 payable to the Socrates/Lumenos, Inc. subrogation claim]. (*See*, Board Report at 5-7).

Mr. Burchinal fully admitted and expressed remorse for mishandling James and Penny Robinson's in a personal injury matter. Specifically, from the time he learned the statute of limitation had been missed in the summer of 2008 until he informed them in May 2010, Mr. Burchinal misled Robinsons to believe negotiations with the insurance company continued. (*Id.*) It is important when Mr. Burchinal sought to compensate them for their loss; he urged Mr. and Mrs. Robinson to consult a lawyer not associated with him because of his conflicts of interest in determining what to pay them. (*See*, Board Report at *9.*) Thereafter, he prepared a written agreement to pay the Robinsons the sum they determined to be the value of their case; $17,000, and to pay an outstanding MRI bill in the approximate amount of $1,200. (*Id.*)

It is significant that Respondent self-reported has misconduct and paid full restitution to those harmed by his misconduct. In May 2010, after he was confronted by one of his partners regarding the unpaid Riverside Methodist Hospital bill, Mr. Burchinal revealed all of his misconduct and expressed his willingness to self-report the conduct to the Office of Disciplinary, which he promptly did. (*See*, Board Report at *9.*) In May 2010, he paid the firm money he had borrowed from his father to pay in full the client creditor bills. He has since repaid his father. (*See*, Board Report at 7.) He also fully satisfied his payment arrangements with the Robinsons prior to the disciplinary hearing. (*Id.*)

III. ARGUMENT

PROPOSITION OF LAW NO. I: GIVEN THE SEVERAL STRONG MITIGATING FACTORS RESPONDENT PRESENTS, WHICH SUBSTANTIALLY OUTWEIGH THE AGGRAVATING FACTORS, A TWO-YEAR SUSPENSION OF RESPONDENT'S LICENSE WITH ONE YEAR STAYED IS TOO SEVERE.

While aggravating factors are present here, they are far outweighed by the strong mitigation evidence presented by Mr. Burchinal and the witnesses who testified on his behalf. In cases such as this, a longer license suspension should not be imposed, but rather, a shorter license suspension, with probation, conditions and monitoring the respondent's law practice to properly protect the public.

Here, as for aggravating factors, the panel correctly determined that Mr. Burchinal acted with a dishonest and selfish motive and engaged in a pattern of misconduct. And as additional considerations for imposing a more severe sanction, the board observed that Mr. Burchinal (1) has not been otherwise suffered consequences for his dishonest conduct; (2) is "dependent" on his treating social worker and OLAP for reassurance and support; and (3) delayed the Robinsons' receipt of the value of their tort claim. The board also unfairly held against him that he is in the midst of an unwanted divorce, living with his parents and works at his law practice from their home. From these considerations the board concluded Respondent's "future is uncertain," implying his license should be suspended for a longer period of time for these reasons.

It is axiomatic that the primary purpose of a disciplinary sanction is not to punish the offending lawyer, but to protect the public. *Disciplinary Counsel v. O'Neil*, 103 St.3d, 2004-Ohio-4704. When imposing sanctions for misconduct, the board and this Court consider all relevant factors, including the duties the lawyer violated, and the sanctions

imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743. Also, the board in recommending, and this Court in imposing sanctions, weigh evidence of the aggravating and mitigating factors listed in Section 10(b) of the Rules and Regulations Governing Procedure on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline ("BCGD Proc.Reg. "). *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251.

Here, unfortunately, the board seemed to overemphasize the aggravating factors and gave little weight to the substantial mitigation Mr. Burchinal and his witnesses presented, including (a) self-reporting and showing an extraordinary amount of remorse for his misconduct; (b) absence of a prior disciplinary record; (c) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (d) timely good faith effort to make restitution or rectify consequences of misconduct; and (e) a diagnosis of a chemical dependency or mental disability by a qualified health care professional. He also has submitted several character letters attesting to his good reputation, including a "subpoenaed statement" from Judge David Gormley before whom Respondent routinely appears. (Appendix B). Not only did the parties enter stipulations regarding many of these mitigating factors, the record is replete with testimony supporting the stipulations. In addition, Mr. Burchinal proved beyond a shadow of a doubt that his diagnosis of depression contributed to cause his misconduct and he continues his mental health treatment and his OLAP contract. His therapist, Ms. Fisher, gives him an excellent prognosis. It is also evident, but the board did not mention in its report, Mr. Burchinal

showed tremendous remorse in his dealings with OLAP and during his counseling sessions with Ms. Fisher.

In similar cases, in which a lawyer took settlement funds but failed to pay creditors, instead using the funds for personal expenses, where strong mitigation existed, this Court imposed sanctions which protect the public but acknowledge the strong mitigation. *See, e.g. Disciplinary Counsel v. Poley*, 94 Ohio St.3d 425, 2002-Ohio-1237 (eighteen-month stayed license suspension for routinely withholding and failing to pay over various client creditors, where incidents occurred when respondent was an actively drinking alcoholic); *Disciplinary Counsel v. Riek*, 125 Ohio St.3d 46, 2010-Ohio-1556 (lawyer received eighteen-month suspension, with twelve months stayed for personal use of a settlement check deposited into his trust account, and deceiving the client when confronted); *see also, Disciplinary Counsel v. Pfundstein*, 128 Ohio St.3d 61, 2010-Ohio-6150 (lawyer license suspended for twelve months, stayed with conditions, for misrepresenting status of the litigation to his client, among other things); *Dayton Bar Association v. Ellison*, 118 Ohio St.3d 128, 2008-Ohio-1808 (lawyer's license suspended for twelve months, stayed with conditions, for misleading client about the disposition in her case, among other things); *Disciplinary Counsel v. Grigsby*, 128 Ohio St. 3d 413, 2011-Ohio-1446 (lawyer's license suspended for eighteen-months, stayed, for misuse of employer's credit card). While the board cited two precedents cited by Relator to justify imposing a two-year license suspension with only one year stayed, the respondents in those cases did not possess the strong mitigation and excellent mental health prognosis that is demonstrated here. See,

Disciplinary Counsel v. Claflin, 107 Ohio St.3d 31, 2005-Ohio-5827; *Disciplinary Counsel v. Kraemer,* 126 Ohio St.3d 163, 2010-Ohio-3300.

Here, the board put too much emphasis on the two or so aggravating factors, and minimized the myriad of mitigating factors presented. Apart from the tremendous amount of remorse Mr. Burchinal showed for his misconduct, as discussed below, perhaps the strongest mitigation evidence presented by Respondent, which was not given enough emphasis was the strong testimony given by OLAP representative Megan Snyder, MSW, LISW and Judith Fisher, MSW, LISW.

PROPOSITION OF LAW NO. II: A TWO-YEAR LICENSE SUSPENSION WITH EIGHTEEN MONTHS CONDITIONALLY STAYED, WITH MONITORING BY A COLLEAGUE, IS MORE APPROPRIATE, GIVEN THE OVERWELMING EVIDENCE THAT RESPONDENT'S MENTAL IMPAIRMENT CONTRIBUTED TO CAUSE HIS MISCONDUCT.

Megan Snyder, MSW, LISW and Judith Fisher, MSW, LISW testified on Respondent's behalf, explaining their diagnoses at times relevant to Respondent's misconduct. They agree Respondent suffered from depression brought on primarily by his financial pressures and difficulties. Ms. Snyder opined that Respondent's depression is now under control, pointing to Respondent's four-year contract with OLAP as important support to assist in Respondent's progress. Likewise, Respondent has been counseling with Judith E. Fisher, MSW, LISW for in excess of one year, since June 10, 2010. Ms. Fisher gave a diagnosis of Respondent's adjustment disorder with mixed emotional features i.e. depression and anxiety during the period of his misconduct. (*See*, Respondent's Exhibit C, Appendix C.)

Both mental health professionals were impressed by the extraordinary remorse Mr. Burchinal has expressed for misusing the client funds intended to pay third-party client

creditors and covered up his mishandling of the tort case. Yet, they were impressed that he had the foresight to seek meaningful treatment for the depression he suffered from at the time of the incidents. In her testimony, his therapist, Ms. Fisher noted:

(By Mr. Mathews)

> Q. Do you have an opinion to a reasonable degree of professional probability as to whether there was a causal connection between the diagnosis that you gave a year ago and the conduct that happened back in 2007 through 2009?
>
> A. Yes…I think that in his case his emotions took over. He's normally a rational person. He has good judgment about most things; he has a good sense of propriety; he knows right from wrong; and he certainly has the capability of feeling remorse with no question. During that period of time when he was feeling so emotionally isolated, and trapped, and scared, depressed, anxious, his rationality was not there. He wasn't thinking clearly. He was thinking like a person does when they have a mental illness. And I'm absolutely certain that that's what was happening when he was making very bad judgment calls in his practice.
>
> Q. And you understand that those judgment calls not only related to neglecting matters, but also misleading clients and his employer.
>
> A. Uh-huh. I do.
>
> Q. What impact do you believe the diagnosis had on that sort of conduct, if any?
>
> A. Well, I think that because it's so out of character for him, in addition to the symptoms that were creating his bad judgment and bad behaviors, the guilt he was feeling was also overwhelming him, and so he would be obsessing about that and at the same time feeling unable to stop what he was doing because his life was going to totally fall apart. It was like almost as if he were just under the surface of water and he was just doing everything he could to try to get his head above water, and he just couldn't think clearly at those times, and he did -- It was almost like a knee-jerk reaction, like fight or flight. I'm just going to do what I have to do right now and I'll take care of it at some point in time. But he wasn't able to take care of it. It got worse.

Q. You've answered this in part, but just further explain. What do you believe the bases are for your opinion that the diagnosis was causally related to his conduct back in 2007 through 2009 in his law practice?

A. Well, I think that, again, the feelings of clinical depression, anxiety, obsessive thinking, agitation, fear got the better of him, and it impacted how -- what his filter was. When he was dealing in his work, all of this was sitting on his shoulders, so he had this filter that he was looking through that made everything unclear and murky, and he made choices that he now is very sorry that he did, but there was a direct connection between that.

Q. Okay. And what remorse has he expressed to you about his decisions during your sessions?

A. It always comes up. Not from my leading him in that direction, like "Do feel badly about this?" You know, he talks all the time about if he could only go back in time...because he knows that the decisions were poor ones, and he takes responsibility, though.

Q. Okay. Do you have an opinion to a reasonable degree of professional probability as to whether or not Mr. Burchinal, Chris, can return to the competent, ethical and professional practice of law under certain conditions?

A. I do. I really believe that he has come out from under the symptoms that were -- had taken over. I see him now as somebody who's alert and clear, and knows what he's about, and ambitious for his clients, and I see him really as an ethical, moral person in his right mind now who is working hard and taking care of his kids. You know, he has them half the time. It's a situation now where he's separated, and that was the worst thing he could have imagined would happen, and it has happened and, yet, even with that being what it is, losing his family, he's doing very well, and very competent, and I think that is the behavior that he will show for the rest of his legal days.

(Fisher Deposition, at 19-24) [Appendix C]. Mr. Burchinal continues treatment with Ms. Fisher regularly, and continues to be monitored by OLAP. He embraces the idea of having a colleague monitor his practice as a part of his sanction.

Because of the significant progress and rehabilitation he has made over the past year, the precedent of this Court supports the imposition of a sanction in the range of a two-year suspension of his license with eighteen-month stayed (including probation and conditions) as a proper sanction for the Mr. Burchinal's conduct.

Although the board does not acknowledge it, depression and anxiety can cause lawyer to engage in deceitful acts. According to Ms. Fisher, Mr. Burchinal engaged in uncharacteristically irrational thinking during the period of his misconduct. Importantly, she now states that, after many months of treatment, he no longer thinks or acts irrationally, that his prognosis is excellent, and that he "can be a competent, respected, and ethical attorney-at-law" at the present time.

IV. CONCLUSION

Based on this Court's precedent in cases where respondents present strong mitigation evidence, and based upon Respondent's and the witnesses' testimony, Mr. Burchinal urges the Court to reject the sanction recommended by the board and impose a two-year suspension of Respondent's license with eighteen-month months stayed (with conditions, including monitoring his practice) as a proper sanction for his conduct base on the following:

- To justify a longer license suspension, the board placed too much weight on aggravating factors and gave little weight to the strong mitigation evidence in making its recommendation. For instance, the board failed to appreciate the tremendous amount of remorse that Mr. Burchinal has shown for committing his misconduct, which was obvious during his own testimony, and is reflected in the testimony of his therapist, Ms. Fisher and Ms. Snyder of OLAP. Both mental health professionals agree that his extraordinary remorse reflects his conduct is not likely to be repeated.

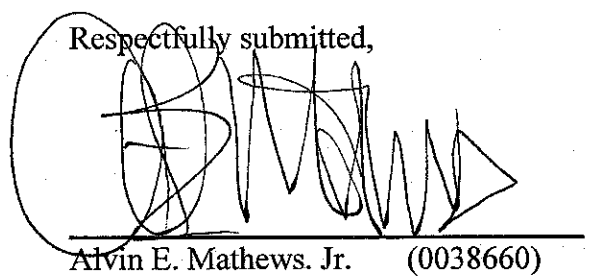
- In recommending a more severe sanction, the board did not appreciate and give significant weight to the uncontroverted testimony of a qualified mental health professional testimony that there is a causal connection between the diagnosed mental health condition and all of Mr. Burchinal's conduct, including that conduct which reflected on his honesty.

- The board did not credit Mr. Burchinal for significantly cutting his expenses, which led to his financial stress. Instead, the board seemed to hold against Mr. Burchinal that he had moved his residence and law practice into his parent's home, in part, to ensure payment of restitution to those harmed by his conduct and meet his financial obligations to his children. They seemed to justify a more severe sanction by remarking that his future is somehow uncertain because of these responsible actions.

- In cases such as this, with strong mitigation presented by a respondent, protection of the public is promoted with a shorter license suspension, and a longer probationary period, with monitoring of the respondent's law practice, and continued mental health counseling and other conditions.

For these, and other reasons outlined herein, Respondent Christopher J. Burchinal urges the Court to reject the sanction recommended by the board as too severe, and impose a two-year suspension of respondent's license with eighteen-month months stayed (with conditions, including monitoring his practice).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Respondent, Christopher Burchinal's Objection to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline*, was served, by Regular U.S. Mail, postage prepaid, this ___ day of September 2011, upon the following:

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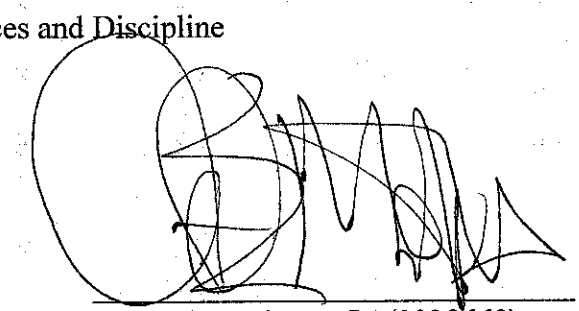

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ATTACHMENT NOT SCANNED