

ORIGINAL

IN THE SUPREME COURT OF OHIO

Cleveland Metropolitan Bar Association,

: Case No. 2011-1727

Relator,

v.

Mark Robert Pryatel,

Respondent.

Respondent's Motion to Supplement the Record

Richard C. Alkire (0024816)
Dean Nieding (0003532)

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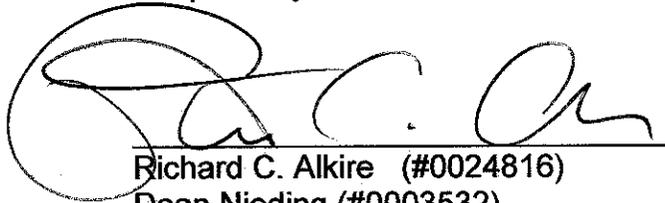
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MOTION

Respondent Mark R. Pryatel hereby moves this Honorable Court for an Order permitting him to supplement the record presently before this Honorable Court in connection with his discipline case. The reasons in support of this Motion are more fully set forth in the previously filed Respondent's Motion to Remand for Hearing and the Brief attached hereto and incorporated herein by reference.

Accordingly, for the foregoing reasons and those more fully set forth below, Respondent respectfully requests that this Honorable Court grant him the opportunity to supplement the record prior to this Court's imposition of a sanction in regard to his discipline case.

Respectfully submitted,



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BRIEF

I. Introduction and Pertinent Facts

Respondent did not defend himself in connection with the discipline case filed with the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court (hereinafter "the Board") in February 2011. He has recently moved this Honorable Court to remand this case so that he can provide testimony and documentary evidence to the Board in connection with the Rules of Professional Conduct violations alleged and mitigation.

In addition, he requests the opportunity to supplement the record with the results of his mental health evaluation with Megan Robertson of OLAP which will take place on December 8, 2011 and a psychological evaluation he is in the process of scheduling at this time.

In this regard, it is counsel's firm belief that Respondent's failure to defend himself in connection with the formal disciplinary matter directly resulted from the depression, stress and anxiety he was experiencing as his mother was dying this year. She had experienced a protracted illness over the previous two years and died on July 11, 2011.¹

While it is admitted that Respondent received certain correspondence and the Complaint in this matter² he did not perceive the necessity of defending himself,

¹ See Affidavit of Mark Pryatel at paras. 11-13, the original of which is attached to Respondent's Motion to Remand for Hearing. (Hereinafter, references to the Affidavit shall be cited as "Aff. at para. ____")

² The Board sent the Complaint to an incorrect address. See attached Ex. A showing that the Complaint was sent to 250 East 26 Street rather than 250 East 264 Street and to the wrong name, Pryatatel rather than Pryatel. However, it is not disputed that ultimately Respondent did receive the Complaint.

believing he previously had provided all available assistance to the Bar's investigator, Stuart Lippe.

To the best of Respondent's knowledge and after searching his residence at 250 East 264 Street, he never received the Motion for Entry of Default.³

As the Master Commissioner noted in the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, it was "puzzling that he initially participated in the proceedings at the Bar's investigation stage and given his lack of a prior record of discipline, but yet had not participated at all in the proceedings before the Board."⁴ Indeed, this is why the Master Commissioner recommended an indefinite suspension, rather than permanent disbarment which the Board ultimately recommended.

As it relates to Respondent's cooperation at the investigation phase of this matter, his depositions⁵ verify that he produced extensive documentation, including approximately 70 letters from his client and 43 responses to his client in the Troyan matter.⁶ Indeed, these letters are significant in that they verify Respondent's deposition testimony that Mr. Troyan realized he was being charged for the letters, that he was provided accountings and that he had been provided the Judicial Release Motion to which he did not object prior to the Court's ruling, which is at the root of the R. 3.3 violation found by the Board.⁷ However, none of these letters are referred to in

³ Aff. at para. 24.

⁴ Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio at para. 17. Hereinafter, references to the Findings of Fact shall be cited as "Report at para. ____."

⁵ Attached to the Bar's Motion for Entry of Default, Exs. E and F, respectively.

⁶ Pryatel Depo at 78-81 and 135-136.

⁷ Pryatel Depo at 138, 142-143, 152-153, 167-168, 178-179.

Relator's Motion for Entry of Default. Apparently, they were never provided to the Board. To the extent that these letters corroborate Respondent's testimony, they could very well serve to alter the conclusions of the Board that numerous Rules of Professional Conduct were violated by Respondent in connection with his representation of Mr. Troyan.

In addition, as it relates to the Martich grievance, proof that Mr. Martich, Sr. has been provided a full refund is significant in connection with the conclusions reached by the Board.

Finally, Respondent's signed Affidavit attached to his Motion to Remand provides additional facts and background pertinent to the disposition of this matter.

II. Law and Argument

A. This Court has Permitted Supplementation of the Record Under Exceptional Circumstances Which Apply to the Case at Bar.

As set forth in Respondent's Motion to Remand, this Honorable Court has permitted the record to be supplemented in the interest of justice in the past. This has occurred at the show-cause level at which the instant matter is situated. *See Cleveland Bar Assn. v. Witt* (1999), 85 Ohio St.3d 9, 706 N.E.2d 763; *Dayton Bar Assn. v. Stephan* (2006), 108 Ohio St.3d 327, 2006-Ohio-1063; *Disciplinary Counsel v. Carpino* (2005), 106 Ohio St.3d 1454, 2005-Ohio-3493; *Butler Cty. Bar Assn. v. Minamyler* (2011), 129 Ohio St.3d 433, 2011-Ohio-3642; *Butler Cty. Bar Assn. v. Portman* (2007), 116 Ohio St.3d 1450, 2007-Ohio-6843; *Disciplinary Counsel v. McShane* (2009), 121 Ohio St.3d 169, 2009-Ohio-746. In the *Carpino* and *Portman* cases, Respondents were permitted to provide additional mitigation evidence. However, in the instant

matter, Respondent requests not only to supplement the record in regard to his mental status at or about the time it became necessary to formally defend himself before the Board, but also to supplement the record on the substantive allegations brought against him in respect to both grievants.

Recently, this Honorable Court permitted supplementation of the record in regard to a Respondent's health condition, even after Oral Argument had occurred. *Butler Cty. Bar Assn. v. Minamyer* (2011), 129 Ohio St.3d 433, 2011-Ohio-3642 (The remand resulted in evidence that Respondent's mental-health conditions played a significant role in his failure to timely respond to Relator's Complaint. However, the evidence was insufficient to warrant a second remand or alter the Board's Findings of Fact and misconduct.) See also, *Disciplinary Counsel v. Johnson* (2011), 128 Ohio St.3d 1404, 2011-Ohio-807 (The matter was remanded for the consideration of mitigation evidence.)

Here, although Respondent cooperated with the Bar and provided hundreds of pages of records, such material has not become part of the record. The letters from Mr. Troyan and responses from the Respondent paint a picture far different than the one presented to this Honorable Court.

Further, significant mitigation evidence, including the full refund of Mr. Martich, Sr.'s payment and various character letters from lawyers familiar with Respondent are absent from the record.⁸

Finally, the reasons for Respondent's failure to defend himself during the formal proceedings supports the remand of this matter for a full hearing on the merits.

⁸ This material has been attached as exhibits to Respondent's Motion to Remand for Hearing as part of the Appendix to Respondent's Motion to Remand (character letters, Exs. 2, 3 and 4).

In this regard, it is expected that information will be available to this Honorable Court from OLAP's Megan Robertson after her evaluation of Respondent on December 8, 2011. In addition, Respondent is also seeking a private psychological evaluation.

As it relates to affording a Respondent an opportunity to file an Answer out-of-rule and defend himself before the Board, it has never been the Board's practice to deny a Respondent an opportunity to defend himself before its Findings of Fact are provided to the Court, even after the matter has been pending for some time. See, e.g., Disciplinary Counsel v. Lape (2011), 2011-Ohio-5757 at para. 2. While Respondent attempted to provide an explanation to the Master Commissioner by letter date October 21, 2011, by then it was too late.⁹

Because the Board has increased the Master Commissioner's recommendation of an indefinite suspension to a permanent disbarment, this Honorable Court is respectfully urged to allow the record to be supplemented so that Respondent, who heretofore had never been disciplined during the course of his career which began in 1983, can provide some explanation for his conduct. Indeed, the purpose of the disciplinary system is not to punish lawyers but to protect the public. The Master Commissioner's recommendation accomplishes this result.¹⁰

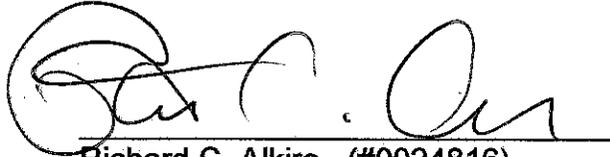
⁹ Aff. at paras. 25-26, Ex. B

¹⁰ While an indefinite suspension would serve to protect the public here, it is respectfully urged that a hearing on the merits of this matter will demonstrate that that sanction is far too harsh given the conduct underlying the two grievances brought against the Respondent.

III. Conclusion

Accordingly, for the foregoing reasons, Respondent respectfully request that this Honorable Court grant him the opportunity to supplement the record before this Honorable Court reaches its decision concerning a sanction in this matter.

Respectfully submitted,



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Certificate of Service

A copy of the foregoing Respondent's Motion to Supplement the Record has been mailed, postage prepaid, this 28th day of November, 2011 to:

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