

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	CASE NO. 2011- 2026
	:	
Relator,	:	
	:	
vs.	:	
	:	
Marc Edward Dann.	:	
	:	
Respondent.	:	

RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS TO THE BOARD REPORT

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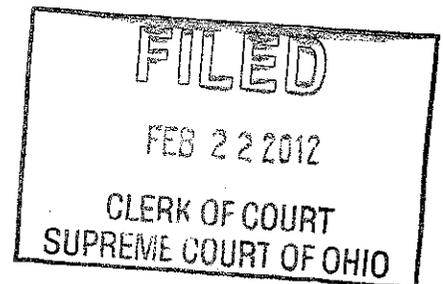


TABLE OF CONTENTS

	<u>PAGE</u>
Table of Authorities	<i>ii</i>
Statement of Facts	1
Relator's Answer to Respondent's Objections	4
I. THE BOARD CONSIDERED THE MITIGATING FACTORS IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW	4
II. THE BOARD WAS JUSTIFIED IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW	5
III. RESPONDENT'S STATUS AS ATTORNEY GENERAL WAS ONE OF SEVERAL FACTORS THE BOARD RELIED UPON IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW	10
Conclusion	13
Certificate of Service	14

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<i>Cleveland Bar Assn. v. Stein</i> (1972), 29 Ohio St.2d 77, 58 O.O.2d 151, 287 N.E.3d 6670	5
<i>Committee on Legal Ethics of West Virginia State Bar v. Roark</i> (1989), 181 W.Va. 260, 382 S.E.2d 313, 318	10
<i>Disciplinary Counsel v. Ault</i> , 110 Ohio St.3d 207, 2006-Ohio-4247, 852 N.E.2d 727	12
<i>Disciplinary Counsel v. Carroll</i> , 106 Ohio St.3d 84, 2005-Ohio-3805, 831 N.E. 2d 1000	9
<i>Disciplinary Counsel v. Connor</i> , 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235	12
<i>Disciplinary Counsel v. Forbes</i> , 122 Ohio St.3d 171, 2009-Ohio-2623, 909 N.E.2d 629	5, 8
<i>Disciplinary Counsel v. Gaul</i> , 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28	12
<i>Disciplinary Counsel v. Kaup</i> , 102 Ohio St.3d 29, 2004-Ohio-1525, 806 N.E.2d 513	12
<i>Disciplinary Counsel v. O'Neill</i> , 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286	10
<i>Disciplinary Counsel v. Russo</i> , 124 Ohio St.3d 437, 2010-Ohio-605, 923 N.E.2d 144	11
<i>Disciplinary Counsel v. Taft</i> , 112 Ohio St.3d 155, 2006-Ohio-6525	6
<i>In Re Complaint Against Resnick</i> , 108 Ohio St.3d 160, 2005-Ohio-6800, 842 N.E.2d 4	12

CASES

PAGE(S)

In the Matter of Raab (2003), 100 N.Y.2d 305, 763 N.Y.S.2d 213 12

Lawyer Disciplinary Bd. v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 10, 12

Mahoning County Bar Assn. v. Dann, 101 Ohio St.3d 266,
2004-Ohio-716, 804 N.E.2d 428 12

RULE

PAGES

BCGD Proc.Reg. §10(B)(1)(a) 5, 9

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**RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS TO THE BOARD
REPORT**

Now comes relator, disciplinary Counsel, and hereby submits this answer to respondent’s objections.

STATEMENT OF FACTS

On January 8, 2007, respondent, Marc Dann, was sworn in as Ohio’s Attorney General. [Report of Board of Commissioners on Grievances and Discipline, hereinafter referred to as the “Report,” ¶1] On May 2, 2008 the Ohio Ethics Commission (OEC) initiated an investigation into respondent’s conduct as Attorney General. [Stipulations, “Stip” ¶4]. 12 days later, on May 14, 2008, respondent resigned his position as Attorney General. Report at ¶1.

Despite respondent’s resignation, the OEC investigation continued, culminating in the filing of a two-count criminal complaint against respondent on May 7, 2010 in the Franklin County Municipal Court, Case No. 2010-CRB-9998-1,2. Stip. ¶6. Respondent was charged with one count of R.C. 2921.43(A)(1) (Providing Improper Supplemental Compensation), which

states, "No public servant shall knowingly solicit or accept, and no person shall knowingly promise or give to a public servant, either of the following:

- (1) Any compensation, other than as allowed by divisions (G), (H), and (I) of section 102.03 of the Revised Code or other provisions of law, to perform the public servant's official duties, to perform any other act or service in the public servant's public capacity, for the general performance of the duties of the public servant's public office or public employment, or as a supplement to the public servant's public compensation;
- (2) Additional or greater fees or costs than are allowed by law to perform the public servant's official duties.

Respondent was also charged with one count of violating R.C. §102.02(D) (Filing False Statements), which states, "No person shall knowingly file a false statement that is required to be filed under this section." Both charges were first degree misdemeanors. Report at ¶8.

With respect to Count One (Providing Improper Supplemental Compensation) of the criminal complaint, respondent entered an Alford plea and was found guilty. Report at ¶8. The facts underlying respondent's conviction were as follows:

- Respondent hired Anthony Gutierrez as the Director of General Services at the OAG's office.
- Between February 5, 2007 and May 2, 2008, respondent, through the "Dann for Ohio Committee," provided Anthony Gutierrez, a public servant, free rental housing and associated expenses totaling at least \$7,178.
- In addition to the rent and living expenses, on or about May 18, 2007, respondent authorized the "Marc Dann OAG Transition Corp." to provide a \$5,000 interest-free loan to Gutierrez.
- Respondent hired Leo Jennings as the Communications Director at the OAG's office.

- Between March 5, 2007 and May 2, 2008, respondent, via payments generated through the “Dann for Ohio Committee” and/or the “Marc Dann OAG Transition Corp.” provided Leo Jennings, a public servant, free rental housing and associated expenses that were either paid through direct billings from a hotel, or via a \$3,000 per month “consulting fee” paid to Jennings’ business, Progressive Solutions Group (PSG), for the express purpose of compensating Jennings for rent and associated living expenses while employed by the OAG’s office. The total of payments exceeded \$30,000 during Jennings’ tenure.

Report at ¶¶12-15.

With respect to Count Two of the criminal complaint (Filing False Statements), respondent pled guilty. Id. at ¶8. The facts underlying respondent’s guilty plea to Count Two were as follows:

- As a public official, respondent was required to file an annual Financial Disclosure Statement (FDS) with the Ohio Elections Commission.
- On or about April 26, 2007, respondent filed his FDS for the calendar year 2006.
- Respondent failed to disclose that during calendar year 2006 that the “Dann for Ohio Committee” was a source of reimbursement, despite the fact that the “Dann for Ohio Committee” issued at least 15 checks totaling \$17,540.86 directly to respondent. The memo lines on the checks reflected that most of the amounts were reimbursements for hotel rooms, parking, mileage, food, supplies, insurance for the campaign vehicle, and other similar, related expenses.
- On or about April 15, 2008, respondent filed his FDS for the calendar year 2007; however, respondent failed to disclose information relating to respondent’s attendance at a Democratic Attorney General Association (DAGA) seminar in Scottsdale, AZ .
- Between January 26th and 30th, 2007, respondent travelled by private jet to the DAGA seminar in Scottsdale, AZ and back.
- Respondent was accompanied by his two minor children, Gutierrez’ two minor children, and two other unidentified individuals.
- The private jet was owned by Imaginaire Private Jet Charter (“Imaginaire”).
- BFB Aircraft, LLC leased the private jet from Imaginaire for the purpose of transporting Dann and his companions from Cleveland, OH to the DAGA seminar in Scottsdale, AZ and back.

- BFB Aircraft, LLC is affiliated with Ben Barnes Group, LP, founded by Ben Barnes, who contributed \$10,000 to Dann's campaign for Ohio Attorney General.
- BFB Aircraft, LLC paid Imaginaire \$20,803.52, which represented the cost of the round trip; however, respondent failed to disclose on his 2007 FDS that BFB Aircraft, LLC (or any of its affiliates) was a Source of Travel Expense, Source of Gifts over \$75, or Source of Meals, Food, or Beverages over \$100 either for himself, his children, Gutierrez' children, or the other two unidentified travelers.

[Report at ¶¶16-18; Stip. ¶12]

Respondent was sentenced to a \$500 fine on Count One and a \$500 fine on Count Two and ordered to complete 500 hours of community service by June 30, 2012. Report at ¶18.

Respondent paid his fines and completed his community service. Stip. ¶14.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. THE BOARD CONSIDERED THE MITIGATING FACTORS IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW

In his objections, respondent erroneously asserts that the panel failed to give ample consideration to respondent's mitigation evidence. To the contrary, the board's report credits respondent for his (1) Full and free disclosure to the Board; (2) Cooperative attitude toward the proceeding; (3) Good character and reputation; and, (4) Imposition of other penalties and sanctions. Report, ¶22. Further, throughout its report, the board elaborated on the facts supporting respondent's mitigation. For instance, regarding the imposition of other penalties and sanctions, the board found that respondent suffered two misdemeanor criminal convictions, paid fines, resigned his position as Attorney General, and is barred from holding public office for seven years. *Id.* at ¶¶8, 33. The board noted that respondent's pro bono work continued after he

completed the mandatory portion as ordered by the criminal court and that his clients, two of whom testified at the disciplinary hearing, hold him in high regard. *Id.* at ¶23. In arriving at its recommendation, the board considered each of the aforementioned mitigating factors, but it also considered respondent’s recent disciplinary history—an aggravating factor under BCGD Proc. Reg. §10(B)(1)(a)—along with his testimony during the disciplinary hearing in which he attempted to “explain away” his misconduct. *Id.* at ¶¶21, 33. Taking into consideration all the factors, the board was justified in recommending an actual six-month suspension from the practice of law.

II. THE BOARD WAS JUSTIFIED IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW.

One of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard. The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach. He should refrain from any illegal conduct. Anything short of this lessens the public confidence in the legal profession—because obedience to the law exemplifies respect for the law.

Disciplinary Counsel v. Forbes, 122 Ohio St.3d 171, 2009-Ohio-2623, 909 N.E.2d 629, citing *Cleveland Bar Assn. v. Stein* (1972), 29 Ohio St.2d 77, 81, 58 O.O.2d 151, 287 N.E.3d 6670.

Never before has the chief legal officer of the state of Ohio been subject to discipline. As Ohio’s Attorney General, respondent was responsible for protecting the public; consequently, it is imperative that the citizens of Ohio have the utmost confidence in the integrity of its chief legal officer.

The panel cannot help but wonder at the harm to the reputation of the legal profession and to the confidence of the public in the office of Attorney General when the chief law officer in the state has committed ethical errors and tries to explain them away as Respondent has.

Report at ¶33.

Citing respondent's inability to accept complete responsibility for his misdeeds while serving as Ohio's Attorney General, the board recommended an actual suspension from the practice of law. Report at ¶34.

Before the disciplinary hearing, relator agreed to recommend a six-month, stayed suspension of respondent's license to practice law; however, as part of the agreed stipulations, relator expressly reserved the right to amend its recommendation based upon respondent's testimony at the disciplinary hearing. *Id.* at ¶22. Like the board, relator was troubled by respondent's inability to accept complete responsibility for his misconduct. Tr. p. 111. Consequently, after respondent testified, relator increased its recommendation to a one year, stayed suspension. *Id.* While relator acknowledges that its recommendation differs from the board's, it can find no basis to challenge the board's recommendation.

In considering the sanction, the board relied upon three disciplinary cases involving public officials; however, in two of those cases, the misconduct in question bore no relation to the practice of law. For instance, In *Disciplinary Counsel v. Taft*, 112 Ohio St.3d 155, 2006-Ohio-6525, this Court publically reprimanded former Ohio governor, Robert Taft, for filing false financial disclosure statements. Taft failed to disclose the benefactors of 45 golf outings and other gifts totaling \$5,682.26 over a six-year period while serving as Ohio's governor. During this time period, Taft was not engaged in the practice of law. In arriving at a public reprimand, the Court noted that "the board thus attributed respondent's nondisclosures to oversight, rather than to a conscious effort to conceal certain relationships." *Id.* at ¶11.

In several respects, respondent's misconduct was much more egregious than the misconduct in *Taft*. First, respondent submitted false financial disclosure statements while serving as the state's chief law enforcement officer. Unlike former governor Taft, respondent

was actively engaged in the practice of law when he committed his misconduct. Second, while Taft's omissions totaled \$5,682.26 over a six-year period, Respondent's omissions in 2006 alone totaled \$17,540.86. Report at ¶16. Further, in 2007, respondent failed to disclose BFD Aircraft as the source of funds used to travel by private jet to the Democratic Attorneys General Association (DAGA) convention in Tuscon, Arizona. BFD Aircraft is affiliated with Ben Barnes Group, LP, which was found by Ben Barnes, who had made a \$10,000 contribution to respondent's campaign for Attorney General. Report at ¶18. Third, unlike the misconduct in *Taft*, respondent's misconduct far exceed the filing of false financial disclosure statements. Respondent's misconduct also included the payment of improper compensation to two members of respondent's staff, Anthony Gutierrez and Leo Jennings. Id. at ¶12.

While serving as the state's chief law enforcement officer, respondent, through the "Marc Dann OAG Transition Corp." provided Gutierrez a \$5,000 interest free loan and free rental housing and associated expenses to Gutierrez and Jennings totaling at least \$7,178. Id. Thereafter, respondent, through the "Dann for Ohio Committee," paid Jennings' business, Progressive Solutions Group, a \$3,000 monthly consulting fee totaling over \$30,000, which was intended to compensate Jennings for rent and associated living expenses. Id. at ¶14.

Given respondent's position as the state's chief legal officer, the underhanded manner in which he sought to enhance his employees' state salaries created the appearance that respondent was above reproach. As respondent noted, he acted with "arrogance" and "hubris." Id. at ¶25.

At the disciplinary hearing, respondent's admitted that he was acutely aware of the problems associated with supplementing a public employee's state salary. "We were operating in a gray area. I knew we were operating in a gray area, even though I thought we might have been right, that was—that in the position that I was in, that was the wrong decision to make and I take

full responsibility for it.” Tr. p. 66. Despite stating that he accepted full responsibility, respondent tried to minimize his involvement.

Given the fact that I shouldn’t have relied, first of all, on hearsay representation that we had obtained legal advice about it, which of course turned out not to be true, from a nonlawyer to boot. So right there, I should have picked up the phone at a minimum and called that lawyer and had built-out conversation with him about the appropriateness of what they were considering doing. And to the extent—again, to the extent that I had a role in making the decision. (Emphasis added).

Id. at 65.

The depth and scope of respondent’s misconduct distinguishes this case from *Taft*. Further, factoring in respondent’s attempt to explain away his misconduct coupled with his previous discipline, the board was justified in recommending a six month suspension from the practice of law.

Attorney George Forbes was appointed to serve on the board of the Bureau of Worker’s Compensation and the oversight commission’s investment committee. *Disciplinary Counsel v. Forbes*, 122 Ohio St.3d 171, 2009-Ohio-2623, 909 N.E.2d. 629. Like former governor Taft, Forbes’ service on the BWC board was completely unrelated to the practice of law. Forbes failed to disclose sources of meal and travel expenses and the creditors to whom he owed more than \$1,000. In addition the failure to disclose, Forbes was also charged and convicted of two violations of R.C. 102.03(E), which “prohibits any public official or employee from soliciting or accepting ‘anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.’” Id. at ¶11. At the time Forbes received gifts in the form of meals and travel, the sources of those gifts were doing or seeking to do business with the BWC; consequently, Forbes was charged with the R.C. 102.03(E) violations. Id. Despite being convicted of the R.C. 102.03(E) charges in a criminal

court, Forbes attempted to explain away the convictions while testifying at the disciplinary hearing, resulting in this Court's finding that Forbes refused to acknowledge the wrongful nature of his misconduct. *Id.* at ¶23. Despite the presence of several mitigating factors, the Court imposed a six-month stayed suspension upon attorney Forbes. *Id.*

Like the lawyer in *Forbes*, respondent attempted to minimize his involvement in the misconduct despite being convicted of the offenses charged. (See Report, ¶27). But what separates *Forbes* from this case is that respondent has been previously disciplined—an aggravating factor under BCGD Proc. Reg. 10(B)(1)(a). When one factors in the misconduct and the aggravating factors, an actual suspension is in line with this Court's precedent.

In *Disciplinary Counsel v. Carroll*, 106 Ohio St.3d 84, 2005-Ohio-3805, 831 N.E.2d 1000, this Court imposed a six-month stayed suspension after it was determined that Attorney Gregory Carroll submitted inaccurate timesheets while serving as the executive director of the Ohio State Barber Board. Unlike the lawyers in *Taft* and *Forbes*, a portion of Carroll's inaccurate entries related to his private law practice. At times, Carroll submitted timesheets that reflected a full workday at the barber board, despite the fact that Carroll had spent part of the day attending to his private law practice. *Id.* at ¶4. In adopting the board's findings, the Court held that "[Carroll's] record-keeping was deficient, but he was not attempting to receive pay for work he did not perform..." *Id.* at ¶10. In addition to a misdemeanor conviction, Carroll resigned his position as the executive director of the barber board and paid \$5,115 in restitution to the state of Ohio. *Id.* at ¶6. In a 5-2 decision, the Court specifically noted the absence of any aggravating factors. *Id.* at ¶12.

Unlike the lawyer in *Carroll*, at the time of his misconduct, respondent was engaged in the full-time practice of law as the state's highest ranking lawyer. The citizens of Ohio elected

respondent as its chief legal officer. His illegal conduct tarnished the office's reputation. His attempts to "explain away" his misconduct, coupled with his previous discipline, justify an actual suspension from the practice of law.

III. RESPONDENT'S STATUS AS ATTORNEY GENERAL WAS ONE OF SEVERAL FACTORS THE BOARD RELIED UPON IN RECOMMENDING A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW.

In his objections, respondent correctly asserts, "The Panel and the Board's recognition that the state of Ohio's chief law enforcement officer should be held to a higher standard is correct." Respondent's Objections, p. 12. "Judges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust* * *"
Disciplinary Counsel v. O'Neill, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, ¶157, quoting Shaman, Lubet & Alfani, *Judicial Conduct and Ethics* (3d Ed.2000) 2. Although not a judge, it is undisputed that respondent—as the state's elected chief legal officer—held a position of great public trust. "Lawyer insensitivity to ethical impropriety [or perceived ethical impropriety] is one of the primary sources of this lack of public confidence in the Bar. The problem is exacerbated when ethical violations are committed by an attorney holding an important public office." *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, citing *Committee on Legal Ethics of West Virginia State Bar v. Roark* (1989), 181 W.Va. 260, 265, 382 S.E.2d 313, 318. Even respondent recognized the importance of his status as a public official, "Again, because I had this important position, other than the Supreme Court, of being the most recognizable lawyer in the State of Ohio or recognizable public official lawyer in the State of Ohio at that time. I had a duty to take this to a higher level." Tr. p. 65.

Without question, the board considered respondent's very visible and public position as Attorney General in recommending a sanction. However, respondent's insinuation that the board's recommendation of a six month actual suspension was based solely upon the fact that respondent committed the misconduct while serving as Attorney General is without merit. Throughout its report, the board mentioned several mitigating factors including:

- Full and free disclosure to the Board;
- Cooperative attitude toward [the disciplinary] proceedings;
- Good character and reputation evidence;
- Imposition of other penalties and sanctions.

Report at ¶20. In fact, the board noted that in addition to respondent's criminal convictions, respondent resigned his position as Attorney General and is barred from holding public office for seven years. *Id.* at ¶33.

In addition to the mitigation, the board also considered respondent's previous discipline—an aggravating factor, and his attempt at the disciplinary hearing to explain away his misconduct. *Id.* at ¶¶ 21, 33. Taking into account the nature of the misconduct, respondent's role as Attorney General, and the aggravation and mitigation, the board's recommendation was justified and appropriate.

Respondent's reliance on cases in which judges and public officials received reprimands or stayed suspensions is misplaced. Most of the cases cited by respondent involve judges whose sanctions were tempered due to a chemical dependency—a mitigating factor not present in the case at bar. (See *Disciplinary Counsel v. Russo*, 124 Ohio St.3d 437, 2010-Ohio-605, 923 N.E.2d 144, in which a judge received a one-year, stayed suspension after having been convicted of two counts of misdemeanor disorderly conduct stemming from substance abuse;

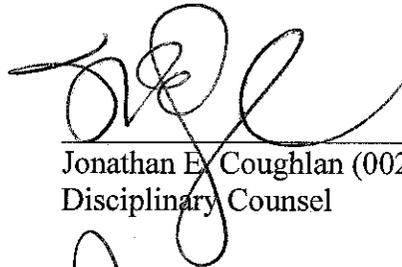
Disciplinary Counsel v. Ault, 110 Ohio St.3d 207, 2006-Ohio-4247, 852 N.E.2d 727, two year, stayed suspension for judge who was convicted of obtaining prescription painkillers by deception based upon judge's addiction and subsequent sobriety; *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235, six-month stayed suspension for judge who was previously reprimanded and convicted of DUI stemming from alcohol addiction; *In Re Complaint Against Resnick*, 108 Ohio St.3d 160, 2005-Ohio-6800, 842 N.E.2d 4, former Supreme Court Justice publically reprimanded for DUI conviction stemming from alcohol dependency).

Other cases relied upon by respondent to support a stayed suspension are easily distinguishable in that none of the cases involve a lawyer or judge with previous discipline. (See *Disciplinary Counsel v. Kaup*, 102 Ohio St.3d 29, 2004-Ohio-1525, 806 N.E.2d 513, judicial candidate received six-month, stayed suspension for using deceptive and misleading campaign literature; *Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28, judge received a one-year, stayed suspension for engaging in conduct that undermined the public's confidence in the integrity of the judiciary; *In the Matter of Raab* (2003), 100 N.Y.2d 305, 763 N.Y.S.2d 213, judge censured for improper campaign activity and intimidating comments directed to an attorney; *McGraw*, supra, 194 W.Va. 788, 461 S.E.2d 850, Attorney General of the state of West Virginia publically reprimanded for breach of confidentiality and conflict of interest). Unlike the lawyers and judges in the aforementioned cases, respondent presents before this Court with a recent disciplinary history. (See *Mahoning County Bar Assn. v. Dann*, 101 Ohio St.3d 266, 2004-Ohio-716, 804 N.E.2d 428). Given the depth of respondent's misconduct, coupled with his previous discipline, the board's recommendation of an actual suspension was justified and appropriate.

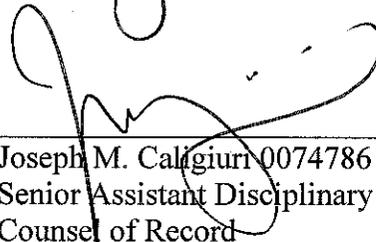
CONCLUSION

Troubled by respondent's testimony during the disciplinary hearing in which he attempted to minimize his involvement in the misconduct, relator increased its recommendation from a six-month, stayed suspension to a one-year, stayed suspension. The board opted to recommend an actual six-month suspension from the practice of law. At the very least, respondent's misconduct warrants a one-year, stayed suspension; however, relator fully supports the board's recommendation.

Respectfully submitted,



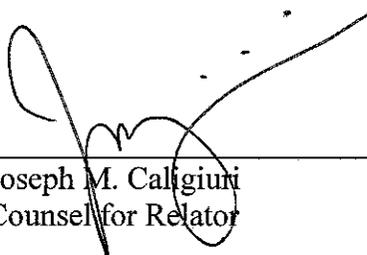
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Alvin Earl Mathews, Esq., of Counsel, Bricker & Eckler LLP, 100 S Third St., Columbus, OH 43215, and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 this 22nd day of February, 2012.



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