
IN THE
SUPREME COURT OF OHIO

Cleveland Metropolitan Bar Association :
: *Relator* :
: :
v. : CaseNo. 2012-1340
: :
Gary Ray Axner :
: *Respondent* :

MOTION FOR REMAND AND TO SUPPLEMENT THE RECORD

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FILED
SEP 24 2012
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION FOR REMAND AND TO SUPPLEMENT THE RECORD

Now comes Respondent Gary R. Axner ("Respondent"), and respectfully requests that this matter be remanded to the Board of Commissioners on Grievances and Discipline for the Supreme Court of Ohio ("Board") so that further evidence can be obtained and considered to supplement the Record of this proceeding, pursuant to S. Ct. R. XIV, Section 4 and Gov. Bar. R. V(11)(D), which, if not corrected, may subject Respondent, soon to be 66 years of age, with an unblemished 41 year legal career, to suffer the consequences of a harsh sanction to indefinitely suspend Respondent from the practice of law recommended by the Board of Commissioners on Grievances and Discipline ("Board").

1. Current Status

On August 6, 2012 the Board filed Findings of Fact, Conclusions of Law and Recommendation ("Recommendation") to impose a sanction of an indefinite suspension from the practice of law by Respondent, arising from a five count amended complaint filed by the Cleveland Metropolitan Bar Association ("Relator"), which was heard on February 27 and 28, 2012 in Cleveland. Shortly thereafter, Respondent's counsel filed a motion for leave to withdraw as counsel, combined with leave for Respondent to file objections to the Board's Recommendation on or before September 24, 2012. The motion by Respondent's former counsel was based upon a clear and unequivocal representation that Relator did not oppose the enlargement of time, which, implicitly if not explicitly, was a stipulation or consent for that purpose. Based upon that understanding, Respondent agreed to his counsel's withdrawal.

Since the agreed nature of the stipulation or consent for extension of time to September 24, 2012, however, was apparently not clearly articulated, this Court granted

Respondent's counsel leave to withdraw; but, only allowed an enlargement of time to file objections to the Recommendation on or before September 14, 2012. Upon becoming aware of the new deadline, Respondent sought an additional extension of time from this Court on September 14, 2012, only to learn that his motion would not be accepted for filing. A copy of Respondent's cover page for his attempted filing of the motion for additional extension of time is attached as Exhibit "A", and was endorsed by the Clerk of Court as received on September 14, 2012.

2. Necessity to Supplement the Record

Under these compelling circumstances, with the prospect of an indefinite suspension from the practice of law, a noble profession which is ingrained in his family, and no longer having the benefit of counsel, Respondent sought to find some explanation from the record of the proceedings in this case of how a 41 year legal career could effectively be brought to an end.

After close scrutiny of the record of this case, it finally became apparent to Respondent that a material and relevant part of Respondent's physical and medical history was not included in the proceedings before the Board. Among these are the facts that Respondent suffered a **blunt force trauma** injury to his brain in June of 2010, resulting in being hospitalized for a period of one and immediately thereafter three days; and, subsequently, suffered a similar injury again, in October of 2010. In short, Respondent suffered from two brain concussions within a four month period as a result of these episodes, which drained Respondent of time and energy to not only attend to his law practice, but to actively participate in Relator's investigation, as well as provide more cogent testimony before the Board, which proved to be highly detrimental to Respondent.

It has only been in recent months that Respondent has felt fully recovered from this trauma; and, Respondent sincerely believes that he is capable of continuing to be a competent and productive member of the legal profession, notwithstanding the Recommendation of the Board. Thus, the development of additional facts and evidence in defense of Relator's complaint would clearly assist in the development of facts that would establish that material findings of fact and conclusions of law made by the Board are substantially negated or explained by Respondent's health issues over the past 28 months. Moreover, the complete nature and extent of Respondent's previous impairment arising from alcohol dependency and a major depressive disorder, and his subsequent substantial progress to achieving a full recovery was also not fully developed during the proceedings before the Board.

3. This Court's Precedents Support a Remand and Supplement of the Record

As an initial matter, Respondent acknowledges that it is a rare event for this Court to allow supplements to the record and remand of a matter back to the Board. Indeed, this Court has stated that it is only upon a showing of exceptional circumstances that it will do so. *Cleveland Bar Assn. v. Witt*, 1999 Ohio 198; *Dayton Bar Assn. v. Stephan*, 2005 Ohio 1063. Respondent notes, however, that in exceptional circumstances, this Court has allowed the record to be supplemented at the show cause level and has remanded matters back to the Board for further development of a case. *Disciplinary Counsel v. Carpino* (2005), 106 Ohio St. 3d 1454; *Butler Cty. Bar Assn., et al. v. Portman* (2007), 116 Ohio St. 3d 1450. In both *Carpino*, and *Portman*, this Court allowed the respondent to supplement the record and further remanded the cases to the Board to hear additional mitigation evidence presented.

As in *Carpino* and *Portman*, Respondent likewise requests that this Court remand this matter back to the Board in light of his major depression and avoidance disorder, which caused much of the misconduct in this case, and subsequent brain concussions which exacerbated the situation, including Respondent's inability to fully and completely cooperate with Relator during its investigation. By doing so, this Court would allow the Board to consider and evaluate additional evidence which would more fully explain Respondent's conduct over the past several years and mitigate the severity of the recommended sanction. Indeed, Respondent's circumstances are profoundly similar to those in which this Honorable Court has granted a remand in previous cases.

In *Carpino*, Mr. Carpino, a former U.S. Air Force Captain and 41-year practitioner before the Courts of Ohio, engaged in admittedly odd behavior as a result of his long-standing diagnosis of bipolar disorder that resulted in disciplinary proceedings being instituted against him to obtain a mental illness suspension. Admittedly, Mr. Carpino appeared in his case prior to the issuance of the Order to Show Cause, albeit *pro se*. The Board's psychiatrist diagnosed Mr. Carpino as suffering from bipolar disorder, an existing mental illness, and a disorder of mood with gross impairment of judgment. Because he was represented by counsel only long enough to submit an Amended Answer and then again appeared *pro se*, this Court appointed counsel for Mr. Carpino, permitted him to file a Supplemental Memorandum in response to the Order to Show Cause, granted a Motion to Supplement the Record and remanded the matter back to the Board to consider additional evidence. *Carpino*, 106 OhioSt.3dat1454.

Although Respondent does not suffer from bipolar disorder, he does suffer from a

major depressive and avoidance disorder, which has not only prevented him from acting in an appropriate manner when faced with disciplinary charges; but, has been responsible for his recent conduct in client and other relationships, compounded by his alcohol dependency. Although Respondent has not undergone a psychiatric examination ordered by the Board, he has voluntarily sought private evaluations. Additionally, he has sought the service of OLAP, and those of a chemical dependency counselor, Marilyn Compton, who confirmed Respondent's alcohol dependency during the hearing before the Board.

For more than four decades Respondent has been a very well respected and very successful attorney. Unfortunately, Respondent has experienced personal, physical and mental health hardships that make his behavior in failing to address the Bar's disciplinary allegations, and avoidance of client responsibilities understandable, although not excusable. Accordingly, as in *Carpino*, Respondent should be allowed to fully demonstrate that his alcohol dependency, combined with his physical and mental condition, impaired his ability to assist Relator with its investigation in this disciplinary action, as well as conducting his law practice on the high level he achieved over more than four decades. Under these circumstances, this matter should be remanded back to the Board for the development of additional facts and evidence to enable this Court to fully consider Respondent's conduct and history, and reach an appropriate and just determination in the disposition of the only disciplinary action brought against Respondent in more than 40 years of practicing law. .

More recently, in *Portman*, this Honorable Court reached a similar conclusion, remanding the matter back to the Board for further hearing. In *Portman*, circumstances not unlike those in Respondent's case, included Mr. Portman neglecting his client's cases by (i) failing to represent his client in an auto accident; (ii) failing to represent two clients in judicial

release proceedings; (iii) failing to represent an indigent criminal defendant whose case he was appointed to defend; and (iv) failing to cooperate in Disciplinary Counsel's investigation. Mr. Portman did not respond to Disciplinary Counsel's five count complaint and a Master Commissioner recommended permanent disbarment. After this Honorable Court issued its Order to Show Cause, Mr. Portman, through counsel, filed Objections with a Motion to Supplement the Record. This Honorable Court granted Mr. Portman's motion to supplement the record and remanded the matter back to the Board to consider the material that Mr. Portman raised in mitigation in his supplemental materials. *Portman, 116 OhioSt.3dat1450.*

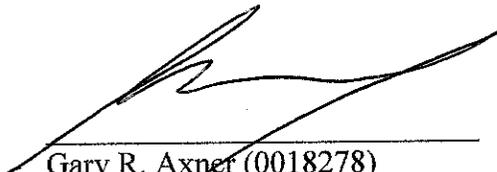
As in *Portman*, Respondent recognizes the hardship he has placed on this Court, the Board and Relator by raising these issues at this stage of the proceeding. Unfortunately, Respondent was represented by counsel until August 22, 2012, and in spite of having identified these issues in Respondent's personal and professional history, they were not brought to the attention of the Board and Relator. As his supplemental materials will demonstrate, the history recited by the Board in its Recommendation is not Respondent's typical history accumulated over more than 40 years of an unblemished legal career. Respondent's depression and two brain concussions in 2010 were debilitating and prevented Respondent from acting in a more cooperative and proactive manner. Respondent will renew his relationship with OLAP and abide by its terms; and, further, will continue his course of treatment with his chemical dependency counselor, Ms. Compton.

As this Honorable Court set forth in *Disciplinary Counsel v. Agopian, 20060hio6510*, the purpose of disciplinary proceedings is to protect the public, not to punish

the offender. See also *Disciplinary Counsel v. O'Neill*, 2004 Ohio4704; *Ohio State Bar Assn. v. Weaver* (1975), 41 OhioSt.2d97,100. Respondent understands and deeply regrets his failure to this Honorable Court, and the Board in assisting Relator in the investigation of his disciplinary matter and in the matters that caused the investigation of this case.

He has suffered from depression and alcohol dependency in recent years, which were compounded by two brain concussions in the summer and fall of 2010. Against this background, Respondent respectfully requests that this Honorable Court remand this matter back to the Board to give him the ability to place additional evidence before the Board for further determination as to the allegations against him and the mitigation that should be considered.

Respectfully submitted,



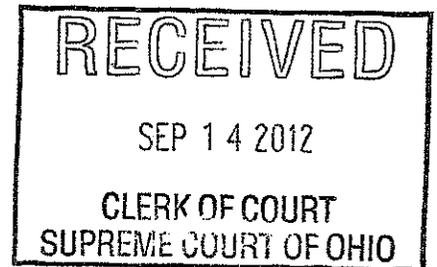
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MOTION FOR ADDITIONAL EXTENSION OF TIME
TO FILE OBJECTIONS

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Counsel for Relator

EXHIBIT A

CERTIFICATE OF SERVICE

I certify that a copy of this Motion was sent by ordinary U.S. Mail to Heather Zirke,
Cleveland Metropolitan Bar Association, 1301, East Ninth Street, Cleveland, Ohio 44113 on
September 24, 2012.



Gary R. Axner(0018278)