

**BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

**12-2070**

<b>In re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 11-113</b>
<b>Joseph Patrick O'Malley</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0060087</b>	:	<b>Conclusions of Law, and</b>
	:	<b>Recommendation of the</b>
<b>Respondent</b>	:	<b>Board of Commissioners on</b>
	:	<b>Grievances and Discipline of</b>
<b>Disciplinary Counsel</b>	:	<b>the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	

<p><b>FILED</b></p> <p>DEC 10 2012</p> <p>CLERK OF COURT SUPREME COURT OF OHIO</p>
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**OVERVIEW**

{¶1} This matter was hearing on November 1, 2012, in Columbus, Ohio before a consisting of members Bernie Bauer, Janica Pierce Tucker, and Paul De Marco, chair. None of the panel members is from the district from which the complaint arose or a member of the probable cause panel in this matter.

{¶2} Larry James appeared on behalf of Respondent, and Joseph Caligiuri appeared on behalf of Relator.

{¶3} The parties have stipulated to all of the violations alleged and to the facts supporting them.

{¶4} The complaint in this case consists of two counts, each alleging multiple violations of the Rules of Professional Conduct by Respondent. The panel finds sufficient evidence to support the misconduct alleged in the complaint and recommends that Respondent be indefinitely suspended from the practice of law.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 5} Respondent was admitted to the practice of law in Ohio on November 9, 1992 and, prior to the events underlying this complaint, had no previous disciplinary history.

### **Count One-Criminal Convictions**

{¶ 6} Respondent's criminal convictions involve conduct that occurred while he was serving as a public employee and conduct that later occurred while he was engaging in the private practice of law.

{¶ 7} On or around April 19, 2010, Respondent was charged by way of an information with misprision of a felony, in violation of 18 U.S.C. § 4, and with making a materially false statement in a matter within the jurisdiction of the government, in violation of 18 U.S.C. § 1001. United States District Court for the Northern District of Ohio, Case No. 1:10CR171.

{¶ 8} On or around April 27, 2010, Respondent pleaded guilty to these charges before Judge Kathleen O'Malley (who is no relation to Respondent), then a United States District Judge for the Northern District of Ohio. On August 2, 2011, Respondent was sentenced to four months in prison on each count to run concurrently, a \$10,000 fine, two years of supervised release, and 250 hours of community service.

{¶ 9} On August 22, 2011, the Supreme Court of Ohio suspended Respondent from the practice of law for an interim period based upon Respondent's felony conviction. *In re Joseph Patrick O'Malley*, 2011-Ohio-4146. The Supreme Court imposed a registration suspension on November 1, 2011.

{¶ 10} The facts underlying Respondent's convictions are contained in Respondent's plea agreement. The plea agreement used "Public Official 2 (PO2)," "Public Employee 4 (PE4)" and "Public Official 7 (PO7)" as substitute identifiers for particular individuals. During

Respondent's disciplinary hearing, however, he identified PO2 as Frank Russo, then Cuyahoga County's Auditor; PE4 as Joseph Gallucci; and PE7 as Steven Terry, then a judge of the Cuyahoga County Common Pleas Court. Respondent's plea agreement stated as follows:

1. Cuyahoga County, Ohio ("County") was a government agency as that term is defined in Title 18, United States Code, Section 666(d)(2), that received benefits in excess of \$10,000 during each calendar year relevant to this Information under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance and other form of federal assistance. Its departments included the Auditor's Office, which was headed by an elected public official.

2. The Cuyahoga County Auditor's Office ("Auditor's Office") was a government agency, as that term is defined in Title 18, United States Code, Section 666(d)(2), which received benefits in excess of \$10,000 during every calendar year material to this Information under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance and other form of Federal assistance.

3. Public Official 2 ("PO2") was an elected County official with overall responsibility for all County funds. He had the power to influence contracts and expenditures within the Office he was elected to operate. He also had the authority to influence personnel decisions within the County, including hiring, approving raises or promotions, terminating employment, and establishing job duties. PO2 was an agent of the County.

4. Public Employee 4 ("PE4") was a County employee who was an employee of PO2.

5. Defendant JOSEPH P. O'MALLEY was an attorney licensed to practice law in the State of Ohio. Defendant was a County employee who worked for PO2 from in or about March 1997 to in or about April 2004. From on or about January 1, 2008, to on or about December 31, 2009, Defendant worked as an independent contractor for the Cuyahoga County Information Service Center.

6. During the Summer of 2006, Defendant knew that Joseph Gallucci was a candidate for county-wide office, running against PO2, the incumbent. Defendant knew in the Summer and Fall of 2006 that Gallucci's chance of winning the election was small. Defendant attended a meeting in August 2006 with PO2, Gallucci and PE4 in which Gallucci expressed an interest in obtaining a County job after the election. Defendant knew that in October 2006, Gallucci withdrew from the race. Defendant knew in November 2006 that PO2 gave Gallucci a County job.

### Misprision of a Felony

7. In the Spring of 2008, the Cleveland Plain Dealer began investigating patronage in the Auditor's Office. As part of that investigation, the Plain Dealer requested from the Auditor's Office the employment files of certain individuals, including Gallucci. PO2 requested that the Defendant assist PO2 in responding to the Plain Dealer's requests for information. Specifically, PO2 asked Defendant to review the requested employment applications. In particular, PO2 requested that Defendant review Gallucci's personnel file. Defendant did so, and found it to contain so little information about Gallucci that a determination about his qualifications for the position he held could not have been made on the basis of the application. As a result of his review, Defendant suggested that Gallucci "complete" his application, which Defendant believed Gallucci then did.

8. From on or about October 2006 to on or about April 29, 2008, in the Northern District of Ohio, Eastern Division, Defendant, JOSEPH P. O'MALLEY, ignoring a high probability of the actual commission of a felony cognizable by a court of the United States, to wit, conspiracy to commit any offense against the United States: that is, bribery concerning programs receiving federal funds, 18 U.S.C. §§ 666(a)(1) and (2), in violation of Title 18, United States Code, Section 371, and deliberately closing his eyes to what was obvious, did conceal the same by agreeing with PO2 to cause the employment application of Joseph Gallucci then on file at the Cuyahoga County Auditor's Office to be supplemented in response to a media public information request, and did not as soon as possible make known the same to some judge or other person in civil authority under the United States.

9. Public Official 7 ("PO7") was a Cuyahoga County Common Pleas Judge.

10. Beginning on a date known to the United States Attorney and well before May 23, 2008, and continuing after the date of the filing of this Information, the FBI and IRS, both part of the executive branch of Government of the United States, and acting within their jurisdiction, were investigating PO2, PO7, Defendant JOSEPH P. O'MALLEY and others for possible violations of federal law in connection with civil cases pending before PO7.

11. On or about September 26, 2008, Special Agents of the FBI interviewed Defendant in connection with the investigation.

### False Statements to the FBI

12. On or about September 26, 2008, in the Northern District of Ohio, Eastern Division, Defendant JOSEPH P. O'MALLEY knowingly and willfully made the following material false statements in a matter within the jurisdiction of the executive branch of the Government of the United States: (1) that he had not asked PO2 for any help on his cases and (2) that his private law practice was limited to representing indigent criminal defendants; well knowing at the time that he made the statements to Special

Agents of the FBI that (1) in two related cases in which Defendant represented two of the parties, Defendant has asked PO2 to tell PO7 to deny motions for summary judgment, that PO2 did as requested and had asked PO7 to deny the motions for summary judgment, that PO7's order denying the motions for summary judgment allowing Defendant to settle a portion of the lawsuits on terms favorable to his clients; and (2) Defendant's practice was not limited to representing indigent criminal defendants.

{¶ 11} The facts contained in the plea agreement reflect conversations involving Respondent, which were taped by federal authorities while they primarily were investigating others.

{¶ 12} Respondent has paid the \$10,000 fine imposed by the federal court in connection with his sentence and has nearly completed his community service.

{¶ 13} As to Count One, Respondent and Relator have stipulated that Respondent violated the following: Prof. Cond. R. 8.4(b) [an illegal act that reflects adversely on the lawyer's honesty or trustworthiness]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]; and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

{¶ 14} The panel finds these violations have been established by clear and convincing evidence.

### **Count Two-The AHB Litigation**

{¶ 15} Respondent represented the homeowners in a multiparty foreclosure action entitled *K & L Excavation, Ltd. v. Auburn Building Company, et al.*, Case No. 03 CV 515172 in the Cuyahoga County Court of Common Pleas (hereinafter, "the AHB litigation").

{¶ 16} On or about November 26, 2006, Respondent filed summary judgment motions against the defendants on behalf of his clients in the AHB litigation.

{¶ 17} On or about March 28, 2008, defendant American Home Bank (“AHB”) filed a motion for summary judgment against Respondent’s clients, as did other defendants in the case.

{¶ 18} In the spring or summer of 2008, Respondent was attempting to settle the AHB litigation. Respondent’s efforts were hindered by the fact that Judge Steven Terry, who was presiding over the litigation, had not ruled on the various summary judgment motions.

{¶ 19} Respondent asked then-Cuyahoga County Auditor Russo to tell Judge Terry to deny the summary judgment motions.

{¶ 20} On July 18, 2008, Judge Terry denied to the motions for summary judgment as instructed by Russo, including the motions Respondent had filed on behalf of his own clients, one of which Respondent considered meritorious.

{¶ 21} The same day, Judge Terry told Respondent that he had denied the summary judgment motions.

{¶ 22} Later that day, Respondent contacted Russo and stated, “You took care of that, he [Terry] just told me ... that’s huge. I should be able to settle that thing. It’s a nightmare.”

{¶ 23} On October 7, 2008, the AHB litigation settled for \$27,000 in favor of AHB.

{¶ 24} As to Count Two, Respondent and Relator have stipulated that Respondent’s conduct violated the following: Prof. Cond. R. 3.5(a)(1) [a lawyer shall not seek to influence a judicial officer by means prohibited by law]; Prof. Cond. R. 3.5(a)(3) [a lawyer shall not communicate ex parte with a judicial officer about the merits of the case during the proceeding unless authorized to do so by law or court order]; Prof. Cond. R. 8.4(c); Prof. Cond. R. 8.4(d); and Prof. Cond. R. 8.4(h).

{¶ 25} The panel finds these violations have been established by clear and convincing evidence.

## AGGRAVATION, MITIGATION, AND SANCTION

{¶ 26} Arriving at the appropriate sanction requires consideration of the attorney's misconduct, the duties violated, the injuries caused, the attorney's mental state, and the sanctions imposed in similar cases. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, ¶24. Before recommending a sanction, we also weigh the aggravating and mitigating factors in the case, including not only those set forth in BCGD Proc. Reg. 10, but all factors relevant to the case. *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, ¶40.

{¶ 27} As aggravating factors, the parties stipulated that Respondent committed multiple offenses and acted with a dishonest and selfish motive. The panel accepts these aggravating factors as established. As mitigating factors, the parties stipulated that Respondent has no prior disciplinary record, has made full and free disclosure to the Board and has had a cooperative attitude toward these proceedings, has presented positive character evidence, and has received criminal penalties including a four-month prison sentence, a \$10,000 fine, and two years of supervised release. The panel accepts these mitigating factors as established.

{¶ 28} Relator and Respondent jointly recommend that Respondent be suspended indefinitely from the practice of law with credit for the time served under his interim suspension of August 22, 2011, on the condition that Respondent complete his federal supervised release prior to reinstatement. Relator submitted case law to the panel supporting an indefinite suspension in lieu of disbarment. *See Ohio State Bar Assn. v. Johnson*, 96 Ohio St.3d 192, 2002-Ohio-3998; *Cincinnati Bar Assn. v. Kellogg*, 126 Ohio St.3d 360, 2010-Ohio-3285; *Disciplinary Counsel v. Smith*, 128 Ohio St.3d 390, 2011-Ohio-957; *Disciplinary Counsel v. Rolla*, 95 Ohio St.3d 27, 2002-Ohio-1366.

{¶ 29} At the hearing, Respondent presented persuasive character evidence through witnesses who were familiar with Respondent and his misdeeds, as well as a large number of character letters from individuals from all corners of Respondent's life. Based on this evidence, the panel is convinced that, while Respondent has committed significant misconduct including violations of the public trust and efforts to undermine the administration of justice, in the future he may be capable of returning to the ethical practice of law. Under similar circumstances involving attorneys convicted of felonies, the Supreme Court has chosen to impose indefinite suspensions in lieu of disbarment. *See Johnson, supra*, at ¶9, and other cases cited above; *see also Dayton Bar Assn. v. Brunner*, 91 Ohio St.3d 398, 2001-Ohio-82. Moreover, the Court has given such individuals credit for the time they served under interim felony suspensions. *Id.*

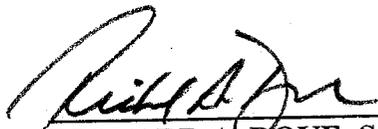
{¶ 30} Accordingly, the panel recommends that Respondent be suspended indefinitely from the practice of law with credit for the time served under his interim felony suspension, with reinstatement conditioned on Respondent completing his federal supervised release and complying with all requirements of his interim suspension order.

#### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 7, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Joseph Patrick O'Malley, be indefinitely suspended from the practice of law in the State of Ohio, with credit for time served under the interim felony suspension imposed on August 22, 2011. The Board further recommends that Respondent's reinstatement be subject to the conditions set forth in ¶30 of this report and that the costs of these

proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**

A handwritten signature in cursive script, appearing to read "Richard A. Bove", written over a horizontal line.

**RICHARD A. BOVE, Secretary**