

No. 2012-2069

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In The  
**Supreme Court of Ohio**

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Columbus Bar Association

*Relator*

v.

Sterling E. Gill III

*Respondent*

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On Appeal From the Board of Commissioners  
On Grievances and Discipline  
Case No. 12-007

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**OBJECTIONS OF THE RESPONDENT**

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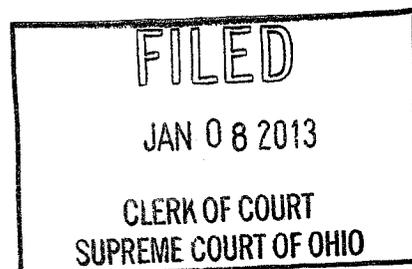
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## I. OBJECTION

Respondent, Attorney Sterling E. Gill, III, objects to the recommended penalty, indefinite suspension, because the findings of fact and stipulations set forth in the record do not support such a harsh penalty. Indeed, rather than craft a recommendation that is tailored to protecting the public, the Board of Commissioners on Grievances and Discipline (hereinafter "Board") has written an opinion that is overly punitive toward Attorney Gill<sup>1</sup>. In that regard, the Board's Report and Recommendation ("Report") does not fulfill the principal goal of the disciplinary system, which is to protect the public. *Disciplinary Counsel v. O'Neill, 2004-Ohio-4704*, (in fashioning a sanction the Court is mindful that "the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public."). Instead of achieving the goal of protecting the public, the Report penalizes Attorney Gill in a manner that is not necessary to truly protect the public. And, most importantly, the Board did not explain why it recommended an indefinite suspension when the hearing panel had only recommended a six-month suspension. Attorney Gill therefore makes the following Objection to the Report:

The recommended penalty of an indefinite suspension is not supported by the record in this case or the Court's precedent. Therefore, Attorney Gill respectfully requests the Court to reject the recommendation of the Board and adopt the two year suspension with 18 months stayed on conditions as recommended by the Hearing Panel.

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<sup>1</sup> The Court should note that the Board did not provide any analysis or justification for rejecting the Hearing Panel's proposed penalty. Instead the Board has essentially forced the parties and the Court to guess at the reasons why it felt a harsher penalty was warranted.

## II. STATEMENT OF FACTS

The recommended penalty of an indefinite suspension is not supported by the facts set forth in the record. Importantly, the Hearing Panel did not make any findings that Attorney Gill committed acts involving dishonesty, deceit or misrepresentation. Report at 33 (where the panel found an absence of any dishonest or selfish motive and specifically said that “[r]espondent made no misrepresentations to his client, the courts or to Relator.”). Further, the panel found that no client was harmed as a result of Attorney Gill’s conduct. *Id.* The panel also found that Attorney Gill fully and freely disclosed and admitted his misconduct, exhibited a cooperative attitude toward the proceedings and entered into a comprehensive set of stipulated facts, rule violations and comprehensive conditions for reinstatement. *Id.* Attorney Gill also acknowledged the wrongfulness of his misconduct. *Id.* Indeed, Attorney Gill proposed conditions that were actually more strict than the conditions recommended by the Hearing Panel and the Board. Transcript at 148-153.

At the hearing of this matter,<sup>2</sup> the parties stipulated that Attorney Gill suffered from a newly diagnosed mental health condition, and this condition was causally linked to the conduct alleged in the Second Amended Complaint. Stipulation 166. At the hearing, Attorney Gill presented the testimony of Stephanie Krznarich, the clinical director of the Ohio Lawyer’s Assistance Programs (hereinafter “OLAP”). Ms. Krznarich testified that in addition to suffering from addiction problems, Attorney Gill had recently been diagnosed with bipolar disorder and was being treated for this disorder by both his primary care physician, Dr. Lombardo and a psychiatrist, Dr. April Mancuso.

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<sup>2</sup> The hearing was held on October 22, 2012. The stipulations include 167 stipulations of fact, rule violations and conditions for reinstatement.

Transcript at 125. Ms. Krznarich also testified that Attorney Gill is currently in a five-year contract with OLAP, which includes the requirement of attending seven Alcoholics Anonymous (hereinafter "AA") meetings per week with an identified home group, and that he comply with all of the treatment recommendations of Dr. Mancuso and Dr. Lombardo. *Id.* at 125-126. Most importantly, Ms. Krznarich testified that there is a causal link between the conduct alleged and Attorney Gill's bipolar disease. *Id.* at 128.

Throughout her testimony, Ms. Krznarich expressed an unusually high degree of confidence that Attorney Gill was in full remission for his addiction issues and given his period of successful mental health treatment, he could successfully maintain his law practice. *Generally*, Transcript 118-132. During questioning from the Hearing Panel, Ms. Krznarich was asked why she had such high confidence in Mr. Gill's ability to sustain recovery, given his recent history of relapses. Ms. Krznarich opined:

The reason why I have additional confidence now as opposed to before is that prior to recently- with working with April Mancuso and doing some extreme testing, he did not have a diagnosis of a mental health disorder. He had some diagnosis of some mild depression, some mild anxiety, but nothing that was officially treated and worked through with individual care plus psychotropics.

So, again, when we have individuals who have co-occurring disorders, which about 70 percent of the population that has a chemical dependency, they also have mental health disorders, I think that gives him a leg up in his sobriety and his recovery.

*Id.* at 136. Thus, Ms. Krznarich essentially testified that Attorney Gill has been suffering from an undiagnosed mental disorder for many years. And that from 1988 through the early part of 2012, the mental disorder has been having a negative effect on his ability to manage his alcoholism and avoid relapses.<sup>3</sup>

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<sup>3</sup> It should be noted that Attorney Gill maintained sobriety for 14 years after his initial discipline in 1988. Transcript at

Attorney Gill may have had a much different life if his bipolar disorder had been properly diagnosed in 1988.

The Court, nonetheless, should place great weight on the opinions of Ms. Krznarich. Not only was her testimony wholly unrebutted by any expert testimony from the Relator, but her opinions are based upon over ten years of experience of working with Attorney Gill. Her opinion, that Attorney Gill can have a successful practice if he complies with certain conditions (set forth in the stipulations of the parties and the Board's Report and Recommendation), should carry great weight in this analysis.

### **III. BURDEN OF PROOF**

In attorney disciplinary proceedings, the relator bears the burden of proving the facts necessary to support each violation by clear and convincing evidence. Gov. Bar R V(6)(J). Clear and convincing evidence is "more than a mere preponderance of the evidence," but not to the extent of such certainty as is required to prove "beyond a reasonable doubt" in criminal cases.<sup>4</sup>

### **IV. ARGUMENT**

#### **The Recommended Penalty of an Indefinite Suspension Is Not Supported By The Record Or By Prior Case Law and Does Not Serve the Goal of Protecting the Public**

The record in this case does not support the recommended sanction of an indefinite suspension. Nor does an indefinite suspension serve the goals of the attorney disciplinary system. An appropriate penalty, first and foremost, must be based upon the

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<sup>4</sup> Relator specifically withdrew all alleged violations that were not contained within the stipulations of the parties. Transcript at 18-19. Consequently, the Relator presented no evidence on the alleged violations that were withdrawn.

record and be formulated after the evidence of wrongdoing is weighed against aggravating and mitigating factors.

In *Columbus Bar Assn. v. Linnen*, 2006-Ohio-5480, at ¶ 25, this Court stated, "In determining the appropriate sanction for professional misconduct, we consider the duties violated, the actual or potential injury caused, the lawyer's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases." Further, the Court noted in *Disciplinary Counsel v. O'Neill*, 2004-Ohio-4704, ¶ 53, "in fashioning a sanction we are mindful that the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public."

When imposing sanctions for attorney misconduct, the Court considers relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 2002-Ohio-4743, ¶ 16. In making a final determination, the Court also weighs 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*, 2007-Ohio-5251.

An Indefinite Suspension is the second harshest sanction available, and it therefore should be reserved for the most egregious cases of attorney misconduct. The Court has never held that an indefinite suspension is the presumptive penalty for cases like Attorney Gill's case, where this is a mental health diagnosis that is causally related to the alleged conduct. In recent cases, the Court has looked favorably on the attorney's treatment and prognosis, and when, as here, there is compelling expert testimony and

high confidence from the attorney's mental health care providers and OLAP, the Court has sanctioned the attorneys with far less severe penalties than an indefinite suspension.

For example, in *Butler County Bar Association v. Minamyers*, 2011-Ohio-3642, Minamyers was accused of several counts of misconduct, including failing to inform clients that he lacked malpractice insurance, neglecting his clients' legal matters, lying to clients about the status of their cases, failing to properly communicate with clients, and failing to cooperate with the disciplinary investigation<sup>5</sup>. During the remanded hearing, Minamyers introduced evidence that he suffered from post-traumatic stress disorder and that this disorder was causally related to his alleged misconduct. *Id.* at 8-9. Specifically, Minamyers's expert witness testified that "PTSD and depression played a significant role in his failure to timely respond to realtor's complaint and, to a lesser extent, contributed to his underlying misconduct." *Id.* at 20. The expert went on to say "by combining outpatient treatment and pharmacological management with a reduced caseload and the appointment of a practice monitor," Minamyers could continue to practice law in a safe and responsible manner. *Id.* Based upon this testimony and the conditions expressed therein, the Court sanctioned Minamyers with a one-year suspension, with the entire suspension stayed upon conditions. *Id.* at 27, citing *Toledo Bar Ass'n v. Lowden*, 2005-Ohio-2162.

A similar analysis took place in *Disciplinary Counsel v. Meehan*, 2012-Ohio-3894. Meehan was accused of engaging in a pattern of misconduct, including practicing under a suspension, as well as multiple violations of the Rules of Professional Conduct.

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<sup>5</sup> Minamyers initially defaulted on the Complaint, but in his Objections to the Court, he argued for a remand so that he could present evidence of a mental health disorder. The Court granted the remand, and Minamyers presented evidence that he suffered from post-traumatic stress disorder as a consequence of his military service. at 9.

*Id.* at 4-8. As mitigating factors, the Court adopted the Board's finding that Meehan lacked a dishonest or selfish motive, he provided full and free disclosure during disciplinary counsel's investigation, he was cooperative during the disciplinary proceedings and he provided evidence of good character and reputation. *Id.* at 8. During the hearing, Meehan presented evidence that he had suffered from a mental disability- a major depressive episode- and that he had undergone a successful period of treatment and was capable of returning to competently and ethically practice law. *Id.* In consideration of this mitigating evidence, the Court sanctioned Meehan with a 24 month suspension, with the entire 24 months stayed on conditions. *Id.* at 9.<sup>6</sup>

Under these cases (and indeed, the cases cited in the Board's opinion) the facts and the record in the present case do not merit an indefinite suspension. To begin, the most egregious facts that typically occur in cases where this Court has found an indefinite suspension to be the appropriate penalty are not present in this case. As the record fully reflects, the Relator did not present facts to show that there was an extensive record of bad acts by Attorney Gill. Nor is there evidence to show that any clients were harmed by his conduct. No client came forward to show that their legal interests had been harmed, prejudiced or impacted by Attorney Gill's actions. Indeed, there was evidence presented at the hearing that no client had ever alleged ineffective assistance of counsel against Mr. Gill.<sup>7</sup> Nor is there any evidence of active dishonesty, either in the course of the investigation or during the hearing, and the Relator did not present any evidence of

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<sup>6</sup> The Court noted that the presumptive sanction in cases where previous sanctions "have been ignored with relative impunity" is permanent disbarment, but decided upon a lesser sanction based on the strength of the testimony from mental health care treator. *Id.* at 12-14.

<sup>7</sup> Attorney Gill's practice primarily focuses on criminal defense.

dishonest, deceit or misrepresentation. There is no evidence of falsification or destruction of documents or harm of any sort to any client.

Instead, in this case, Attorney Gill admitted in his stipulations to violations stemming from record keeping problems and problems meeting deadlines. In mitigation, Attorney Culbreath has provided the unrebutted stipulated opinions of Dr. Lombardo and Dr. Mancuso, as well as the testimony of a OLAP's clinical director, who all very clearly and strongly testified that he: (1) met each of the factors listed in BCGD Reg 10(g), (2) was capable of competently representing clients and (3) has been successful in his treatment of the newly discovered mental disorder.

This case then is more like *Minamanyar* except that here Relator did not present evidence that any client suffered harm and did not allege that any client had been lied to about the status or his or her case. In *Minamyer*, however, the Court clearly found that *Minamyer* lied to his client after he defaulted on her case, leading her to believe that the case was still live and was heading toward settlement. No such misrepresentations occurred in this case (none were even alleged).

This case is also less egregious than the conduct that occurred in *Meehan*. *Meehan* practiced law while under a suspension, and he admitted that he received notice of the suspension from the Court. Yet *Meehan* only received a penalty of a two-year suspension with conditions upon his reinstatement.

Here, Attorney Gill has stipulated to conditions that are vastly more stringent than the conditions suggested in *Minamyer* and *Meehan*, including:

- a. The institution and maintenance of an IOLTA account,

b. The completion of 12 hours of CLE classes on law office management, at least six hours of which shall be focused on the use and maintenance of his trust count;

c. Compliance with the terms of his five year OLAP contract and follow all recommendations of OLAP, including, if applicable, contract renewal, attending a specified number of AA meetings, maintaining an AA sponsor, random drug testing, and continued treatment by a qualified mental health provider;

d. Avoiding any further violations of the Rules of Professional Conduct

e. Certification from a qualified psychiatrist or psychologist that Attorney Gill is able to return to the competent, ethical and professional practice of law.

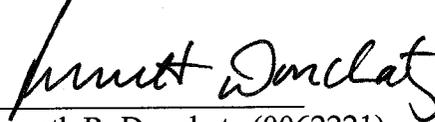
Report and Recommendation at 41. Additionally, Attorney Gill has proposed two additional conditions (1) reinstatement of the SCRAM bracelet, with monitoring by the House of Hope and OLAP and (2) assignment of an attorney-monitor for an indefinite period with conditions for the release of the monitor. Transcript at 146-151.

These conditions are nearly unprecedented in their scope and efficacy. Imposing these conditions would assure the Court that the public is protected and that the attorney is successfully rehabilitated. An indefinite suspension will not achieve those goals, because in a case like this where there has been a period of successful treatment, an indefinite suspension serves a punitive goal, not a rehabilitative goal. Therefore, Attorney Gill respectfully requests that the Court reject the Board's recommended sanction of an indefinite suspension and adopt the sanction of a two-year suspension with 18 months stayed upon all of the conditions noted herein and in the stipulations of the parties and the Board's Report and Recommendation.

## CONCLUSION

The Court should not adopt the Board's recommended sanction of indefinite suspension. The Board erred in levying a penalty that is unduly harsh and overly punitive. The panel recommended a penalty that is fair and equitable given the record, with conditions that will ultimately protect the public and allow Attorney Gill to continue his rehabilitation and treatment. For all of these reasons, the Board's recommended penalty should be overruled, and the Court should adopt the Hearing Panel's recommendation of a two year suspension with 18 months stayed.

Respectfully submitted,



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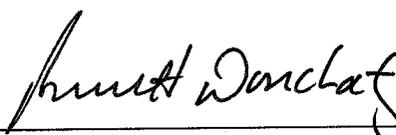
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing OBJECTIONS OF RESPONDENT was served via regular United States Mail, postage pre-paid, this 8<sup>th</sup> day of January 2012 upon each of the following:

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By: Kenneth R. Donchatz

**APPENDIX A**

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

<b>In re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 12-007</b>
<b>Sterling Everard Gill II Attorney Reg. No. 0034021</b>	:	<b>Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio</b>
<b>Respondent</b>	:	
<b>Columbus Bar Association</b>	:	
<b>Relator</b>	:	

**OVERVIEW**

{¶1} This matter was heard on October 22, 2012, before a panel consisting of Stephen C. Rodeheffer, David L. Dingwell and Lawrence R. Elleman, chair. None of the panel members is from the appellate jurisdiction from which the complaint arose or served on the probable cause panel in this matter. Relator was represented by James Erwin, Bruce A. Campbell, and A. Alysha Claus. Respondent was present at the hearing and represented by Kenneth R. Donchatz. The only witnesses at the hearing were Respondent and Stephanie Krznarich of OLAP.

{¶2} Respondent's misconduct in this case involves 40 violations of the Ohio Rules of Professional Conduct, including failure to obtain client signatures regarding the absence of malpractice insurance; failure to maintain an IOLTA for the segregation of client funds; failure to explain the basis for calculation of fees, the scope of representation and entering into a flat fee arrangement without written notice to the client regarding the circumstances under which the fee is subject to refund; lack of diligence; dividing a fee with another lawyer without proper

disclosure and consent; failure to explain to his client matters needed to make informed decisions; and failure to cooperate with Relator's investigation and fee arbitration procedures.

{¶3} No client was shown to have been harmed by Respondent's misconduct. No client is entitled to a refund of fees paid. Respondent did not benefit from his misconduct. Respondent did not make any misrepresentations to clients, the courts, or to Relator.

{¶4} Respondent is an alcoholic and, in addition, has been recently diagnosed as having a bipolar mood disorder. Respondent has been in and out of substance abuse treatment programs since at least 1986. Respondent has supposedly successfully completed such treatment programs, but has suffered multiple relapses.

{¶5} The second amended complaint alleges 11 counts and 53 violations. The parties entered into comprehensive written stipulations of facts and 41 stipulated rule violations. Relator dismissed all of the alleged violations contained in the second amended complaint, except for the stipulated violations. Hearing Tr. 18-19.

{¶6} The panel recommends that Respondent be suspended from the practice of law for a period of two years, with 18 months stayed on stringent conditions that are designed to protect the public from a reoccurrence of misconduct.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶7} Respondent is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar.

{¶8} Respondent was admitted to the Bar of Ohio in 1978. Respondent is 64 years old. Respondent is a graduate of The Ohio State University law school. At the time of the events that are the subject to this proceeding, he was a sole practitioner in Columbus, Ohio.

{¶9} On April 13, 1988, Respondent was indefinitely suspended for endorsing his client's name on a settlement check for \$7,000 and converting \$4,700 of that amount to his own use. *Columbus Bar Ass'n. v. Gill*, 39 Ohio St.3d 4, (1988). Respondent was reinstated on December 21, 1990.

{¶10} The following paragraphs summarize the stipulated facts, other evidence, and stipulated violations regarding Counts One through Eleven.

#### **Count One—Reffitt/Justice Matter**

{¶11} The parties stipulated that if called to testify, Ms. Reffitt would testify that Respondent agreed to a flat fee to represent Ms. Reffitt father in a pending criminal matter. Stipulations ¶¶15-16. Respondent testified, upon questioning by the panel, that he did not agree to a flat fee, but he admitted that he failed to explain the basis of his fee arrangement or the scope of the representation. Hearing Tr. 73-77. Respondent did not obtain the client's signature on a "Notice to Client" regarding the absence of malpractice insurance.<sup>1</sup> Stipulation ¶7. Respondent did not deposit the unearned fee in an IOLTA. Stipulation ¶8. Further, he initially did not respond to Respondent's demand for information.<sup>2</sup> Stipulations ¶¶9-10; Joint Ex. 2. Relator has proven by clear and convincing evidence that Respondent committed all of the violations described in ¶28 of the stipulations, except for Prof. Cond. R. 1.5(d)(3) regarding the alleged flat fee. Relator failed to prove by clear and convincing evidence that Respondent agreed to a flat fee. The panel recommends dismissal of that claimed violation.

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<sup>1</sup> Respondent testified he sometimes used an engagement letter which notified the client that he had no malpractice insurance but the engagement letter did not call for the signature of the client to a notice to client as required by Prof. Cond. R. 1.4(c). Hearing Tr. 108-109.

<sup>2</sup> Respondent stipulated that he did not provide timely written responses to Relator regarding the notices of grievances on each of Counts One through Eleven. Stipulation 10. However, at a later time, he did produce substantial documents, submitted to depositions, cooperated in the hearing, and negotiated a comprehensive stipulation of facts and rule violations.

### **Count Two—Corley Matter**

{¶12} Respondent did not act with reasonable diligence and did not reasonably consult with Ms. Corley about her case. Respondent entered into a flat fee arrangement without explaining the basis of the fee, the scope of the representation, and without providing written notice as to the circumstances under which a portion of the fee would be refunded. As with several other counts in the amended complaint, he did not obtain the client's signature on a notice to client that he did not carry malpractice insurance. Respondent failed to respond to Relator's demand for information and to cooperate in the certified grievance committee's ADR procedure. Stipulations ¶¶7-10, 29-39; Joint Ex. 7. Relator has proven by clear and convincing evidence that Respondent committed all the violations described in ¶40 of the stipulations.

### **Count Three—Hicks Grievance**

{¶13} Respondent failed to respond to Relator's demand for information. Stipulations ¶¶9-10, 41-45; Joint Ex. 9. Relator has proven by clear and convincing evidence that Respondent committed all of the violations set forth in ¶46 of the stipulations.

### **Count Four—Martin/Toney Matter**

{¶14} Respondent entered into a fee arrangement with Ms. Martin to represent her son without explaining the basis of the fee or the scope of representation. Respondent divided the fee with another lawyer without proper disclosure and written consent. Respondent did not obtain the client's signature on the notice to client regarding malpractice insurance, and did not establish an IOLTA account or deposit into a trust account unearned fees and expenses paid by the client. Respondent knowingly failed to respond to the demand for information from Relator. Stipulations ¶¶7-10, 47-65; Joint Ex. 12. Relator has proven by clear and convincing evidence that Respondent committed all the violations set forth in ¶66 of the stipulations.

### **Count Five—Criminal Traffic Matter**

{¶15} Respondent was involved in an automobile accident wherein he rear ended a car that had been stopped in traffic. Respondent left the scene of the accident because his car was disabled in freeway traffic, and he walked home intending to report the accident to the police when he got home. There is no evidence in connection with this particular count that Respondent was driving under the influence of alcohol. Hearing Tr. 38-40, 63-64, 68-70. As with the other counts, Respondent failed to respond to Relator's demand for information. Stipulations ¶¶8-10, 67-76; Joint Ex. 13-14. Relator proved by clear and convincing evidence that Respondent committed all the violations set forth in ¶77 of the stipulations.

### **Count Six—Henderson/Hackney<sup>3</sup> Matter**

{¶16} Respondent agreed to represent Mr. Hackney in a criminal matter with Hackney's mother, Ms. Henderson, paying for the representation. When Ms. Henderson requested fee arbitration from the Columbus Bar Association, Respondent knowingly failed to respond to Relator's demand for information and did not cooperate with Relator regarding the ADR procedure. Stipulations ¶¶9-10, 78-89; Joint Ex. 16. Relator has proven that Respondent committed all the violations set forth in ¶90 of the stipulations.

### **Count Seven—Fitness to Practice; Franklin County Municipal Court**

{¶17} On November 4, 2011, Respondent appeared in Franklin County Municipal Court three hours late and with a breath alcohol content of 0.022. There is no contention that Respondent committed any misrepresentation to the judge regarding same. Stipulations ¶¶91-100; Hearing Tr. 88-91. Relator has proven by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(h) by engaging in conduct adversely reflecting on his fitness to practice law as set forth in ¶101 of the stipulations.

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<sup>3</sup> Mr. Hackney is also referred to as "Hachney" and "Hechney" in the complaint and stipulations.

### **Count Eight—Judge Nusbaum Contempt Matter**

{¶18} Respondent was scheduled to appear before Judge Nusbaum for a jury trial on May 1, 2012. On April 30, 2012, Respondent spoke with his client and the charge nurse at Grant Hospital, who notified Respondent that Respondent's client was in the hospital. Respondent notified the judge's bailiff later on April 30 that his client could not attend the trial the next day. The bailiff asked for documentary proof that the client was in the hospital. Respondent sent the documents to the clerk's office instead of the judge's chambers so the judge was unaware of the receipt of the documents. Unbeknownst to the Respondent, his client was released from the hospital in the "wee hours" of April 30 and the documents that had been sent to the clerk's office confirmed that fact. The following morning, the jury was scheduled to report for duty. The judge instructed his bailiff to order Respondent to appear for trial at 8:30 a.m. on May 1. Respondent did not appear in court until 9:45 a.m., at which time Respondent mistakenly stated to the judge that his client was still in the hospital. Ultimately, Respondent was held in contempt of court for being late to trial on May 1 and ordered to pay \$200 to charity and to pay the costs associated with bringing in the jury in for the May 1<sup>st</sup> trial. Relator did not contend at the hearing that Respondent had deliberately misrepresented the facts to Judge Nusbaum and dismissed its claimed violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]. Stipulations ¶¶102-124; Hearing Tr. 42-45, 70-73; Joint Ex. 21-23. Respondent knowingly failed to respond to Relator's demand for information. Stipulations ¶¶9-10. Relator has proven by clear and convincing evidence that Respondent committed all the violations described in ¶125 of the stipulations.

### **Count Nine—Representation in Matters before the Fourth District Court of Appeals**

{¶19} Respondent missed due dates for filing the notices of appeal and two successive filing dates for merit briefs. Relator did not contend at the hearing that Respondent had deliberately misrepresented that his “associate” was unable to get the notices of appeal filed timely, and voluntarily dismissed its claimed violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]. Respondent knowingly failed to respond to Relator’s demand for information. Stipulations ¶¶9-10, 126-139; Hearing Tr. 45-49, 64; Joint Ex. 26-28. Relator has proven by clear and convincing evidence that Respondent committed all of the violations described in ¶140 of the stipulations.

### **Count Ten—Roach Matter**

{¶20} Respondent missed a filing date for a merit brief and failed to respond to a motion for reconsideration. Respondent failed to respond to two requests from Relator to respond to the grievance. Stipulations ¶¶9-10, 141-152; Joint Ex. 31. Relator has proven by clear and convincing evidence that Respondent committed all of the violations described in ¶153 of the stipulations.<sup>4</sup>

### **Count Eleven—Rogers Matter**

{¶21} Respondent stipulated that if called to testify, Rogers, who retained Respondent to represent him in a criminal matter, would testify that he had been unable to communicate with Respondent by telephone and that when he visited Respondent at his home, Respondent was intoxicated. Stipulations ¶¶162-164. Rogers was present at the disciplinary hearing but was not called as a witness by either party. Respondent denied Rogers’ version of these facts. Hearing Tr. 98-102. Respondent failed to respond to requests by Relator for information about these

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<sup>4</sup> The stipulated violation of Prof. Cond. R. 8.1(b) was mistakenly identified by the parties in ¶ 153 of the stipulations as Prof. Cond. R. 1.8(b).

allegations. The panel needs not to decide whether the facts regarding stipulations ¶¶162-164 are true because the other stipulated facts and evidence (Stipulations ¶¶9-10, 154-166; Hearing Tr. 51-53, 98-102; Joint Ex. 35) are sufficient to establish by clear and convincing evidence that Respondent committed all of the violations described in ¶165 of the stipulations.

#### **Other Factual Findings**

{¶22} The evidence clearly establishes that Respondent is an alcoholic and has, in the past, abused other drugs. In 1986, after being charged with misconduct, he admitted himself into an inpatient detoxification center and one week later entered into a substance abuse program offered for professionals by Shepherd Hill Hospital in Newark, Ohio. *See Columbus Bar Ass'n. v. Gill, supra*. He was involved in that program for about six or seven months. Hearing Tr. 21-22, 77-80.

{¶23} The Supreme Court of Ohio indefinitely suspended Respondent on April 13, 1988. The Court recited and discussed in detail Respondent's substance abuse illness, his treatment program at Shepherd Hill and concluded "[b]ecause we are impressed with respondent's apparent success in controlling his alcoholism and drug addiction \* \* \* respondent will be permitted to petition for reinstatement in one year. We assume that monitoring and supervision under which respondent is currently functioning will continue throughout the sanction period." *Id.* at 7-9. Respondent was reinstated on December 21, 1990. *Columbus Bar Ass'n. v. Gill*, 56 Ohio St.3d 602, (1990).

{¶24} After his successful completion of the Shepherd Hill program, Respondent remained sober for 14 years. During most of that period of time, he worked as a hearing officer for the Ohio Industrial Commission; and, as appointed by the commissioner on occasion, as

deputy commissioner. In the early 2000s, he left the Industrial Commission and recommenced the practice of law as a sole practitioner. Hearing Tr. 21-23, 67-68, 79-81.

{¶25} Since about 2003, Respondent has had periods of sobriety for up to perhaps six months at a time and then he would relapse. *Id.* at 23. From 2003 to 2005, Respondent was again involved in alcohol treatment programs at Maryhaven for detoxification and then with Southeast Recovery and Mental Health Care Service. *Id.* at 81-83; Joint Ex. 47.

{¶26} In 2010, Respondent was charged with OVI, which was reduced to reckless operation. Hearing Tr. 21-24. As a result, Judge Barrows placed him on probation. Joint Ex. 45. As part of his probation, he completed an intensive alcohol and drug program with the Columbus Health Department on September 29, 2011. Joint Ex. 45. However, he suffered a relapse shortly thereafter. Hearing Tr. 24-25, 91-92.

{¶27} On November 4, 2011, Respondent appeared in court before Judge Brown with a breath alcohol content of 0.022. As a result, Respondent was required to go back before Judge Barrows, who ordered Respondent to be equipped with an ankle monitor device which would detect and alert the probation authorities of the use of alcohol. Hearing Tr. 25-26. Respondent has been completely sober since November 4, 2011. *Id.* at 97. Respondent no longer wears the ankle monitor device.

{¶28} On February 13, 2012, Respondent was admitted to an alcohol treatment program at House of Hope Outpatient Treatment Services. Respondent was discharged on July 10, 2012, with a discharge diagnosis of "Alcohol Dependence-Early Partial Remission." Respondent was released from probation on July 9, 2012. Joint Ex. 40 and 45.

{¶29} Respondent is currently subject to a five-year OLAP contract dated March 18, 2011. Joint Ex. 42. Respondent is in compliance with the OLAP recommended treatment

program, calls OLAP daily, has an AA sponsor, and attends AA meetings three or four times per week. In addition, Respondent began treatment with April Mancuso Psy.D. in August 2012, and has received a new diagnosis from her of "BiPolar Mood Disorder (Not Otherwise Specified in Partial Remission)" in addition to "Alcohol Abuse (in remission)." Until now, he had never been diagnosed with bipolar disease. Respondent sees Dr. Mancuso two to three times per month. Respondent is being treated with psychotherapy drugs. Whereas Respondent often formerly felt "stuck" this sometimes prevented him from even opening his mail. Respondent is now feeling much better and the therapy seems to be working. Hearing Tr. 26-31, 55-59, 114, 121-136.

{¶30} The parties stipulated to the admission into evidence of Joint Ex. 47-48, which are letters from Dr. Mancuso which set forth her diagnosis and her opinion as to the causal relationship between the misconduct and Respondent's illnesses. The letters describe Dr. Mancuso's recommendations regarding treatment, including psychotherapy for six months, continued psychiatric medications, continued attendance at AA meetings, maintenance of a sponsor, working with OLAP, and random drug testing. Dr. Mancuso concludes that Respondent will be able to return to the competent ethical practice of law as long as he meets the conditions described above.

{¶31} Stephanie Krznarich of OLAP testified as to her general agreement with Dr. Mancuso. Hearing Tr. 121-137. Her opinion is that with Respondent's "current plan in place, with pharmaceuticals, with therapy, with the 12-step involvement, his sponsor, his current contract recovery, right now he's got the best foundation I've ever seen in place for him since I started working with him in 2002 because now he's treating both of his disorders, his mental health disorder in addition to the chemical dependency disorder. And I believe it was a key impact that led to chronic relapses, the mental health disorder was never appropriately diagnosed

or treated.” Hearing Tr. 131-132. She is more optimistic that Respondent may succeed this time even though he has failed in the past. *Id.* at 135-136.

### **AGGRAVATION, MITIGATION, AND SANCTION**

{¶32} The panel finds the following aggravating factors:

- Respondent has received a prior indefinite suspension based on conduct that the Supreme Court found was related to his substance abuse problem;
- Respondent exhibited a pattern of misconduct by his repeated inattention to the details of the practice of law required of attorneys in the State of Ohio;
- Respondent has committed multiple offenses;
- Respondent initially failed to cooperate in the disciplinary process; and
- After having been notified that disciplinary charges were pending against him for, among other things, failure to maintain an IOLTA account, Respondent continued to violate the Rules of Professional Conduct regarding IOLTA accounts. The original complaint was filed against Respondent in February 2012. By at least that time Respondent knew or should have known of the IOLTA requirements, yet Respondent still did not establish an IOLTA account, even though Respondent continued to receive retainers from clients for legal work. Hearing Tr. 110-112.

{¶33} The panel finds the following mitigating factors:

- Absence of any dishonest or selfish motive. Respondent made no misrepresentations to his client, the courts, or to Relator;
- No client was shown to have been damaged as a result of his misconduct. No client is entitled to a refund of fees paid. Stipulation ¶11;
- Once Respondent obtained an attorney in this disciplinary proceeding, Respondent fully and freely disclosed and admitted his misconduct, exhibited a cooperative attitude toward these proceedings, and entered into comprehensive stipulations of facts and rule violations, as well as comprehensive conditions for reinstatement;
- Respondent acknowledges the wrongfulness of his misconduct; and
- Respondent has received a diagnosis of chemical dependency and mental disability by a qualified health care professional, which chemical dependency and mental disability contributed to the cause of the misconduct. Respondent has successfully completed approved treatment programs and has had a one year sustained period of successful treatment. The prognosis from a qualified health care professional is that

Respondent will be able to return to the competent, ethical professional practice of law as long as he meets certain conditions described above. Stipulation ¶166.

{¶34} Respondent recommends a completely stayed suspension upon stipulated conditions to prevent the reoccurrence of misconduct. Stipulation ¶167. Relator recommends that Respondent receive a two-year actual suspension from the practice of law with the same stipulated conditions to reinstatement.

{¶35} Respondent cites as authority for a completely stayed suspension the recent cases of *Butler Cty. Bar Assn. v. Minamyers*, 129 Ohio St.3d 433, 2011-Ohio-3642 (one-year stayed suspension for neglect, communication issues with client, and misleading a client as to status of matter); and *Disciplinary Counsel v. Meehan*, 133 Ohio St.3d 51, 2012-Ohio-3894 (two-year stayed suspension for unknowingly practicing law after he had receive a registration suspension). The panel concludes that the cases cited by Respondent for a completely stayed suspension are not convincing authority in this case because Respondent has been previously sanctioned for serious misconduct and because Respondent's misconduct in this case is more widespread than in the cited cases. The panel therefore concludes that an actual suspension is required in this case.

{¶36} Relator cites numerous cases as authority for the imposition of an actual suspension, with sanctions ranging from indefinite suspensions to two-year suspensions with some portions stayed. The case law does not support the imposition of a two-year actual suspension. However, the panel is troubled by Respondent's previous relapses from sobriety, thus suggesting that a two-year suspension, with a portion of the suspension stayed, is appropriate so as to allow time for Respondent to devote to his treatment programs and to further incentivize Respondent's recovery efforts.

{¶37} Several recent cases have imposed two-year suspensions with 12 or 18 months stayed with stringent conditions to reinstatement so as to prevent reoccurrence of misconduct and at the same time allow for continued substance abuse or mental disability treatment. *Akron Bar Assn. v. McNerney*, 122 Ohio St.3d 40, 2009-Ohio-2374 (two-year suspension, with the second year stayed on stringent conditions, including monitored probation and formal reinstatement proceedings pursuant to Gov. Bar. R. V, Section 10(C) through (G) for malpractice insurance and attorney registration violations); *Erie-Huron Grievance Commt. v. Stoll*, 127 Ohio St.3d 290, 2010-Ohio-5985 (two-year suspension, with 12 months stayed on stringent conditions plus two-year monitored probation for mishandling 20 estate proceedings); *Disciplinary Counsel v. Burchinal*, 133 Ohio St.3d 38, 2012-Ohio-3882 (two-year suspension, with 18 months stayed with a monitored probation on condition of completion of OLAP contract for misappropriation of funds, neglect and concealment); *Disciplinary Counsel v. Johnson*, 131 Ohio St.3d 372, 2012-Ohio-1284 (two-year suspension, with 18 months stayed); and *Erie-Huron Counties Joint Certified Grievance Commt. v. Derby*, 131 Ohio St.3d 144, 2012-Ohio-78 (two-year suspension, with 18 months stayed).

{¶38} In *Johnson, supra*, the respondent was found to have committed multiple instances of misconduct based on his commingling of personal and client funds, improperly withdrawing client funds from his IOLTA account, failing to keep records for each client and failing to cooperate in the relator's investigation. He used his client trust account for personal transactions to evade an IRS lien on his personal checking account. He represented in deposition testimony that certain funds were in his trust account but they were not. He failed to abide by a court order and falsely stated to that court that he maintained a separate ledger for each of his clients, but he did not. In mitigation, the court noted that respondent had made a timely good

faith effort to make restitution and further that his mental disabilities qualified as a mitigating factor pursuant to BCGD Proc. Reg. 10(B)(2). The Court acknowledged that absent the mitigating factors, a two-year actual suspension would be warranted. "But on remand, Johnson successfully demonstrated that he suffers from mental disabilities that contributed to his misconduct. He sought treatment for those conditions and signed a three-year contract with the Ohio Lawyers Assistance Program to help him deal with them. Having considered these facts and the additional mitigating factors established on remand \* \* \*," the Court imposed a two-year suspension, with the last 18 months stayed. *Id.* at ¶¶18, 19.

{¶39} In *Derby, supra*, the attorney received substantial retainers and filing fees to file personal bankruptcies. He neglected eight separate personal bankruptcy matters and failed to keep his clients reasonably informed or to reply to their repeated requests for information, which caused the clients personal distress and frustration. In mitigation, the Court found that Derby had made good faith efforts to make restitution or to rectify the consequences of his misconduct. Although Derby's alcohol abuse and depression did not qualify as a mitigating factor under BCGD Proc. Reg. 10(B)(2), his effort at recovery was accorded some mitigating effect. The Court imposed a two-year suspension, with the final 18 months stayed, followed by two years of monitored probation. *Id.* ¶ 16. In addition, the Court imposed stringent conditions to protect the public from further misconduct, including but not limited to the "certification of a qualified psychiatrist that he is able to return to the competent, ethical, and professional practice of law." *Id.* at ¶17.

{¶40} In consideration of the relevant factors, including the ethical duties that Respondent violated, the sanctions imposed in similar cases and the aggravating and mitigating factors, the panel recommends that Respondent be suspended for two years, with 18 months

stayed on the conditions set forth below and that there be a monitor appointed pursuant to Gov. Bar R. V, Section 9 for the period of the stayed suspension and for an 18-month probationary period thereafter.

{¶41} Based in part on the stipulated conditions of the parties, the panel recommends the following conditions to reinstatement:

- a. Respondent shall institute and maintain an IOLTA account;
- b. Respondent shall complete 12 hours of CLE classes on law office management, at least six hours of which shall be focused on the proper use and maintenance of his trust account;
- c. Respondent shall comply with the terms of his current five-year OLAP contract and follow all recommendations of OLAP, including, if applicable, contract renewal, attending a specified number of AA meetings, maintaining an AA sponsor, random drug testing, and continued treatment by a qualified mental health provider;
- d. Respondent shall commit no further violations of the Ohio Rules of Professional Conduct; and
- e. In view of Respondent's history of successfully completing substance abuse treatment programs and then subsequently relapsing, the panel recommends as an additional condition to reinstatement, whether for the stayed portion of the suspension or after the entire two-year suspension, Respondent be required to present a certificate from a qualified psychiatrist or psychologist that he is able to return to the competent, ethical, and professional practice of law.

#### **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 6, 2012. The Board adopted the Findings of Fact and Conclusions of Law of the panel. However, the Board concludes the more appropriate sanction for Respondent's misconduct is an indefinite suspension from the practice of law, with reinstatement subject to conditions b. through e. contained in ¶41 of the report, and recommends imposition of that sanction to the Supreme Court. Respondent further shall comply with condition a. contained in ¶41 of the report upon reinstatement. The Board further recommends

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 black ink, appearing to read "Richard A. Dove", written over a horizontal line.

**RICHARD A. DOVE, Secretary**