

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

**13-0221**

<b>In re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 12-023</b>
<b>Michael James Wagner</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0016371</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>Mahoning County Bar Association</b>	:	<b>the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	
	:	

**FILED**  
FEB 04 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

**OVERVIEW**

{¶1} This matter was heard on November 26, 2012, before a panel consisting of Judge John R. Willamowski, Paul M. DeMarco, 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 David Comstock, Jr. Respondent was represented by John J. Juhasz.

{¶2} The parties introduced into evidence written stipulations as to both facts and violations of Prof. Cond. R. 8.4(c) and (d), but not Prof. Cond. R. 8.4(b). The parties also stipulated to aggravating and mitigating factors and a sanction of an 18-month suspension with credit for time served pursuant to the interim suspension. The only witness at the hearing was Respondent. The stipulations, together with the stipulated exhibits A, B, and C, were received in evidence as well as eight character letters from numerous judges, friends, and colleagues

attesting to Respondent's good character and reputation for truthfulness, professionalism, and community involvement.

{¶3} On July 6, 2011, Respondent pleaded guilty in the United States District Court, Northern District of Ohio, to one count of conspiracy to commit wire fraud in violation of 18 USC §371, and was sentenced to federal probation for three years. The panel concludes that Respondent violated Prof. Cond. R. 8.4(b) [an illegal act that reflects adversely on his honesty and trustworthiness]; Prof. Cond. R. 8.4(c) [conduct involving fraud]; and Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]. The panel recommends that Respondent be indefinitely suspended from the practice of law with credit for the interim felony suspension imposed on January 24, 2012.

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

{¶4} The panel adopts and incorporates all of the stipulated facts and conclusions set forth in paragraph 1 through 29 of the attached stipulations, except to the extent that they are inconsistent with the panel's findings set forth in these findings of fact. The panel finds that paragraph 11 of the stipulations is incorrect in that Respondent was charged with, pled guilty to, and found guilty of a violation 18 USC §371 instead of 18 USC §374. Joint Exs. A, B, and C.

{¶5} Respondent was admitted to the practice of law on November 6, 1981, is a graduate of the University of Toledo College of Law, is 56 years old, practiced for many years as in-house counsel for Home Savings & Loan Company, and at various times has engaged in private practice, and as a title agent in the Youngstown, Ohio area. At the time of the conspiracy, Respondent was the owner and operator of the Freedom Title Agency. Respondent was a title agent licensed by the State of Ohio. Hearing Tr. 16-24.

{¶6} Respondent is active in community and religious affairs in his community, including the Board of Athletics of the Youngstown Christian Schools, the Old North Church in Canfield, Ohio, and coaching youth sporting activities. *Id.* 17-18; Respondent's Ex. 5.

{¶7} According to the indictment, Romero Minor conspired with others, including Respondent, in a scheme to defraud banks making mortgage loans to "straw buyers" (individuals who applied for mortgage loans to purchase properties with no intention of making the properties their primary residence or keeping the properties as investments) recruited by Minor to purchase the properties in their names. Minor had the properties appraised and financed at values far beyond what the properties were worth, and personally received thousands of dollars at the closings from the mortgage proceeds. The mortgage lenders providing the mortgage loans were unaware that the loan applications contained false information or that the values of the properties were fraudulently inflated. Joint Ex. A.

{¶8} As the title agent, Respondent and his title company had responsibility to collect from the straw buyers the down payment money at closings and properly distribute the mortgage proceeds and ensure the relevant paperwork, namely HUD-1s, was properly completed for each real estate closing. Joint Ex. A.

{¶9} Respondent entered into a plea agreement with the United States on or about April 12, 2011, in which he admitted that he conspired with Minor and others to commit wire fraud through the mortgage fraud scheme designed by Minor, and that from April 21, 2005 through January 11, 2006, Respondent prepared the necessary settlement statements or HUD-1s to induce the various lenders to approve the loans for the purchase of seven different properties. Joint Ex. B and C. For the first three properties for which Respondent prepared the settlement statements, Respondent did not realize the information provided to him by Minor was false.

However, as he continued to work with Minor, he realized that the “structure of the transactions presented by Minor was suspect.” Respondent was then “willfully blind to what he should have known to be false information and documentation being provided by Minor in order for (Respondent) to complete the settlement statements on the next four transactions.” Joint Ex. B, E, and F.

{¶10} Respondent admitted in the plea agreement that he “knowingly prepared the settlement statements based on the information provided by Minor without questioning the accuracy of the information.” The settlement statements were made to appear to the lenders that large cash distributions to Minor were legitimate by listing them as “Pay off of Note to Romero Minor.” Respondent admitted that he should have known that Minor had no legitimate reason to receive large cash distributions at the last four closings. Joint Ex. B and H.

{¶11} At the hearing, Respondent testified that the cash distributions made at the closings to Minor were supported by actual promissory notes which he personally saw, that he confirmed with the sellers the legitimacy of the notes, and that he was told that the promissory notes were for the value of repair work performed by Minor or his companies for the sellers in order to make the property saleable. The panel finds as true Respondent’s testimony that he confirmed the existence of the promissory notes as purported justification for cash distributions to Minor from the loan proceeds. Hearing Tr. 31-32, 46-47, 60-62, 70-71. However, the panel finds as a fact, based on the language of the plea agreement, that Respondent “realized the structure of the transactions was suspect” and that he was “willfully blind” to such realization and continued to prepare false settlement statements on the next four transactions.

{¶12} The plea agreement does not state that Respondent was actually aware of all the details of the scheme, was aware of the inflated appraisals of the properties, or aware that the

buyers did not provide the down payments from their personal funds. Respondent testified that he did not have knowledge of such details. *Id.* 30-31, 46-47, 51-52, 66-67, 79-80. However, complete knowledge of the details of the mortgage scheme was not necessary for the criminal conspiracy to which Respondent, with the assistance of counsel, pled guilty.<sup>1</sup>

{¶13} On July 6, 2011, judgment was entered in the criminal case against Respondent as to Count One of the indictment, a violation of 18 USC 371, conspiracy to commit wire fraud. Respondent was sentenced to probation for a term of three years, and ordered to perform 50 hours of community service. Stipulation 25 and 26; Joint Ex. C. Respondent has completed his community service obligation but remains on “non-reporting probation.” *Id.* 35-36.

{¶14} Pursuant to the judgment of the district court, Respondent was ordered to make restitution to the banking institutions, jointly and severally with the other participants in the scheme, in the total amount of \$147,620. The restitution obligation is to be paid at a minimum rate of not less than 10 percent of his gross monthly income. Respondent’s current repayment agreement with his probation officer calls for \$20 per month, but now that he is working he is paying more. Respondent is current in his payments pursuant to the repayment agreement. To date, Respondent has paid less than \$1,000 toward his restitution obligation. Stipulation 27 and 28; Hearing Tr. 34-36, 73-74.

{¶15} Respondent is currently under an interim felony suspension imposed on January 24, 2012. *In re: Michael James Wagner*, Supreme Court Case No. 2012-0086.

{¶16} Relator proved by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(d) as stipulated by the parties.

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<sup>1</sup> See Joint Ex. B where Respondent agreed with the government as to the elements of the crime to which Respondent pleaded guilty.

{¶17} The parties have not stipulated to a violation of Prof. Cond. R. 8.4(b).

Respondent admits he committed the crime, but denies that his offense reflects adversely on his honesty or trustworthiness. Respondent maintains that he did not realize that the information being provided by Minor was false. Stipulation 21. However, a specific intent to deceive is not necessary to establish a violation of Prof. Cond. R. 8.4(b). *Disciplinary Counsel v. McCord*, 121 Ohio St.3d 497, 2009-Ohio-1517.

{¶18} The judgment in the criminal case is conclusive evidence that Respondent committed the federal crime in question. *Disciplinary Counsel v. McAuliffe*, 121 Ohio St.3d 315, 2009-Ohio-1151. However, proof of a criminal conviction is not necessarily proof as to the issue of whether the crime “reflects adversely on the lawyer’s honesty or trustworthiness.” See *Disciplinary Counsel v. Burkhart*, 75 Ohio St.3d 188, 1996-Ohio-121. [Conviction is conclusive evidence that the crime was committed but not conclusive evidence that the crime involved “moral turpitude” within the meaning DR 1-102 (A)(3)].

{¶19} The parties have not cited any cases that discuss the proper interpretation of the words “honesty” or “trustworthiness” in Prof. Cond. R. 8.4(b) and the panel has discovered none. Respondent admits that he had a responsibility to the lenders to accurately and truthfully prepare the settlement statements. Joint Ex. B and G. The banks had a right to rely upon Respondent to prepare the settlement statements in a completely honest and trustworthy manner. Respondent further admits that he “realized the structure of the transactions was suspect” and was “willfully blind” to that suspicion. The panel concludes that a common meaning of the word trustworthy in this context is “worthy of trust; dependable or reliable.” See Webster’s New World Dictionary. Respondent’s admitted conduct was neither completely honest nor trustworthy. The panel

therefore concludes that Relator has proved by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(b).

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

{¶20} The panel finds the following aggravating factor: Respondent committed multiple offenses and a pattern of misconduct because he prepared settlement statements in at least four different transactions after realizing that the transactions were suspect.

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

- Respondent has no prior disciplinary record
- Respondent did not have a selfish motive. Respondent received no compensation beyond his normal fee as a title agent. Hearing Tr. 33.
- Respondent cooperated fully with the prosecutors, self-reported his indictment to Relator, and fully cooperated in the disciplinary process. *Id.* 25-27, 36-38;
- Respondent acknowledges that his knowledge of five successive unsecured promissory notes from the sellers to Minor to justify cash distributions to Minor should have put him on notice that something was wrong with the transactions and that he was willfully blind to his suspicions. *Id.* 86-87; Plea Agreement 24.
- Respondent has an excellent reputation for truthfulness, professionalism, and community involvement. Respondent's Ex. 1-8.
- Respondent received other penalties or sanctions, namely an interim suspension and a criminal sentence.

{¶22} The parties stipulated that Respondent be suspended from the practice of law for 18 months with credit for the interim felony suspension imposed on January 24, 2012.

Stipulation 30. The stipulated sanction would make Respondent eligible for reinstatement on July 24, 2013, at a time when he is currently scheduled to still be on supervised release from his criminal conviction.<sup>2</sup> In recognition of the recent case law regarding reinstatement while still on supervised release from a felony conviction, Relator proposed at the hearing, and Respondent's attorney agreed, that the Court should impose a period of probation pursuant to Gov. Bar R. V, Section 9 after his reinstatement on July 24, 2013 for the purpose of monitoring Respondent's

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<sup>2</sup> Assuming no change by the criminal court in Respondent's supervised release time table, he will remain on supervised release for three years until January 6, 2014. Joint Ex. C.

compliance with the terms of his supervised release. Hearing Tr. 98-102, 125-129. The panel recommends an indefinite suspension with credit for the interim felony suspension.

{¶23} The parties have cited and the panel has discovered only three decided cases where the sole issue was misconduct leading to a conviction for bank fraud. Those cases are *Disciplinary Counsel v. Lash*, 68 Ohio St.3d 12, 1993-Ohio-157; *Cuyahoga Cty. Bar Assn. v. Garfield*, 109 Ohio St.3d 103, 2006-Ohio-1935; and *Disciplinary Counsel v. Gittinger*, 125 Ohio St.3d 467, 2010-Ohio-1830. The sanctions imposed in these three cases vary according to the particular circumstances.

{¶24} In the 1993 case of *Disciplinary Counsel v. Lash, supra.*, Respondent overstated his income on a loan refinance application by \$10,000 in order to get an increase in a mortgage loan by \$15,000. He was sentenced to 100 hours of community service, one year probation, and a \$1,000 fine. At the time of the Court's decision regarding professional misconduct, *Lash* had complied with his criminal sentence. The Court found in mitigation that the bank incurred no loss, that respondent took full responsibility for his misconduct, and that there was extensive evidence submitted as to his good character. The Court imposed a one-year suspension with credit for the prior interim felony suspension. The *Lash* case is not persuasive as to the appropriate sanction in this case because *Lash* committed only one isolated instance of misconduct, he was not guilty of a pattern of misconduct, and the bank suffered no harm.

{¶25} In the 2006 case of *Cuyahoga Cty. Bar Assn. v. Garfield, supra.*, respondent pledged a certificate of deposit, which was owned by a company as to which he possessed power of attorney, to secure a loan for his personal use, leading the bank to believe that he was obtaining the loan on behalf of the company instead of himself. *Garfield* was sentenced to 30 days in a halfway house followed by three years on probation, plus a small fine and special

assessment. The breach of his fiduciary duty to the company was cited as an aggravating factor. Mitigating factors included the absence of a prior disciplinary record, prompt and full cooperation with the prosecutors, cooperation with relator, numerous statements filed with the Board regarding respondent's good character, and payment in full of restitution even before the criminal charge was filed. The Court imposed an 18-month suspension with credit for time served pursuant to the interim felony suspension. The instant case is analogous to *Garfield*, but there are some differences. In *Garfield*, full restitution was made even before the criminal charge was filed. In this case, Respondent's situation regarding restitution is still very much up in the air. In *Garfield*, the lawyer engaged in a single act of fraud. In this case, Respondent's conduct seems more innocent than *Garfield*, but the fraud occurred on four occasions rather than just one. On the other hand, *Garfield* benefitted from his fraud while Respondent did not benefit beyond his normal fee as a title agent.

{¶26} The most recent case involving bank fraud is the 2010 case of *Disciplinary Counsel v. Gittinger, supra*. Like Respondent in this case, *Gittinger* was a title agent who performed services in connection with real estate closings. He falsified material information on the HUD-1 Settlement Statements relied upon by the bank. The losses to the bank were between \$400,000 and \$1,000,000. *Gittinger* was sentenced to an aggregate 12-month and one-day incarceration, plus an aggregate five-year period of supervised release, a fine of \$6,000, and a special assessment of \$200. The criminal sentence further provided that during the supervised release, *Gittinger* would be prohibited from the practice of the law. The parties stipulated to a sanction for the professional misconduct of 18 months. However, an 18-month suspension would potentially have allowed *Gittinger* to be reinstated while he was still under supervised release from his felony conviction. The Court stated: "[W]e find that indefinite suspension is the

proper sanction in these circumstances. Imposing an indefinite sentence suspension will avoid inconsistency between this court's disciplinary sanction and the federal court's criminal sentence and will allow for proper resolution of the underlying criminal case prior to any application for reinstatement to the practice of law." *Id.* at ¶45. The Court imposed an indefinite suspension with credit for the time under the interim suspension.

{¶27} The parties in this case pointed out that *Gittinger* received an indefinite suspension rather than an 18-month suspension only to avoid an inconsistency between the sentencing order and a disciplinary sanction and that such inconsistency would not exist in the instant case because there is no provision in the sentencing order that would prevent respondent from practicing law while under supervised release. However, since at least 2010, the Court has with apparent uniformity, denied reinstatement to lawyers still under supervised release from felony convictions. See e.g., *Disciplinary Counsel v. Smith*, 128 Ohio St.3d 390, 2011-Ohio-957; *Disciplinary Counsel v. Bennett*, 124 Ohio St.3d 314, 2010-Ohio-313; *Cincinnati Bar Assn. v. Kellogg*, 126 Ohio St.3d 360, 2010-Ohio-3285; and *Columbus Bar Assn. v. Hunter*, 130 Ohio St.3d 355, 2011-Ohio-5788. Therefore, *Gittinger* may well have been denied reinstatement prior to the completion of supervised release regardless of any inconsistencies with the federal sentencing order.

{¶28} The instant case is arguably distinguishable from *Gittinger* because in *Gittinger* the lawyer did not fully acknowledge the wrongfulness of his actions and his participation of the fraudulent scheme appears to have been more direct than Respondent's misconduct in this case. However, it should be noted that the Supreme Court's order in *Gittinger* potentially called for more time off because *Gittinger*'s supervised release was for five years whereas Respondent's scheduled supervised release is three years.

{¶29} It appears that a majority, but not all of the recent opinions reviewed by the panel, have imposed an indefinite suspension for misconduct leading to a felony conviction. *See e.g. Disciplinary Counsel v. Smith, supra.*, (indefinite suspension with credit for time served for an attorney convicted of conspiracy to impede an IRS investigation. Reinstatement was conditioned on the completion of federal supervised release, and execution of a final agreement to pay restitution); *Disciplinary Counsel v. Zapor*, 127 Ohio St.3d 372, 2010-Ohio-5769 (indefinite suspension with reinstatement conditioned on the execution and compliance with an OLAP contract for an attorney convicted of felony theft from a guardianship account); *Cincinnati Bar Assn. v. Kellogg, supra.*, (indefinite suspension with reinstatement conditioned on the completion of federal supervised release for attorney convicted of money-laundering, conspiracy to commit money-laundering, and conspiracy to obstruct proceedings before the Federal Trade Commission and the Food and Drug Administration); *Disciplinary Counsel v. Bennett, supra.*, (indefinite suspension with credit for time served under an interim felony suspension with reinstatement conditioned on completion of supervised release for an attorney convicted of illegally structuring currency transactions to evade taxation). But *see e.g. Disciplinary Counsel v. Margolis*, 114 Ohio St.3d 165, 2007-Ohio-3607 (two-year suspension for conspiracy to restrain trade); *Disciplinary Counsel v. Blaszak*, 104 Ohio St.3d 330, 2004-Ohio-6593 (two-year suspension with credit for time served under an interim felony suspension for sale of witness testimony).

{¶30} The panel concludes that an indefinite suspension is the appropriate sanction in this case. However, in view of Respondent's more indirect role in the bank fraud scheme; that Respondent did not benefit from the scheme beyond his normal fee as a title agent; that Respondent fully cooperated with the prosecutors and self-reported his indictment to Relator and then fully cooperated with Relator in the disciplinary process; that Respondent acknowledges the

wrongfulness of his conduct; that Respondent has an excellent reputation for truthfulness, professionalism, and community involvement; that Respondent has already received other penalties or sanctions; and, that Respondent has made arrangements and complied with the payment plan agreed upon with his probation officer regarding restitution,<sup>3</sup> the panel concludes that Respondent should receive credit for the time already served pursuant to his interim felony suspension.

{¶31} After considering the ethical duties violated, the sanctions imposed in similar cases, and the aggravating and mitigating factors, the panel recommends that Respondent be indefinitely suspended from the practice of law with credit for the interim felony suspension imposed on January 24, 2012.

### **BOARD RECOMMENDATION**

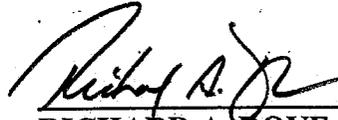
Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 1, 2013. The Board modified the Findings of Fact and Conclusions of Law to dismiss the stipulated violation of Prof. Cond. R. 8.4(d) because there is no evidence in the record to support a finding that Respondent engaged in conduct prejudicial to the administration of justice. In all other respects, the Board adopted the panel's Findings of Fact and Conclusions of Law. The Board concurs in the Recommendation of the panel and recommends that Respondent, Michael James Wagner, be indefinitely suspended from the practice of law in Ohio with credit for time served under the interim felony suspension imposed on January 24, 2012. The Board further recommends that the

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<sup>3</sup> The issue of restitution is, based on the record before the panel, unclear. Respondent was ordered to make restitution in the amount of \$147,620, but that obligation was made jointly and severally with the other participants in the scheme. Respondent is current with respect to his repayment agreement with the probation officer, but there was no evidence at the hearing as to the amounts, if any, paid toward the joint and several obligation by the other participants in the scheme. The panel assumes the parties will have better information as to the status of the restitution obligation at the time that Respondent applies for reinstatement, and therefore makes no recommendation regarding any restitution that will be required for reinstatement.

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**