

ORIGINAL

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

In re: : 13-0572
Complaint against : Case No. 12-057
David Edward Troller : Findings of Fact,
Attorney Reg. No. 0013296 : Conclusions of Law, and
Respondent : Recommendation of the
Disciplinary Counsel : Board of Commissioners on
Relator : Grievances and Discipline of
 : the Supreme Court of Ohio
 :
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OVERVIEW

{¶1} This matter was heard February 22, 2013 in Columbus before a panel composed of Alvin R. Bell, Janica A. Pierce Tucker, and Keith A. Sommer, chair. None of the panel members is from the appellate judicial district in which the complaint arose, and none was a member of a probable cause panel that certified the matter to the Board.

{¶2} Donald M. Scheetz and Robert R. Berger appeared as counsel for Relator and Melissa Zujkowski appeared on behalf of Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶3} Respondent and Relator entered into joint stipulations as to facts and rule violations, exhibits, mitigation and aggravation evidence, and recommended sanction.

{¶4} Respondent was hired by Clopay Corporation in 1999 as senior corporate counsel. From April 2002 to April 2010, he held the position of chief legal officer, and also secretary. The

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title "chief legal officer" was used on his stationery and business cards since April 2002.

Respondent ceased the use of this job title in April 2012 upon receipt of Relator's letter of inquiry.

{¶5} From April 2002 until April 2012, as chief legal officer, Respondent engaged in the practice of law which included hiring and managing outside legal counsel; drafting and negotiating contracts and assisting with human resources; and was responsible for managing the legal department employees which included a patent liaison and part-time attorney. Respondent never signed pleadings or appeared in court or other proceedings. Respondent only served Clopay.

{¶6} Respondent failed to register for the 2003 attorney registration biennium and for the 2005 attorney registration biennium. On December 2, 2005, Respondent was suspended from the practice of law for his failure to register for the 2005-2007 attorney registration biennium. Exhibit 3. The order of suspension prohibited Respondent from counseling or advising, or preparing legal instruments or in any manner performing legal services, or examining or passing upon the legal effect of any document in Ohio or passing upon the legal effect of any act, document, or law.

{¶7} On May 16, 2006, Respondent was suspended from the practice of law for his failure to comply with continuing legal education requirements for 2003-2004 and failure to pay a previous court-ordered sanction for non-compliance for the 2001-2002 reporting period. Exhibit 4.

{¶8} Respondent has not been reinstated to the practice of law to date. The parties stipulated that Respondent's actions as chief legal officer on behalf of Clopay Corporation after his suspension constituted the practice of law and holding oneself out as authorized to practice law in Ohio.

{¶9} Respondent's conduct violates the following: DR 1-102(A)(6) [conduct that adversely reflects upon his fitness to practice law]; DR 3-101(B) [practicing law in a jurisdiction where to do so would be in violation of the regulations of the profession in that jurisdiction]; Prof. Cond. R. 8.4(h) [conduct that adversely reflects upon his fitness to practice law]; Prof. Cond. R. 5.5(a) [practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction]; and Gov. Bar R. VI, Section 5(C) [practicing law while suspended for failing to register with the Supreme Court].

{¶10} Relator and Respondent requested a waiver of the hearing based on the stipulations. The panel overruled this request and ordered a hearing. Paragraph 4 of the stipulations left open questions that necessitated the hearing. The stipulation stated that from April 2002 through April 2012, as chief legal officer, Respondent engaged in the practice of law and stated "Respondent engaged in the practice of law by hiring and managing outside legal counsel, drafting and negotiating contracts and assisting with human resources issues." During cross-examination by Relator, Respondent was hesitant in admitting that his work constituted the practice of law. Respondent testified at different times that he could not give examples that would illustrate he was practicing law, but under further examination by Relator, would admit the conclusion that he was practicing law. Hearing Tr. 15-18, 22, 65-69.

{¶11} Relator reviewed each rule violation, and Respondent admitted that he violated each. Respondent specifically admitted that as part of his job duties, he drafted and negotiated contracts; worked on patents; and managed litigation.

{¶12} Relator then questioned Respondent from the time of his registration suspension in 2005 and after the CLE suspension in 2006 if he agreed he was practicing law up until April 2012. Respondent stated he had a hard time answering that question and attempted not to provide legal

advice. Relator then referred back to the stipulations, and Respondent agreed that he signed the same.

{¶13} Relator referred Respondent to Exhibit 8 that was signed by the Board of Directors of Clopay and was dated March 6, 2007, and listed Respondent as vice president, secretary, and chief legal counsel. Relator then referred to the next document signed by the Board of Directors dated January 16, 2012, which deleted the reference to chief legal counsel following Respondent's name.

{¶14} Respondent testified that he signed a contract with OLAP in August or September 2012 and that he has been getting treatment for anxiety. A report from OLAP was never submitted. The stipulation of facts did not mention the OLAP contract or the reasons why Respondent sought OLAP and his present status. Respondent testified concerning a counselor and a doctor, but again reports were not submitted.

{¶15} In response to questions from the panel, Respondent testified as to the percentage of time that he worked on contracts, addressing human resource matters, managing outside legal counsel, and acting as ethics liaison. Respondent again stated he attempted to avoid providing legal advice as such in all areas. Respondent admitted that he would "participate in the drafting of the wording of contracts."

{¶16} The first issue was whether "hiring and managing outside legal counsel constituted the practice of law." In response to a panel question as to his activity in hiring and managing outside legal counsel, Respondent stated that he would talk to counsel about the progress of cases and discuss the case and even challenge them on it and help the company decide on resolution of cases. Respondent admitted to discussing discovery proceedings, discussing issues concerning

answers or complaints filed in court, engaging in discussions concerning depositions, and engaging in discussions with outside counsel concerning settlements.

{¶17} The second issue was whether assisting with human resources issues constituted the practice of law. In response to panel questions concerning human resources, Respondent admitted that he probably did have discussions with the company concerning discharging an employee because of age or an employee's health, and the risk of being sued for unlawful discharge.

{¶18} The third issue was whether drafting and negotiating contracts constituted the practice of law. Respondent admitted that this was the practice of law and testified to his legal work in the drafting and negotiating of contracts, and this constituted 25 percent of his work. Respondent testified that in 2006 and 2007 that a fulltime attorney was an employee of the corporation and he would work with him managing contracts and HR and litigation of the company. This attorney would report to Respondent, and Respondent admitted that he would work with the fulltime attorney on the legal issues that he was working on. Respondent stated that after that, they had a parttime attorney who was outside legal counsel. Respondent admitted that he would work with this parttime attorney from 2008 to 2012 on all legal issues.

{¶19} Respondent offered an additional exhibit marked Exhibit 9, which was an employee performance planning and review for the year end 2004. The document identifies Respondent as Clopay's senior legal manager and states "this position carries responsibility for a wide range of legal compliance, planning and advocacy." The employee performance further states "the position requires competencies in a broad range of legal subjects."

{¶20} Based upon the parties' joint stipulations as to facts and rule violations, testimony and evidence presented at the hearing, and Relator's and Respondent's exhibits, the panel finds

that Relator has proven by clear and convincing evidence that Respondent committed the misconduct set forth in the agreed stipulations and committed the stipulated violations. The panel specifically finds that the acts set forth above were performed by Respondent while acting in his capacity as the chief legal officer of Clopay.

AGGRAVATION, MITIGATION, AND SANCTION

{¶21} The panel finds that the following aggravating factors are present:

- Respondent made a good faith effort to rectify his conduct;
- Respondent has cooperated fully with the disciplinary process, including making full and free disclosures during the pre-grievance investigation process;
- Respondent is an active member of his church and community and has a long history of engaging in charitable endeavors, including volunteering with post-hurricane rescue and recovery efforts in New Orleans and Haiti and serving as a volunteer fireman; and
- Respondent did cease using the title “chief legal officer” on his stationery and business cards and testified that he avoids giving any legal advice or in any way committing acts that would constitute the practice of law in his work in support of the good-faith effort to rectify his conduct as a mitigating factor. The testimony supported all mitigating factors.

{¶22} The panel finds that the following mitigating factors are present:

- Respondent engaged in a pattern of misconduct;
- Respondent engaged in multiple offenses; and
- Respondent has a disciplinary history.

{¶23} The parties stipulated to a two-year suspension, with six months stayed subject to the following conditions: (1) Respondent continue with his OLAP contract for a period of two and one-half years beyond the date that the Supreme Court of Ohio enters its final order in this matter and that Respondent abide by the terms of that contract to the satisfaction of OLAP; (2) any application for reinstatement will include a letter from OLAP or a qualified mental health professional approved by OLAP stating that Respondent is capable of returning to the competent,

ethical, and professional practice of law; and (3) Respondent will complete the remaining outstanding balance of his CLE hours.

{¶24} In *Disciplinary Counsel v. Bancsi*, 79 Ohio St.3d 392, 1997-Ohio-378, the Court adopted the findings and conclusions of the Board wherein Respondent continued to practice law while his license was under suspension and cited *Disciplinary Counsel v. Koury*, 77 Ohio St.3d 433, 1997-Ohio-91, which stated “The normal penalty for continuing to practice law while under suspension is disbarment.” In *Bancsi*, Respondent promptly attempted to cure the deficiency with respect to his continuing legal education which resulted in his suspension and the immediate payment of outstanding fines. In view of the short duration of the suspension, the Court ordered that Respondent be suspended from the practice of law for one year, with six months of the suspension stayed.

{¶25} In *Disciplinary Counsel v. Blackwell*, 79 Ohio St.3d 395, 1997-Ohio-377, the Court stated Respondent continued to practice law after having been suspended for failure to meet his CLE requirements and practiced for 15 months while not maintaining a current certificate of registration, and stated that Respondent practiced for five years while delinquent in his CLE requirements. The Court again stated that the normal penalty for continuing to practice law while under suspension is disbarment, but stated in view of the specific facts and circumstances of involving Respondent and the fact that most of his violations occurred during a period that he was achieving a successful recovery from alcoholism, the Court imposed a two-year suspension, with the second year of the suspension period stayed. The Court referred to *Bancsi* supra, and stated that Bancsi continued to represent clients during a five-week period before his reinstatement motion was granted.

{¶26} In *Disciplinary Counsel v. Seabrook*, 133 Ohio St.3d 97, 2012-Ohio-3933, Respondent's license to practice law was suspended December 2, 2005 through March 1, 2006, for his failure to comply with the attorney registration requirements. A second registration suspension was imposed by the Court on November 3, 2009, and his license was reinstated on March 5, 2010.

{¶27} On October 11, 2010, Relator filed a complaint alleging that Respondent continued to practice law by representing two clients during his second attorney registration suspension and failed to cooperate in the ensuing disciplinary investigation. The panel and Board adopted the parties' stipulations and recommended that Respondent be suspended from the practice of law for two years, with the entire suspension stayed on conditions. The Court adopted the Board's findings of fact and misconduct, but imposed a two-year suspension, with the second year stayed on conditions recommended by the Board.

{¶28} In Count One of the complaint against Respondent, he received a retainer to represent a client in a child support matter and appeared before the magistrate in the Franklin County Domestic Relations Court. On March 3, 2010, the magistrate submitted a grievance to Relator upon discovering Respondent's suspension. Two days later, Respondent's license was reinstated. Relator's letter of inquiry to Respondent at his residence address listed in his attorney registration records was returned unclaimed, and no response was received from Respondent. In Count Two, Respondent represented a client in an eviction action on February 17, 2010. The Court stated that Respondent's misconduct included his continued practice of law during his registration suspension and his initial failure to cooperate in the ensuing disciplinary investigation and his un-excused tardiness at the panel hearing. The Court stated that an actual suspension is

warranted and suspended Respondent from the practice of law for two years, with the second year stayed on conditions.

{¶29} In *Disciplinary Counsel v. Carson*, 93 Ohio St.3d 137, 2001-Ohio-1300, the Court suspended Respondent June 18, 1993, from the practice of law for his failure to cure the deficiency in his CLE requirements for the 1990-1991 reporting period. Despite being suspended, Respondent continued to represent clients until May 8, 2000.

{¶30} By the end of 1992, Respondent had made up the deficiency in his continuing legal education hours for the 1990-1991 period. However, he did not pay his fine and on June 18, 1993 was suspended from the practice of law. On June 23, 1993, Respondent submitted to the CLE commission a letter in lieu of a late report and a check to satisfy his noncompliance and a check to satisfy the monetary sanction imposed by the Court order. Respondent indicated that he would file a petition for reinstatement but never filed the same. By May 8, 2000, Respondent had ceased to practice law and had taken other steps to comply with the Court's June 18, 1993, order.

{¶31} The panel found that Respondent was a recovering alcoholic and worked closely with OLAP. The panel also found that Respondent assumed that paying the fines was all he needed to do and has been in full compliance with his CLE requirements since 1992.

{¶32} The panel recommended Respondent be suspended for two years, with one year of the suspension stayed, and the Board adopted the findings, conclusions and recommendations of the panel. The Court suspended Respondent from the practice of law for two years, with one year suspended and with credit for the time he has not practiced since May 8, 2000.

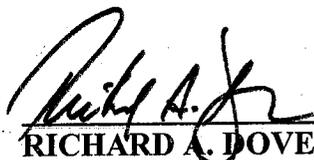
{¶33} Based on the parties stipulations and the cases cited above, the panel recommends the stipulated sanction be adopted with one additional condition. The panel recommends that Respondent receive a two-year suspension, with six months stayed subject to the following

conditions: (1) Respondent continues his OLAP contract for a period of two and one-half years beyond the date that the Supreme Court of Ohio enters its final order in this matter and abide by the terms of that contract to the satisfaction of OLAP; (2) any application for reinstatement will include a letter from OLAP or a qualified mental health professional approved by OLAP stating that Respondent is capable of returning to the competent, ethical, and professional practice of law; (3) Respondent will complete the remaining outstanding balance of his CLE hours; and (4) Respondent pay the applicable attorney registration fees for the 2005-2007 biennium and each subsequent biennium during which he was practicing law while under suspension.

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 April 5, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, David Edward Troller, receive a two-year suspension, with six months stayed on conditions contained in ¶33 of this report. 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.



RICHARD A. DOVE, Secretary