

No. 2014-1394

In The Supreme Court of Ohio

APPEAL FROM THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
CASE No. 2013-050

CLEVELAND BAR ASSOCIATION,
Relator,

v.

JALAL TAMER SLEIBI,
Respondent.

**RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S OBJECTION TO
THE AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
AND DISCIPLINE OF THE SUPREME COURT OF OHIO**

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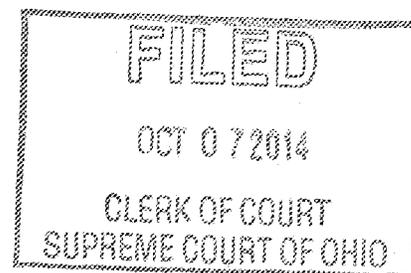


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I. INTRODUCTION

This is a case of an attorney engaging in repeated sexual relations with four separate female clients. Respondent Jalal Tamar Sleibi ("Sleibi") and Relator Cleveland Metropolitan Bar Association ("CMBA") submitted written stipulations in which Sleibi admitted that a sexual relationship did not exist with any of the clients when the attorney/client relationship commenced and that Sleibi engaged in prohibited sexual activity with each of the four clients during the time period covered by the attorney/client relationship. The parties stipulated that Sleibi violated Prof. Cond. R. 1.8(j) and Prof. Cond. R. 8.4(h), which provide in relevant part:

Rule 1.8(j):

A lawyer shall not solicit or engage in sexual activity with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

Rule 8.4(h):

It is professional misconduct for a lawyer to do any of the following:

* * *

[E]ngage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Stipulations of the Parties, (T. 309-310).

Sleibi downplays these incidents, claiming that they were all consensual.¹ Although the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the "Board") found the acts to be technically consensual, the Board failed to give sufficient weight and consideration to the vulnerability of each of these clients, the flagrant and gross sexual activity involved, the lewd and offensive communications, and the devastating emotional impact on these women.

¹ While Sleibi contends that the incidents were consensual, even his own expert, Ms. Risen, testified there is "no such thing as free will or informed consent when it comes to these kinds of issues." (T 192-193).

In addition, the Board made an incorrect finding that Sleibi established a diagnosis of mental disability as a mitigating factor pursuant to BCGD Proc. Reg. 10(B)(2)(g). The Board erroneously considered a diagnosis of mental illness without the submission of an expert report or the testimony of the treating physician. Instead, the Board improperly admitted the hearsay testimony of a social worker who relied upon a separate diagnosis of depression and then coupled that with a diagnosis of Sleibi as a “sex addict,” which is not a recognized mental disability. For these reasons, the Board erred in failing to consider the aggravating circumstances surrounding Sleibi’s conduct and erred in its finding of a mental disability in the absence of admissible evidence.

The recommendation of the Board, if accepted, sends a misleading message to the bar and public – that sex with clients is tolerated if technically consensual, despite the devastating emotional and personal toll on the women and that “sex addiction,” a bogus and unrecognized diagnosis, becomes a new mitigating factor in the absence of proof of a recognized mental disability.

At the hearing and in its Complaint, the CMBA sought the sanction of indefinite suspension. The Board ordered that Sleibi be suspended from the practice of law for two years with one year stayed on conditions. The CMBA urges the Court to reverse the recommendation of the Board and order the indefinite suspension of Respondent Sleibi from the practice of law in Ohio.

II. STATEMENT OF FACTS

A. Sleibi’s Sexual Activity Was Flagrant And Lewd

The Board found that each of the four female clients engaged in consensual sexual activity with Sleibi (Amended Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

(hereinafter “Amended Recommendations”), ¶¶3, 12, 17 and 20; *see* Appendix).² Although the Board found Sleibi’s conduct to be egregious warranting a violation of Prof. Cond. R. 8.4(h), the Board makes only passing reference to the flagrant gross and lewd conduct of Sleibi, thus failing to give sufficient weight to the aggravating factors of acting with a selfish motive, a pattern of misconduct, and multiple offenses (Amended Recommendation, ¶¶32 and 40).

Sleibi typically lured his clients by first engaging in flirtatious emails which then blossomed into graphic lewd and gross email texts on a repeated continuous basis. As an example, Sleibi admitted sending the following text message to L.F.:

Wanna meet me at my office and s**k some d**k?

(Relator Ex. 8, Transcript, hereafter “T.”, 541). On cross examination, Sleibi could not deny that he sent text messages to L.F. containing the following lewd and vulgar content:

“I’m looking for a woman that likes to s**k d**k.”

“Do I like to s**k d**k.”

“Get ready to s**k d**k and swallow some c*m.”

“Get ready to s**k d**k.”

“Is it worth a trip to come to the east side. Already there, get ready to s**k d**k.”

(T. 539 – 541, Relator Ex. 7, p. 00218).

Sleibi further admitted that he sent sexually explicit texts similar to this to all the women except Patricia Ambers (T. 542), with whom he claimed only to have spoken in such a lewd manner (T. 542). And Sleibi’s texts were incessant, sending over 2,000 texts in one month (T. 23, 526).

² The allegations regarding one of the four women, L.F., were hotly contested. L.F. alleged that Sleibi came to her home and physically forced her to engage in anal sex, vaginal sex, and oral sex against her will (T. 229-231). L.F. subsequently filed a criminal complaint against Sleibi alleging rape (T. 238-239, Relator Ex. 9). Sleibi contends that it was all completely consensual. The Board found that the CMBA failed to prove by clear and convincing evidence that this sexual encounter was non-consensual (Amended Recommendations, ¶28).

Sleibi's sexual escapades were no less flagrant. He had sex with H.W. during working hours in his car (license plate "NOT GUILTY") with the top down, in a motel, in his office, and even in her grandparents' home (T. 204 – 206, 524). L.F. claimed that Sleibi raped her. (T. 230 - 232).

With S.M., Sleibi had weekly sexual encounters at his office (T. 51 – 53). Sleibi admitted he engaged in oral and vaginal sex in his office on the floor and on his desk (T. 548 – 549). Sleibi told S.M. that he enjoyed having a private practice because it allowed him to have sex with clients in his office (T. 57). He sent partially nude pictures of himself to both S.M. and H.W. (T. 206, 552).

Sleibi married his wife in 2004 but had been with her since 1996. He admitted to having sexual relations with up to 20 women since being with his wife (T. 527 – 529).

B. Sleibi's Actions Exacted A Devastating Emotional And Personal Toll On His Clients

The Board admittedly found that the female clients were all in a vulnerable position given the nature of their legal problems. But the Board failed to appreciate and recognize the devastating emotional and personal impact on them as a result of Sleibi's actions. In February 2008, Sleibi began representing H.W. in connection with two separate criminal misdemeanor proceedings. The charges arose out of two traffic incidents regarding drug and alcohol driving offenses. H.W. was potentially subject to significant fines and jail time. Sleibi knew that she was only 18 years old at the time (Stipulations ¶2, 5, 8, T. 522, Amended Findings ¶10).

Sleibi represented P.A., L.F. and S. M. in their personal bankruptcies (Amended Recommendations, ¶17, 18, 25). The Board recognized that the clients' position of vulnerability and dependency upon the lawyer is not limited to defendants who are charged with crimes. The

Board found persuasive the testimony of another bankruptcy attorney that bankruptcy is an emotional and traumatic experience (Amended Findings, ¶36).

Although the Board made findings that Sleibi's sexual conduct resulted in an emotional toll on each of the testifying women, there was scant recognition of the severity and trauma experienced by each of them (Amended Findings, ¶14, 24, 29).

S.M. summarized how the experience with Sleibi affected her as follows:

Q: Can you tell us how you feel about the experience that you had with Mr. Sleibi and how it affected you?

A: It ruined my life . . . It ruined my life, it almost ruined my life.

Q: How did it ruin your life?

A: It destroyed my husband because of it. He had a nervous breakdown because of it. My children suffered greatly because of it. Financially it ruined us again. Taking us a long time to try to heal as a family where things were just getting at a point to where we are good again. A lot of damage was done. A lot of lies were said. It's taken a lot. It's taken a huge toll where I was already in a shaky mental state, it made it a lot worse. I've never received – I'm sorry. He knew where I was mentally. He didn't care. He doesn't care. He doesn't care that he destroys families. That's why I'm here.

(T., 97 – 98).

L.F. testified in a similar manner about the effect of Sleibi's sexual conduct on her as follows:

Q: Could you state, Ms. F., to the panel and to all of us how you feel about this and how this has affected you?

A: This has been intentional infliction of emotional distress. I can't sleep. I've gained weight. Just been in trouble with my family and I for the last four years. My brother – my brother that is closest to me, have a hard relationship now and it's never been that way. He's a veterinarian. I'm scared to come in and out of my home. I'm afraid that I'm going to get attacked or hurt by somebody that he might hire or somebody else. I can't – I can't – I – even

thought that I can eat a little bit, I can barely eat. I can't get my weight off and I'd love my weight to come back down and stay down, even though I can't compete anymore. It hurts. I know what I used to look like and I know what I look like now and it has been very hard. . .

(T. 240 – 241).

C. Sleibi's Expert Diagnosis Of Depression Is Inadmissible And The Diagnosis Of Sex Addiction Is Not A Recognized Mental Disability

For over three years after the first grievance was filed against Sleibi by L.F., his expert witness, Candice Risen, maintained that he suffered from what she called "sex addiction." Just two weeks before the hearing in May, 2014, Sleibi must have recognized that "sex addiction" is not a recognized mental disability and that he needed to introduce "depression" into his expert witness diagnosis in order to seek cognizable mitigating factor. In order to achieve this, Ms. Risen then issued a report merely two weeks before the hearing that a Dr. Pallas had diagnosed Sleibi with depression. Over objection by the CMBA, the Board allowed this clearly inadmissible testimony.

Sleibi did not seek treatment for his alleged "sex addiction" until after the first grievance was filed by L.F. in March, 2011 (Relator Ex. 7, Respondent Ex. 4). Sleibi's counsel referred him to Ms. Risen, a licensed independent social worker associated with the Center for Marital and Sexual Health (Respondent Ex. 5).

In her report dated March 5, 2012, Ms. Risen opined that Sleibi's behavior fit the criteria for "sexual addiction," although she acknowledged that it was not a "formal diagnosis in the psychiatric diagnostic manual" (Respondent Ex. 6). Ms. Risen acknowledged that this report contained no reference to anxiety or depression (T. 180). In a subsequent report dated December 31, 2013, Ms. Risen reiterated the same diagnosis of sexual addiction (Respondent Ex. 4). Ms. Risen again acknowledged this report contained no reference to depression (T. 180).

Upon cross examination, Ms. Risen admitted that sex addiction is not a diagnosable mental health disorder, stating as follows:

Q: And I think that you've already alluded to this, but just to clarify, isn't it a fact that sex addiction is not a diagnosable mental health disorder under the DSM-IV or the recently published DSM-V?

A: That is correct.

Q: And isn't it also a fact that sexual compulsivity is not a diagnosable mental health disorder under the DSM-IV or the recently published DSM-V?

A: That is correct.

Q: And isn't it also true that there is not an accepted cluster of symptoms related to sex addiction?

Q: I guess that is true.

(T. 182).

Dr. David Ley, Ph.D., a psychologist and leading expert on the subject (Relator Ex. 11) confirmed Ms. Risen's admission, testifying that "sex addiction" is nothing more than a constellation of symptoms used to excuse or rationalize abhorrent male behavior (T. 269-275, 287-288). Risen stated that she found Dr. Ley's testimony compelling regarding the absence of scientific validity regarding sex addiction (T. 169).

Recognizing that he did not have an expert opinion providing the mitigating factor of a mental health disability under the DSM-IV or DSM-V, Sleibi scrambled to get an opinion of depression from Ms. Risen. By Entry dated February 14, 2014, the Panel ordered, *inter alia*, that all final expert reports be exchanged on or before May 14, 2014. By letter dated May 13, 2014, counsel for Sleibi transmitted his "Supplemental Expert Report" of Ms. Risen with a letter of transmittal referring to her as his designated expert. A copy of the letter of transmittal dated May 13, 2014 and the Risen report of May 12, 2014 is marked Respondent's Exhibit 2.

This is not the first report that CMBA has received regarding Ms. Risen. Counsel for Sleibi has sent multiple reports to the CMBA during the pendency of this case containing the opinions of Ms. Risen. Each of these earlier reports are included as Respondent's Exhibits 4 – 7. Ms. Risen is a licensed independent social worker and a treating counselor to Sleibi. In each of the reports prior to the most recent May 12, 2014 report, Ms. Risen references only "sex addiction" as her assessment of Sleibi's condition and, in one report, behavior that "suggests an anxiety disorder." Ms. Risen admitted that her "suggestion" of an anxiety disorder does not constitute a diagnosis (Ex. 5, T. 184 – 185).

In her latest May 12, 2014 report, Ms. Risen for the first time states that Dr. James Pallas, a psychiatrist, diagnosed Sleibi with a mental disability. Ms. Risen does not render an opinion herself in this report with respect to Sleibi's purported mental disability, but instead continues her references to Sleibi's "sex addiction."

At the hearing, the CMBA established and the parties stipulated that Dr. Pallas had never been identified by Sleibi as an expert witness and that Candice Risen was the only person listed as an expert witness in discovery as follows:

MR. POLLOCK: All right. We were addressing the issue of trying to stipulate yesterday to the statements in the discovery related to an expert report. And counsel, I appreciated, offered to stipulate that they had not identified Dr. Pallas, which is correct. I just want to elaborate on that stipulation just slightly as follows: That the stipulation will be that the Relator requested in written discovery that they identify their experts, and the Respondent responded to that written discovery that their expert would be Dr. Risen or Candace Risen and did not disclose Dr. Pallas.

THE CHAIRPERSON: Is that correct? Is that what you want to stipulate to?

MR. KOBLENTZ: We have no problem stipulating because we didn't offer Dr. Pallas as a witness.

MR. PENVOSE: So stipulated.

THE CHAIRPERSON: That will be stipulated. Anything else?

(T. 571 – 572).

In each of the expert reports submitted by Ms. Risen prior to the final supplemental report dated May 12, she opines that Sleibi suffers from a condition she refers to as “sex addiction.” (Respondent’s Exhibits 4 - 7). In the final supplemental report dated May 12, 2014, Ms. Risen states for the first time that Sleibi has been diagnosed by Dr. James Pallas with certain mental disabilities. Ms. Risen states in relevant part as follows:

1. Does Mr. Sleibi have a diagnosable condition?

Yes. In March, 2011, shortly after I began working with Mr. Sleibi, I referred him to a psychiatrist here, Dr. James Pallas, for an assessment of his symptoms of major anxiety and depression. Dr. Pallas diagnosed him with DSM-IV diagnoses of Dysthymia (300.4), Anxiety (300.0) and Sexual Disorder (not otherwise specified). (emphasis added)

This is the first time that Sleibi’s expert raised the issue of mental disability. But it is significant that Ms. Risen is not rendering a diagnosis herself, but instead is referring to a purported diagnosis by Dr. Pallas of a mental disability. Significantly, Dr. Pallas was never identified as an expert witness and did not testify at the hearing.

During her testimony on direct examination, Ms. Risen then expanded from the confines of her report, testifying over objection that she diagnosed Sleibi herself with depression (T. 129). Ms. Risen went even further, testifying over objection that yet a third person named Wasman rendered a report which allegedly indicated that Sleibi suffered from depression (T. 140 - 141, 143 – 144). No mention had ever been made by Ms. Risen of a Wasman diagnosis in any of her expert reports over the preceding three years leading up to the hearing.

On cross examination, Ms. Risen admitted that in her May 12, 2014 report (Respondent Ex. 2), she did not diagnose Sleibi with anxiety or depression but instead merely referred to a diagnosis from Dr. Pallas, stating as follows:

Q: Now, isn't it true that in this letter you did not diagnosis Mr. Sleibi with anxiety or depression?

A: I'm sorry, in which letter?

Q: This letter, the Exhibit 2, the one dated May12, 2014.

* * *

Q: And I understand that. I just want to kind of clarify for the record that there is no diagnosis from you in this letter of anxiety and depression, there is a reference to a diagnosis from Dr. Pallas?

A. That is true.

(T. 181 – 182).

The May 12, 2014 Risen report and the inadmissible testimony of Risen was nothing less than an ambush which Sleibi attempted; namely, expressing one opinion in an expert report and then attempting to expand that opinion after the fact.

In this case, Ms. Risen attempted to expand her opinion of “sex addiction” to include a diagnosis of mental disability which is not included in her most recent report of May 11, 2014 or any previous report. Ms. Risen refers to a diagnosis by Dr. Pallas of mental disability but does not render such an opinion herself.

III. LAW AND ARGUMENT

A. Applicable Law From This Court Shows That Indefinite suspension Is The Appropriate Sanction

The Board found by clear and convincing evidence that Sleibi’s conduct in having sexual relations with four separate clients violated Prof. Cond. R. 1.8(j). Additionally, the Board found by clear and convincing evidence that Sleibi’s conduct of having sexual relations with four

separate clients and sending sexually explicit and lewd messages to at least three of those clients constitutes egregious unprofessional conduct that warrants a finding of a violation of Prof. Cond. R. 8.4(h), which prohibits conduct that adversely reflects on a lawyer's fitness to practice law.

When determining an appropriate sanction for attorney misconduct, the Ohio Supreme Court considers "the duties violated, the actual or potential injury caused, the attorney's mental state, and sanctions imposed in similar cases." *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 477 (2007) citing *Stark Cty. Bar Ass'n v. Buttacavoli*, 96 Ohio St.3d 424 (2002). The Court must weigh both aggravating and mitigating factors to ascertain whether a more, or less, sanction is warranted. BCGD Proc. Reg. 10(B)(1); *Cleveland Bar Ass'n v. Jimerson*, 113 Ohio St.3d 452 (2007). Here, both case law and the cumulative aggravating factors – and lack of substantial mitigation factors - militate in favor of indefinite suspension.

1. The Aggravating Factors Warrant A Sanction Of Indefinite Suspension

The Board's Recommendation recognized that Sleibi stipulated to the aggravating factors of acting with a selfish motive, committing multiple offenses, engaging in a pattern of misconduct, and the vulnerability of his clients. Despite these findings – and despite Ohio Supreme Court precedent imposing sanctions of disbarment or indefinite suspension in factually analogous cases – the Board recommended a two-year suspension with one year stayed. In light of the serious nature of Sleibi's admitted conduct, the recommended sanction is insufficient to protect the public, the courts, and the legal profession as a whole and is likely to have a negative effect on other lawyers who have sexual relations with clients and then seek an "after the fact" diagnosis of sexual addiction, anxiety, or depression to excuse their improper behavior.

In *Disciplinary Counsel v. Sturgeon*, 111 Ohio St.3d 285 (2006), the Ohio Supreme Court found that permanent disbarment from the practice of law was an appropriate sanction for a lawyer's misconduct, which included repeatedly making inappropriate sexual comments to

female clients and touching them in a sexual manner. The Supreme Court found that the lawyer's conduct of acting with a dishonest or selfish motive, engaging in a pattern of misconduct, committing multiple offenses, and causing harm to vulnerable victims were aggravating factors that supported permanent disbarment. Significantly, the Court noted that:

[R]espondent's actions were rude, offensive, and thoroughly unprofessional. He used the attorney-client relationship to gratify his own sexual interests rather than focusing on the legal needs of his clients. His crude behavior would not be acceptable in any social setting, and it was outrageously inappropriate in the midst of an attorney-client relationship. Respondent preyed on women who were in vulnerable legal and financial circumstances, and he tried to seduce them for his own sexual gratification.

Sturgeon, 111 Ohio St.3d at 288. The Board attempted to distinguish *Sturgeon* from the instant case primarily by arguing that Sleibi suffered from a mental disability which contributed to the cause of his misconduct, while *Sturgeon* made no such showing. (Amended Recommendations ¶ 49.) Rather, as set forth more fully below, Ms. Risen impermissibly attempted at the hearing to expand her "sex addiction" diagnosis of Sleibi previously provided in three separate expert reports to include a last-minute diagnosis of depression and anxiety rendered by another physician who did not testify and who has never been identified as an expert witness.

Similarly, the Ohio Supreme Court in *Cleveland Metropolitan Bar Association v. Lockshin*, 125 Ohio St.3d 529, found that a lawyer violated disciplinary and professional conduct rules, among them engaging in numerous inappropriate sexual communications with a number of female clients, one of whom was underage, despite the fact that no sexual relations took place. Accordingly, the Court recognized that indefinite suspension was the appropriate sanction. The Board attempts to distinguish *Lockshin* from the instant case by relying upon the fact that *Lockshin* was not truthful during the disciplinary process and discontinued treatment. Nevertheless, the Board failed to note the substantial similarities between *Lockshin* and the instant case. Specifically, the Court's sanction was based upon the

fact that – like Sleibi – Lockshin admitted to multiple counts of misconduct; “engaging in behavior that had a negative impact on his clients, many of whom were vulnerable young women”; and that the “multiple separate counts against him involving inappropriate sexual communications or conduct demonstrate a disturbing pattern of professional misconduct” which revealed his “selfish motive to advance his own sexual interests at his clients’ expense.” *Lockshin*, 125 Ohio St. 3d at ¶ 47.

Indeed, the Supreme Court of Ohio has also recognized that the lawyer-client relationship in a criminal matter is inherently unequal and places a lawyer in a position of dominance over a potentially vulnerable and dependent client. Specifically, the Supreme Court of Ohio explains:

The client's reliance on the ability of her counsel in a crisis situation has the effect of putting the lawyer in a position of dominance and the client in a position of dependence and vulnerability. The more vulnerable the client, the heavier is the obligation upon the attorney not to exploit the situation for his own advantage. Whether a client consents to or initiates sexual activity with the lawyer, the burden is on the lawyer to ensure that all attorney-client dealings remain on a professional level.

Disciplinary Counsel v. Booher, 75 Ohio St.3d 509, 510. Moreover, as recognized by the Board, one of Sleibi’s own character witnesses, a bankruptcy attorney who practices extensively in the same court as Sleibi, testified that “bankruptcy is something that is very emotional and very traumatic for people. You’re dealing with people who are not sophisticated frankly, who have not had legal matters. ...” (T. at 350.)

Here, like the respondents in *Sturgeon* and *Lockshin*, Sleibi has admitted to having sexual relations with four clients. All four women were vulnerable and Sleibi took advantage of them: H.W. was only 18 years old and faced criminal charges and the other three women were in dire financial straits and forced to file for bankruptcy. Sleibi therefore has exhibited a disturbing pattern of professional misconduct that reveals a selfish motive to advance his own sexual

interests at his clients' expense. The women also testified movingly about the devastating emotional and personal toll Sleibi's actions exacted on them. Accordingly, a sanction of indefinite suspension is warranted.

2. Indefinite Suspension Is Warranted Because The Primary Mitigation Factor – Sleibi's Purported "Mental Disability" – Was Not Admissible As A Matter Of Law

a. *Dr. Pallas's Diagnosis Should Have Been Stricken*

The Board should not have admitted Ms. Risen's testimony referring to the diagnosis of depression from Dr. Pallas (T. 135 - 136). Sleibi's attempt to introduce this testimony is a classic case of "trial by ambush." Dr. Pallas never introduced an expert report and he was never identified as an expert witness. Indeed, Sleibi does not even list him as a witness. The CMBA had no opportunity to cross examine him at the hearing.

This type of trial ambush is exactly what the Board should have prohibited. A trial court is vested with discretion in determining the admissibility of evidence in any particular case so long as such discretion is exercised in conformance with the Rules of Civil Procedure. *Rigby v. Lake County*, 58 Ohio St.3d 269 (1991). Moreover, a trial court has broad discretion in determining the admissibility of expert testimony. *Berry v. Motorists Mutual Insurance Co.*, 13 Ohio App.3d 228 (8th Dist. 1983).

The CMBA relied upon the supplemental expert report of Ms. Risen (May 12, 2014) in preparing for trial (not including the reference to the diagnosis by Dr. Pallas). The deadline for exchanging expert reports had passed well before trial began. Sleibi should not have been permitted to introduce a new expert, Dr. Pallas, through the form of a new "report" from Ms. Risen regarding a new diagnosis of mental disability at the 11th hour. The law is clear that such attempts to "sandbag" CMBA are not permitted. In *Saikus v. Ford Motor Co.*, 2001 WL 370650 (8th Dist. 2001), the Court held in a similar circumstance that an attempt to use a

supplemental expert report submitted after the deadline for exchanging expert reports was not permitted, stating as follows:

“The Court did not abuse its discretion by refusing to allow Appellants to “sandbag” Ford with this new evidence.”

Accordingly, the Board should have stricken that portion of the May 12, 2014 report referring to Dr. Pallas’s diagnosis as an impermissible attempt to submit an expert “report” in violation of the February 14, 2014 entry of this Panel.

b. *Candace Risen, Sleibi’s Testifying Expert, Should Have Been Precluded From Expressing Any Opinion Regarding A Diagnosis Of Mental Disability*

Over Relator’s objections, the Board allowed Ms. Risen to provide a diagnosis of a mental disability as mitigation evidence (T. 129). In each of the expert reports submitted by Candace Risen prior to the final supplemental report dated May 12, Ms. Risen opines that Sleibi suffers from a condition she refers to as “sex addiction.” (Respondent’s Exhibits 4 - 7). In the final supplemental report dated May 12, 2014 (Respondent’s Exhibit 2), Risen states for the first time that Sleibi has been diagnosed by Dr. James Pallas with certain mental disabilities. This is the first time that Sleibi’s expert raised the issue of mental disability. But it is significant that Ms. Risen did not render a diagnosis herself in her report but instead referred to a purported diagnosis by Dr. Pallas of a mental disability.

At the hearing, Ms. Risen expanded on the opinions expressed in her May 12 report to also render an opinion herself regarding the diagnosis of mental disability. Over Relator’s objection, this testimony was admitted into evidence – and it should have been precluded (T. 129). This represented another form of trial by ambush; namely, expressing one opinion in an expert report and then attempting to supplement or expand that opinion after the fact.

In *O'Connor v. Cleveland Clinic Foundation*, 161 Ohio App.3d 43 (8thDist. 2005), the Court found that a parties' failure to disclose a critical new theory by an expert witness is a violation of Civil Rule 26(E). In *O'Connor*, the Court recognized the necessity of supplementing expert testimony, stating that the "introduction of a new theory that has not been disclosed prior to trial 'smacks of ambush' and thwarts an opposing counsel's ability to effectively offer a counter theory or to cross examine the expert." *Id.* at ¶ 20, citing *Jackson v. Booth Memorial Hospital*, 47 Ohio App.3d 176, 178, 547 N.E. 2d 1203 (8th Dist. 1988).

Here, Ms. Risen impermissibly expanded her expert opinion of "sex addiction" to include a diagnosis of mental disability, which is not included in her most recent report of May 12, 2014 or any previous report. While Ms. Risen refers to a diagnosis by Dr. Pallas of mental disability, she does not render such an opinion herself in the report. The Board should have precluded Ms. Risen from expressing a diagnosis of mental disability by Sleibi or otherwise characterizing or referring to such a diagnosis by Dr. James Pallas.

c. Even If Ms. Risen's Diagnosis Was Admissible – Which It Is Not – The Panel Should Have Declined To Find A Mitigating Mental Disability

The Board relied heavily upon the mitigation evidence of Sleibi's "mental disability." Amended Recommendation ¶ 58. ("In the instant case, the mitigating factors weigh more heavily in Respondent's favor than in the cases discussed in ¶¶ 54-57 above, primarily because Respondent suffered from a mental disability that contributed to the cause of the misconduct, while the attorneys in those cases made no such showing.") Ms. Risen's testimony of a "mental disability," therefore, played a significant mitigation role. However, even if Ms. Risen's testimony had been admissible – which it is not under controlling Ohio law – the Board still should not have assigned it much, if any, weight.

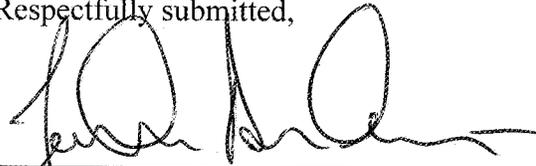
In *Columbus Bar Association v. Linnen*, 111 Ohio St. 3d 507 (2006), the Ohio Supreme Court imposed an indefinite suspension upon an attorney for gross sexual imposition, sexual imposition, and public indecency. Linnen attempted to include as mitigation evidence that: “he had been medically diagnosed with sexual addiction by his treating psychologist, Dr. George Mass; that this mental disability had contributed to cause his misconduct; that he had been successfully treated for his illness; and that he had been cleared as ethically and competently able to return to the practice of law.” *Id.* ¶ 12. Significantly, the Court declined to accept Linnen’s psychologist’s diagnosis or attribute mitigating effect to Linnen’s purported mental disability. *Id.* ¶ 13. The *Linnen* Court pointed to a number of factors for this finding, including: Linnen’s misconduct did not end and he did not seek medical attention until he was caught by his final victim; Linnen’s psychologist only relied on Linnen’s faithful membership and attendance at Sex Addicts Anonymous and the insights gained on Linnen’s stressors triggering his behavior in predicting his chance of relapse; and the expertise of Mr. Linnen’s OLAP contact, Mr. Paul Caimi, was in the area of alcohol and drug dependency, not sexual addiction. *Id.* ¶¶ 11, 16-17.

Here, just as in *Linnen*, Sleibi’s misconduct did not end – nor did he seek medical attention - until he was “caught” by LF’s complaint to the CMBA. Like Linnen’s psychologist, Ms. Risen relied on Sleibi’s regular attendance at SLAA meetings (T. 154 - 155) and the insights gained about Sleibi’s “triggers” to predict his chance of relapse (T. 196). Finally, Sleibi’s OLAP sponsor was Mr. Caimi (T. 144 – 145, 151), who the *Linnen* Court recognized had no expertise in the area of sexual addiction. Accordingly, even if Ms. Risen’s testimony of Sleibi’s “mental disability” was properly admissible before the Panel – which it was not – the Panel should not have accepted Ms. Risen’s diagnosis or attribute mitigating effect to Sleibi’s purported mental disability.

IV. CONCLUSION

For all these reasons, the CMBA urges this Court to reject the recommendation of the Board and order the indefinite suspension of Sleibi. While this is a serious sanction, indefinite suspension is certainly appropriate and reasonable. The recommendation of the Board, if accepted, sends a misleading message to the bar and the public that sex with clients is tolerated if technically consensual - despite the devastating emotional and personal toll on the clients – and that “sex addiction” becomes a new mitigating factor in the absence of proof of a recognized mental disability.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served via regular mail this 7th day of October 2014 upon
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