

IN THE SUPREME COURT OF OHIO

Toledo Bar Association,	:	Case No. 2014-1738
	:	
Relator,	:	
	:	
v.	:	On Appeal from the Board of
	:	Commissioners on Grievances
	:	and Discipline of the
Robert Paul DeMarco,	:	Ohio Supreme Court
	:	
Respondent.	:	

**RESPONDENT ROBERT PAUL DEMARCO'S OBJECTIONS TO
THE FINAL REPORT OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE**

Richard C. Alkire (0024816)
Dean Nieding (0003532)

Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Boulevard
Cleveland, Ohio 44131-2335
Telephone: 216-674-00550
Facsimile: 216-674-0104
rick@alkirelawyer.com
dean@alkirelawyer.com

Counsel for Respondent

Michael A. Bonfiglio (0029478)
Toledo Bar Association
311 North Superior Avenue
Toledo, Ohio 43604
419/242/9363 / Fax 419-242-3614

Counsel for Relator

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

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I. INTRODUCTION

Respondent Robert Paul DeMarco (hereinafter “Respondent” or “Mr. DeMarco”), hereby submits his Objections to the Final Report of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio captioned Findings of Fact, Conclusions of Law and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (hereinafter “Opinion”) (App. A) which recommends the imposition of a one-year suspension from the practice of law. The Panel¹, after hearing the testimony of four witnesses and receiving exhibits admitted during the hearing concerning the Professional Conduct Rule violations alleged (Prof. Cond. R. 3.3(a)(1), (App. B), 3.3(a)(3), (App. B) and Prof. Cond. R. 8.4(c), (App. C)) and acknowledging certain aggravating and mitigating factors, recommended that Respondent be suspended from the practice of law for the period of one-year with six months stayed on the condition that he pay the costs associated with this matter and commit no further violations. The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (hereinafter “the Board”) adopted the Findings of Fact and Conclusions and Law of the Panel but amended the sanction recommended by the Panel to an actual suspension from the practice of law for one year.

Because the Panel recounted in its report an incomplete factual explanation of the role of the expert witness, Jack Harper, (hereinafter “Harper”) in connection with retaining the disc from which documents were extracted which lead to the Show Cause hearing at which Respondent admittedly lied to the Court, the Board erroneously concluded that there was a potential of harm to the expert due to the conduct of Mr. DeMarco. The Panel also failed to completely explain the mitigating evidence presented in the hearing on the merits which resulted in the Board’s inability

¹ Hereinafter, “the Panel: refers to the three members of the Board who heard this matter, on the merits, on August 7, 2014

to weight the aggravating and mitigating factors in order to arrive at a sanction recommendation consistent with all of the evidence. Finally, both the Panel and the Board failed to acknowledge the sincere remorse that was demonstrated by Mr. DeMarco and conveyed to Judge Duhart. Since Relator itself has never sought an actual suspension from the practice of law and because the Panel and the Board erroneously weighed the mitigating and aggravating circumstances demonstrated in this matter, Respondent seeks, in the alternative, a fully stayed suspension.

II. STATEMENT OF THE FACTS

A. The Ness Litigation

Respondent represented his long-time friend Douglas Cunningham (hereinafter “Cunningham”). Respondent had known Cunningham since they were 14 years old. (Tr. 29)² After they both went on to higher education, Cunningham ended up in the field of laboratory studies related to the medical field. (Tr. 29) Eventually, Cunningham went into business with individuals by the last name of Ness and Plandowski. At some point, Ness and Plandowski attempted to cut Cunningham out of the partnership into which they had entered causing him to seek representation by Respondent. (Tr. 30) A two-year lawsuit ensued resulting in a settlement which upset both Ness and Plandowski. (Tr. 30-31) Thereafter, they anonymously contacted his then current employer, SpectraCell, telling lies about him. It was this contact which led to a libel suit brought by Respondent on behalf of Cunningham, against Ness and Plandowski. (Tr. 31)

In this regard, it was the libel case brought by Respondent in the Lucas County Court of Common Pleas from which this discipline matter arose. Mr. Davis and Mr. Tuschman were counsel representing Ness and Plandowski in that case who had not been previously involved in

² Hereinafter, citations to the transcript of the proceedings of August 7, 2014 before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio shall be referred to as “Tr. ___.”

the partnership lawsuit. (Tr. 31) Throughout the libel litigation, Respondent enjoyed an excellent relationship with each of those lawyers. (Tr. 31-32)

Previously, during the partnership litigation, depositions had been taken in Texas. A spreadsheet received from Ness and Plandowski was discovered among records of SpectraCell which allegedly indicated that Cunningham had “double dipped,” charging SpectraCell for things that he had charged the partnership. (Tr. 32) This same spreadsheet was later attached to anonymous letters which were sent to the CEO of SpectraCell, the company that was employing Cunningham at the time of the partnership lawsuit. (Tr. 32)

As a result, it was this spreadsheet and the anonymous letter to Cunningham’s employer that Respondent wanted to prove had emanated from Ness and Plandowski. Respondent had concluded that one avenue of proof would be to search the disc from Plandowski’s computer to locate the anonymous correspondence and spreadsheet. (Tr. 33)

In order to accomplish the pursuit of this evidence, Respondent drafted a search protocol (Ex. 1 and Ex. A)³. The June 20, 2011 search protocol authored by Respondent set forth the method by which the Plandowski and Ness computers would be searched. Respondent contemplated that if he located any documents on a disc extracted from the computer of Plandowski or Ness that he would turn over the documents to Judge Duhart for an in-camera inspection. (Tr. 35-38)

Respondent’s expert, Harper, traveled to Nantucket to image the drive of Plandowski. (Tr. 38) Harper returned from Nantucket with a zip drive which Harper had previously looked at. (Tr. 39) Discussing this with Harper, Respondent learned that what Respondent was looking

³ Hereinafter, citations to Exhibits presented by both Relator and Respondent during the August 7, 2014 hearing shall be referred to as “Ex. ____.” Relator’s exhibits were represented by Arabic numerals and Respondent’s exhibits were represented by capital letters.

for on the disc was not there. (Tr. 40) Thus, Respondent obtained the zip drive from Harper, and, searched it himself verifying that no pertinent documents had been found after Harper came to Respondent's office to show him how to search it. (Tr. 40-41) Harper had arranged the documents into sub-files to facilitate Respondent's viewing. It did not contain what Respondent had hoped it might. (Tr. 41) All of this occurred within two or three weeks of Harper's return from Nantucket in September 2011. (Tr. 42)

When Respondent first requested that Harper give him the disc to look at, Harper resisted indicating that Harper himself had made a side agreement with Plandowski not to do that. Respondent explained that that was not contemplated by the protocol and gave him the June 20, 2011 letter. (Tr. 42-44) Once having verified that the disc which was created by Harper from the image Harper had obtained from Plandowski's computer, (called by Judge Duhart during the November 27, 2012 hearing as the "extraction disc") contained no helpful information, he did not look at again between then and the March 2012 pretrial had with Judge Duhart. (Tr. 44) Respondent had not printed any of the contents of the disc nor had he downloaded the contents onto his own computer. (Tr. 44)

As the libel litigation progressed, Judge Duhart held a pretrial in March 2012 during which the possibility of mediation was discussed as well as the potential for settlement. (Tr. 46-47) It was during this pretrial when Respondent indicated "well, there is nothing of any value there [on the disc]. We're not going to be using it." Mr. Tuschman wanted to know how Respondent knew that, and that is the point in time when Respondent said that it was Harper who told him there was nothing on the disc. At the time of the pretrial, Respondent did not recall that the wording of the protocol (Ex. 1, p. 2) allowed him to look at the disc and that it was only the documents that were supposed to be delivered to Judge Duhart, not the disc. (Tr. 47) However,

what Respondent did recall when Mr. Tuschman asked him the question of how he knew there was nothing of value on the disc was the private agreement that had been related to him by Harper, which had been entered into between Harper and Plandowski. (Tr. 47) So, covering for Harper, knowing how vindictive Plandowski could be, Respondent failed to admit in front of Judge Duhart at the pretrial that he (Respondent) had actually looked at the contents of the disc also. This was the first misrepresentation made by Respondent in this matter. (Tr. 47-49)

The fact that Respondent looked at the disc had nothing to do with the resolution of the case, moving the case forward or completing the case. Yet, as Respondent admitted at the hearing on the merits, it was an outright lie. (Tr. 49) The problem was, the last time Respondent had looked at the protocol, which did not preclude him from looking at the documents on the disc, was in June of the preceding year. (Tr. 49-50)

It was after this pretrial in March 2012 that Respondent telephoned Harper on his way home in the car, when Respondent told Harper that Respondent had told the Court that Harper had the disc not Respondent, and that Respondent would return the disc to Harper. (Tr. 51)

After Respondent returned the disc to Harper in March 2012, even though Mr. Tuschman requested that Harper turn it over, Harper chose not to turn it over. (Tr. 53) In fact, Mr. Tuschman at the November 27, 2012 hearing before Judge Duhart recounted his efforts to retrieve the disc from Harper.

In particular, during that November 2012 hearing, Harper explained that he flew back to Cleveland with two imaged discs that he had copied from the hard drive of Plandowski. (Ex.2, p. 19) Upon his return to Cleveland, Harper used those two discs, following the protocol provided him by Respondent (Ex. 1, Ex. A) and created a third drive which he gave to Respondent. (Ex. 2, p. 19) The original imaged discs were retained by Harper for a period of

time after the readable disc had been turned over to Respondent. (Ex. 2, p. 20) These imaged discs were destroyed after a period time. (Ex. 2, p. 20) They were destroyed after Harper had called the Judge upon receiving a telephone call from Plandowski (all of which occurred contemporaneous with the March pretrial). (Ex. 2, pp. 20-21) They were still in existence when Harper spoke to Mr. Tuschman offering him the discs only if Mr. Tuschman would pay for them. Mr. Tuschman in questioning Harper at the hearing on November 27, 2012 suggested to him that he, Tuschman, told Harper to keep the discs and turn them over to the Court. Harper disagreed with Tuschman. (Ex. 2, p. 22) Mr. Tuschman established that when Harper called him on March 27 he (Harper) still had the disc. (Ex. 2, pp. 23-24) Indeed, upon the Court's questioning, Harper admitted receiving the disc back from Mr. DeMarco. (Ex. 2, p. 42) He received it at or about the time he received the voicemail message from Mr. DeMarco while Mr. DeMarco had been driving home from the March 2012 pretrial. (Ex. 2, pp. 42-43)

As it relates to Mr. DeMarco's efforts to cause compliance by Harper with Mr. Tuschman's request to return the disc, Mr. DeMarco explained that he spoke with Harper after Mr. Harper had been notified by Mr. Tuschman. (Tr. 53) This conversation took place sometime between March and June and Mr. DeMarco explained to Mr. Harper that Judge Duhart wanted Harper to return the disc to Mr. Tuschman. At the time of this conversation, as Harper had said to Mr. Tuschman, Harper wanted \$1,000.00 for disc. Mr. DeMarco was incredulous as he had already paid Harper over \$8,000.00, in fact, having paid him for the trip to Nantucket twice. (Tr. 47, 54)

Further, after the March 2012 pretrial, a pretrial took place in June 2012 when the case was dismissed because it settled. At the time of this pretrial, Mr. DeMarco learned that Harper had still not returned the disc to Mr. Tuschman. (Tr. 54-55) As a result, Mr. DeMarco

forwarded a letter in September indicating to Harper that Judge Duhart's Bailiff, Tabitha Valentine, wanted to know whether the disc was returned and wanted to be notified as to that fact. At this point, the case is already settled but the issue of Harper's possession of the disc remained. (Tr. 56) Defendants in the Ness case, even after it was settled, filed a Motion to Compel Harper to turn over the disc, and later, a Motion to Show Cause Why Harper Should not be held in Contempt.

On November 27, 2012⁴, the Court held a hearing on Defendants' Ness and Plandowski's Motion to Compel Production of Mr. Plandowski's hard drive and a Motion to Show Cause Why Harper Should Not Be Held in Contempt (Tr. 4). As was explained during the hearing, Mr. Harper had called the Court after the aforementioned pretrial seeking permission to destroy the copy of the Plandowski computer hard drive. Harper then called Mr. Tuschman requesting money for the disc or, upon not receiving money he would destroy it. Mr. Tuschman did not give permission to Harper to destroy the disc explaining that Harper had to receive permission from the Court in order to do that. After a Motion to Compel had been filed, Harper filed a Certificate with the Court that the disc had been destroyed which lead to the November 27, 2012 contempt hearing. (Ex. 2, pp. 5-7)

As such, to a great extent, Harper was the author of his own difficulties which resulted in the November 27, 2012 hearing. He had been requested by Plandowski's counsel Mr. Tuschman not to destroy the disc and to turn it over to the Court. He had been notified by Mr. DeMarco after Mr. DeMarco returned the disc to him to not destroy it and turn it over to the Court.

⁴ The transcript of the proceeding incorrectly indicates that it took place on Thursday, November 29, 2012. Instead, consistent with the testimony at the hearing as well as in the Briefs filed by the parties throughout the course of the hearing, the proceeding actually occurred on Tuesday, November 27, 2012.

Instead, he destroyed the disc and filed a Certificate of Destruction with the Court leading to the Motion to Show Cause hearing.

It is noteworthy that none of these details found their way into the Panel report to explain Harper's role in refusing to turn over the disc that had been returned to him, even after the Ness case had settled. Further, clear and convincing evidence does not exist supporting the assertion that Mr. DeMarco told Mr. Harper to destroy the disc. Instead, the evidence presented at the Disciplinary Hearing was otherwise. It is also noteworthy that Mr. Harper did not testify at the Disciplinary Hearing but was viewed on the DVD of his testimony at the Show Cause hearing which took place on November 27, 2012. In fact, the Panel's comment at para. 41 that Harper's testimony was truthful, is not at all supported by the record.

Indeed, one member of the Panel pointed this out during his examination of Respondent, in reference to Mr. Harper's claim during the November 2012 hearing that he never saw the documents. Instead, Mr. Harper did see the documents as explained carefully by Mr. DeMarco to the Panel member's questioning in that regard. (Tr. 93-95)

B. Aggravation and Mitigation Evidence

The Panel found, in a conclusory way in one paragraph (Opinion, para. 58) that the parties stipulated to the mitigating factors of no prior disciplinary record, the display of a cooperative attitude in these proceedings and letters from the bench and bar of Cuyahoga County attesting to Respondent's good character. The Board was presented no other details about these significant mitigating factors to weigh along with mitigating factors which the Panel rejected and which provided detail in the report. (Opinion, paras. 60-61) To a great extent, it is because of this approach to recounting the evidence for purposes of review by the Board, that the Board was not in a position to reject the weighing of mitigating and aggravating factors which lead the

Panel to its recommendation of a one-year suspension with six months stayed and instead recommend a one-year suspension. It is noteworthy, being fully aware of all the mitigating circumstances, Relator at no time requested that Respondent serve any actual suspension.

In this regard, the parties initially presented an Agreement to Consent to Discipline which stipulated fact and rule violations and an agreed sanction of a six-month suspension from the practice of law with all six months stayed. (Opinion, para. 3) At the time of the hearing, a full stayed suspension from the practice of law of twelve months or less was recommended by Relator. (Opinion, para. 62) These recommendations of Relator arose from its investigation of this matter which was a full and complete one.

In this connection, Mr. DeMarco explained in his testimony that not only did he make full and free disclosure to the Toledo Bar, but he attempted to rectify the consequences of his misconduct by doing so. He explained that a very complete and candid letter was supplied to the Investigator of the Toledo Bar Association admitting fault and not trying to cover anything up. (Ex. B) He then went to the Investigator to discuss the letter with her. (Tr. 66) He also appeared before the Toledo Bar Association during a formal hearing and testified voluntarily about this matter⁵. (Tr. 66-67) He also wanted to assure that Mr. Tuschman, Mr. Davis and Judge Duhart saw what he had explained in this letter to the Bar and waived the right of that response to remain private in another effort to rectify the consequences of his misconduct. (Tr. 72)

As it relates to the character evidence, Mr. DeMarco presented letters from not only the bench and Bar but from others. Mr. DeMarco explained that the Rev. McGee (Ex. C) was his pastor and explained his active membership in the United Methodist Church of Chagrin Falls,

⁵ See Joint Brief in Support of the Agreement of Relator and Respondent regarding Consent to Discipline, p. 2

Ohio. (Tr. 73) Hillary S. Taylor , Esq., a partner at Weston Hurd LLP provided detailed information about Mr. DeMarco's competence and devotion to his client. He also explained about Mr. DeMarco's contrition. Retired Judge Burt W. Griffin (Ex. E) attested to Mr. DeMarco's character and professionalism and remorse. (Ex. F) Retired Judge Richard J. McMonagle also attested to his competency and professionalism. (Ex. G) Judge Brian J. Melling of the Bedford Municipal Court also attested to Mr. DeMarco's industry, preparation, competency and good reputation. (Ex. H) Judge Thomas J. Pokorny, former Judge of the Cuyahoga County Common Pleas Court and active visiting Judge throughout the State, attested to Mr. DeMarco's competency and reputation for honesty. As Judge Pokorny indicated, it was "greatly out of character" for Mr. DeMarco to have acted untruthfully. Even Judge Pokorny recognized that in the letter to Judge Duhart(Ex. B) that Mr. DeMarco was remorseful. (Ex. I) None of these letters were specifically mentioned by the Panel nor their contents brought to the attention of the Board.

In addition, although the Panel acknowledged that Daniel J. Stipula, Christopher J. Berger and Cheryl DeMarco testified at the hearing, (Opinion, para. 5) that didn't inform the Board as to what the purpose of their testimony was. In fact, each of these witnesses attested to Mr. DeMarco's good character and remorse.

In this regard, Mr. Stypula was a former client who had met Mr. DeMarco in 1993 and spent nine years in court with Mr. DeMarco all the way through a decision from this Honorable Court. (Tr. 98-101) Mr. Stypula acknowledged he was made aware of the allegations against Mr. DeMarco. (Tr. 103) Mr. Stypula stated that Mr. DeMarco never tried to make any excuses for lying to Judge Duhart in the matter before the Panel. (Tr. 103)

Next, Mr. Berger was also a character witness who testified on behalf of Mr. DeMarco. He had known Mr. DeMarco for almost twenty years beginning with their association at the United Methodist Church of Chagrin Falls where they both are active members. (Tr. 107) Mr. Berger attested to Mr. DeMarco's role in putting together and funding a scholarship program for children to do what he termed a "Bible Challenge." He also acknowledged that Mr. DeMarco funded programs for Vacation Bible School and for a summer program for children. He acknowledged that Mr. DeMarco also represented him currently. Finally, he explained that he was aware of why Mr. DeMarco was before the Board in the hearing on the merits. He explained that Mr. DeMarco told him he had lied to the Judge and that he had made no excuses for that. (Tr. 110)

Finally, Mr. DeMarco's wife, Cheryl DeMarco, testified. She went to great length to explain Mr. DeMarco's remorse. She explained how Mr. DeMarco indicated to her that he let the Judge down, he felt he let his profession down and he felt that he let her down given his conduct in this matter. (Tr. 114)

Importantly, the Board did not receive any of this information from the Panel in order to properly weight the aggravating and mitigating circumstances in order to arrive at an appropriate sanction.

As it further relates to the stipulated factor of timely good-faith effort to rectify the consequences of his misconduct, the Panel focused on the timeliness issue. However, no credit was afforded Mr. DeMarco for any of his conduct after the hearing in November. Indeed, Mr. DeMarco explained in great detail how he felt after it had become clear to him as well as everyone else at the hearing that he had lied. Until Mr. DeMarco heard the actual voicemail message that he had left in March 2012, it now being November 27, 2012, he hadn't recalled it.

(Tr. 59) Thus, to attribute knowing misrepresentations to Mr. DeMarco based upon that voicemail message ignores his testimony in that regard. (Tr. 59)

However, Mr. DeMarco admitted that sometime during the hearing he recognized that he had left the message “and I just continued the lie. . . that may explain it but that doesn’t justify it. I am not trying to.” He candidly admitted that he had no excuse. (Tr. 59) Mr. DeMarco observed Judge Duhart’s face and saw disappointment. Judge Duhart could barely talk. It was at that moment that Mr. DeMarco wanted to speak with him but Judge Duhart’s bailiff thought that wouldn’t be a good idea. (Tr. 61) Therefore, Mr. DeMarco hand wrote a letter to Judge Duhart and after he arrived home, the next day, and indicated the following:

Dear Judge Duhart: I hope that someday you can find it in your heart to forgive me, and to accept my heartfelt apology for my most egregious betrayal of your trust in me. You were professional and gentlemanly in the way you treated me throughout this case and you certainly did not deserve this. I won’t soon forget the look on your face when the voicemail was played. My shame is great. Sincerely, Bob DeMarco. (Tr. 63-64, Ex. B)

Likewise, as it relates to the Panel’s rejection of the stipulated mitigating factor that Respondent did not act with a selfish motive, because the Panel failed to appreciate the reason for the initial lie made at the March, 2012 pretrial, that Mr. DeMarco was actually covering for Mr. Harper by explaining that Mr. Harper had kept the disc consonant with the unauthorized private agreement that Harper made with Mr. Plandowski, it failed to appreciate the reason the parties stipulated to this mitigating factor. It also failed to acknowledge in the Opinion that the November 27, 2012 hearing the Ness matter had already been settled and dismissed. Therefore, Mr. DeMarco had no selfish motive to misrepresent anything at the hearing. Further, as Mr. DeMarco explained during the November 27, 2012 hearing, Mr. DeMarco had become angry listening to the testimony of Mr. Harper:

Well, I shouldn't have been, but I was angry at 2-and-a-half three years of litigation where I heard nothing but lies about a friend and client from Tuschman - not Tuschman, from Plandowski and Ness, but all of it. So I was angered then. (Tr. 60)

Again, it is unfair to portray Mr. DeMarco's lies as having been made for a selfish purpose. As such, this mitigating factor should have been recognized as well.

III. LAW AND ARGUMENT

Proposition of Law: An actual suspension from the practice of law is not warranted in a case involving a violation of Prof. Cond. R. 8.4(c), 3.3(a)(1) and 3.3(a)(3) when the aggravating factors are far outweighed by the mitigating factors and the misconduct is an isolated instance in the longstanding career of an attorney

Respondent's Objections to the Panel, simply stated, are that the Panel failed to provide the Board the full and complete recounting of the mitigation evidence, failed to appreciate the reason for the initial lie during the March 2012 pretrial leading to the failure to recognize the existence of other mitigating evidence and therefore failed to arm the Board with information sufficient to enable it to properly balance the one aggravating factor present in this case with the numerous mitigating factors in order to arrive at an appropriate recommendation for a sanction. As such, the evidence presented at the hearing warrants a fully stayed suspension under the facts and circumstances of the instant matter.

As this Court has pointed out numerous times,

In determining the appropriate length of the suspension and any attendant conditions, we must recognize that the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public. Disciplinary Counsel v. O'Neill, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, para. 53; See also, Ohio State Bar Assn. v Weaver (1975), 41 Ohio St.2d 97, 100, 70 O.O.2d 175, 322 N.E.2d 665.

Disciplinary Counsel v. Agopian, 112 Ohio St.3d 103, 2006-Ohio-6510, 858 N.E.2d 368, para.

10.

Further, this Court has also has recognized on numerous occasions:

[A] violation of Prof. Cond. R. 8.4(c) will typically result in an actual suspension from the practice of law unless single “significant mitigating factors that warrant a departure ‘from that principal are present.’” Disciplinary Counsel v. Potter, 126 Ohio St.3d 50, 2010-Ohio-2521, 930-N.E.2d 307, para. 10, quoting Disciplinary Counsel v. Rohrer, 124 Ohio St.3d 65, 2009-Ohio-5930, 919 N.E.2d 180, p. 45. See Disciplinary Counsel v. Carol, 106 Ohio St.3d 84, 2005-Ohio-3805, 831 N.E.2d 1000 para. 13. (Violation of DR. 1-102(A)(4) usually results in an actual suspension unless mitigating factors warrant a lessor sanction.)

Disciplinary Counsel v. Ricketts, 128 Ohio St.3d 278, 2010-Ohio-6240 943 N.E.2d 981

(Respondent recorded a mortgage to create the appearance of debt and deceive creditors meant to misrepresent the true status of land which was not executed in good faith. Respondent also intended to deceive the County Recorder by filing a unilateral release of mortgage. Because there was no prior discipline, a lack of a selfish motive, cooperation with the investigation and exemplary character, even though he failed to acknowledge his wrong conduct, the Court suspended Respondent for six months and stayed the entire suspension.)

Other fully stayed six month suspensions have been handed down by the Ohio Supreme Court in situations involving dishonest behavior. Cf Akron Bar Ass’n v. Groner, 131 Ohio St.3d 194, 2012-Ohio-222, 963 N.E.2d 149. (While the Court agreed that respondent violated Prof. Cond. Rules 3.1, 3.3(a)(1) and (3) and 4.1, it disagreed that respondent violated 8.4(c). In that case, respondent filed a document with the probate court which set forth false allegations of fact concerning an individual in the probate matter seeking to become the representative of the estate. The false statements of material fact became a public record which respondent failed to correct. Although the Board felt that these false assertions and misleading arguments which had no basis

in fact or law were “a matter of fundamental dishonesty and misrepresentation” the Supreme Court disagreed that such false assertions and misleading arguments constituted a Prof.Cond.R. 8.4(c) violation. Since Respondent had no prior discipline, made full and free disclosure to the Board and provided evidence of good character, a six month, all stayed suspension was appropriate.)

Other cases involving dishonesty in which six month suspensions, all stayed, include Disciplinary Counsel v. Forbes, 122 Ohio St.3d 171, 2009-Ohio-2623, 909 N.E.2d 629 (Respondent was convicted of filing a false Financial-Disclosure Statement and accepted gifts of such character as to influence his performance of his public duties in violation of R.C. 102.02(D) (App. D) and R.C. 102.03(E) (App. E). This behavior impacted his fitness to practice law under the predecessor to Prof.Cond.R. 8.4(h), DR 1-102(A)(6)); Disciplinary Counsel v. Koehler, 132 Ohio St.3d 465, 2012-Ohio-3235, 973 N.E.2d 262 (A six month, all stayed suspension was issued where an attorney signed his client’s name to a document and then forged his secretary’s name as the notary on the same document in order to secure funds as administrator of his client’s brother’s estate. Upon respondent’s secretary’s filing of the grievance, the Court determined that the mitigating factors included the absence of a dishonest or selfish motive, lack of a prior disciplinary record and a cooperative attitude toward the disciplinary proceedings even though respondent did not seem remorseful); Disciplinary Counsel v. Burnstein, 131 Ohio St.3d 302, 2012-Ohio-977, 964 N.E.2d 427 (After creating affidavits for friends in order to convince the sheriff to not bring charges against another friend and a mutual friend for whom the affidavits were created, respondent thereafter was found to have lied to the sheriff in the sheriff’s investigation and also to the panel in connection with the hearing on the matter. Despite the lies to both the sheriff and to the Board, mitigating factors were found to include the absence of a

prior disciplinary record, the imposition of other penalties or sanctions because of a negotiated misdemeanor no-contest plea. However, there were two aggravating factors, including acting with a selfish motive and refusal to acknowledge the wrongful nature of his conduct. Despite this, given that respondent has practiced law in the State of Ohio for 30 years without a prior disciplinary record as the main mitigating factor, the Court issued a six month, all stayed suspension); Akron Bar Ass'n. v. DeLoach, 130 Ohio St.3d 153, 2011-Ohio-4201, 956 N.E.2d 811 (In a grievance arising from the representation of a criminal defendant, respondent created documents in order to respond to relator's investigator. The Court found that this behavior violated Prof.Cond.R. 8.4(c). Since the respondent had an absence of a prior record, the expression of remorse, that this was a single case of misconduct with no intent to obtain financial gain and that no unfair advantage was gained from the deception, with the only aggravating factor of the deceptive practice, the Court found that a six month suspension, all stayed, was appropriate. In this case, the Court emphasized the fact that no unfair advantage was gained from the deception and that this was a single case of misconduct, which is also applicable to the instant matter.)

The Panel cited the case of Medina Cty. Bar Assn v. Cameron, 130 Ohio St.3d 299, 2011-Ohio-5200; 958 N.E.2d 138. In that case, the Panel acknowledged that the attorney made a misrepresentation to a Court which was an isolated incident in the attorney's career. Also, no actual harm was attributable to the misconduct. Thus, the Court suspended Cameron for a period for one year, and stayed the entire suspension. In the instant case, the Panel acknowledged that Mr. DeMarco had no prior disciplinary record. (Opinion, para. 58) Mr. DeMarco has been practicing law since 1969 beginning his career in the Cuyahoga County Prosecutor's Office with John T. Corrigan. (Tr. 26) After that he began doing criminal defense work and plaintiff's work

involving contracts. He also has done domestic relations work over the years. (Tr. 26-27) Thus, similar to the facts in Cameron, Mr. DeMarco has had an unblemished career of over 45 years.

The parties in this matter stipulated that there was one aggravating factor of dishonest motive and five mitigating ones:

1. There [was] an absence of prior disciplinary record.
2. There [was] an absence of a selfish motive.
3. There was timely good-faith effort to rectify the consequences of Respondent's misconduct.
4. There [was] a full and free disclosure to Relator and the Disciplinary Board, as well as a cooperative attitude displayed during the proceedings to the present.
5. Respondent . . . provided letters from bench and Bar of Cuyahoga County Ohio, attesting to his good character.

The Board has failed to properly balance these factors.

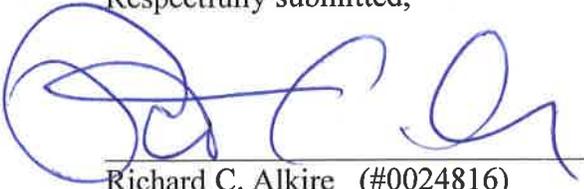
While the Panel failed to find mitigating factors of timely good faith effort to rectify the consequences of the misconduct and the absence of a selfish motive, it is respectfully submitted that the Panel failed to properly accord Respondent the benefit of the evidence presented in regard to those factors, much less explain them to the Board along with all of the character evidence so it was armed with the facts necessary to perform an appropriate balancing.

As such, under the facts and circumstances of the matter, a fully stayed suspension of twelve months or less is appropriate

IV. CONCLUSION

Accordingly, for the foregoing reasons, Respondent respectfully objects to the recommendation of the Board to this Honorable Court that Respondent be suspended to the practice of law and respectfully request that this Honorable Court fully stay any actual suspension it deems appropriate.

Respectfully submitted,



Richard C. Alkire (#0024816)

RICHARD C. ALKIRE CO., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Blvd.
Independence, Ohio 44131-2335
216-674-0550 / Fax 216-674-0104

Attorney for Respondent

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

In Re:	:	
		Case No. 2014-009
Complaint against	:	
Robert Paul DeMarco Attorney Reg. No. 0031530	:	Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Toledo Bar Association	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on August 7, 2014, in Columbus before a panel consisting of Judge Robert Ringland, David Tschantz, and David L. Dingwell, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Michael A. Bonfiglio and David G. Grude appeared on behalf of Relator. Respondent was present and was represented by Richard C. Alkire.

{¶3} Initially, the parties in this case filed an agreement to consent to discipline that set forth stipulations of fact, rule violations, as well as an agreed sanction of a six-month suspension from the practice of law with all six months stayed. The panel recommended the adoption of the agreement to consent to discipline. The Board voted to reject the recommended approval of the consent to discipline.

{¶4} The matter proceeded to a hearing before the panel. Based on the evidence presented at the hearing and the parties' stipulations, the panel recommends the imposition of a one-year suspension with six months stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} The parties and counsel have entered into 13 written stipulations of fact. Twelve exhibits were admitted into evidence at the hearing, including the transcript of a contempt hearing held before the Lucas County Court of Common Pleas on November 29, 2012. Respondent, Cheryl DeMarco (Respondent's wife), Daniel J. Stypula, and Christopher J. Berger testified at the hearing. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶6} Respondent was admitted to the practice of law in the state of Ohio on May 3, 1969 and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶7} Respondent undertook the representation of a life-long friend, Douglas Cunningham, in a civil lawsuit alleging a defamation claim against two individuals, Bernie Ness and Joseph Plandowski (hereinafter "Ness Litigation"). Cunningham was the plaintiff. Ness and Plandowski were the co-defendants.

{¶8} The Ness Litigation was filed in Lucas County Court of Common Pleas. Judge Myron C. Duhart was assigned to preside over the case.

{¶9} Respondent testified that he had known Cunningham since he was 14 years old. Hearing Tr. 29.

{¶10} The Ness Litigation involved allegations that Ness and Plandowski authored and disseminated defamatory statements about Cunningham related to double-billing Cunningham's employer for certain business expenses.

{¶11} Based upon prior litigation between Cunningham, Ness, and Plandowski, the relationship among these individuals was already very contentious. The Ness Litigation continued and deepened the ill will among these parties.

{¶12} Respondent's wife testified at the hearing that Respondent is generally very "protective of his clients." Hearing Tr. 116. She described the Ness Litigation as "very ugly and frustrating." *Id.*

{¶13} It is with this emotionally-charged backdrop that the following events unfolded in the Ness Litigation.

{¶14} During the discovery phase of the Ness Litigation, Respondent requested an electronic harvest of various computer hard-drives of Ness and Plandowski in order to try to confirm that it was the Ness/Plandowski computers that were the origin of certain defamatory materials that were the crux of the Ness Litigation.

{¶15} A transcript of a November 29, 2012 contempt hearing, held before Judge Duhart, was introduced as Exhibit 2. This transcript contains many details relating to how the electronic harvest process unfolded and evidences the multiple misrepresentations that were made by Respondent during the Ness Litigation that give rise to Relator's complaint.

{¶16} Respondent retained Jack Harper to serve as the electronic data forensic expert on behalf of Cunningham. Harper was asked to harvest electronic documents from the Ness/Plandowski computers.

{¶17} Respondent and counsel for Ness and Plandowski reached an agreement that set forth the protocol by which Harper would conduct the copying of the Ness/Plandowski computer hard drives, search the data contained on those hard drives, and then handle the results of that search.

{¶18} This electronic data harvesting agreement is documented in a June 20, 2011 letter authored by Respondent and sent to James Tuschman, one of the attorneys representing Ness and Plandowski. That letter was introduced as Relator's Ex. 1.

{¶19} The letter agreement proposed a search for documents, including "word documents, Excel spreadsheets, and emails" that contained certain words, phrases, or abbreviations in order to locate relevant materials from the Ness/Plandowski computers. *Id.* at p. 2.

{¶20} The letter agreement contained the following provision:

All documents to be delivered to Judge Duhart's chambers for an in-camera inspection to determine what documents, if any, may be turned over to the [Respondent].

Id.

{¶21} Following this agreement, Harper traveled to Nantucket in the Fall 2011 in order to conduct the electronic harvest of the Ness/Plandowski hard drives. Harper made a mirror image of the Ness/Plandowski hard drives by copying the entire hard drive onto a mirror-image drive ("Mirror Image Disk"). Relator's Ex. 2 at 17-19.

{¶22} Harper brought the Mirror Image Disk back to Ohio. Harper used proprietary software in his possession that was able to search the Mirror Image Disk and create a separate disk that contained a filtered set of data that met the search term criteria set forth in the letter agreement. *Id.* at 19.

{¶23} This filtered set of data was then loaded onto a separate disk ("Filtered Results Disk"). *Id.* at 19-20.

{¶24} According to Harper, and unbeknownst to counsel for Ness and Plandowski, this Filtered Results Disk was then given to Respondent "within a week" after Harper went to Nantucket to conduct the electronic data harvest in Fall 2011. *Id.* at 24. According to Harper, Respondent told Harper that "he [Respondent] would take care of it." *Id.* at 31-32.

{¶25} Despite the letter agreement, the Filtered Results Disk was never given to Judge Duhart to conduct an in camera inspection to decide what documents on that Filtered Results Disk would be turned over to Respondent. Instead, Respondent testified that based on his interpretation of the letter agreement, Respondent was permitted to search the Filtered Results Disk himself, and he did so. Hearing Tr. 36-37, 40.

{¶26} Counsel for Ness and Plandowski were unaware that Respondent was doing this, and they were never provided with a copy of the Filtered Results Disk.

{¶27} According to Respondent, after he searched the Filtered Results Disk, he determined that “it did not contain what we hoped it might.” *Id.* at 41.

{¶28} According to Respondent, the timing of his review of the Filtered Results Disk coincides with Harper’s recollection of it occurring in October or November 2011. *Id.* at 42.

{¶29} In late March 2012, Judge Duhart scheduled a pretrial conference in the Ness Litigation. Respondent attended the pretrial.

{¶30} According to Respondent’s testimony at the hearing in this matter, Respondent believed that “the whole computer thing was a distant memory.” *Id.* at 45. Having not found anything of note on the Filtered Results Disk, Respondent no longer believed that anything associated with the electronic harvest was at issue.

{¶31} Despite that belief, counsel for Ness and Plandowski pressed the issue at the March 2012 pretrial about whether or not there had been any results of the electronic data harvest.

{¶32} During the pretrial with opposing counsel and Judge Duhart, Respondent misrepresented that he had not looked at any of the electronic data harvest results. Respondent was questioned at the hearing about what precisely he stated during that pretrial. He testified at the hearing as follows:

Q: What did you say instead of “Because I looked”?

A: I said “Because Harper told me there was nothing there.”

So in any event, that’s why I said “He saw it.” How do you know – Then Tuschman asked me, “How do you know?” I said, “Because he saw it.” He said, “Well, do you have a copy?” I said, “No, I never saw it” which was a flat out lie. I was actually talking to Tuschman at the time, but the judge was in the room.

Id. at 48.

{¶33} Following the pretrial, and on the drive home from Toledo, Respondent placed a telephone call to Harper and left Harper a voice mail message. The voice mail message stated as follows:

Jack, it’s Bob DeMarco. Apparently Plandowski called you before I did. I told the Court today that we were not going forward with the extraction. I told him that you had the disc

and never gave it to me. You didn't look into it, I didn't look into it. And that you would send it back, which I have. You gave it to me, but I didn't (inaudible), and my secretary said you just called and it just beeps it through before I did, that's all.

Relator's Ex. 2 at 58-59.

{¶34} Despite knowingly making the misrepresentation to counsel and in the presence of Judge Duhart during a pretrial conference, Respondent did nothing to correct the misrepresentation.

{¶35} The parties reached a resolution to the Ness Litigation. However, counsel for Ness and Plandowski pressed Harper to provide them with the data that he had harvested from the Ness/Plandowski computers.

{¶36} By that time (Spring and Summer 2012), Harper had already written over the Mirror Image Disk so that the mirror image of the drives no longer existed. *Id.* at 38. Harper had also received back the Filtered Results Disk from Respondent and had destroyed that as well based upon Respondent's representation to Harper that the case was over.

{¶37} Based upon Respondent's misrepresentation to the court and counsel that he had never had possession of the Filtered Results Disk, counsel for Ness and Plandowski apparently refocused their attention upon Harper and pursued Harper to produce the disk. Ultimately, they filed a motion in the Ness Litigation for an order to show cause why Harper should not be held in contempt of court.

{¶38} Judge Duhart scheduled the motion for hearing on November 29, 2012. The November 29, 2012 hearing was transcribed and was admitted as Relator's Ex. 2. In addition, the court's security camera footage video was played for the panel at the hearing in this matter.

{¶39} Present at the November 29, 2012 hearing was Harper, Respondent, and counsel for Ness and Plandowski. Judge Duhart presided over the hearing.

{¶40} During the first portion of the proceeding, Respondent was silent while Harper was aggressively cross-examined by counsel for Ness and Plandowski. Respondent made no attempt to come forth and correct the record with regard to his prior March 2012 misrepresentation.

{¶41} As the hearing wore on, counsel and Judge Duhart continued to aggressively press Harper regarding the extraction process and what happened to the disk. Harper's testimony was truthful, but it appears that counsel for Ness and Plandowski and Judge Duhart may have believed that Harper was giving false testimony.

{¶42} This culminated in Ness and Plandowski's counsel asking Harper about whether Harper believed that Respondent had misrepresented facts to the court. *Id.* at 47. Harper testified that he did believe that Respondent made a misrepresentation to the court. *Id.*

{¶43} Following that statement, counsel for Ness and Plandowski requested that they go off the record in order to have a brief discussion in chambers with Judge Duhart and Respondent.

{¶44} In chambers, Respondent repeated his misrepresentation to Judge Duhart and counsel that he had never had possession of the Filtered Results Disk. *Id.* at 48. It is not clear whether Harper was present in chambers during that exchange off the record.

{¶45} When the hearing reconvened on the record moments later, Respondent stated in open court and on the record that "the testimony that was given by Mr. Harper before this Court under oath was flatly refuted by me in chambers." *Id.* at 49.

{¶46} Judge Duhart then questioned Respondent directly. Respondent once again misrepresented on the record that he had never accepted delivery of any disk, and that no one other than Harper and Plandowski had ever seen any of the contents of either the Mirror Image Disk or the Filtered Results Disk. *Id.* at 50-51.

{¶47} Then, upon being questioned by counsel for Ness and Plandowski, Respondent yet again restated his misrepresentations and stated on the record that Harper's testimony was untruthful, and that "I never received a disc, no." *Id.* at 52.

{¶48} When asked about the March 2012 pretrial, Respondent once again continued his series of misrepresentations and stated, "No, I had not looked at the disc." *Id.* at 55.

{¶49} Despite having multiple opportunities to correct the record and reveal that he had made misrepresentations to the court, both on and off the record, Respondent concluded his statements by yet again making false statements of fact on the record to the court and counsel with the following:

Q: Did you ever – Mr. Harper sat on that stand and said that you talked to him on the telephone and said to him that you lied to the Court. Did you ever make that statement?

A: He said that? I didn't hear him say that. If he did, I would like to go outside with him. I never lied to anybody, especially to a Court.

Q: You never made that statement, to your knowledge?

A: No. Of course not.

Q: So just to be clear, you did not receive any disc whatsoever from Mr. Harper, your retained expert in this case, true?

A: True.

Id. at 55.

{¶50} Harper, the subject of the contempt proceeding, had endured cross-examination from counsel for Ness and Plandowski and from Judge Duhart. Despite having told the truth, Harper was now being accused by Respondent of having just committed perjury and threatened with being taken “outside” by Respondent. Respondent made no effort whatsoever to extract Harper from this most unenviable position.

{¶51} The panel is left to wonder what would have happened to Harper had Harper not been fortuitous enough to have saved the March 2012 voice mail message from Respondent whereby Respondent admitted in the voice mail that he had outright lied to the court. Fortunately for Harper, he did save it, and he was able to play the message at the November 29, 2012 hearing in order to clear himself. *Id.* at 58-59.

{¶52} The contempt hearing then quickly concluded once it became obvious to everyone that Respondent had made a series of misrepresentations to the court and to counsel. No punitive action was taken against Harper.

{¶53} During the hearing in this matter, Relator elicited the following testimony from

Respondent:

Q: I'm a little bit troubled by your testimony today. It almost sounds to me like you lied, then you lied again, and it seems like it's all okay up until the time that you got caught. The voicemail was played, and all of a sudden now I'm caught and now I'm remorseful. **Were you remorseful before then?**

A: **No.**

Q: **You were not?**

A: **No.** I didn't think of it as a lie. I know how that sounds. I'm trying to be honest with you. The moment that voicemail was played, I realized I had lied to a judge. It's the truth.

Hearing Tr. 84-85; emphasis added.

{¶54} Despite knowing that he had made misrepresentations to Judge Duhart and counsel for Ness and Plandowski, Respondent's testimony confirms that he was not remorseful for having made those misrepresentations. Instead, only when he was caught in the series of lies was he remorseful.

{¶55} The parties stipulated to, and the panel concludes by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following:

- Prof. Cond. R. 3.3(a)(1) [a lawyer shall not knowingly make a false statement of fact to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer];
- Prof. Cond. R. 3.3(a)(3) [a lawyer shall not offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal]; and
- Prof. Cond. R. 8.4(c) [conduct that involves fraud, dishonesty, deceit, or misrepresentation].

{¶56} Respondent stipulates to all the rule violations.

MITIGATION, AGGRAVATION, AND SANCTION

{¶57} The parties stipulated to, and the panel finds, one aggravating factor, specifically, Respondent acted with a dishonest motive.

{¶58} The parties stipulated to, and the panel finds the following mitigating factors: Respondent has no prior disciplinary record; Respondent has displayed a cooperative attitude in these proceedings; and Respondent has provided letters from the bench and the bar of Cuyahoga County attesting to his good character.

{¶59} The parties stipulated to two mitigating factors, but the panel rejects the stipulation and fails to find any evidence of the following.

{¶60} *Respondent did not act with a selfish motive.* The evidence actually demonstrates the contrary. Respondent made the misrepresentations likely because he feared that he violated the letter agreement regarding the handling of the Filtered Results Disk because he looked at them himself rather than submit them to Judge Duhart for the in camera inspection as set forth in the letter agreement. Relator did not charge Respondent with regard to whether or not he violated the letter agreement, nor does the panel make any determination that Respondent did violate the letter agreement. Whether Respondent violated the letter agreement or did not has no relevance to the charges asserted by Relator, nor does the panel find that it constitutes any evidence of a violation of any of the charged rules. However, what is clear is that Respondent's motive was selfish and dishonest, and that is an aggravating factor as set forth above.

{¶61} *Respondent made a timely good-faith effort to rectify the consequence of his misconduct.* Once again, the evidence demonstrated exactly the opposite. Respondent's misrepresentations continued to be made even as Harper was right on the verge of being held in contempt of court by Judge Duhart. The one and only thing that saved Harper from a contempt finding, and even possibly a charge of perjury, was the fact that he had the good fortune to have saved the damning voice mail confirming that

Respondent had lied to the court at the March 2012 pretrial. Rather than go on record to advise Judge Duhart that he made a misrepresentation, and that Harper's testimony at the contempt hearing was truthful, Respondent initially sat silent, and then continued to repeat his misrepresentations, and even went so far as to falsely state that Harper had committed perjury. Only after he was "caught red-handed," did Respondent have no other option but to admit his misrepresentations to the court.

{¶62} Relator and Respondent stipulate to a recommended sanction of a fully-stayed suspension from the practice of law of twelve months or less.

{¶63} The Supreme Court of Ohio has held:

Although an actual suspension from the practice of law is the general sanction when an attorney engages in dishonest conduct, a lesser sanction **may be appropriate** when the misconduct is an isolated incident in an attorney's career or when little or no harm resulted from the misconduct. [Emphasis added.]

Medina Cty. Bar Assn. v. Cameron, 130 Ohio St.3d 299, 2011-Ohio-5200 at ¶17, citing *Disciplinary Counsel v. Cuckler*, 101 Ohio St.3d 318, 2004-Ohio-784 at ¶10.

{¶64} The *Cameron* case is somewhat similar to the present case because it involved an attorney who made a misrepresentation to a court which was an isolated incident in the attorney's career. In *Cameron*, there was also no actual harm attributable to the misconduct. The Court therefore suspended Cameron for a period of one year, and stayed the entire period.

{¶65} The panel also considered other cases which involved Prof. Cond. R. 3.3(a) misrepresentations.

{¶66} *Akron Bar Assn. v. Groner*, 131 Ohio St.3d 194, 2012-Ohio-222 involved an attorney who was suspended for six months, all stayed, when the attorney's reckless and sloppy conduct resulted in attorney filing false and misleading statements with the court. This case was less egregious than the present case because Respondent was fully aware that he was making misrepresentations to Judge Duhart and to counsel on each and every occasion that he made misrepresentations both on the record and off the record.

{¶67} *Toledo Bar Assn. v. Miller*, 132 Ohio St.3d 63, 2012-Ohio-1880 involved an attorney who was suspended for one year, with six months stayed, when the attorney submitted false statements to a court in response to garnishment requests. This case is different than the present case because the attorney in *Miller* was also found to have mishandled trust account funds in addition to the misrepresentation.

{¶68} The parties presented additional cases involving violations of Prof. Cond. R. 8.4(c) that led to a variety of sanctions, many of which were six-month stayed suspensions. However, the panel finds that the conduct in this case makes it more appropriate to focus upon those cases relating to Prof. Cond. R. 3.3(a), misrepresentations to courts, when deciding what sanction to recommend.

{¶69} Like *Cameron*, this case involves an attorney making intentional misrepresentations to a court. Like *Cameron*, this is an isolated incident in an otherwise long career. Although there was no actual harm in *Cameron*, the conduct that the Court was faced with in *Cameron* was less egregious than the conduct in the present case because it was one misrepresentation.

{¶70} In the present case, Respondent engaged in a series of misrepresentations, beginning at the March 2012 pretrial and continuing during the November 29, 2012 contempt hearing. Further, the misrepresentations by Respondent were made at the contempt hearing while being questioned by counsel and by Judge Duhart while on the record.

{¶71} In *Cameron*, the misrepresentation was more quickly discovered and resolved, without a “near miss” that occurred in the present case. While there was no harm that was ultimately caused, it is only because Harper saved the voice mail message from Respondent that proved that Respondent had lied to the court in March 2012 and was still making misrepresentations both on and off the record at the November 2012 contempt hearing. Had Harper not saved the voice mail message, there could have been significant harm to him, a non-party to the Ness Litigation.

{¶72} The panel believes that Respondent's conduct, and the facts of this case, present a more egregious violation than the Court addressed in *Cameron*. Unlike the situation in *Cameron*, Judge Duhart and counsel for Ness and Plandowski had no independent basis to know that Respondent had misrepresented facts to them in order to confront Respondent with his misrepresentation and remedy the misrepresentation.

{¶73} A nonparty to the case, Harper, was left to his own resources to defend himself at the contempt hearing, was accused by Respondent of testifying untruthfully, and was even threatened by Respondent of being taken "outside" merely because Harper testified to the truth of what happened.

{¶74} Respondent's candid admission at the hearing in this matter was that he was not remorseful for making the misrepresentations. Instead, he was remorseful only when he was discovered to have lied.

{¶75} A key foundation upon which the judicial process rests is the truthfulness of attorneys appearing before our courts. The failure of Respondent to have any remorse after knowingly making several misrepresentations directly to Judge Duhart and to opposing counsel leads this panel to conclude that a sanction that includes an actual suspension is appropriate here.

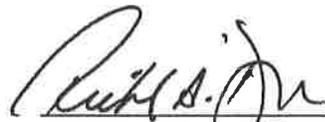
{¶76} The panel, having considered the case law cited, the rule violations, and the aggravating factors verses the mitigating factors, recommends that Respondent be suspended from the practice of law for a period of one year with six months stayed on the condition that he pay the costs associated with this matter and commit no further violations.

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 October 3, 2014. The Board adopted the findings of fact and conclusions of law of the panel. In light of Respondent's repeated misrepresentations to the court and client, the potential for harm to the expert witness

Harper, and his failure to acknowledge or show remorse for his misconduct until he was caught, the Board amended the sanction recommended by the panel and recommends that Respondent, Robert Paul DeMarco, be suspended from the practice of law for a period of one year. 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

III: ADVOCATE

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

[3] The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

Comparison to former Ohio Code of Professional Responsibility

DR 7-102(A)(2) and EC 7-25 address the scope of Rule 3.1.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.1 is identical to Model Rule 3.1.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not *knowingly* do any of the following:

(1) make a false statement of fact or law to a *tribunal* or fail to correct a false statement of material fact or law previously made to the *tribunal* by the lawyer;

(2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer *knows* to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to *know* of its falsity, the lawyer shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer *reasonably believes* is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who *knows* that a person, including the client, intends to engage, is engaging, or has engaged in criminal or *fraudulent* conduct related to the proceeding shall take *reasonable* measures to remedy the situation, including, if necessary, disclosure to the *tribunal*.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest *tribunal* that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the *tribunal* of all material facts *known* to the lawyer that will enable the *tribunal* to make an informed decision, whether or not the facts are adverse.

Comment

[1] This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(o) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, division (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with

persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in division (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Division (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [RESERVED]

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] [RESERVED]

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action including making such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official, or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, division (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law or fact must be established. A final determination of the issue to which the duty relates by the highest tribunal that may consider the issue, or the expiration of the time for such consideration, is a reasonably definite point for the termination of the obligation. Division (c) modifies the rule set forth in *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260 to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an *ex parte* proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(c) to seek permission of the tribunal to withdraw if the lawyer's compliance with this rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this rule or as otherwise permitted by Rule 1.6.

Comparison to former Ohio Code of Professional Responsibility

Rule 3.3(a)(1) is comparable to DR 7-102(A)(5), Rule 3.3(a)(2) is comparable to DR 7-106(B)(1), and Rule 3.3(a)(3) is comparable to DR 7-102(A)(1) and (4).

Rule 3.3(b) is comparable to DR 7-102(B)(1) and (2). There are two differences. First, Rule 3.3(b) does not necessarily require disclosure to the tribunal. Rather, the rule requires the lawyer to take steps to remedy the situation, including, if necessary, disclosure to the tribunal. Second, the rule does not adopt the DR 7-102(B)(1) requirement that the lawyer reveal the client's fraudulent act, during the course of the representation, upon any person. Requiring a lawyer to disclose any and all frauds a client commits during the course of the representation is

unworkable. There is no Ohio precedent where a lawyer was disciplined for failing to disclose a client's fraud upon a third person. This rule requires a lawyer to take remedial measures with respect to criminal or fraudulent conduct relating to a proceeding in which the lawyer represents or has represented a client.

Rule 3.3(c) provides that the duties set forth in divisions (a) and (b) continue until a final determination on the issue to which the duty relates has been made by the highest tribunal that may consider the issue or the expiration of time for such a determination. The Code provisions that correspond to Rule 3.3 have no comparable time limitation. But see *Disciplinary Counsel v. Heffernan* (1991), 58 Ohio St.3d 260, which is modified by Rule 3.3(c) to the extent that *Heffernan* imposed an obligation to disclose false evidence or statements that is unlimited in time.

Rule 3.3(d) has no analogous Disciplinary Rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 3.3(c) is replaced by a standard analogous to that used in Rule 3.3 of the North Dakota Rules of Professional Conduct.

IV. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not *knowingly* do either of the following:

- (a) make a false statement of material fact or law to a third person;
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting an *illegal* or *fraudulent* act by a client.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Disclosure to Prevent Illegal or Fraudulent Client Acts

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is illegal or fraudulent. Rule 4.1(b) requires a lawyer to disclose a material fact, including one that may be protected by the attorney-client privilege, when the disclosure is necessary to avoid the lawyer's assistance in the client's illegal or fraudulent act. See also Rule 8.4(c). The client can, of course, prevent such disclosure by refraining from the wrongful conduct. If the client persists, the lawyer usually can avoid assisting the client's illegal or fraudulent act by withdrawing from the representation. If withdrawal is not sufficient to avoid such assistance, division (b) of the rule requires disclosure of material facts necessary to prevent the assistance of the client's illegal or fraudulent act. Such disclosure may include disaffirming

an opinion, document, affirmation, or the like, or may require further disclosure to avoid being deemed to have assisted the client's illegal or fraudulent act. Disclosure is not required unless the lawyer is unable to withdraw or the client is using the lawyer's work product to assist the client's illegal or fraudulent act.

[4] Division (b) of this rule addresses only ongoing or future illegal or fraudulent acts of a client. With respect to past illegal or fraudulent client acts of which the lawyer later becomes aware, Rule 1.6(b)(3) permits, but does not require, a lawyer to reveal information reasonably necessary to mitigate substantial injury to the financial or property interests of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.1 addresses the same issues contained in several provisions of the Ohio Code of Professional Responsibility. Division (a) of the rule is virtually identical to DR 7-102(A)(5). Division (b) parallels DR 7-102(A)(3) and the "fraud on a person" portion of DR 7-102(B)(1). The "fraud on a tribunal" portion of DR 7-102(B)(1) is now found in Rule 3.3.

No Ohio case has construed DR 7-102(B) in the context of a lawyer failing to disclose a fraud on a person. Nevertheless, revealing such an ongoing or future fraud is justified under Rule 4.1(b) when the client refuses to prevent it, and the lawyer's withdrawal from the matter is not sufficient to prevent assisting the fraud.

The mitigation of past fraud on a person, addressed in DR 7-102(B), is now found in Rule 1.6(b)(3).

Comparison to ABA Model Rules of Professional Conduct

Rule 4.1 incorporates two changes in Model Rule 4.1(b) that are intended to track Ohio law. First, division (b) prohibits lawyers from assisting "illegal" and fraudulent acts of clients, (rather than "criminal" and fraudulent acts) consistent with proposed Rule 1.2(d) and DR 7-102(A)(7). Second, the "unless" clause at the end of division (b), which conditions the lawyer's duty to disclose on exceptions in Rule 1.6, is deleted. Deleting this phrase results in a clearer stand alone anti-fraud rule because it does not require reference to Rule 1.6, and also because such a provision is more consistent with DR 7-102(B)(1).

Comment [3] is rewritten and Comment [4] inserted to clarify the scope and meaning of division (b), and to add appropriate cross-references to other rules.

RULE 8.4: MISCONDUCT

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

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[3] Division (g) does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

ORC Ann. 102.02

Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE I. STATE GOVERNMENT > CHAPTER 102. PUBLIC OFFICERS -- ETHICS

§ 102.02. Duty to file disclosure statement with ethics commission

(A) Except as otherwise provided in division (H) of this section, all of the following shall file with the appropriate ethics commission the disclosure statement described in this division on a form prescribed by the appropriate commission: every person who is elected to or is a candidate for a state, county, or city office and every person who is appointed to fill a vacancy for an unexpired term in such an elective office; all members of the state board of education; the director, assistant directors, deputy directors, division chiefs, or persons of equivalent rank of any administrative department of the state; the president or other chief administrative officer of every state institution of higher education as defined in section 3345.011 of the Revised Code; the executive director and the members of the capitol square review and advisory board appointed or employed pursuant to section 105.41 of the Revised Code; all members of the Ohio casino control commission, the executive director of the commission, all professional employees of the commission, and all technical employees of the commission who perform an internal audit function; the individuals set forth in division (B)(2) of section 187.03 of the Revised Code; the chief executive officer and the members of the board of each state retirement system; each employee of a state retirement board who is a state retirement system investment officer licensed pursuant to section 1707.163 of the Revised Code; the members of the Ohio retirement study council appointed pursuant to division (C) of section 171.01 of the Revised Code; employees of the Ohio retirement study council, other than employees who perform purely administrative or clerical functions; the administrator of workers' compensation and each member of the bureau of workers' compensation board of directors; the bureau of workers' compensation director of investments; the chief investment officer of the bureau of workers' compensation; all members of the board of commissioners on grievances and discipline of the supreme court and the ethics commission created under section 102.05 of the Revised Code; every business manager, treasurer, or superintendent of a city, local, exempted village, joint vocational, or cooperative education school district or an educational service center; every person who is elected to or is a candidate for the office of member of a board of education of a city, local, exempted village, joint vocational, or cooperative education school district or of a governing board of an educational service center that has a total student count of twelve thousand or more as most recently determined by the department of education pursuant to section 3317.03 of the Revised Code; every person who is appointed to the board of education of a municipal school district pursuant to division (B) or (F) of section 3311.71 of the Revised Code; all members of the board of directors of a sanitary district that is established under Chapter 6115. of the Revised Code and organized wholly for the purpose of providing a water supply for domestic, municipal, and public use, and that includes two municipal corporations in two counties; every public official or employee who is paid a salary or wage in accordance with schedule C of section 124.15 or schedule E-2 of section 124.152 of the Revised Code; members of the board of trustees and the executive director of the southern Ohio agricultural and community development foundation; all members appointed to the Ohio livestock care standards board under section 904.02 of the Revised Code; and every other public official or employee who is designated by the appropriate

Richard Alkire

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ethics commission pursuant to division (B) of this section.

The disclosure statement shall include all of the following:

- (1) The name of the person filing the statement and each member of the person's immediate family and all names under which the person or members of the person's immediate family do business;
- (2) (a) Subject to divisions (A)(2)(b) and (c) of this section and except as otherwise provided in section 102.022 of the Revised Code, identification of every source of income, other than income from a legislative agent identified in division (A)(2)(b) of this section, received during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. If the person filing the statement is a member of the general assembly, the statement shall identify the amount of every source of income received in accordance with the following ranges of amounts: zero or more, but less than one thousand dollars; one thousand dollars or more, but less than ten thousand dollars; ten thousand dollars or more, but less than twenty-five thousand dollars; twenty-five thousand dollars or more, but less than fifty thousand dollars; fifty thousand dollars or more, but less than one hundred thousand dollars; and one hundred thousand dollars or more. Division (A)(2)(a) of this section shall not be construed to require a person filing the statement who derives income from a business or profession to disclose the individual items of income that constitute the gross income of that business or profession, except for those individual items of income that are attributable to the person's or, if the income is shared with the person, the partner's, solicitation of services or goods or performance, arrangement, or facilitation of services or provision of goods on behalf of the business or profession of clients, including corporate clients, who are legislative agents. A person who files the statement under this section shall disclose the identity of and the amount of income received from a person who the public official or employee knows or has reason to know is doing or seeking to do business of any kind with the public official's or employee's agency.

(b) If the person filing the statement is a member of the general assembly, the statement shall identify every source of income and the amount of that income that was received from a legislative agent during the preceding calendar year, in the person's own name or by any other person for the person's use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. Division (A)(2)(b) of this section requires the disclosure of clients of attorneys or persons licensed under section 4732.12 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, if those clients or patients are legislative agents. Division (A)(2)(b) of this section requires a person filing the statement who derives income from a business or profession to disclose those individual items of income that constitute the gross income of that business or profession that are received from legislative agents.

(c) Except as otherwise provided in division (A)(2)(c) of this section, division (A)(2)(a) of this section applies to attorneys, physicians, and other persons who engage in the practice of a profession and who, pursuant to a section of the Revised Code, the

common law of this state, a code of ethics applicable to the profession, or otherwise, generally are required not to reveal, disclose, or use confidences of clients, patients, or other recipients of professional services except under specified circumstances or generally are required to maintain those types of confidences as privileged communications except under specified circumstances. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose the name, other identity, or address of a client, patient, or other recipient of professional services if the disclosure would threaten the client, patient, or other recipient of professional services, would reveal details of the subject matter for which legal, medical, or professional advice or other services were sought, or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services. Division (A)(2)(a) of this section does not require an attorney, physician, or other professional subject to a confidentiality requirement as described in division (A)(2)(c) of this section to disclose in the brief description of the nature of services required by division (A)(2)(a) of this section any information pertaining to specific professional services rendered for a client, patient, or other recipient of professional services that would reveal details of the subject matter for which legal, medical, or professional advice was sought or would reveal an otherwise privileged communication involving the client, patient, or other recipient of professional services.

- (3) The name of every corporation on file with the secretary of state that is incorporated in this state or holds a certificate of compliance authorizing it to do business in this state, trust, business trust, partnership, or association that transacts business in this state in which the person filing the statement or any other person for the person's use and benefit had during the preceding calendar year an investment of over one thousand dollars at fair market value as of the thirty-first day of December of the preceding calendar year, or the date of disposition, whichever is earlier, or in which the person holds any office or has a fiduciary relationship, and a description of the nature of the investment, office, or relationship. Division (A)(3) of this section does not require disclosure of the name of any bank, savings and loan association, credit union, or building and loan association with which the person filing the statement has a deposit or a withdrawable share account.
- (4) All fee simple and leasehold interests to which the person filing the statement holds legal title to or a beneficial interest in real property located within the state, excluding the person's residence and property used primarily for personal recreation;
- (5) The names of all persons residing or transacting business in the state to whom the person filing the statement owes, in the person's own name or in the name of any other person, more than one thousand dollars. Division (A)(5) of this section shall not be construed to require the disclosure of debts owed by the person resulting from the ordinary conduct of a business or profession or debts on the person's residence or real property used primarily for personal recreation, except that the superintendent of financial institutions shall disclose the names of all state-chartered savings and loan associations and of all service corporations subject to regulation under division (E)(2) of *section 1151.34 of the Revised Code* to whom the superintendent in the superintendent's own name or in the name of any other person owes any money, and that the superintendent and any deputy superintendent of banks shall

disclose the names of all state-chartered banks and all bank subsidiary corporations subject to regulation under section 1109.44 of the Revised Code to whom the superintendent or deputy superintendent owes any money.

- (6) The names of all persons residing or transacting business in the state, other than a depository excluded under division (A)(3) of this section, who owe more than one thousand dollars to the person filing the statement, either in the person's own name or to any person for the person's use or benefit. Division (A)(6) of this section shall not be construed to require the disclosure of clients of attorneys or persons licensed under section 4732.12 of the Revised Code, or patients of persons certified under section 4731.14 of the Revised Code, nor the disclosure of debts owed to the person resulting from the ordinary conduct of a business or profession.
- (7) Except as otherwise provided in section 102.022 of the Revised Code, the source of each gift of over seventy-five dollars, or of each gift of over twenty-five dollars received by a member of the general assembly from a legislative agent, received by the person in the person's own name or by any other person for the person's use or benefit during the preceding calendar year, except gifts received by will or by virtue of section 2105.06 of the Revised Code, or received from spouses, parents, grandparents, children, grandchildren, siblings, nephews, nieces, uncles, aunts, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, fathers-in-law, mothers-in-law, or any person to whom the person filing the statement stands in loco parentis, or received by way of distribution from any inter vivos or testamentary trust established by a spouse or by an ancestor;
- (8) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source and amount of every payment of expenses incurred for travel to destinations inside or outside this state that is received by the person in the person's own name or by any other person for the person's use or benefit and that is incurred in connection with the person's official duties, except for expenses for travel to meetings or conventions of a national or state organization to which any state agency, including, but not limited to, any legislative agency or state institution of higher education as defined in section 3345.011 of the Revised Code, pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues;
- (9) Except as otherwise provided in section 102.022 of the Revised Code, identification of the source of payment of expenses for meals and other food and beverages, other than for meals and other food and beverages provided at a meeting at which the person participated in a panel, seminar, or speaking engagement or at a meeting or convention of a national or state organization to which any state agency, including, but not limited to, any legislative agency or state institution of higher education as defined in section 3345.011 of the Revised Code, pays membership dues, or any political subdivision or any office or agency of a political subdivision pays membership dues, that are incurred in connection with the person's official duties and that exceed one hundred dollars aggregated per calendar year;
- (10) If the disclosure statement is filed by a public official or employee described in division (B)(2) of section 101.73 of the Revised Code or division (B)(2) of section 121.63 of the Revised Code who receives a statement from a legislative agent, executive agency lobbyist, or employer that contains the information described in division (F)(2) of section 101.73 of

the Revised Code or division (G)(2) of *section 121.63 of the Revised Code*, all of the nondisputed information contained in the statement delivered to that public official or employee by the legislative agent, executive agency lobbyist, or employer under division (F)(2) of section 101.73 or (G)(2) of *section 121.63 of the Revised Code*.

A person may file a statement required by this section in person, by mail, or by electronic means. A person who is a candidate for elective office shall file the statement no later than the thirtieth day before the primary, special, or general election at which the candidacy is to be voted on, whichever election occurs soonest, except that a person who is a write-in candidate shall file the statement no later than the twentieth day before the earliest election at which the person's candidacy is to be voted on. A person who holds elective office shall file the statement on or before the fifteenth day of April of each year unless the person is a candidate for office. A person who is appointed to fill a vacancy for an unexpired term in an elective office shall file the statement within fifteen days after the person qualifies for office. Other persons shall file an annual statement on or before the fifteenth day of April or, if appointed or employed after that date, within ninety days after appointment or employment. No person shall be required to file with the appropriate ethics commission more than one statement or pay more than one filing fee for any one calendar year.

The appropriate ethics commission, for good cause, may extend for a reasonable time the deadline for filing a statement under this section.

A statement filed under this section is subject to public inspection at locations designated by the appropriate ethics commission except as otherwise provided in this section.

- (B) The Ohio ethics commission, the joint legislative ethics committee, and the board of commissioners on grievances and discipline of the supreme court, using the rule-making procedures of Chapter 119. of the Revised Code, may require any class of public officials or employees under its jurisdiction and not specifically excluded by this section whose positions involve a substantial and material exercise of administrative discretion in the formulation of public policy, expenditure of public funds, enforcement of laws and rules of the state or a county or city, or the execution of other public trusts, to file an annual statement on or before the fifteenth day of April under division (A) of this section. The appropriate ethics commission shall send the public officials or employees written notice of the requirement by the fifteenth day of February of each year the filing is required unless the public official or employee is appointed after that date, in which case the notice shall be sent within thirty days after appointment, and the filing shall be made not later than ninety days after appointment.

Except for disclosure statements filed by members of the board of trustees and the executive director of the southern Ohio agricultural and community development foundation, disclosure statements filed under this division with the Ohio ethics commission by members of boards, commissions, or bureaus of the state for which no compensation is received other than reasonable and necessary expenses shall be kept confidential. Disclosure statements filed with the Ohio ethics commission under division (A) of this section by business managers, treasurers, and superintendents of city, local, exempted village, joint vocational, or cooperative education school districts or educational service centers shall be kept confidential, except that any person conducting an audit of any such

school district or educational service center pursuant to section 115.56 or Chapter 117. of the Revised Code may examine the disclosure statement of any business manager, treasurer, or superintendent of that school district or educational service center. Disclosure statements filed with the Ohio ethics commission under division (A) of this section by the individuals set forth in division (B)(2) of section 187.03 of the Revised Code shall be kept confidential. The Ohio ethics commission shall examine each disclosure statement required to be kept confidential to determine whether a potential conflict of interest exists for the person who filed the disclosure statement. A potential conflict of interest exists if the private interests of the person, as indicated by the person's disclosure statement, might interfere with the public interests the person is required to serve in the exercise of the person's authority and duties in the person's office or position of employment. If the commission determines that a potential conflict of interest exists, it shall notify the person who filed the disclosure statement and shall make the portions of the disclosure statement that indicate a potential conflict of interest subject to public inspection in the same manner as is provided for other disclosure statements. Any portion of the disclosure statement that the commission determines does not indicate a potential conflict of interest shall be kept confidential by the commission and shall not be made subject to public inspection, except as is necessary for the enforcement of Chapters 102. and 2921. of the Revised Code and except as otherwise provided in this division.

(C) No person shall knowingly fail to file, on or before the applicable filing deadline established under this section, a statement that is required by this section.

(D) No person shall knowingly file a false statement that is required to be filed under this section.

(E)

(1) Except as provided in divisions (E)(2) and (3) of this section, the statement required by division (A) or (B) of this section shall be accompanied by a filing fee of sixty dollars.

(2) The statement required by division (A) of this section shall be accompanied by the following filing fee to be paid by the person who is elected or appointed to, or is a candidate for, any of the following offices:

For state office, except member of the state board of education	\$ 95
For office of member of general assembly	\$ 40
For county office	\$ 60
For city office	\$ 35
For office of member of the state board of education	\$ 35
For office of member of a city, local, exempted village, or cooperative education board of education or educational service center governing board	\$ 30
For position of business manager, treasurer, or superintendent of a city, local, exempted village, joint vocational, or cooperative education school district or educational service center	\$ 30

(3) No judge of a court of record or candidate for judge of a court of record, and no referee or magistrate serving a court of record, shall be required to pay the fee required under division (E)(1) or (2) or (F) of this section.

(4) For any public official who is appointed to a nonelective office of the state and for any

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Current through Legislation passed by the 130th General Assembly and filed with the Secretary of State through File 140 (SB 143)

Page's Ohio Revised Code Annotated > TITLE I. STATE GOVERNMENT > CHAPTER 102. PUBLIC OFFICERS -- ETHICS

§ 102.03. Restrictions on present or former public officials or employees

(A)

- (1) No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.
- (2) For twenty-four months after the conclusion of service, no former commissioner or attorney examiner of the public utilities commission shall represent a public utility, as defined in section 4905.02 of the Revised Code, or act in a representative capacity on behalf of such a utility before any state board, commission, or agency.
- (3) For twenty-four months after the conclusion of employment or service, no former public official or employee who personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, the development or adoption of solid waste management plans, investigation, inspection, or other substantial exercise of administrative discretion under Chapter 343. or 3734. of the Revised Code shall represent a person who is the owner or operator of a facility, as defined in section 3734.01 of the Revised Code, or who is an applicant for a permit or license for a facility under that chapter, on any matter in which the public official or employee personally participated as a public official or employee.
- (4) For a period of one year after the conclusion of employment or service as a member or employee of the general assembly, no former member or employee of the general assembly shall represent, or act in a representative capacity for, any person on any matter before the general assembly, any committee of the general assembly, or the controlling board. Division (A)(4) of this section does not apply to or affect a person who separates from service with the general assembly on or before December 31, 1995. As used in division (A)(4) of this section "person" does not include any state agency or political subdivision of the state.
- (5) As used in divisions (A)(1), (2), and (3) of this section, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in division (A)(4) of this section, "matter" includes the proposal, consideration, or enactment of statutes, resolutions, or constitutional amendments. As used in division (A) of this section, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.
- (6) Nothing contained in division (A) of this section shall prohibit, during such period, a

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former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served.

- (7) Division (A) of this section shall not be construed to prohibit the performance of ministerial functions, including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other similar documents.
- (8) Division (A) of this section does not prohibit a nonelected public official or employee of a state agency, as defined in *section 1.60 of the Revised Code*, from becoming a public official or employee of another state agency. Division (A) of this section does not prohibit such an official or employee from representing or acting in a representative capacity for the official's or employee's new state agency on any matter in which the public official or employee personally participated as a public official or employee at the official's or employee's former state agency. However, no public official or employee of a state agency shall, during public employment or for twelve months thereafter, represent or act in a representative capacity for the official's or employee's new state agency on any audit or investigation pertaining to the official's or employee's new state agency in which the public official or employee personally participated at the official's or employee's former state agency through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.
- (9) Division (A) of this section does not prohibit a nonelected public official or employee of a political subdivision from becoming a public official or employee of a different department, division, agency, office, or unit of the same political subdivision. Division (A) of this section does not prohibit such an official or employee from representing or acting in a representative capacity for the official's or employee's new department, division, agency, office, or unit on any matter in which the public official or employee personally participated as a public official or employee at the official's or employee's former department, division, agency, office, or unit of the same political subdivision. As used in this division, "political subdivision" means a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.
- (10) No present or former Ohio casino control commission official shall, during public service or for two years thereafter, represent a client, be employed or compensated by a person regulated by the commission, or act in a representative capacity for any person on any matter before or concerning the commission.

No present or former commission employee shall, during public employment or for two years thereafter, represent a client or act in a representative capacity on any matter in which the employee personally participated as a commission employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

- (B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by the public official or employee in the course of the public official's or employee's official duties that is confidential because of statutory provisions,

or that has been clearly designated to the public official or employee as confidential when that confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

- (C) No public official or employee shall participate within the scope of duties as a public official or employee, except through ministerial functions as defined in division (A) of this section, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation, or association in which the public official or employee or immediate family owns or controls more than five per cent. No public official or employee shall participate within the scope of duties as a public official or employee, except through ministerial functions as defined in division (A) of this section, in any license or rate-making proceeding that directly affects the license or rates of any person to whom the public official or employee or immediate family, or a partnership, trust, business trust, corporation, or association of which the public official or employee or the public official's or employee's immediate family owns or controls more than five per cent, has sold goods or services totaling more than one thousand dollars during the preceding year, unless the public official or employee has filed a written statement acknowledging that sale with the clerk or secretary of the public agency and the statement is entered in any public record of the agency's proceedings. This division shall not be construed to require the disclosure of clients of attorneys or persons licensed under *section 4732.12 of the Revised Code*, or patients of persons certified under *section 4731.14 of the Revised Code*.
- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (F) No person shall promise or give to a public official or employee anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (G) In the absence of bribery or another offense under the Revised Code or a purpose to defraud, contributions made to a campaign committee, political party, legislative campaign fund, political action committee, or political contributing entity on behalf of an elected public officer or other public official or employee who seeks elective office shall be considered to accrue ordinarily to the public official or employee for the purposes of divisions (D), (E), and (F) of this section.

As used in this division, "contributions," "campaign committee," "political party," "legislative campaign fund," "political action committee," and "political contributing entity" have the same meanings as in *section 3517.01 of the Revised Code*.

- (H)
 - (1) No public official or employee, except for the president or other chief administrative officer

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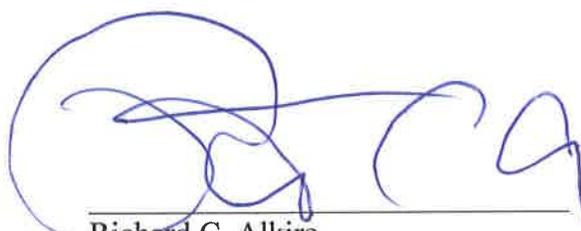
The foregoing **RESPONDENT ROBERT PAUL DEMARCO'S OBJECTIONS TO
THE FINAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
AND DISCIPLINE** was e-filed with the Supreme Court of Ohio and email this 22nd day of

December, 2014 to:

Michael A. Bonfiglio, Esq.
Attorney for Relator
Toledo Bar Association
311 North Superior Avenue
Toledo, Ohio 43604
mbonfiglio@toledobar.org

David G. Grude, Esq.
Counsel for Relator
4253 Monroe Street
Toledo, Ohio 43606
dgrude@gmail.com

Amy E. Stoner, Esq.
Counsel for Relator
241 N. Superior Street, Suite 200
Toledo, Ohio 43604
amyestoner@yahoo.com



Richard C. Alkire

Attorney for Respondent