

IN THE SUPREME COURT OF OHIO

OFFICE OF DISCIPLINARY COUNSEL, :  
 :  
 Relator :  
 :  
 vs. : CASE NO. 2014-2157  
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 :  
 STEVEN JAMES TERRY, ESQ. :  
 :  
 Respondent :  
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RESPONDENT'S OBJECTIONS AND BRIEF IN SUPPORT THEREOF, TO THE  
RECOMMENDED SANCTION OF THE BOARD OF THE SUPREME COURT OF  
OHIO

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Now comes Respondent Steven J. Terry, Esq., by and through counsel, and pursuant to this Honorable Court's Order to Show Cause filed on December 19, 2014, herein posits his objections to the Recommendation of the Board of Commissioners on Grievances and Discipline (hereinafter the "Board").

## I. INTRODUCTION

As all of the relevant facts have been fully stipulated to by the parties and adopted, in toto, by the Panel and the Board, Respondent is not objecting to the Findings in Fact or Conclusions of Law, but poses their objections solely to the Board's Recommendation of the appropriate sanction to be issued. In fact, Mr. Terry has, prior to as well as during the investigation, in responding to Relator's Complaint and, as evidenced by the parties' (Relator and Respondent) submitted stipulations and the testimony adduced at the hearing, freely and consistently admitted that his conduct violated the Code of Judicial Conduct, to wit: Canon 1 [a judge shall uphold the integrity and independence of the judiciary]; Canon 2 [a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary]; Canon 3(B)(7) [a judge shall not initiate, receive, permit or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding]; Canon 3(E) [a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably be questioned]; Canon 4 [a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities] as well as admitting his conduct additionally violated Ohio Rules of Professional Conduct Rule 8.4(h) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law].

## II. STATEMENT OF FACTS

As a brief factual background, respondent, Steven James Terry, was admitted to the practice of law in the State of Ohio on May 8, 1989 and is subject to the Code of Judicial Conduct, the Code of Professional Responsibility, Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

On or about April 20, 2007, Mr. Terry, a political neophyte, was appointed by the governor to fill an open seat on the Cuyahoga County Court of Common Pleas. As a result of this appointment, Mr. Terry was required to run for election in November 2008 to retain this judicial position in which campaign, Cuyahoga County Auditor Frank P. Russo, widely acknowledged to be one of the most influential politicians in Cuyahoga County, provided substantial and continuous support to respondent for respondent's 2008 election campaign.

After respondent was appointed to the bench, he inherited numerous pending court cases, including *K & L Excavation, Ltd. v. Auburn Building Company, et al.*, Case No. CV-03-515172 and *Avon Poured Wall, Inc. v. Brian Lane, et al.*, Case No. CV-04-519620. These two cases had previously been consolidated by the trial court in June 2005.

The *K & L Excavation* and *Avon Poured Wall* cases involved a multiparty civil foreclosure action arising out of the construction of a home by Brian and Erin Lane. As a part of this litigation, American Home Bank sought \$190,000 in damages from the Lanes. On or about November 27, 2006, the Lanes filed a motion for summary judgment, likewise, on or about March 28, 2008, American Home Bank filed a motion for summary judgment.

In mid 2008, Frank Russo contacted Mr. Terry and requested respondent to deny American Home Bank's motion for summary judgment. Mr. Terry did not disclose this contact with the other parties to the *K & L Excavation* and *Avon Poured Wall* cases.

Mr. Terry did not examine the court case file or read any of the relevant pleadings, examining only the long docket history of the case. Mr. Terry then called Magistrate Monica Klein, who was assigned to the American Home Bank case. During this conversation, Mr. Terry instructed Klein to deny both the Lanes' and American Home Bank's motions for summary judgment, without providing any explanation for his decision. On or about July 18, 2008, Mr. Terry signed an entry denying all pending motions for summary judgment. At his criminal trial an expert witness, a civil procedure law professor, testified, without contradiction from the government, the denial of the motions was appropriate. In October of 2008 American Home Bank agreed to settle the case for twenty seven thousand dollars and zero cents (\$27,000.00).

On September 14, 2010, a five count indictment was filed against Mr. Terry, alleging that he engaged in one count of conspiracy to commit mail fraud and honest services mail fraud, one count of mail fraud, and three counts of honest services mail fraud. *United States v. Terry*, Case No. 1:10-CR-390. On June 13, 2011 after a five day jury trial, Mr. Terry was found guilty of Count One [conspiracy to commit mail fraud and honest services mail fraud], Count Three [honest services mail fraud] and Count Four [honest services mail fraud]. Mr. Terry was acquitted of the two remaining counts [including the issue on improper ruling in the aforementioned, underlying case and accepting gifts, payments and other things of value from Mr. Russo for his campaign].

On October 4, 2011, Mr. Terry was sentenced to sixty three (63) months incarceration on each of the three counts, to run concurrently. The court further ordered Mr. Terry to pay \$16,380.79 in restitution to Cuyahoga County and \$11,500 in restitution to American Home Bank, for a total of \$27,880.79. Mr. Terry was further sentenced to two years of supervised release and ordered to complete 250 hours of community service, to be served following his

release from federal incarceration. On October 26, 2011, the Supreme Court suspended Mr. Terry for an interim period pursuant to Gov. Bar R. V (5) due to his felony conviction based upon his self-report of the conviction. Mr. Terry had previously, at the time of his indictment, informed the Office of Disciplinary Counsel of his pending criminal matter honoring his duty to self report pursuant to Rule 8.3 of the Ohio Rules of Professional Conduct.

The recommendation of the Board is contrary to the recommended sanction of indefinite suspension advocated by the Hearing Panel, which, after conducting a full hearing, reviewing the law as provided in the briefing, applying the law and precedent and weighing all aggravating and mitigating evidence, recommended that Mr. Terry be indefinitely suspended from the practice of law. The Board, to the contrary, recommended that Mr. Terry be disbarred from the practice of law, not only the most severe sanction possible under the Ohio attorney disciplinary system but one which is so severe that it does not even exist in ninety percent (90%) of jurisdictions in the United States. With all due respect to the Board, a sanction of disbarment will not best serve the interests of the public which is the primary purpose of the attorney discipline system. As this Honorable Court has repeatedly stated and held the primary purpose of the attorney discipline system is to protect the public and not punish the attorney. That laudable goal will be fully and appropriately met by the imposition of an indefinite suspension from the practice of law with the conditions that he complete all court ordered conditions (imposed by the Ohio Supreme Court as well as the Federal District Court), complete the terms of his criminal sentence and commit no further misconduct. When and if Mr. Terry meets all of those requirements the time to apply for reinstatement to the roll of attorneys, in the State of Ohio would begin to run (a minimum of two years from that occurrence).

Mr. Terry's position relative to the issue of sanction, simply, if adopted would allow Mr. Terry to apply to be reinstated to the practice of law only if he is in full compliance with all Court Orders and has rehabilitated himself to the extent that he can demonstrate by clear and convincing evidence that he, at that time, currently possesses the requisite character and fitness to be re-instated to the practice of law. Should Mr. Terry take on that burden, both the Board and this Honorable Ohio Supreme Court will have the duty and opportunity to fulfill its role as gatekeeper by utilizing the Board's and this Honorable Court's discretion in determining whether or not Mr. Terry has met this high bar and thus merits reinstatement to the bar of the State of Ohio.

In light of the particular facts of this case, wherein the mitigating factors outweigh the aggravating factors and the case law supports Mr. Terry's position, as will be discussed at length below, counsel for Mr. Terry recommends, as has been respondent's position throughout this matter, that a sanction of indefinite suspension be imposed as the appropriate discipline for Mr. Terry's misconduct. Such sanction will not only express our system's unquestionable disdain for Mr. Terry's actions but will, more than adequately, protect the public of the State of Ohio and meet the public's expectation that our self-regulating profession has met its obligation.

### **III. LAW AND ARGUMENT**

As we are all aware, the purpose of these attorney disciplinary proceedings is to protect the public rather than punish the lawyer. *Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, 929 N.E.2d 1028, ¶ 42. Utilizing this time tested standard, which goes back centuries to Blackstone, respondent's recommendation of an indefinite suspension is appropriate in light of the fact that an indefinite suspension carries with it absolutely no assurance of reinstatement, unless and until approved by this Honorable Court after this

Honorable Court conducts its review of the rigorous examination of the evidence engaged in by the Board and upon Mr. Terry meeting the requisite burden of proof placed upon him, including, but not limited to, Mr. Terry exemplifying his total compliance with any and all conditions placed upon him by this Honorable Court.

When imposing sanctions for attorney misconduct, in addition to the fact that each case must, as this Honorable Court has often stated, be viewed on its own merit, all relevant factors should be considered, including the duties violated, the mental state of the attorney, and sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818. In making a final determination, evidence of the aggravating and mitigating factors should be weighed. *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, 875 N.E.2d 935.

As stated above, Mr. Terry has testified and stipulated to the factual allegations contained in Relator's Complaint which are the basis and give rise to the violations of misconduct found against him. However, Mr. Terry objects to the sanction recommended by the Board of disbarment.

**A. The Board's recommended sanction should be rejected and the sanction of an indefinite suspension should be imposed.**

"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 (emphasis added). Disciplinary proceedings are instituted for the protection of the public and to safeguard the courts from unethical lawyers. *Greenbaum, Guide to Code of Professional Responsibility*, T 10.1 at 644. Sanctions imposed on attorneys for misconduct do, by their very nature and existence, constitute punishment, but punishment of the lawyer is not the

purpose of the attorney disciplinary system and process. Thus, the purpose of disciplinary actions is designed to determine whether a person, “formerly admitted [to the bar], is a proper person to be continued on the roll,” or, in the instant matter, whether the attorney may be eligible for potential reinstatement to that roll upon the appropriate circumstances following suspension from the roll. *Cleveland Bar Assn. v. Feneli* (1999), 86 Ohio St.3d 102, citing *Disciplinary Counsel v. Trumbo* (1996), 76 Ohio St.3d 369, 372, 667 N.E.2d 1186, 1188.

“Unless the record weighs heavily against the hearing panel’s findings, we (The Ohio Supreme Court) defer to the panel’s credibility determinations, inasmuch as the panel members saw and heard the witnesses firsthand”. *Cuyahoga Cty. Bar Assn. v. Wise*, 108 Ohio St.3d 164, 2006-Ohio-550, 842 N.E.2d 35, ¶ 24. Mr. Terry objects to the recommendation of the Board of disbarment as the recommended sanction is contrary to case law applying similar matters involving the same violations of misconduct that have been found against Mr. Terry including, but not limited to, those cases cited by the Hearing Panel. In addition, the Board makes its harsher (and harshest possible) recommendation of disbarment without supporting case law, and which is contrary to the recommendation of the Hearing Panel which engaged in extensive analysis of aggravating and mitigating factors after hearing and digesting the evidence at the hearing and then applying the appropriate case law.

The Board’s recommended sanction of disbarment for Mr. Terry is not appropriate here, when one applies the rationale that this Honorable Court has previously utilized in imposing such a sanction on Judges who, based on the record, committed more extensive misconduct and/or where mitigation similar to that existing in the present record were not present.

In the very recent case of *Ohio State Bar Association v. McCafferty*, which the Board fails to discuss, this Honorable Court adopted the board’s findings, concluding that the

respondent had engaged in violations of the Judicial Code of Conduct as well as the Ohio Rules of Professional Responsibility, in a case that is, in essence, a companion case to Mr. Terry's matter. *Ohio State Bar Assn. v. McCafferty*, 140 Ohio St.3d 229, 2014-Ohio-3075. In *McCafferty*, like here, the Relator and Respondent stipulated to certain violations such as Jud. Cond. R. 1 (a judge shall uphold the integrity and independence of the judiciary); Jud. Cond. R. 2 (a judge shall act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary) and Rule of Prof. Cond. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law). *McCafferty* at ¶4.

In addition to the aforementioned violations, *McCafferty* committed other violations of the Judicial Code of Conduct as well as the Ohio Rules of Professional Responsibility. This Honorable Court adopted the Board's findings of fact, misconduct, and recommended sanction and ordered an indefinite suspension, the same sanction Mr. Terry respectfully posits is appropriate herein. *McCafferty* at ¶6. In mitigation this Honorable Court found that *McCafferty* had no prior disciplinary record, she had a cooperative attitude throughout the disciplinary proceedings, provided the Board with letters attesting her good character and reputation not only as a judge, but also as a member of the community, and that *McCafferty* suffered the imposition of other penalties and sanctions. *McCafferty* at ¶18. The Relator has, recognizing that appropriate evidence on this subject clearly exists herein, stipulated to the same mitigating factors in the instant matter, as were found in *McCafferty*. *McCafferty* at ¶18.

The Relator in *McCafferty*, as it is herein, sought disbarment as the appropriate sanction in that matter. *McCafferty* at ¶19. The Board recommended an indefinite suspension, whereas *McCafferty* was seeking a two (2) year term suspension. Unlike the Respondent in *McCafferty*, where this Honorable Court, based upon the evidence, appropriately questioned whether Ms.

McCafferty actually and fully appreciated the wrongness of her actions, Mr. Terry has, throughout this matter, acknowledged the severity of the violations he committed by, in addition to his total acceptance of responsibility as reflected in the record, requesting the appropriate sanction of indefinite suspension, which is the sanction the Board recommended and this Honorable Court ultimately adopted in *McCafferty*. *Id.* As the evidence unquestionably and amply exemplifies, Mr. Terry admitted his actions violated his professional conduct obligations from the first time his criminal defense counsel met with the United States Attorney in 2008.

As the record amply reflects at the hearing held, as well as in all of his other actions, Mr. Terry submits that his position on the issue of sanction certainly exhibits his understanding of his wrongdoing and exemplifies the remorse he feels for the actions which bring him before this Honorable Court. The Panel, in the instant, matter distinguished Mr. Terry from *McCafferty* specifically on this basis, that Respondent acknowledged the severity of the violations committed.

In applying the applicable precedent in *McCafferty* this Honorable Court distinguished her actions from cases in which judges were disbarred for felony convictions. See *Disciplinary Counsel v. Gallagher*, 82 Ohio St.3d 51, 53, 693 N.E.2d 1078 (1998), *Disciplinary Counsel v. McAuliffe*, 121 Ohio St.3d 315, 2009-Ohio-1151, 903 N.E.2d 1209. This Honorable Court noted that in those instances of disbarment the judges engaged in conduct violating the Judicial Code of Conduct, the Ohio Professional Rules of Responsibility, and Criminal Code over a long period of time. *McCafferty* at ¶23. This Honorable Court found that *McCafferty* engaged in conduct stemming from one incident with the FBI. *McCafferty* at ¶24.

In a similar case, *Disciplinary Counsel v. Hale*, this Honorable Court noted that Respondent, a municipal court judge was involved in a single incident of misconduct as opposed

to a pattern of misconduct or multiple instances of misconduct. *Disciplinary Counsel v. Hale*, Slip Opinion No. 2014–Ohio-5053 ¶ 37. In *Hale*, Respondent, a former Franklin County Municipal Court judge misused his power when he took it upon himself to unilaterally dismiss a speeding ticket that had been issued to attorney Patrick M. Quinn, who was representing *Hale* in a civil suit. *Hale* was suspended for 6 months for this conduct stemming from a single incident. *Id* at ¶ 11-13.

Here, Mr. Terry’s conduct also stemmed from a single motive and circumstance, the perceived necessity of pleasing the political bosses who controlled his political fate, which is the identical issue and motivating factor that was the genesis of *McCafferty*’s misconduct, and respondent posits, is similar to the motivating factor present in *Hale*, which was granting a personal favor for his attorney.

However, in distinguishing Mr. Terry’s matter from *McCafferty*, Respondent would submit that in *McCafferty* this Honorable Court, as well as the Board, was troubled by the contradiction between *McCafferty*’s asserted cooperation with the disciplinary process and her continuous assertion that she accepts full responsibility in the face of her insistence that she was telling the truth to the FBI. *McCafferty* at ¶25. The evidence of recorded phone conversations proved she was not truthful and, in fact, this Honorable Court found her refusal to acknowledge the wrongful nature of her conduct to be an aggravating factor over and above the aggravating factor of dishonest motive. *McCafferty* at ¶25. [The finding of the additional aggravating factor of BCGD Proc. Reg. 10(B)(1)(g) in *McCafferty*, may have led this Honorable Court to reject her recommended sanction of a term suspension and, in counsel’s view, this factor played a role as a reason for ordering the continuation of her interim suspension until she completed all terms of her federal supervised release and discharge by the Federal District Court and did not commence

her indefinite suspension until that obligation is fully served.] Mr. Terry requests the same sanction on the same terms as those imposed in *McCafferty*.

Additionally, in distinguishing Mr. Terry's matter from *Hale*, Respondent and Relator have stipulated that Mr. Terry has accepted responsibility for his actions, and cooperated throughout the pendency of the disciplinary proceedings. In *Hale*, Respondent unilaterally dismissed a ticket of his personal attorney with a journal entry that falsely stated the dismissal was at the prosecutor's request. 2014-Ohio-5053 ¶ 26. After the unilateral dismissal was discovered by the media, *Hale* created a second false entry to vacate the dismissal and cover the prior misconduct even after the prosecutor's refusal to sign the proposed entry. *Id.* This Honorable Court noted that *Hale's* "efforts to cover his tracks with additional misconduct rather than accept responsibility for his conduct" was a major factor in this Honorable Court's decision. *Id.* at ¶ 27. Throughout the pendency of the current matter, Mr. Terry's actions and statements have been both truthful and consistent with providing full cooperation and disclosure, which mitigating factor was stipulated to by both Relator and Respondent.

Mr. Terry has always acknowledged that the wrongful nature of his actions amounted to misconduct, and that his misconduct warrants a severe sanction, in the form of an indefinite suspension. Unlike *McCafferty*, Mr. Terry is not, and never has, recommended either credit for time served under an interim suspension or a sanction of a term suspension.

After a full hearing on the matter and both Respondent and Relator submitting written closing arguments, the Hearing Panel recommended an indefinite suspension after weighing both the aggravating and mitigating factors, identifying that the Respondent acknowledges the severity of the violations committed unlike *McCafferty* and *Hale*. In light of all the facts and law

present herein as well as the Hearing Panel's weighing of evidence it heard first hand, the Board's recommended sanction of disbarment is inappropriately harsh in this case.

In consideration of the stipulated violations of the Ohio Rules of Judicial and Professional Conduct, the facts giving rise thereto and the mitigation present herein and stipulated to as set forth above, counsel recommends to this Honorable Court that Mr. Terry be suspended from the practice of law indefinitely, on the condition that he remain compliant with all terms and conditions set forth as part of the Judgment in this matter, his post release supervised control, payment of all required restitution and commit no further misconduct. Judges, as well as, attorneys who have committed violations similar to those of Mr. Terry have had this severe (indefinite suspension), but less than death penalty like, sanction imposed by the Ohio Supreme Court.

Mr. Terry has, from the inception of this matter, in responding to Relator's Complaint and, through the parties' submitted stipulations and testimony adduced at the Hearing, admitted that his conduct violated the Code of Judicial Conduct, to wit: Canon 1 [a judge shall uphold the integrity and independence of the judiciary]; Canon 2 [a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary]; Canon 3(B)(7) [a judge shall not initiate, receive, permit or consider communications made to the judge outside the presence of the parties or their representatives concerning a pending or impending proceeding]; Canon 3(E) [a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be reasonably be questioned]; Canon 4 [a judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities] as well as admitting his conduct additionally violated

Ohio Rules of Professional Conduct Rule 8.4(h) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law].

### **1. Mitigation**

A number of mitigating factors identified in Appendix II, §10(B)(2) of the Ohio Rules of the Government of the Bar are stipulated and present herein and should be considered in favor of Mr. Terry's recommended sanction which factors include:

**A. Mr. Terry has no prior disciplinary record;** See Agreed Stipulations ¶36; BCGD Proc. Reg. 10(B)(2)(a).

Respondent, Steven James Terry was admitted to the practice of law in the State of Ohio on May 8, 1989. Up until the actions which bring him before this Honorable Court, Mr. Terry was an exemplary lawyer and community role model whose actions had been above reproach.

**B. Mr. Terry has cooperated throughout the disciplinary process;** See *Agreed Stipulations* ¶38 BCGD Proc. Reg. 10(B)(2)(d).

Upon his indictment and again following his conviction, Mr. Terry self reported his violations to the Office of Disciplinary Counsel, taking full responsibility for his misconduct as evidenced by the October 20, 2011 letter to Robert R. Berger, who, at that time, was a Senior Assistant Disciplinary Counsel who had been assigned to this matter. As stated earlier, the evidence at the hearing uncontestedly demonstrated that Mr. Terry, while challenging the criminality of his conduct, immediately admitted to the United States Attorney that his conduct violated his ethical duties as a judge and a lawyer and in advocating this position, his criminal defense counsel requested immediate referral to the Office of Disciplinary Counsel, which he and Mr. Terry firmly believed was the appropriate forum to address Mr. Terry's wrongdoing.

Since self reporting, Mr. Terry has cooperated at every stage of the disciplinary process. Immediately after self-reporting his conviction to Disciplinary Counsel, Mr. Terry opened a

dialogue between himself and Jonathon Coughlan, Robert R. Berger and Amy Stone and subsequently with successor Disciplinary Counsel and assistant Disciplinary Counsel, has provided full cooperation and compliance with all requests which have continued throughout the pendency of this matter. Relator and Respondent have entered into agreed stipulations of facts, and agreed stipulations of the mitigating factors, as well as one aggravating factor present in the instant matter, all of which evidence Mr. Terry's total cooperation with the Ohio Attorney Disciplinary System.

Throughout the pendency of the current matter, Mr. Terry's actions and statements have been both truthful and consistent in providing full cooperation and disclosure, which mitigating factor was stipulated to by both Relator and Respondent. Mr. Terry has accepted full responsibility for his misconduct, unlike *McCafferty* wherein the Ohio Supreme Court cited the contradiction between accepting full responsibility for her actions and the inconsistency of her statements about subjectively believing she was being truthful to the FBI as evidence of *McCafferty's* lack of actual acceptance of responsibility which, counsel believes, in part, justified the rejection of *McCafferty's* request for a term suspension but did not cause this Honorable Court to impose the ultimate sanction of permanent disbarment. *McCafferty* at ¶17.

**C. Mr. Terry has a positive reputation in both the legal community and the general community; See *Agreed Stipulations* ¶37, Exhibit 9; BCGD Proc. Reg. 10(B)(2)(e).**

Mr. Terry's outstanding character and reputation should be considered in mitigation of the imposition of the draconian sanction sought by Relator. While the testimonial letters presented in the stipulations do not speak directly to the matters which form the basis of the instant action (which as agreed and stipulated, were unquestionably wrong), they do speak

volumes regarding the overall character of Mr. Terry not only as a professional, but also as a friend, a member of the community and church, a husband, a father, and as a human being.

These nearly 40 testimonial letters are uniform in their characterization of Mr. Terry as a judge and attorney of the utmost integrity and professionalism as exemplified in his dealings with attorneys, clients, friends, and his community, his concern for his colleagues and work associates, and the willingness of others to entrust him with various tasks, the accomplishment of which has been instrumental and crucial to the professional and personal lives of others.

**D. Mr. Terry's conduct resulted in the imposition of other penalties and sanctions including federal incarceration. See *Agreed Stipulations* ¶39; BCGD Proc. Reg. 10(B)(2)(f).**

Mr. Terry was sentenced to sixty-three (63) months of incarceration on each of the three counts, to run concurrently and has been and continues to be punished by being a federal prisoner and deprived, not only of his liberty, but, also of the companionship of his family and community. Unquestionably, this deprivation constitutes among the harshest of impositions of penalties. In addition to incarceration, Mr. Terry has also been ordered to pay \$16,380.79 in restitution to Cuyahoga County and \$11,500.00 in restitution to American Home Bank. Following his long term of incarceration, Mr. Terry will serve two years of supervised release and, in addition to all of the terms and conditions imposed during that period, will perform 250 hours of community service. Following his completion of that regimen, which will cover the better part of an additional decade, Mr. Terry will continue to suffer the stigma, both de jure and de facto, that follows a citizen with a felony record for the rest of his life.

## 2. Aggravation

- A. **Mr. Terry acted with a selfish motive in that his actions were motivated by the desire to remain in judicial office by courting political favors from officials in a position to dictate his political fate. See *Agreed Stipulations* ¶35 BCGD Proc. Reg. 10(B)(1)(b).**

While Mr. Terry fully acknowledges and is remorseful for his actions which constitute an aggravating circumstance, counsel would respectfully point out that the selfishness exhibited herein was directed towards a motive of retaining employment and is far less egregious than the selfishness we often see in the attorney discipline arena.

Further, in *McCafferty* and *Hale*, and unlike the circumstances in the instant matter, this Honorable Court found an additional aggravating factor of refusal to acknowledge the wrongful nature of the misconduct to be an additional aggravating factor over and above the stipulated factors; the instant matter has no such component. See BCGD Proc. Reg. 10(B)(1)(g); *McCafferty* at ¶17, *Hale*, 2014-Ohio-5053 . This Honorable Court noted *McCafferty*'s insistence that she believed she was telling the truth to the FBI agents despite the evidence in the form of recorded phone calls, demonstrated that she did not appreciate the wrongful nature of her misconduct in addition to her dishonesty as an aggravating factor. *McCafferty* at ¶17. This aggravating factor is absent herein as Mr. Terry as part of his full cooperation throughout the pendency of this instant matter, has fully and consistently acknowledged the wrongful nature of his misconduct. Thus, the additional aggravating factor of BCGD Proc. Reg. 10(B)(1)(g) found in *McCafferty* is not present in the instant matter and should be acknowledged and taken into account in this Honorable Court's consideration of the appropriate sanction for Mr. Terry in this companion case.

“Because each disciplinary case is unique, we are not limited to the factors specified in the rule but may take into account "all relevant factors" in determining what sanction to impose.”

*Disciplinary Counsel v. Taylor*, 120 Ohio St. 3d 366, 2008-Ohio-6202, 899 N.E.2d 955 citing BCGD Proc.Reg. 10(B).

This Honorable Court in *McCafferty* imposed the appropriate and correct sanction, indefinite suspension. This Honorable Court has stated repeatedly that“...an indefinite suspension carries with it no assurance of reinstatement in two years, five years, ten years or indeed at any time.” *Akron Bar Assn. v. Chandler*, 62 Ohio St. 3d 471 (1992). Further, this Honorable Court cited to its own precedent in similar cases: *Cincinnati Bar Assn. v. Levin*, 3 Ohio St.3d. 25(1983), *Disciplinary Counsel v. Soucek*, 37 Ohio St.3d. 42 (1988) and *Disciplinary Counsel v. O'Neill*, 39 Ohio St.3d. 337 (1988), where indefinite suspension was the professional sanction levied upon those respondents as well.

In *Disciplinary Counsel v. Muntean*, this Honorable Court imposed an indefinite suspension rather than permanent disbarment for theft of county funds. *Disciplinary Counsel v. Muntean*, 127 Ohio St. 3d 427, 940 N.E.2d 942, 2010-Ohio-6133 (2010). In *Muntean*, the attorney was the treasurer of county board of Court Appointed Special Advocates (CASA), and during his tenure used and converted CASA funds for personal expenses, resulting in a conviction for grand theft. *Id.* This Honorable Court found that the attorney fully understood the gravity of his misconduct, attorney immediately self-reported his violation, and attorney was well perceived within the legal community. *Id.* The mitigating factors in *Muntean* mirror those possessed by Mr. Terry who, as did *Muntean*, fully understands and is remorseful for the gravity of his misconduct, Mr. Terry self-reported his indictment and, then, his conviction on October 4, 2011 and is well respected within the general as well as the legal community, as evidenced by the nature and number of testimonial letters as stipulated to.

In *Disciplinary Counsel v. Rolla*, the appropriate sanction was indefinite suspension for a former prosecutor who was charged and convicted of felony offenses of obstructing justice, forgery, tampering with records, tampering with evidence, and misdemeanor offense of dereliction of duty. *Office of Disciplinary Counsel v. Rolla*, 95 Ohio St.3d 27, 765 N.E.2d 316, 2002-Ohio-1366 (2001). In *Rolla* the only two (2) mitigating factors present were the absence of prior disciplinary matters and the appearance of a mental disorder. *Id.* Herein, Disciplinary Counsel and Respondent, through open dialogue and cooperation, have stipulated to four (4) mitigating factors which include; no prior disciplinary matters, positive reputation in the legal community as well as the general community, full disclosure throughout the disciplinary process and the imposition of other penalties and sanctions. See *Agreed Stipulations* ¶¶36-39.

In *Dayton Bar Association v. O'Brien*, this Honorable Court issued an indefinite suspension for a lawyer who solicited the use of money to influence the Judge in a criminal case. *Dayton Bar Association v. O'Brien*, 103 Ohio St.3d 1, 2004-Ohio-3939, 812 N.E.2d 1263 (2004). In *O'Brien*, the attorney stated to a client that \$12,000.00 could influence the judge to permit a withdrawal of guilty plea and that results are obtained for those who can afford it. *Id.* This Honorable Court found that the attorney's actions eroded and impugned the integrity of a judicial officer and intimated to a client that money could be used to improperly influence the outcome of a criminal case, which in turn represented that the judicial system was corrupt thus diminishing the public's perception and confidence in the courts. *Id.* In *O'Brien* this Honorable Court did not note any mitigating factors, and the appropriate sanction was found to be an indefinite suspension. Here, there are stipulated facts and stipulated mitigating factors between the Relator and Respondent, and Respondent is advocating that the appropriate sanction for Mr. Terry is an indefinite suspension.

In *Disciplinary Counsel v. Columbro*, this Honorable Court imposed an indefinite suspension, rather than permanent disbarment where the attorney, a major trial assistant county prosecutor in Cuyahoga County, was convicted of twenty (20) separate counts of drug abuse, and sixteen (16) separate counts of theft in office. *Disciplinary Counsel v. Columbro*, 66 Ohio St.3d 195, 611 N.E.2d 302 (1993). Taking advantage of his office as an assistant county major trial prosecutor, *Columbro* removed and repeatedly signed out and stole evidence in the form of cocaine from the evidence locker. *Id.* Mr. *Columbro* stole amounts of cocaine on a number of occasions from the evidence bags and then returned the remaining cocaine evidence to the evidence locker, seeking to obfuscate his actions. *Id.* This Honorable Court noted that an indefinite suspension rather than disbarment was the appropriate sanction wisely observing “to take all hope away from this.... would not be tempering justice with mercy”. *Id.* at 197. In the instant matter, Mr. Terry, as in *Columbro*, took responsibility for his misconduct against the public and the profession.

Mr. Terry submits that he appears before this Honorable Court as a person who exhibits the same degree of potential for rehabilitation and future service to the public as *Columbro* did in 1993. In imposing the appropriate sanction this Honorable Court noted, as previously stated by Mr. Terry herein, that an indefinite suspension does not guarantee reinstatement at any point. *Id.*

In addition to waiting no less than two years before having the opportunity to begin the application process, (Mr. Terry, due to his circumstances, recognizes that under all circumstances he would wait no less than five years from the time this Honorable Court rules in his matter) the indefinitely suspended attorney has the heavy burden of proving by clear and convincing evidence, at the time of the hearing on the application, he has satisfied all terms and conditions contained in the Order of indefinite suspension, currently possesses the requisite character and

fitness required of a new applicant to the bar and further is a proper person to be readmitted to the practice of law in Ohio, notwithstanding the previous disciplinary action. Gov. Bar R. V (10)(E)(2) and (4). Counsel would further observe that once the application for readmission is filed, it will take no less than one additional year to be finally adjudicated.

This Honorable Court has, through case law precedent, set an appropriately difficult standard for reinstatement. After taking into account all facts known at the time for petition for reinstatement, including the severity of the misconduct, aggravating factors and mitigating factors for which the sanction was initially imposed, the petition would "... receive meticulous scrutiny to ensure that the public be protected and that respondent has indeed been rehabilitated." *Chandler* at Pg. 473.

An indefinite suspension is not a mere sanction; rather it is essentially a life sentence with the possibility of parole. In fact the overwhelming majority of states treat the imposition of disbarment as Ohio views an indefinite suspension of a respondent's license to practice law. In those states disbarment means that your license is suspended but, if you behave appropriately and ask for forgiveness, you may be permitted to re-enter the profession. Brian Finkelstein, *Should Permanent Disbarment Be Permanent?*, 20 *Geo. J. Legal Ethics* 587, 589 (2007).

Only five states, New Jersey, Ohio, Oregon, Indiana and Kentucky hold the position that disbarment of a lawyer is permanent, and, when such draconian sanction is levied, the lawyer may never practice law again within the disbarring state. *Id* at 590-591. Eight other states allow disbarment to be permanent in only the very most egregious situations. Thus, it is patently obvious that the sanction requested by Mr. Terry certainly is severe, and in no way minimizes or excuses his misconduct and certainly sends the appropriate message to both the public and the bar that, in Ohio, the profession engages in serious self-regulation.

It is respectfully submitted that, taking into account the stipulated violations, the stipulated mitigation evidence presented herein, and the foregoing precedent, an indefinite suspension is appropriate here, based on the distinguishing facts existing between Mr. Terry's instant matter and that of *McCafferty* and *Hale*. In the majority opinion of *McCafferty* the Ohio Supreme Court, and the Board, seized upon the additional aggravating factor of her refusal, years after the misconduct, to acknowledge the wrongful nature of her actions in addition to the aggravating factor of dishonesty as rationale for an indefinite suspension rather than a term suspension as requested by *McCafferty*. This Honorable Court seemingly used the same rationale to continue *McCafferty's* interim suspension until all post-incarceration community control sanctions are completed and not to commence her indefinite suspension until those obligations are successfully completed.

Respondent, Mr. Terry, is not respectfully requesting and never has requested the less severe sanction of a term suspension nor is he requesting credit for time served under the interim suspension as was the plea posited by *McCafferty* in her matter. Contrary to the actions of *McCafferty* in the litigation with her disciplinary matter, Mr. Terry's consistent acknowledgement of the wrongful nature of his misconduct, the absence of dishonesty and the presence of full cooperation and disclosure, among other stipulated mitigating factors; his position requesting an indefinite suspension is both just and appropriate meeting the goal of the attorney discipline system and this Honorable Court, which is to protect the public.

#### IV. CONCLUSION

In light of the foregoing facts and legal precedent, Respondent Steven J. Terry respectfully requests that this Honorable Court duly consider this Objection and Brief in Support, as well as any and all evidence, testimony, and arguments of Counsel adduced at the

Hearing of this matter, and that after weighing all of the evidence adduced therein, determine that Mr. Terry committed the violations of the Judicial Code of Conduct and Ohio Rules of Professional Conduct, to which he has stipulated, and thereupon enter an order indefinitely suspending him from the practice of law, as was recommended by the Hearing Panel in the instant matter.

Respectfully submitted,



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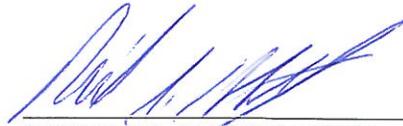
*Counsel for Steven J. Terry, Esq.*

**CERTIFICATE OF SERVICE**

A copy of the foregoing has been sent via regular U.S. mail on this 5<sup>th</sup> day of  
January, 2015.

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