

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION,	:	Case No. 2015-0286
Relator,	:	
v.	:	
	:	
STEPHEN J. BALL ,	:	
Atty. Reg. No. 0087242	:	
Respondent	:	

**RELATOR'S ANSWER BRIEF TO RESPONDENTS' OBJECTIONS TO THE  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE  
BOARD OF PROFESSIONAL CONDUCT**

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MAY 01 2015  
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## STATEMENT OF THE FACTS

Relator accepts the Statement of Facts as set forth in the Findings of Fact, Conclusions of Law and Recommendation of the Board of Professional Conduct, and specifically in paragraphs 7-35.

Respondent stipulated to all violations charged in Relator's complaint (Findings, ¶4) and the hearing panel found by clear and convincing evidence that Respondent had violated the following rules, as charged: Prof. Cond. R. 5.5(a), Prof. Cond. R. 8.1(a), Prof. Cond. R. 8.4(b), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h). (Findings, ¶36) Relator and Respondent had stipulated to various aggravating and mitigating factors, which the hearing panel accepted, except: "The panel does not accept the mitigating factor of alcohol addiction because neither party submitted evidence that alcohol dependency contributed to any misconduct." (Findings, ¶5-6)

The hearing panel agreed with Relator's recommendation that Respondent should be indefinitely suspended from the practice of law, with the conditions that he successfully complete an OLAP- approved treatment for substance abuse and establish that he is capable of returning to the competent, ethical, and professional practice of law. The Board of Professional Conduct amended the hearing panel's findings and conclusions to find that Respondent's conduct was egregious and thus merited a separate finding of a violation of Professional Conduct Rule 8.4(h), per this Court's decision in *Disciplinary Counsel v. Bricker*, 137 Ohio St. 3d. 35, 2013-Ohio-3998. The Board adopted the amended findings of fact and conclusions of law and adopted the sanction recommended by the hearing panel.

## ARGUMENT

Although Respondent admits that discipline in this matter is warranted, he argues that the sanction recommended by the Board, an indefinite suspension with reinstatement subject to conditions, is too severe. Instead, Respondent argues that the appropriate sanction is a suspension of 24 months with six months stayed on the conditions recommended by the Board. Respondent asserts that a 24 month suspension with six months stayed upon conditions is the appropriate sanction for two predominate reasons. First, Respondent argues that the Panel did not properly consider evidence of Respondent's alcohol dependency as a mitigating factor. Second, Respondent argues that an indefinite suspension is not supported by the record, or Ohio Supreme Court precedent. The Court should reject both of Respondent's arguments.

## PROPOSITION OF LAW I

**THE BOARD IS REQUIRED TO GIVE SPECIFIC CONSIDERATION TO MITIGATING FACTORS, BUT MITIGATING FACTORS DO NOT AND SHALL NOT CONTROL THE DISCRETION OF THE BOARD.**

Respondent erroneously asserts that because he presented evidence of alcohol dependency, the Board is required to adopt alcohol dependency as a mitigating factor. Rule V of the Rules for the Government of the Bar is unequivocal:

Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, the Board shall give consideration to specific professional misconduct and to the existence of aggravating or mitigating factors. In determining the appropriate sanction, the Board shall consider all relevant factors, precedent established by the Supreme Court of Ohio, and the aggravating and mitigating factors set forth in this section.

Gov. Bar R. V, Section 13(A).

Further, the existence of a disorder, *i.e.* alcohol dependency, “shall not control the discretion of the Board, but may be considered in favor of recommending a less severe sanction.” *See* Gov. Bar R. V, Section 13(C). As mitigating factors, the Board adopted the hearing panel’s finding of an absence of prior disciplinary record, self-reporting for December 2012 incident, and evidence of good character and reputation. However, both mitigating and aggravating factors are to be considered in making a final determination. *Disciplinary Counsel v. Broeren*, 131 Ohio St.3d 272 (2007). The Board adopted the hearing panel’s finding of the following aggravating factors: Respondent engaged in multiple offenses; submitted false statements during the disciplinary process; and Respondent is currently in violation of his Ohio Lawyers Assistance Program (“OLAP”) contract.

The linchpin of Respondent’s argument is that the Board abused its discretion by refusing to accept evidence of Respondent’s alcohol dependency from a Licensed Independent Chemical Dependency Counselor outside of OLAP. Acting within its discretion, the Board did not find by clear and convincing evidence that Respondent met all four requirements of Gov. Bar R. V, Section 13(C)(7) to mitigate Respondent’s sanction because of alcohol dependency.

Respondent ignores the hearing panel’s main concern: Respondent is in violation of his OLAP contract. This is the second time in which Respondent has been in violation of his OLAP contract. Respondent concedes that the Board is not required to accept all evidence in favor of mitigation, but argues that the Board must acknowledge such evidence. Respondent’s argument

is circular. The hearing panel acknowledged, on more than one occasion, that Respondent suffers from alcohol dependency and is currently in treatment programs. Panel Member Bell, asked the following of Respondent during direct examination:

Q. And look, I believe the treatment you're getting in Cincinnati is second to none. I believe that if you are to follow that you're going to be in good shape, I really do.

I guess the challenge that I do have is that you have all of this treatment, you're going through all of this, you're attending all these meetings, your parents are involved, everybody is involved.

Why do you not have – why can you not meet all the steps required for mitigation?

(Transcript, p.120).

Such acknowledgement, however, does not require a finding of mitigation. Although Respondent is currently participating in treatment programs, that fact must be considered in light of Respondent's criminal history and other issues with alcohol dependency. Respondent has a history of alcohol abuse and illegal conduct going back as early as 2000, which includes four OVIs, underage consumption, public intoxication, and possession of an open container.

Respondent also concedes that his alcohol dependency does not act as a mitigating factor for Respondent's misconduct after the December 23, 2012 OVI. Therefore, alcohol dependency is not a mitigating factor for Respondent's willful dishonesty during the disciplinary process; the two separate occasions Respondent wrote checks on IOLTA accounts with insufficient funds; or Respondent's decisions to change his attorney registration to inactive and continue to practice law.

In light of the foregoing, it was within the discretion of the Board to reject Respondent's plea for alcohol dependency as a mitigating factor.

## **PROPOSITION OF LAW II**

### **THE RECOMMENDED SANCTION OF INDEFINITE SUSPENSION IS SUPPORTED BY OHIO SUPREME COURT PRECEDENTS.**

Respondent cites several cases, arguing that Respondent's ethical violations are akin to misconduct in which the Court imposed a lighter sanction. However, Respondent's argument mischaracterizes the extent and gravity of his own misconduct.

First, Respondent cites *Disciplinary Counsel v. Niles*, 126 Ohio St.3d 23 (Ohio 2010). In *Niles*, the attorney suffered from a series of health issues and depression. *Id.* In her position as a Municipal Court clerk, the attorney accepted and retained cash payments from defendants with pending court fines. *Id.* When confronted about the theft, the attorney denied it, however an audit revealed the theft. *Id.* She was terminated and subsequently pled guilty to theft in office and tampering with records. *Id.* The Court noted that the attorney fully complied with her OLAP contract and voluntarily stayed in an aftercare program for more than a year after she could have been rightfully discharged. *Id.* at 25. Finally, the parties did not stipulate, but the board found that the attorney initially denied any wrongful conduct, as an aggravating factor. *Id.* Therefore, the Court imposed a two year suspension, all stayed provided conditions. *Id.* at 26.

Unlike *Niles*, Respondent is charged with multiple incidents of misconduct. Aside from Respondent's multiple DUI's, Respondent willfully accepted stolen license plates to use on his vehicle, lied during the course of the Cincinnati Bar Association's investigation, overdrew two ILOTA accounts on two separate occasions, allowed his license to go into inactive status, and practiced law while inactive.

Second, Respondent cites *Toledo Bar Association v. Lockhart*, 84 Ohio St.3d 7 (Ohio 1998). Lockhart, the charged attorney, was found guilty of petty theft, and then one month later pled guilty to shoplifting. *Id.* at 8. In connection with the charge of petty theft, Lockhart tampered with court records. *Id.* In favor of mitigation, Lockhart presented evidence that she suffered from depression and had been successfully treated by a clinical therapist. *Id.* Although the panel recommended that Lockhart be suspended for two years, with one year stayed, the Board recommended that Lockhart be indefinitely suspended. *Id.* The Court agreed with the panel and imposed a two year suspension, with one year stayed. *Id.* at 9.

Again, Respondent grossly mischaracterizes the extent and gravity of the his own misconduct. In *Lockhart*, the attorney's misconduct was limited to three incidents over the course of a one year. Here, Respondent has a history of alcohol abuse and illegal conduct going back as early as 2000, which includes four OVIs, underage consumption, public intoxication, and possession of an open container. Further, Respondent has engaged in other illegal conduct, *inter alia*, receiving stolen license plates.

Third, Respondent cites *Akron Bar Association v. Meyer*, 87 Ohio St. 3d 324 (1999). In *Meyer*, the attorney was indicted on one count of trafficking in food stamps. *Id.* at 324. The attorney pled guilty to the charge and subsequently repaid the value of the food stamps he received. *Id.* As mitigating factors the panel found the attorney chemically dependent on alcohol

and marijuana, and found that no client had been harmed by the attorney's conduct. *Id.* The board adopted the panel's findings, conclusions, and recommendation of a two year suspension, with the last year stayed. *Id.* The Court adopted the panel's recommendation and sanctioned the attorney to two years suspension, with one year stayed. *Id.* at 325.

The *Meyer* precedent is also unauthoritative and unpersuasive. The attorney in *Meyer* had one incident of misconduct and the Court found that the attorney made sincere efforts to treat his substance abuse and had paid restitution in full. Unlike *Meyer*, the hearing panel here was not persuaded that Respondent has made a full faith and sincere effort to treat his substance abuse issues because Respondent is in violation of his OLAP contract.

Fourth, Respondent cites *Columbus Bar Association v. Allerdig*, 123 Ohio St.3d 382 (Ohio 2009). In *Allerdig*, the attorney promised a potential client that he would open and oversee the administration of an estate. *Id.* at 383. The attorney accepted a fee from the client, but failed to perform the work needed to oversee the estate. *Id.* Further, the attorney accepted documents from a couple in anticipation of rendering legal services, but failed to return the couples' phone calls. *Id.* at 384. After a bar association launched an investigation for the aforementioned violations, the attorney failed to appear for a deposition. *Id.* In light of the attorney's alcohol dependency as a mitigating factor, the Court adopted the board's recommendation and imposed a two year suspension, all stayed upon conditions. *Id.* Although the attorney in *Allerdig* had similar misconduct, namely deceptive practices during the disciplinary process, Respondent's misconduct here is far more egregious, as previously discussed at length.

Lastly, Respondent cites *Akron Bar Association v. Carter*, 115 Ohio St.3d 18 (Ohio 2007). In *Carter*, the attorney misused his employer's credit card, by charging \$5,900.23 for a

personal hotel stay. *Id.* at 19. After leaving the company without repaying the debt, he subsequently wrote a check for the debt on an account with insufficient funds. *Id.* The attorney later pled guilty to theft and misuse of a credit card. *Id.* The panel and the board recommended that respondent be suspended for two years with the second year stayed on conditions. This Court agreed. Again, Respondent here grossly misstates the magnitude of his misconduct. Unlike *Carter*, Respondent has been charged with misconduct arising from more than one incident.

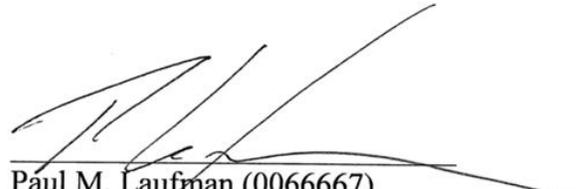
In determining the appropriate sanction to recommend in the instant matter, the hearing panel and Board of Professional Conduct found the following cases to be relevant: *Stark Cty. Bar Ass'n. v. Zimmer*, 135 Ohio St. 3d 462, 2013-Ohio-1962 and *Columbus Bar Ass'n. v. Larkin*, 128 Ohio St. 3d 386, 2011-Ohio-762. The respondents in *Zimmer* and *Larkin* each received an indefinite suspension from the practice of law, with conditions. Both of those respondents had a history of alcohol or drug abuse, both endangered the general public, and themselves, by driving automobiles while impaired, and both failed to comply with this Court's basic requirements to maintain the privilege of practicing law in Ohio. *Zimmer* failed to appear for a deposition during the investigation of his disciplinary case, and, during the pendency of *Larkin's* disciplinary case, he was sanctioned and suspended for failing to comply with continuing legal education requirements. The *Zimmer* and *Larkin* cases provide relevant precedents for the instant matter.

## CONCLUSION

Respondent's misconduct demonstrates a pattern of inability to manage his daily affairs over a significant period of time and in diverse ways. In contrast to the *Niles*, *Lockheart* and *Meyer* cases, wherein the attorneys were impaired or depressed at the time of their misconduct but had been successfully treated by the time of their disciplinary hearings, Respondent herein has repeatedly failed to fulfill his contracts with the Ohio Lawyer's Assistance Program (Finding, ¶16) and continues to struggle with the practice of law even during those times when he is sober and fully supported by friends and family.

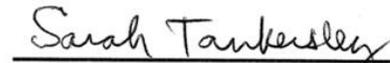
It is axiomatic that the purpose of the attorney disciplinary system is to protect the public. In order to do that, the recommendation of the Board of Professional Conduct should be adopted by this Court.

Respectfully submitted,



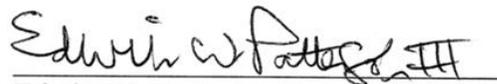
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Relator's Response to Respondent's Objections to the Findings of Fact, Conclusions of Law & Recommendations of the Board of Professional Conduct has been served upon the following Counsel for Respondent via regular U.S. mail, postage prepaid, and via electronic mail, this 30<sup>th</sup> of April, 2015.

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