Supreme Court of Ohio Clerk of Court - Filed July 10, 2015 - Case No. 2015-1005

2015-1005

In The Supreme Court of Ohio

On Appeal from The Board of
Commissioners on Grievances and Discipline
Case No. 2014-037

MARK PRYATEL (0019678),
Respondent,
v.
CLEVELAND METROPOLITAN BAR ASSOCIATION,
Relator.

RESPONDENT MARK PRYATEL'S OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

On March 13, 2014, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio[1] served a single-count complaint against Respondent Mark Robert Pryatel alleging that he had engaged in the practice of law while indefinitely suspended by this Court.[2] All of the facts and allegations in the complaint by the Cleveland Metropolitan Bar Association related to Rocky River, Ohio Municipal Court traffic offenses and related proceedings involving Mr. Richard Brazell in Case No. 10-TRD-17986. Respondent was charged with having violated Prof. Cond. R. 5.5(a) (prohibiting a lawyer from practicing law in a jurisdiction in violation of the regulations of the legal profession); Prof. Cond. R. 8.1(a) (prohibiting a lawyer from knowingly making a false statement of material fact during a disciplinary investigation); Prof. Cond. R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); and Prof. Cond. R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice). Pre-hearing discovery ensued, with counsel for Attorney Pryatel propounding admission requests, document production requests, and interrogatories, and Relator's counsel deposing Pryatel.[3]

On November 4, 2014, after discovery had closed, and without bothering to amend any of its prior responses to Respondent's propounded discovery requests, the Cleveland Metropolitan Bar Association filed its First Amended Complaint, repeating the previous allegations, and

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[1] Effective January 1, 2015, the Board of Commissioners on Grievances and Discipline was renamed the Board of Professional Conduct. Gov. Bar. R. V(1)(A).

[2] *Cleveland Metro. Bar Ass'n. v. Pryatel*, 135 Ohio St. 410, 2013-Ohio-1537.

[3] Amidst Mr. Pryatel's deposition, legal counsel for Relator launched into a series of pointed inquiries about happenings and matters occurring in the Cleveland Municipal Court, and Attorney Pryatel's actions and inactions in those totally separate proceedings in relation to Mr. Brazell. None of counsel's inquiries were alleged or noticed in the Cleveland Metropolitan Bar Association's due process complaint.

adding an allegation that Mark Pryatel's actions on behalf of Mr. Richard Brazell in Cleveland Municipal Court Case No. 2008-TRD-026794 on June 3, 2013 violated Prof. Cond. R. 5.5(a) (prohibiting a lawyer from practicing law in a jurisdiction in violation of the regulation of the legal profession) and Prof. Cond. R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice). Counsel for Respondent moved to strike the First Amended Complaint, but the assigned three-member hearing panel did not rule on that motion until the first day that the disciplinary hearing commenced (Tr. 4-5). The three-member panel ordered counsel for the Bar Association: "[T]o present your full case with regard to everything involved here", including the First Amended Complaint's allegations with respect to the Cleveland Municipal Court proceeding (Tr. 5). The panel members ordered counsel for Respondent to put its case and defenses on with respect to the properly noticed Rocky River Municipal Court matters, and then conduct discovery on the Cleveland Municipal Court issue after conclusion of the first day of hearing (Tr. 5). A second hearing day would then be scheduled solely for the purpose of Respondent's counsel putting on whatever evidence it wished with respect to claims or defense relating to the Cleveland Municipal Court allegation (Tr. 5-6). The Solomon approach by the disciplinary panel members quickly fell apart when, after conclusion of the first day of hearing and Relator's counsel had rested its case-in-chief, the Cleveland Bar Association moved to "supplement the evidentiary record" with a video recording of the Cleveland Municipal Court proceedings. Counsel for Respondent again objected, not only because this latest maneuver was contrary to the order issued by the panel members on the first day of the hearing, but also because none of the propounded discovery had been amended in the least by counsel for the Cleveland Metropolitan Bar Association. The second day of hearings was conducted on February 5, 2015, and post-hearing briefing concluded on February 19, 2015.

The Board of Professional Conduct for the Supreme Court of Ohio filed its certified report and recommendation on June 15, 2015, and this Court issued its order to show cause on June 24, 2015.

STATEMENT OF THE FACTS

A. Traffic Defendant Richard Brazell.

Mr. Richard Brazell ("Brazell") was cited by the Rocky River, Ohio police for two minor misdemeanor traffic offenses – obstructed license plates and not wearing seat belts – along with a misdemeanor of the first degree for driving under suspension (Bd. Dec. ¶ 14; Res. Exh. "O", pp. 1-2; Tr. 141-142).[4] Brazell had an arraignment in Rocky River Municipal Court scheduled for November 1, 2010, but he failed to appear and a bench warrant issued (Res. Exh. "P", p. 1). Eventually the warrant over Brazell was returned as executed, and an arraignment before Magistrate Kelly Serrat of the Rocky River Municipal Court was held on June 5, 2013 (Bd. Dec. ¶ 15; Res. Exh. "O", p. 4).

1. The Brazell Municipal Court Arraignment.

Traffic and criminal defendants in the Rocky River Municipal Court *who are represented by legal counsel* almost always mail in not guilty pleas on behalf of their represented clients because it is the most efficient and cost-effective of communicating such with the Court (Tr. 141-142). However, Mr. Brazell's arraignment was scheduled for an in-person hearing which initially signaled to Rocky River Magistrate Judge Kelly Serrat that Brazell was *pro se* (Tr. 175). At the Brazell June 5, 2013 municipal court arraignment, Respondent-Appellant Mark Robert Pryatel ("Pryatel" or "Respondent") was present because he had previously represented, with

[4] The decision by the Board of Professional Conduct of the Supreme Court of Ohio shall be cited herein as: "Bd. Dec. __". Citation to the disciplinary hearing transcript shall be: "Tr. __". Respondent's hearing exhibits are cited as: "Res. Exh. __". Relator's hearing exhibits are cited as: "Rel. Exh. __".

much success, Brazell in several traffic and criminal matters and was asked by Brazell's girlfriend Sonya Spurlock to attend (Tr. 55, 57, 65-66). At the arraignment, Magistrate Serrat inquired of Respondent Pryatel: "Are you attorney of record?" to which Mr. Pryatel responded in the negative, and Magistrate Serrat confirmed on the record: "So for now he's *pro se*"[5] (Tr. 144, 174; Res. Exh. "G", *passim*). Given this unambiguous, candid exchange, Magistrate Serrat was under no misperceptions that Brazell was appearing *pro se*, unrepresented by legal counsel at the arraignment:

> [By Magistrate Serrat]
>
> Q. I'm looking at particularly at the third 5-13 entry down, out of court NGP for Magistrate Serrat; do you see that?
>
> A. Yes.
>
> Q. What is NGP?[6]
>
> A. Not guilty plea.
>
> Q. The docket entry states that defendant in court pro se before Magistrate Serrat; do you see that?
>
> A. I do.
>
> Q. Pro se is Latin legalese for not represented by counsel?
>
> A. Yes.
>
> * * *
>
> Q. If I read the continuation of the entry that appears on the docket text for the 6-5-13 date, it says reading of complaint and rights waived on the record; do you see that?
>
> A. Yes.

[5] Exhibit "G" is the digital audio recording of Mr. Brazell's June 5, 2013 arraignment before Magistrate Serrat (Tr. 11). It was stipulated as authentic at the disciplinary hearing (Tr. 11).

[6] Brazell testified he wanted to plead "not guilty" at his municipal court arraignment (Tr. 87).

Q. On the record means as tape recorded?

A. Yes.

Q. Then the entry continues the defendant entered a plea of not guilty; do you see that?

A. Yes.

Q. With respect to what is meant in that particular document, it was the defendant who entered the plea of not guilty, time waiver and jury waiver?

A. Yes.

Q. You understood that at the arraignment on June 5, 2013 involving Mr. Brazell he was pro se?

A. Let me be clear first. I have no independent recollection of this event. I have probably handled 2,000 arraignment sessions in my time as a magistrate. There was nothing about this arraignment session that stood out in my memory that would cause me to remember personally anything that occurred that day.

I have since heard the tape. That has of course jogged my memory. I know it's my voice. I don't remember any of it.

Q. I understand. When you say you heard the tape, you heard the tape played at your deposition?

A. Yes.

Q. When you heard the tape played at your deposition, after you heard the colloquy that went on, you were able to state that it was your understanding that Mr. Brazell was pro se at the arraignment on June 5, 2013.

A. Yes.

Q. That was based on a particular question you asked Mr. Pryatel, Mr. Mark Pryatel and response given to you by Mr. Pryatel?

A. Yes.

Q. Not only did you have that understanding that Mr. Brazell was pro se in that arraignment, you confirmed it on the record something to the effect for now he's pro se?

A. Yes.

(Tr. 141-142).

Rocky River Court forms completed by Defendant Brazell – *not Respondent Pryatel* – confirmed Brazell's *pro se* arraignment stature (Res. Exhs. "B", p. 3; "O", p. 4). A speedy trial/jury trial waiver form was signed and dated by individual Brazell, *not counsel Pryatel*:

ROCKY RIVER MUNICIPAL COURT
21012 Hilliard Blvd
Rocky River, OH 44116-3398

SCRAT C 8 28 14 SRD COURT REPORTERS

www.rrcourt.net
Phone: (440) 333-0066
Fax: (440) 356-5613

June 5, 2013

Rocky River, City of, Plaintiff
vs
Richard Brazell, Defendant

Case No. 10 TRD 17986

WAIVER OF TIME FOR TRIAL (ORC §2945.71)

A. A person against whom a charge of minor misdemeanor is pending in a court of record shall be brought to trial within thirty (30) days after his arrest or the service of summons.

B. A person against whom a charge of misdemeanor, other than a minor misdemeanor, is pending in a court of record, shall be brought to trial:
1. Within 45 days after his arrest or the service of summons, if the offense charged is a misdemeanor of the 3rd or 4th degree, or other misdemeanor for which the maximum penalty is imprisonment for not more than 60 days.
2. Within 90 days after his arrest or the service of summons, if the offense charged is a misdemeanor of the 1st or 2nd degree, or other misdemeanor for which the maximum penalty is imprisonment for more than 60 days.

With full knowledge of the time requirements set forth above, and knowing that I have the right to have my case set for trial within the time specified in the Statute, I hereby expressly waive the right to trial within the time specified in ORC §2945.71. I consent to having my case set for trial at the convenience of the court.

Def Time Waiver — Atty Time Waiver

X 03/18/2013 01:05:15 pm Richard Brazell — 03/18/2013 01:10:54 pm 6-5-13

Richard Brazell Signature — Signature

TRIAL BY JUDGE WAIVER

I agree to have my contested Traffic and/or Criminal Case referred to a magistrate for the taking of evidence, ruling on motions and dispositions.

Def Judge Waiver — Atty Judge Waiver

X 03/18/2013 01:13:40 pm Richard Brazell — 03/18/2013 01:15:37 pm 6-5-13

Richard Brazell's Signature — Signature

DEMAND FOR JURY

Now comes the accused and demands a jury of eight in the above-entitled cause.

Def Jury Demand — Atty Jury Demand

03/18/2013 01:17:53 pm — 03/18/2013 01:22:44 pm

Richard Brazell's Signature — Signature

WAIVER OF JURY TRIAL

I, Richard Brazell, the accused defendant in the above cause, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which said cause may be pending. I fully understand that I have a constitutional right to a trial by jury pursuant to the laws of this

Def Jury Waiver — Atty Jury Waiver

03/18/2013 01:24:43 pm — 03/18/2013 01:25:22 pm

Richard Brazell's Signature — Signature

*ORC §2933.05 Claim of Jury once made may be withdrawn by written Waiver of Jury, but in such case, the Court may, if a Jury has been summoned, require the accused to pay all costs of mileage and fees of members of the venue for one day's service, notwithstanding the outcome of the case.

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TA-waiv(F) Schmotzer — Rev. 1/14/13

(Tr. 148, Res. Exh. "C"). If Brazell had been represented by legal counsel, Magistrate Serrat would have insisted this court form be completed by the attorney (Tr. 175). Similarly, a Trial Assignment notification was signed by individual Brazell – not counsel Pryatel – even though there is an "Attorney's Signature" block:

ROCKY RIVER MUNICIPAL COURT
21012 Hilliard Blvd
Rocky River, OH 44116-3398

www.rrcourt.net
Phone: (440) 333-0066
Fax: (440) 356-5613

June 5, 2013

Richard Brazell
1153 Buhrer
Cleveland, OH 44109

SERRAT D
8/28/14 SRD
COURT REPORTERS

IMPORTANT: TRIAL ASSIGNMENT

Rocky River, City of,
Plaintiff
VS
Richard Brazell,
Defendant

Case No. 10 TRD 17986

Judge Brian F Hagan

OFFENSE(S):
335.07 DUS
331.46b1 Seat Belts; Drivers and Passengers
335.10 Obstructed Plates

CASE OFFICER: Sharp
AFFIANT:

The above entitled case has been assigned for **Pretrial on 07/09/2013 at 9:00 am IN COURTROOM 3, SECOND FLOOR**. You are required to notify this court in writing if there is a change in your residence or phone number. Motions for continuances are granted only for good cause shown and shall be filed not less than 48 hours prior to trial/pretrial.

ALL LITIGANTS, WITNESSES, AND ATTORNEYS WILL NEED TO GO THROUGH SECURITY SCREENING PRIOR TO ENTERING THE NEW COURTHOUSE. PLEASE ARRIVE AT THE COURT AT LEAST FIFTEEN MINUTES BEFORE THE SCHEDULED TIME, IN ORDER TO BE IN THE COURTROOM AT THE TIME ABOVE. THANK YOU!

Defendant Attorney

04/10/2013 12:55:20 pm Richard Brazell 06/18/2013 01:02:19 pm 216-624-7452
Richard Brazell's Signature Attorney's Signature Phone No. ()--

hand deft ~~& atty~~
sent pltf & pros

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(Res. Exh. "H"; Tr. 146). Again, if Respondent were Brazell's counsel of record at the arraignment, Magistrate Serrat would have insisted that Mark Pryatel, Esq. sign this form (Tr. 175). What's more, a Rocky River Court stamp confirming that the Trial Assignment form had been distributed intentionally crossed out "Attorney" given Brazell's known and announced *pro se* status (Tr. 145-147, 191-192; Res. Exh. "H"). The Trial Assignment court form handed to Brazell scheduled him for a July 9, 2013 9:00 a.m. pre-trial in Courtroom No. 3 of the Rocky River Municipal Court before the Honorable Brian F. Hagan (Res. Exh. "H"). To Magistrate Serrat, it was "abundantly" clear that Brazell was appearing before her *pro se* (Tr. 174).

2. <u>The Municipal Court Pre-Trial/Plea Hearing</u>.

At this juncture, with respect to this discrete aspect of the disciplinary complaint, it is important to observe that Rocky River's Municipal Court Rules demand that all proceedings other than minor misdemeanor traffic proceedings, be recorded:

> **RULE NO. 18: <u>COURT RECORDING AND TRANSCRIPTS</u>**
>
> **A.** <u>RECORD OF PROCEEDING</u>: All traffic and criminal proceedings, except minor misdemeanor traffic arraignments, shall be recorded as required by the Ohio Rules of Criminal and Civil Procedure.

(Res. Exh. "A", p. 17; Tr. 136-138, 242). Rocky River Judge Brian F. Hagan was keenly aware of this court requirement because he individually approved of the court's local rules after they were presented to him in draft format by Magistrate Serrat (Tr. 136, 242). Additionally, the court's rules are available to all judicial officers on the computers in their individual courtrooms. To accomplish this obligatory audio recording, the Rocky River Municipal Court acquired a sophisticated digital recording device for every courtroom known as CourtSmart® (Tr. 139-140;

260-263).[7] After being booted-up in the morning by the respective bailiff, each Rocky River Judicial Officer controls the mute button for any discussions to be held off-the-record (Tr. 222, 262). A "fail safe" feature of CourtSmart® will record in-court proceedings even if the bailiff neglected to boot-up the system, as long as the mute button is not triggered by a judge (Tr. 262-263). A ten inch by ten inch LED brightly illuminated blue screen facing the judge reflects that the recording feature of CourtSmart® is on and working when it is not repeatedly flashing on and off (Tr. 263). When the mute button of CourtSmart® is triggered, the screen constantly flashes on and off from bright blue to opaque white, so as to alert the judicial officer that the proceedings *are not* being recorded or otherwise memorialized (Tr. 199, 237-238, 262-263).

Furthermore, each of the Rocky River Municipal courtrooms is equipped with two separate security cameras that capture and record visual images of what is occurring in the courtroom (Tr. 242, 264). The security cameras, however, unlike CourtSmart® loop over the recordings after six to eight weeks of continuous recording time (Tr. 265).

Journal and docket entries of the Rocky River Municipal Court state (falsely) that Brazell's pre-trial and in-court plea hearing all occurred "in open court on the record" (Res. Exhs. "J", "K", "L").[8] *These twin journal entries and single electronic docket entry are all false* (Tr. 193-197, 220-221, 234-235)! In point of fact, Judge Hagan never recorded any in-court proceedings with respect to Brazell's pre-trial, or the later-occurring plea hearing (Tr. 234-235).[9]

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[7] Hearing witness Michael Bracken was the MIS Systems Administrator for the Rocky River Municipal Court (Tr. 259).

[8] Magistrate Serrat testified that: "[O]n the record means as tape recorded" (Tr. 143). Rocky River Municipal Judge Brian Hagan concurred that "on the record" means recorded (Tr. 234).

[9] In his eventual plea deal, Mr. Brazell plead *nolo contendere* to one minor misdemeanor count of obstructed license plates (a 0 point infraction), with the remaining traffic charges withdrawn (Res. Exh. "L"; Tr. 125, 215-220).

The false journal entries were either dictated by Judge Hagan, or authored by Judge Hagan, at a point in time that he knew that the Brazell in-court proceedings were, in fact, not recorded (Tr. 193-195, 240).

After the attorney disciplinary complaint in this case had been served and filed, but prior to her pre-hearing deposition, Magistrate Serrat received an anonymous envelope at the Rocky River Municipal Court containing a detailed question and answer transcript of the Brazell plea hearing before Judge Hagan wherein Respondent Pryatel supposedly engaged in the unauthorized practice of law (Tr. 152). Although it remains a mystery as to how a detailed Q and A transcript was created of the Brazell plea hearing since Judge Hagan, contrary to the Rocky River Municipal Court rules, failed to record that plea hearing or otherwise transcribe it, Magistrate Serrat glanced over the transcript, and then destroyed it since she was not sure why it was of any importance or even why it had been secretly placed on her desk (Tr. 152-153).

The destruction of, and failure to preserve both exculpatory and impeaching evidence is quite material here because of the markedly divergent testimony between witnesses of what exactly occurred at Brazell's pre-trial, and in-court plea hearing. For his part, Rocky River Municipal Prosecutor Michael O'Shea could not recall *any* specific conversation of *any* nature that he had with this Respondent (Tr. 117-121). Prosecutor O'Shea could not even recall if Attorney Pryatel informed him that everyone was waiting for Brazell's lawyer to arrive for the pre-trial (Tr. 119-121). Respondent, on the other hand, was able to specifically recollect his conversations with Prosecutor O'Shea, and the fact that he specifically told O'Shea that he was not going to be representing Brazell, and instead had placed a call to another counsel to handle

the matter (Tr. 304, 318).[10] Prosecutor O'Shea could not even testify to any true "advocacy" that this Respondent engaged in on behalf of Brazell (Tr. 124). Additionally, the only written Rocky River Court document memorializing Brazell's plea again was left completely blank where the "attorney" is supposed to sign (Res. Exh. "M"; Tr. 189).

Judge Hagan's assigned bailiff, Ms. Christine Ida-Seedhouse swore in her testimony that not once in the subsequent in-court plea hearing did Respondent speak to her (Tr. 191). Judge Hagan, on the other hand, swore under oath that Attorney Pryatel and Ida-Seedhouse spoke to each other while in-court (Tr. 213). Also, Brazell's pre-trial/plea hearing was set for 9:00 a.m. – a point in time that Judge Hagan routinely uses to schedule *pro se* traffic-related offense pre-trials (Tr. 188, 207, 230).[11]

Given the developed record and uncontested facts, Respondent-Appellant Mark Robert Pryatel indeed denied having engaged in the unauthorized practice of law at either Brazell's Rocky River, Ohio Municipal Court arraignment or subsequent pre-trial/plea hearing (Res. Answer, ¶¶ 3-5, 7). Moreover, in his answer, Respondent Pryatel specifically asserted state and federal Constitutional due process defenses (Res. Answer, Affirmative Defenses IV-V). The Board deemed these defensive challenges to be "lack of cooperation in the disciplinary process" and a "refusal to acknowledge the wrongful nature of [sic] conduct" (Bd. Dec. ¶ 30).

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[10] Prosecutor O'Shea never once went into the in-court proceedings wherein Brazell's no contest plea to a minor misdemeanor failure to display, zero point traffic infraction was taken (Tr. 121-122).

[11] For traffic defendants represented by legal counsel, Judge Hagan schedules their pre-trial/plea hearings for 8:15 a.m. so that representing counsel can quickly leave the court and tend to other business affairs (Tr. 188, 207). It is not unusual at all for individuals to represent themselves in minor traffic-related offenses such as that facing Brazell (Tr. 233).

B. <u>Post-Rocky River Municipal Court Events</u>.

Amidst pre-hearing discovery in this case, counsel for Relator, after discussing the matter with Judge Hagan, insisted that at no point in time after the in-court Brazell plea hearing did Judge Hagan call Attorney Pryatel (Tr. 255). When confronted with Attorney Pryatel's cellular records showing that Respondent had indeed received a phone call from Judge Hagan after the Brazell plea hearing, on Judge Hagan's private, office landline, Judge Hagan changed his denial and conceded that he indeed called Respondent, although could not recollect the content of that call (Tr. 255-256). Attorney Pryatel, however, distinctly recollected Judge Hagan calling his cellular phone, and Attorney Pryatel later calling Judge Hagan back (Tr. 321-323). Attorney Pryatel left a voicemail message on Judge Hagan's private answering machine in his chambers that same day stating that he had no idea why Judge Hagan was calling him since he did not represent Brazell as his counselor (Tr. 323).

There has been no request by anyone – not Brazell, not Magistrate Serrat, not Judge Hagan – to "do over" Brazell's plea hearing against the alleged backdrop that Brazell was allegedly represented by an unlicensed legal counsel (Tr. 257).

Finally, even if all of the adverse testimony against Respondent were to be credited, Attorney Pryatel did not make one red cent off of his alleged "practice of law".[12] For this

[12] Brazell's girlfriend, Sonya Sperlock, testified that $300.00 was remitted to Respondent in the spring of 2013, but that $150.00 of the remitted sum was for monies due and owing to Respondent for 2009 legal services prior to his suspension by this Court (Tr. 56). Allegedly, another $50.00 was tendered to Attorney Pryatel on the date of Brazell's Rocky River Court arraignment (Tr. 49, 67). While Ms. Sperlock gave additional funds to Attorney Pryatel to remit to the Cleveland Municipal Court of Clerk of Courts to pay fines and costs on behalf of Brazell (Tr. 63), all of the Brazell fines and court costs in the Rocky River Municipal Court matter were paid by Attorney Pryatel, and they amounted to some $400.00 (Tr. 67).

Respondent, who for years has dedicated his practice to representing the indigent and the poor,[13] fronting money to clients was not unusual at all (Tr. 38, 47, 48).

Finally, to the extent this Court sides to any degree with the hearing panel and Board, it is important to note that by all accounts, any so-called "representation" of Brazell by Attorney Pryatel was skillfully done:

> [BY SONYA SPERLOCK]
>
> Q. There is no doubt that with respect to that 2009 [criminal] matter, Mr. Pryatel did represent Mr. Brazell?
>
> A. *Excellently, yes, he did.*
>
> Q. Excellently?
>
> A. Yes, he did.
>
> Q. You said that Mr. Pryatel had been the Sperlock attorney for 20 years. Any of those 20 years were you ever alerted to any problems with the way he represented the Sperlock family?
>
> A. Absolutely not.
>
> Q. When the Sperlock family mentioned – I don't want to delve into your history – had he ever represented you?
>
> A. Myself, personally, no. My father, my brother, my mother and my parents divorce.
>
> Q. All those individuals were satisfied with his representation?
>
> MR. DUNSON: Objection.
>
> THE CHAIRMAN: Overruled.
>
> A. Yes, sir.

(Tr. 65-66).

[13] *Cleveland Metro. Bar Ass'n. v. Pryatel*, 135 Ohio St. 410, 2013-Ohio-1537.

C. **<u>The Board's Decision and Recommendation</u>.**

The Findings of Fact, Conclusions of Law, and Permanent Disbarment Recommendation by the Board of Professional Conduct of the Supreme Court of Ohio failed to address all of the material defenses and challenges raised by Respondent before the hearing, amidst the hearing, and after the hearing (Bd. Dec., *passim*).[14] No mention of Magistrate Serrat's recorded acknowledgment that Brazell was proceeding *pro se* at his traffic arraignment (*Id.*). No mention that the jury trial waiver, and speedy trial waiver forms were signed by Brazell himself, not Attorney Pryatel, notwithstanding the presence of an attorney signature line (*Id.*). No mention of the fact that the Rocky River Journal Entries record Brazell as proceeding *pro se* at his traffic arraignment (*Id.*). No mention of the fact that Rocky River Prosecutor O'Shea could not recall any of his substantive discussions with Attorney Pryatel at the pre-trial, but that Attorney Pryatel could (*Id.*). No mention that the only memorialization of a pre-trial plea agreement being reached was signed only be Prosecutor O'Shea and not by this Respondent, notwithstanding the presence of a required attorney signature on the Rocky River's form (*Id.*). No mention of the destroyed, and non-preserved exculpatory and impeaching evidence (*Id.*). No mention of the falsified Rocky River Municipal journal entries and electronic docket entry (*Id.*). No mention of the fact that Attorney Pryatel did not reap one red cent from his alleged "practice of law" (*Id.*). No mention of the fact that Brazell and his girlfriend were ecstatic with Attorney Pryatel's course of conduct, and that Brazell's Rocky River dilemma concluded with a lone minor misdemeanor failure to display a license plate that is a zero point traffic infraction under the codified ordinances of Rocky River (*Id.*). No mention of the more analogous decisions by this Court that even a finding

[14] "The due process requirement of a full and fair hearing means that the decisionmaker must, *in some meaningful manner*, consider and appraise all the evidence to justify the decision". *State ex. rel v. Industrial Commission*, 142 Ohio St. 3d 444, 447, 2015-Ohio-120, ¶ 12 (emphasis in original).

that one has practiced law while under indefinite suspension does not inexorably lead to a mandatory permanent disbarment (*Id.*). In point of fact, the Board's written decision is somewhat schizophrenic, stating that "the panel finds no mitigating factors"[15], but simultaneously recognizing that "Respondent has been involved with OLAP since before his suspension. As of December 2014, he was attending meetings once a month".[16]

ARGUMENT

A. Respondent Pryatel Did Not Engage in the Unauthorized Practice of Law with Respect to Mr. Brazell's June 5, 2013 Traffic Court Arraignment.

Those present at the June 5, 2013 Brazell Rocky River Court traffic arraignment understood perfectly well that Respondent Pryatel was *not* serving as Brazell's legal counsel, and instead that Brazell *was* appearing *pro se*. Rocky River Magistrate Kelly Serrat pointedly inquired of Respondent Pryatel whether he was Brazell's legal counsel, and Respondent candidly replied that he was not (Tr. 142). Magistrate Serrat testified at the disciplinary hearing that it was "abundantly" clear to her that Brazell was proceeding *pro se* at the traffic court arraignment (Tr. 174). Indeed, after Attorney Pryatel truthfully informed Magistrate Serrat that he was *not* Brazell's legal counsel, Magistrate Serrat confirmed on the record that Brazell was then proceeding *pro se* (Tr. 141-142; Res. Exh "G").

Furthermore, at the Rocky River Municipal Court arraignment, it was individual Brazell who signed the speedy trial and jury waiver Court form, and it was Brazell alone who signed the Trial Assignment Court form (Res. Exhs. "C", "H"; Tr. 175). Had Brazell been represented by counsel, Magistrate Serrat would have insisted that these dual forms be signed and completed by counsel (Tr. 175). It was thus error for the Board to have found: "Respondent appeared with

[15] Bd. Dec. ¶ 31.

[16] Bd. Dec. ¶ 28.

Brazell again before Magistrate Serrat and entered a plea of not guilty on behalf of Brazell…and waived Brazell's right to a trial by jury" (Bd. Dec. ¶ 17). Brazell did all of this, in writing (Res. Exh. "C").

The "practice of law" is not some obscure, malleable, ill-defined concept. Rather, it requires one to engage in advocacy, persuasion, cross-examining of witnesses, citation to legal precedents, or the preparation, signing and filing of documents on behalf of another, in court. *Cleveland Bar Assoc. v. CompManagement*, 111 Ohio St. 3d 444, 2006-Ohio-6108, ¶¶ 24-25, 47-48. "[A] finding of unauthorized practice in a contested proceeding must rest upon some evidence of specific conduct". *Disciplinary Council v. Palmer* (2001), 115 Ohio Misc. 2d 70, 76, 761 N.E. 2d 716 (cited with approval in, *Cleveland Bar Assoc. v. CompManagement*, 111 Ohio St. 3d 444, 2006-Ohio-6108, ¶ 25)). When examined at the disciplinary hearing, Magistrate Serrat testified that Attorney Pryatel did none of the above when he was present in the Rocky River Municipal courtroom for Brazell's arraignment (Tr. 141-142, 144, 174-175).

B. <u>Prosecution by Relator of Attorney Pryatel Alleging the Unauthorized Practice of Law in the July 9, 2013 Pre-Trial/Plea Hearing Violated Due Process of Law</u>.

It is axiomatic that Ohio's attorney disciplinary proceedings must comply with due process of law. *Office of Disciplinary Council v. Simecek*, 83 Ohio St. 3d 320, 322, 699 N.E. 2d 933, 934 (1998). Due process of law, in turn, guarantees one's right to timely access of evidence against them:

> In *Brady*[17] this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where that evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. at 87. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs*, 427 U.S. 97, 107, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), and that the duty encompasses impeachment evidence

[17] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

> as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different". *Id.* at 682; see also, *Kyles v. Whitley*, 514 U.S. 419, 433-434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995).
>
> * * *
>
> There are three components of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.

Strickler v. Greene, 527 U.S. 263, 281-282, 119 S. Ct. 1936 (1999).

There is, then, a Constitutional guaranteed access to both exculpatory and impeaching evidence that must be preserved:

> To safeguard a defendant's due process right to present a complete defense, the Supreme Court has developed "'what might loosely be called the area of Constitutionally guaranteed access to evidence'". *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (quoting, *The United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)). Separate tests are applied to determine whether the government's failure to preserve evidence rises to the level of a due process violation in cases where material exculpatory evidence is not accessible. See, *Trombetta*, 467 U.S. at 489, versus cases where "potentially useful" evidence is not accessible. See, *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).
>
> In *Trombetta*, the [Supreme] Court held that the government violates a defendant's due process rights where material exculpatory evidence is not preserved.

United States v. Wright, 260 F. 3d 568, 570-71 (6th Cir. 2001). "[T]he Supreme Court's decision in this area indicative…an *absolute* duty to preserve and disclose [exculpatory] evidence". *Moldown v. City of Warren*, 573 F. 3d 309, 341 (6th Cir. 2009).

In this dispute, not only was exculpatory and impeaching evidence destroyed *after the filing of this disciplinary complaint*, but both exculpatory and impeachment evidence was effectively destroyed when Rocky River Municipal Judge Hagan failed to adhere to that court's

rules, and failed to audio-record Brazell's pre-trial and plea hearing (Tr. 193-198, 220-221, 234-235). That exculpatory and impeaching evidence was, in fact, destroyed is undisputed here. A detailed series of questions and answers allegedly posed at Brazell's plea hearing was mysteriously and anonymously laid on Magistrate Kelly Serrat's desk after Judge Hagan had informed the Magistrate that he neglected to audio-record Brazell's plea hearing (Tr. 152-153). This exculpatory and impeaching evidence existed after Relator's filing of these disciplinary proceedings against this Respondent (*Id.*). Exculpatory and impeaching evidence was also destroyed when no one from Relator's office, and no one from the Rocky River Municipal Court bothered to secure and preserve the security video tapes that would presumably (at least according to Relator) capture Mark Robert Pryatel engaging in the prohibited practice of law (Tr. 260-263). Six to eight weeks after Brazell's plea hearing, those security tapes "looped over", effectively destroying them (Tr. 265). Significantly, if he is to be credited, Judge Hagan knew at Brazell's July 9, 2013 plea hearing that Mark Robert Pryatel had been suspended from the practice of law by this Court (Tr. 223-225).

Furthermore, both impeachment and exculpatory evidence was effectively destroyed when Judge Hagan failed to create it as required and mandated by the Rocky River Municipal Court Rules. Those rules command:

> **RULE NO. 18: <u>COURT RECORDING AND TRANSCRIPTS</u>**
>
> **A.** <u>RECORD OF PROCEEDING</u>**:** All traffic and criminal proceedings, except minor misdemeanor traffic arraignments, *shall be recorded* as required by the Ohio Rules of Criminal and Civil Procedure.

(Res. Exh. "A", p. 17; Tr. 136-138, 242) (emphasis added). Rocky River Municipal Judge Hagan knew perfectly well that all plea hearings, even traffic related plea hearings, had to be recorded

through the court's CourtSmart® system (Tr. 242). As Judge Hagan testified, Brazell's plea hearing "absolutely" should have been digitally recorded for memorialization (Tr. 241-242).

Relator constructed its disciplinary prosecution of Attorney Pryatel by hoping to set up and then prevail in a credibility war, wherein a distinguished robed judge sitting on a local court will presumably testify that at Brazell's plea hearing, Respondent engaged in the proscribed practice of law. Respondent vehemently denies practicing law in any form or fashion at Brazell's Rocky River Municipal Court pre-trial or earlier arraignment (Answer, ¶¶ 4-5, 7; Tr. 278). But not placing Respondent in the middle of this sort of "he said/she said" debate is precisely what *Brady* and its progeny are designed to avoid. *Strickler v. Greene*, 527 U.S. 263, 289-290, 119 S. Ct. 1936 (1999). "The question is not whether the defendant would have more likely than not have received a different verdict with the evidence, but whether in its absence, he received a fair trial, understood as a trial resulting in a verdict worthy of confidence". (*Id.*) (quoting, *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555 (1995)). "The suppression by the prosecution of evidence favorable to an accused…violates due process where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution*". *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct., 1194 (1963).[18]

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[18] Although a series of detailed questions and answers ostensibly memorializing Mr. Brazell's plea, and who said what, existed at one time after the filing of this disciplinary complaint they were destroyed, and a copy has never been disclosed to Respondent's counsels during discovery of this matter (Tr. 152-153). It is, nevertheless, important to recognize that Judge Hagan's "destruction" of evidence via non-preservation is nevertheless attributable to Relator:

> [The *Brady* obligation] "applies to relevant evidence in the hands of the police, whether the prosecutors knew about it or not, whether they suppressed it intentionally or not, and whether the accused asked for it or not".

* * *

Brady and its progeny required dismissal of any allegations against Respondent vis-à-vis Brazell's July 9, 2013 pre-trial/plea hearing in the Rocky River Municipal Court.

C. <u>Respondent Did Not Engage in the Practice of Law at the July 9, 2013 Pre-trial/Plea Hearing of Mr. Brazell</u>.

The "practice of law" requires evidence that one engaged in persuasion, advocacy, cross-examine of witnesses, preparation of papers with legal citations, or the preparation, signing and filing documents in connection with a court proceeding. *Cleveland Bar Assoc. v. CompManagement*, 111 Ohio St. 3d 444, 2006-Ohio-6108, ¶¶ 24-25. See also, *Cleveland Bar Assoc. v. Pearlman*, 106 Ohio St. 3d 136, 2005-Ohio-4107, *syllabus* (a layperson engages in the practice of law where they engage in cross-examination, argument or other acts of advocacy). Accord, *Disciplinary Council v. Bukstein*, 139 Ohio St. 3d 230, 232, 2014-Ohio-1884, ¶¶ 10-12 (requiring the existence of legal arguments, or advising and advocating for another on issues of law).

Even if the panel and Board could have considered the July 9, 2013 Brazell pre-trial/plea hearing notwithstanding the destruction of exculpatory and impeaching evidence that has admittedly occurred, Judge Hagan's hearing testimony confirms that Attorney Pryatel did not engage in the "practice of law" when he was present in Judge Hagan's court. Judge Hagan has no distinct recollection of Respondent engaging in any advocacy, argument, persuasion, interpretation, analysis, or reference to legal citations when Judge Hagan entertained Brazell's *nolo contendere* plea to a single minor misdemeanor, zero point driving without displayed plates

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> As far as the Constitution is concerned, a criminal defendant is equally deprived of his or her due process rights when the police rather the prosecutor suppresses exculpatory evidence because, in either case, the impact on the fundamental fairness of the defendant's trial is the same.

Moldowan v. City of Warren, 573 F. 3d 309, 335-336 (6th Cir. 2009) (quoting, *Harris v. Lafler*, 553 F. 3d 1028, 1033 (6th Cir. 2009)).

citation on July 9, 2013 (Tr. 214-215). All Judge Hagan could testify to was his "normal" taking of a plea procedures (*Id.*). As testified to by Judge Hagan, his pointed plea inquires on July 9, 2013 were posed to individual defendant Brazell while taking Brazell's no contest plea in-court (Tr. 235-236). It was individual Brazell who plead no contest, and individual Brazell who waived speedy trial and jury trial rights (Tr. 216).

There is no untainted record evidence that Respondent engaged in the "practice of law", even accepting as completely true and accurate Judge Hagan's hearing testimony. For this separate reason, the panel and Board erred in finding against Attorney Pryatel on the disciplinary allegations (Bd. Dec. ¶ 29).

D. <u>The Board Erred in Considering and Using All Evidence Used to Support the Cleveland Municipal Court Allegations</u>.

The panel and the Board should never have allowed Relator to file its first amended complaint, should never have allowed Relator to marshal evidence that was not identified in pre-hearing exhibit list disclosures, interrogatory or document production disclosures, and a witness who was never disclosed in interrogatory, document production or admission answers.

On this point, the Cleveland Metropolitan Bar Association and counsel for Respondent agree concerning how matters should proceed before the state's disciplinary panels and the Board of Professional Conduct of the Supreme Court of Ohio. The Cleveland Metropolitan Bar Association has decried the notion that disciplinary proceedings should countenance "trial by ambush" or "sandbagging". See, Cleveland Metro. Bar Ass'n. Merits Brief, *Cleveland Metro. Bar Ass'n. v. Sleibi*, 2015-Ohio-2274 at pp. 14, 15. Indeed, the Cleveland Metropolitan Bar Association has appealed to this Court unfavorable Board rulings where they were the recipient of "trial by ambush" and "sandbagging" tactics (*Id.).* "This type of trial ambush is exactly what the Board should have prohibited" (*Id.* at p. 14).

The "sandbagging" occurred early on in this case when counsel for Relator grilled Attorney Pryatel at his deposition about non-plead matters purportedly occurring in the Cleveland Municipal Court, even though none of it was alleged in any complaint. The "sandbagging" continued with Relator's counsel holding in-check their First Amended Complaint to include the newly-announced Cleveland Municipal Court matter until the eve of the first day of the disciplinary hearing, which concerned only those events occurring in the Rocky River, Ohio Municipal Court. Even when the disciplinary panel allowed the amended complaint, with the caveat that Relator put on its full case on the first day of hearing, this Solomon-like approach was reneged upon when, *after resting its case-in-chief*, counsel for Relator sought (and was permitted) to introduce a videotape of proceedings in the Cleveland Municipal Court. Neither the video, nor the witness that Relator summoned to authenticate and verify that video was disclosed or named in any pre-hearing discovery responses, or in the panel-ordered witness and exhibit lists.

"The law is clear that such attempts to 'sandbag'…are not permitted". Cleveland Metro. Bar Ass'n. Merits Brief, p. 14 in *Cleveland Metro. Bar Ass'n. v. Sleibi*, 2015-Ohio-2724 (citing, *Saikus v. Ford Motor Co.*, 2001 WL 370650 (8th Dist. 2001); *O'Connor v. Cleveland Clinic Foundation*, 161 Ohio App. 3d 43 (8th Dist. 2005)). Simply put, the "'introduction of a new theory that has not been disclosed prior to trial "smacks of ambush"'". (*Id.* at p. 16). The Board erred in finding Respondent guilty of any infraction relating to the Cleveland Municipal Court Brazell matter.

E. <u>The Sanctions Analysis</u>.

"[T]he primary purpose of the disciplinary process is not to punish the offender, but to protect the public from lawyers who are unworthy of the trust and confidence essential to the

attorney-client relationship". *Disciplinary Counsel v. Troller*, 138 Ohio St. 3d 307, 2014-Ohio-60, ¶ 15. The practice of law in the State of Ohio is limited to validly licensed attorneys "…to 'protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation'". *Cleveland Metro. Bar Assoc. v. Hill*, 141 Ohio St. 3d 166, 168, 2014-Ohio-5239, ¶ 10 (quoting, *Cleveland Bar Ass'n. v. CompManagement, Inc.*, 104 Ohio St. 3d 168, 2004-Ohio-6506, ¶ 40).

"We reserve the ultimate sanction of permanent disbarment for the most egregious misconduct". *Disciplinary Counsel v. Cicero*, 2014-Ohio-4639, ¶ 20 (quoting, *Disciplinary Counsel v. Hoskins*, 119 Ohio St. 3d 17, 2008-Ohio-3194, ¶ 92). Alleged conduct and misconduct that is not charged against a disciplinary respondent cannot form the basis of either a disciplinary violation or selection of the recommended sanction. *Cincinnati Bar Assoc. v. Rothermel*, 112 Ohio St. 3d 443, 2007-Ohio-258, ¶ 10. "When imposing sanctions for attorney misconduct, we consider relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases". *Disciplinary Counsel v. Freeman*, 126 Ohio St. 3d 389, 2010-Ohio-3824, ¶ 9. In making final sanctions determinations, the aggravating and mitigating factors listed in Gov. Bar. Rule V, Section 13(B) "*may be considered*". Gov't. Bar Rule V, Section 13(B) (emphasis added) (formerly, BCGD Proc. Reg. 10(B)).

Notwithstanding all of the above, it is well-settled that "…each disciplinary case is unique, [and] we are not limited to the factors specified in the [Gov. Bar Rule V, Section 13] Rule but may take all relevant factors into account in determining what sanction to impose". *Cleveland Metro. Bar Assoc. v. Davis*, 133 Ohio St. 327, 2012-Ohio-4546, ¶ 7. Accord, *Dayton Bar Ass'n. v. O'Neal*, 134 Ohio St. 3d 361, 2012-Ohio-5634, ¶ 15.

1. <u>The Board's Successively-Higher Sanction Doctrine is Punitive in Nature</u>.

In its decision, the Board observed that Respondent was already serving an indefinite suspension from the practice of law, and felt constrained to impose as elevated sanction after finding Respondent guilty of the professional misconduct ethical violations for which he was charged (Bd. Dec. ¶ 32). That, however, is the very definition of punitive. Yet, "[t]his court has repeatedly held that the purpose of the sanction imposed in disciplinary cases is not to punish the offender but to protect the public". *Cleveland Metro. Bar Ass'n. v. Sleibi*, 2015-Ohio-2724, ¶ 30. Had the Board followed this rule of law, not only would it not have been troubled (or concerned for that matter) with the need to impose some level of successively higher sanction beyond indefinite suspension, it would have at the very least acknowledged that those persons surrounding Brazell thought Attorney Pryatel's representation to be "excellent" (Tr. 65-66). The Board would have also acknowledged the Brazell's Rocky River *nolo contendere* plea to a single minor misdemeanor, zero point traffic failure to display citation was an outstanding result for Brazell (Tr. 125, 218-219).

Indeed, that no one – Brazell, Magistrate Serrat, or Judge Hagan – has moved or initiated proceedings to void Brazell's *nolo* plea in Rocky River Municipal Court confirms that no one was harmed to the slightest degree by Respondent's alleged "practice of law".[19]

2. <u>The Aggravating Analysis</u>.

It is important to recall that under Gov. Bar Rule V, Sections 13(B)-(C), none of the listed aggravating/mitigating factors "…shall…control the discretion of the Board, but *may* be considered". *Id.* Although all of the aggravating factors in Gov. Bar Rule V, Section 13(B) will

[19] Indeed, this noticeable inaction confirms that Attorney Pryatel, in fact, did not practice law while under suspension since a plea under such circumstances would have required the proverbial "do over".

be dealt with *infra* under the mitigation portion of this brief, the Board incorrectly found that Respondent has engaged in a "pattern of misconduct" (Bd. Dec. ¶ 30). This is not true. For sympathetic and altruistic reasons,[20] Respondent allegedly engaged in the "practice of law" with respect to but one client whose family considered Attorney Pryatel's legal skills to be "excellent" over the course of two decades (Tr. 65-66). Moreover, the allegation of having engaged in this single client "practice of law" is unlike anything that served as the basis for Respondent's indefinite suspension in *Cleveland Metro. Bar Assoc. v. Pryatel*, 135 Ohio St. 3d 410, 2013-Ohio-1537, ¶¶ 4-8.

3. <u>The Mitigating Analysis</u>.

The Board stated that there were absolutely no mitigating factors in this developed record (Bd. Dec. ¶ 31). There are, however, plenty.

a. <u>The Absence of Dishonest/Selfish Motive</u>.

The Board decreed Respondent guilty of having a "dishonest or selfish motive"[21] but had it followed the complete money analysis it would have found as fact that this Respondent, again, "loaned" Brazell money during the course of any so-called "practice of law" (Res. Exhs. "R", "S", "L", "N"; Rel. Exh. 1; Tr. 56, 66, 232, 245). This concededly unusual, altruistic conduct had been exhibited earlier by this Respondent when he "loaned" Brazell $200.00 in earned legal fees for four solid years (Rel. Exh. "1"; Tr. 38, 56).

The so-called "sanctions imposed in *similar* cases" relied on by the Board all[22] involved an attorney who absconded with client funds or neglected legal matters to the client's detriment.

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[20] Tr. 296, 329-330, 331.

[21] Bd. Dec. ¶ 30.

[22] Bd. Dec. ¶¶ 34, 35.

See, Disciplinary Counsel v. Sabroff, 123 Ohio St. 3d 182, 2009-Ohio-4205, ¶ 21 ("We have previously explained that misappropriation of client funds carrie[s] a 'presumptive sanction of disbarment'"); *Disciplinary Counsel v. Caywood*, 74 Ohio St. 3d 596, 1996-Ohio-294 (counsel neglected legal matters, refused to cooperate in subsequent disciplinary investigation, lied to clients, and there was no aggravating or mitigating analysis because the disciplinary record was stipulated to).

b. <u>Efforts to Make Restitution to Rectify Consequences of Misconduct</u>.

Gov. Bar Rule V, Section 13(C)(3) looks at a licensed counselor's efforts to make restitution or to rectify the consequences of proven misconduct. Here, neither the first-filed, nor first amended complaints petitioned for restitution because counsel for the Relator knew full well that not one dime of proceeds remitted to the Respondent for his purported "practice of law" ($300.00 plus $50.00) was used by this Respondent for any personal gain. In point of undisputed fact, it all went to pay off Brazell's court fines and costs (Tr. 56, 66, 232, 288-289, 341).

Additionally, there can be no "rectification [of the] consequences of misconduct" because Mr. Brazell was left in a distinctly enviable legal position given the troika of criminal predicaments that he was facing (*Compare*, Res. Exh. "B" *with* Res. Exhs. "J", "N"). The Board's finding of fact that it was Respondent who "…waived Brazell's right to trial by jury"[23] is not an accurate statement of the record facts, and indeed is thoroughly disproved by documentary evidence (Res. Exh. "C"). Rocky River Magistrate Serrat testified that: (1) she understood perfectly well that Mr. Brazell appeared before her *pro se*, and noted that fact on her

[23] Bd. Dec. ¶ 17.

docket official record (Tr. 142-143; Res. Exh. "B", p. 3);[24] (2) when questioned at the arraignment hearing, this Respondent candidly and honestly informed the Magistrate that he *was not* Brazell's counsel (Tr. 144-145); (3) that within the Trial Assignment form that the Rocky River Municipal Court prepared, the court took the affirmative step of crossing out "attorney", thereby demonstrating in official court records that Brazell was *pro se* (Tr. 145-146; Res. Exh. "H"); (4) no one in her court is recognized as an "attorney of record" until their name appears on the file jacket of the matter, and that this Respondent's name never was on Brazell's file (Tr. 159, 160-161, 173, 175); and (5) she herself agreed that since this Respondent forthrightly and candidly answered her inquiry regarding *non-representation* of Brazell, it was "abundantly" clear to her that Brazell was *pro se* (Tr. 174).

With the Magistrate before whom Attorney Pryatel appeared testifying to all of the above, Relator surely did not carry it's *clear and convincing* burden. *Cleveland Bar Assoc. v. Cleary*, 93 Ohio St. 3d 191, 2001-Ohio-1326 ("This Court has defined 'clear and convincing evidence' as 'that measure or degree of proof which is more than a mere "preponderance of the evidence", but not to the extent of such certainty as is required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established'").

c. <u>Full Disclosures to the Board and Cooperative Attitude</u>.

The Board found Respondent demonstrated a "lack of cooperation in the disciplinary process" (Bd. Dec. ¶ 30). This Respondent fully cooperated in all respects with the Board, the Panel, and Relator's assigned counsel. *Indeed, there is no allegation in any of the two drafted*

[24] "Defendant in court *pro se* before Magistrate Serrat; Reading of compl. & rts waived on record; *Defendant* entered Plea of Not Guilty, Time Waiver, Jury Waiver" (Res. Exh. "B", p. 3).

*complaints that this Respondent violated DR 7-106(A), DR 7-102(A)(5), or Gov. Bar Rule V, Section 9(G) (**Duty to Cooperate**).* This "wrong" was not even alleged.

During the pre-hearing discovery phase, Respondent made himself available for deposition at the convenience of Relator's counsel. Counsel for Respondent made arrangements with counsel for Relator to depose other Rocky River Municipal Court officials so as not to intrude on the important conduct of that court, at a location that was convenient for each of those witnesses and inconvenient for this counsel. Counsel for Respondent also stipulated to certain hearing evidence, such as the CourtSmart® audio recording of Brazell's arraignment and Rocky River court documents (Tr. 11).

d. <u>Character or Reputation</u>.

This Respondent's character for providing quality legal services for the poor and indigent is unquestioned:

> As to Pryatel's character and reputation, three judges of the Cuyahoga County Court of Common Pleas submitted letters praising Pryatel as professional, competent, and reputable. Judge Ronald Suster stated that Pryatel is respected for "filling a critical need in our criminal justice system by frequently representing poor defendants facing the possibility of significant prison terms". Similarly, three criminal-defense lawyers testified as to Pryatel's lengthy career, honesty, good character and professional reputation in the criminal-defense field.

Cleveland Metro. Bar Assoc. v. Pryatel (2013), 135 Ohio St. 3d 410, 2013-Ohio-1537, ¶ 13. See, *Dayton Bar Assoc. v. O'Neal*, 134 Ohio St. 3d 361, 2012-Ohio-5634, ¶ 14 (refusing to disbar attorney who represented clients after suspension) ("Indeed, as to the fourth [mitigating] factor, the Board noted that throughout his career, O'Neal has represented underserved individuals who might not otherwise be able to hire legal counsel, and such services are valued by the Dayton community and the courts").

e. <u>Imposition of Other Available Penalties or Sanctions</u>.

Gov. Bar Rule V, Section 13(C) permitted the panel and the Board to consider the imposition of other penalties or sanctions. Gov. Bar Rule V, Section 13(B)(6). Clearly, the established precedent is not as simplistic as the Board stated it to be, to wit: the "practice of law" after the suspension of one's license always equals permanent disbarment (Bd. Dec. ¶ 32). Even in circumstances where an Ohio counselor was *indefinitely suspended* and then engaged in the true "practice of law", permanent debarment is not the inevitable result. *Dayton Bar Assoc. v. Siehl*, 135 Ohio St. 3d 261, 2013-Ohio-735 (imposing second indefinite suspension to run consecutively with first indefinite suspension even where counsel refused to cooperate or appear in second disciplinary proceedings); *Col. Bar Ass'n. v. Gill*, 137 Ohio St. 3d, 377, 2013-Ohio-4619 (imposing second indefinite suspension on counsel who committed forty one disciplinary violations after first indefinite suspension, including being found in contempt of court and prejudicing a client by not filing a timely appeal); *Disciplinary Counsel v. Anthony*, 2013-Ohio-5502 (imposing indefinite suspension upon counsel who, while suspended from the practice of law, misappropriated $118,000.00 in church funds and then plead guilty to criminal grand theft); *Toledo Bar Assoc. v. Faraah*, 136 Ohio St. 3d 295, 2013-Ohio-3680 (imposing indefinite suspension to run consecutively with prior suspension for counselor who, while suspended from the practice of law, caused prejudice to a client's civil matter; retained $1,500.00 in fees; and failed to communicate with client who made repeated efforts to contact counsel); *Cincinnati Bar Assoc. v. Alsfelder*, 138 Ohio St. 3d 333, 2014-Ohio-870 (imposing indefinite suspension on counsel who, while suspended and while found in contempt for failing to adhere to his original suspension order, charged a client clearly excessive fees; failed to cooperate in the disciplinary process; failed to comply with the Board's issued subpoenas during discovery; and failed to

maintain segregated client funds). See also, *Disciplinary Counsel v. Troller*, 138 Ohio St. 3d 307, 2014-Ohio-60; *Disciplinary Counsel v. Freeman*, 126 Ohio St. 3d 389, 2010-Ohio-3824; *Disciplinary Counsel v. Seabrook*, 133 Ohio St. 3d 97, 2012-Ohio-3933; *Disciplinary Counsel v. Koury*, 77 Ohio St. 3d 433 (1997); *Disciplinary Counsel v. Bansci*, 79 Ohio St. 3d 392 (1997); *Disciplinary Counsel v. Blackwell*, 79 Ohio St. 3d 395 (1997); *Disciplinary Counsel v. Carson*, 93 Ohio St. 3d 137 (2001); *Columbus Bar Ass'n. v. Winkfield*, 107 Ohio St. 3d 360, 2006-Ohio-6; *Disciplinary Counsel v. Jackson* (1999), 86 Ohio St. 3d 104; *Disciplinary Counsel v. Higgins*, 117 Ohio St. 3d 473 (2008); *Akron Bar Ass'n. v. Barron*, 85 Ohio St. 3d 167 (1999); *Disciplinary Counsel v. Mitchell*, 124 Ohio St. 3d 266 (2010). Not one of these analogous decisions cited to the panel and Board was even mentioned, let alone distinguished, by the Board here (Bd. Dec., *passim*).

In point of fact, the cases cited by the Board can be distinguished from all of the cases cited by Respondent (in terms of Relator's requested disbarment) on the basis that Brazell was not harmed to any degree, and this Respondent derived no economic benefit whatsoever:

> Here, Seabrook's misconduct includes his continued practice of law during his registration suspension and his initial failure to cooperate in the ensuing disciplinary investigation.
>
> * * *
>
> It appears that no client suffered grave or irreparable harm as a result of Seabrook's practice during his registration suspension – though their cases were undoubtedly delayed – and that he did not act with dishonest or selfish motives. We do not take the recommendations of the Panel and Board lightly, but given the sanctions we have imposed for similar misconduct and our ongoing concerns about Seabrook's mental health since he stopped taking his medications in 2010, we conclude that an actual suspension from the practice of law is warranted.

Disciplinary Counsel v. Seabrook, 133 Ohio St. 3d 97, 2012-Ohio-3933, ¶ 14. *See also, Disciplinary Counsel v. Gorby*, 2015-Ohio-476, ¶ 15 ("Gorby's clients suffered no harm as a result of her misconduct and she poses little, if any, threat to the public…").

f. <u>Other Interim Rehabilitation</u>.

Gov. Bar Rule V, Section 13(C)(8) suggest that the Board and Panel consider "other interim rehabilitation". Here, this Respondent has fully complied with the Supreme Court's indefinite suspension order and conditions (with exception of these alleged three incidents of the "practice of law" for one "client"). There is no complaint allegation to the contrary. The prior indefinite suspension order from the Ohio Supreme Court required that Respondent comply "…with the terms of his OLAP contract, [and] has obtained treatment from a psychiatrist for his mental disorders [and] has fulfilled all follow-up care and reporting requirement imposed by OLAP". *Cleveland Metro. Bar Assoc. v. Pryatel*, 135 Ohio St. 3d 410, 2013-Ohio-1537, ¶ 20. The hearing evidence was such that Respondent has completely complied with his OLAP requirements; regularly attends OLAP meetings; and has been periodically seeing a mental health care provider for treatment (Tr. 345-347). The Board found this to be undisputed (Bd. Dec. ¶ 28) but then inconsistently found there to be "…no mitigating factors" (*Id.* at ¶ 31). But see, *Disciplinary Counsel v. Weithman*, 2015-Ohio-482, ¶ 22 (while mental disability was not shown to have contributed to misconduct, one's commitment to proper care and treat is a mitigating factors).

<u>CONCLUSION</u>

For the forgoing reasons, the Board's Findings of Fact, Conclusions of Law and Sanctions Recommendation should be reversed and vacated. Respondent requests oral argument.

Respectfully submitted,

s/Keith L. Pryatel

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Attorneys for Appellant,
Mark Pryatel

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Respondent Mark Pryatel's Objections to the Findings of Fact, Conclusions of Law, and Recommendation of the Board was served upon the following via electronic mail on this 10th day of July, 2015:

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s/Keith L. Pryatel

APPENDIX

BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO

In re:

Complaint against

Mark Robert Pryatel
Attorney Reg. No. 0019678

Respondent

Cleveland Metropolitan Bar Association

Relator

Case No. 2014-037

Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct of the Supreme Court of Ohio

OVERVIEW

{¶1} This matter was heard on December 5, 2014 in Cleveland and on February 5, 2015 in Columbus before a panel consisting of Hon. John Wise, McKenzie Davis, and Robert L. Gresham, chair. None of the panel members resides in the appellate district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the December 5, 2014 hearing represented by Keith L. Pryatel and Steven E. Pryatel. Respondent was not present at the February 5, 2015 hearing in Columbus. Joseph Dunson, William Norman, and Heather Zirke appeared on behalf of Relator.

{¶3} On April 8, 2014, Relator filed its original complaint against Respondent alleging violation of the following disciplinary rules in connection with his representation of Richard Brazell in the Rocky River Municipal Court:

- Prof. Cond. R. 5.5(a) [practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction];
- Prof. Cond. R. 8.1(a) [knowingly making a false statement of material fact in connection with a disciplinary matter];

- Prof. Cond. R. 8.4(c) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation]; and

- Prof. Cond. R. 8.4(d) [engaging in conduct that is prejudicial to the administration of justice].

{¶4} On June 16, 2014, Respondent filed his answer to the complaint. On November 5, 2014, Relator filed an amended complaint, alleging additional violations of Prof. Cond. R. 5.5(a) and Prof. Cond. R. 8.4(d) related to Respondent's representation of Brazell in the Cleveland Municipal Court. Respondent filed his answer to the amended complaint on November 25, 2014.

{¶5} Evidence was presented by way of testimony; Relator's Exhibits 1-6, 9-12, and 13; Respondent's Exhibits A, B, C, E, F, G, H, I, J, K, M, N, O, Q, R, and S; testimony of James Melton, Sonya Spurlock, Rhonda Melton, Richard Brazell, Michael O'Shea, Magisrate Kelly Serrat, Christine Seedhouse, Judge Brian Hagan, Michael Bracken, Respondent, and Grace Evangelo.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶6} Respondent was admitted to the practice of law in the state of Ohio on November 1, 1983 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶7} On April 24, 2013, the Supreme Court of Ohio suspended Respondent indefinitely from the practice of law. *Cleveland Metro. Bar Assn. v. Pryatel,* 135 Ohio St.3d 410, 2013-Ohio-1537.

Count One: Representation of Richard Brazell in the Cleveland Municipal Court[1]

{¶8} In May 2013, Richard Brazell was charged with a probation violation in Cleveland Municipal Court. As a result, Brazell turned himself in.

{¶9} In May 2013, Respondent met with James Melton, Rhonda Melton, and Sonya Spurlock, Brazell's step-father, mother, and girlfriend, respectively.

{¶10} Respondent had previously represented Brazell on other matters as recent as 2011 and they were discussing retaining Respondent for a new traffic offense.

{¶11} At no point during the meeting did Respondent mention his license suspension.

{¶12} During the meeting, Respondent was paid $450, $300 for a retainer on Brazell's current cases and $150 for amounts owed on previous matters.

{¶13} On June 3, 2013, Respondent appeared in the Cleveland Municipal Court to represent Brazell in a traffic related offense in Cleveland Municipal Court, Case No. 2008 TRD 026794.

Count Two: Representation of Richard Brazell in the Rocky River Municipal Court on June 5, 2013

{¶14} Prior to June 5, 2013, Mr. Brazell was charged with driving under a suspended license in Rocky River Municipal Court.

{¶15} On June 5, 2013, Respondent met with Brazell in the Rocky River Municipal Court for arraignment on a driving under suspension charge.

{¶16} Brazell paid Respondent $50 to appear in court that day.

{¶17} Respondent appeared with Brazell again before Magistrate Serrat and entered a plea of not guilty on behalf of Brazell, referenced his representation of Brazell on June 3, 2013 in Cleveland Municipal Court, and waived Brazell's right to a trial by jury.

---

[1] The counts identified in this report correspond to the allegations set forth in Relator's amended complaint.

{¶18} Respondent represented to Magistrate Serrat that he "would probably enter an appearance" but Brazell was pro se for the time being.

Count Three: Violations of the Ohio Rules of Professional Conduct related to representation of Richard Brazell in the Rocky River Municipal Court on July 9, 2013

{¶19} On July 9, 2013, Richard Brazell appeared in Rocky River Municipal Court for a pretrial on a driving under suspension charge.

{¶20} Brazell testified that Respondent had been his attorney throughout the matter.

{¶21} Upon arriving at Rocky River Municipal Court, Brazell waited for Respondent.

{¶22} Eventually, Respondent appeared with Brazell before Judge Brian Hagan in open court and assisted Brazell in entering a plea of no contest to an amended charge of failure to display. Other charges were nolled consistent with Respondent's prearranged agreement with Prosecutor Michael O'Shea.

{¶23} Respondent never informed either Brazell, Judge Hagan, or O'Shea that his license was suspended.

{¶24} Immediately after accepting Brazell's plea, Judge Hagan recalled that Respondent's last name sounded familiar because he had just read the Supreme Court's published disciplinary decisions. As a result, he asked his bailiff to check Respondent's license. After checking, his bailiff confirmed Respondent's license was in fact suspended. Accordingly, Judge Hagan left the bench and asked O'Shea if Respondent had negotiated a plea which O'Shea and he confirmed. Judge Hagan expressed that he believed Respondent's license was under suspension and he "[thought] he [had] to report this."

{¶25} Subsequently, after leaving the bench, Judge Hagan called Disciplinary Counsel to advise of the situation.

{¶26} In his written response to a letter of inquiry from Relator, Respondent denied representing Brazell after his indefinite suspension commenced.

{¶27} Respondent accepted payment from Brazell's family for post-suspension legal work he performed for Brazell, and provided Brazell's stepfather with a receipt for his payment.

{¶28} Respondent has been involved with OLAP since before his suspension. As of December 2014, he was attending meetings once a month.

{¶29} The panel finds by clear and convincing evidence, through exhibits and testimony, that Respondent violated the following in relation to his multiple representations of Brazell: Prof. Cond. R. 5.5(a), Prof. Cond. R. 8.1(a), Prof. Cond. R. 8.4(c), and Prof. Cond. R. 8.4(d).

AGGRAVATION, MITIGATION, AND SANCTION

{¶30} Based upon the exhibits and testimony adduced at the hearing, the panel finds the following aggravating factors: prior disciplinary offenses; a dishonest or selfish motive; a pattern of misconduct; multiple offenses; lack of cooperation in the disciplinary process; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; and refusal to acknowledge the wrongful nature of conduct.

{¶31} Based upon the exhibits and testimony adduced at the hearing, the panel finds no mitigating factors.

{¶32} Relator is requesting permanent disbarment. Respondent has not offered a specific sanction, but rather loosely argued that the panel should consider "other interim rehabilitation" or "other penalties or sanctions" besides disbarment. At best, the panel can determine, Respondent is seeking to maintain the status quo of indefinite suspension or imposing an additional indefinite suspension to run consecutively. Respondent clearly engaged in the

practice of law following imposition of an indefinite suspension which based on prior decisions by the Board and the Court call for permanent disbarment. The aggravating factors identified above only reinforce that conclusion.

{¶33} In determining whether or not this sanction is appropriate for Respondent's misconduct, all relevant factors must be considered including duties of Respondent, the violations incurred and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli,* 96 Ohio St.3d 424, 2012-Ohio-4743. Additionally, in making a final determination, evidence of aggravating and mitigating factors are considered. *Disciplinary Counsel v. Broeren,* 115 Ohio St.3d 473, 2007-Ohio-5251. We therefore direct our attention to a few relevant cases.

{¶34} In *Disciplinary Counsel v. Sabroff,* 123 Ohio St.3d 182, 2009-Ohio-4205, the Supreme Court of Ohio disbarred an attorney who continued to practice law during his interim felony suspension. *Id.* at ¶14. The Court found that less than one month after the commencement of his interim suspension, the respondent sent a letter on his son's behalf to the Cleveland Heights Municipal Court regarding a traffic infraction. *Id.* at ¶20. The respondent sent the letter on his letterhead, identified himself as "Attorney and Counselor at law," entered a not guilty plea on his son's behalf, waived all statutory time requirements, and sought the scheduling of a pre-trial. *Id.* Sabroff was disbarred for his efforts to practice law under suspension.

{¶35} In *Disciplinary Counsel v. Caywood,* 74 Ohio St.3d 596, 1996-Ohio-294, the respondent was indefinitely suspended for violating various provisions of the former Code of Professional Responsibility. One month after the commencement of his indefinite suspension, Caywood made a pre-trial appearance before a referee in Willoughby Municipal Court. *Id.* at 597. The parties in *Caywood* stipulated that the respondent cooperated with disciplinary

authorities during the case, and only engaged in the practice of law one time after the commencement of his indefinite suspension. *Id.* at 598. The Board recommended that Caywood's reinstatement eligibility date be extended eighteen months as a sanction. *Id.* Despite the stipulations, and the Board's recommendation, the Court disbarred Caywood.

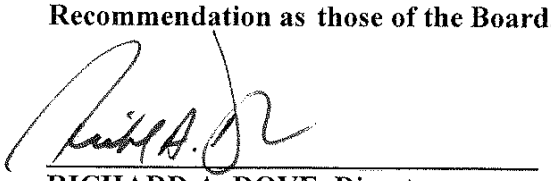
{¶36} Here, Respondent's actions defy logic and reason and go beyond either actor in *Sabroff* or *Caywood.* Moreover even at the hearing, Respondent constantly contradicted himself, as well as, stood by his contention that negotiating a plea deal, speaking for a defendant in open court, and accepting a retainer did not rise to the level of practicing law.

{¶37} For the foregoing reasons and taking into account the aggravating and mitigating factors, the panel agrees with Relator's recommendation of a permanent disbarment from the practice of law.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on June 12, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Mark Robert Pryatel, be permanently disbarred from the practice of law in Ohio and ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct 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, Director