

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel, : **CASE NO. 2015-1316**
Relator, :
vs. :
Gerald Phillips : **RELATOR'S ANSWER TO**
: **RESPONDENT'S OBJECTIONS TO**
Respondent. : **THE BOARD OF PROFESSIONAL**
: **CONDUCT'S REPORT AND**
: **RECOMMENDATION**

**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF
PROFESSIONAL CONDUCT'S REPORT AND RECOMMENDATION**

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

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RELATOR'S REPLY BRIEF

INTRODUCTION

Respondent Phillips has stipulated to, and testified in support of, facts, rule violations, and a recommended sanction. After the Panel extensively questioned both respondent Phillips and respondent Cannata (hereinafter referred to as "Phillips" and "Cannata"), the Hearing Panel and the Board adopted the respondents' stipulations. Despite that, Phillips has filed objections and has effectively not only negated any mitigation he appeared to earn for acknowledging the

wrongfulness of his misconduct, he has now created several aggravating factors. While relator urges this Court to hold respondent to his stipulations and testimony regarding the violations and their factual basis, relator now asks this Court to impose a greater sanction. Because the aggravating factors now outweigh the mitigating factors, relator asks this Court to deviate from the Board's recommended sanction and to impose a sanction greater than a six-month, fully stayed, suspension.

FACTS

This consolidated case involves two respondent lawyers, Gerald Phillips and Sam Cannata¹, who cooperated together as co-counsel in connection with two cases regarding limited liability companies of which Cannata was a member, resulting in admitted conflict of interest violations by both respondents. Bd. Report ¶ 3. In addition, Phillips and Cannata acted as co-counsel in certain business matters under circumstances that created the impression that they were practicing law as a partnership, when they were not.² *Id.*

Co-Counsel Relationship

In May 2009, Phillips and Cannata executed a co-counsel agreement, which stated in part that nothing about their relationship shall “establish any kind of any other relationship, including without limitation a partnership, a professional association, or a law firm.” Bd. Report ¶ 13 & 17; Phillips Ex. 5. Despite that language, they filed Articles of Organization with the Ohio Secretary of State for a limited liability company called Cannata Phillips, LPA, LLC, which expressly represented that they were a law firm. Bd. Report ¶ 17; Phillips Ex. 7. Respondent Phillips testified that they filed the Articles of Organization to somehow provide notice to the

¹ The statement and arguments contained in this reply are solely intended to apply to respondent Phillips. Both relator and respondent Cannata stand by their separate stipulated agreement.

² For narrative purposes, the facts underlying the respective counts will be addressed largely in chronological order rather than the by the numerical order of the counts in the complaint.

public that he would not be bound by Cannata's other liabilities. Bd. Report ¶ 14; Hearing Tr. 42-43. In fact, the two of them also went so far as to obtain separate malpractice insurance and to open a separate escrow account for Cannata Phillips LPA, LLC. Hearing Tr. 68:7 – 69:10.

Thereafter, Cannata created a website for Cannata Phillips, LPA, which gave the misleading appearance that they were members of a law firm. Bd. Report ¶ 17; Phillips Ex. 6. They intended to attract clients with their website, from which the fees would be divided according to the co-counsel agreement. Bd. Report ¶ 17; Hearing Tr. 93-94. Respondents have now removed the website from the internet and dissolved Cannata Phillips LPA, LLC. Bd. Report ¶ 18; Phillips Stip.³ ¶ 11.

96th Street Foreclosure

Respondent Phillips' conflict of interest violations occurred in 2012; however, the facts leading up to those violations date back to the 1990's. In the mid-1990's, prior to becoming an attorney, respondent Cannata and David Snider formed several real estate and property management companies together, which owned and operated several parcels of real estate in Northeast Ohio. Bd. Report ¶ 14; Phillips Stip. ¶ 5. During 2008, the real estate market suffered a dramatic downturn which had a significant negative impact on the business entities owned by respondent Cannata, David Snider, and their wives. Bd. Report ¶ 14; Phillips Stip. ¶ 10. This led to bitter business disputes and ultimately to an impasse between the Cannatas and the Sniders in 2012. Bd. Report ¶ 14; Phillips Stip. ¶ 5-10.

Among the entities that Cannata and Mr. Snider formed were:

- a. Vista Way Partners, LLC ("Vista Way") an Ohio limited liability company. Snider Interests LLC (an entity that, since approximately 2008, was owned by David Snider's wife, Robin) and Cannata Vista Way LLC (an entity whose

beneficial ownership is owned by Cannata's wife, Jill) are the members of Vista Way, with each having a 50% membership interest. At all relevant times herein, Mr. Cannata and Robin Snider served as managers of Vista Way.

b. Snider Cannata Property Management LLC ("SCPM") is an Ohio limited liability company. Cannata and Mr. Snider were the members of SCPM, with each having a 50% membership interest. They were also co-managers of SCPM. SCPM managed all real properties owned by Vista Way.

c. Bridgeview Center South LLC ("BCS") is an Ohio limited liability company. Snider Interests LLC and Cannata-Infinity LLC (an entity whose beneficial ownership is owned by Jill Cannata) are the members of BCS, with each having a 50% membership interest. At all relevant times herein, Cannata and Robin Snider served as managers of BCS. Bd. Report ¶ 35; Phillips Stip. ¶ 25.

Cannata and David Snider also formed 96th Street Development, LLC ("96th Street"), which was owned in part by Snider personally and by a Cannata entity. Bd. Report ¶ 19; Phillips Stip. ¶ 7. In March 2009, Cannata and Mr. Snider retained Phillips to represent 96th Street in connection with an anticipated foreclosure filing by Bank of America against 96th Street. Bd. Report ¶ 35; Phillips Stip. ¶ 27. As part of that representation, Phillips prepared certain mortgages for money owed on intercompany accounts by 96th Street to other related entities, which included Snider Interests, LLC, Vista Way, and BCS, all owned by the Sniders or entities controlled by the Sniders. Bd. Report ¶ 35; Phillips Stip. ¶ 7 & 28. Pursuant to that representation, Phillips prepared and recorded the mortgages, defended 96th Street in the foreclosure action, and filed cross-claims based on the mortgages that he had drafted. Bd. Report ¶ 35; Phillips Stip. ¶ 23-30; Hearing Tr. 35-37.

³ This refers to the Agreed Stipulation of Facts

In 2010, the mortgage obligations by 96th Street based on the intercompany accounts were either written off or fully satisfied. Bd. Report ¶ 36. However, Phillips continued to represent Snider Interests, LLC, and the other entities owned in part by Snider Interests, LLC, until September 25, 2012. Bd. Report ¶ 14; Phillips Stip. ¶ 39-41. Phillips also continued to represent 96th Street until December 21, 2012. Bd. Report ¶ 36; Phillips Stip. ¶ 42.

On June 27, 2012, Phillips filed a complaint on behalf of Cannata Infinity, LLC to statutorily dissolve BCS (owned by Snider Interests, LLC and Cannata-Infinity, LLC), resulting from a management deadlock. Bd. Report ¶ 37; Phillips Stip. ¶ 43-45; Hearing Tr. 38-39. Pursuant to applicable statute, Phillips named Snider Interests, LLC as a defendant. Bd. Report ¶ 37; Phillips Stip. ¶ 43-45; Hearing Tr. 38-39. As of June 27, 2012, Phillips was still counsel of record in the 96th Street foreclosure case (owned in part by David Snider) and the cross claimants including BCS and Snider Interests, LLC. Bd. Report ¶ 38; Phillips Stip. ¶ 43-45; Hearing Tr. 38-39. Phillips admitted by stipulations and in his testimony before the Panel that he was “in a conflict.” Bd. Report ¶ 38; Phillips Stip. ¶ 46; Phillips Stip. Viol.⁴ ¶ 3; Hearing Tr. 13-18 and 38-39.

On July 9, 2012, the Sniders filed a statutory dissolution proceeding of their own to dissolve various Cannata/Snider entities including, BCS, Vista Way, and SCPM resulting from a management deadlock. Bd. Report ¶ 39; Phillips Stip. ¶ 47. On October 3, 2012, the court in the statutory dissolution cases granted Snider Interests, LLC’s motion to disqualify Phillips and Cannata as counsel, holding “The Court finds the motion to disqualify counsel to be well taken and it is hereby granted. Gerald Phillips and Sam Cannata are disqualified as counsel and shall not represent any party in the above-caption consolidated matters.” Bd. Report ¶ 41; Cannata Stip. ¶ 34.

Vista Way Eviction

As described above, Vista Way was a limited liability company that, by 2012, was indirectly owned on a 50-50 basis by the wives of Cannata and David Snider. Bd. Report ¶ 19; Phillips Stip. ¶ 7; Vista Way was the owner of the real property for the headquarters of various Cannata/Snider businesses. Bd. Report ¶ 19. One of the lessees for this property was Snider Cannata Property Management, LLC (SCPM), which was the property manager for various Cannata/Snider enterprises. Bd. Report ¶ 19; Phillips Stip. ¶ 7. SCPM was owned by respondent Cannata and David Snider, each having a 50 percent interest and an equal share in the management. Bd. Report ¶ 19; Phillips Stip. ¶ 7; Hearing Tr. 86-87; Phillips Ex. 4. By 2012, the Sniders and the Cannata's were involved in a bitter dispute over the control and management of the Cannata/Snider enterprises. Bd. Report ¶ 20; Phillips Stip. ¶ 10.

Cannata asked Phillips to file an eviction action on behalf of Vista Way against SCPM. Bd. Report ¶ 21. Though the eviction would have also purportedly evicted Cannata in so far as he was a manager of SCPM, in reality he would still have had access to the building as a manager of Vista Way. Bd. Report ¶ 21; Phillips Stip. ¶ 19; Hearing Tr. 99:19 – 100:7. Because Phillips' judgment was compromised, he believed that Cannata had the authority to pursue relief on behalf of Vista Way. Hearing Tr. 57.

On July 13, 2012 at 8:38 a.m., Phillips filed the complaint on behalf of Vista Way against SCPM in the Cuyahoga County Court of Common Pleas, alleging breach of the lease agreement between the parties. Bd. Report ¶ 23; Phillips Stip. ¶ 12. Simultaneously, with the filing of the complaint, Cannata filed a waiver of service on behalf of SCPM, acknowledging that SCPM had already received a copy of the complaint. Bd. Report ¶ 23; Phillips Stip. ¶ 20; Phillips Ex. 9 & 10. On July 13, 2012, at 8:42 a.m., only four minutes after the complaint was filed, Cannata

⁴ This refers to the Stipulated Recommendation for Violations and Sanctions

filed an answer, admitting certain allegations in the complaint and denying other allegations. Bd. Report ¶ 24; Phillips Stip. ¶ 21; Phillips Ex. 11.

Phillips and Cannata jointly submitted to the judge a stipulated judgment entry evicting SCPM employees and managers from the leased premises. Bd. Report ¶ 25; Phillips Stip. ¶ 22; Phillips Ex. 12. Because that particular judge was unavailable, the entry was forwarded to Judge McMonagle, who happened to be the judge presiding over the corporate dissolutions filed by Phillips and Cannata and David Snider a few days before the filing of the eviction action. Bd. Report ¶ 27; Phillips Stip. ¶ 23. As a result, Judge McMonagle did not sign the entry. Bd. Report ¶ 27; Phillips Stip. ¶ 23. The SCPM operating agreement specifically provided that the members had “equal rights in the management of the business.” Bd. Report ¶ 26; Phillips Ex. 4. Despite that requirement in SCPM’s operating agreement, Cannata filed the SCPM answer and the proposed stipulated judgment entry without the consent of David Snider or his wife. Bd. Report ¶ 26; Phillips Stip. ¶ 21 22; Hearing Tr. 105 – 106. Cannata conceded at the hearing that Snider’s consent was required. Bd. Report ¶ 26; Hearing Tr. 105-106.

ARGUMENT

I. BASED UPON THE RESPONDENT’S TESTIMONY, THE BOARD CORRECTLY FOUND THAT RESPONDENT VIOLATED PROF. COND. R. 1.7(a)(2)

Before the hearing, Phillips entered into a set of comprehensive stipulations that included stipulations to facts, mitigating factors, and, most importantly, rule violations, and a recommended sanction. Further, Phillips testified at the hearing in support of those stipulations during the hearing. Finally, during a detailed examination by the panel, Phillips explained why he believed there was a conflict of interest. At no time during the hearing did Phillips question

the stipulations. As a result, the Board correctly relied upon the stipulations of fact and Phillips' testimony and found that he violated Rule of Prof. Cond. 1.7(a)(2).

A. A RESPONDENT'S TESTIMONY ADMITTING THAT HE VIOLATED PROF. COND. R. 1.7(a)(2) IS SUFFICIENT TO ESTABLISH A VIOLATION OF THAT RULE.

Relying on Phillips' sworn testimony and the stipulated facts, the Board correctly determined that Phillips violated Prof. Cond. R. 1.7(a)(2). In order to violate Prof. Cond. R. 1.7(a)(2), a lawyer must accept or continue representing a client when there is a substantial risk that the lawyer's ability to represent that client is materially limited by the lawyer's responsibilities to another ("material limitation conflict"). The principles underlying this rule are loyalty and independent judgment, and whether divided loyalties may affect a lawyer's judgment. Prof. Cond. R. 1.7(a)(2) cmt. 1. In light of comment 1, there are two fundamental questions when analyzing a conflict under Prof. Cond. R. 1.7(a)(2) are: Is the attorney loyal to his or her client, or is the attorney ultimately loyal to another person or entity, i.e. another client, former client, a third person, or the lawyer him or herself, and is there a substantial risk that the competing loyalty will materially limit the lawyer's judgment. *Id.* ("Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client.") Thus, when a lawyer comes before the Board of Professional Conduct and testifies under that there was a substantial risk that his or her judgment in representing a client would be materially limited by some competing loyalty and that he or she continued to represent that client despite that risk, there is sufficient evidence to establish a violation of Prof. Cond. R. 1.7(a)(2). Neither the Board nor this Court need consider other objective facts and circumstances to find the violation. In looking back at an attorney-client relationship in the context of Prof. Cond. R. 1.7(a)(2), there is no better arbiter of a

lawyer's judgment than the lawyer himself. If the lawyer admits that his or her judgment was limited, then the violation has been established.

Of course, in many cases, it is necessary to refer to other objective facts to prove divided loyalty resulting in a substantial risk of materially limited judgment. However, this Court should not confuse what is typically *used* to prove a violation of Prof. Cond. R. 1.7(a)(2) with what is *required* to prove a violation.

In the typical litigated case, an attorney denies that a conflict existed, and in those cases, relator must prove other facts that demonstrate that the attorney engaged in a conflict of interest. For example, relator might prove that the representing attorney prejudiced or damaged the client's case and then offers evidence to show that the prejudicial action or inaction by the representing attorney was caused by divided loyalties.

However, it is not necessary for relator to prove that the client's case was actually prejudiced or damaged. All that is necessary to prove the material limitation conflict is the existence of conflicting interests and the "substantial risk" that those conflicting interests could materially limit the attorney's ability to represent his or her client with the requisite undivided loyalty and independent judgment. Where, as here, a respondent attorney expressly admits both the existence of the conflicting interests and the impairment of his judgment, no further proof is necessary.

B. PHILLIPS STIPULATED AND TESTIFIED THAT HE VIOLATED PROF. COND. R. 1.7(a)(2).

On May 28, 2015, prior to the hearing in this matter and after extensive negotiation through counsel, Phillips stipulated to a comprehensive set of facts, violations, and recommended sanction in this matter. Bd. Report ¶ 7; Phillips Stipulated Recommendation for Violations and Sanctions; Phillips Agreed Stipulation of Facts. In those stipulations, Phillips

stipulated and agreed that his conduct in Counts One and Three violated Prof. Cond. R. 1.7(a)(2). Phillips Stip. Viol. ¶ 1 & 3. Both Phillips and his attorney signed those stipulations.

On June 4, 2015, Phillips testified at the disciplinary hearing in support of his stipulations even while he was questioned at length by the hearing panel. Bd. Report ¶ 7; Hearing Tr. 12 – 74. Before and during the hearing, Phillips was represented by Chris Weber from Kegler, Brown, Hill, & Ritter. In his opening statement, Phillips stated, through counsel, that Phillips accepted responsibility for his misconduct and felt remorse for that conduct. Hearing Tr. 9 – 10. Then, relator called Phillips to testify. Hearing Tr. 12. After the court reporter swore him in, Phillips then testified, under oath, to the following:

-Regarding the Stipulated Recommendations for Violations and Sanctions

- That he signed the document;
- That he had an opportunity to review the document prior to signing it;
- That he reviewed the document with counsel;
- That he signed the document freely and voluntarily;
- That nothing was promised to him in order to obtain his signature;
- That he understood that he was stipulating to a recommended sanction;
- That the recommendation was not binding upon the Panel, the Board, or this Court;
- That he agreed with the recommended sanction of a stayed, six-month suspension; and
- That by entering into the stipulations, he was agreeing that his conduct violated the Rules of Professional Conduct.

-Then, regarding the Agreed Stipulation of Facts:

- That he signed the document;
- That he signed the document freely and voluntarily;

- That no promises were made to obtain his signature; and
- That he was agreeing to the facts contained in the stipulations.

After relator addressed each violation individually, Phillips acknowledged each violation as described in the stipulations, and Phillips then admitted that his conduct violated each of those rules. Hearing Tr. 12 – 18. Then, just before resting, relator moved the stipulations into evidence without objection. Hearing Tr. 22. Respondent’s counsel and the Panel questioned Phillips. Hearing Tr. 22 – 74. Phillips again testified in support of the stipulation and purported to take responsibility for his actions, stating:

- “Well, I accept full responsibility for it. As I look back...because Mr. Cannata was a 50 percent owner in Vista Way, I should have - - and being a lawyer of 37 years, I should have sat back, questioned and said, you know, Mr. Cannata, You need to get independent counsel besides yourself to represent SCPM. I didn’t think about it. I made an error.” Hearing Tr. 32:12 – 20.
- A conflict was created in the Vista Way Eviction because respondent Cannata’s interests were on both sides of the matter. *Id.* at 34:11 – 15.
- A conflict was created in the 96th Street Foreclosure matter because he was representing Snider’s interests in one matter and was adverse to them in another. *Id.* at 35:10 – 39:4.
- That his judgment was compromised in the Vista Way Eviction and that he did not question Cannata’s actions despite knowing or having reason to know that Cannata and Snider were equal partners. *Id.* at 57:2 – 12 (“Well, to be truthful at the time that’s probably my error of judgment. I just didn’t dwell on it. That’s my error of judgment, mistake.”)
- “I made a mistake. I made errors of judgment, and I accept the responsibility for that....I should know better.” *Id.* at 73:24 – 74:3.

Despite having many opportunities to object to the violations or the sufficiency of the evidence provided, Phillips did not object or offer any of the arguments or analysis that he now tries to inject into the record through his objections. Instead, Phillips stipulated and testified that he violated Prof. Cond. R. 1.7(a)(2). Specifically, he agreed that he continued to represent Snider/Cannata entities when there was a substantial risk that his judgment was materially limited both by his representation of those same entities in some cases while acting as adversarial counsel against some of those same entities in other matters, and by his personal and professional relationship with Cannata, whose interests were involved in the 96th street foreclosure, the corporate dissolution, and on both sides of the Vista Way Eviction. Prof. Cond. R. 1.7(a)(2) is a rule involving an attorney's judgment and loyalty and the risks posed to those, and that Phillips, who is certainly a qualified arbiter of his own judgment, stipulated and testified that his judgment was placed at substantial risk of a material limitation, which is against his interest and thus reliable, the Panel and Board was correct to find that he violated that rule.

C. THE FACTS CORROBORATE PHILLIPS' TESTIMONY THAT HE VIOLATED PROF. COND. R. 1.7(a)(2) AND SUPPORT THE VIOLATION FOUND BY THE BOARD.

The Board correctly found that Phillips violated Rule 1.7(a)(2) in both the Vista Way Eviction and the 96th Street Foreclosure. Bd. Report ¶ 28 & 43. With respect to the Vista Way Eviction, the Board found that Phillips' personal relationship with Cannata materially limited his judgment. Bd. Report ¶ 28. Several factors corroborate and support these findings: (1) Phillips' close personal and professional relationship with Cannata; (2) Phillips' participation in a sham legal process to benefit Cannata; (3) The short timeline between the corporate dissolution Phillips filed for Cannata and the Vista Way eviction. Those two actions, which were adverse to David Snider and the Snider's interests, occurred within a very short period of time and at the

same time that Phillips was purportedly representing Snider's interests in the 96th Street Foreclosure matter.

Although Phillips attempts to downplay the importance of his relationship with Cannata, it is clear from the testimony in this matter that their relationship was lucrative and important to Phillips. Since at least 2008, Cannata and Phillips have enjoyed a personal and extensive professional relationship. Hearing Tr. 44:21 – 45:10. In 2009, they entered into a formal agreement to co-counsel various cases together. Phillips Ex. 5. Phillips saw Cannata as a young attorney who needed a mentor, and he wanted to provide that service to him. Hearing Tr. 44:4 – 7. In fact, at the disciplinary hearing, Phillips became emotional while testifying about his relationship with Cannata – going so far as to apologize to Cannata. Hearing Tr. 73:19 – 74:4. Phillips' personal relationship with Cannata was not lost on the Board, as evidenced by its reference to Phillips' emotional testimony. Bd. Report ¶ 30 fn.4.

But, the relationship was also very lucrative for Phillips. The two of them earned approximately \$140,000 over three years, which was separate from their individual practices. Bd. Report ¶ 13; Hearing Tr. 71:19 – 22. In fact, as a result of their relationship, Cannata still owes money to Phillips. Hearing Tr. 71:23 – 71:4. All of these facts corroborate Phillips' testimony at the hearing that Cannata's interests formed the basis of the conflict, and they support the Board's reliance upon that testimony, acceptance of the stipulations, and finding that Phillips violated Prof. Cond. R. 1.7(a)(2). Bd. Report ¶ 15 & 28; Hearing Tr. 34:11-16.

The finding of a material limitation conflict is further supported by the series of events in which Phillips and Cannata concocted and participated in a sham legal process in an effort to benefit Cannata at the expense of David Snider. Vista Way, beneficially owned by the Sniders and Cannatas, owned a piece of property that it leased to other various Snider/Cannata entities

for those entities to use as a headquarters. Bd. Report ¶ 19; Phillips Stip. ¶ 7; Hearing Tr. 106:24 – 107:5. By June 2012, the Sniders and the Cannata's were involved in a bitter dispute over the control and management of the Snider/Cannata entities. Bd. Report ¶ 20. As a result, on June 27, 2012, Phillips, acting as counsel for Cannata, filed for a corporate dissolution of one of the Snider/Cannata entities on Cannata's behalf, naming Sinder Interests LLC as a defendant. Bd. Report ¶ 37; Phillips Stip. ¶ 43. At the disciplinary hearing, Phillips testified that Cannata unilaterally changed the locks to the headquarters for *all* of the Snider/Cannata entities. Hearing Tr. 53:17 – 54:3. The Sniders then filed their own corporate dissolution action on July 9, 2012. Bd. Report ¶ 39; Phillips Stip. ¶ 47; 54:4 – 9. Phillips received notice of that action, which included dissolution of Vista Way based upon a management deadlock.

Phillips then conspired with Cannata to evict SCPM from the building, thereby evicting David Snider. Phillips and Cannata planned to file a complaint and have Cannata waive service and file an answer admitting to the breach of the lease agreement. Hearing Tr. 55:18 – 57:11. The two of them further conspired and agreed to submit an agreed judgment entry disposing of the majority of the matter; to David Snider's detriment and before he could react.

With the plan in place, Phillips and Cannata began to execute their scheme. Purporting to represent Vista Way, Phillips drafted an eviction complaint alleging that SCPM breached the lease agreement with Vista Way. Bd. Report ¶ 23; Phillips Ex. 9; Hearing Tr. 55:18 – 21. Simultaneously, with the filing of the complaint, respondent Cannata filed a waiver of service on behalf of SCPM acknowledging that SCPM had already received a copy of the complaint. Bd. Report ¶ 23; Phillips Stip. ¶ 20; Phillips Ex. 10; Hearing Tr. 55:18 – 21. Four minutes later, Cannata filed an answer, admitting certain allegations, including the breach of the lease agreement. Bd. Report ¶ 24; Phillips Stip. ¶ 21; Phillips Ex. 11. After filing these items, Phillips

and Cannata jointly submitted to the judge a stipulated judgment entry evicting SCPM employees and managers from the leased premises. Bd. Report ¶ 25; Phillips Stip. ¶ 22; Phillips Ex. 12. Merely by luck, the judge they submitted their entry to was unavailable; consequently the entry was forwarded to Judge McMonagle, who was the judge presiding over the corporate dissolution, and thus aware of the management deadlock. Judge McMonagle refused to sign the entry. Bd. Report ¶ 27; Phillips Stip. ¶ 23.

Phillips engaged in this conduct knowing that if he and Cannata were successful, David Snider would not have time to react and to protect his interests. Phillips knew of the management deadlock. He knew that Cannata was on both sides of the suit, acting as manager for Vista Way, and as manager/counsel for SCPM. Phillips was so brazen that although he professes to have only been looking out for Vista Way, he conditioned his representation on how Cannata would answer the complaint, effectively negotiating SCPM's response. Hearing Tr. ¶ 56:5 – 16. Phillips knew that SCPM had not paid rent since the beginning of the lease. Phillips Ex. 9. Phillips also knew that Cannata was going to admit the allegations, thereby waiving any potential defenses to those allegations, including any pattern and practice or laches arguments. By intentionally excluding Snider, Phillips knew he was precluding SCPM of these arguments.

Further, Phillips professes that after having reviewed R.C. 1705, he believed that Cannata had authority to act as he did. However, Phillips had statutory, documentary, and other factual reasons demonstrating he was wrong. For example, Phillips ignored the terms of the SCPM operating agreement, which provided that the members had "equal rights in the management of the business." Bd. Report ¶ 26; Phillips Ex. 4. During the hearing, Cannata admitted that David Snider's consent was required. Bd. Report ¶ 26; Hearing Tr. 105 – 106.

Moreover, as further evidence of Phillips' sinister intent, Phillips ignored the manner in which Vista Way had retained him in the past. Phillips represented Vista Way in a board of revision, real estate tax situation. Hearing Tr. 44:21 – 45:10. When Vista Way hired Phillips to act as counsel, *both* Cannata and David Snider signed the engagement letter; Cannata signed on behalf of himself individually, and David Snider signed individually on behalf of Snider Interests. *Id.* In this instance, Phillips ignored this past practice.

Finally, Phillips claims to have read R.C. 1705, yet, he clearly ignored R.C. 1705.281 [Duties of a Member], including the requirement that a member act in accordance with the obligations of good faith and fair dealing and that a member should not act as or on behalf of a party having an interest adverse to the limited liability company. Likewise, Phillips ignored R.C. 1705.25(A)(3)(a), which proscribes any act that would make it impossible to carry on the business of the company, and R.C. 1705.282 dealing with the duties of a manager who is also a member. Phillips ignored these provisions, thereby effectively assisting respondent Cannata in violating his fiduciary duties.

In his objections, Phillips also alleges that he was attempting to evict both Cannata and Phillips. Although true in a technical sense, Phillips argument lacks merit and is misleading. Although, Cannata and Snider would have been evicted in their roles as members of SCPM, Cannata would have been able to access the property as a member/manager of Vista Way. Phillips Ex. 12. Hearing Tr. 99:19 – 100:7. Snider, on the other hand, would not have had access as his wife – not him- was the only member. Phillips Stip. ¶ 7. Thus, if Phillips and Cannata had been successfully in obtaining a signature on the judgment entry, David Snider would have been considered a trespasser and subject to removal by law enforcement. Phillips Ex. 12.

Lastly, the timeline of events supports both Phillips' testimony and the Board's conclusion that he violated Prof. Cond. R. 1.7(a)(2) in Count Three. Phillips had represented various entities beneficially owned by the Sniders, including 96th Street, of which David Snider personally owned 25 percent. In late June 2012, Phillips filed a corporate dissolution naming several Snider entities as defendants. During the hearing, Phillips testified that having Snider interests on both sides placed him in a conflict. Bd. Report ¶ 38 – 40; Hearing Tr. 37:11 – 39:4. Less than three weeks later, Phillips engaged in the sham eviction, thus corroborating Phillips' testimony that his judgment was materially limited. Bd. Report ¶ 23 & 37; Phillips Stip. ¶ 12 & 43. Given the close proximity in time, the same material limitations in judgment based upon the close relationship between the respondents that were found in the Vista Way Eviction would have also limited Phillips' judgment in his representation of 96th Street at the end of June 2012 and thereafter. However, as comment 6 to 1.7(a)(2) acknowledges, conflicts can arise during representation and change over time. Here, the objective facts demonstrate that by July 13, 2012, Phillips had allowed his desire to protect Cannata at the expense of David Snider to materially limit his judgment. Thus, a conflict certainly existed in the 96th Street Foreclosure case by that time. As a result, on October 3, 2012, the trial court disqualified Phillips from acting as counsel in the corporate dissolution matter. Bd. Report ¶ 41. Despite that order, Phillips continued to represent 96th Street until late December 2012 when he finally withdrew as counsel. Phillips Stip. ¶ 42.

The close personal relationship with Cannata, the sham eviction matter perpetrated by the Phillips and Cannata, and the short timeline involved in Counts One and Three all corroborate Phillips' testimony that he violated Prof. Cond. R. 1.7(a)(2), and those same factors support the Board's reliance upon the testimony in finding that Phillips committed those violations.

Consequently, this Court should adopt the Boards findings that respondent Phillips violated Rule 1.7(a)(2) in Counts One and Three.

D. PROF. COND. R. 1.13(a) SUPPORTS THE BOARD'S FINDING THAT RESPONDENT PHILLIPS' VIOLATED PROF. COND. R. 1.7(a)(2)

Although Phillips correctly quotes Prof. Cond. R. 1.13, which states that a lawyer for organization owes his allegiance to the organization and not to its constituents, this reliance upon the rule is misplaced. In fact, Prof. Cond. R. 1.13(a) underscores Phillips inappropriate actions. As stated above, Phillips allowed his personal relationship with, and loyalty to, Cannata to materially limit his judgment. Phillips was not acting for Vista Way; he was acting for Cannata. Phillips did not consult with the other member of Vista Way despite the past practice of both members signing his engagement letter. Phillips ignored any duties and obligations imposed on Cannata by R.C. 1705. Despite professing to represent the organization, he did not review the operating agreement to establish whether each member had authority to act as they did. Hearing Tr. 57:11 – 12. Finally, he engaged in all of this conduct knowing that there was management deadlock and corporate dissolution pending for Vista Way.

He also attempts to hide behind the illusory argument that he was evicting all parties, including Cannata. Resp. Obj. 10. However, relator established at hearing that Cannata was only evicting himself as a manager/member of SCPM. He was not evicting himself as a member/manager of Vista Way and would have still had access through that company. Hearing Tr. 99:19 – 100:21. In the face of all this, Phillips subsumed his judgment to Cannata's interests and disregarded his obligation to represent the interests of the organization rather than the interests of the constituents. Prof. Cond. R. 1.13(a) requires an attorney to represent the best interests of the entity the attorney is representing, not any individual member. However, Phillips' conduct makes clear that he disregarded this ethical obligation.

**E. THIS COURT SHOULD NOT ADOPT THE FOUR-FACTOR TEST
ADVOCATED BY RESPONDENT**

Phillips argues that this Court should utilize a four-factor test to determine whether an attorney has violated Prof. Cond. R. 1.7(a)(2). This Court should summarily reject his argument because there already exists a clearly written rule to apply to any set of facts. Creating some kind of test on top of that is unnecessary, has no basis in law, and adds needless complexity. All that is required is to read the rule and apply it to the facts in any given situation. It is only necessary to decide whether there is a substantial risk that the attorney's judgment will be materially limited by divided loyalty. Finally, while Phillips contends that he is presenting novel legal issues for this Court to consider, this issue is only novel because respondent made it up. It is fiction. He has cited no authority or policy consideration supporting the adoption of this test. Because it is unnecessary and creates needless complexity, this Court should summarily reject the use of Phillips' "four-factor test."

**F. PHILLIPS' ARGUMENT THAT THE DANA TEST MUST BE SATISFIED
FOR A CONFLICT OF INTEREST TO EXIST MISUNDERSTANDS THE
CONFLICT RULES AND THE DANA TEST ITSELF AND SHOULD BE
REJECTED.**

In his objections, Phillips states that "In order for a conflict of interest to exist the three part test of the *Dana* Test must be satisfied." Resp. Obj 17. Phillips' reliance on *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 889 (6th Cir.1990) for the proposition that courts must employ a three-part test to determine whether a conflict exists is misplaced and should be summarily rejected. *Dana* dealt specifically with former clients and is relevant only to Prof. Cond. R. 1.9. In the instant case, we are dealing with a current client and third persons. Prof. Cond. R. 1.7(a)(2) does not require a past attorney-client relationship. In fact, it expressly states that an attorney's judgment could be materially limited by the interests of non-clients

whether they be the personal interests or the interests of third parties. Nowhere does the Prof. Cond. Rule 1.7(a)(2) require the acquisition of confidential information or a substantially related matter. The factors in the Dana Test are fundamentally different from Prof. Cond. R. 1.7(a)(2).

Furthermore, the Dana test merely addresses the question of disqualification, not whether a violation of the Rules of Professional Conduct has occurred. The question of disqualification weighs competing principles and policies, and it is possible under the Dana Test to have violated the conflict rules and still be permitted to continue as counsel. “[D]isqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.” *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St. 3d 1, 6, 688 N.E.2d 258 (1998).

Finally, this Court understands when various Rules of Professional Conduct are meant to codify case law and indicates that in the comments to those rules. For example, the official comments comparing Prof. Cond. R. 1.10 to the former Code of Professional Responsibility state that “Divisions (c) and (d) are added to codify the rule in *Kala v. Aluminum Smelting Refining Co., Inc.*” In fact, comment 8 to Prof. Cond. R. 1.7 contains case citations to assist the reader; however, there is no cite to *Dana* anywhere in any of the comments to that rule. Thus, Prof. Cond. R. 1.7 is not a codification of the Dana Test.

II. THE BOARD CORRECTLY FOUND THAT RESPONDENT PHILLIPS VIOLATED PROF. COND. R. 7.5(D) BASED UPON RESPONDENT PHILLIPS’ STIPULATION AND TESTIMONY THAT HE VIOLATED THE RULE WITH THE ENTITY AND WEBSITE THEY CREATED.

In May 2009, respondent Phillips and respondent Cannata executed a co-counsel agreement, which stated in part that nothing about their relationship shall “establish any kind of

any other relationship, including without limitation a partnership, a professional association, or a law firm.” Bd. Report ¶ 13 & 17; Phillips Ex. 5. Despite that language, they filed Articles of Organization for a limited liability company called Cannata Phillips, LPA, LLC, which represented that it was a law firm. Bd. Report ¶ 17; Phillips Ex. 7. Thereafter, respondent Cannata solicited information from respondent Phillips and created a website for Cannata Phillips, LPA which appeared to represent it was a law firm and that Phillips and Cannata were members of that firm. Bd. Report ¶ 17; Phillips Ex. 6; Hearing Tr. 48 & 49. Respondent Cannata testified that they created the website in order to attract clients. Bd. Report ¶ 17, Hearing Tr. 93 – 94.

The Board correctly found that the Articles of Organization they filed, the entity they created, and the website they published were misleading and gave the false impression that they were a firm when their intent was to merely co-counsel cases together. Additionally, the only document that clearly communicated their intent was their private contract, which was not made available to the public. In fact, the two of them also went so far as to obtain separate malpractice insurance and to open a separate escrow account. One panel member aptly pointed out that “if you were actually going to establish a law firm, isn’t this exactly how you would do it?” Hearing Tr. 68:7 – 69:10. That is how attorneys establish law firms, and that is precisely why it is so misleading.

A. DESPITE THE EXCRUCIATING CLARITY OF HIS VIOLATION AND HIS STIPULATION AND TESTIMONY THAT HE VIOLATED PROF. COND. R. 7.5(d), RESPONDENT IS OBJECTING BASED UPON LACK OF HARM AND HIS WILLFUL IGNORANCE OF THE ETHICAL RULES. NEITHER OF THOSE IS A DEFENSE, AND HIS ARGUMENTS SHOULD BE REJECTED

In his objections, Respondent Phillips argues that “[a]t most this is a technical violation.” He bases his argument on two points: that no harm was done and that he did not knowingly

violate the rule. First, he asks whether deceiving the public without actually harming the public can constitute a violation of Prof. Cond. R. 7.5(d). His position that there can be no violation of this rule without harm is absurd. That would require this Court and relator to sit back while attorneys deceive the public and wait for someone to be harmed by the deception by it before taking any formal action. The primary purpose of our disciplinary system is to protect the public. If this Court adopted Phillips' position, we would be required to allow harm to the public in order to protect the public. That is an absurd position.

Second, Phillips argues the he did not knowingly violate the rules. The only way that is possible is if he was willfully ignorant of his ethical obligations. The rule cannot be clearer, and his deceit cannot be clearer. For example, the private agreement between the respondents stated that nothing about their agreement shall "establish any kind of any other relationship, including...a professional association." Bd. Report ¶ 13; Phillips Ex. 5. The respondents then created a Legal Professional Association. Finally, Prof. Cond. R. 7.5(d) states that "Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact." The respondents created a Legal Professional Association and stated that they were a Legal Professional Association when that was not the fact based upon their private contract. The only way he could not understand this violation is if he was willfully ignorant of the clearly written rule. Willful ignorance cannot be a defense to misconduct. Otherwise, no one would read the rules and then would be immune from discipline as a result.

Respondent violated 7.5(d). That is clear from the stipulated exhibits, from respondent's own stipulation that he violated the rule, and from his testimony, under oath, that he violated the rule. As a result, this Court should reject respondent's arguments and adopt the Board's finding of this violation.

III. RESPONDENT'S CONDUCT IN THIS MATTER REQUIRES THAT THIS COURT IMPOSE A SANCTION GREATER THAN THE SIX-MONTH STAYED SUSPENSION RECOMMENDED BY THE PARTIES

Relator originally agreed and stipulated to a recommended sanction of a six-month suspension, fully stayed. That was based on an analysis of recent case law, the unique set of facts in this matter, and the presence of several mitigating factors. Based upon all of these factors, relator believed that the misconduct was unlikely to occur again. However, respondent's conduct since stipulating to his misconduct undermines several of the mitigating factors on which relator relied in crafting a sanction and leads relator to believe that Phillips' conduct could reoccur.

Initially, relator agreed that a fully stayed six-month suspension was appropriate. While there are numerous conflict cases in which the Court has issued a public reprimand, the facts of this matter are distinguishable and warrant discipline greater than a public reprimand.

In *Disciplinary Counsel v. Ita*, 117 Ohio St. 3d 477, 2008-Ohio-1508, 884 N.E.2d 1073, the respondent asserted a loss of consortium claim on behalf of a client's wife without obtaining the wife's consent. *Id.* at ¶ 4-6. Only upon reaching a settlement did the respondent discover that the client's wife had neither signed a fee agreement with his law firm, nor had any contact at all with the firm. *Id.* ¶ 6. The case was settled, but the client had to agree to dismiss the loss of consortium claim with prejudice and to indemnify the defendant for the potential value of the loss sustained. *Id.* In imposing a public reprimand, the Court noted the existence of several mitigating factors and stated that respondent's actions were the result of "nothing other than carelessness." *Id.* at ¶ 10.

In *Columbus Bar Assn. v. Mangan*, 123 Ohio St.3d 250, 2009-Ohio-5287, 915 N.E.2d 651, the Court imposed a public reprimand based upon the respondent improperly representing a

client, the client's son, and the client's daughter-in-law in a foreclosure action. *Id.* at ¶5. The respondent in *Mangan* was retained by, and met with, the father who falsely assured the respondent that he was acting on behalf the entire family. *Id.* at ¶6. The respondent improperly relied on the father's assurances and neither gained the consent of all of the parties to the multiple representation, nor communicated with the couple. *Id.* at ¶ 6 – 11. In imposing a public reprimand, the Court relied upon *Ito*, noted the existence of several mitigating factors, and stated that the respondent's actions were also the result of carelessness. *Id.* at ¶ 17.

Finally, in *Disciplinary Counsel v. Mamich*, 125 Ohio St.3d 369, 2010-Ohio-1044, 928 N.E.2d 691, the respondent received a stayed six-month suspension after he represented a client's daughter at the client's request but without the daughter's knowledge or consent. *Id.* at ¶ 4 – 6. In *Mamich*, the client took out a credit card in the daughter's name, without the daughter's knowledge or consent, and failed to repay the debt he accrued with the card. *Id.* Based upon the father's failure to repay his debt, the creditor filed a complaint against the daughter and received a default judgment when no answer was filed. *Id.* The father then contacted respondent and falsely informed the respondent that the credit card was in the father's name with the daughter only being an authorized user. *Id.* On that basis, the respondent began representation in the matter, which ended with a finding of summary judgment in favor of the creditor. *Id.* at ¶ 5 – 9. The daughter only learned of these events after her wages were garnished, and she then had to hire an attorney. *Id.* at ¶ 10. In imposing a stayed six-month suspension, the Court discussed *Mangan* and *Ito* but departed from a public reprimand based upon the damage done to the daughter. *Id.* at ¶ 20 – 21.

Similarly to *Mamich*, the instant case is distinguishable from both *Mangan* and *Ito*. In both *Mangan* and *Ito*, the respondents were dealing with unfamiliar parties and were largely

unaware of the effects of their actions upon the unconsulted parties. However, with respect to Count One of the instant case, respondent engaged in a sham legal process knowing that David Snider did not know about the lawsuit and would be unable to react and defend himself.

Additionally, respondent Phillips was aware of the management deadlock and pending corporate dissolutions, yet he persisted in his conduct. Further, unlike the respondents in *Mangan* and *Ito*, respondent in the instant matter was not dealing with a manipulative client and his actions were not entirely the result of carelessness. Finally, an upward departure is also required based upon there being numerous aggravating factors and multiple counts of misconduct, which include a violation of Ohio Rules of Prof. Conduct Rules 7.5(d) for deceiving the public.

However, our recommended sanction was also based upon a perceived lack of aggravating circumstances and the perception that there were several mitigating factors, including a lack of prior discipline, full and free disclosure and complete cooperation, and good character and reputation. Since the hearing, respondent has contradicted virtually any mitigation that was believed to exist and has aggravated this matter by his conduct. This change in factual circumstances requires this Court to impose a greater sanction.

The parties stipulated to a lack of prior discipline, full and free disclosure to the Board, cooperation, and good character and reputation. The Board independently found that he acknowledged the wrongfulness nature of his misconduct based upon the veneer of sincerity he presented at the hearing. Since the hearing, however, respondent has objected and demonstrated a lack of cooperation, that he did not provide full and free disclosure before the Board, called his good character into question, and is no longer acknowledging the wrongfulness of his misconduct.

Prior to the hearing, respondent stipulated that he violated the Rules of Professional Conduct, and he stipulated that a six-month stayed suspension was appropriate. Then, he testified, under oath, that he committed the violations and agreed with the sanction. Further, he testified emotionally, demonstrating remorse to the panel. However, now he is objecting to the Board's adoption of his stipulated violations and the recommended sanction. He is not acknowledging the wrongful nature of conduct, which is an aggravating factor. Further, this Court should find that he was uncooperative in the disciplinary process. Until this Court issues its decision, the disciplinary process is still ongoing. He stipulated to violations. He testified in support of those violations. He cannot now try to deny and call into question what he agreed to. The disciplinary process is not a game and his lack of cooperation is also an aggravating factor. Additionally, he appeared to testify with sincere remorse, but his objections contradict that. Further this Court should question the good character of any attorney that testifies to violations under oath and then proceeds to contradict his own testimony. This Court must also consider whether his conduct constitutes submitting false statement or engaging in a deceptive practice during the disciplinary process.

Now respondent professes to deserve a public reprimand because the mitigating factors outweigh the aggravating factors and he cites a number of cases he argues support his position. However, by stipulating to violations and a sanction, by testifying under oath to his violations, and by contradicting all his testimony and stipulations, he has effectively distinguished his case from every public reprimand case. Now, the aggravation in this matter substantially outweighs the mitigation, and thus a greater sanction is required. Respondent engaged in a sham legal proceeding taking advantage of David Snider's vulnerability and ignorance of the eviction case.

While respondent has distinguished his case from all of the prior precedent, this Court does have a history of imposing an actual suspension in cases in which the aggravating factors outweigh mitigation and in cases involving professed remorse coupled with an inability to acknowledge the wrongfulness of the misconduct. In *Toledo Bar Assn. v. Pheils*, 129 Ohio St.3d 279, 2011-Ohio-2906, 951 N.E.2d 758, this Court imposed an actual suspension when the aggravating factors outweighed the mitigating factors. Like the present case, the sole mitigating was a lack of prior discipline; however, there were several aggravating factors including multiple offenses, being uncooperative at times, deceptive practices, and a refusal to acknowledge wrongdoing. *Id.* at ¶29 – 33. Additionally, in *Cuyahoga Cty. Bar Assn. v. Newman*, 102 Ohio St.3d 186, 2004-Ohio-2068, 808 N.E.2d 375, this Court imposed an actual suspension when the respondent had no prior history of discipline but failed to appreciate the wrongfulness of his misconduct despite professing remorse during the proceedings. Given that the aggravating factors in the instant case far outweigh any mitigation, this Court should impose a sanction greater than the recommended sanction of a six-month, fully stayed, suspension.

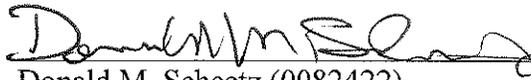
CONCLUSION

Relator urges this Court to hold respondent Phillips to his word. Respondent Phillips stipulated that he violated the Rules of Professional Conduct. Respondent Phillips testified under oath that he violated the Rules of Professional Conduct. On that basis, the Board adopted his stipulations and testimony and found that he violated Prof. Cond. R. 1.7(a)(2) and Prof. Cond. R. 7.5(d), and this Court should adopt the Board's findings of fact and violations. However, because the aggravating factors now outweigh the mitigating factors, this Court should impose a sanction greater than a six-month, fully stayed, suspension.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that Relator's Reply Brief was served by U.S. Mail, postage prepaid, upon Gerald Wayne Phillips, 401 Windward Way, Avon Lake, Ohio 44012, this 6th of October 2015.



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