ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	:	
	:	
RELATOR,	:	
	:	CASE NO. 2010-2021
VS.	:	
	:	
PERCY SQUIRE,	:	BCGD Case No. 09-023
	:	
RESPONDENT.	:	

RESPONDENT PERCY SQUIRE'S OBJECTIONS AND BRIEF IN SUPPORT OF OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF PROFESSIONAL CONDUCT OF THE SUPREME COURT OF OHIO

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STATEMENT OF FACTS

I. INTRODUCTION

The undersigned respectfully files objections to the Final Report of the Board of Professional Conduct of the Supreme Court of Ohio for the following reasons:

1. The Board's Report is not based upon the majority opinion of the Hearing Panel appointed to conduct a hearing on the Petition for Reinstatement;

2. The Report is based on the Hearing Panel's dissenting opinion which is both analytically flawed and factually inaccurate;

3. The Report is based on evidence elicited in violation of the Board's own policies and Ohio law concerning the attorney-client privilege; and

4. The Report trivializes and disparages the undersigned's prior history of military service and no professional misconduct.

II. BACKGROUND

The undersigned was suspended indefinitely from the practice of law by the Ohio Supreme Court on November 3, 2011. The order of suspension required the following as conditions precedent to any Petition for Reinstatement:

1. The filing within 30 days of November 3, 2011, of a full accounting to Mark Lay, the court, and any related party in interest for withdrawals from, and deposits to, the $113,228.18 insurance proceeds fund and the $280,000 Mark Lay Defense and Welfare fund during my involvement with those funds.

2. These accountings should set forth all payments to me that were made either directly or through an intermediary and should include documentation of all fees, loans to me or third parties, and expenses paid on behalf of Mark Lay.

3. As an additional condition for reinstatement, the undersigned was required to submit proof to the Ohio Supreme Court , to be verified by Relator, that I have paid restitution, if any is due, to the Mark D. Lay Legal Defense and Welfare Fund and the insurance fund of any unverified fees, loans, or expenses, with interest at the statutory rate.

The undersigned has fully complied with the above conditions and the Hearing Panel's majority report found full compliance.

The suspension order also required that:

1. I immediately cease and desist from the practice of law in any form and I was forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority.

2. I was forbidden to counsel or advise or prepare legal instruments for others or in any manner perform such services.

3. I was divested of each, any, and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

4. Before entering into an employment, contractual, or consulting relationship with any attorney or law firm, I was required to verify that the attorney or law firm has complied with the registration requirements of Gov.Bar R. V(8)(G)(3). If employed pursuant to Gov.Bar R. V(8)(G), I was required to refrain from direct client contact except as provided in Gov.Bar R. V(8)(G)(1), and from receiving, disbursing, or otherwise handling any client trust funds or property.

5. I was taxed the costs of these proceedings in the amount of $3,995.77, which costs shall be paid to the court by cashier's check or money order on or before 90 days from the date of this order. I was further ordered that if these costs were not paid in full on or before 90 days from the date of this order, interest at the rate of 10% per annum shall accrue as of 90 days from the date of this order and the matter may be referred to the Attorney General for collection.

6. I was prohibited from petitioning for reinstatement until such time I paid costs in full, including any accrued interest.

7. Pursuant to Gov. Bar R. X(3)(G), I was required to complete one credit hour of continuing legal education for each month, or portion of a month, of the suspension. As part of the total credit hours of continuing legal education required by Gov.Bar R. X(3)(G), I was also required to complete one credit hour of instruction related to professional conduct required by Gov. Bar R. X(3)(A)(1), for each six months, or portion of six months, of the suspension.

8. Within 90 days of the date of this order, I was required to reimburse any amounts that have been awarded against me by the Clients' Security Fund pursuant to Gov.Bar R. VIII(7)(F).

9. If, after the date of this order, the Clients' Security Fund awarded any amount against me pursuant to Gov. Bar R. VIII(7)(F), I was required to reimburse that amount to the Clients' Security Fund within 90 days of the notice of such award.

10. Under the suspension order the undersigned shall not be reinstated to the practice of law in Ohio until (a) I comply with the requirements for reinstatement set forth in the Supreme Court Rules for the Government of the Bar of Ohio; (b) comply with the Supreme Court Rules for the Government of the Bar of Ohio; and (c) I am reinstated by the Ohio Supreme Court.

11. On or before 30 days from the date of the suspension order, I was required to:

    a) Notify all clients being represented in pending matters and any co-counsel of my suspension and consequent disqualification to act as an attorney after the effective date of the suspension order and. in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in respondent's place;

    b) Regardless of any fees or expenses due to me , deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

    c) Refund any part of any fees or expenses paid in advance that were unearned or not paid, and account for any trust money or property in the possession or my control;

    d) Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of my disqualification to act as an attorney after the effective date of the suspension order, and file a notice of my disqualification with the court or agency before which the litigation is pending for inclusion in the respective file or files;

    e) Send all notices required by the suspension order by certified mail with a return address where communications may thereafter be directed to me;

    f) File with the clerk of the Ohio Supreme Court and the Disciplinary Counsel of the Supreme Court an affidavit showing compliance with this order, showing proof of service of notices required herein, and setting forth the address where I may receive communications; and

g) Retain and maintain a record of the various steps taken by me pursuant to the suspension order.

h) On or before 30 days from the date of this order, I was required to surrender my attorney registration card for the 2011/2013 attorney registration biennium.

The Ohio Supreme Court Rules for Government of the Bar provide, at Gov. Bar R. V(25)(F)(5):

> **Requisites for Reinstatement.** A shall not be reinstated unless he or she establishes all of the following by clear and convincing evidence to the satisfaction of the panel hearing the petition for reinstatement:
>
> (a) That I have made appropriate restitution to the persons who were harmed by my misconduct;
>
> (b) That I possess all of the mental, educational, and moral qualifications that were required of an applicant for admission to the practice of law in Ohio at the time of my original admission;
>
> (c) That I have complied with the continuing legal education requirements of Gov. Bar R. X, Section 3(G);
>
> (d) That I have completed a term of probation, community control, intervention in lieu of conviction, or any sanction imposed as part of a sentence for a felony conviction;
>
> (e) That I am now a proper person to be readmitted to the practice of law in Ohio, notwithstanding the previous disciplinary action.

Id. (Emphasis added.)

An evidentiary hearing concerning the reinstatement of the undersigned to the practice of law in Ohio was commenced on November 21, 2014, in Cleveland, Ohio and concluded on January 20, 2015, in Columbus, Ohio. The undersigned Petitioner, Percy Squire, appeared pro se. In support of his Petition for Reinstatement, the undersigned presented the following seven live witnesses:

1. The Honorable Thomas D. Lambros, Esq.
   Chief Judge (retired)
   United States District Court for the Northern District of Ohio;

2. The Honorable George L. Forbes, Esq.
   Former President of Cleveland, Ohio City Council and the Cleveland NAACP; Editor of the Cleveland, Ohio "Call and Post" Newspaper and Member of the Ohio Bureau of Workers Compensation Investment Committee;

3. Mr. Antoine Smalls
   Co-trustee of the Mark D. Lay Legal Defense and Welfare Fund II; and Chief Compliance Officer & Senior Vice President of CIM Investment Management, Inc., Pittsburgh, PA

4. Charles F. Freiburger, Esq.
   Partner, Dinsmore & Shohl
   Columbus, Ohio

5. Matthew Blair, Esq.
   Attorney, Niles, Ohio
   President of the Mahoning Valley Sanitary District
   (counsel for the widow of Bishop Norman L. Wagner)

6. Leo P. Ross, Esq.
   Attorney, Columbus, Ohio
   (an employer of Petitioner)

7. W. James Cobbin
   Owner, W. J. Cobbin Office Tower, LLC and
   Inner City Transit, LLC
   Youngstown, Ohio
   (former member of the New York Black Yankees and the Indianapolis Clowns "Negro Baseball League")

I also introduced twenty exhibits. Relator introduced exhibits but no witnesses at the hearing. In the view of the Panel majority the evidentiary presentation of the undersigned established by clear and convincing evidence that I met all of the requisites for Reinstatement to the Practice of Law enumerated within the November 3, 2011 Ohio Supreme Court suspension order.[1]

[1] On October 6, 2015, the Hearing Panel, with one member dissenting, issued its Report recommending reinstatement. The Board rejected the Panel Report and, without explanation, adopted the dissenting member's recommendation. The undersigned has timely appealed.

The undersigned is a native of Youngstown, Ohio having graduated from Youngstown East High School, the United States Military Academy at West Point, New York, and Ohio State University, College of Law. See, Exhibit M. Petitioner was admitted to the practice of law in Ohio in 1981. Petitioner is a former judicial clerk for the Chief Judge of United States District Court for the Northern District of Ohio and a former member of the law firm of Bricker & Eckler, having become a partner in 1992. Id. Petitioner formed his own law firm in 2000. Id. Petitioner is a retired United States Army Infantry Officer, with Airborne, Pathfinder and Ranger credentials. Petitioner retired as a major in 1993. Id. Petitioner is the managing general partner of Sandblast, L. P., Columbus, Ohio, owner of Columbus, Ohio radio station 95.9 FM, which began broadcasting on January 18, 2015. See, Exhibit BB. Petitioner formerly owned Columbus, Ohio radio stations WVKO-AM, 1580, WVKO-FM, 103.1, and WODB-FM, 107.9. See, Exhibit M. Sandblast also owns a radio license in Youngstown, Ohio however that station, 99.5 FM, is not yet on the air.

According to the Panel, the undersigned has complied with each of the above requirements by clear and convincing evidence. Clear and convincing evidence to support compliance was introduced during the reinstatement hearing. Clear and convincing evidence is "...that degree of proof which will produce in the mind of the court a firm belief or conviction of the truth of the charges and specifications sought to be established. Cross v. Ledford, (1954), 161 Ohio St. 469, paragraph 3 of the syllabus: "Clear and convincing evidence is 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 by '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 to be established." Also see Lansdowne v. Beacon Journal Publishing Co., (1987), 32 Ohio St. 3d 176, 180-181; In re. Meyer (1994), 98 Ohio App. 3d 189, 195; Cincinnati Bar Assn. v. Massengale, (1991), 58 Ohio St. 3d 121, 122; In re. Adoption of Holcomb, (1985), 18 Ohio St. 3d 361, 368; In re. Brown, (1994), 98 Ohio App. 3d 337, 342-343." According to the Panel, Petitioner has established his bases for reinstatement by clear and convincing evidence. A summary of this evidence is set forth below.

III. EVIDENCE

A. Accounting to the Mark D. Lay Legal Defense and Welfare Fund and Restitution

The undersigned introduced full accountings to the Panel of the expenditures for MDL Trust No. 1 and MDL Trust No. 2. Petitioner's Exhibits F and G. Exhibit KK, is a list of invoices for legal work performed by the undersigned on behalf of Mark Lay. The information within Exhibits E. F and KK was attested to by both Antoine Smalls, co-trustee of the MDL Trust No. 2 and the undersigned. This evidence combined to produce the following results:

MDL TRUST No. 1:	$ 113,228.15	
Expenditures on Mark D. Lay	$ 82,935.53	
Payments to Percy Squire	$ 31,079.10	
Total	$ 114,014.63	See, Exhibit F
MDL TRUST No. 2:	$ 280,000.00	
Expenditures on Mark D. Lay	$ 262,131.94	
Gross Payments to Percy Squire	$ 70,914.27	
Payments by Percy Squire to Trust 2	$ 50,000.00	
Net Payments to Percy Squire by Trust 2	$ 17,081.58	
Percy Squire Invoices for Legal Services	$ 158,062.00	See, Exhibit G
Summary: MDL TRUSTS 1 & 2:		
Total Trust Funds	$ 393,228.15	

Expenditures on behalf of Mark D. Lay	$ 345,067.47	
Legal Fees Paid to Percy Squire from Trusts	$ 48,160.68	
Total Legal Fees Billed	$ 158,062.00	See, Exhibit KK

The undersigned has provided receipts to support the accounting for MDL Trust No. 1. Antoine Smalls and the undersigned both attested to the accuracy of the above accounting in relation to MDL Trust No. 2. See, Exhibit H for Affidavit of Antoine Smalls

The accountings for MDL Trust No. 1 and No. 2 were filed with the Ohio Supreme Court within 90 days of November 3, 2011, the date of suspension, on December 5, 2011. See, Respondent's Exhibit 17. As stated the co-trustee, Mr. Smalls, attested to the accounting for MDL Trust No. 2. Relator did not address the accountings provided when filed.

According to this evidence and the Hearing Panel majority, no restitution was due to any client, including Mr. Lay, and no claim for restitution has been made by any client of the undersigned. See, Report of Lawyer Fund for Client Protection.

B. Debt to Bishop Norman L. Wagner

The undersigned introduced correspondence and testimony from counsel for the widow of Bishop Norman L. Wagner, Attorney Matthew Blair, attesting to the fact that satisfactory arrangements have been made with the Estate of Bishop Wagner and the undersigned to resolve the business debt between the undersigned and Bishop Wagner. See, Exhibit P. The business debt between the undersigned and Bishop Wagner was not cited in the November 3, 2011 suspension order.

C. Continuing Legal Education (CLE)

CLE transcripts were introduced by the undersigned to establish that the undersigned has complied with all CLE requirements. The undersigned has been suspended for 47 months. The Report of the Office of Attorney Services establishes that since November 3, 2011, the undersigned has completed a total of 50 hours of CLE with 14.25 hours awarded for instruction in professional conduct.

D. Payment Costs

The undersigned presented evidence at the hearing establishing full payment of costs as required by the November 3, 2011 suspension order. The Board has now filed an additional cost statement that double bills the undersigned and does not give credit for amounts paid. See, Exhibit C and Supplement pp. 1-8.

E. Petitioner's Qualifications for Readmission

The following witnesses testified that the undersigned possesses the mental, educational and moral qualifications for readmission to the practice of law:

1. Chief Judge Thomas D. Lambros, (retired);
2. Attorney George L. Forbes;
3. Attorney Charles F. Freiburger, IV;
4. Attorney Leo P. Ross; and
5. Mr. W. James Cobbin.

IV. INACCURACIES IN DISSENTING OPINION

A. Harm to Others

The dissent in this matter makes the erroneous statement that "Petitioner is required to prove, by clear and convincing evidence, that he has made appropriate

restitution to the persons who were harmed by his or her misconduct." Gov. Bar. R.V. Section 25 (D)(1)(a). Section 25(D)(1) states "The petitioner shall not be reinstated unless he or she establishes all of the following by clear and convincing evidence to the satisfaction of the panel hearing the petition for reinstatement." Id. (Emphasis added.)

In this case, the Panel hearing the petition for reinstatement determined that the undersigned has made appropriate restitution to the persons who were harmed by my misconduct. See, Panel Majority Report, Appx. Only the dissent concluded that appropriate restitution had not been made. The standard set forth within Section 25 (D)(1), is that it must be established to the satisfaction of the Panel, that appropriate restitution has been made. (Emphasis added.) According to the majority Report of the Panel, this condition was met. Accordingly the dissent is incorrect in its statement that restitution has not been made. It has, as required by Gov. B. R. 25(D), been established to the satisfaction of the Panel that restitution has been made. The Board reliance on a different outcome is inconsistent with Gov. B. R. 25(D).

B. Bishop Wagner

The dissent erroneously contends that appropriate restitution has not been made for the reason the business debt owed to Bishop Wagner has not been repaid. While it is true, the debt remains unpaid, the undersigned and the Estate of Bishop Wagner entered into an amicable agreed judgment to delay repayment pending my request for reinstatement to the practice of law. Moreover, Bishop Wagner's widow has provided correspondence in support of my Petition for Reinstatement. See, Exhibit P.

The dissent incorrectly concludes that Bishop Wagner was harmed by my misconduct because the Court found that "Based upon the manner in which [I] handled

the Wagner loan proceeds I violated Prof. Cond. R. 1.15(a) and 1.15(c)." While it is correct that the Court found that I violated Rules 1.15(a) and 1.15(c), the Court did not find that Bishop Wagner was harmed by these violations. Rule 1.15 provides, in pertinent part:

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

(1) maintain a copy of any fee agreement with each client;

(2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:

(i) the name of the client;

(ii) the date, amount, and source of all funds received on behalf of such client;

(iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;

(iv) the current balance for such client.

(3) maintain a record for each bank account that sets forth all of the following:

(i) the name of such account;

(ii) the date, amount, and client affected by each credit and debit;

(iii) the balance in the account.

(4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;

(5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule...

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

The Court found that the funds borrowed from Bishop Wagner should not have been placed into my trust account. The Court did not find and the dissent does not state how placing loan proceeds into my trust account harmed Bishop Wagner. The funds were voluntarily loaned to me as part of an ongoing business relationship. I should not have commingled the loan proceeds with trust funds, however, Bishop Wagner was not prejudiced because of my commingling the loan proceeds. I was in a business relationship with Bishop Wagner, which is now ongoing with his estate. The dissent's conclusion that Bishop Wagner was harmed by my commingling is not supported by the record, illogical and contrary to the purpose of Rule 1.15 which is Safekeeping client funds. The funds loaned by Bishop Wagner were not <u>client funds</u>, they were my funds. The Rule violation arose due to commingling, however Bishop Wagner had knowingly and voluntarily parted with the funds, it was not his property within the meaning of Rule 1.15. Accordingly, to the extent the Board relied upon the dissent's rationale that Bishop Wagner was harmed by my misconduct, failure to segregate funds, the Board's reliance is fallacious and misguided.

C. Mark Lay Accounting

The dissent states "there is no evidence from Lay himself concerning Petitioner's handling of the insurance proceeds and the defense trust fund."

The dissent is incorrect in this regard as established by Mr. Lay's deposition testimony.

During his deposition, at which Mr. Lay was unrepresented by counsel and never advised of his right to assert the attorney-client privilege, Mr. Lay stated:

> MR. COUGHLAN (Ohio Disciplinary Counsel): Did [Mr. Squire] ever tell you about that? To your knowledge, did he ever write to you and – did he ever write to you about the $113,000, I have it, and here's what I'm going to do, or tell me what to do. Did he ever tell you about it?
>
> MR. LAY: I know he had the money in an account, but it was to – basically it was to pay for legal bills and things of that nature, so no, I never got a formal letter saying I'm going to do this or that.
>
> Q: Do you understand that he would pay his own legal fees out of monies he was holding for you?
>
> A: I mean, I can't really answer that question because he was doing – he's done a lot for me, and we didn't have a formal, arrangement to say to do this or that, so I can't answer that really.
>
> Q: Okay.
>
> A: I'm being open as possible.
>
> Q: I understand. You know he was holding some money for you right? Is that fair?
>
> A: Yes.

Mr. Lay stated he knew that I had money in an account. This was at a point prior to my receipt of the $280,000 defense funds. The only money I had was the insurance fund. Mr. Lay stated he knew I "was holding money for [him]." He did not say as the dissent contends that he did not give me instructions. He said he knew I was holding money and doing a lot for him. Even if Mr. Lay did not know that I was holding money for him he certainly was told at his deposition by Relator. Notwithstanding the dissent's erroneous contention that there is no evidence from Lay himself of the handling of the

insurance proceeds that he was told, erroneously, at his deposition that funds were missing. Lay has not filed a claim. An inference clearly arises from Mr. Lay's failure to file a claim that he is satisfied with how his funds were handled.

What Mr. Lay has said, he said in a subsequent proceeding under oath.

Attached as part of the Supplement is Mr. Lay's affidavit given in a reciprocal disciplinary proceeding in which he states he has no claim against me related to the insurance proceeds. Accordingly, Mr. Lay has testified that he has no claim related to the insurance proceeds and Mr. Smalls has stated a full accounting was provided of the defense fund.

D. Attorney-Client Privilege

The undersigned does not seek to relitigate the Court's conclusions that I engaged in serious misconduct. I accept that conclusion and regret my behavior. However, it should be noted that while I failed to follow the rules Relator also did not follow appropriate disciplinary rules by interrogating my clients who had not filed grievances against me without advising them of their right to assert the attorney-client privilege. Evidence used in these disciplinary proceedings, was elicited by Relator from my former clients, Mark Lay, Bishop Wagner, and Pat Prout without any of them being advised of their right to assert the attorney-client privilege. None of these individuals had filed grievances and thus the privilege was not waived. Relator did not advise any of these individuals of their right to assert the privilege and evidence elicited from them was used in these proceedings.

In this connection, the Ohio Rules of Professional Conduct state:

Rule 4.2: Communication with Person Represented by Counsel

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Here Relator contacted and interviewed, and in the case of Mark Lay, conducted the deposition of a client of mine without obtaining a waiver of the attorney-client privilege. Relator then elicited evidence protected by the privilege from each client. This practice is prohibited by Ohio law which provides, in pertinent part:

> {¶9} Ohio's codification of the attorney-client privilege appears in R.C. 2317.02(A), which provides, "An attorney [shall not testify] concerning a communication made to the attorney by a client in that relation or the attorney's advice to a client except that the attorney may testify by express consent of the client." The privilege belongs not to the attorney but to the client. Frank W. Scaefer, Inc. v. C. Garfield Mitchell Agency, Inc., (1992), 832 Ohio App.3d 322, 329, 612 N.E.2d 442. This court has held that R.C. 2317.02(A) "provides the exclusive means by which privileged communications directly between an attorney and a client can be waived." State v. McDermott, (1995), 72 Ohio St.3d 570, 651 N.E.2d 985, syllabus.

Allen County Bar Asso. V. Williams, (2002) 95 Ohio St.3d 160. (Emphasis added.) "The privilege cannot be waived by the attorney. The option to disclose confidential communications rests with the client, and may only be exercised by the client or the clients personal representative. Woyczynski v. Wolf, 11 Ohio App.3d 226 (Cuyahoga County App. Ct. 1983). Citing, Taylor v. Sheldon, (1961), 172 Ohio St. 118, 15, Ohio Ops.2d 206.

Ohio Courts have stated:

[There are]

> The two exceptions contained in R.C. 2317.02(A), express waiver and client testifying about the privileged matter, are the only two methods by which the privilege may be waived. State v. McDermott, (1995), 72 Ohio St.3d 570, 572, 651 N.E.2d 985, 987. In order to determine whether the privilege should apply, we must balance the public's interest in confidentiality against the need for discovery in the efficient administration of justice. Henneman v. Toledo, (1988), 35, Ohio St.3d 241, 245-246, 520,

> N.E.2d 207, 211-212. Cross examination testimony is not voluntary, "as the client and his counsel do not have control of the questions or the information which is to be elicited." Tandon v. Tandon (Dec. 27, 2999), Jefferson App. No. 99 JE 36, unreported, at 3, 1999 WL 1279162.

Ohio courts have concluded that testimony given on cross examination is not voluntary testimony and does not constitute a waiver of the privilege under R.C. 2317.02. See, Carver v. Deerfield Township, 742 N.E.2d 1182, 1190 (Portage County App. Court (2000)). Here Relator made contact with persons represented by me, (Curtis Jewell, Patrick Prout, Bishop Wager and Mark Lay), but failed to obtain waivers of the attorney-client privilege, and obtained evidence used in the disciplinary proceeding against me. This is clearly irregular and highly prejudiced.

For example, without ever advising Mr. Lay that he owned the attorney-client privilege, or that Mr. Lay had the right not to answer certain questions in light of his privilege, Relator asked Mr. Lay:

- The details of his fee arrangements (including Respondent) with the law firms representing him in his criminal appeal, while the appeal was still pending (facts which Mr. Lay would not want the government to know). Lay Tr. pp. 14-15; 20-21.
- Respondent's legal advice to Mr. Lay concerning the prospects for success in the criminal appeal. Lay Tr. pp. 15-16.
- Communications between Respondent and Mr. Lay concerning the $113,228 fund. Lay Tr. pp. 22-24.
- Communications by Mr. Lay to his attorney about Mr. Lay's relationships or debts owed to DJM Capital, LLC, PMC, and Kelley Settles. Lay Tr. pp. 26-34.

This improperly obtained evidence became the focal point of the Order and accompanying Opinion. The dissent also relies upon this tainted evidence.

In this case Relator did not obtain any waivers of the Attorney-Client privilege from my clients, except from Mr. Riley, who was privately interviewed by Relator.

Under Gov. Bar. Rule V. Sec. 4(c)(3), Relator is empowered and required to investigate any matter filed with him or that comes to his attention. However, Relator is not permitted, as he did not repeatedly here, to make direct contact with clients he knows to be represented and obtain evidence concerning privileged issues, such as fee arrangements and discussions concerning the substance of legal work performed, without obtaining a privilege waiver. See, Rule Prof. Conduct 4.2.

It is especially egregious where there, as here, the person engaging in these serial violations of Rule 4.2 is the state Disciplinary Counsel. This conduct is consistent with the overzealousness and a win-at-all costs attitude that permeates the dissent. In point of fact:

> The [Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a...prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> Berger v. United States, 295 U.S. 78, 88 (1935). (Emphasis added.)
>
> it is the responsibility ... of the [prosecution] to create a culture where 'win-at-any-cost' prosecution is not permitted... It is equally important that the courts of the United States must let it be known that, when substantial abuses occur, sanctions will be imposed to make the rest of non-compliance too costly.
>
> United States v. Shaygan, 661 F.Supp.2d 1289, 1292 (S.D. Fla. 2009) (Emphasis added.)

While I accept responsibility for my misconduct and recognize the seriousness of my actions, I have been punished. Violations of the Board's own policy however in relation to the attorney-client privilege have been winked at and overlooked.

E. Lay's Knowledge of Insurance Funds

Aside from inquiring of Mr. Lay without advising him of his privilege of confidentiality, Relator adduced testimony about the $113,288.18 legal fees fund that directly contradicted what he later reported to the Panel and Court. Mr. Lay stated he knew Respondent was holding funds for legal fees.

V. DISPARAGEMENT OF THE UNDERSIGNED'S BACKGROUND

The dissent states erroneously that the character evidence presented by Petitioner during the reinstatement hearing is similar in nature to the character evidence presented during his disciplinary hearing. According to the dissent," most of the character testimony relates to the early part of [his] career." This characterization by the dissent is especially disheartening because the dissent trivializes my military service and thirty years of legal practice.

The dissent is particularly troubling because again its statements concerning character evidence are erroneous. I presented one character witness at my disciplinary hearing, Judge Lambros. Seven character witnesses were presented at the reinstatement hearing. An evidentiary presentation with one witness is hardly similar to a presentation with seven witnesses.

While I do not raise these points to suggest that my misconduct should be overlooked, I have had no other record of misconduct. I have spent decades performing and training for service to the public and the United States.

I was the president of my high school student government, an Eagle Scout with a God and Country Award, a Cadet Captain and Battalion Commander at West Point. I have commanded three infantry companies and been the Operations Officer for an Infantry Battalion I served on active duty in Asia, Europe and the United States. I have been a federal judicial clerk, partner in a major law firm, served on the Civil Rules Committee of the Ohio Supreme Court and operated six radio stations in the State of Ohio. The dissent trivializes this service.

Most troubling to me is the dissent's remark that my military service was early in my career, as though that lessens its significance. Military service is performed early in everyone's career. That does not diminish its importance. It is a reflection that the dissent lacks an appreciation for when one serves in the military ,perhaps an indication that the writer of the dissent has never served.

The dissent's comments in this regard undercut its fairness and provide evidence of its flawed analytical frame of reference. The Board's recommendation should be rejected because it relies upon the dissent's disturbing and unfair point of view.

CONCLUSION

For the above reasons it is respectfully requested this Board Report be rejected and the undersigned reinstated to the practice of law.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true and correct copy of the forgoing was served via email October 29, 2015 upon:

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The Supreme Court of Ohio
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7205
scott.drexel@sc.ohio.gov

Percy Squire, Pro Se

APPENDIX

Report Recommending Two Year Suspension with One Year Stayed (November 22, 2010)……. ……..APPX. PAGE NO. 1

Decision Indefinitely Suspending Petitioner (November 3, 2011)…… ……...……APPX. PAGE NO. 22

Report and Recommending Reinstatement Petition be Denied (October 6, 2015)……..APPX PAGE NO. 25

Order to Show Cause (October 9, 2015)……APPX PAGE NO. 55

ORIGINAL

10-2021

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

FILED
NOV 22 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	**Case No. 09-023**
Percy Squire **Attorney Reg. No. 0022010**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

INTRODUCTION

This matter was heard on May 6 and 7, 2010 in Columbus, Ohio, before a hearing panel consisting of members attorneys Charles E. Coulson, John H. Siegenthaler and Judge Arlene Singer, 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. Respondent appeared pro se and Jonathan E. Coughlan, Disciplinary Counsel, and Karen H. Osmond, staff attorney for Disciplinary Counsel, represented Relator.

Respondent was charged in a five-count complaint with violating the Ohio Rules of Professional Conduct. The parties submitted certain stipulations of fact and conclusions of law, as well as admission of certain exhibits.

Based upon the stipulations of fact submitted by the parties and the testimony and exhibits presented at trial, the panel finds by clear and convincing evidence that Respondent was

admitted to the practice of law in Ohio on November 16, 1981; that he is subject to the Code of Professional Responsibility, the Rules of Professional Conduct and the Rules for the Government of the Bar; and at all relevant times to the misconduct alleged Respondent practiced law as "Percy Squire Co., LLC" and is the sole member of the same. Based on the evidence, the panel makes the following findings of fact and conclusions of law.

Findings of Fact and Conclusions of Law

Count 1

George "Mike" Riley and his father, Anthony Riley, retained Respondent on Friday, December 7, 2007 after meeting with him that day and discussing various pending legal matters. The engagement letter signed by the Rileys contained an agreement for a "flat fee" of $100,000; $25,000 acknowledged to have been paid that day, and the balance of $75,000 to be paid in installments by February 2008. In addition, Mike Riley gave Respondent $5,000 so that Respondent would begin work immediately. Respondent, in exchange, wrote a $5,000 check to Mike Riley's son from his business account. (Respondent testified that Riley originally was going to give the cash to Riley's son at college.) The $5,000 in cash was not deposited into Respondent's business or IOLTA account. (Tr. 48-50)

Also on December 7, the $25,000 fee payment was deposited into Respondent's business account via wire transfer from an account in Florida. The $5000 in cash was given to Respondent so he would begin working on the legal matters for the Rileys that weekend. The parties did not expect that the $25,000 wired to Respondent's account would be credited to his account until the following Monday morning.

During this same meeting, apart from the issues of legal representation, Respondent and Mike Riley discussed Riley's help in brokering financing for the acquisition of a local radio station by Respondent.

The following Monday, December 10, 2007, Riley informed Respondent that he no longer needed his legal services and asked him to deduct his earned expenses from the December 7 meeting and return the balance of the $25,000. (Tr. 54-55) Respondent testified that he and his staff worked approximately 14 hours that weekend on the Riley matter. Respondent stated that his hourly rate at that time was $250. On December 10, by the close of the day, a balance in excess of $5000 was in Respondent's business account. (Res. Ex. 1 and Stip. Ex. 2) However, Respondent informed Riley he had spent the funds and was unable to return the $25,000. (Tr. 55-56) Respondent then gave Riley a promissory note from Percy Squire., LLC to return the entire $25,000 by January 10, 2008. (Tr. 61) The terms of note included that overdue payments of interest and principal will bear an "interest rate of 12% per annum payable immediately" and that "overdue penalties will accrue at a rate of 18% commencing January 11, 2008." On the same day, Respondent provided Riley with a copy of the letter of intent drafted for Respondent to purchase the radio station for $3,000,000. (Tr. 60) Respondent did not discuss any conflict of interest with Riley prior to execution of the note, or advise him to seek independent counsel regarding the note and any participation in the radio station purchase. Respondent failed to timely repay the note, and on March 11, 2008, Mike Riley paid a visit to Respondent's office. Respondent at that time, at Riley's request, issued a post-dated, March 12, 2008 check from his business account payable to Mike Riley for $25,000. Riley attempted to cash the check that day, but there were insufficient funds in the account. (Tr. 63-64) Respondent then gave him a cashier's check for $25,000.

Respondent was charged in this count with violating the following disciplinary rules:

- Prof. Cond. R. 1.7(a)(2) - A lawyer's representation of a client creates a conflict of interest if the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another;

- 1.7(b)(2) - A lawyer shall not accept or continue the representation of a client if there is a conflict of interest without informed consent;

- 1.8(a) - A lawyer shall not enter into a business transaction with a client unless the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel and the client gives informed consent;

- 1.15(a) - A lawyer shall hold property of clients separate from the lawyer's own property;

- 1.15(c) - A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred;

- 1.16(e) - A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned;

- 8.4(c) - Conduct involving dishonesty, fraud, deceit, or misrepresentation; and

- 8.4(h) - Conduct that adversely reflects on the lawyer's fitness to practice law.

Respondent argues that the promissory note was not a business transaction with Riley, that the $25,000 was a portion of the $100,000 agreed upon, and that it was a flat fee that he could place in his business account. He argues further that, by issuing the promissory note, he fulfilled his obligation to promptly refund the fees.

The panel finds that the Relator has failed to prove by clear and convincing evidence a violation of Prof. Cond. R 1.7(a) and (b) and 1.8(a). Mike Riley terminated Respondent's representation before Respondent issued a promissory note to Riley. Further, Respondent gave Riley the letter of intent to purchase the radio station in order for Riley to assist Respondent in obtaining financing after or at the same time that Riley terminated Respondent's representation.

The panel also finds that Relator has failed to prove by clear and convincing evidence a violation of Prof. Cond. R. 8.4(c). Relator argues that Respondent had approximately $5000 in his operating account on Monday December 10 when he told Mike Riley that he did not have the $25,000, but would write a promissory note for that amount. The panel finds this evidence is insufficient to find a violation.

The panel therefore recommends the dismissal of the Prof. Cond. R 1.7(a) and (b), 1.8(a) and 8.4(c).

Respondent stipulated to violating Prof. Cond. R. 1.15(a) and (c.). However, at the hearing Respondent disputed a violation of Prof. Cond. R. 1.15(c.) Respondent relies on Board Op. 96-4 for justification for putting the $25,000 "flat fee" into his operating account. Relator argues that reliance on the Board Opinion is not dispositive of the issue. Prof. Cond. R. 1.15(c) directs that a lawyer "shall deposit ...legal fees... that have been paid in advance, to be withdrawn by the lawyer only as fees are earned..." The Board's Advisory Opinion 96-4, adopted prior to the adoption of the Ohio Rules of Professional Conduct, has not been withdrawn and may still offer guidance to similar Professional Conduct Rules. However, Comment [6A] following Prof. Cond. R. 1.5, which addresses fees and expenses, discusses "flat fees" and explains: "A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed . . . When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15 . . ."

Respondent immediately wrote checks from his operating account upon receipt of the $25,000 from Riley to the extent that he could not refund any unearned fees just three days later. Respondent spent nearly all of the partial "flat fee" before he did substantial work for the client and kept no records as required.

A majority of the panel found a violation of Prof. Cond. R. 1.15(a) and (c). Therefore the panel finds a violation of Prof. Cond. R. 1.15(a) and (c).

Two of the panel members also found a violation of Prof. Cond. R. 8.4(h). Respondent wrote a check with insufficient funds to repay the note to Riley. Therefore, the panel finds a violation of Prof. Cond. R. 8.4(h).

The panel finds by clear and convincing evidence a violation of Prof. Cond. R. 1.16(e).

Count 2

To pay Mike Riley the $25,000 referenced in Count 1, on March 12, 2008, Respondent borrowed $30,000 from a current client, Curtis Jewell, whom Respondent was representing in a lawsuit in the Franklin County Common Pleas Court during the period of May 2006 until May 2009. Respondent executed a promissory note stating that the entire amount was "due and owing if the payment of the $30,000 was not made before March 18, 2008 and overdue installations of interest and principal shall bear interest at the rate of 12% per annum payable immediately." It further stated that "In addition, overdue penalties will accrue at a rate of 18% commencing on March 19, 2008." Respondent did not advise Jewell in writing regarding obtaining the advice of independent counsel or obtain Jewell's written consent to the essential terms of the transaction, including whether Respondent was representing Jewell. (Stip. 27)

Respondent transferred $31,000 from his trust account to Jewell on March 17, 2008. In March 2009, in answer to an interrogatory from Relator regarding the source of the $25,000 provided to Mike Riley, Respondent stated that the $25,000 was loaned by Jewell and repaid to him the following week from funds borrowed from Bishop Norman L. Wagner. When asked to identify the terms of the loan "as they were explained" to Jewell, Respondent stated that "Percy Squire Co, LLC, would borrow $25,000 for one or two days." (Stip. 30, 31) Respondent did not

refer to the promissory note or its terms. In October 2009, Respondent stated to Relator that he had borrowed $28,500 from Jewell and the remaining $3000 was an interest payment.

Respondent was charged with violating the following disciplinary rules:

- Prof. Cond. R. 1.8(a) - A lawyer shall not enter into a business transaction with a client unless the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel and the client gives informed consent; and
- 8.4(h) - Conduct that adversely reflects on the lawyer's fitness to practice law.

The panel finds that Respondent violated Prof. Cond. R. 1.8(a). [1] The panel recommends dismissal of Prof. Cond. R. 8.4(h).

Count 3

Respondent received $100,000 by wire transfer on March 17, 2008 and arranged for the funds to be deposited into his IOLTA account. The funds were money borrowed from Bishop Norman L. Wagner, who had borrowed $100,000 from Huntington National Bank that same date. (Wagner's loan to Respondent was used to pay Curtis Jewell as referenced in Count 2.)

Also on March 17, Respondent signed a promissory note, an indemnification agreement and a security agreement as sole member of Squire LLC, which promised to repay Wagner $75,000 on or before March 19, 2009. Respondent, again on behalf of Squire LLC, agreed to pay Wagner for all of the interest payments to Huntington National Bank that Wagner paid in connection with the $100,000 loan. If Respondent failed to pay the amounts owed by March 19, 2009, Wagner was authorized to obtain a judgment against Squire LLC without notice and that Squire LLC would hold Wagner harmless if there was a default on the $100,000 loan from Huntington National Bank. The collateral included:

[1] Respondent argues that he did not violate Prof. Cond. R. 1.8(e); Respondent was not charged with violating Prof. Cond. R. 1.8(e), rather the charge cited Prof. Cond. R. 1.8(a).

"1. All accounts, contract rights, instruments, documents, chattel paper, and all obligations in any form arising out of the sale or lease of goods or the rendition of services by [Squire LLC];

2. All general intangibles, chooses in action. Causes of action. Obligations or indebtedness owed to [Squire LLC] from any source whatsoever, and all other intangible personal property of every id and nature..."

The security agreement also provided:

"1. Any officer, employee or agent of [Wagner] shall have the right, at any time or times hereafter, in the name of [Wagner] or its nominee to verify the validity, amount or any other matter relating to any Accounts by mail, telephone, or otherwise.[Wagner] or its designee may at any time notice Account Debtors that Accounts have been assigned to [Wagner] or on [Wagner's] security interest therein, and after default by [Squire LLC] collect the same directly...

2. [Squire LLC] appoints [Wagner] or [Wagner's] designee as its attorney-in-fact to endorse [Squire LLC] name on any checks, notes acceptances, money orders, drafts or other forms of payment or security that may come into [Wagner's] possession...to notify post office authorities to change the address for delivery of [Squire LLC's] mail to an address designated by [Wagner]. To receive and open all mail addressed to [Squire LLC] and to retain all mail relating to Collateral and forward all other mail to [Squire LLC], to send requests for verification of Account to customers or Account Debtors, and to do all things necessary to carry out this Agreement. [Squire] ratifies and a[proves all acts of [Wagner] as attorney-in-act. ...Any person dealing with [Wagner] shall be entitled to conclusively rely on any written or oral statement of [Wagner] or his designee that this power of attorney is in effect."

As of the date of the hearing, Respondent had not repaid Wagner any of the principal due on the note.

In response to August 10, 2009 inquiries from Relator, Respondent stated that he had received $75,000, not $100,000, from Wagner. When questioned again by Disciplinary Counsel, Respondent admitted that he received $100,000, but asserted that the $25,000 not documented in the promissory note was payment for his work in the case *Brian Wallace, Administrator of the Estate of Norman E. Wallace v. Case Western Reserve University, et al.* However, when Relator reminded Respondent that he took the case on a contingent fee basis, and therefore the $25,000 would be clearly excessive, Respondent "gave this further thought." (Tr. 83) Respondent testified he made a mistake and he left the extra $25,000 out of the promissory note

because it was actually to repay a personal debt owed to Mike Riley. (Tr. 80) Respondent has claimed his responses were based on honest mistaken memories rather than stating his inaccuracies were misrepresentations, compounded by inaccurate record keeping. The panel does not find this credible.

When Respondent received the $100,000 from Wagner, Respondent's IOLTA account contained $50. On March 17, 2008, Respondent transferred $25,000 to his Huntington Bank account, paid Curtis Jewell the $31,500 and used almost $28,000 for personal or business expenses. From March 17, 2008 after the $100,000 was deposited, through April 21, 2008, 19 withdrawals and two deposits were made. All payments made during this period were personal or business expenses of Respondent, including repayments of personal loans. The two deposits were Respondent's earned legal fees.

On April 24, 2008, the balance in Respondent's IOLTA account was $6479.06 when Shearman & Sterling LLP wired $113,228.18 that belonged to his client Mark Lay. His IOLTA account then contained $119,707.24.

From April 24, 2008 to June 10, 2008, activity in Respondent's IOLTA account included a $7500 deposit of Respondent's earned fees, a payment of $10,000 to DJM Capital to obtain investment banking services for Squire LLC, that was unrelated to Respondent's law practice, a payment to Huntington Bank for interest on the Wagner loan, and payment of personal loans, including a loan from the Prout group. Respondent testified that $20,000 of the $113, 228.18 that he had transferred into his operating account was for payment to him for legal work on five separate matters for Lay. One of the legal matters was his representation of Lay in the criminal matter of *United States of America v. Mark D. Lay.* However, Respondent testified that he had

been paid-in-full for the trial by the end of 2007. (Tr. 97-98) Further, Respondent has not produced any billing records or agreements evidencing the earnings for these matters.

Respondent testified that the use of these funds was pursuant to permission given to him by either Lay or Antoine Smalls, as trustee for the "Indenture for the Mark D. Lay Legal Defense and Welfare Fund." Smalls was a vice president of MDL Capital Management, Mark Lay's company, and a friend of Mark Lay. Lay has no recollection of the original money ($113,228.18) and Smalls testified that he did not become involved with such an indenture fund until June, 2008. (Tr. 114) No documentation supporting use of these funds was produced, including trust account records. [2]

On June 10, 2008 the balance in Respondent's IOLTA account was $193.61.

On June 20, 2008 the Mark D. Lay Defense and Welfare Fund was created by Antoine Smalls for acceptance of contributions towards Lay's legal defense and welfare. Smalls sent Respondent a check for $280,000 representing contributions he had received. Respondent deposited the check into his IOLTA account. (Stip. 61)

From the receipt of this check on June 20 to October 14, 2008 Respondent's IOLTA account activity included payments to Huntington Bank, deposits of client's funds, personal funds or earned legal fees, a loan from Charles Freiburger to Respondent and funds for expenses in another legal matter. An example of the activities in this account explaining the problems with Respondent's use of his IOLTA account is a September 19, 2008 deposit of $4,466.28 from McCarthy, Lebit, Crystal, and Liffman for expenses related to the *Wallace v Halder* matter, however, there is no record of payment from these funds. As a result of all this activity, the balance in Respondent's IOLTA account on October 14, 2008 was $289.32.

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[2] Smalls's video deposition was played during the hearing and Lay's deposition, taken at Fort Dix Prison in Fort Dix, New Jersey, on April 21, 2010 was offered as Stipulated Exhibit 76 and received into evidence.

Woven throughout Respondent's bank records are approximately 60 checks made payable to a Wesley Walker. (Tr. 304) Respondent testified that Walker was a "courier" and that Walker would "follow whatever instructions [Respondent] gave him." (Tr. 304) Respondent would write checks to Walker, who would cash the check and return the money to Respondent. Walker appears to be unknown by Respondent's clients, but was involved in the disposition of their IOLTA funds; sometimes a client was noted on the memo portion of the IOLTA check, other times not. According to Respondent, the cash was then used to pay client expenses, Respondent's creditors, Respondent's legal fees, or converted into bank checks by Walker. Walker did not testify before the panel. (Tr. 304)

Also woven throughout the explanation for withdrawals of IOLTA funds for his use, is Respondent's explanation of "borrowing" funds only in an amount that he determined was representing what he considered earned fees for his legal work for Mark Lay and the Trust Fund. Unfortunately, Respondent had no records of billing or agreements with his clients for this practice. Respondent testified that he only took what he could justify in legal work. Monies were repaid with money borrowed from others, such as Wagner, or from Columbus attorney Charles Freiburger.[3] Other than the $150,000 he and another attorney charged Lay for representing him in his criminal case, there was no written or verbal agreement of how he was going to be paid. He would determine what a fair charge was at a later date. (Tr. 308) Lay's understanding was that they would work it out and Respondent would be paid at a later date. Respondent did not send any billing or accounting for his time to Lay. Respondent also testified that he made transfers from the IOLTA account on instructions from either Lay or Smalls. Lay does not recall any specific instructions, and testified that any money from the Trust was not his

[3] Respondent testified that by the time of the hearing, he had borrowed $250,000 from Charles Freiburger, securing the loans by an agreement dated February 26, 2007 in which Respondent assigned his fees from enumerated cases to Freiburger.

and he did not direct any of its use, other than knowing it was to be used for defense expenses and to support his children. Smalls remembers some discussions. Complicating the matter are two MDL trust instruments- one dated June 20, 2008 appointing Respondent as the sole trustee of the Mark D. Lay Defense and Welfare Fund signed by Smalls, and a document dated October 6, 2008 appointing Smalls as the sole trustee of the Mark Lay Legal and Defense Fund (MDL) that was signed by Respondent. These documents are not dispositive of the allegations against Respondent. Smalls and Respondent communicated with each other from June through October of 2008; however, it is not clear what Smalls's understanding of the communications were.

What is clear is that Respondent has not maintained a general ledger for his IOLTA account or individual ledgers for his clients, or all bank statements, deposit slips and cancelled checks for his IOLTA account; Respondent has not done a monthly reconciliation of his IOLTA account and records.

What is also clear is that Respondent floated loans to himself and payments on behalf of himself or others with the MDL funds in his IOLTA account. Smalls acknowledged that he knew about these loans.

Respondent was charged in Count 3 with violating the following disciplinary rules:

- Prof. Cond. R. 8.1(a) - Knowingly making a false statement of material fact;
- 8.4(c) - Conduct involving dishonesty, fraud, deceit, or misrepresentation;
- 1.15(a) - A lawyer shall hold property of clients separate from the lawyer's own property;
- 1.15(c) - A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred;
- 1.5(b) - The nature and scope of the representation and the basis or rate of the fee and expenses shall be communicated to the client, within a reasonable time after commencing the representation;

- 1.6(a) - A lawyer shall not reveal information relating to the representation of a client;
- 1.7(a) and (b) - A substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's own personal interests; and
- 8.4(h) - Conduct that adversely reflects on the lawyer's fitness to practice law.

Respondent stipulated to violating Prof. Cond. R. 1.15(c.) The panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.1(a); 8.4(c); 1.15(a) and (c); 1.5(b) and 8.4(h.)

Prof. Cond. R. 1.6(a) charge relates to the assignment of client fees and records in the security agreement Respondent gave to Wagner (and Freiburger) in exchange for loans, which have not yet been paid. Prof. Cond. R. 1.7(a) and (b) charges relate to the inherent conflicts of interest in these assignments. While there is no evidence of what, if any, client information has been revealed, Relator offers *Disciplinary Counsel v. Shaver*, 121 Ohio St. 3d 393, 2009-Ohio-1385, as argument that actual revelation of client information is not necessary for a violation. In *Shaver,* a violation of Prof. Cond. R. 1.6(a) as well as 1.9(c)(2) was found. Shaver was moving his law office and placed client files in storage. Later the respondent put boxes of client files in a dumpster. The files contained confidential client material.

Only one panel member finds a violation of Prof. Cond. R. 1.6(a) and 1.7(a) and (b). A majority of the panel recommends dismissal of Prof. Cond. R. 1.6(a) and 1.7(a) and (b).

Count 4

On May 9, 2003 Biswanath Halder shot and killed Norman Wallace at the Case Western Reserve University ("CWRU") business school. Norman Wallace was Bishop Norman L. Wagner's nephew. In May 2006, Respondent filed a wrongful death action against Halder, CWRU and others on behalf of the administrator of Norman Wallace's estate, his brother Brian

Wallace. Respondent and attorneys Christian Patno and Robert Glickman performed legal work on behalf of the plaintiff in this case. The docket for this case lists Respondent, Glickman, Patno and attorney Barry Murner as counsel of record, none of whom practices in Respondent's law firm. Their representation was on a contingent fee basis.

Respondent also represented Brian Wallace in Cuyahoga County Probate Court for Norman Wallace's estate, which was opened in April 2005. In December 2008, the probate court removed Brian Wallace as fiduciary of the estate for failing to file an account (first and second partial account were filed previously) and sua sponte dismissed the estate on December 12, 2008.

Local Rule 71.1(D) of the Cuyahoga County Probate Court required the fiduciary to obtain court approval prior to entering into a contingency fee agreement for services with an attorney. No such application was filed in the probate court in the Wallace estate matter.

The Cuyahoga County Probate Court limits under Local Rule 71.2 contingency fees pursuant to a wrongful death case to 33.3% for the first $100,000 and 30% for any amount over $100,000. However, upon written application extraordinary fees may be granted. No written application for extraordinary fees was filed in the Wallace wrongful death case.

On March 17, 2008, Bishop Wagner borrowed $100,000 from Huntington Bank on Respondent's behalf. As explained in Count 3, Respondent received $100,000, but issued a promissory note to Bishop Wagner for $75,000. During the investigation, Respondent initially said the $25,000 discrepancy was for attorney's fees in this probate matter. However, the only plaintiff against whom Respondent secured a judgment in this wrongful death action was the campus gunman, who was judgment-proof and unable to pay. Case Western Reserve University,

a second defendant, was granted summary judgment, which was upheld on appeal and denied rehearing by both the Ohio Supreme Court and the United States Supreme Court.

Upon notification by Disciplinary Counsel that it is clearly excessive to charge an additional flat-fee in a contingent fee case, Respondent changed his story, testifying that the $25,000 was part of the loan from Bishop Wagner and thus not a fee for his services.

Respondent was charged with violating the following disciplinary rules:

- Prof. Cond. R. 1.5(a) - A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee;
- 1.5(e) - Dividing fees with lawyers from another firm without the client giving written consent after full disclosure;
- 8.4(c) - Conduct involving dishonesty, fraud, deceit, or misrepresentation; and
- 8.4(h) - Conduct that adversely reflects on the lawyer's fitness to practice law.

Two panel members find that Respondent violated 8.4(h) for "flip-flopping" on his statements, thus casting doubt on his credibility. Respondent also failed to apply to the local probate court prior to entering into a contingency fee agreement.

Therefore, the panel finds that Respondent violated Prof. Cond. R. 8.4(h).

The panel finds that Relator failed to prove violations of Prof. Cond. R. 1.5(a); 1.5(e) and 8.4(c) by clear and convincing evidence. While there is no written agreement to divide attorney fees with attorneys Christian Patno, Robert Glickman or Barry Murner, because this case was to be paid on a contingency fee basis and no fees were collected (other than the $25,000 that Respondent discussed above) there is no violation. Further the Wallace family was generally aware of the additional legal representation and fee arrangements with these other lawyers. (Tr. 255- 270 and Stip. Ex. 78)

Count 5

Respondent filed an action in the Franklin County Municipal Court on behalf of Patrick Prout in January 2007. A judgment was issued in Prout's favor in June 2007, and when the defendant failed to pay the judgment a motion to show cause was filed. The case was continued to March 2008, at which time the court ordered sanctions against the defendant.

Patrick Prout is the President and CEO of the Prout Group. Respondent borrowed money from the Prout Group seven times during the period of time he represented Patrick Prout. On each occasion, Respondent executed a promissory note to the Prout Group for the amount borrowed each with interest at 12% and overdue penalties at a rate of 18%. On March 17, 2008, Respondent wired $6000 from his IOLTA account to the Prout Group. (Stip. 91) Respondent did not advise Prout in writing to seek the advice of independent counsel or obtain a written consent from Prout to the essential terms of the transaction or Respondent's role in the transaction. Respondent only dealt with Patrick Prout in regard to these loans, and Prout's assistant who wired the funds to Respondent and kept track of the notes was the only other person at the Prout Group who was aware of the loans.

Relator charged Respondent with violations of these disciplinary rules:

- Prof. Cond. R. 1.8(a) - A lawyer shall not enter into a business transaction with a client unless the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel and the client gives informed consent; and
- 8.4(h) - Conduct that adversely reflects on the lawyer's fitness to practice law.

The question posed is whether representing an individual in a civil case while accepting a loan from that client's business violates this rule.

Here, Respondent stipulated that Patrick Prout is the president and CEO of the Prout Group with whom Respondent dealt with to obtain these loans. Further, Respondent only dealt

with Prout when arranging the terms of the loans. The only other person at the Prout Group involved or who had knowledge of the loans was Prout's assistant, who wired the money to Respondent and kept track of the promissory notes. (Stip. 92) Respondent's Exhibit F describes the Prout Group and lists five individuals on the Prout "team" besides Mr. Prout. No other evidence was presented as to the ownership interests of the Prout group.

The panel finds that the ownership interests of the Prout Group and Patrick Prout are not aligned enough to constitute a violation of Prof. Cond. R. 1.8(a).

Therefore, the panel recommends dismissal of Prof. Cond. R. 1.8(a).

One member of the panel would find a violation of Prof. Cond. R. 8.4(h) because there still exists a conflict of interest under all the circumstances in this transaction.

A majority of the panel recommends dismissal of a violation of Prof. Cond. R. 8.4(h).

MITIGATION AND AGGRAVATION

The panel finds the following mitigating factors pursuant to BCGD Proc. Reg. 10(B)(2):

(a) no prior disciplinary record;

(b) good character or reputation. (Witnesses Brian Wallace, the executor of the estate of Norman Wallace and his sister, Kim Wallace testified they had no complaints about the way Respondent handled the estate or wrongful death cases of Norman Wallace. Curtis Jewell volunteered that Respondent was one of the most respected people he knew. (Tr. 283) Respondent at one time served for two years as a law clerk for retired federal Judge Thomas D. Lambros. Judge Lambros testified on Respondent's behalf, with obvious affection and high praise. However, the judge was not familiar with the specifics of this grievance. Respondent also is a graduate of West Point and is a retired army officer.)

The panel finds the following aggravating factors pursuant to BCGD Proc. Reg. 10(B)(1):

(b) a dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(f) submission of false evidence, false statements or other deceptive practices during the disciplinary process. (As explained above in Count 3, in response to inquiries from Relator, Respondent stated that he had received $75,000 not $100,000, from Bishop Wagner. Later in the hearing Respondent admitted to receiving the entire $100,000 but asserted that the extra $25,000 above the $75,000 in the promissory note, was a flat fee payment for a case in which he was also charging a contingency fee, but when reminded of that issue by Relator he "gave this further thought" (Tr. 83));

(g) refusal to acknowledge wrongful nature of conduct. (Respondent admits and characterizes his misconduct as solely record keeping in nature. He does not recognize the extent of possible harm to his clients when he engages in an extensive scheme of commingling, borrowing of client funds for himself and for other clients, borrowing against expected billing, lack of full disclosure to clients about use of their funds and of conflict of interests and his other actions described in this report. He claims that he has received no complaints from his clients. Indeed, his clients, even when advised of his use of their funds, do not seem upset and even support him, not perceiving that they have been hurt in any way. However, the panel is concerned that Respondent's lack of record keeping and other professional misconduct may have concealed actual harm, even if unintended harm. Respondent does not recognize this possibility);

(h) vulnerability of and resulting harm to the victims of misconduct. (Respondent's clients have given him their utmost trust, which he has violated); and

(i) failure to make restitution. (It is impossible to tell if Mark Lay and other clients are owed money because of a lack of proper record keeping).

SANCTION

Relator asks that the Respondent be indefinitely suspended from the practice of law. Respondent requests that any sanction that is imposed be stayed pending no further violations of the disciplinary rules.

Relator cited a case in which an actual suspension from the practice of law is deemed required under circumstances of dishonesty, fraud, deceit or misrepresentation. Respondent was found to have violated Prof. Cond. R. 8.4(c) in Count 3. See *Disciplinary Counsel v. Rooney*, 110 Ohio St.3d 349, 2006-Ohio-4576.

Relator also characterizes Count 3 as demonstrating that Respondent converted clients' funds for his own use. The amounts deposited for Mark Lay and the Mark Lay Defense Fund were used to pay Respondent's personal expenses and for other clients. While Respondent claims that he only took money that he earned and could have charged as fees, his lack of documentation and poor record- keeping taint this argument. Relator cites *Cuyahoga Cty. Bar Assn. v Churilla* (1997), 78 Ohio St.3d 348, and *Disciplinary Counsel v. Connaughton* (1996), 75 Ohio St.3d 644, as standing for disbarment as the presumptive sanction for misappropriation. Also cited were *Akron Bar Assn. v. Smithern*, 125 Ohio St.3d 72, 2010-Ohio 652; *Cleveland Bar Assn. v. Harris*, 96 Ohio St.3d 138, 2002-Ohio-2988; and *Disciplinary Counsel v. Brown* (1996), 74 Ohio St.3d 594. Smithern, who was given an indefinite suspension, was convicted of grand theft, had no prior disciplinary record, and had a gambling and alcohol addiction problem. Harris's mitigating evidence resulted in the Supreme Court indefinitely suspending him. Brown was given an indefinite suspension and was convicted of a felony.

Respondent's clients are not seeking reimbursement, and due to Respondent's pattern of borrowing money, may not have lost any funds. (Again, Respondent's poor records may obfuscate any outright theft.) The panel did not find rule violations proven to the extent that Relator charged in its complaint.

The panel notes that Respondent's clients who testified were all satisfied with his representation and seem to continue to hold him in high esteem. If not for Mike Riley, a very short-term client, these matters might not have been brought before the Board.

The panel recommends that Respondent be suspended from the practice of law for 2 years, with 12 months stayed, on condition that Respondent:

(1) provide a full accounting to Mark Lay and any related party in interest for all funds contributed to the Mark Lay Defense Fund during Respondent's involvement, showing all payments to Respondent or to him through an intermediary, with supporting documentation as to all fees, loans and expenses;

(2) pay restitution to the Mark Lay Defense Fund of any unverified fees, loans or expenses, with interest at the statutory rate;

(3) serve probation during the stay period in which Respondent shall meet the requirements of Gov. Bar R. V(9) and establish an office accounting system to accurately track receipts and disbursements of clients' funds and monies advanced or paid for fees, loans and expenses; and

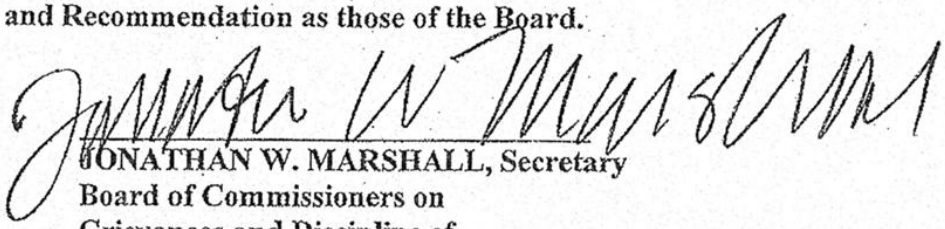
(4) pay the costs of this proceeding.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 8, 2010. The Board

adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Percy Squire, be suspended for a period of two years with one year of the suspension stayed upon the conditions contained in the panel report. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.



JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

FILED

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CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

Case No. 2010-2021

Disciplinary Counsel,
Relator,
v.
Percy Squire,
Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT

ORDER

The Board of Commissioners on Grievances and Discipline filed its final report in this court on November 22, 2010, recommending that pursuant to Rule V(6)(B)(3) of the Supreme Court Rules for the Government of the Bar of Ohio respondent, Percy Squire, be suspended from the practice of law for a period of two years with one year stayed on conditions. Relator filed objections to said final report, respondent filed an answer, and this cause was considered by the court.

On consideration thereof, it is ordered and adjudged by this court that pursuant to Gov.Bar R. V(6)(B)(2), respondent, Percy Squire, Attorney Registration Number 0022010, last known business address in Columbus, Ohio, is indefinitely suspended from the practice of law consistent with the opinion rendered herein. It is further ordered that any future petition for respondent's reinstatement shall be conditioned upon respondent filing, within 30 days of the date of this order, a full accounting to Mark Lay, the court, and any related party in interest for his withdrawals from, and deposits to, the $113,228.18 insurance proceeds fund and the $280,000 Mark Lay Defense and Welfare fund during respondent's involvement with those funds. It is further ordered that the accountings should set forth all payments to respondent that were made either directly or through an intermediary and should include documentation of all fees, loans to respondent or third parties, and expenses paid on behalf of Mark Lay. It is further ordered that as an additional condition for reinstatement, respondent shall submit proof to this court, to be verified by relator, that he has paid restitution to the Mark D. Lay Legal Defense and Welfare Fund and the insurance fund of any unverified fees, loans, or expenses, with interest at the statutory rate.

It is further ordered that respondent immediately cease and desist from the practice of law in any form and is hereby forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority.

It is further ordered that respondent is hereby forbidden to counsel or advise or prepare legal instruments for others or in any manner perform such services.

It is further ordered that respondent is hereby divested of each, any, and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that before entering into an employment, contractual, or consulting relationship with any attorney or law firm, respondent shall verify that the attorney or law firm has complied with the registration requirements of Gov.Bar R. V(8)(G)(3). If employed pursuant to Gov.Bar R. V(8)(G), respondent shall refrain from direct client contact except as provided in Gov.Bar R. V(8)(G)(1), and from receiving, disbursing, or otherwise handling any client trust funds or property.

It is further ordered that respondent be taxed the costs of these proceedings in the amount of $3,995.77, which costs shall be payable to this court by cashier's check or money order on or before 90 days from the date of this order. It is further ordered that if these costs are not paid in full on or before 90 days from the date of this order, interest at the rate of 10% per annum shall accrue as of 90 days from the date of this order and the matter may be referred to the Attorney General for collection. It is further ordered that respondent may not petition for reinstatement until such time as respondent pays costs in full, including any accrued interest.

It is further ordered that, pursuant to Gov.Bar R. X(3)(G), respondent shall complete one credit hour of continuing legal education for each month, or portion of a month, of the suspension. As part of the total credit hours of continuing legal education required by Gov.Bar R. X(3)(G), respondent shall complete one credit hour of instruction related to professional conduct required by Gov.Bar R. X(3)(A)(1), for each six months, or portion of six months, of the suspension.

It is further ordered, sua sponte, by the court, that within 90 days of the date of this order, respondent shall reimburse any amounts that have been awarded against respondent by the Clients' Security Fund pursuant to Gov.Bar R. VIII(7)(F). It is further ordered, sua sponte, by the court that if, after the date of this order, the Clients' Security Fund awards any amount against respondent pursuant to Gov.Bar R. VIII(7)(F), respondent shall reimburse that amount to the Clients' Security Fund within 90 days of the notice of such award.

It is further ordered that respondent shall not be reinstated to the practice of law in Ohio until (1) respondent complies with the requirements for reinstatement set forth in the Supreme Court Rules for the Government of the Bar of Ohio; (2) respondent complies with the Supreme Court Rules for the Government of the Bar of Ohio; (3) respondent complies with this and all other orders of the court; and (4) this court orders respondent reinstated.

It is further ordered that on or before 30 days from the date of this order, respondent shall:

1. Notify all clients being represented in pending matters and any co-counsel of respondent's suspension and consequent disqualification to act as an attorney after the effective date of this order and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in respondent's place;

2. Regardless of any fees or expenses due respondent, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or

notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

3. Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in the possession or control of respondent;

4. Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of respondent's disqualification to act as an attorney after the effective date of this order, and file a notice of disqualification of respondent with the court or agency before which the litigation is pending for inclusion in the respective file or files;

5. Send all notices required by this order by certified mail with a return address where communications may thereafter be directed to respondent;

6. File with the clerk of this court and the Disciplinary Counsel of the Supreme Court an affidavit showing compliance with this order, showing proof of service of notices required herein, and setting forth the address where the respondent may receive communications; and.

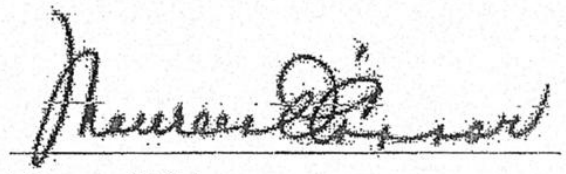
7. Retain and maintain a record of the various steps taken by respondent pursuant to this order.

It is further ordered that on or before 30 days from the date of this order, respondent surrender the attorney registration card for the 2011/2013 attorney registration biennium.

It is further ordered that until such time as respondent fully complies with this order, respondent shall keep the Clerk and the Disciplinary Counsel advised of any change of address where respondent may receive communications.

It is further ordered, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, to respondent's last known address.

It is further ordered that the clerk of this court issue certified copies of this order as provided for in Gov.Bar R. V(8)(D)(1), that publication be made as provided for in Gov.Bar R. V(8)(D)(2), and that respondent bear the costs of publication.



Maureen O'Connor
Chief Justice

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

In re:

Reinstatement of

Percy Squire
Attorney Reg. No. 0022010

Petitioner

Disciplinary Counsel

Relator

Board Case No. 2009-023

SCO Case No. 2010-2021

**Findings of Fact
and Recommendation of the
Board of Professional Conduct
of the Supreme Court of Ohio**

ON PETITION FOR REINSTATEMENT TO THE PRACTICE OF LAW

{¶1} This matter was heard on November 21, 2014 in Cleveland and January 20, 2015 in Columbus, upon the petition of Percy Squire for reinstatement to the practice of law pursuant to Gov. Bar R. V, Section 25. The panel consisted of Alvin R. Bell, Sanford E. Watson, and Roger S. Gates, chair. None of the panel members resides in the district in which Petitioner now resides or resided at the time of his suspension.

{¶2} Petitioner appeared *pro se*. Scott J. Drexel appeared on behalf of Relator.

{¶3} There are three issues raised by the petition for reinstatement. The first issue is what constitutes clear and convincing evidence of an accounting in a case involving commingling and misappropriation of trust funds. Because Petitioner accounted for every expenditure made in connection with his representation of Mark Lay, the majority of the panel finds that Petitioner proved by clear and convincing evidence that he provided the accounting required by the Court.

{¶4} The second issue is whether restitution should be ordered for a loan Petitioner took from a client where an order of repayment of that loan was not part of the original suspension. Because the proceeds were not in any way misappropriated, restitution is not required.

{¶5} The third issue is whether Petitioner who admits to all of the factual allegations against him, and acknowledges the wrongful nature of his conduct is a proper person for reinstatement, notwithstanding the fact that he takes issue with certain findings of Court. The evidence here is that Petitioner, without, reservation admitted to commingling funds, borrowing money from clients held in trust, completely violating the ethical rules governing trust accounts, and using those trust funds "like a slush fund." And so while Petitioner admitted to all of his wrongful conduct, the fact that he denies any intention to steal from clients is not a denial of the wrongful nature of his conduct.

{¶6} Accordingly, for the reasons set forth below, the majority of the panel (Commissioners Watson and Bell) recommends that Petitioner be reinstated to the practice of law.

PETITIONER'S PRIOR DISCIPLINARY CASE

{¶7} On November 3, 2011, Petitioner was indefinitely suspended based on numerous violations contained in a five-count complaint brought by Relator. *Disciplinary Counsel v. Squire*, 130 Ohio St.3d 368, 2011-Ohio-5578. In the disciplinary hearing, Petitioner appeared *pro se.*

Count One—Riley Representation

{¶8} Petitioner agreed to represent Mike Riley in exchange for a $100,000 "flat fee." Shortly after making an initial payment of $25,000, Riley advised Petitioner that he would not need his services and requested return of the initial payment. Petitioner advised Riley that he had already spent the money and was unable to return it. Petitioner instead provided Riley a promissory note. After failing to timely satisfy the promissory note, Petitioner gave Riley a check that was dishonored. Petitioner then provided Riley with a cashier's check for the full amount. The Supreme Court held that Petitioner violated Prof. Cond. R. 1.15(a) [requiring a lawyer to hold property of clients separate from the lawyer's own property], Prof. Cond. R. 1.15(c) [requiring a

lawyer to deposit into a client trust account legal fees and expenses that have been paid in advance and to withdraw them only as fees are earned or expenses incurred], Prof. Cond. R. 1.16(e) [requiring a lawyer to promptly refund any unearned fee upon the lawyer's withdrawal from employment], and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]. Alleged violations of Prof. Cond. R. 1.7(a)(2), Prof. Cond. R. 1.7(b)(2), Prof. Cond. R. 1.8(a), and Prof. Cond. R. 8.4(c) were dismissed because they were not supported by clear and convincing evidence.

Count Two—Jewell Loan

{¶9} In order to obtain funds to satisfy his obligation to Riley, Petitioner borrowed $30,000 from his friend and client Curtis Jewell. Petitioner provided Jewell with a promissory note agreeing to repay the loan within six days. Petitioner failed to advise Jewell in writing that he should seek the advice of independent counsel, nor did he obtain Jewell's informed consent in writing to the essential terms of the transaction and Petitioner's role in the transaction, and Petitioner did not disclose whether he was representing the client in the transaction. Although Petitioner timely satisfied the note to Jewell, the Supreme Court held that Petitioner violated Prof. Cond. R. 1.8(a) [conflict of interest], but dismissed the alleged violation of Prof. Cond. R. 8.4(h).

Count Three—Bishop Wagner and Mark Lay

The Bishop Wagner Loan

{¶10} On March 17, 2008 and two days before his loan from Jewell was due, Petitioner borrowed $100,000 from Bishop Norman Wagner, who had borrowed the money from Huntington National Bank. Petitioner signed a promissory note to Wagner agreeing to repay $75,000 in a year, to pay Wagner for all of the interest payments on the Huntington loan, and to indemnify and hold Wagner harmless in the event of a default on the Huntington loan. Petitioner also executed a

security agreement providing Wagner with a security interest in the accounts receivable and other intangibles connected with Percy Squire Co., LLC. The moneys were deposited in Petitioner's client trust account.

{¶11} Within five weeks after receiving the $100,000 from the Wagner loan, Petitioner made nineteen withdrawals from his client trust fund to pay Petitioner's personal and business expenses.

{¶12} In response to Relator's inquiries concerning the Riley and Jewell transactions, Petitioner informed Relator that he had obtained the money to repay Jewell from his client trust fund. When asked to identify the source of the money in his client trust fund which was used to repay Jewell, Petitioner made misrepresentations to Relator's investigator before finally disclosing information about the Wagner loan. Although Petitioner testified at his disciplinary hearing that his incorrect statements resulted from "an honest mistake of memory," the original hearing panel did not find his testimony credible. At the time of his hearing in the disciplinary case, the principal due on the Wagner note had not been repaid.

{¶13} The Supreme Court held that Petitioner violated Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(c), Prof. Cond. R. 8.1(a) [prohibiting knowingly making a false statement of material fact in connection with a disciplinary matter], Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation], and Prof. Cond. R. 8.4(h). At the Board's recommendation, the Court dismissed alleged violations of Prof. Cond. R. 1.6, Prof. Cond. R. 1.7(a), and Prof. Cond. R. 1.7(b).

The Lay Matter--$113, 228.18 Lay Insurance Proceeds

{¶14} On April 24, 2008, the law firm of Shearman & Sterling, LLP wired $113,228.18 on behalf of Petitioner's client, Mark Lay, to Petitioner's trust account. Petitioner wrote checks

against the trust account to cover his own expenses and legal fees. Petitioner claims that he withdrew money in part to cover legal fees was prior to testimony that he had been paid in full in 2007 for his work in handling Lay's criminal matter. By June 10, 2008, the balance in Petitioner's client trust fund was only $193.61. At the hearing, Petitioner testified that every expenditure had been approved by Lay or Antoine Smalls, the former vice president of operations for Lay's company, MDL Capital Management. Smalls, however, testified that he had no recollection of the $113,228.18. Lay testified at deposition that he and Petitioner did not discuss specific details regarding fees and expenditures but agreed to settle at a later time. Petitioner produced some records, including canceled checks and summaries of expenditures, but not sufficient to satisfy the Board or the Court.

The Mark D. Lay Legal Defense and Welfare Fund

{¶15} In June 2008, Petitioner was appointed the sole trustee of the Lay defense fund, and Smalls sent him $280,000 in contributions received on behalf of the fund. Petitioner deposited the money into his client trust account and began issuing checks to Lay and his creditors, himself, his own creditors, and to pay expenses related to his representation of other clients from the defense fund. The Board also found scores of checks made payable to Petitioner's courier, Wesley Walker. Petitioner testified that he used the courier to get cash to pay client expenses, staff, himself, and his own creditors. Petitioner, however, produced no documentation to support this testimony.

{¶16} With the exception of a $150,000 flat fee arrangement, Petitioner did not have a specific agreement with Lay regarding the fee for services. Instead, they had a very loose understanding that Petitioner's fees would be determined at a later date. Petitioner borrowed money from the fund and paid it back with money he borrowed from others. Lay was not aware

of the day-to-day expenditures. Small recalled that he knew that Petitioner was taking loans from the funds held in trust.

{¶17} The Supreme Court held that Petitioner violated Prof. Cond. R. 1.5(b) [fees and expenses], Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(c), Prof. Cond. R. 8.4(c), and Prof. Cond. R. 8.4(h).

{¶18} Relator objected to the Board's findings with respect to Count Three seeking a specific finding that Petitioner misappropriated funds in violation of Prof. Cond. R. 8.4(c). In reconciling the objection with the evidence, the Court sustained the objection with respect to the Lay insurance proceeds, but overruled it with respect to the Lay defense fund.

Count Four

{¶19} Petitioner represented the fiduciary of the Estate of Bishop Wagner's nephew, Norman Wallace on a contingent fee basis. Petitioner failed to get approval for the contingent fee agreement as required by the probate court. Petitioner also claimed to charge a $25,000 fee for the representation and later changed his story when he testified that the $25,000 represented a loan from Bishop Wagner. The Supreme Court held that Petitioner violated Prof. Cond. R. 8.4(h), but alleged violations of Prof. Cond .R. 1.5(a), Prof. Cond. R. 1.5(e), and Prof. Cond. R. 8.4(c) were dismissed.

Count Five

{¶20} Petitioner represented Patrick Prout in a civil action. During the course of that representation, Petitioner borrowed money from the Prout Group, a company for which Prout served as president and CEO. Petitioner did not advise Prout to seek the advice of independent counsel regarding the loan. In the absence of additional evidence, alleged violations of Prof. Cond. R. 1.8(a) and Prof. Cond. R. 8.4(h) were dismissed.

Disciplinary Sanction

{¶21} The Court engaged in extensive analysis as to what would be the appropriate sanction for this misappropriation of funds case, weighing both the aggravating and mitigating factors. The aggravating factors here were many: (1) acting with a dishonest or selfish motive; (2) engaging in a pattern of misconduct involving multiple offenses; (3) submitted false evidence and false statements or engaged in other deceptive practices during the disciplinary proceeding; (4) refusal to acknowledge the wrongful nature of his conduct; (5) potential harm to clients; and (6) the failure to make restitution to Lay. The mitigating factors included the lack of a prior disciplinary record and evidence of good character and reputation.

{¶22} The Board's decision not to find that Petitioner misappropriated or converted client funds served as the basis for its recommendation of a two-year suspension, with 12 months stayed. Petitioner argued for a fully stayed suspension. Relator objected to the Board's report and recommended an indefinite suspension. In sustaining Relator's objection, the Court recognized that disbarment is the presumptive sanction for misappropriation but may be "tempered with sufficient evidence of mitigating or extenuating circumstances." Ultimately, a majority of the Court concluded that the appropriate sanction for Petitioner's misconduct was an indefinite suspension with conditions placed on his reinstatement. See *Squire, supra*. Three members of the Court dissented and would have imposed the Board recommended sanction of a two-year suspension, with one year stayed on conditions.

{¶23} On July 9, 2014, Petitioner filed his verified petition for reinstatement, and after a period of discovery, the case proceeded to hearing.

FINDINGS OF FACT

{¶24} Gov. Bar R. V, Sec. 25(D)(1)[1] establishes the requirement for reinstatement from an indefinite suspension by stating, in relevant part:

> The petitioner shall not be reinstated unless he or she establishes all of the following by clear and convincing evidence to the satisfaction of the panel hearing the petition for reinstatement:
>
> (a) That the petitioner has made appropriate restitution to the persons who were harmed by his or her misconduct;
>
> (b) That the petitioner possesses all of the mental, educational, and moral qualifications that were required of an applicant for admission to the practice of law in Ohio at the time of his or her original admission;
>
> (c) That the petitioner has complied with the order of suspension;
>
> (d) That the petitioner has complied with the continuing legal education requirements of Gov. Bar R. X;
>
> * * *
>
> (f) That the petitioner is now a proper person to be readmitted to the practice of law in Ohio, notwithstanding the previous disciplinary action.

{¶25} The suspension order issued by the Supreme Court set forth the following additional conditions that Petitioner must satisfy prior to reinstatement:

- Any future petition for Squire's reinstatement shall be conditioned upon Squire's providing, within 30 days of the date of our order, a full accounting to Mark Lay, the court, and any related party in interest for his withdrawals from, and deposits to, the $113,228.18 insurance proceeds and the $280,000 Mark Lay Defense and Welfare Fund during Squire's involvement with those funds. The accountings should set forth all payments to Squire made either directly or through an intermediary and include documentation of all fees, loans to Squire or third parties, and expenses paid on behalf of Mark Lay.

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[1] Although the reinstatement petition was filed, and the hearing was commenced, in this matter prior to the January 1, 2015 effective date of the amendments to Gov. Bar R. V, current Gov. Bar R. V, Section 27(C) provides that the amendments shall apply to all pending complaints to the extent practicable. The hearing in this matter was completed after the effective date of the amendments, and neither party has argued that application of the amendments to this case is not practicable.

- As an additional condition for reinstatement, Squire shall submit proof, to be verified by relator, that he has paid restitution to the Mark D. Lay Legal Defense and Welfare Fund and the insurance fund of any unverified fees, loans, or expenses, with interest at the statutory rate.

Accounting to Mark Lay

{¶26} There is no dispute that Petitioner filed an accounting with the Court in a timely manner. The issue is whether that accounting constitutes a "full accounting to Mark Lay, the Court, and any related party in interest for withdrawals" from the two Lay trust funds. The majority of the panel believes that Petitioner did provide a full accounting to both Lay and the Court. The majority will address the accountings separately.

{¶27} The testimony of Petitioner that he prepared a full accounting of all expenditures from both trust funds, reviewed it with Lay, and Lay approved the accounting is unrefuted. Petitioner further testified that Lay approved the findings of the accounting that there was no restitution required. Furthermore, Smalls, who was vice-president of operations for MDL Capital Management, an investment management firm, for which Lay was the principal, testified, "One thing I am sure of is that myself and Mr. Lay had no issues with the way the trust accounting was done in conjunction with Mr. Squire." November 21, 2014 Hearing Tr. 71. Given this testimony, there can be no dispute that Lay was satisfied with the accounting and is not seeking restitution.

Accounting to the Court

{¶28} Petitioner clearly complied with the accounting requirements set forth by the Court in its order. The Court required that the accounting set forth "all payments to Squire made either directly or through an intermediary and include documentation of all fees, loans to Squire or third parties, and expenses paid on behalf of Mark Lay." In response to the accounting requirements of the Court, Petitioner provided summary statements detailing transactions from those accounts, and each of those transactions he provided supporting documents in the form of cancelled checks

and/or transaction records from the financial institutions in which the trust accounts were held. These documents were filed with the Court on December 5, 2011 as required by the order of suspension, and subsequently admitted in the reinstatement hearing. Petitioner's Ex. F and G.

{¶29} Relator argues that Petitioner's accounting was insufficient by using the same evidence that formed the basis of the Court's finding that he misappropriated funds. Relator engaged in a very rigorous cross-examination of Petitioner, most of which was centered on the events of 2008 and 2009—the factual basis for the indefinite suspension. What was in place (or not in place) in 2008 and 2009 in the way of documentation should not be relitigated here.

{¶30} The focus of this inquiry should be whether the accounting submitted by Petitioner on December 5, 2011 satisfied the Court's order. The best guidance we have for determining what should be included in an appropriate accounting is Prof. Cond. R. 1.15(a). Under the rule, a lawyer is required to:

- maintain a copy of any fee agreement with each client [division (a)(1)];
- maintain a record of client funds for each client [division (a)(2)];
- maintain a record of each bank account [division (a)(3)];
- maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account [division (a)(4)]; and
- perform and retain a monthly reconciliation [division (a)(5)].

{¶31} In viewing the accounting provided by Petitioner it is clear he substantially complied with the documentation required of lawyers holding client funds. The documentation provided by Petitioner provided a record of client funds, information regarding each of the two bank accounts, deposit slips, cancelled checks, and other records of transactions provided by the banks. And he prepared summaries of each of the two trust accounts in an attempt to reconcile expenditures. The summaries included dates, amounts, and payees for each transaction.

{¶32} The documentation did not include copies of "any fee agreement" simply because there was no written free agreement regarding Petitioner's representation of Lay or detailing how

these accounts should be managed. Lay testified in his April 21, 2010 deposition that there was no written agreement but he had an understanding with Petitioner that they would at some later point figure what attorney fees were owed. Lay was also aware that Petitioner borrowed money from these funds, although he did not approve every transaction.

{¶33} Relator further argues that the accounting is deficient because it did not identify any of the disbursements as loans. The fact that some of the amounts characterized as legal fees in the accounting were originally loans taken by Petitioner and later reconciled as legal fees was no secret to the Court or anyone else. This evidence was originally admitted in the disciplinary hearing and should not be relitigated here.

{¶34} In preparation for the hearing, Petitioner turned to his computer to review all of the legal work he performed for Lay. As a result of that review, he created legal invoices to further account for the services he performed. Relator attempted to argue that those invoices should have been produced in the original accounting, but stipulated to their admission. Petitioner explained that these invoices were not contemporaneous records and were created to help explain the accounting already provided.

{¶35} Relator cross-examined Plaintiff about checks that were not specifically listed in Petitioner's summary of his accounting. Petitioner explained that these checks were included in his total for legal fees. Petitioner readily admitted he borrowed money from the trust funds to pay his staff and himself. Those checks represented part of what he had calculated were part of legal fees. There is no question that the loans were improper but they were ultimately reconciled to the satisfaction of the client to cover earned legal fees. To relitigate the underlying issue of whether they were loan and/or legal fees now is inappropriate—so long as Petitioner gave account (and he did) for those expenditures.

{¶36} Finally during the hearing, there was some confusion as to whether Relator was required to verify the accounting performed by Petitioner. We note that there is no such requirement in the Court's order, nor did Relator ever attempt to verify the accounting. The Court's order only requires a verification of restitution.

{¶37} For all of the foregoing, we find that Petitioner presented clear and convincing evidence that he provided a full accounting to Lay and the Court as required under and in compliance with the order of suspension.

Restitution

{¶38} The Court's order, as an additional condition of reinstatement, specifically required restitution to the Mark D. Lay Legal Defense and Welfare Fund and the insurance fund. Because there is clear and convincing evidence that no restitution was required or claimed by the client, the issue of restitution to these two funds is moot.

{¶39} Relator's argument that Petitioner should "atone" for misconduct by repaying an outstanding loan of $100,000 to the Estate of Bishop Wagner is misplaced. First and foremost, repayment of this loan was not a requirement of the Court's order. Secondly, while the loan proceeds where the subject of commingling funds, there was no allegation that these funds were in any way misappropriated. Therefore, the fact that Petitioner had an outstanding loan to a client is not in and of itself a measure of restitution. The best evidence of this is the fact the Court did not order restitution of this loan in its original order.

{¶40} Relator now seeks to impose an additional condition for reinstatement upon the Petitioner that was not required by the Court in its order because he wants the Petitioner to "atone for his misconduct." The whole notion of "atonement" is something that takes on a religious

connotation that has no place in this proceeding. We agree that Petitioner should acknowledge the wrongful nature of his conduct as required by rule, but "atonement" is something entirely different.

{¶41} Furthermore, Relater's argument that Petitioner needs to "atone" by repaying this loan suggests that Petitioner is attempting to shirk his responsibility to repay this debt. The evidence does not support this argument. When Petitioner found he was unable to repay the loan on schedule, he entered into an agreed judgment acknowledging the debt. In that agreed judgment, Petitioner also filed a Chapter 11 bankruptcy, not for the purpose of avoiding the debt, but to reorganize his finances so that he could pay-off his creditors including the Estate of Bishop Wagner.

{¶42} Also, the suggestion that the amount of the debt owed to Bishop Wagner's estate was a subject of the accounting is a clear mistake. There is no dispute that the original loan was $100,000, and at the time of the reinstatement hearing, Petitioner owed $172,000. The Court did not order an accounting on behalf of Bishop Wagner because it did not need one to know how much was owed. Therefore, had it wanted to, the Court could have ordered repayment of the loan in its original order. This is not now, nor should be retroactively treated as, a measure of restitution.

{¶43} Matthew Blair, Bishop Wagner's former attorney, testified that Petitioner and Bishop Wagner had a very close friendship, "almost a father son arrangement between the two of them." He also indicated that Bishop Wagner's widow was supporting Petitioner's effort to get his license back. At the time of hearing, Bishop Wagner's estate was not seeking restitution for the outstanding loan balance. To now require repayment of this loan as a condition of reinstatement is yet another attempt to relitigate the underlying discipline.

{¶44} Furthermore, the Wagner loan was not the only outstanding loan. Petitioner also borrowed money from Charles M. Freiburger that was not paid back at the time of the

reinstatement hearing. It is not unusual or in and of itself inappropriate for lawyers to borrow money to pay off debts. The fact a lawyer's use of loan proceeds becomes the subject of discipline does not necessarily make the underlying loan a debt that requires immediate restitution.

{¶45} For the foregoing reasons, the majority finds by clear and convincing evidence that no restitution is required prior to reinstatement.

Petitioner's Mental, Educational, and Moral Qualifications

{¶46} The question of whether Petitioner possesses the mental, educational, and moral fitness to practice law is clearly a question of credibility given that there is competent, credible evidence to support it. The Supreme Court of Ohio has deferred to the panel's credibility determinations where the record does not weigh heavily against those findings. See *Akron Bar Assn v. Shenise*, 143 Ohio St.3d 134, 2015-Ohio-1548, ¶12; *Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, ¶39; *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, ¶8.

{¶47} Here Petitioner presented competent, credible, and contemporaneous evidence in the form of five character witnesses, Attorney George L. Forbes, Thomas D. Lambros, retired and former chief judge of the United States District Court for the Northern District of Ohio, Attorney Charles M. Freiburger, Attorney Leo P. Ross, and James Cobbin who testified on his behalf. And although many of them were longtime friends, they did offer testimony regarding recent (post-suspension) interactions with Petitioner.

{¶48} The most compelling of these witnesses was Judge Lambros. Judge Lambros met Petitioner in 1984. Petitioner served as the judge's law clerk for two years in 1984 and 1985, and they have maintained a friendship since that time. Judge Lambros and Petitioner met to discuss Petitioner's discipline. Judge Lambros gave him a "probing inquiry, more intensive than [he] ever

had in [his] life." November 21, 2014 Hearing Tr. 87. The judge's primary concern was whether or not Petitioner accepted responsibility for his conduct. And at the end of the probing, he was satisfied that Petitioner had accepted responsibility for his conduct. Judge Lambros recalled to Petitioner that "you said you deserved it and I agreed with you." *Id.* at 89. Judge Lambros reiterated more than once that he believed that Petitioner acknowledged, admitted, accepted responsibility and Petitioner acknowledged more than once that he "got what he deserved." *Id.* at 90.

{¶49} Mr. Forbes testified that he has known Petitioner for 25 to 30 years and had hired Petitioner in the past. On cross-examination, he testified without reservation that notwithstanding the prior decision against Petitioner included misappropriation of funds, he would hire Petitioner to represent him again. On redirect examination, he further indicated that "Since I answered the question to him [Relator] by saying that I would hire you again to represent me I think that indicates that I trust you." *Id.* at 40.

{¶50} Mr. Freiburger met Petitioner when he was a partner at Bricker & Eckler and Petitioner was one of his associates. Freiburger testified that he believed that Petitioner currently possesses the mental, educational, and moral qualifications to be a lawyer.

{¶51} Mr. Ross obtained approval from Relator and hired Petitioner as his law clerk after Petitioner was indefinitely suspended. Ross testified that he believed that Petitioner currently possesses the mental, education, and moral qualifications to be a lawyer. Ross further testified that he went over the decision with Petitioner "point by point" and that Petitioner admitted to commingling funds but was adamant that he never stole any money from clients.

{¶52} Mr. Cobbin also hired Petitioner after his suspension. Cobbin owns a company called C.C.S. Transportation and his company operates W.J. Cobbin Office Tower. He employed

Petitioner to help him refinance the debt on his office building. He was well aware of Petitioner's suspension from the practice of law. He said he was impressed that Petitioner was forthcoming about the suspension and told him everything "up front, whether it's embarrassing or not." *Id.* at 157.

{¶53} Given the testimony of these witnesses, if believed, there is clear and convincing evidence that Petitioner meets the mental, educational, and moral qualifications for reinstatement to the practice of law.

Compliance with CLE Requirements of Gov. Bar R. X

{¶54} At the commencement of the hearing on November 21, 2014, Petitioner admitted that he had miscalculated the amount of CLE required of a suspended attorney under Gov. Bar R. X. However by the resumption of the hearing on January 20, 2015, Petitioner had completed enough additional CLE hours to meet the requirement. The parties stipulated and the panel unanimously concludes that, as of the second day of the hearing, Petitioner had established his compliance with the CLE requirement.

{¶55} Notwithstanding, an agreement that Petitioner completed the required CLE hours, Relator makes this spurious argument that because Petitioner originally miscalculated the number of CLE hours required, he is not a proper person for reinstatement. There are many Ohio lawyers who find they have miscalculated CLE hours and act correct it. To suggest that the miscalculation of CLE hours makes Petitioner unfit to practice violates both the stipulation as well the spirit in which it was entered.

{¶56} Relator also played a memory test with Petitioner during cross-examination asking that he recite all of the requirements in the rule for maintain a trust account. Petitioner could not remember every requirement, however, not passing that test does not preclude him from being able

to open the rule book and refer to it from time to time, as we all do. For the foregoing reasons, we do not believe that Relator's memory test is evidence that Petitioner is not mentally, educationally, or morally fit to practice law.

Petitioner is a "Proper Person" for Reinstatement

{¶57} The determination that Petitioner is a proper person for reinstatement to the practice of law turns on whether he acknowledges the wrongful nature of his conduct. Petitioner fully acknowledges the wrongful nature of his conduct and accepts all of the factual allegations, but takes issue with two of the Court's findings. We must answer the question of whether his admitting to the facts and his acknowledgement is enough to make him a proper person for reinstatement.

{¶58} Understanding the circumstances under which Petitioner disputed certain charges is important to our analysis. The disciplinary hearing was a highly contested proceeding. At hearing, Petitioner faced 29 separate rule violations. Only 16 of those 29 alleged violations (55 percent) were sustained. The other 13 alleged violations (45 percent) were dismissed. Given these percentages, it was not unreasonable for Petitioner to contest many of the charges he faced.

{¶59} It was also not unreasonable under the circumstances for Petitioner to take issue with the allegation that he misappropriated client funds. Petitioner readily admits to commingling funds, but does not believe his conduct rose to the level of misappropriation. He was not alone in this assessment—the panel and the Board in the underlying disciplinary proceeding did not make a finding of misappropriation. The misappropriation finding was made by the Court in a 4-3 decision when it sustained Relator's objection. The Court's misappropriation finding and the finding that he "lacked candor" with respect to his dealings with Bishop Wagner are not in dispute. The question is whether Petitioner also has to agree with the findings when he already acknowledges the wrongful nature of his conduct.

{¶60} Furthermore, the argument that Petitioner attempted to relitigate the underlying discipline mischaracterizes his testimony and the context in which it was offered. Petitioner presented his case and called seven witnesses and introduced his hearing exhibits. Not once during that case did he attempt to relitigate the underlying decision. The issue of whether he agreed with all the Court's findings did not come up until Relator called Petitioner on cross-examination. The testimony that Petitioner offered was in response to Relator's questions on cross-examination, and to further offer rebuttal to those questions during redirect examination. If anyone attempted to relitigate the underlying discipline, it was Relator.

{¶61} Petitioner's decision to litigate this matter *pro se* is a factor that should be considered, not as an excuse, but for the purpose of understanding the context in which his testimony was given or not given. Petitioner made the tactical decision not to offer a direct examination during his case in chief. This is not a decision hired counsel would have likely made under the circumstances. As a result of this decision, he was precluded by the panel chair from re-opening his case to further explain his behavior. While this factor alone may not influence the decision here, it provides further context for understanding how an argument could be made that Petitioner was trying to relitigate the underlying offense.

{¶62} From a factual perspective, there can be no dispute that Petitioner acknowledged the wrongful nature of his conduct. He readily admitted that he (1) commingled funds, (2) failed to manage his trust account properly, (3) was not keeping track of the trust accounts daily or keeping contemporaneous records, (4) took money out of Lay's trust account that had no relation to Lay, (5) borrowed money from trust accounts without documentation, (6) took money from trust accounts where he thought he was entitled to legal fees, again without any proper documentation, (7) took money from trust accounts with the idea that he would "settle-up" with Lay later, (8) that

his overall management of the trust account was "totally contrary to the rules," and (9) "totally contrary" to his ethical responsibilities, (10) described his use of the trust accounts as "like a slush fund," (11) and acknowledged that when he borrowed money from Bishop Wagner that he failed to disclose the potential conflict of interest as required by the rules. While there were some conflicts between the testimony offered by Petitioner and the documents he produced, he never denies the underlying facts or the overall nature of his wrongful conduct.

{¶63} Finally, reliance on *Office of Disciplinary Counsel v. Bell*, (1988), 39 Ohio St.3d 276 is misplaced. In *Bell*, the Court denied the petitioner reinstatement because "the gravity of his misconduct continues to persuade us that he is unworthy of the public's trust." *Id.* at 277 (where Bell had engaged in trafficking of babies for adoption). Petitioner's conduct here is no way similar or as extreme as trafficking in babies. According, it would be improper to depart from the standard set forth in the rules. We as a panel, are required to assess Petitioner "notwithstanding the previous disciplinary action." Gov. Bar R. V, Section 25(D)(1)(f).

MAJORITY PANEL RECOMMENDATION

{¶64} A majority of the panel concludes, by clear and convincing evidence, that Petitioner has satisfied all of the requirements for reinstatement mandated by Gov. Bar R. V, Section 25(D)(1) as to restitution; the mental, educational, and moral qualifications; the CLE compliance; and he is a proper person for readmission. The majority further finds, by clear and convincing evidence, that Petitioner has satisfied all of the specific requirements for reinstatement set forth in the Supreme Court's suspension order of November 3, 2011.

{¶65} For the reasons set forth above, a majority of the panel recommends that Petitioner be reinstated to the practice of law.

DISSENT BY COMMISSIONER GATES

{¶66} I conclude that Petitioner has failed to prove by clear and convincing evidence that he has complied with the Court's order of suspension, that he has made appropriate restitution, that he possesses the moral character required for admission, and that he is now a proper person for reinstatement. Therefore, I dissent from the conclusions of the majority of the panel and recommend that the petition be denied.

Restitution to Persons Harmed by Petitioner's Misconduct

{¶67} While I agree with the majority that the Court ordered Petitioner to pay restitution only "to the Mark D. Lay Legal Defense and Welfare Fund and the insurance fund," a condition of Petitioner's reinstatement was that he provide "a full accounting to Mark Lay, the court, and any related party in interest for his withdrawals from, and deposits to, the $113,228.18 insurance proceeds and the $280,000 Mark Lay Defense and Welfare Fund during Squire's involvement with those funds." *Disciplinary Counsel v. Squire*, 2011-Ohio-5578, ¶71. Additionally, for purposes of the instant proceeding, Petitioner is required to prove, by clear and convincing evidence, that he "has made appropriate restitution to the persons who were harmed by his or her misconduct." Gov. Bar R. V, Section 25(D)(1)(a).

{¶68} Although the majority concludes there is no doubt that Lay was satisfied with Petitioner's accounting and is not seeking restitution, there is no evidence from Lay himself concerning Petitioner's handling of the insurance proceeds and the defense trust fund. The only evidence in this record from Lay is the testimony he provided in his deposition taken on April 21, 2010 for purposes of Petitioner's disciplinary hearing.[2] In its decision, the Court found that Lay

[2] Antoine Smalls testified that both he (as co-trustee with Petitioner of the defense fund) and Lay were aware of and approved each expenditure Petitioner made from the trust fund, including loans that Petitioner advanced to himself. Smalls also claims to have reviewed invoices for legal fees which Petitioner paid to himself even though Petitioner admitted to this panel that he did not prepare invoices until after the Court's decision. In the disciplinary

did not authorize Petitioner's expenditures and never had an agreement with Petitioner concerning attorney fees. The Court also noted the Board's conclusion that 'Petitioner's "failure to maintain adequate records may have concealed any actual harm." *Id.* at ¶61. From these findings, the Court concluded that Petitioner had misappropriated money belonging to Lay and ordered Petitioner to make a full accounting and make restitution verified by Relator. Because of the inadequate records presented at the disciplinary hearing, the Court made no specific finding in its order of suspension as to an amount of any restitution which Petitioner was required to make to Lay.

{¶69} Based on the evidence Petitioner presented at the hearing on his petition for reinstatement, my conclusion is that the Estate of Bishop Norman Wagner was harmed by Petitioner's misconduct. Therefore, Petitioner should be required to make restitution by satisfying the judgment against him in favor of the Estate of Bishop Wagner or his heirs.

{¶70} Petitioner commingled in his client trust account the money he borrowed from Bishop Wagner with money he received from or on behalf of Lay and other clients and from the operation of his practice. Petitioner used the Wagner loan proceeds to pay his personal debts and expenses including the money he borrowed from Jewell which had been used to repay Riley. Based upon the manner in which Petitioner handled the Wagner loan proceeds, the Court

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hearing, Petitioner made a similar claim of authority to take loans from the defense fund. However, the Court found that Lay testified that he did not recall giving Petitioner any directions concerning the use of the defense fund.

In its decision, the Court also discussed Petitioner's quite similar testimony concerning his handling of the insurance proceeds:

> Petitioner testified that every dollar of the $113,228.18 he spent was discussed with Lay and approved by Smalls, the former vice president of operations for Lay's company, MDL Capital Management. Lay, however, testified that he had no recollection of the $113,228.18. Smalls testified that he was not involved in authorizing payments on Lay's behalf until he established the Mark D. Lay Legal Defense and Welfare Fund ("Lay defense fund") after Lay went to prison—more than two months after Petitioner received the $113,228.18 and began spending it. *Id.* at ¶26.

In short, the Court rejected Petitioner's claims of authority to use the insurance proceeds and concluded that he had misappropriated those proceeds.

concluded that Petitioner had engaged in misconduct in violation of Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(c).

{¶71} On April 13, 2012 (subsequent to Petitioner's suspension), Rita H. Wagner as the administratrix of the Estate of Bishop Norman L. Wagner obtained a judgment against Petitioner in the amount of $100,000, plus interest at the rate of $49.32 per diem from November 3, 2010. Relator's Ex. 7. Because the evidence establishes the balance due on this unsatisfied judgment now exceeds $172,000, I conclude that Petitioner has failed to prove, by clear and convincing evidence, that he has made appropriate restitution to the person(s) harmed by his misconduct.

Accounting for Misappropriated Funds

{¶72} I am also unable to agree with the majority's conclusion that Petitioner has provided "a full accounting to Mark Lay, the court, and any related party in interest" for the amounts he misappropriated from the insurance proceeds and the defense fund. On December 9, 2011, Petitioner filed an affidavit of compliance with the Court that he intended to be the accounting required by the Court. Relator's Ex. 17. While Relator raised no issue prior to the commencement of the reinstatement hearing concerning any of the expenditures listed in Relator's Exhibit 17, Relator has not "verified" any of those expenditures.

- On March 17, 2008 (two days before his loan from Jewell was due), Petitioner borrowed $100,000 from Bishop Norman Wagner. The moneys were deposited in Petitioner's client trust account. Within five weeks after receiving the $100,000 from the Wagner loan, Petitioner made nineteen withdrawals from his client trust fund to pay Petitioner's personal and business expenses.

- On April 24, 2008, Petitioner received a wire transfer to his client trust fund in the amount of $113,228.18 for the insurance proceeds, which brought the balance in his client trust fund to $119,707.24. Relator's Ex. 18, pp. 10-12. By June 10, 2008, the balance in his client trust fund was $198.61. *Id.* During that same period, Petitioner claimed in Relator's Exhibit 17 to have made expenditures from the insurance proceeds totaling $114,014.63; $82,935.53 to other people on Lay's behalf, and eight expenditures totaling $31,079.10 to himself for attorney fees.

- On June 23, 2008, Petitioner received a wire transfer to his client trust fund in the amount of $280,000 to establish the Lay Defense Fund. Relator's Ex. 18, pp. 13-20. After that deposit, the balance in Petitioner's client trust account was $280,193.61. *Id.* By October 14, 2008, the actual balance in Petitioner's client trust fund was $289.32. *Id.* During that same period, Petitioner claimed in Relator's Exhibit 17 to have made expenditures from the Lay Defense Fund totaling $291,454.39; $220,540.12 to other people on Lay's behalf, and 24 expenditures totaling $70,914.27 to himself for attorney fees.[3]

{¶73} My conclusion is that Relator's Exhibit 17 provides incomplete information to establish why the payments, which Petitioner claims to have made to third parties on Lay's behalf, actually relate to Lay. Since the insurance proceeds and the Lay Defense Fund were commingled with money received from the Bishop Wagner Loan and money received from other loans, clients, and business operations, Relator's Exhibit 17 also fails to establish the actual source of the listed expenditures. At most, Relator's Exhibit 17 shows that Petitioner expended money from his client trust account to pay some bills or expenses that he claims are related to Lay.

{¶74} Petitioner has also failed to prove, by clear and convincing evidence, that a correlation exists between the money he claims to have taken from his client trust fund for attorney fees and the legal services he claims to have performed on Lay's behalf. Relator disputes the legitimacy of these amounts because Relator's Exhibit 17 lacks any documentation as to the tasks performed, the hours worked, or the rate charged for Petitioner's legal services.

- On January 15, 2015, Petitioner provided Relator and the panel with a series of "Invoices" for legal services which he claims to have performed on behalf of Lay. Petitioner's Ex. OO.

- Although these "Invoices" total $158,062, Petitioner admits that he had no contemporaneous time records and that he had no agreement with Lay regarding the fees he would be charging for his services.

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[3] Petitioner also claims that he made payments to the Lay Defense Fund on September 3, 2008 and on April 9, 2009 in the amount of $25,000 each, $50,000 total. Petitioner characterizes these payments as a return of fees he previously received and therefore reduces the fees he received from the Lay Defense Fund to $20,914.27. However, Petitioner provided no evidence as to the source of these two payments.

- Instead, Petitioner testified that he constructed these "Invoices" after he was suspended based on a review of court dockets for cases in which he participated on behalf of Lay and his estimate of the work he performed in each case.

- Petitioner made no effort in Petitioner's Exhibit OO to distinguish the services to which payments made from the insurance proceeds relate as opposed to those made from the Lay Defense Fund.

- Petitioner failed to show that the money he took from Lay for attorney fees was actually for fees he earned during the time period in which he received the payments.

- While Petitioner informed the Court in Relator's Exhibit 17 that he paid himself a total of $101,273.37 for attorney fees from the insurance proceeds and the Lay Defense Fund between April 24, 2008 and October 14, 2008, Petitioner's Exhibit OO shows only $61,375 for legal services allegedly performed on Lay's behalf during that same period.[4]

- After Smalls had replaced Petitioner as the trustee for the Lay Defense Fund, Petitioner wrote to Smalls on December 19, 2008 describing unpaid expenses due to other lawyers working on Lay's appeal from his conviction and stated [Relator's Ex. 19]:

  > * * * I have not submitted a bill or been paid since July 11, 2008, despite performing work through the present.
  >
  > You are aware of the amounts that you have been instructed me to pay out. None of the payments have been for legal fees.

{¶75} However, Petitioner reported in Relator's Exhibit 17 that between July 11, 2008 and September 27, 2008 he received 12 payments for legal fees from the Lay Defense Fund totaling $17,016.81.

- Petitioner's Exhibit OO actually proves that much of the work described in the "Invoices" was performed after Petitioner received the fee payments listed in Relator's Exhibit 17.

- In the reinstatement hearing, Petitioner further testified that, in any event, the fair value of legal services he performed on Lay's behalf far exceeded the amount of Lay's money which Petitioner expended on his personal and business

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[4] This amount is the total of the following based on Petitioner's Exhibit OO: *U.S. v. Lay* (criminal case), post-trial $28,125, appeal $5,187.50; Tower of Chatham $812.50; Federal Insurance $2,062.50; Mark Lay General $10,500; Merrill Lynch $625; SEC $1,187.50; and OBWC $12,437.50.

> expenses. Although not clearly articulated by Petitioner, this assertion seems to be an effort to establish either that Lay was not "harmed" by Petitioner's misconduct, or that Petitioner made appropriate restitution to Lay by subsequently performing legal services for which he was not otherwise compensated. However, the Court repeatedly emphasized in its decision that Petitioner had no fee agreement with Lay. Petitioner offered no evidence that he ever sent the "Invoices" contained in Petitioner's Exhibit OO to Lay, that Lay ever approved the fees reflected in the "Invoices," or that the fees described in the "Invoices" were reasonable within the standard of Prof. Cond. R. 1.5.[5]

{¶76} Therefore, I conclude that Petitioner has failed to prove, by clear and convincing evidence, that he complied with the order of suspension and that he has made appropriate restitution to the person(s) harmed by his misconduct.

Petitioner's Moral Qualifications

{¶77} Petitioner has also failed to meet his burden of proving, by clear and convincing evidence, that he has the moral qualifications required of an applicant for admission to the practice of law and that he is a proper person to be readmitted to the practice of law.

{¶78} Although Gov. Bar R. V, Section 10, fails to contain any specific standards regarding these issues, Gov. Bar R. I, Section 11(D)(3) delineates a nonexclusive list of factors which a local bar admissions committee shall carefully consider before making a recommendation about the character, fitness, and moral qualifications of an applicant for admission to the bar; that list includes "false statements, including omissions," "acts involving dishonesty, fraud, deceit, or misrepresentation," and "neglect of financial responsibilities."

{¶79} Gov. Bar R. I, Section 11(D)(4) further requires the local committee to consider a list of factors in assigning weight and significance to the applicant's prior conduct when determining whether the present character, fitness, and moral qualifications of an applicant qualify

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[5] While the Court noted that Petitioner performed legal services in connection with Lay's criminal trial on a "flat fee basis," the Court expressly found that Petitioner had violated Prof. Cond. R. 1.5(c) by failing to discuss with Lay the basis or rate for legal services he claims to have performed after the criminal trial. *Id.* at ¶36.

the applicant for admission to the practice of law. These factors include the recency and seriousness of the conduct, the factors underlying the conduct, and the cumulative effect of the conduct. Evidence of the applicant's rehabilitation and positive social contributions since occurrence of the conduct is also to be considered.

{¶80} In addition to the express directives delineated in Gov. Bar R. I, Section 11(D) for determining the character, fitness, and moral qualifications of an applicant for admission to the bar, the Court has held that "the gravity of the misconduct" that led to an indefinite suspension is an appropriate factor to be considered when deciding whether to grant a petition for reinstatement. In the Court's decision in *Office of Disciplinary Counsel v. Bell* (1988), 39 Ohio St.3d 276, the petitioner was denied reinstatement following his indefinite suspension due to his falsification of filings with the probate court to hide improper payments to the birth mother in two adoption cases. The petitioner supplied evidence concerning his remorse, his respect for the legal profession, his continuing legal education, his redeeming personal qualities, and his involvement in community activities. Reinstatement was opposed by the relator and by the probate court judge. The Court concluded that, although the petitioner had already been suspended for four years, "the gravity of his misconduct continues to persuade us that he is unworthy of the public's trust." *Id.* at 277.

{¶81} In its decision in *Office of Disciplinary Counsel v. Woods* (1990), 50 Ohio St.3d 72, the Court granted reinstatement from an indefinite suspension that had been based upon the petitioner's conviction for theft and forgery in connection with his conversion of $70,000 belonging to a friend and client. Although recognizing that the conduct in the *Bell* decision demonstrated a serious character defect and enduring offense against justice which could not be quickly or easily corrected or atoned for, the Court distinguished that decision based on the entire

record concluding that the criminal and disciplinary sanctions that had already been meted out were appropriate to the gravity of the misconduct. *Id.* at 74.

{¶82} Petitioner's misconduct was extremely serious. The Court stated that Petitioner had repeatedly violated his professional duties and responsibilities. *Squire, supra* at ¶70. The Court found that Petitioner had:

- "[F]lagrantly violated the Rules of Professional Conduct that require attorneys to hold client property separate from their own property and to maintain detailed records of the money held and disbursed on behalf of those clients." *Id* at ¶35.
- Misappropriated his client's property. *Id.* at ¶47.
- Engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by knowingly making false statements of material fact during the course of the disciplinary investigation. *Id.* at ¶37.

{¶83} The Board also found as an aggravating factor that Petitioner had "submitted false evidence and false statements or had engaged in other deceptive practices during the disciplinary proceeding." *Id.* at ¶59.

{¶84} The evidence fails to demonstrate any significant rehabilitation of Petitioner from his serious misconduct. Although Petitioner testified that he accepts that the Supreme Court concluded that he engaged in misconduct, he failed to acknowledge that his misconduct was a violation of the public trust. Instead, throughout the reinstatement hearing, Petitioner attempted to essentially rebut the Court's conclusion concerning his misappropriation and dishonesty. As he did in the disciplinary hearing, Petitioner argued that his improper management of his client trust account was simply based on his lack of understanding of his obligations to separately hold and account for client funds and his failure to pay proper attention to office procedures. He testified that he always believed that he was spending his own money, not his client's money, despite the fact that the balance in his client trust account fell far below the money he had received on Lay's

account. In many respects, Petitioner appeared throughout the reinstatement process to simply be relitigating the Court's findings concerning his dishonest misconduct.

{¶85} In short, I conclude that considerable weight and significance should be assigned to Petitioner's prior misconduct when determining whether he now possesses the moral qualifications for admission to the practice of law and whether he is now a proper person to be admitted to the practice of law. Petitioner has failed to establish, by clear and convincing evidence, that he accepts the wrongfulness of his actions and that he now possesses the moral character of a person who desires to be licensed to practice law.

{¶86} Relator also argues that Petitioner's failure to pay any portion of the judgment against him arising from the Bishop Wagner loan militates against his reinstatement. Financial irresponsibility alone may be enough to disapprove bar candidacy or bar exam application, *In re Application of Stewart*, 112 Ohio St.3d 415, 2006-Ohio-6579, ¶ 19; see also, *In re Application of Wiseman*, 135 Ohio St.3d 267, 2013-Ohio-763 (applicant denied permission to take bar exam based upon prior criminal conduct, financial irresponsibility, misappropriation of funds while serving in a fiduciary capacity, and a pervasive pattern of lies and omissions throughout this admissions process in an effort to conceal his past conduct); *In re Application of Acton*, 121 Ohio St.3d 154, 2009-Ohio-499 (applicant denied permission to take bar exam based on his continued pattern of disregard of the traffic laws, failure to provide complete and accurate information concerning his past, nondisclosure of pertinent information, apathy or inability to appreciate and/or neglect of his financial responsibilities, and evidence of mental disorder, which untreated could affect the applicant's ability to practice law); *In re Application of Kline*, 116 Ohio St.3d 185, 2007-Ohio-6037 (applicant denied permission to take bar exam due to his persistent failure to address relatively small debts); and *In re Application of Manayan*, 102 Ohio St.3d 109, 2004-Ohio-1804

(applicants for admission to the Ohio bar and bar members are expected to scrupulously honor all financial commitments). "An applicant's tendency toward financial irresponsibility makes him a poor risk to entrust with the duties owed clients, adversaries and others in the practice of law." *Stewart* at ¶18; *In re Application of Ford*, 110 Ohio St.3d 503, 2006-Ohio-4967.

{¶87} Finally, the character evidence presented by Petitioner during the reinstatement hearing is similar in nature to the character evidence he presented during his disciplinary hearing. As was the case in his disciplinary hearing, most of the character testimony relates to the early part of Petitioner's career. See, *Squire* at ¶70. Retired federal judge Thomas D. Lambros once again testified with obvious affection and high praise for Petitioner. See, *Id.* at ¶62. Leo P. Ross, an attorney with whom Petitioner now works, testified that he read the Court's decision suspending Petitioner and that, when interviewed by Ross, Petitioner admitted commingling client money with his personal money but assured Ross that he had never taken any money from anyone. Because the evidence of Petitioner's character fails to support a conclusion that Petitioner has been rehabilitated from his prior misconduct, I am unable to conclude that Petitioner has proven, by clear and convincing evidence, that he now possesses the moral character necessary for reinstatement to the practice of law.

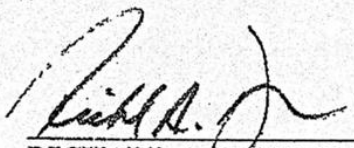
Conclusion

{¶88} Based upon the entire record, Petitioner has, in my opinion, failed to prove, by clear and convincing evidence, that he currently possesses all the mental, educational, and moral qualifications that were required at the time of his original admission and that he is now a proper person to be readmitted notwithstanding the previous disciplinary action. Therefore, I respectfully dissent from the majority's recommendation and would recommend denial of the petition.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 25, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on October 2, 2015. After discussion, the Board adopted the findings and recommendation as set forth in the dissenting report of Commissioner Gates and recommends that the reinstatement petition of Percy Squire be denied. The Board further recommends that the cost of these proceedings be taxed to Petitioner.

Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing findings of fact and recommendation as those of the Board.



RICHARD A. DOVE, Director

The Supreme Court of Ohio

FILED

OCT -9 2015

CLERK OF COURT
SUPREME COURT OF OHIO

Disciplinary Counsel,
Relator,
v.
Percy Squire,
Respondent.

Case No. 2010-2021

ORDER TO SHOW CAUSE

The Board of Professional Conduct of the Supreme Court of Ohio has filed a final report in the office of the clerk of this court. This final report recommends that the petition for reinstatement to the practice of law of respondent, Percy Squire, be denied. The board further recommends that the costs of these proceedings be taxed to respondent in any disciplinary order entered, so that execution may issue.

On consideration thereof, it is ordered by the court that petitioner show cause why the recommendation of the board should not be confirmed.

It is further ordered that pursuant to Gov.Bar R. V(25)(F)(5) any objections to the findings of fact and recommendation of the board, together with a brief in support thereof, shall be due not later than twenty days after receipt of notice of filing of this report. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

Thereafter, the court shall enter such order as it may find appropriate.

It is further ordered that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings. All case documents are subject to Sup.R. 44 through 47 which govern access to court records.

It is further ordered that service shall be deemed made on respondent by sending this order, and all other orders in this case, to respondent's last known address.

Maureen O'Connor
Chief Justice