

THE SUPREME COURT OF OHIO

LAWRENCE WINKFIELD 0034254

RESPONDENT

COLUMBUS BAR ASSOCIATION

RELATOR

OHIO SUPREME COURT No. 2005-1115

RESPONDENT'S RESPONSE TO RELATOR'S OBJECTIONS

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PREFACE

The purpose of this response is to respond to the objections filed by Relator. It is not the intent to malign, criticize for the sake of criticism, *unabashedly blame* others during this process or do anything for any other reason than to have this body apply the law to the facts. Respondent, and the undersigned is merely seeking to defend. On various occasions during this process and in other representations before the board the Relator makes it appear that, rather than making an argument or trying to follow the law, Respondent and counsel attempt to take approaches that are not above board.

Relator maintains in their Objections that Respondent in his trial brief “unabashedly directed the blame...toward his monitor”. The panel found that the monitor did not even review the Court’s reinstatement order. ¶ 40. Respondent’s trial brief stated: “The intent of this brief is to illuminate, not transfer blame or make excuses.”

Respondent would request further briefing and oral arguments on the issue brought up by the panel’s request and Relator’s that this Court clarify Gov. Bar. R. V. § 21(I) if this case in any way changes that rule. Under the rules as they are set any type of suspension is based on a certified complaint filed by Relator. Thereafter sanctions are handed down that spell out the do’s and don’ts of the Respondent. A changing or modification of Gov. Bar. R. V§ 21 would require more than what is put into a response to objections.

Had the Relator wanted to go beyond the four corners of this Court’s June 12, 2014 order then the proper vehicle would have been to file a certified complaint charging Respondent. Relator should not be able to back door the grievance procedure by filing one document and requesting a sanction that is not included in the rules. To do so would offend the notion of fair play, notice and

due process. Relator's request would be no different than a prosecutor asking for an 8-month sentence on a probation violation of a misdemeanor.

Finally, the Respondent, without being critical, or attempting to shift the blame somewhat takes issue with the direction of the Relator to argue that Respondent had the burden of proof in certain matters. For example, as far back as July 2015 when Respondent was deposed by Relator, and in the letters given to monitor and obtained by Relator, Respondent indicated that Dr. Zober felt there was no need for further treatment. Respondent testified to as much. Respondent is not suggesting what the Relator should and shouldn't do, however, upon the allegation of probation violation the Relator has a duty to investigate the allegation. Relator never investigated, other than arguing that Respondent shouldn't be believed, or Respondent didn't have corroboration. The corroboration comes when Respondent is attempting to get off of probation by showing he is in compliance with the Ohio Supreme Court's orders.

The fact of the matter is that if Relator didn't believe Respondent then all that was needed was for the Relator to 1. Investigate and interview Dr. Zober and 2. Call Dr. Zober to the stand and refute the Respondent. When Respondent wants to terminate probation then the burden is on him; if the Relator wants to revoke probation then the burden is on Relator.

RESPONSE

The Relator sought three things as a result of their petition:

1. That Respondent's probation be revoked;
2. That Respondent's indefinite suspension be reinstated, and;
3. That Respondent's be cited for contempt

The panel's recommendation declined to revoke Respondent's probation which they could lawfully do based on the law in effect; the panel likewise declined to reinstate Respondent's

indefinite suspension, which there appears no legal basis, but did find Respondent in contempt of court.

Relator did not have any objections to the findings of facts. Relator objects because, notwithstanding any law to support their position, Relator feels that Respondent should have an already served indefinite suspension reinstated. Relator then seems to complain that they were not prepared for Respondent's argument that the monitor failed to point out to Respondent that Respondent was not in compliance by indicating that Respondent was blaming the monitor. Relator points out, however, that this argument was in Respondent's trial brief. Relator states that Respondent filed his trial brief "four days before the hearing" seemingly implying that they were not prepared for the argument. The brief clearly stated that Respondent's wife had "a serious health issue" and was desirous of a continuance which Respondent's counsel rejected.

RESPONSE TO RELATOR'S OBJECTION I.

I. Respondent Has Violated the Terms of His Probation and His Probation and His Indefinite Suspension Should Be Reinstated

The panel indicated and found that Respondent "*failed to comply with two of the three requirements set forth in the order*" Report and Recommendation "RR" ¶ 4. Relator in their objection states that the panel indicated Respondent "*violated two of the three probation conditions*". See p. 4 of Objections "RO". Based on the failure to comply the requirements the panel recommended that Relator's petition be granted in part and recommended that Respondent be cited for contempt. The panel then recommended purge conditions.

As stated by the panel there were three requirements set forth in the Supreme Court's order of reinstatement. Monitored probation for three years is one condition. A second condition was

that he fulfill recommendations of mental health practitioners and the final one was to refrain from illegal conduct. The order, in pertinent part, stated:

Upon consideration thereof, it is ordered by this court that the petition of respondent for reinstatement to the practice of law in Ohio is granted and that respondent, Lawrence Edward Winkfield, last known address in Westerville, Ohio is *reinstated upon the conditions that respondent*

- (1) serve a period of monitored probation for three years, with a monitor assigned by relator, and that such monitor's principal office be located within the Columbus, Ohio metropolitan area,
- (2) fulfill all recommendations of mental health practitioners, including ongoing and routine psychotherapy counsel and treatment as recommended by Dr. Jerry M. Zober or other licensed psychiatrist, and
- (3) refrain from any illegal conduct.

The panel found that Respondent failed to comply with the 2nd and 3rd condition of reinstatement. The 1st condition was *probation* and there was no violation of that probation [such as failure cooperate, meet, etc.], only a failure to comply with 2 of the 3 conditions. The panel found that the failure to comply amounted to contempt for which the panel indicated purge conditions.

Based on the Relator's changing of the finding of the panel and inserting the word "violation" for "failure to comply" the Relator wants Respondent's probation revoked and Respondent's indefinite suspension re-instated. It is certainly not Respondent's intention to mince words, but there may be a difference, or this court may rule there is no difference. But one thing is for sure" Respondent did everything asked of him by his monitor.

A. THE RULES DO NOT CALL FOR A REINSTATEMENT OF SANCTION THAT HAS BEEN COMPLETED

Relator is essentially asking this Court to re-impose a sentence that was already completed. There is presently in place the sanction of being on probation. Being on probation means that Respondent is not in "good standing" with the Ohio Supreme Court.

The cases cited by Relator are clearly not on point. In every case cited by the Relator where they accurately indicate the result there was a “stayed suspension” that was re-instated based on a violation of probation. In *Disciplinary Counsel v. Oglesby*, 90 Ohio St. 455 Relator indicates that that there was a “one-year suspension with six months suspended increased to indefinite suspension”. RR. p. 5 That was not the case. In *Oglesby* the attorney was placed on monitored probation which lasted from 1992 until the panel recommended that that the probation be revoked. There was no “increase to indefinite suspension”. The indefinite sentence was based on violations of the rules of professional conduct during the probationary period. The Court in *Oglesby* stated:

The panel recommended that respondent's earlier probation be revoked and that respondent be suspended for one year. The board adopted the findings of the panel and concluded that in failing to cooperate with his monitor during his probation respondent violated Gov.Bar R. V(9)(C)(1) and V(9)(C)(3), but violated no Disciplinary Rules.

* * *The board recommended that respondent be suspended from the practice of law for one year and that his current probation be terminated. * * *

PER CURIAM. Having reviewed the record in this matter, we adopt the findings and conclusions of the board. However, we believe that respondent should be and he hereby is indefinitely suspended from the practice of law in Ohio. Costs are taxed to respondent. Judgment accordingly. MOYER, C.J., DOUGLAS, RESNICK, COOK and LUNDBERG STRATTON, JJ., concur. FRANCIS E. SWEENEY, SR. and PFEIFER, JJ., dissent and would suspend respondent for two years.

In *Oglesby*, the panel “revoked” the probation, however, there was no sanction for the violation of probation. The “stayed” six months was never enforced or reinstated. The panel recommended a “one year” suspension and that the current probation be terminated. This clearly shows that, notwithstanding the probation violation, the panel, nor the Ohio Supreme Court has to or is duty bound to sanction. The fact that the Ohio Supreme Court felt that an indefinite suspension was ultimately given doesn’t change the fact that the “six months stayed” in *Oglesby* was never implemented.

Therefore, based on *Oglesby* it is clear that the Ohio Supreme Court can “terminate probation” without implementing any “stayed provision” and then can proceed to another sanction in the complaint. In this case the Relator sought that Respondent’s probation be “revoked” and also that Respondent be held in contempt. In *Oglesby* Relator sought termination of probation and a suspension based what occurred with *Oglesby* while on probation. In *Oglesby* there was something stayed, in *Winkfield* nothing was stayed.

Respondent was charged by Relator for a violation of probation. Respondent’s probation was after he served and was reinstated for an indefinite suspension. There was no allegation by Relator that there was a violation of the rules of professional conduct by Respondent. It is the contention of the Relator that a violation of the conditions of probation warrants the reinstatement of the indefinite suspension based on cases cited by Relator.

Respondent’s contention is that the Rules of the Government of the Bar does not indicate that there is sanction of *reinstatement of an indefinite suspension* when probation is violated. Based on the *rules of the government of the bar* the only sanction based on the petition filed is that Respondent be continued on probation and cited for contempt. Should Respondent “fail to cooperate” with his monitoring attorney, then to do so would be sanctionable and the sanction would be anything permissible under Gov. Bar R.V. Further, should Respondent not comply he would not be able to get off probation.

Relator wanted the panel and this Court to now add another element to rules. Relator wants the panel after the to add to Gov. Bar R. V § 21(E) the ability to not only reinstate a stayed suspension, *but also an indefinite suspension and prior completed suspension*. The request is contrary to fair play and fundamental fairness. See, e.g., *Powell v. McCormack*, 395 U.S. 486 (1969). *Powell* involved Congress and House Speaker McCormack trying to deny

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Harlem, New York Congressman Adam Clayton Powell, Jr. a seat in the house after he met all the qualifications and was duly elected by his constituents. The *Powell* court, paraphrasing, indicated that in order to judge you apply the facts to the law, but you cannot add another element to the law as was done to Congressman Powell in stripping Powell of his seat because of some misbehavior by Congressman Powell.

There appears to be a reason why the Ohio Supreme Court never addressed revocation of an indefinite suspension. The concept of being on probation after an indefinite suspension just came into being. The following is an historical perspective cobbled together by trying to find old laws that quite frankly are hard to find in this computer age.

It *appears* that the former Rules of the Government of the Bar have slightly changed. Prior to the rules in effect today there was no provision for placing an attorney that was indefinitely suspended on probation once that attorney was reinstated. Probation was only allowed for attorneys with a definite suspension from six months to two years. Under former Gov. Bar R. V § 10 the rules gave the criteria for reinstatement proceedings. Former Gov. Bar R. V § 10(A) gave the necessary requirements for probation when an attorney had a “definite suspension”. Former Gov. Bar R. V § 10(B) and Gov. Bar R. V § 10 (G) (6) gave the requirements for reinstatement after an “indefinite suspension”.

Under the former Rules of the Government of the Bar, probation was only applicable for definite suspensions. Former Gov. Bar R. V § 10(G) (6) had no provision for reinstatement from an indefinite suspension with probation. Former Gov. Bar R. V § 10(G) (6) merely indicated “* * * The Supreme Court shall enter an appropriate order, which may include provisions for reimbursement of the costs and expenses incurred in connection with the proceedings.”

Probation upon the reinstatement of an indefinite suspension was never contemplated by the former rules. Upon the revision of the rules if the Supreme Court wanted to use a violation of probation while reinstated from an indefinite suspension the Rules would have reflected that change. The rules didn't. One can only conclude that probation for an indefinite suspension serves another purpose. That purpose of probation is corrective rather than punitive.

In *Disciplinary Counsel v. Nicholson* 77 Ohio St. 3d 1453 (1996) the panel sought to have monitored probation after respondent, upon respondent's probation being revoked, served his suspension. The panel in *Nicholson* "recommended that, if it is determined that the court is empowered to do so under Gov. Bar R. V, respondent's practice and professional conduct be subjected to monitored probation for an additional year after suspension." *Id.* By silence the Ohio Supreme Court declined the invitation to suspend and thereafter place respondent on probation.

However, In *Disciplinary Counsel v. Young*, 113 Ohio St.3d 36, 2007-Ohio-975, while ostensibly the former rules were in effect. The Ohio Supreme Court added on to their judicial order that Respondent Young be placed on probation, notwithstanding former Gov. Bar R. V § 10(B) not indicating that probation was applicable. In *Disciplinary Counsel v. Young*, the Court stated:

{¶ 34} Respondent is therefore indefinitely suspended from the practice of law in Ohio, and this indefinite suspension shall run consecutively to the indefinite suspension that respondent is currently serving. *In addition to the requirements of Gov. Bar R. V (10), respondent must in any petition he files for reinstatement (1) show that he has successfully completed an OLAP-approved alcohol- and drug-abuse treatment program and that he can return to the competent, ethical, and professional practice of law and (2) establish his compliance with a payment plan, approved by the OLAP monitor, for making \$44,101.06 in restitution to the appropriate insurance companies. If respondent is reinstated, he shall be placed on probation for three years and be required to (1) continue treatment for his substance-abuse problem under the supervision of an OLAP monitor, (2) submit to testing as directed by the OLAP monitor to ensure sobriety, (3) report quarterly to the OLAP monitor on his treatment progress and his compliance with his payment plan, (4) follow the OLAP monitor's recommendations as to appropriate case management, client communication, and financial responsibility in his practice, and (5) refrain from any further misconduct. [Emphasis supplied]*

Sometime after *Disciplinary Counsel v. Young* and after the former Rules of the Government of the Bar were changed there was placed in the rules of the bar a provision for an attorney reinstated after indefinite suspension with “probation” as a condition. Gov. Bar R. V § 10(G) (6) which didn’t have a provision for “probation” was replaced by Gov. Bar R. V § 25(F) (6), which states:

(6) Grant of Petition; Appeal. If the final report recommends granting the petition, any person or organization referred to in division (B)(3) of this section shall have twenty days from the receipt of notice of filing of the report to file objections to the recommendations and a brief in support of the objections. The Supreme Court shall enter an appropriate order that may include provisions for reimbursement of the costs and expenses incurred in connection with the proceedings. The order of reinstatement may be subject to conditions the Supreme Court considers appropriate including, *but not limited to, requiring the petitioner to serve a period of probation under Section 21 of this rule on conditions the Supreme Court determines* and requiring the petitioner to subsequently take and pass a regular bar examination of the Supreme Court and take the oath of office. [Emphasis supplied]

The former rules of the bar never indicated that probation was available after reinstatement of an indefinite suspension. However, in *Disciplinary v. Young* the Supreme Court indicated that probation could be given as a condition for being reinstated. Since *Disciplinary v. Young* and the new rule, Gov. Bar R. V § 25(F) (6) probation is something that the Court can order by rule. However, the rule indicated that the petitioner may be required to serve a period of probation under Section 21.

Gov. Bar R. V §21 *does not* make a provision for revoking probation and reinstating an indefinite suspension. When the rules were changed to the rules allowing for probation for a reinstatement from an indefinite suspension, had the Court wanted to make the *revocation of a reinstatement of an indefinite suspension an option to the revocation of probation* they would have placed that in Gov. Bar R. V § 21(E). Instead Gov. Bar R. V § 21(E) states:

(E) **Violation of Probation;** Authority and Duty of Relator. The relator immediately shall investigate any report of a violation of the conditions of probation by the respondent. If it finds probable cause to believe that a significant or continuing violation of the conditions of probation has occurred, it shall notify the respondent of the report of probation violation and provide an opportunity to respond to the report. *Thereafter, if warranted, the relator shall file a petition for the revocation of probation, reinstatement of any stayed suspension, and citation for contempt with the director of the Board within thirty days after its receipt of the report,* in the same manner as provided in Section 10 of this rule. If, upon investigation of a report of a violation of probation, the relator determines that the filing of a petition for revocation of probation with the director of the Board is not warranted, the person reporting the alleged violation of probation shall be notified in writing of that determination. [emphasis]

When Gov. Bar R. V § 10(G) (6) was replaced by Gov. Bar R. V § 25(F) (6) the rules concerning revocation of probation and reinstatement of an indefinite suspension could have easily been placed in the §21. It only makes sense that it was purposely left out of §21 because probation was never originally in the cards when an attorney was indefinitely suspended.

Further, the Ohio Supreme Court, or the Relator could have asked that the Court put in the order that the violation of the conditions of probation could result in the sanction of re-instating the prior discipline.

Probation was originally for those whose full license was spared and ultimately had an automatic right to reinstatement. Herein, a person who was indefinitely suspended and reinstated by the grace and discretion should not need probation. However, probation should never hurt and it would be a waste to not implement probation because when done effectively it is a wonderful and beautiful thing to have one member of the bar assist their fallen colleague.

RESPONSE TO RELATOR’S OBJECTION II

Respondent’s Monitor is Not to Blame for
Respondent’s Failure to Comply
with the Conditions of Probation

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Respondent is not trying to “blame” the monitor for any failure to comply. In reality, the monitor and Respondent did immediately in report to Relator the OMVI and other charges pursuant to Gov. Bar R. V § (21) (B)(3). The Relator knew about the OMVI in October 2014 by notice from the Respondent. The panel was concerned about the charge of OMVI “in light of the negative effects of alcohol on Respondent’s prior history.” ¶ 35 RR. There was nothing done by the monitor *or the Relator at the time of the incident*. It is no wonder the Respondent thought he was in compliance.

In Relator’s conclusion to their objections they state: “No monitor should be expected to accept responsibility for the probationer’s compliance with the terms and conditions of probation”. RO p. 17. Relator makes it seem like the monitor was sanctioned, disciplined by the panel and sued by the Respondent. The fact of the matter is that it is precisely the monitor’s responsibility to monitor compliance. If it isn’t monitor’s responsibility it should be.

Relator is under the impression that attorneys reinstated and on probation are always attempting to “wiggle out” of their responsibilities to themselves, their families, the bar and the public. Once an attorney is damaged goods or has failed Relator must think that their entire mission upon reinstatement is to repeat the past history that got them suspended.

It is interesting to note in *Oglesby*, since the Relator brought up the case, that in *Oglesby* the burden was on Respondent Oglesby to make monthly reports: “The panel found that during his period of probation *respondent failed to keep his commitment to make monthly reports* to and meet quarterly with his monitoring attorney”. Id at 455 Herein, Relator appears to allege that the burden was on Winkfield, like in *Oglesby*, to make reports or take some affirmative action so that Respondent Winkfield was in compliance.

The Rules of the Government of the Bar puts the onus on the monitoring attorney to write the reports. Gov. Bar R. V § (21) (B) states:

(B) Monitoring. The monitoring attorney shall, with respect to *those aspects of the terms of probation assigned to that attorney*, do all of the following: (1) *Monitor compliance by the respondent with the conditions of probation imposed by the Supreme Court;* (2) *File with the relator, at least quarterly or as otherwise determined by the relator, written, certified reports regarding the status of the respondent and compliance with the conditions of probation;* (3) *Immediately report to the relator any violations by the respondent of the conditions of probation.*

In *Oglesby*, it appears that had the rules been applied there would not have been a failure to comply by *Oglesby* because the onus was on the monitoring attorney to file reports not Respondent *Oglesby*.

The Rules appear to put the monitoring attorney in charge and orders that Respondent Winkfield, inter alia, to have a meeting with the monitoring attorney “at least once each month” and that respondent “cooperate fully with the efforts of each monitoring attorney to monitor the respondent’s compliance”. See Gov. Bar. R. V § (21) (C) (1) and (3).

It is clear that there was a transition from the burden being of reporting be on the respondent, like in *Oglesby*, to now the burden being on the monitor using his “efforts” to monitor respondent’s compliance with respondent fully cooperating. Gov. Bar. R. V § (21) (C) (3) certainly doesn’t suggest that the monitor be passive, nor does it appear that the monitor should be there as a “mentor” as it was suggested in *Oglesby*.

Gov. Bar R. V § (21) (C) states:

(C) Duties of Respondent. The respondent shall do all of the following: (1) Have a personal meeting with the monitoring attorneys at least once each month during the first year of probation, and at least quarterly thereafter, unless the monitoring attorneys require more frequent meetings; (2) *Provide the monitoring attorneys with a written release or waiver, on a form approved by the Board, for use in verifying compliance regarding medical, psychological, or other treatment and attendance at self-help programs;* (3)

Cooperate fully with the efforts of each monitoring attorney to monitor the respondent's compliance. [It should be noted that this was never seriously touch upon during the hearing]

Relator wants the panel and this Court to re-write the rules. The Relator seeks “revocation of respondent’s probation, *reinstatement of the indefinite suspension* and a citation for contempt”. Nowhere in the rules does it permit the “reinstatement” of an “indefinite suspension”. Once a respondent is reinstated he is readmitted to the practice of law. Once readmitted to the practice of law the respondent can be, as was done here, placed on probation. The only permissible act is to reinstate a *stayed suspension*. Gov. Bar V § 21(E) and (I) states:

(E) Violation of Probation; Authority and Duty of Relator. The relator immediately shall investigate any report of a violation of the conditions of probation by the respondent. If it finds probable cause to believe that *a significant or continuing violation* of the conditions of probation has occurred, it shall notify the respondent of the report of probation violation and provide an opportunity to respond to the report. Thereafter, if warranted, the relator shall file a petition for the *revocation of probation, reinstatement of any stayed suspension, and citation for contempt* with the director of the Board within thirty days after its receipt of the report, in the same manner as provided in Section 10 of this rule. [Emphasis supplied]

(I) Reinstatement of Stayed Suspension. On the filing of the final certified report by the panel, the Supreme Court may issue to the respondent *an order reinstating any period of suspension previously stayed by the Supreme Court*, pending the entry of a final order by the Supreme Court. Notice of an order *reinstating any period of suspension previously stayed* shall be served personally or by certified mail by the clerk of the Supreme Court on the respondent and all counsel of record. [Emphasis supplied]

To judge one must apply the facts to the law. Relator wants to amend or alter Gov. Bar V § 21(E) to allow Relator the power to petition for the reinstatement of an indefinite suspension. The Supreme Court of Ohio did not “stay” respondent’s indefinite suspension. Relator’s argument is not supported by the rules. Yet, there must be something that can be done when an attorney is on probation after being reinstated from an indefinite suspension by the Supreme Court after. The rules have the answer.

I. Monitored Probation

In *Columbus Bar Association v. King*, 95 Ohio St.3d 93, 2002-Ohio-1945, cited by Relator and attached to their brief, the Ohio Supreme Court made an observation concerning mentorship [monitored probation]. In *King*, the respondent completely failed to cooperate and abide by any set of rules. The observation made the Ohio Supreme Court indicated that there was a “purpose” to the mentorship. In *King*, the Court stated as follows:

On the basis of this evidence the panel found that respondent had not fulfilled the purpose of his mentorship and that his conduct indicated that he could neither function as a professional lawyer in a courtroom nor afford his clients adequate representation.

We must look to the spirit and the letter of the rules and purpose behind probation and attorney monitoring. The spirit and purpose of the rules relating to “probation” and a “monitoring attorney”, in this sense, is to transition the fallen attorney back into the good graces of the profession through the mercy of the Court. One cannot eradicate the problem without first knowing what the problem is. The monitor in this case never read the Ohio Supreme Court’s decision.

Has Mr. Winkfield “fulfilled the purpose” of his probation and can he “function as a professional lawyer in a courtroom” and “afford his clients adequate representation”? The answer is clearly: Yes.

Unlike criminal law wherein once a person serves his sentence he cannot be on probation, the rules of the Governance of the Bar allow the Supreme Court to place a person on probation for a term after an indefinite suspension. Herein, there has not been any allegation that Respondent failed to cooperate with his monitoring attorney. If Respondent is cooperating with the monitoring attorney then eventually Respondent can apply to terminate his probation; if Respondent doesn’t then he remains on probation.

The penalty for being on probation is that respondent is not in good standing. Relator is in essence indicating that the burden is on Respondent to comply with the terms, however there is another element in the monitoring that would require the monitor to indicate to the Respondent that he is not compliant. Upon the Respondent's refusal to comply with or cooperate with the monitor creates in and of itself a violation of the rules of professional conduct.

Relator, perhaps, should have allowed the monitor to monitor prior to jumping the gun with this petition to revoke. For instance, Relator had deposed the Respondent in July of 2015. Respondent pretty much said what he said at the deposition at the hearing. However, Relator at that time of the deposition, with full knowledge of the mental health matters, never once mentioned to Respondent *or the monitor* that the Relator thought he was not in compliance.

Gov. Bar V § 21(E) indicates that a violation should "immediately" be investigated and if the violation is "significant" or "continuing" then Relator can file a petition. The allegations of the operating a motor vehicle while intoxicated, while admittedly a crime it is not significant to the extent that the actions are sufficiently great or important to be worthy of attention; noteworthy as a reflection on his ability to practice law. Respondent is not condoning the acts, however, the act and resultant aftercare, if necessary, can be subsumed in the probationary process. Relator never demonstrated that the illegal conduct is continuing. The blood alcohol content of .05% was less than the .08% threshold for the per se violation.

The mental health assertions are the easiest to put in the process. The monitor indicates that Respondent, based on the Supreme Court's order, and either he does it doesn't do it. It is troubling and even more problematic that Respondent was never informed that he was not in compliance until the petition process was initiated.

Respondent, as stated earlier, was deposed by the Relator. Not once during that process did the Relator indicate to the Respondent that he was not in compliance, or even in danger of not being in compliance during the July 2015 deposition. On October 13, 2014 monitor Jack Gibbs, Esq. indicated in his report that Respondent had met with the monitor, has been fully cooperative, and that based on the monitor's "monitoring" the monitor "concluded that Respondent is in compliance with his probation." The monitor further indicated in his report that "Respondent is doing an excellent job complying with all terms of his probation. I am very pleased with his cooperation and diligence." [See Respondent's Ex. C-1] On January 20, 2015 the monitor indicated the same as he indicated in Ex. C-1, with the exception that Respondent had been charged with the OMVI on October 10, 2014. The January 20, 2015, which was due January 15, 2015, report indicated that Respondent was in compliance.

The next report by the monitor was due on April 15, 2015. The April 15, 2015 report was dated June 8, 2015 and once again the Respondent was in compliance. After the monitor was informed that Respondent was convicted monitor wrote, concerning the OMVI charge: "These charges have been resolved with a plea deal. The particulars of this plea deal have been forwarded to [Relator]." [See Respondent's Ex. C-3] Notwithstanding, the plea by Respondent, the monitor indicated on his report that Respondent was in "compliance with the terms of his probation".

The monitor filed another report on July 17, 2015, once again indicating the Respondent was in compliance. However, this report indicated that respondent may not be in compliance based on a jaywalking ticket and what may have come out of a deposition. [See Respondent's Ex. C-4]

RESPONSE TO RELATOR'S OBJECTION III

This Court should not modify the Conditions of
Respondent's Probation as Recommended by the Panel

During any period of time that an attorney is on probation, the *monitoring attorney is the most important element of the process*. Let's make no mistake about it Mr. Jack Gibbs, Esq. is a fine attorney. From all reports this is the general consensus. However, the fact that he is a great person doesn't equate to him being a great monitor. I cannot speak for counsel for the Relator, but as Counsel for the Respondent I must admit I dropped the ball on the process. I should have known about Gov. Bar. R. V (21) (A)(6) wherein the monitor selected had a background in mental health.

There really should be some training for a monitor, rather than just being thrown out and expect to do the job. The monitor and Respondent should almost be polar opposites. The monitor probably should not, necessarily, be in private practice because the private practice gets in the way of the process. This case should not have been adversarial. The monitor in this case indicate that he did not even read the decision, yet the Relator is defending his monitoring. Relator confuses a good person with not being given good instruction to do a good job. Just like the Respondent, if Mr. Gibbs was given good direction there is no doubt he would have made sure that Respondent was in compliance with the mental health section.

Had the Relator, monitor, Respondent and counsel worked together this case would have never been filed. And had it been filed there would have been no doubt that Respondent didn't follow instructions or in compliance with the mental health aspects. But to now, as the Relator indicates, require the Respondent to get letters, corroboration, etc., after the fact is unfair. There is no doubt that should this Court decline the Relators suggestion of re-instatement, that a new monitor or the present monitor wouldn't require Respondent to get mental health evaluation. If a

new psychiatrist comes to same conclusion as Dr. Zober then the appropriate paperwork can be submitted. Respondent indicated Dr. Zober indicated he didn't need any more treatment, there is no evidence to the contrary. Relator wants to take a man's license because, without any investigation, they just don't believe Respondent, or claim that Respondent should have done more when Relator does nothing.

Before Relator cries out that Respondent is blaming them or making an excuses, the fact of the matter is Respondent indicated by letter that Dr. Zober felt there was no more need for treatment. Thereafter in two setting Respondent said the same thing under oath. Being on "probation" doesn't mean a man's oath is meaningless. Even if the panel gave Respondent's testimony little weight there was nothing by Relator or the monitor to show otherwise.

Counsel for the Respondent has been through the monitoring process twice. In my case there is a reason why one period of probation lasted 7 years and one lasted one year. It was due to the monitor. Both monitors of mine were fine attorneys, however both were different in their approach. One was a criminal defense attorney and the other was civil defense attorney, turned mediator. The approach of the two was different. The second monitor was completely and totally hands on doing everything from going over files, directing my secretary, speaking to judges, checking on my accounting, payroll, hires, etc. The second monitor did not fill out a "form" like Mr. Gibbs, he wrote reports on a monthly basis from start to finish detailing the meetings. Mr. Gibbs' reports consist of "checking boxes" and making "optional" comments.

My second monitor read my cases, understood the problems and developed a plan to resolve the problems. At the first meeting we set the dates of the following year's meetings. The meetings were scheduled at the first of the month so that if something unexpected came up the meeting would still take place during the month. The monitor came to my office and randomly

checked files, accounting procedures and the like during his visits. Quite frankly, had I seen the limited quarterly reports I would have objected.

The object is to win. We win when Mr. Winkfield graduates from probation. It has been three years since my probation was terminated, probation helps.

Counsel can easily say that Respondent is desirous of seeking necessary help when it required. Respondent does not deny he has had problems with his mental health.

Relator maintains that OLAP should not monitor Respondent. However, OLAP monitoring was done in *Disciplinary Counsel v. Young*, 113 Ohio St.3d 36, 2007-Ohio-975, the Court stated:

{¶ 34} Respondent is therefore indefinitely suspended from the practice of law in Ohio, and this indefinite suspension shall run consecutively to the indefinite suspension that respondent is currently serving. *In addition to the requirements of Gov. Bar R. V (10), respondent must in any petition he files for reinstatement* (1) show that he has successfully completed an OLAP-approved alcohol- and drug-abuse treatment program and that he can return to the competent, ethical, and professional practice of law and (2) establish his compliance with a payment plan, approved by the OLAP monitor, for making \$44,101.06 in restitution to the appropriate insurance companies. If respondent is reinstated, he shall be placed on probation for three years and be required to (1) continue treatment for his substance-abuse problem under the supervision of an OLAP monitor, (2) submit to testing as directed by the OLAP monitor to ensure sobriety, (3) report quarterly to the OLAP monitor on his treatment progress and his compliance with his payment plan, (4) *follow the OLAP monitor's recommendations as to appropriate case management, client communication, and financial responsibility in his practice, and (5) refrain from any further misconduct.* [Emphasis supplied]

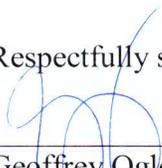
Conclusion

Mr. Winkfield's prior indefinite suspension cannot be reinstated based on the laws and rules in effect now. Relator cannot assume that because there is no case law on a matter that the matter becomes a case of first impression. The impression is contained in the rules; since the rules don't allow for the reinstatement of an indefinite suspension the matter is covered by the existing rules. Relator can't ignore the rule, file a case and then state that it is a case of first impression.

Unlike *Disciplinary Counsel v. Oglesby*, supra, there is not allegation that Winkfield failed to cooperate with his monitoring attorney, nor is there an independent allegation of professional misconduct. As such Relator is confined to the rules as they exist now. Relator's option is to object when Winkfield seeks to terminate his probation. Unlike *Oglesby*, there was no amendment of the complaint to add any violations of rules of professional conduct. There is no significant or continuing violation of anything of the conditions set by the Ohio Supreme Court.

Relator wants the Respondent to not only self-report but also to self-monitor. How easy would this be if the monitoring attorney recommended that Winkfield seek further meetings with his mental health people and Winkfield refused? In this case, only after the die was cast did the monitor indicate that Winkfield was not in compliance.

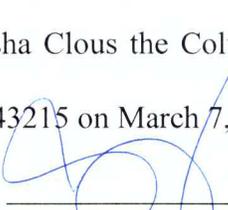
Respectfully submitted,



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OGLESBY & OGLESBY ATTORNEYS & COUNSELORS AT LAW

CERTIFICATE OF SERVICE

A copy of the foregoing Response to Relator's Objections has been served by regular U.S. Mail upon the Board of Professional Conduct of the Supreme Court, upon Richard A. Dove, Director, 65 South Front Street Columbus, Ohio 43215 and upon Bruce Campbell Esq., Bar Counsel, Judy McInturff, Lori Brown and A. Alysha Clous the Columbus Bar Association, 175 South Third Street, Suite 1100, Columbus, Ohio 43215 on March 7, 2016.



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