

**Before the Supreme Court of Ohio**

VIRGINIA MARY ANN BARBORAK  
Registration Number 0068601  
120 South Market Street  
Lisbon, Ohio 44432

Respondent

v.

COLUMBIANA COUNTY BAR ASS'N.  
32 North Park Avenue  
Lisbon, Ohio 44432

Relator

Nº 2016-0853

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RESPONDENT VIRGINIA MARY ANN BARBORAK'S  
OBJECTION TO THE  
FINDINGS OF FACT AND CONCLUSIONS OF LAW  
OF THE BOARD OF PROFESSIONAL CONDUCT  
AND BRIEF IN SUPPORT

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*Toledo Bar Ass'n. v. Crossmock*, 111 Ohio St.3d 278, 2006  
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## STATEMENT OF FACTS

The facts of the case are as stipulated by the parties and is found by the panel, with the exceptions in ¶¶119 and 122, quoted *post*. Respondent does not disagree with any of the other factual findings, and there is accordingly no need to repeat the essential facts of the case here.

## ARGUMENT IN SUPPORT OF OBJECTION

***Respondent's Objection No. 1:*** The Panel and the Board Improperly Concluded that there was a discrepancy between Respondent's Hearing Testimony and What Was Represented at a post-hearing telephone Conference, which in turn "in keeping with a pattern of dishonesty as evidenced by the stipulations to the facts of this matter." *Board Report*, ¶119.

Respondent wishes to make clear that she does not object to most of the findings and she does not object to the recommendation of the Board. However, simply because she agrees with the ultimate conclusion does not mean that errors should not be pointed out so that there is an accurate record.

Respondent agrees with the Board that an indefinite suspension is appropriate, with reinstatement subject to the conditions set forth in ¶¶124 and 125 of the Board's Report. *See, e.g., Toledo Bar Ass'n. v. Crossmock*, 111 Ohio

St.3d 278, 2006 Ohio 5706, 855 N.E.2d 1215 (indefinite suspension for misappropriation of more than \$300,000.00 over a 10 year period); *Disciplinary Counsel v. Yajko*, 77 Ohio St.3d 385, 1997 Ohio 263, 674 N.E.2d 684 (indefinite suspension for misappropriating funds on 20 separate occasions from 20 clients over a 7 year period); *Disciplinary Counsel v. Crowley*, 69 Ohio St.3d 554, 1994 Ohio 214, 634 N.E.2d 1008 (indefinite suspension for misappropriation of some \$200,000.00 from as many as 17 clients); *Columbus Bar Assn. v. Osipow*, 68 Ohio St.3d 338, 1994 Ohio 145, 626 N.E.2d 935 (indefinite suspension for failing to report fees to law firm, for misrepresenting expenses, and for misappropriating client and law firm funds); and, *Akron Bar Association v. Smithern*, 125 Ohio St.3d 72, 2010 Ohio 652, 926 N.E.2d 274 (indefinite suspension where lawyer had no prior disciplinary record, had cooperated throughout the disciplinary proceedings, acknowledged her addictions, and had entered into a settlement to pay full restitution, despite a dishonest and selfish motive in stealing the money).

The Board concluded that Respondent had engaged in a troubling pattern of dishonesty. The objection here is premised upon a conclusion of fact from a “witness” with no

firsthand knowledge and that was not tested by the usual on-the-record inquiry of someone *with* firsthand knowledge. The Board concluded at ¶119 that one of the reflections of troubling pattern of dishonesty was a “discrepancy” between that to which Respondent testified at the record hearing and that which purportedly was represented by her counsel at a subsequent telephone conference.<sup>1</sup>

The Respondent testified at the record hearing that she had “a few cases that I’m winding up, but I am—I have removed myself from the practice of law due to stress and so forth,” and that “I have voluntarily removed myself from the practice of law.” Hearing Tr. 13, 25. During a telephone conference five months after the hearing between Respondent’s counsel, Relator’s counsel, and the panel chair, it was the Relator’s counsel, who practices primarily in Columbiana County, who brought up that Respondent was still practicing law. Respondent’s counsel does not

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<sup>1</sup> This paragraph in the report highlights the danger of allowing the representations of counsel to substitute for “evidence.” Respondent and her counsel are not comfortable arguing matters outside of the record. Yet, Respondent believes that there is little choice, in light of inclusion in the report of a post-hearing “confirmation” made by at least 1 lawyer who had no firsthand knowledge, and permitting that confirmation to serve as some “evidence” of a “discrepancy” that was “in keeping with a pattern of dishonesty.” *Board Report*, ¶119.

practice primarily in Columbiana County. Relator respectfully disagrees that her counsel “confirmed” that Respondent was still practicing law. Counsel could not do so, as he had no firsthand knowledge of this. If counsel said something during the May 3 teleconference that was interpreted to mean something other than that he would look into the matter, then apologies are extended to all. However, it would be difficult for counsel to “confirm” to a representative of this State’s highest Court what he did not know firsthand, unless he had an admission from the Respondent—which he did not. Counsel’s recollection is that when Relator’s counsel brought up the matter, Respondent’s counsel said that he had no direct knowledge but believed that Respondent was not practicing law. Relator’s counsel suggested that he had firsthand information to the contrary.

Counsel did inquire of the Respondent after the teleconference, but Respondent represented nothing other than that to which she had testified. Upon inquiry, Respondent said that she was not accepting any new cases and was finishing up existing cases. She at this point (and at that) has not been suspended, and she is attempting to do

no more than to discharge the obligation for the cases for which she was engaged. Put another way, Respondent is accepting no new cases and is simply attempting to “clean up” the rest of her practice, knowing that a suspension is in the offing. This is not, with respect, a discrepancy between her record hearing testimony and the truth. This, in Respondent’s view and Respondent hopes, in the view of the Court, does not represent disingenuous conduct, conduct at odds with Respondent’s record hearing testimony. It is one thing for a lawyer for who knows that a suspension is coming to take on as many cases as he or she can possibly accept in an effort to pad the nest for the upcoming cold winter of a license suspension. It is quite another to decline to take on new cases, but to complete the work for which Respondent was previously engaged.

The practice of law is a profession of public service. *See, e.g., Disciplinary Counsel v. Claflin*, 107 Ohio St.3d 31, 2005 Ohio 5827, 836 N.E.2d 564, ¶14. As is the case with so many lawyers who encounter disciplinary trouble, there are those client cases which give rise to the discipline, but there are many other client cases where the lawyer has performed competent, professional service. If there are

client cases pending at the time that a suspension is entered, then the Respondent will comply with the Court's order to cease and desist practicing law immediately; to notify tribunals, adversaries, unrepresented parties, and clients of the suspension; to advise clients of the need to obtain new counsel with relative dispatch; and to make available all papers to assist clients in that transition. But because this is a profession of service, if the clients' cases can be closed out by the lawyer in whom the clients originally expressed trust and confidence, then that is not a bad thing.

#### CONCLUSION

For the foregoing reasons, the Respondent objects to the findings in §§119 and 122 (to the extent that it reiterates §119), asks that such finding of a "discrepancy" not be affirmed as it is untested by normal evidentiary tests for competence and reliability. Respondent prays that the indefinite suspension otherwise be imposed based upon the corrected record.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was  sent by regular United States Mail, postage prepaid;  hand delivered to counsel or counsel's office;  sent by telecopier or  electronic mail this 5<sup>th</sup> day of July, 2016 to Mr. Timothy A. Barry, Esq., Counsel for Relator, 600 East State Street, P.O. Box 590, Salem, Ohio 44460; and to Mr. Richard A. Dove, Secretary, Board of Professional Conduct, Supreme Court of Ohio, 65 South Front Street, Fifth Floor, Columbus, Ohio 43215-3431.



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