

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

In re:

Complaint against

Case No. 2016-033

**Kenneth James Lewis
Attorney Reg. No. 0073002**

**Findings of Fact,
Conclusions of Law, and
Recommendation of the
Board of Professional Conduct**

Respondent

Lorain County Bar Association

Relator

OVERVIEW

{¶1} This matter was heard on July 19, 2017 before a panel composed of Frank C. Woodside, III, Paul M. DeMarco, and David L. Dingwell, panel chair. None of the panel members is from the appellate judicial district in which the complaint arose, and none served on the probable cause panel that certified the matter to the Board.

{¶2} Relator was represented by Daniel A. Cook. Respondent was present at the hearing and represented by Kevin R. Marchaza.

{¶3} Initially, these proceedings were consolidated with Case No. 2016-032, *Lorain Cty. Bar Assn. v. Heather B. Wilsey*, as the conduct giving rise to the Relator's complaints related to an incident that involved both Respondent and Wilsey. Subsequently, the proceedings were bifurcated at the request of the parties. Wilsey died shortly thereafter, an apparent victim of a drug overdose, and her case was dismissed.

{¶4} Based on the parties' stipulations and evidence presented at the hearing, the panel finds, by clear and convincing evidence, that Respondent engaged in professional misconduct as outlined below. Upon consideration of the applicable aggravating and mitigating factors, and case

precedents, the panel recommends that Respondent be suspended from the practice of law for a period of two years, with the final six months stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} The parties entered into 47 written stipulations of fact. Fifty-seven exhibits were admitted into evidence at the hearing. In addition to Respondent, the following witnesses testified at the hearing: Fred Merrill, Zachary Kasperovich, Margaret O'Bryon, J.D. Tomlinson, Hon. D. Christopher Cook, Jeannie Motylewski, and Robb Nupp.

{¶6} The panel finds the following facts to have been proven by clear and convincing evidence:

{¶7} Respondent was admitted to the practice of law in Ohio on November 20, 2000. He is subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶8} Respondent has a history of prior discipline imposed against him by the Supreme Court of Ohio. On April 21, 2009, Respondent was suspended from the practice of law for one year by the Supreme Court of Ohio for forging a judge's signature on a previously time-stamped judgment entry. *Medina Cty. Bar Assn. v. Lewis*, 121 Ohio St.3d 596, 2009-Ohio-1765. Respondent was reinstated from that suspension on May 14, 2010.

Elyria Obstruction of Official Business Incident

{¶9} On June 8, 2016 at approximately 1:14 a.m., Officers Fred Merrill and Zachary Kasperovich of the Elyria Police Department were detailed to the area of Fourth Street and East Avenue in Elyria on a report of a single unit accident.

{¶10} Upon arrival, Officer Kasperovich observed a white female, later identified as Heather Wilsey, and a white male, identified as Respondent, walking westbound on the south side of Fourth Street, away from the traffic accident scene.

{¶11} Officer Kasperovich stopped Respondent and Wilsey who advised that they were in the vehicle at the time of the accident.

{¶12} The vehicle, a gray Acura TL, owned by Respondent, was in the tree lawn on the south side of Fourth Street.

{¶13} The vehicle was heavily damaged from the accident such that the rim and tire were destroyed.

{¶14} The extent of the damage to the vehicle rendered it nonoperable.

{¶15} Officer Merrill assisted in the traffic investigation and conducted a field interview with Respondent.

{¶16} Respondent and Wilsey advised Officer Merrill that they were intoxicated at a local bar, the Train Station.

{¶17} The officers continued their field interviews of Respondent and Wilsey regarding the facts and circumstances surrounding the traffic accident.

{¶18} Both officers testified consistently at the hearing with regard to what Respondent specifically told them had occurred.

{¶19} According to both officers, Respondent stated that an unknown black male that Respondent and Wilsey had met at the Train Station had agreed to drive them home because they were intoxicated. Respondent told the officers that the black male was seated in the driver's seat, Wilsey in the front passenger seat, and Respondent in the rear seat of the vehicle. Hearing Tr. 41-42, 49.

{¶20} Both officers confirmed that while they did not believe Respondent's version of events, they diverted Elyria's limited police resources to investigate the matter and put in a request for a search of the male who was alleged to be driving the vehicle, as well as obtain the video footage from the bar where Respondent and Wilsey were located just prior to the car accident. Hearing Tr. 45-47, 50-53.

{¶21} Respondent's testimony at the hearing contradicted the two officers. Respondent claims that Wilsey, not Respondent, was responsible for telling the officers about this fictitious driver. Hearing Tr. 124-129. According to Respondent, he told Officer Merrill, "it happened just like she said it did." Hearing Tr. 142.

{¶22} Respondent admits that this corroborating statement to the officers was untrue. Respondent claims that he made the statement because of his romantic interest in Wilsey. According to Respondent, "I had just started dating [Wilsey] and I didn't want to lose her. I did not appreciate the gravity of the trouble I was in or about to be in." Hearing Tr. 145.

{¶23} Respondent and Wilsey were advised by the officers at the scene that the officers did not believe their version of the events and that the case would be investigated as an open hit-skip accident.

{¶24} Respondent and Wilsey were advised that they would need to provide a written statement to complete the accident report and that the officers would speak to them at the Elyria Police Department.

{¶25} Respondent advised the officers that he would meet them at the police department.

{¶26} On June 8, 2016, at approximately 1:45 a.m. Officers VanWormer and Longacre of the Elyria Police Department were detailed to the Train Station to further investigate the accident

whereat they obtained a video recording of Respondent and Wilsey leaving the bar just prior to the motor vehicle accident.

{¶27} The video recording clearly reveals that Respondent entered the passenger seat, Wilsey entered the driver's seat, and Wilsey drove the vehicle away from the Train Station while she was intoxicated. Relator's Ex. 19.

{¶28} Later in the day on June 8, 2016, Officer Merrill was contacted by Respondent who advised that he could not come to the police department that evening to complete the accident report because he had to watch his child and had no means of getting to the department.

{¶29} Officer Merrill advised Respondent to come to the police department on June 9, 2016 at 10:00 p.m.

{¶30} Respondent agreed that he would come to the police department on June 9, 2016, at 10:00 p.m. to complete the accident report.

{¶31} On June 9, 2016, at 10:00 p.m., Respondent arrived at the Elyria Police Department.

{¶32} Respondent was given a blank OH-3 Traffic Report and provided a written statement. Relator's Ex. 11.

{¶33} Officer Merrill reviewed the written statement provided by Respondent and observed that the statement did not honestly and accurately describe the facts surrounding the accident investigation. Respondent admits that this written statement contains multiple false statements about what occurred on June 8. Hearing Tr. 129-132.

{¶34} Respondent was arrested on June 9, 2016 on the charge of obstruction of official business, in violation of R.C. 2921.31, a second degree misdemeanor.

{¶35} On September 20, 2016, Respondent appeared in the Elyria Municipal Court in regard to the proceedings entitled *State of Ohio, City of Elyria v. Kenneth J. Lewis*, Case No.

2016CRB01998, arising from the events of June 8-9, 2016, and the charge of obstruction of official business.

{¶36} At the September 20, 2016 appearance, Respondent entered a plea of “no contest” resulting in a finding of guilt.

Brunswick OVI Incident

{¶37} On September 12, 2016, Respondent and Wilsey were once again intoxicated while Respondent was operating his vehicle. Hearing Tr. 132-133.

{¶38} As a result, Respondent was arrested by the Brunswick Hills Police Department. *Id.*

{¶39} On September 16, 2016, Respondent appeared in the Medina Municipal Court in the matter entitled *State of Ohio v. Kenneth J. Lewis*, being Case No. 16TRC05250, and entered a plea of “no contest” and was found guilty of OVI, a violation of R.C. 4511.19.

{¶40} Four days after Respondent entered his plea of “no contest” in the OVI case, pending in Medina Municipal Court, Respondent appeared in the Elyria Municipal Court in regard to the obstruction case.

{¶41} Following the plea in the obstruction case, the Elyria Municipal Court referred Respondent to the Elyria Municipal Court probation department for a presentence report and scheduled a sentencing hearing for October 25, 2016.

{¶42} On September 21, 2016, Respondent filled out a “Presentence Information” form and provided same to the Elyria Municipal Court’s probation department for the purpose of assisting in the preparation of the presentence report. Relator’s Ex. 16.

{¶43} Respondent completed the presentence information form completely and accurately. Hearing Tr. 161-162.

{¶44} The parties stipulated during the hearing to the fact that no one from the Elyria Municipal Court's probate department questioned Respondent in any way to gather any facts other than merely asking Respondent to complete the Presentence Information form. Hearing Tr. 135-136.

{¶45} Nothing in the presentence information form required Respondent to disclose to the Elyria Municipal Court's probation department the fact of the Medina Municipal Court OVI charge to which he had just recently pled no contest on September 16, 2016.

{¶46} The prosecutor, Margaret O'Brien, testified that, prior to Respondent's sentencing hearing in the Elyria Municipal Court obstruction case, she discovered the Medina Municipal Court OVI charge. Hearing Tr. 92.

{¶47} Ms. O'Brien testified that when she discovered the OVI charge, she informed Respondent's criminal defense attorney that, "I'm going to change my stance on this case when we go in for sentencing." Hearing Tr. 91. Accordingly, the prosecutor and the judge were both aware of the Brunswick OVI prior to sentencing for the Elyria obstruction charge.

{¶48} On October 25, 2016, Respondent appeared in the Elyria Municipal Court for his previously scheduled sentencing hearing in that case. At that sentencing hearing, Respondent was sentenced to 90 days in jail, but the court suspended 80 days of the sentence. Respondent served his 10-day jail sentence from November 25, 2016 through December 5, 2016.

{¶49} On or around June 23, 2016, Relator sent Respondent notice of its investigation of the Elyria obstruction incident.

{¶50} On or around July 9, 2016, Respondent timely replied to Relator's letter regarding the investigation.

{¶51} On July 25, 2016, at a regularly scheduled meeting of Relator's certified grievance committee, affirmative votes were recorded finding probable cause that Respondent had committed multiple violations of the Ohio Rules of Professional Conduct associated with the Elyria obstruction incident.

{¶52} On or around July 26, 2016, Respondent formally agreed to waive probable cause and received a copy of the certified complaint from Relator's counsel on or around July 27, 2016.

{¶53} Following the Brunswick OVI incident in September 2016, Respondent did not come forward to disclose the incident and subsequent plea of no contest to Relator. Instead, Relator discovered the Brunswick OVI incident when a member of the Lorain County Bar Association telephoned Janette Motylewski, Relator's Executive Director. Hearing Tr. 96. Motylewski then obtained the police report regarding the OVI incident and provided it to Relator's counsel. Hearing Tr. 97.

Respondent's Alcohol Addiction

{¶54} On July 8, 2016, Respondent entered a two-year chemical dependency contract with the Ohio Lawyers Assistance Program ("OLAP"). The contract expires on July 8, 2018.

{¶55} Respondent testified that while he was trying to stop drinking during this time, he suffered a relapse when he went out with Wilsey again on September 12, 2016. Hearing Tr. 159.

{¶56} According to Respondent, following the OVI incident, he decided to try harder to address his alcohol addiction. On December 27, 2016, Respondent was assessed at the Glenbeigh Center of Rocky River relative to his alcohol chemical dependency. The findings of the biopsychosocial assessment indicated a recommendation that Respondent engage in the full course (4-6 weeks) of Intensive Outpatient ("IOP") treatment.

{¶57} On January 2, 2017, Respondent began IOP treatment at the Glenbeigh Center.

{¶58} On February 6, 2017, Respondent received a Certificate of Completion for successful completion of all program expectations outlined by the IOP program.

{¶59} In February 2017, Respondent began treatment in Glenbeigh's 12-week Outpatient/Aftercare Program.

{¶60} On May 3, 2017, Respondent received a Certificate of Completion for successful completion of all program expectations outlined by the Outpatient/Aftercare Program.

{¶61} From July 14, 2016 through June 4, 2017, Respondent has attended 120 Alcoholic Anonymous meetings.

{¶62} Respondent's Alcoholics Anonymous sponsor, Rob Nupp, testified in support of Respondent. Nupp testified that he is hopeful for Respondent's continued sobriety, and that Respondent has taken the treatment process seriously. Hearing Tr. 199-200.

{¶63} However, Nupp candidly admits that he is not a licensed counselor and is not qualified to render any medical prognosis. Hearing Tr. 201.

{¶64} While Respondent's alcohol addiction may well have led him to be intoxicated on June 8, 2016 and September 12, 2016, no evidence was presented that demonstrated that Respondent's alcohol addiction was in any way the cause of his poor judgment to make false statements to the Elyria Police Department officers who responded to the scene of the June 8, 2016 car accident.

Rule Violations

{¶65} Respondent stipulated to and the panel concludes, by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following rules with regard to the Elyria obstruction incident (Counts One, Two and Three):

- Prof. Cond. R. 8.4(b) [an illegal act that reflects adversely on the lawyer's honesty or trustworthiness];
- Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation];
- Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice].

{¶66} Relator also charged in its amended complaint that Respondent violated Prof. Cond. R. 3.3(a)(1), Prof. Cond. R. 8.4(c), and Prof. Cond. R. 8.4(d) by failing to affirmatively disclose the Brunswick OVI incident to the Elyria Municipal Court.

{¶67} The panel finds that Relator failed to present clear and convincing evidence to demonstrate how Respondent violated these rules. Respondent honestly completed answers for all of the questions put to him in the presentence investigation form. If the Elyria Municipal Court truly wanted to know information on potential charges or convictions in other jurisdictions, it should amend its form or have probation officers inquire about this information.

{¶68} Further, with regard to the charge that Respondent violated Prof. Cond. R. 3.3(a)(1), this rule governs the conduct of a lawyer who is representing a client before a tribunal. Prof. Cond. R. 3.3, Comment [1]. In this instance, the Respondent was the client being represented by separate legal counsel before the Elyria Municipal Court. Respondent therefore had no duty, under Prof. Cond. R. 3.3(a)(1), to voluntarily disclose the Brunswick Hills OVI.

{¶69} The panel therefore dismisses Counts Four, Five, and Six of the amended complaint.

{¶70} Lastly, in Count Seven of the amended complaint, Relator charges Respondent with violating Prof. Cond. R. 8.4(h) [other conduct that adversely reflects on the lawyer's fitness to practice law].

{¶71} In *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 41, 2013-Ohio-3998 at ¶21, the Supreme Court of Ohio held as follows:

Prof. Cond. R. 8.4(h) is a catchall provision. In order to find a violation of Prof. Cond. R. 8.4(h), there must be clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness to practice law, even though that conduct is not specifically prohibited by the rules, or there must be proof that the conduct giving rise to a specific rule violation is so egregious as to warrant an additional finding that it adversely reflects on the lawyer's fitness to practice law.

{¶72} Respondent's conduct giving rise to this matter clearly violates specific rules. The panel believes that while the Respondent exercised terrible judgment, and repeatedly lied to police officers regarding the events of June 8, 2016, the conduct was not so egregious as to give rise to a separate violation of Prof. Cond. R. 8.4(h). Accordingly, the panel dismisses Count Seven of the amended complaint.

AGGRAVATION, MITIGATION, AND SANCTION

{¶73} The parties stipulated to, and the panel finds one aggravating factor: Respondent has prior discipline as noted in ¶8, *supra*.

{¶74} In addition to the stipulated aggravating factor, the panel additionally finds Respondent acted with a selfish and dishonest motive.

{¶75} In mitigation, the parties stipulated to, and the panel finds, that other penalties and sanctions have been imposed on Respondent through the underlying criminal proceedings. As an additional mitigating factor, the panel finds that Respondent has a good reputation with his clients. Respondent's Ex. GG.

{¶76} The parties assert competing arguments with regard to Respondent's conduct during the investigation of this matter. Respondent urges that he was cooperative, open, and forthcoming during the investigation. Relator urges that Respondent was covering up the Brunswick Hills OVI incident by failing to disclose it.

{¶77} The panel believes that there should be no mitigation or aggravation assigned to this particular matter. Respondent was cooperative with regard to the Elyria incident. However, the panel believes that Respondent should have voluntarily disclosed the OVI incident in order to be completely forthcoming.

{¶78} This is especially true when Respondent has referenced his alcoholism as a contributing factor to both incidents. Although the OVI incident did not itself constitute a violation of the Rules of Professional Conduct, Respondent's failure to openly reveal the incident renders somewhat disingenuous his assertion that he acted with a "cooperative attitude."

{¶79} Relator's suggestion with regard to an appropriate sanction is a "permanent suspension." The panel will assume that this is a recommendation of an indefinite suspension.

{¶80} Respondent suggests that a more appropriate sanction would be a two-year suspension, with eighteen months stayed, subject to specified conditions.

{¶81} In reviewing similar cases where there were prior disciplinary offenses involving dishonesty, the Supreme Court of Ohio has issued the sanction of either a two-year suspension or an indefinite suspension:

- *Mahoning Cty. Bar Assn. v. DiMartino*, 145 Ohio St.3d 391, 2016-Ohio-536. Indefinite suspension. Violations of Prof. Cond. R. 1.3, 1.4(a), 1.5, 1.15(a), and 8.4(c). Aggravating factors included prior disciplinary offenses, a dishonest or selfish motive, a pattern of misconduct, multiple offenses, lack of cooperation in the disciplinary process, and failure to make restitution. No mitigating factors.
- *Disciplinary Counsel v. Cicero*, 143 Ohio St.3d 6, 2014-Ohio-4639. Indefinite suspension. Violations of Prof. Cond. R. 3.3(a), 8.4(c), 8.4(d), and 8.4(h). Aggravating factors included prior discipline, dishonest and selfish motive, pattern of misconduct, and failure to acknowledge wrongdoing. No mitigating factors were found.
- *Trumbull Cty. Bar Assn. v. Large*, 134 Ohio St.3d 172, 2012-Ohio-5482. Two-year suspension. Violations of Prof. Cond. R. 1.3, 1.5(a),(c), and (d), and 8.4(c), (d), and (h). Aggravating factors of prior discipline, dishonest and selfish

motive, failure to cooperate, submission of false evidence, no acknowledgement of wrongdoing, pattern of misconduct, and harm to vulnerable clients. No mitigating factors.

- *Warren Cty. Bar Assn. v. Marshall*, 113 Ohio St.3d 54, 2007-Ohio-980. Two-year suspension. Violations of DR 1-102(A)(4) [now Prof. Cond. R. 8.4(c)], 6-101(A)(3) [now Prof. Cond. R. 1.3], 7-101(A)(2) [now Prof. Cond. R. 3.1] and Gov. Bar R. V, Section 4(G) [Now Gov. Bar R. V, Section 9(G)]. Aggravating factors include prior discipline, pattern of misconduct, harm to vulnerable client, and lying to an investigator. One mitigating factor of cooperation during the disciplinary proceedings was found.
- *Cincinnati Bar Assn. v. Rothermel*, 104 Ohio St.3d 413, 2004-Ohio-6559. Indefinite suspension. Violations of DR 1-102(A)(4)[now Prof. Cond. R. 8.4(c)] and 9-102(A) and (B)(3). Mitigating factors of cooperation and commitment toward restitution. Aggravating factors of prior misconduct, dishonest and selfish motive, and lack of remorse.
- *Disciplinary Counsel v. King*, 104 Ohio St.3d 438, 2004-Ohio-5470. Two-year suspension, one year stayed. Two prior cases involved violations of DR 1-102(A)(4) [now Prof. Cond. R. 8.4(c)]. Violations of DR 1-102(A)(4) [8.4(c)], 1-102(A)(5) [now Prof. Cond. R. 8.4(d)], and 6-101(A)(3) [now Prof. Cond. R. 1.3]. Aggravating factors of prior discipline, and pattern of dishonesty. Mitigating factors of cooperation, restitution, remorse, and evidence of good character and reputation.

{¶82} The panel finds that the Respondent's conduct is not as egregious as those cases in which an indefinite suspension was assessed.

{¶83} Although Respondent was not open and forthcoming during the investigation stage with regard to the OVI incident, Respondent did fully cooperate with regard to the Elyria incident.

{¶84} Respondent took full responsibility for his poor judgment, was remorseful, and appears to be successfully addressing his alcohol addiction.

{¶85} While the panel is concerned that Respondent's misconduct involves yet another instance of dishonesty and misrepresentation, the panel believes that a term suspension is more appropriate here.

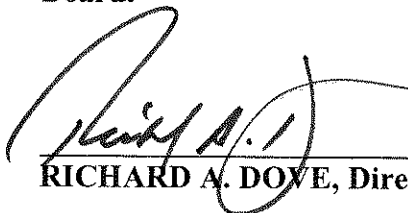
{¶86} The panel recommends Respondent be suspended from the practice of law for a period of two years. The panel further recommends that six months of the suspension should be stayed, subject to the following conditions:

- Respondent must commit no further violations;
- Respondent must comply with all of the terms of his two-year contract with OLAP;
- Respondent must continue attending Alcoholics Anonymous meetings and stay in regular contact with his sponsor;
- Prior to reinstatement, Respondent must demonstrate that he is able to return to the competent, ethical and professional practice of law; and
- Following reinstatement, Respondent must serve a two-year period of monitoring, by an attorney approved by Relator, to help ensure his continued abstinence from alcohol.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on October 6, 2017. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Kenneth James Lewis, be suspended from the practice of law in Ohio for a period of two years, with six months stayed on the conditions that Respondent: (1) comply with all terms of his two-year contract with OLAP and any extension of that contract; (2) continue attending AA meetings and stay in regular contact with his sponsor, and (3) refrain from further misconduct. In applying for reinstatement, Respondent shall be required to demonstrate that his is able to return to the competent, ethical, and professional practice of law. Upon reinstatement, the Board recommends that Respondent be required to submit to a two-year period of monitoring, by an attorney designated by Relator, to help ensure his continued abstinence from alcohol. The Board further recommends that Respondent be ordered to pay the costs of these proceedings.

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



RICHARD A. DOVE, Director