IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	
	:	
Relator,	:	Case No. 2017-0492
	:	
v.	:	
Brian Allan Maciak,	:	On Certified Report by the
	:	Board of Professional Conduct
Respondent.	:	

Respondent's Answer Brief to Relator's Objections to the Board of Professional Conduct's Certified Report

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Introduction

This disciplinary case involves two violations premised on the following facts: First, that Respondent Brian Maciak performed his duties as General Counsel for TBC when he was not licensed in Florida, and second, that during that same time period, Respondent performed those same duties as General Counsel for TBC while he was administratively suspended from the practice of law in Ohio. The suspension lasted for three years and eleven months and was based on Respondent's failure to comply with all of his Continuing Legal Education (CLE) reporting requirements, not on a failure to attend CLEs. Respondent has consistently taken responsibility for these lapses.

Statement of Facts

Respondent attended Kent State for his undergraduate degree and worked to pay for his education at a variety of jobs, including as a mailroom employee at Thompson, Hine & Flory in Cleveland. (Board Report ¶ 49). Respondent was active in Campus Crusade for Christ during college, graduated *magna cum laude* from Kent State, and attended Syracuse Law School on a full scholarship. (Board Report ¶ 49). Respondent both worked and volunteered during law school, married his wife after his first year, and graduated in the top five percent of his class among other honors. (Board Report ¶ 49).

Currently, Respondent and his wife, who was his high school sweet heart, have two children. They are active participants in their church and attend a couple's Bible study group. (Board Report ¶ 50). Respondent is passionate about helping children and the less-fortunate, including working with Urban Youth Impact, an organization for mentoring disadvantaged and troubled youth. (Board Report ¶ 50).

Respondent was first admitted to the practice of law in Ohio in 2000. (Board Report ¶ 7). Respondent's employment history since his admission is listed in the chart below (*See* Joint Exh. 30):

EMPLOYER	POSITION(S)	DATES	LOCATION
Thompson Hine	Associate	November 2000 – October 2002	Cleveland, Ohio
Frantz Ward	Associate	October 2002 – August 2005	Cleveland, Ohio
National City Corporation	Asst. VP, Attorney	August 2005 – March 2006	Cleveland, Ohio
Michaels Stores, Inc.	Director, Corporate Counsel VP, Assistant General Counsel	March 2006 – August 2008	Irving, Texas
Pinnacle, an American Management Services Company	VP, General Counsel	August 2008 – April 2009	Dallas, Texas
TBC Corporation	VP, General Counsel (TBC Retail Group, Inc.) SVP, General Counsel (TBC Corporation)	April 2009 – present	Juno Beach, Florida Palm Beach Gardens, Florida

Respondent has had a very successful career, first as a lawyer in Ohio and then in various in-house positions for different corporations.[1] Presently, Respondent is a highly respected General Counsel of a $4 Billion corporation. This matter was brought to the attention of the Florida Bar and Disciplinary Counsel by way of a grievance filed by a disgruntled, former employee at TBC

[1] Respondent resigned his in-house position at Pinnacle, with no new job prospect, because of perceived unethical practices. (Board Report ¶ 50, T. 421-422, 566-568).

Corporation (TBC). None of the substantive concerns the grievant raised are part of the complaint. But, the grievance did raise Respondent's license issue.

Respondent was and remains responsible for managing the Human Resources department for the corporate, field, franchise and warehouse subsidiaries of TBC Corporation. His duties include restructuring the department, developing companywide programs to improve associate morale, improving recruiting, establishing compensation and incentive plans, administering an internship program, and creating standard operating procedures. Additionally, he is ultimately responsible for the Contract Administration department.

As part of his responsibilities for oversight of the Contract Administration department, Respondent supervises associates who work with (potential and current) franchisees regarding signing new (and renewing) franchise agreements and renewing them, and managing the company's real estate interests in the franchise network. Respondent spends significant time streamlining the processes and implementing technological changes to better equip the associates to perform their jobs. Respondent was also responsible for the Customer Relations department, for which he devoted substantial time to restructuring the department, establishing performance metrics, and creating an incentive system for those associates.

Perhaps the largest amount of Respondent's time is spent on executive leadership tasks. These companywide initiatives are typically handled at the executive level and include cost-savings and sales-generating ideas, growth expansion plans, and serving as a liaison with the Board of Directors. (Tr. at 216-18, 222).

As General Counsel, Respondent also oversees the legal department. Respondent's primary duties with regard to the legal department include ensuring the legal department's affairs

are handled in the most cost-effective means possible and remain within budget. This requires Respondent to determine the best cost structure under which to engage outside counsel (e.g., flat fee; contingency; blended rate). Because of the other demands on his time, Respondent typically manages outside counsel on only a few litigation matters at a time, leaving other attorneys to oversee the majority of matters. His role also requires him to manage other personnel's time to ensure their plates are full and that they develop as professionals.

Although Respondent ultimately oversees the legal department, the actual lawyers in the legal department perform the majority of in-house legal work for TBC. During his tenure as General Counsel, Respondent has hired attorneys for the company. Among those hires are attorneys Steve Miller and Doug Sergent, who were initially licensed only in Ohio. Mr. Miller has worked as Director, Senior Corporate Counsel at TBC from approximately July 2010 through to the present. Mr. Sergent has worked as Vice President, Assistant General Counsel at TBC from approximately June 2012 through to the present. Respondent, Sergent, and Miller were all under the misapprehension that they were not engaged in the practice of law because they did not appear in any litigation, and did not engage in advocacy in legal proceedings or formally represent clients in legal matters. In November 2015, after receiving relator's second written inquiry, Respondent learned, through new counsel, that he was mistaken about his belief that he was not engaged in the practice of law. Within a matter of days Respondent fulfilled the CLE requirements, paid the outstanding fines, and was reinstated in Ohio on November 25, 2015. Two weeks later, on December 9, 2015, Respondent obtained Authorized House Counsel (AHC) status in Florida on December 9, 2015. Sergent and Miller obtained that status on January 25, 2016. All three are in full compliance with Ohio and Florida attorney registration and CLE requirements.

In February 2015, Respondent was contacted by Jeff Picker of the Florida Bar. (Report at ¶ 12; Joint Exh. 1). Picker works in the UPL section of the Florida Bar and told Respondent that he needed to either become licensed in Florida or obtain AHC status. (Tr. at 69, 70, 600, 179; Joint Exh. 1). Picker understood that Respondent had been serving as General Counsel at TBC for some time but was not concerned with Respondent continuing to perform his duties as General Counsel so long as Respondent addressed the license issue (*See* Tr. at 578, 592, 188-89, 203; Joint Exh. 7). Respondent then reached out to the Office of Attorney Services and learned that he had CLE deficiencies. (Tr. at 75-77, 587-88). Respondent was not advised that he was CLE suspended. (*See* Tr. at 585; Joint Exh. 8). Believing that he had maxed out the web based CLEs he could participate in, Respondent decided to attend a CLE in Ohio to comply with his CLE requirements. (Joint Exh. 13, Joint Exh. 30). Respondent and Picker spoke on the phone in April and June. (Tr. at 589; Joint Exhibit 5). Respondent advised that he was going to complete his Ohio CLE requirements allowing him to obtain his good standing certificate in Ohio, whereupon he would submit his AHC application. (Tr. at 589-90, 592-95, 195; Joint Exh. 5). Picker accepted this proposal. (Joint Exh. 8; Tr. at 196). The CLE Respondent considered was a program sponsored by the Akron Bar Association in September, during which he was planning to handle a family matter. (Tr. 589-90). Ultimately, Respondent was unable to attend that program and subsequently explained the circumstances surrounding his inability to attend that program to Picker. (Tr. 592-93). In October, after some discussion, Picker required Respondent to stop holding himself out as General Counsel until he was able to obtain AHC status. (Joint Exh. 3; Joint Exh. 5). Respondent did so, and as part of his response to Mr. Picker, included the following hand written note:

> "You explained that you are not concerned with my current duties running afoul of any unauthorized practice of law principles; rather, it is the title of "General Counsel" that is

concerning. Please be aware that I have made the request to our IT department to remove the notations on the website."

(Joint Exh. 7). During his testimony at the hearing, Picker acknowledged that he may have said precisely that to Respondent. (Tr. 188). Further, it was clear to Picker that Respondent was surprised when Picker indicated that serving as General Counsel could be considered the practice of law. (Tr. 197). Around the time of his October communications with Picker, Respondent received the initial letter from Disciplinary Counsel dated October 19, 2015. (Joint Exh. 27).

Respondent testified that he first learned he was CLE suspended when he received Relator's initial letter in October 2015. (Tr. at 585). The same day he received Relator's letter, respondent advised Erik Olsen, TBC's CEO, of the contents of the letter and retained counsel to assist with his reinstatement and responding to Relator. (Tr. 219, 317, 420). Respondent retained attorneys Chris Keim and Michael Smith at Frantz Ward to assist him with these responsibilities. Smith had served on the Cleveland Metropolitan Bar Association (CMBA) Grievance Committee for 17 years, including a stint as the chair. (Board Report ¶ 23).

While Respondent produced voluminous records of numerous CLE's he attended – and some where he was a presenter – during the period of his suspension, he had not kept all the records he submitted to receive credit for those CLEs and his lawyers learned (1) it is was not possible to re-open a closed biennium period to seek retroactive credit, and (2) a suspended attorney cannot get credit for a CLE completed before the suspension was imposed. (Board Report ¶ 41, Tr. 783-784). Accordingly, Respondent chose to complete the required CLEs as soon as possible. (Tr. 509). Keim worked closely with the staff at the Supreme Court to ensure that Respondent complied with all the requirements to be reinstated. (Board Report ¶ 57, Tr. 544-546). Having

taken all the requisite CLEs, paid the fines, and submitted the paperwork, Respondent was reinstated on November 25, 2015, just over a month after receiving Relator's letter.

Keim and Smith also worked on a response to Relator. That response included volumes of documentation to establish all the CLEs Respondent had taught and attended, as well as an explanation of Respondent's role as a business advisor as opposed to a lawyer for the Company. Respondent, Keim and Smith all were of the opinion that Respondent's duties as General Counsel did not constitute the practice of law, or that he had not been holding himself out as a lawyer in Florida by using the title "General Counsel." (Board Report ¶ 23, Tr. 82, 116, 501-506). Thus, Keim's response to Relator's initial letter included the following statements: "it is Mr. Maciak's understanding that he is not engaged in the unauthorized practice of law in Florida…" and "Mr. Maciak has provided legal-related services to TBC Corporation, such as drafting/reviewing legal agreements and choosing and directing outside counsel to represent TBC Corporation in various assignments. These activities do not constitute the practice of law and he has not formally entered his appearance in any court or other tribunal as counsel for TBC." (Stip. Exh. 8).

Shortly thereafter Keim received Relator's second letter with more than 90 questions and called and spoke with assistant disciplinary counsel Bondurant, who was upset that Keim had indicated Respondent was not engaged in the practice of law. (Tr. 529-530). Keim and Smith then withdrew as counsel. (Tr. 547-548). After consulting with new counsel, Respondent understood that several of his responsibilities as General Counsel did constitute the practice of law and that by utilizing the title "General Counsel" he was holding himself out as an attorney. Respondent's response to Relator's second series of written inquiries fully acknowledges that some of his duties as General Counsel for TBC involve the practice of law. (Stip. Exh. 13). In his deposition and his

disciplinary hearing testimony, Respondent has consistently testified that he fully understands that he was engaged in the unauthorized practice of law while serving as General Counsel for TBC before obtaining AHC status. (Board Report ¶ 23, Tr. 33-37). And Respondent has stipulated that by engaging in the unauthorized practice of law while serving as General Counsel for TBC before December 9, 2015, he violated Prof. Cond. R. 5.5(a).

At his disciplinary hearing, Respondent repeatedly apologized and expressed remorse for his omission and failures concerning his CLE obligations.

> There is – there is not an excuse. I'm not making an excuse. This process has – it has educated me of something that I should have done myself. I completely appreciate that.
>
> ****
>
> Yeah, I'm remorseful. This – this is embarrassing. I worked way too hard for – for my law degree to – to not, you know, bird-dog my transcripts. I should have done that. And so I apologize.
>
> I apologize to [my paralegal] because she thinks this is her fault. And just to reassure, no, this is – ultimate responsibility is mine.
>
> ****
>
> I apologize for how much time this has taken *** this is my mistake and I need to own up to it.
>
> ****
>
> So, I apologize to [my son], to my wife. This has been a source of stress. And so I feel this is all – this is all on me. So, I apologize. I apologize.

(Tr. 662-663)

Law and Argument

I. The Board's recommended sanction is supported by the law and the facts

a. The Court has repeatedly emphasized the importance of the unique facts and circumstances in each disciplinary case when imposing a sanction

Section 13 of Gov. Bar R. V sets the standards for the imposition of disciplinary sanctions in attorney discipline case.

> Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, the Board shall give consideration to specific professional misconduct and to the existence of aggravating or mitigating factors. In determining the appropriate sanction, the Board shall consider all relevant factors, precedent established by the Supreme Court of Ohio, and the aggravating and mitigating factors set forth in this section.

Gov. Bar R. V §13 (A)

The Court has repeatedly stressed that each disciplinary case is unique and must be viewed accordingly. In addition, the Court has also consistently recognized that the Board and the Court are not limited by the aggravating and mitigating factors listed in Gov. Bar R. V §13; rather, all relevant factors must be taken into account.

One of the statements of this acknowledgement is found in the frequently employed assertion that "[b]ecause each disciplinary case is unique, we are not limited to the factors specified in the rule but may take into account "all relevant factors" in determining what sanction to impose." *Disciplinary Counsel v. Goldblatt*, 118 Ohio St. 3d 310, 2008-Ohio-2458, 888 N.E.2d 1091; *Cincinnati Bar Ass'n v. Mullaney*, 119 Ohio St. 3d 412, 2008-Ohio-4541, 894 N.E.2d 1210; *Butler County Bar Ass'n v. Portman*, 121 Ohio St. 3d 518, 2009-Ohio-1705, 905 N.E.2d 1203; *Disciplinary Counsel v. Forbes*, 122 Ohio St. 3d 171, 2009-Ohio-2623, 909 N.E.2d 629; *Disciplinary Counsel v. Johnston*, 121 Ohio St. 3d 403, 2009-Ohio-1432; *Disciplinary Counsel v.*

Gaul, 127 Ohio St. 3d 16, 2010-Ohio-4831, 936 N.E.2d 28; *Toledo Bar Ass'n v. DeMarco*, 144 Ohio St. 3d 248, 2015-Ohio-4549, 41 N.E.3d 1237.

As Justice Kennedy recently stated in a concurring opinion, "Gov. Bar R. V (13) imposes a duty on the Board of Professional Conduct to examine the unique facts and circumstances of each disciplinary case, the aggravating and mitigating factors applicable to the individual attorney, and his or her life circumstances, in order to determine the appropriate sanction for that particular attorney." *Cleveland Metro. Bar Ass'n v. Paris*, 148 Ohio St.3d 552016-Ohio-5581, 68 N.E.3d 775, ¶ 23.

The reason for this individualized treatment of disciplinary cases is found in the very purpose of the discipline system: "[a]s we have often explained 'the goal of disciplinary proceedings is not to punish the errant lawyer, but to protect the public.' *Toledo Bar Assn. v. Hales*, 120 Ohio St.3d 340, 2008-Ohio-6201, 899 N.E.2d 130, ¶ 21. And '[w]hile consistency is also a goal, 'we examine each case individually and impose the discipline we believe appropriate based on the unique circumstances of each case.'" *Columbus Bar Ass'n v. Reed*, 145 Ohio St. 3d 464, 2016-Ohio-834, 50 N.E.3d 516, ¶15.

Having as its primary purpose the protection of the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship, the disciplinary process carefully examines each lawyer's ongoing fitness to perform these essential fiduciary duties. *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006 Ohio 6510, 858 N.E.2d 368.

b. The Board appropriately evaluated the unique facts and circumstances

The Board found two violations after reviewing the exhibits and hearing two and ½ days of testimony. First, respondent was found to have violated Prof. Cond. R. 5.5(a) [practicing law

in a jurisdiction in violation of the regulation for the practice of law in that jurisdiction] for engaging in the unauthorized practice of law in Florida from April 2009 until December 9, 2015. Second, respondent was found to have violated Prof. Cond. R. 8.4(h) [adversely reflecting on fitness to practice] because he admitted he engaged in the practice of law in Florida after being suspended in Ohio for four years.

The Board declined to find, and specifically rejected a stipulation, that Respondent's practice of law in Florida while suspended in Ohio was a separate violation of Prof. Cond. R. 5.5(a). The Board stated there was no evidence that Respondent's practice of law while suspended in Ohio was a violation of Florida regulations on the practice of law. This absence of a violation of Prof. Cond. R. 5.5(a) for practicing in Florida while suspended is significant.

The Panel exhaustively examined the evidence and repeatedly acknowledged that the crux of the case lay with the Respondent's credibility. Early in its report, the Panel states that the resolution of the contested allegations "turns almost entirely upon Respondent's credibility…" (Board Report ¶15). And in evaluating the alleged misrepresentations, the Panel reiterated that the primary question was "whether to believe Respondent when he says he does not remember. Hence Respondent's character is very much in issue and his personal life bears some examination." (Board Report ¶ 48). This analysis plays heavily in both the determination of the sufficiency of the proof of the alleged violations and the appropriate sanction.

After thorough deliberation, the Panel determined there was sufficient evidence to sustain the two listed violations. The Panel then gave careful consideration to the Respondent's specific misconduct, the aggravating and mitigating factors, as well as all other relevant factors, including respondent's personal life, in formulating its recommended sanction.

Surprisingly, Relator's Objections state that "Relator is not asking the Court to reweigh the evidence or to second-guess the panel's credibility determinations. Relator accepts the panel's factual findings." (Relator's Objections at 10). And yet, Relator proceeds to argue against or ignore numerous factual findings by the Panel. In particular, having purportedly accepted the Panel's factual findings on the existence of aggravating and mitigating factors, Relator proceeds to argue that the Panel did not give certain evidence credence as an aggravating factor.

The Panel and Board found two aggravating factors, but afforded them little weight. (Board Report ¶65).[2] Relator argues that the Board failed to consider as an aggravating factor the evidence that Respondent continued to serve as General Counsel to TBC when he applied for reinstatement and, therefore, he had failed to stop practicing law in Florida. Thus, according to Relator, Respondent misrepresented his compliance with the Court's suspension order when he sought reinstatement. But the Board specifically addressed this allegation. (Board Report ¶57). Respondent testified that he immediately hired counsel once he received Relator's initial letter in October and proceeded to follow their advice on seeking reinstatement. (Tr. at 597). As the Board found, "Respondent completed and filed this application pursuant to the advice of his counsel, who in turn, was acting on the recommendation of the Supreme Court personnel." (Board Report ¶57)

Part and parcel of the Board's findings included the credibility determination as to Respondent's testimony on this issue and those of his counsel. Respondent and his counsel, who included a former chair of the CMBA grievance committee, were of the opinion that Respondent was not engaged in the practice law while serving as General Counsel for TBC. (Board Report ¶

[2] The Board found prior discipline based on Respondent's prior 53-day registration suspension in 2007/2008 due to a technical glitch with his company's credit card and that he failed to address his CLE suspension for a substantial period of time.

23) The Board credited this testimony and found no fault with Respondent's application for reinstatement, finding that since "Respondent sought and acted on the advice of counsel, the panel does not find that Respondent committed additional acts of dishonesty, fraud, deceit, or misrepresentation, by virtue of his counsel's advice or actions on his behalf." (Board Report ¶57)

Relator fails to address the mitigation and even suggests there was a lack of mitigation. (Relator's Objection at 4). Yet, the Panel found and considered the following noteworthy mitigation.

1. No harm to any client;
2. The absence of a dishonest or selfish motive;
3. Favorable character and reputation testimony; and,
4. The imposition of other penalties or sanctions in the form of monetary fines imposed as a result of CLE noncompliance.

Board Report ¶ 66

Relator may have chosen to ignore this mitigation evidence, but the Panel and Board did not. There was no evidence that a single client was harmed by Respondent's misconduct. And the one jurisdiction, Florida, where Respondent engaged in the unauthorized practice of law, chose not to pursue any action against him. Picker, Assistant Bar Counsel in Florida, made it clear that his focus was for Respondent to submit his AHC application and become authorized to continue his service as General Counsel for TBC. (Tr. 196). And once Respondent obtained his AHC status the Florida Bar closed its file. (Tr. 202-203).

Additionally, after a careful evaluation of all the evidence and an examination of Respondent's personal life, the Board found an absence of a dishonest or selfish motive on

Respondent's part. This included a determination of the credibility of Respondent's testimony about his actions and state of mind.

The Board also credited the strong character evidence. (Board Report ¶ 51). All told, five witnesses provided character evidence and there are an additional nine character letters. (Resp. Exhibit 38 & March 8, 2017 letter). The witnesses span the length of Respondent's career: Erik Olsen, TBC's present CEO; Shawn Hearn, the former SVP, HR from Respondent's tenure at Michaels Stores; Thomas Babel, a friend and colleague who has known Respondent since their time together at Frantz, Ward; Douglas Sergent, a TBC colleague who has known Respondent for 20 years; and Chris Keim, a colleague who practiced with Respondent at Frantz Ward.

The Board Report details the character testimony from Shawn Hearn, who testified that Respondent shares his Christian beliefs and carries himself at all time in a manner consistent with those beliefs. (Board Report ¶51). Douglas Sergent's character testimony included the following: "I'm 50 years old, Respondent is 40 years old. I have modeled my professional life and my personal life after how Respondent conducts himself. Knowing him for 20 years and working with him – with him closely in these last five years is what sort of brought me to that conclusion." (Tr. 423).

The character letters come from business colleagues at TBC, Respondent's former boss and CEO of TBC Retail Group, Respondent's minister at the First Presbyterian Church, and other former colleagues from Respondent's time at Frantz Ward. The Board appropriately considered the strength of Respondent's character evidence as extraordinarily strong mitigation evidence.

In addition to hearing from multiple character witnesses and reviewing the character letters, the Panel had the opportunity to judge Respondent's demeanor and comportment over the three

days of the hearing. In short, the Panel had a first-hand opportunity to evaluate the testimony about Respondent's integrity, good character and reputation for honesty. (Board Report ¶¶ 48-52). All of this mitigation evidence, including the Panel's evaluation of Respondent's personal life, weighed heavily in the Board's sanction recommendation.

c. The absence of precedent emphasizes the unique facts relied upon by the Board

There is no precedent addressing all the relevant facts in Respondent's situation:

1. Respondent engaged in the unauthorized practice of law in Florida because he failed to obtain AHC status while he served as General Counsel at TBC;

2. Florida Bar authorities were aware of Respondent's lack of AHC status for ten months and chose not to pursue any action against him, ultimately closing their file once he did obtain AHC status;

3. No client was harmed;

4. Respondent did not have a dishonest or selfish motive;

5. Respondent was CLE suspended for four years;

6. Respondent took the required number of CLE courses but failed to adequately report and monitor his CLE compliance;

7. Respondent complied with his attorney registration requirements each biennium and received notice that he was in "active" status; and,

8. Respondent violated Prof. Cond. R. 5.5(a) for engaging in the unauthorized practice of law in Florida for 4 years and Prof. Cond. R. 8.4(h) for engaging in the practice of law while suspended during those same 4 years but not Prof. Cond. R. 5.5(a) for practicing while suspended in violation of the regulation of the practice of law in Florida.

As mentioned by the Board and in Relator's objections, three cases have some similarity to this case. In *Disciplinary Counsel v. Simmons*, 120 Ohio St.3d 304, 2008-Ohio-6142, 898 N.E.2d 943, the lawyer was suspended for failing to comply with his registration requirements,

actively represented two separate clients in different Michigan courts while suspended in Ohio and not licensed in Michigan, made misrepresentations to Michigan courts, and was found in contempt by the Michigan courts. The only noted mitigation was that Simmons paid the fines for his contempt. A 12 month suspension with 6 months stayed was imposed for this misconduct.

Respondent's conduct did not involve knowingly representing clients before courts in another jurisdiction while suspended nor did he make false statements to judges in another jurisdiction to facilitate his misconduct. And Respondent has significant mitigation while Simmons had virtually none.

In another case of an Ohio lawyer engaging in the unauthorized practice of law in a different jurisdiction, the lawyer engaged in six incidents of UPL in Florida state courts, was sanctioned by the Florida Supreme Court for engaging in those six incidents of UPL, and paid a $6,000 penalty as a result. *Ohio State Bar Ass'n v. Good*, 114 Ohio St.3d 204, 2007-Ohio-3602, 871 N.E.2d 542. Good was suspended in Ohio for six months.

Respondent did not appear on behalf of clients in Florida courts and even though Florida Bar authorities were well aware of his conduct, he was never the subject of a UPL prosecution. Moreover, there is substantial mitigation here while none was mentioned in the *Good* case.

The one case where an Ohio lawyer was disciplined for continuing to serve in an in-house counsel capacity while suspended is *Disciplinary Counsel v. Troller*, 138 Ohio St.3d 307, 2014-Ohio-60, 6 N.E.3d 1138. The similarities and differences between this matter and the *Troller* case are worthy of examination.

1. Troller failed to register for the 2003 attorney registration biennium, he was registration suspended on December 5, 2005 and he served as the Chief Legal Officer of Clopay

from April 2002 until April 2012, shortly after receiving the initial letter from Disciplinary Counsel. Troller did not become reinstated until January 12, 2016.

Here, Respondent continuously complied with his attorney registration requirements during the time of his CLE suspension.[3]

2. Troller failed to pay a sanction for non-compliance with his CLE obligations for the 2001-2002 reporting period and was suspended for failure to comply with his CLE obligations for the 2003-2004 biennium. Troller's CLE suspension was not lifted until January 12, 2016. The record is silent about whether Troller completed any CLE between his suspension and his disciplinary hearing.

   Respondent was fined for CLE noncompliance on December 29, 2009 and was CLE suspended from December 29, 2011 until November 25, 2015. Respondent continued to attend and present at CLE programs throughout the entire time period of his suspension. Immediately upon receiving Relator's initial letter in late October 2015, Respondent advised his CEO of the circumstance and hired counsel to represent him during the reinstatement process and to respond to Relator's inquiries. Approximately one month after receiving Relator's letter, Respondent completed all his CLE requirements, paid the outstanding fines and was reinstated. On December 8, 2015, two weeks after being reinstated in Ohio, Respondent's application for AHC status in Florida was approved.

3. Troller, knowing he was CLE and then registration suspended, continued to serve as Chief Legal Officer for 9 years.

[3] Respondent was registration suspended for 53 days in 2007 – 2008 and the Board considered this to be an aggravating factor.

Respondent unwittingly served as General Counsel for 4 years while he was CLE suspended. Respondent acknowledges this was his fault and accepts responsibility for this misconduct.[4]

4. At his disciplinary hearing, Troller was hesitant to admit that as an in-house counsel he was engaged in the practice of law.

   In his second written response to Relator, in his testimony at his deposition and again at his disciplinary hearing, Respondent acknowledged he now understands that his role as General Counsel constituted the practice of law.

5. While suspended, Troller continued to practice in Ohio.

   While suspended, Respondent served as General Counsel in Florida and, after reviewing the matter over a 10 month period, the Florida Bar closed its file without taking any against Respondent once he obtained his AHC status.

6. Troller ceased using the title "Chief Legal Officer" and testified he avoided giving legal advice after he received Relator's first letter but was not reinstated until 2016.

   Respondent ceased using his title shortly after receiving Relator's letter and was reinstated just over a month later.

7. Troller presented mitigation evidence.

   Respondent's evidence included those factors and much more.

[4] Respondent does not dispute that the contents of the February 2012 email but simply doesn't remember the conversation of whether he was told of a suspension.

While *Troller* is similar in some respects there are crucial differences. Troller was both CLE and attorney registration suspended, was engaged in the unauthorized practice of law in Ohio, and did not make any efforts to become reinstated until 2016. In stark contrast, Respondent continued to participate in CLE programs throughout the time period of his suspension, complied with his attorney registration requirements, immediately addressed his suspension once he received Relator's letter, and obtained AHC status in Florida two weeks after his reinstatement in Ohio. The Board found no harm to any clients, and that Respondent did not have a dishonest or selfish motive. Finally, Respondent has exceedingly strong character evidence.

All of this establishes that Respondent's facts and circumstances are truly unique and therefore the precedent is of limited value. Respondent did not flout his suspension by actively practicing in Ohio, he operated under a misapprehension that he was not engaging in the practice of law, a misapprehension he has done everything possible to acknowledge and rectify. No misrepresentations were made to clients, to courts or to disciplinary authorities. No clients were harmed. Respondent took CLE courses, but failed to follow through on his obligation to ensure they were properly reported to the Supreme Court's Office of Continuing Legal Education and reflected on his transcript. That failure is of an administrative duty, albeit an important one. Respondent has acknowledged and expressed remorse for his misconduct.

Respondent expeditiously addressed his suspension and obtained AHC status at the first opportunity after becoming reinstated in Ohio. And Respondent has ensured his failures to comply with his CLE reporting obligations will not happen again. First, Respondent now personally completes and submits all the required paperwork as opposed to delegating this function to his

paralegal; and second, he logs onto his attorney portal almost daily to confirm his good standing in Ohio. (Board Report ¶ 42, Tr. 125, 703).

Based on all of these circumstances and the unique nature of the facts, the Board was correct in its recommended sanction.

II. The Panel's unanimous dismissals are final and non-reviewable

Relator challenges the Panel's unanimous dismissal of the following charges:

> "the panel does not find by clear and convincing evidence that [Respondent] knowingly made misrepresentations to Relator in connection with Relator's investigation, and cannot conclude that his conduct was sufficiently egregious to meet the standard enunciated in *Disciplinary Counsel v. Bricker*." Accordingly, the panel finds no violation of . . . 8.4(c) and . . . 8.4(h), . . . and unanimously dismisses those charges."

Relator claims that "nothing in these prior decisions or in Gov. Bar Rule V limits the Court's ability to review the ***legal conclusions*** of the Panel or the Board." Relator then asks this Court to "reject the Panel's ***legal conclusions*** regarding RPC 8.4(c) and (h)." (Relator's Objection at 10.) There are at least two problems with Relator's arguments, which are equally fatal to Relator.

a. The Panel's unanimous decision precludes further review of the dismissal

The first flaw is a procedural one. The Panel unanimously dismissed the charges in Count Three of the Complaint (at ¶50(c) and (d)) that Respondent violated Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(h). *See* Board Report at ¶¶ 55 and 63. Because these charges were unanimously dismissed under Gov. Bar. R. V (12) (G), the Board, appropriately so, did not review them under Gov. Bar. R. V (12) (H) and (J). Neither can this Court. *Disciplinary Counsel v. Hale*, 141 Ohio St.3d 518, 2014-Ohio-5053 at ¶22 ("A unanimous dismissal by the panel precludes further review of the dismissal by either the board or this court."); *Cuyahoga County Bar Assn. v. Marosan*, 109

Ohio St.3d 439, 2006-Ohio-2816 at ¶13 ("We do not review such dismissals."). The Rules, and this Court's holdings, cannot be clearer. To permit otherwise will result in this Court being asked to routinely review a panel's unanimous dismissal, which would render Gov. Bar Rule V(12)(G) meaningless. *Relator has not directed this Court to a single case where the Court reviewed a Panel's unanimous dismissal*.

b. The Panel's decisions were factual findings of insufficient evidence

The second flaw in Relator's argument is a substantive one. Relator's argument hinges upon its misguided belief that the Panel's dismissals of the Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(h) charges are "legal conclusions." They are not. They are dismissals of charged rule violations based upon factual findings. The factual predicate for an RPC 8.4(c) violation is whether Respondent "knowingly made misrepresentations to Relator in connection with Relator's investigation." The factual predicate for an RPC 8.4(h) violation is whether Respondent's conduct was "sufficiently egregious." The Panel found that Respondent "did not lie." (Report at ¶55). This is a factual finding, and Relator has conceded that it "accepts the panel's factual findings." (Relator's Objections at 10).

Whether an attorney "knowingly" makes misrepresentations or engages in "sufficiently egregious" conduct require factual findings which test the sufficiency of the evidence. The Panel is in the best position to make factual findings which often involve the assessment of credibility. In *Dayton Bar Association v. Scaccia*, 141 Ohio St.3d 35, 2016-Ohio-3299, 21 N.E.3d 290, this Court held that "we also defer to the Board's conclusion that Scaccia's failure to comply with Cooper's discovery was deliberate. *The Hearing Panel was in the best position to* ***assess the credibility*** *of the witnesses and* ***determine whether Scaccia's conduct was intentional***. 'We typically defer to ***factual findings*** of the Panel and Board unless the record weighs heavily against

those determinations.'" *Id.* at ¶16 (quoting *Cleveland Metro. Bar Assn. v. Gruttadaurio*, 136 Ohio St.3d 283, 2013-Ohio-3662 (emphasis added).

Relator is not objecting to these factual determinations nor is Relator arguing that the record weighs heavily against those determinations. But Relator's claim, namely that the Panel's determinations are legal decisions rather than factual determinations that the evidence was insufficient, is contrary to the plain language used by the Panel regarding all the dismissed violations. As to each dismissed violation, the Panel made the following finding: "That Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. [8.4(c) as alleged in ¶50 (c)] of the complaint and accordingly, that claim is hereby unanimously dismissed." (Board Report ¶ 63). This could not be a clearer statement of two findings: first, that the evidence adduced by Relator was insufficient to sustain the allegation, and second, that the alleged violation was unanimously dismissed. There is no ambiguity; the Panel unanimously dismissed the violations because the evidence was insufficient. Calling the Panel's factual determination that the evidence was insufficient a legal conclusion does not make it so.

III. Respondent did not make misrepresentations in violation of Prof. Cond. R. 8.4(c) & (h)

Despite accepting the Board's finding of fact that Respondent did not make misrepresentations, Relator challenges the Board's findings and conclusions by arguing that ignorance of the law is not an excuse for an attorney's dishonesty or misrepresentation. (Relator's Objections pg. 10 & 11). But at no time has Respondent asserted that his lack of memory was based on ignorance of the law.

As the Board found, Respondent completed a sufficient number of CLEs to be in compliance but, due to negligence and an understandable confusion about the process for reporting

and receiving credits, he failed to adequately report his attendance. (Board Report ¶¶ 35-40, 43). This, along with Respondent's compliance with his attorney registration requirements and receiving notices of his "active" status during the four years of his CLE suspension, contributed to his ongoing lack of awareness that he was suspended. (Board Report ¶ 38).

Relator alleged Respondent made false statements about what he knew about his CLE suspension and when he knew it. Specifically, Relator alleged Respondent's statements in his deposition and in his counsel's written responses to inquiries about these subjects were false. (Board Report ¶¶ 44-45).

But, as the Board correctly noted, Respondent's testimony was that he simply didn't remember seeing his suspension order previously, receiving the court's notices, or accessing his attorney registration portal. (Board Report ¶ 45). And all of Respondent's answers in his deposition were consistent with his counsel's written responses to Relator's numerous questions. (Board Report ¶45). As a result, the question the Board had to decide was whether to believe Respondent when he testified he just didn't remember.[5] This necessitated an examination of Respondent's character and personal history. (Board Report ¶ 48).

As a result of their examination of both Respondent's character and his personal history, the Panel made the factual determination that Respondent was "cavalier, inattentive, negligent, and foolish, ***but he did not lie***." (Board Report ¶ 55) (emphasis added). Based on their analysis, the Panel found there was not "clear and convincing evidence that he knowingly made misrepresentations to Relator in connection with Relator's investigation, and [could not] conclude

[5] Respondent has never asserted that his lack of memory was in any way connected to ignorance of the law.

that his conduct was sufficiently egregious to meet the standard enunciated in *Disciplinary Counsel v. Bricker*." (Board Report ¶ 55) (Citation omitted). This was not a legal determination as Relator suggests, nor was Respondent claiming his omissions should be excused because of his ignorance of the law. Respondent has never denied that he and he alone has been responsible for compliance with his CLE obligations, and it was his failure to comply with these obligations which lead to his present predicament.

Respondent did testify that he was unaware that some of his duties as General Counsel constituted the practice of law, but that misapprehension has nothing to do with the alleged false statements. Starting with his second written response to Relator, during his deposition, and during his disciplinary hearing, Respondent has fully acknowledged he was wrong in that belief and has stipulated to violating Prof. Cond. R. 5.5 (a) as a result. The alleged false statements are focused on Respondent's statements concerning what he knew about his CLE suspension and when he knew it, not his mistaken belief that his service as General Counsel did not constitute the practice of law. Accordingly, Relator's argument and citation to the analysis in *Disciplinary Counsel v. Harmon*, 143 Ohio St.3d 1, 2014-Ohio-4598, 34 N.E.3d 55, concerning the claimed defense of ignorance of the law, is not relevant. Nor is the misconduct in *Harmon* similar.

While the lawyer in *Disciplinary Counsel v. Stemper*, 103 Ohio St.3d 104, 2004-Ohio-4656, 814 N.E.2d 811 did practice while CLE and attorney registration suspended, she did not assert the defense of ignorance of the law. Nonetheless, the misconduct in *Stemper* is markedly different: the lawyer engaged in a "17-year campaign of misconduct," including forging client signatures to legal documents, practicing in Ohio without a license for years, defaulting in her

discipline case and attempting to pay for CLE fines and then claiming no knowledge of the suspension. *Stemper*, ¶ 21. There is simply no valid comparison.

Contrary to Relator's contention, the facts in *Cleveland Metro. Bar Ass'n v. Gruttadaurio*, 136 Ohio St.3d 283, 2013-Ohio-3662, 995 N.E.2d 190 are not strikingly similar.[6] Gruttadaurio was caught providing entirely different versions of events to the Bar investigator: He started with a letter detailing his correspondence and telephone communications with the Supreme Court clerk's office; then, in his first meeting with the investigator he repeated that he had called the Court on a couple of occasions and recounted what he was purportedly told by a court employee; and finally, at the second meeting with the investigator, he backpedaled and indicated he may not have called the court at all.

At his discipline hearing, Gruttadaurio testified that he only said he had called the court in the first meeting because he felt put on the spot by the investigator, and after the meeting realized his error which he then corrected in the second meeting. As the Court correctly noted, that explanation simply did not hold up. Gruttadaurio had submitted a detailed written response outlining his conversation with the Court personnel long *before* his first meeting with the investigator. In short, Gruttaduario's explanation for providing two diametrically opposed versions of his actions did not withstand scrutiny and the Court found he knowingly made misrepresentations during the disciplinary investigation.

There is no evidence that Respondent has ever changed his testimony during the course of this disciplinary matter. As the Board report notes, Respondent's written responses, his deposition,

[6] Gruttaduario's misconduct did not include practicing while suspended or engaging in the unauthorized practice of law.

and his hearing testimony are all consistent. (Board Report ¶ 45). The question posed by the Board was whether Respondent's testimony was to be believed in view of the other evidence. And, as accepted by Relator, the Board answered that question in the affirmative.

Conclusion

Respondent unwittingly engaged in the unauthorized practice of law while he served as General Counsel for TBC and was negligent in ensuring he complied with his administrative CLE reporting obligations. As a result, Respondent has stipulated to violating Prof. Cond. R. 5.5 (a). The Board has found that his neglect was of such duration that he also violated Prof. Cond. R. 8.4(h).

Respondent deeply regrets and has apologized for his errors in judgment, his failures to act in a more timely fashion, his misunderstanding about his role as General Counsel, and the status of his license. Respondent has now rectified all his licensure issues and there is virtually no possibility of any repetition of his misconduct. Respondent is mortified that he put his law license at risk and that he damaged the reputation of the profession.

The Panel carefully examined all the evidence and made specific findings that the evidence was insufficient to support all but two of the charged violations. The Panel's unanimous dismissal of those violations is final under Gov. Bar. R. V § 12 (G). The Panel and the Board considered all the evidence, including the mitigation evidence and unique nature of the facts and circumstances, and recommended an appropriate and commensurate sanction. The Court should adopt those findings and the recommended sanction.

Respectfully submitted

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Certificate for Service

I hereby certify that the foregoing Respondent's Answer Brief was filed and served via e-mail to Scott J. Drexel, Esq. (scott.drexel@sc.ohio.gov) and Jennifer A. Bondurant (jbondurant@sc.ohio.gov), this 3rd day of July, 2017.

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