ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	)	
	)	
Relator,	)	**Case No. 2011-0408**
	)	
vs.	)	
	)	
JOSEPH GREGORY STAFFORD,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S ANSWER TO RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES OF THE SUPREME COURT OF OHIO

Lawrence A. Sutter (0042664)
Stephanie D. Adams (0081822)
Sutter, O'Connell & Farchione
3600 Erieview Tower
1301 East Ninth Street
Cleveland, Ohio 44114
Telephone: (216) 928-2200
Facsimile: (216) 928-4400
E-mail: lsutter@sutter-law.com
E-mail: sadams@sutter-law.com

Counsel for Respondent

Jonathan E. Coughlan (0026424)
Lori J. Brown (0040142)
Karen H. Osmond (0082202)
Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
Telephone: (216) 687-1311
Facsimile: (216) 687-1841
E-mail: Jonathan.Coughlan@sc.ohio.gov
E-mail: Lori.Brown@sc.ohio.gov

Counsel for Relator

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I. INTRODUCTION AND STATEMENT OF THE FACTS

The Respondent, Joseph G. Stafford, by and through counsel, respectfully submits his Answer to Relator's Objections. Respondent graduated from the University of Dayton, Summa Cum Laude, in 1982, and then graduated from Cleveland-Marshall College of Law in 1984. (Tr. 1086-1087) Respondent has practiced law in excess of twenty-five years in the field of Family Law. (Tr. 1087) Respondent is a Certified Specialist as recognized by the Ohio State Bar Association since the program's inception in 1999. (Tr. 1088) Respondent has lectured at various CLE programs on topics of Family Law and Trial Practice. (Tr. 1088)

It is against this backdrop of a well-respected, seasoned domestic relations attorney that Relator has brought the allegations of misconduct. Count One of the Amended Complaint arose from the *Tallisman v. Tallisman* case, a domestic relations case in Cuyahoga County, Ohio. As stated by Panel Member Judge John B. Street, five days of the hearing before the Hearing Panel was spent pertaining to one sentence in an Amended Complaint. (Tr. 1363) Count Three, the other remaining claim, pertains to the misidentification by a client and an associate attorney pertaining to events at a Pretrial in the Rymers' domestic relations case. The *Tallisman* issues, as raised by Relator in Count One, occurred in 2007 while the *Rymers* divorce case as set forth in Count Three occurred in 2009. The Board's Recommendations were accurate that the Complaint in this case involves allegations of isolated conduct. The notion, as advanced by Relator, that Respondent engaged in dishonest activity is lacking from the record before this Court.

Both the Board's Recommendations and the recent filing by Relator lack specificity of the record to support any conclusion of wrongdoing. A review of the Recommendations as well as Relator's Objections reveals that there is a lack of citation to the record, the evidence, or the

ten volumes of exhibits containing three hundred six exhibits submitted by the Respondent. Relator did not prove at trial, nor does it prove in its Objections, by clear and convincing evidence, any alleged misconduct on the part of Respondent.

II. COUNT ONE: RESPONDENT DID NOT ENGAGE IN ANY MISCONDUCT AND COUNT ONE SHOULD BE DISMISSED

The Board's Recommendations, in Count One paragraphs 8 through 51, mirror Relator's Trial Brief to such a degree that it appears that the Board ignored the actual testimony and instead relied upon an unverified pleading. A chart which compares the Trial Brief and the Recommendations of the Board regarding Count One is set forth in Appendix A, attached hereto. The Objections by Relator also offer few citations to the record of the actual testimony presented at the trial. Strangely, Relator's Objections merely recite statements in the Recommendations which are not found in the record.

Additionally, Relator's Objections mischaracterize the actual statements of the Recommendations. For example, in paragraph 37 of the Recommendations, the Board identifies the allegations as made by Relator. This is merely a statement of the charges. Yet, in Relator's Objections, Relator refers to the restatements as "findings" as if all were found to be true. The Board did not find that the new party defendants added in the Second Amended Complaint were known to Respondent a substantial period of time prior to its filing. It only found that those were the Relator's claims, not a finding of fact.

In May 2007, the following entities were added as New Party Defendants in the *Tallisman* matter: CitiSmith Barney; New York Life Insurance; Lincoln Financial Advisors Corporation; Westcoast Life Insurance; Metlife; AIG Sun; America, Inc; ING North American Insurance Company; and Snow Capital Management. Relator failed to present evidence of

when documentation was turned over to Respondent by Mr. Tallisman and his counsel pertaining to these entities.

Relator's Trial Brief at page 14 only mentions four entities that were added in May 2007. Relator failed to enter into evidence facts as to when the other four entities became known to Respondent. That omission is fatal to Relator's claim. Respondent carefully explained the reasons for the Second Amended Complaint and the documentation that Respondent received in May of 2007, after it was requested of Mr. Tallisman during his deposition on April 21, 2007. (Ex. 4-P)

As explained by the Respondent, the documentation received on May 9, 2007 from Mr. Tallisman and his counsel included thirteen different areas of assets that had been requested during the April 21, 2007 deposition of Alan Tallisman. (Tr. 161-165, 1233-1237)(Ex. 4-R) The documentation disclosed for the first time the life insurance policies owned by Alan Tallisman through various corporate entities and his Trusts, all of which had not been previously disclosed. Additionally, Alan Tallisman, for the first time, presented his Trust Agreement despite the fact that it was requested two years prior. On May 3, 2007, Respondent finally received a response from CitiGroup-Smith Barney to the subpoena that he had issued on January 31, 2007. (Ex. 4-S) Moreover, Respondent's Exhibit 8-E, which is a listing of documentation Mr. Tallisman and his attorneys were required to file with the Court, admits that Mr. Tallisman did not produce all of the insurance policies that Mr. Tallisman owned or was the beneficiary of, until May 11, 2007. The Motion for Leave to File the Second Amended Complaint was filed on May 24, 2007.

Respondent indicated to the Panel that there is a substantial difference between having a document list or a list of entities rather than having the actual records of the accounts. (Tr.

1170-1171) Respondent explained in detail that Mr. Tallisman and his attorneys were not forthcoming with the proper information. (Tr. 1170-1172) Once the information came to light, the case dramatically shifted in favor of Respondent's client.

While Relator attempted to fill this void with the testimony of James Lane, that strategy backfired. James Lane confirmed that Mr. Tallisman's assets were not properly disclosed. Mr. Lane conceded that Alan Tallisman was not forthcoming in asset disclosure and that additional discovery of new assets was provided in 2007, just as Respondent testified. (Tr. 590)

James Lane admitted that Alan Tallisman forgot to list funds from the sale of his home. (Tr. 574) Mr. Lane admitted that Mr. Tallisman forgot that he owned Milbrook and Associates and there was no value for this business on his pretrial statement. (Tr. 574, 579) Mr. Lane agreed that Mr. Tallisman did not list all of his bank accounts. (Tr. 575) Mr. Lane admitted the income reported on Mr. Tallisman's pretrial statement was not accurate. (Tr. 576) Mr. Lane conceded that Mr. Tallisman did not originally disclose any creditors. (Tr. 577) Mr. Lane agreed that Mr. Tallisman did not disclose trust accounts in 2005. (Tr. 578) He admitted the insurance policies and life insurance were not listed on the pre-trial statement. (Tr. 578) Mr. Tallisman did not list trust assets. (Tr. 579) Mr. Lane did not dispute that the values of the insurance policies were not provided prior to 2007. (Tr. 580-581) After Mr. Lane imploded on cross-examination, Relator did not attempt to enter any further testimony purporting to support this claim.

On January 28, 2010, Respondent filed various discovery requests that Respondent had made to Relator regarding the issues raised in Relator's Complaint.[1] In an attempt to force the

[1] Relator repeatedly stated the following objections to Respondent's valid and proper discovery requests:

> Relator objects to the following Requests for Admissions on the grounds that it is vague and overbroad. Relator further objects on the grounds that the information sought does not appear to be reasonably calculated to lead to the discovery of admissible

Relator to disclose the basis for the claim that the Fifth Third accounts had been fully disclosed, Respondent simply requested that the following be admitted or denied:

In Request for Admission No. 92 the following request was made:

> Please admit that Alan Tallisman did not provide his Fifth Third Bank statements until December of 2007, over 2 ½ years after they were requested.

The Response was as follows:

> Answer: Objection. Relator objects to the foregoing Request for Admission on the grounds that it is vague and overbroad. Relator further objects to the foregoing request in that it applies that Alan Tallisman's conduct or that his counsel is the subject of this formal complaint. Relator objects on the grounds that the information sought does not appear to be reasonably calculated to lead to discovery in admissible evidence regarding whether Respondent violated the Ohio Rules of Professional Conduct.

This evasive discovery request can only be interpreted as a tacit admission of the lack of evidence supporting this claim. The Fifth Third account information was not timely provided by Mr. Tallisman and his attorneys. In his Answers to Interrogatories, Mr. Tallisman only admitted that he had a Fifth Third Bank account that was separate property. Mr. Tallisman had never identified the Fifth Third account as marital property. Moreover, Mr. Tallisman did not provide documentation of the balance of the account until April 2007, (Ex. 222 and 4(A)) and he did not provide the account statements until December 2007.[2]

First, all references to the Fifth Third account should have been excluded from the hearing. The Probable Cause Panel had previously found that Relator had failed to establish that probable cause existed and ordered Relator to strike those allegations from the Draft Complaint. While Relator deleted the paragraphs with the allegations of misconduct relating to the Fifth

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> evidence regarding whether Respondent violated the Ohio Rules of Professional Conduct.

[2] (Ex. 8-G, p. 3)(Tr. 1291-1292)[2] See Request for Admissions 72, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92.

Third account, the underlying factual allegations for the same conduct was left in the Complaint. Inexplicably, the Panel Chair denied Respondent's motion to strike those statements. Moreover, the Board used those same excluded facts as the only evidence supporting the claim that the Respondent had knowledge of the accounts prior to the filing of the motions for leave to amend.

The Board did not seem to understand the difference between a separate property and marital property as determined by Ohio Revised Code §3105.171. The discovery responses relied upon by the Relator as evidence of disclosure do not list the Fifth Third account as a marital asset or marital property. Mr. Tallisman had attempted to hide the account by claiming it was his separate property. It was not until the time period just prior to the filing of the motions for leave in 2007 that the truth had been revealed.

Just as surprising was the Board's inability to grasp the difference between Mr. Tallisman merely listing the name of an account holder and producing information as to the account balances. The record in this matter clearly demonstrates that in the discovery responses relied upon by the Relator, no balance or documentation was provided for the Fifth Third account. Yet in the days immediately prior to the filing of the first Motion to Amend, the Respondent learned that the balance on the Fifth Third account was one million, four thousand, nine hundred thirty-two dollars and thirteen cents ($1,004,932.13). On April 13 and 14, 2007, Mr. Tallisman and his counsel for the first time disclosed this information through a document falsely entitled "Updated Pretrial Statement". The Motion for Leave to File Amended Complaint was filed April 17, 2007. Obviously, this late disclosure of a seven figure marital asset or marital property justifies the Respondent's actions in amending the Complaint to bring in Fifth Third as a party and force the complete disclosure of assets.

Relator attempts to get around these uncontroverted facts by claiming that the Board found that the Fifth Third account was "disclosed" in 2005. While that statement is technically correct, it ignores the fact that is was not disclosed as a marital asset and that no account balance was provided. It was "disclosed" dishonestly as a personal asset. Despite a specific request for the balance of the account, none was provided. There was nothing in the response to discovery that even hinted that over one million dollars was being hidden from Mrs. Tallisman. Those facts came out just days prior to the filing of the Motion for Leave to Amend. After the Motion for Leave was filed, Alan Tallisman removed nearly $1 million from the Fifth Third account, despite court orders restraining such conduct. (Tr. 130-134; 1138-1139)

The Relator then attempts to circumvent the lack of evidence in the record by citing to the Findings of Fact and not the transcript. The problem with this approach is that the paragraph relied upon by the Relator (paragraph 42 of the Recommendations) does not contain a record cite either. In fact, that paragraph is an exact quote taken from the Relator's Trial Brief at page 16. (See also Appendix A)

The Hearing Panel did not acknowledge the failure of James Cahn to properly serve his Answer and Counterclaim upon other parties as required by Ohio Civ. R. 5. Specifically, Ohio Civ. R. 5(A) provides that Mr. Cahn had an obligation to serve all other parties with his Answer and Counterclaim. (Ex. 6-K) Mr. Cahn did not even attempt to serve the other parties as mandated by the Ohio Rules of Civil Procedure. (Tr. 1258-1259) The failure of Mr. Cahn to serve the Answer and Counterclaim on all parties in *Tallisman* negates a proper Answer and Counterclaim being filed by Mr. Cahn. Mr. Cahn actually testified that there was no evidence that Respondent ever received the pleading. (Tr. 453)

There is apparently further confusion on the part of the Board as to *ex parte* proceedings. The Board recommended a violation under Prof. Cond. R. 3.3(d). (In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision...) Respondent did not file motions in *ex parte* proceedings, nor did he seek *ex parte* relief in his Motions for Leave. The Motions for Leave to file the Amended and Second Amended Complaints, as well as the Motion for Leave of Court to respond to the Answer and Counterclaim *Instanter* were not filed on an *ex parte* basis. The only *ex parte* relief that Respondent sought was regarding the temporary restraining orders as permitted and prescribed by Local Rule 24 of the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio.

A plain review of the motions filed by Respondent (Ex. 4-C, 5-B, and 6(L)), reveals that he did not request *ex parte* relief. The *Tallisman* trial judge made the decision to grant the motions filed by Respondent on the same day they were filed. Respondent did not have control over when the trial court ruled on the motions. There was no evidence presented to the Hearing Panel that indicated that Respondent filed any motion requesting *ex parte* relief. The motions filed in the *Tallisman* proceedings did not involve "*ex parte* proceedings".

Relator called as its witness on direct examination Judge James P. Celebrezze, who was the presiding judge in the *Tallisman* matter. (Tr. 274-281) On direct examination, the only questions pertaining to the Complaint asked by Relator related to a Judgment Entry which was never journalized or filed with the Clerk of Courts. The relevant topics of this litigation were completely ignored.

Never once did counsel for Relator ask Judge Celebrezze why he signed the judgment entries granting Respondent's Leave to Amend. Relator did not ask Judge Celebrezze why the

judge signed the first Judgment Entry granting Motion for Leave on April 17, 2007. Relator did not ask Judge Celebrezze why the judge signed the Judgment Entry granting the May 24, 2007, Motion for Leave to Amend the Complaint. Relator failed to ask the Judge Celebrezze why Judge Celebrezze signed the Judgment Entry granting the Motion for Leave to File the Reply to the Answer and Counterclaim Instanter on April 18, 2007. Again, this omission in the record speaks volumes as to the insufficiency of evidence supporting those claims and the Board's mistaken findings which are equally unsupported.

The testimony of Judge Celebrezze was improperly quoted by Relator on page 13 of its Objections filed with this Court. On page 13, Relator makes the following statement:

> According to Judge Celebrezze, disposing of the multitude of motions, the January 13, 2008 Entry was filled with 'corrective measures' that essentially put the parties in nearly the same position as they were before Respondent's misconduct began in 2007. (Tr. 277)

Judge Celebrezze's actual testimony at pg. 277, line 3 through 14, is as follows:

> A. Well basically, it's – a judgment that does a lot of things, I suppose you call them, corrective measures of pleadings that were part of the divorce complaint.
>
> There were some Motions to Strike, Motions to Amend, various things that took place. Because the – there were so many pleadings filed by both sides in the case it was just becoming almost impossible to follow what was going on.
>
> So I think this attempt to kind of clean up the docket, so to speak.

Contrary to the citation by Relator, Judge Celebrezze did not state that the entry was a "corrective measure". (Tr. 274-281) The attempt to convince this Court otherwise is not supported by the record.

On page 14 of Relator's Objections, the first paragraph is paraphrasing paragraph 51 of the Board's Recommendations. However, paragraph 51 contains no record cite and is instead,

again a direct quote from Relator's Trial Brief. (See Appendix A) The direct quotation leads to the conclusion that **the allegations against Respondent are not supported by the record**. Relator has premised her arguments against Respondent primarily on a Judgment Entry in the *Tallisman* case, which was never filed nor journalized by the court. Judge James P. Celebrezze testified that he had the entry prepared and that it was his intention to have the document filed with the Court. However, due to the failure of the Entry to ever be filed, it is of little judicial meaning. It is well settled under Ohio law that a court of record speaks only through its journal and not by oral pronouncements or mere written minute or memorandum.[3] **"The oral announcement of a judgment or decree by the trial court binds no one. It is axiomatic that the court speaks only through its journal. Any other holding would necessarily produce a chaotic condition."[4]**

The trial court in the *Tallisman* matter routinely granted motions on the day, or near the date and time motions were filed. Opposing counsel routinely obtained relief and rulings by the

[3] *Schenley v. Kauth* (1953), 160 Ohio St. 109, 111, citing *State ex rel. Indus. Comm. v. Day* (1940), 136 Ohio St. 477, 479; *Bittman v. Bittman* (1934), 129 Ohio St. 123; *State ex rel. Marshall v. Glavas* (2003), 98 Ohio St.3d 297, 298; *Angerman v. Burick* (March 29, 2003), Wayne App. No. 02CA0028, 2003 WL 1524505 (a court of record speaks only through its journal and not by oral pronouncement); *Glick v. Glick* (1999), 133 Ohio App. 3d 821, 831; *In re Adoption of Klonowski* (1993), 87 Ohio App.3d 352, 357; *Howard v. Wills* (1991), 77 Ohio App.3d 133, 142; *San Filipo v. San Filipo* (1991), 81 Ohio App.3d 111,112; *Weinberger v. Weinberger* (1974), 43 Ohio App. 2d 129, 133. *State v. Richards* (October 08, 2008), Summit App. No. 23968, 2008-Ohio-5237, 2008 WL 4493067; *Morgan v. Mikhail* (September 11, 2008), Franklin App. Nos. 08AP-87, 08AP-88, 2008-Ohio-4598, 2008 WL 4174063; *State v. Sanner* (March 14, 2008), Greene App. No. 2007 CA 13, 2008-Ohio-1168, 2008 WL 697738; *State v. Murillo* (January 11, 2008), Greene App. No. 21919, 2008-Ohio-201, 2008 WL 186672; *State v.Hatfield* (December 29, 2006), Greene App. No. 2006 CA 16, 2006-Ohio-7090, 2006 WL-3849074; *Buckeye Telesystem, Inc. v. MedCorp., Inc.* (July 21, 2006), Lucas App. No. L-05-1256, 2006-Ohio-3798, 2006 WL 2053322; *First National Bank of S.W. Ohio v.Doellman* (April 03, 2006), Butler App. No. CA2005-05-127, 2006-Ohio-1663, 2006 WL 846001; *In re Estate of Odebrecht* (January 31, 2006), Franklin App. No. 05AP-250, 2006-Ohio-381, 2006 WL 225277.

[4] *Bittman, supra* at 127; *Rose v. Rose* (May 23, 1996), Franklin App. No. 95APF12-1626, 1996 WL 274101; *State v. Clements* (December 24, 1990), Clermont App. No. CA90-04-033, 1990 WL 210809.

trial court without Mrs. Tallisman being afforded the opportunity to respond. Motions which were filed by Mr. Cahn and Mr. Lane and granted (similar to motions filed on behalf of Mrs. Tallisman) are as follows:

1. (Ex. 6-P) – Mr. Tallisman's Motion for Temporary Restraining Order filed on March 4, 2005, and granted on March 7, 2005 (Ex. 6-Q). The motion was filed on Friday, granted on Monday;

2. Mr. Tallisman filed on July 21, 2005 (Ex. 6-Q) ***a Motion to Order Mrs. Tallisman out of the residence in Moreland Hills***. Motion was filed on June 21, 2005 and granted on the same day. The Judgment Entry set forth in Respondent's Ex. 6-S;

3. On February 22, 2007 Ex. 6-T James Cahn and James Lane sought to ***add new party defendants without amending their Answer and Counterclaim***. The Court granted their motion on February 27, 2007. (Ex. 6-U)[5]

4. Ex. 6-V is Defendant's Motion to Compel Plaintiff's Pretrial Statement which was filed on April 16, 2007. The Court granted the motion on April 17, 2007. (Ex. 6-W)

5. On May 9, 2007 Mr. Cahn and Mr. Lane filed on behalf of Mr. Tallisman a Motion for Restraining Order. The motion for restraining order was granted on May 10, 2007. (Ex. 6-Y)

6. On June 30, 2006 Mr. Tallisman filed through his attorneys, Mr. Cahn and Mr. Lane a Motion for Emergency Restraining Order. A restraining order was granted on the same day, June 30, 2006. (Ex. 6-Z and 7-A)

Obviously, this particular trial court's docket demonstrates that motions were often granted on the same day as they were filed. While this may be an anomaly with this Court, it is in no way evidence of misconduct on the part of the Respondent. If it were, then every attorney practicing in Cuyahoga County Domestic Relations Court would be guilty of ethical violations.

The argument of Relator regarding Exhibit 86, the un-filed and undocketed January 3, 2008 Order, prepared by Judge James P. Celebrezze, is misplaced and inaccurate. The Order

[5] In this case, James Lane and James Cahn had received all of Susan Tallisman's bank records in June 2006. (Ex. RRR) Mr. Cahn and Mr. Lane waited over seven months before he named new party defendants. According to the logic of Relator this would be improper for Mr. Lane and Mr. Cahn to wait such a lengthy period of time to name new parties.

was most favorable to Respondent's client and adopted the position advanced by Respondent regarding the failure of Mr. Cahn to properly plead the Answer and Counterclaim. The Order specifically sets forth the following:

> Notably, the averments themselves do not make any representation as the enforceability of the prenuptial agreement, although Defendant's prayer for relief does request the prenuptial agreement be deemed valid and enforceable. Defendant argues that making such a distinction is merely playing semantics, however, the Court disagrees. Simply put, the Court finds that the prayer for relief is not an averment that can be deemed admitted by the opposing parties' failure to respond. The trial court relied upon the matter of *Heffernan v. Heffernan*, (August 19, 1981) C.A. No. 10090.

Id. at 4.

Respondent submitted the *Heffernan* case to the trial court in April of 2007, Ex. 6-O at page 3, which sets forth the basis why Mr. Tallisman's Motion to Have Averments Deemed Admitted was improper and why the Court could not grant said motion. (Tr. 1260-1261) The trial court granted Mr. Tallisman's various motions to vacate the orders granting leave of court to file Amended Complaints, and to respond to the Answer and Counterclaim on the basis that the trial court did not afford Mr. Tallisman the opportunity to respond to Mrs. Tallisman's motions. The trial court set forth the following:

> The Court finds that in Plaintiff's Motion for Leave of Court to File Amended Complaint, Plaintiff alleged that new assets had been discovered and an Amended Complaint was sought in order to include and restrain those assets. Defendant argues that Plaintiff, while amending to add more defendants, included additional language in the Amended Complaint that would allow Plaintiff to assert the affirmative defense that she did not properly assert in failing to respond to Defendant's Counterclaim.
>
> While the circumstances may be suspect, Defendant has provided no case law suggesting that, once granted, a leave to amend is limited only to those specific amendments set forth in the motion for leave to plead, provided such limitations are not set forth in the judgment entry granting a party leave to amend. However, the

> record clearly demonstrates that Defendant was not given an opportunity to respond to Plaintiff's Motion for Leave of Court to File Amended Complaint. While it may be customary to grant leave to amend in order to include additional newly found defendants, the inclusion of the additional language relating to the prenuptial agreement alters the pleading in such a way that the Court finds Defendant must be given a meaningful opportunity to respond to the Motion for Leave of Court to File Amended Complaint.

Id at 3.

The trial court further stated the following:

> The Court granted Plaintiff leave to amend her complaint on May 25, 2007. Consequently, the record clearly demonstrates that Defendant was not Afforded an opportunity to respond to Plaintiff's Motion for Leave of Court.

Id.

Contrary to the inferences made by Relator, Respondent was neither sanctioned nor admonished by the trial court. To the contrary, the trial court adopted the reasoning of Respondent as counsel for Mrs. Tallisman and proceeded to trial on the issue of the validity and enforceability of the prenuptial agreement.

Ohio Civ. R. 15 and the amendments of pleadings are to be interpreted liberally to effectuate justice and to avoid dismissal of claims on unnecessarily technical grounds.[6] Ohio Civ. R. 15(A) provides for an amendment of pleadings by the trial court when justice so requires. The Civil Rules neither mandate any requirements that must be met when filing a motion for leave to amend, nor indicate the grounds which must be articulated for leave to be granted. An amendment may be necessitated to reflect additional language in a complaint. *Langhorst v. Riethmiller* (1977), 52 Ohio App.2d 137. Ohio Civ. R. 15(B) even permits the

[6] *Abram & Tracy, Inc. v. Smith* (1993), 88 Ohio App.3d 253; *Grant v. Ohio Dept. of Liquor Control* (1993), 86 Ohio App.3d (the purpose of Ohio Civ. R. 15, providing that court should freely allow leave to amend, is to ensure that cases will be decided on their merits rather than on procedural technicalities.)

amendment of pleadings after trial were such amendment reflects issues which were tried explicitly or implicitly with the consent of the parties. *Ragland v. Nationwide Mut. Ins. Co.* (1986), 34 Ohio Misc.2d 1. Ohio Civ.R. 15(A) provides "[a] party may amend is pleading only by leave of court or by written consent of the adverse party. ***Leave of court shall be freely given when justice so requires."*** (Emphasis added.)

As the trial court noted in the un-filed Judgment Entry of January 3, 2008, many times it is important for the court to grant a request for leave of court to amend new parties in order to protect the marital estate from dissipation or secreting of assets. (See, footnote 3, Ex. 86) This is exactly what Respondent sought to protect on behalf of Mrs. Tallisman. After April 17, 2007, when the First Amended Complaint was filed, Mr. Tallisman went to Fifth Third Bank, and removed over Nine Hundred Seventy-Five Thousand Dollars ($975,000.00) from the bank account. (Tr. 130-104; 1138-1139) Since there was a restraining order in place premised upon the First Amended Complaint, Mr. Tallisman was required to return the funds. *Id.*

In this matter, the Board's Recommendations did not take into consideration the true nature of the un-filed Order of January 3, 2008, and **merely made another exact quote from Relator's Trial Brief**. (*See Findings of Fact and Conclusions of Law issued by the Board at paragraphs 50 – 51, pages 10-11 of the Decision, and compare it with Relator's Trial Brief filed July 19, 2010 on pages 18-19.)* A quoting of the exact language by the Panel of the Relator's Trial Brief can lead to the conclusion that the Entry was not properly reviewed and the evidence was not in the record.

Respondent humbly suggests to this Court that the Panel and Board did not consider the evidence presented at trial and instead merely copied the unproven allegations contained in the Relator's Trial Brief. The evidence in this case clearly demonstrates that the statements in the

Relator's Trial Brief were inaccurate and not supported by the exhibits and testimony presented at trial. This Court must correct this error and dismiss Count Two in its entirety.

III. RELATOR'S COUNT THREE SHOULD BE SUMMARILY DISMISSED BY THIS COURT

This Count is about mistaken identity, unintended consequences, and good faith beliefs and the failure to appreciate the real time practice of law. This Court must take notice of the fact that Counts Two and Three of Relator's Amended Complaint were never submitted to, reviewed by or certified by a Probable Cause Panel. Relator's original Complaint was filed on February 23, 2009. This case was set for trial on Relator's original Complaint (consisting of one count) in January 2010. In December 2009, Relator sought a continuance of that trial date to complete discovery. When the continuance was granted, Relator immediately amended its Complaint, adding Counts Two and Three, thereby avoiding the vetting of these new claims by the Probable Cause Panel.[7] Count Two was properly dismissed by the Panel and the Board. This Court should similarly dismiss Count Three.

Relator had the burden of establishing the allegations set forth in Count Three of its Amended Complaint by clear and convincing evidence. *Disciplinary Counsel v. Russo* (2010), 124 Ohio St.3d 437. As stated by this Court in *Findlay/Hancock Cty. Bar Assn. v. Filkins* (2000), 90 Ohio St.3d 1, "[w]hile the Board of Commissioners on Grievances and Discipline makes recommendations, it is the Supreme Court of Ohio that renders the final determination of the facts and conclusions of law in disciplinary proceedings." *Id.*[8] Relator did not prove its allegations of misconduct in Count Three by clear and convincing evidence.

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[7] The prejudicial result to Respondent is that two thirds of the Amended Complaint went forward without the procedural safeguards outlined in the Gov. Bar R. V.

[8] In *Filkins*, this Court set aside Board recommendation, finding that relator did not meet its burden, where relator's witnesses were not credible and evidence was not clear and convincing. Such is the case in the instant matter.

Eugene A. Lucci submitted this grievance against Respondent involving the matter of *Rymers v. Rymers*, a divorce action in the Lake County Court of Common Pleas, Division of Domestic Relations. Amy L. Rymers and Jeffery G. Rymers were the parties to that divorce action. Eugene Lucci attempted to intervene in the Rymers' divorce action at a time when he was involved in a relationship and resided with Mrs. Rymers and her minor children. Eugene Lucci is the presiding judge in the Lake County Court of Common Pleas, General Division. (Ex. 10-U; Tr. 733) However, he was **not** the presiding judge in the Rymers' divorce matter, nor was he acting as a judge (or in any official capacity as a judge) in the Rymers' divorce matter. He was a party attempting to improperly intervene.

In order to properly appreciate the chronology of events, it is important to understand that on June 3, 2009, the morning of the first pretrial in the Rymers' divorce action, both Nicholas Gallo and Mr. Rymers were of the mistaken belief that a man they observed standing in the doorway to Eugene Lucci's chambers and courtroom was Eugene Lucci, when in fact it was Eugene Lucci's bailiff, Charles Ashman.

A. Eugene Lucci was at all times acting as a litigant, *not a judge*, in the Rymers' divorce matter

Respondent is accused of violating Prof. Cond. R. 8.2(a), 8.4(c), 8.4(d) and 5.1(c)(1), which are all dependent upon a finding that Eugene Lucci was acting as a judge in the Rymers' divorce matter. However, it is absolutely imperative for this Court to note the fact that at no point in time was Eugene Lucci the presiding judge in the Rymers' divorce action, nor was he acting in his official capacity as a judge or judicial officer in the Rymers' divorce action. It is

not, nor can it be disputed, that, at all relevant times, Eugene Lucci was acting as an individual, attempting to intervene as a ***party litigant*** in the Rymers' divorce action.[9]

Eugene Lucci sought to intervene in the Rymers' divorce action (1) to attempt to disqualify Respondent from representing Jeffery G. Rymers; (2) to attempt to file a complaint against Jeffery G. Rymers (in the divorce matter) for the repayment of a loan in the amount of approximately $4,662.92 which Eugene Lucci alleged he gave to Mr. Rymers, *with Mr. Rymers' knowledge*; and (3) to attempt to obtain funds from Jeffery Rymers (support) as Mrs. Rymers and her minor children were living with Eugene Lucci.[10] Judge Judith A. Nicely, the presiding judge in the Rymers' divorce action, denied Eugene Lucci's motions, and specifically found "***[t]here are no facts or law to support Applicant's Motion to Intervene***." (Ex. 10-I)[11] The Court of Appeals agreed with the trial court's determination that Eugene Lucci had no legal basis to intervene. *Rymers v. Rymers*, 2010-Ohio-4289.

The Board would have this Court create new law in the State of Ohio giving a sitting judge special consideration when he is not acting as a judge, but is instead a party to, or attempting to, become a party to litigation. If upheld, the Recommendations of the Board would provide special privileges and considerations to a member of the judiciary whenever they are a private party in litigation against other citizen(s) of this State. This holding is not only contrary to Ohio law, but would be in violation of both the Constitution of the State of Ohio and the Constitution of the United States.

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[9] Eugene Lucci was not a judge but merely a private citizen who was attempting to improperly enter an appearance in a case without any legal basis. (Tr. 779) Even Eugene Lucci testified that "I'm the litigant." (Tr. 779) See also, *Rymers v. Rymers* 2010-Ohio-4289.

[10] (Ex. 10-I; 10-U) It is undisputed that Eugene Lucci was ***not*** the presiding judge in the *Rymers v. Rymers* case. Eugene Lucci was an individual who attempted to circumvent Ohio Civ. R. 75 (B) and intervene in a domestic relations case as a creditor. As a litigant, he was entitled to no more rights and privileges than any other litigant.

[11] The Board ignores and fails to acknowledge the rulings and Order of Judge Nicely, in its Decision.

It is axiomatic that no individual stands in a greater position in civil litigation than another. The foundation of our system requires that all individuals stand on equal footing. A person is treated the same as a corporation or business. Likewise, the mere measure of a person's success does not provide it with any advantages against those less fortunate. Despite these concepts that are well founded in both our Nation's and State's Constitutions, the Board in this matter has chosen to give special privileges to a member of the judiciary when that person willingly becomes a party in civil litigation.

B. It was Eugene Lucci that held himself out as a "judge" in his conduct and filings in the Rymers' divorce action

Relator's position that "it was respondent and not Lucci who made Lucci's status as a judge an "issue" in *Rymers v. Rymers*" (Relator's Objections at p. 20) is contrary to the documented evidence in the record. It was Eugene Lucci and his counsel and agent who first raised the issue of Eugene Lucci being "the presiding judge". Eugene Lucci had his counsel and agent, Walter McNamara, forward correspondences to Respondent demanding Respondent's withdrawal from the Rymers' divorce matter. (Exs. 10-P and 10-Q) The May 19, 2009, correspondence specifically referenced Eugene Lucci as a "Common Pleas Judge in Lake County" and demanded Respondent's withdrawal, alleging a conflict of interest. (Ex. 10-P; Tr. 1334-1334)[12]

The fact that Eugene Lucci was a judge was interjected into the *Rymers* case by Lucci himself as part of the Motion to Intervene. In an affidavit attached to the motion (Ex. 10-U) filed on June 3, 2009, Eugene Lucci – not Respondent – averred the following:

> **2. I was elected judge of the Court of Common Pleas, General Division, and took office on January 6, 2001, and have served**

[12] A May 28, 2009 correspondence (e-mail) specifically indicated "[i]f you refuse to withdraw, he [Lucci] shall take such action as is appropriate . . . [t]his conflict requires your immediate withdrawal from Mr. Rymers' case." (Ex. 10-Q; Tr. 1335)

in that capacity ever since. I am the presiding judge of the court.

The correspondence from Attorney McNamara and the affidavit definitely establish that Eugene Lucci introduced the issue of being a "presiding judge" into this matter. Yet, the Board seems to indicate that it was Respondent who introduced the issue of Eugene Lucci being a presiding judge. In fact, at the hearing, Eugene Lucci admitted that he did not need to identify himself as a judge in his affidavit or motions, and that he chose to identify himself as "the presiding judge". (Tr. 800-801)

The only other person to testify regarding this issue would have been Walter McNamara but the Panel excluded him from being called by Respondent.[13] Respondent received correspondence from Walter McNamara which he viewed as a failed attempt to remind the Respondent of the fact that Eugene Lucci was a judge. (Tr. 1334-1335) The record also indicates that Respondent took part in telephone conversations wherein McNamara repeatedly used threats implying that Eugene Lucci was a sitting judge. (Tr. 1335-1336) In fact, Respondent specifically testified that Walter McNamara indicated to the Respondent that Eugene Lucci was a judge. Respondent testified that Walter McNamara made it painfully apparent to Respondent that the issue of Eugene Lucci being a judge was an issue that was going to be addressed one way or another. (Tr. 1336)

[13] Respondent attempted to have Walter McNamara testify in this proceeding, but the Panel Chair granted a Motion *in Limine* preventing Respondent from calling Walter McNamara as a witness. The Panel Chair held that because Walter McNamara was personal counsel to Eugene Lucci and would be representing Mr. Lucci during the Panel hearing, that it would be improper for Mr. McNamara to appear as a witness. The objection by Respondent to this ruling is contained in the record. (Tr. 752) (See Relator's Motion *in Limine* of June 14, 2010 at p. 4. and Orders of July 16, 2010 and July 20, 2010) Mr. McNamara never appeared to represent Eugene Lucci as his "personal counsel".

C. Respondent made no statements which would qualify under Prof. Cond. R. 8.2, as he did not prepare, draft, sign or file the Motion to Strike or the affidavits of Mr. Gallo or Mr. Rymers

This Court must realize it is not an affidavit or pleading signed by the Respondent that is the subject of Relator's allegations.[14] The section of which Relator complains is the memorandum section and the affidavits of Mr. Gallo and Mr. Rymers. Respondent did not prepare, draft, sign or file the Motion to Strike or the affidavits of Mr. Gallo or Mr. Rymers, which are the subject of Relator's Amended Complaint, and the subject of Relator's claims and Objections.

Eugene Lucci testified that it was Mr. Gallo who was representing Mr. Rymers at the pretrial on June 3, 2009. (Tr. 769) Eugene Lucci admitted that Respondent was not at the courthouse that day; and that Respondent never filed or signed an affidavit stating that Eugene Lucci was in the hallway or intimidating people in a hallway on June 3, 2009. (Tr. 769-770)

The Board found that, "[a]lso at the direction of Respondent, Gallo prepared his own affidavit and that of the client Jeffrey(sic) Rymers to be attached in support of Respondent's motions. (Tr. 652-53) **It is clear from a review of pages 652-653 that Mr. Gallo does not testify that it was "at the direction of Respondent".** The Panel's finding is plain error.

Mr. Gallo testified on direct examination that his direct supervisor was Gregory J. Moore of Stafford & Stafford. (Tr. 641) At no point in time did Mr. Gallo ever testify that Respondent instructed him to prepare the Motion to Strike Eugene Lucci's motions. Likewise during cross-examination, Respondent set forth that the Motion to Strike filed on June 17, 2009 (Ex. 96; Ex. 10-V) was prepared by Stafford & Stafford Co., L.P.A. and signed by Mr. Gallo. (Tr. 204-205)

[14] It should also be noted that no signature appears on the memorandum which is attached to the first three pages of the Motion to Strike prepared and filed by Mr. Gallo. (Ex. 10-V, at p. 24)

Further, there was no knowledge on the part of Respondent of any misconduct or reckless/false allegations, being made by Mr. Gallo or Mr. Rymers. The Motions and Affidavits were prepared and filed by Mr. Gallo in good faith, based upon the events which Mr. Gallo and Mr. Rymers witnessed and observed on June 3, 2009. (Ex. 11-L) The Rules require that a statement be made by Respondent. The evidence in the record reveals that it was Mr. Gallo and Mr. Rymers who made the statements in reference to Eugene Lucci as a litigant, not the Respondent. (Tr. 111)

D. Respondent reasonably relied upon the sworn statements and eye witness accounts of Mr. Rymers and Mr. Gallo, and the memorandum of Mr. Gallo; and there was a good faith basis of fact and law upon which the Motion to Strike and the affidavits of Mr. Rymers and Mr. Gallo were filed.

Even though Eugene Lucci was not acting as a judicial officer, and Respondent did not make the statements complained of, the statements were made upon a reasonable factual basis and the context in which they were made, including the eye-witness accounts of a client, an associate attorney and the sworn statements of both. In *Disciplinary Counsel v. Gardner (2003),* 99 Ohio St. 3d 416, the Supreme Court of Ohio "adopt[ed] an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or reckless disregard of its falsity." *Gardner* at ¶26, quoting Annotated Model Rules of Professional Conduct (4th Ed. 1999) 566, Rule 8. The *Gardner* Court went on to explain that the "standard assesses an attorney's statements in terms of what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances***[and] focuses on whether an attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." (Internal citations omitted.) *Gardner* at ¶26.

First, Eugene Lucci filed his Motion to Intervene on the morning of June 3, 2009, when he knew that Jeffery Rymers and his counsel would be present for the initial pretrial in the Rymers' divorce matter. (Tr. 747) Mr. Lucci knew that the domestic relations court was on the same floor and directly across the hallway from Eugene Lucci's chambers and courtroom. (Tr. 748; 775-778) Eugene Lucci made the decision to have Mr. Rymers served with his Motion to Intervene while Mr. Rymers was at the Courthouse for his pretrial. (Tr. 775-778) Service was eventually made in the hallway outside of Eugene Lucci's chambers by a woman who came out of Eugene Lucci's doorway. Mr. Rymers testified unequivocally that he was intimidated by this conduct. (Tr. 696-697) A man then came out of Eugene Lucci's chambers and stared at Jeffery Rymers. (Ex. 11-L) This happened repeatedly. (*Id.*) Mr. Rymers reported the incident to Mr. Gallo, the associate from Respondent's office who was attending the pretrial. Mr. Gallo also observed the man coming and going from Eugene Lucci's chambers. Mr. Rymers indicated that the man involved was Eugene Lucci, the man who was living with his wife and his children.

Mr. Gallo returned to the office and wrote a comprehensive memorandum to Gregory J. Moore outlining what had occurred on June 3, 2009. Respondent had in his possession a detailed memorandum from Nicholas Gallo. Ex. 11-L detailed specifically what Nicholas Gallo indicated he observed and what Mr. Rymers' observed and indicated on June 3, 2009:

> I arrived at the Courthouse at 9:35 a.m. and found Mr. Eugene Lucci milling around the hallway outside of the Courtroom. Mr. Lucci came out of his chambers and surveyed the waiting area no less than five times before Mr. Rymers or Ms. Cooper arrived.
>
> Ms. Cooper entered Lucci's chambers and immediately handed me a Motion to Intervene that was filed by Mr. Lucci on June 3, 2009 (the date of the hearing) at 9:20 a.m. Mr. Lucci made several more appearances in the waiting area before we were called into Court. (Note: Lucci made a point of staring/glaring at Mr. Rymers before we went into Court, and Mr. Rymers stated that he was intimated by the ordeal.) . . .

Respondent testified that the Memorandum was two pages in length and detailed what had occurred. (Tr. 1345) Respondent testified to the Panel that there was no reason to dispute Mr. Gallo because Respondent did not see any motivation for Mr. Gallo to distort the facts. (*Id.*) (Ex. 11-L) A Motion to Strike and affidavits were prepared by Mr. Gallo in reference to Mr. Lucci's Motion to Intervene. The Affidavits prepared by Mr. Gallo for himself and Mr. Rymers outline what occurred on June 3, 2009. (Ex. 10-V; 11-L) The Motion was signed and filed by Mr. Gallo. (Ex. 10-V; Ex. 96)

In response to the Motion to Strike, Eugene Lucci filed another affidavit. This statement merely denied that Lucci was in the hall on the morning of the pretrial. It offered no proof or evidence. It did not identify the fact that the person involved was Eugene Lucci's bailiff.

Mr. Gallo had in his possession the prior affidavit of Eugene Lucci. The first affidavit claimed that Lucci loaned money to Mr. Rymers. The second affidavit contradicted the first and claimed that Lucci had never met Mr. Rymers. The stark contradiction between the two affidavits was obvious. Further, the testimony from trial in the Rymers' divorce action on October 7, 2009 revealed that Eugene Lucci's claims in his affidavit regarding a loan were incorrect. (Ex. 11-A, pp. 117-118; 11-B, 11-C; Tr. 1340-1341)

Gallo testified that he thought it was Eugene Lucci in the hallway, and that he conferred with Jeffery Rymers about whether it was Eugene Lucci in the hallway on June 3, 2009. (Tr. 653, 660, 662) Gallo specifically testified that Jeffery Rymers was visibly upset on June 3, 2009 pertaining to what was transpiring on that day. (Tr. 662-663)

Based upon the facts and circumstances on June 3, 2009, no reasonable attorney would take additional steps to determine if the person in the hall was his client's wife's live-in boyfriend. Ordinarily, the client's eyewitness account could be relied upon by itself, but

Respondent additionally had his associate's account of the events, both of which were contained in sworn affidavits and a memorandum supporting the Motion to Strike.

Mr. Rymers testified before the Board that he was intimidated when he walked into the Lake County Courthouse because it was his wife's boyfriend's place of work, and that her boyfriend had indicated he was a presiding judge. (Tr. 696-7) Mr. Rymers stated that Eugene Lucci has intimidated him since the start of the divorce. (Tr. 689, 696-697)[15]

Respondent had two individuals making sworn declarations that Eugene Lucci was in the hallway on June 3, 2009, i.e., Mr. Rymers and Mr. Gallo. Respondent also knew of misleading statements in the affidavits of Eugene Lucci pertaining to his loaning of money to Mr. Rymers as the basis to intervene into the divorce case. (Tr. 1338-1341) Eugene Lucci's response to the Motion to Strike and his accompanying affidavit merely made a blanket denial that the person was Eugene Lucci. No mention was made as to the existence of video discs or surveillance tapes, or that the person was Lucci's own bailiff.

Moreover, Respondent testified at length regarding the propriety of Lucci entering into the divorce case as a creditor under the improper theory that Lucci loaned Mr. Rymers money and that Lucci provided support to Amy Rymers' minor children. (*Id.*) Ohio Civ. R. 75(B) does not permit a creditor to intervene in a domestic relations case. Eugene Lucci, an attorney and a sitting Common Pleas Court Judge should have known that the motion was improper. Both the trial judge and the Eleventh District Court of Appeals held that this attempt to intervene was legally improper.

[15] The Panel Chairman thanked Mr. Rymers for coming and told him that he was not on trial and that he was a public servant and a good citizen. (Tr. 700)

E. When Respondent became aware of the mistaken identity, he took immediate remedial measures, including the withdrawal of the affidavits submitted by Mr. Rymers and Mr. Gallo

Relator did not reveal the existence of the video discs of the events of June 3, 2009 until January 2010. Respondent received the video discs, in January of 2010. (Tr. 217; 1348) Upon review of the video disks, the prior Affidavits of Mr. Gallo and Mr. Rymers were withdrawn. (Tr. 1348, Ex. 10-Y) On January 25, 2010, Stafford & Stafford prepared on behalf of Mr. Rymers and filed the Notice of the Defendant, Jeffery G. Rymers' Withdrawal of Two Affidavits Filed on June 17, 2009, specifically indicating "The Defendant, Jeffery G. Rymers, hereby withdraws his Affidavit of June 17, 2009. The Defendant further withdraws the Affidavit of Nicholas Gallo of June 17, 2009." (Ex. 10-Y) This was the earliest possible time to correct any inaccuracies contained in the affidavits. Had the existence of the video discs evidencing the mistaken identity been disclosed or provided by Eugene Lucci or Relator prior to January 2010, this matter would have been resolved immediately, and would not be before this Court. Instead, Eugene Lucci waited months to disclose such evidence and admitted he intentionally did not provide the video discs. (Tr. 815)

Regardless of the mistaken identity, Eugene Lucci testified that he was in the courthouse on June 3, 2009. (Tr. 747) Eugene Lucci admitted that he appears in at least one of the cameras in the courthouse on June 3, 2009, walking (and/or kissing) Mrs. Rymers at his rear courtroom door. (Tr. 773-774)

Respondent's reasonable analysis was that there was substantial basis and reason to doubt the veracity of Eugene Lucci's denial. Comparatively, Respondent had no reason to doubt Mr. Gallo or Mr. Rymers account/recollection of the events. There was simply no basis or motivation for Mr. Gallo to say anything that he felt was not true. (Tr. 1372) Respondent

further testified that he reasonably assumed that Jeffery Rymers could accurately identify the man that was living with his wife and children. (*Id.*)

Even though Eugene Lucci was an individual attempting to intervene and not a sitting judge in the case, the Board chose to allow Mr. Lucci to hide behind the protection of the Prof. Cond. R. 8.2(a). This is a wholly inaccurate application of this Rule of Professional Conduct. Further, the Rule requires that a statement be made by the Respondent.

The purpose of Rule 8.2 is to protect the judiciary while they are in their official capacity. The Rule itself states "*...Judges and Justices, not being wholly free to defend themselves...*" clearly does not apply to a judge who has voluntarily made himself a party in civil litigation. When an individual who happens to be a judge is a party, they have every right and opportunity to defend themselves. In fact, in this case Eugene Lucci filed numerous motions or responses and affidavits attempting to prosecute his claims and defending his actions.

There is not a single case in Ohio wherein Prof. Cond. R. 8.2(a) was applied when a judge was a party to the litigation. There is not a single case outside of the state of Ohio where Prof. Cond. R. 8.2(a) was applied when a judge was a party to the litigation. This Rule does not apply under these circumstances.

Moreover, the Board's conclusion that the proper remedy for Respondent would have been to file a disciplinary action seems to ignore that Mr. Rymers was the client in this case and that he too has a right to be defended. Filing an ethical complaint would not have in any fashion aided in the representation of Jeffery Rymers. Eugene Lucci had filed a motion in Rymers' divorce action and Mr. Gallo had a duty and no choice but to file a response to Eugene Lucci's Motions.

Eugene Lucci was seeking relief from the trial court which was not supported by the facts or the law, and was, at least in part, based upon misleading statements. Mr. Rymers only redress against Eugene Lucci was to respond to Mr. Lucci's Motion to Intervene.[16] If Mr. Lucci was a presiding judge in the Rymers' divorce action, Mr. Rymers could have filed an Affidavit of Bias and Prejudice to seek his disqualification. Such statements regarding a judicial officer presiding over the pending action, made in an Affidavit of Bias and Prejudice would not have subjected Mr. Gallo or Respondent to disciplinary violations. However, in this matter, Mr. Lucci was a attempting to be a litigant in the Rymers' divorce action. The affidavits of Mr. Gallo and Mr. Rymers in support of the Motion to Strike were accurate and truthful to the best of their knowledge at the time they were signed and filed.

The more important aspect of the Board's Recommendations is that if upheld, the decision would confer upon a sitting judge special rights and privileges as a party in civil litigation. There is no basis in law for this decision.

The lack of factual and legal support for the Board's Recommendations of a violation relating to Count Three is evident by the contradictory nature of the two recommendations. First, they suggest a violation under Prof. Cond. R. 5.1 against the Respondent as the supervising attorney and then recommend another violation under Prof. Cond. R. 8.2 as if the Respondent was the author of the motion and affidavits. The Board goes on to recommend to this Court that it holds the Respondent responsible, personally, under Prof. Cond. R. 8.2(a), 8.4(c) and 8.4(d).

> Rule 8.2(a) provides "[a] lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its

[16] Much has been made that if Mr. Rymers and/or Respondent determined that Eugene Lucci's actions were improper, they should have filed a grievance. However the filing of a grievance would not have addressed or stayed Eugene Lucci's request to intervene in the Rymers' divorce action.

> truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

Again, it must be noted that all of the cases which involve this section, apply to a judge when he is acting in his or her official capacity as a judge, not where the judge is attempting or is acting as a litigant in his or her individual capacity.

Secondly, in this Section, the Board indicates that the Respondent authored the Motion to Strike and accompanying affidavits. There is no evidence in the record to support this suggestion. It is undisputed that Nicholas Gallo authored both the Motion and the Affidavits.

It is self evident that the Board cannot recommend to this Court alternative theories of ethical violations. It was the job of the Board, as directed by the Rules for the Governance of the Bar, to find facts to support their conclusion. The mere fact that the Board's Recommendations are contradictory is an excellent example of the failure of the record to establish by clear and convincing evidence any violation of the rules, either under Prof. Cond. R. 5.1, 8.2, or 8.4.

The Board's Findings of Fact and Conclusions of Law appear to be based singularly on one quotation contained in Mr. Gallo's brief relating to a letter received from Walter McNamara. **Missing in the Board's Findings of Fact is the fact that the entire letter was attached to the Motion to Strike as Exhibit 2**. (Ex. 10-V) There was no misrepresentation. The letter, in its entirety, was attached to the pleading. A finding to the contrary defies common sense.

When this Court reviews the totality of the circumstances involved in this scenario, it is impossible to reach the conclusion that Respondent violated Prof. Cond. R. 8.2(a), 8.4(c) or 8.4(d). Respondent had an obligation to represent Jeffery Rymers in this matter. Eugene Lucci,

the litigant, personally and through his counsel, interjected the fact that he was a common pleas court judge into the Rymers' divorce matter. The actions of Mr. Gallo in bringing that fact to the forefront and submitting the information to the trial judge was prudent under the circumstances.

F. The Board's Conclusion That Respondent Violated Prof. Cond. R. 5.1(C) Is Erroneous And Is Not Supported By The Record In This Matter

Obviously, in order to prosecute a claim under Prof. Cond. R. 5.1(c), there needs to be evidence that another lawyer committed a violation of an ethical rule. In this matter, all allegations against Respondent stemmed from the actions of Mr. Gallo, and the eye witness accounts of Mr. Gallo and Mr. Rymers. The fundamental requirement for a charge against Respondent is a finding that Mr. Gallo violated one of the Rules of Professional Conduct. No such evidence was offered. At the time of the hearing in this matter and the Board's Recommendations, there was no finding by this Court that Gallo violated a disciplinary rule. Nor has there any evidence presented that the Board recommended that this Court so find. There have been accusations and allegations, but no proof.

Respondent cannot be held liable for violating a disciplinary rule after the fact, and after trial is completed, based upon subsequent events.

G. Relator's Arguments Are Not Accurate or Supported By The Record.

Relator's arguments are not supported by the record, as at no point in time does the Recommendations reference that "Rymers 'falsely' claimed that Lucci was present in the hallway" or that the affidavits of Rymers and Gallo are "false" or that the "motion to strike contains a number of 'false'" statements. (Objections at p. 19)

Relator argues that there is "no evidence that anyone threatened or took any menacing action toward Jeffery Rymers in the courthouse hallway on June 3, 2009." Jeffery Rymers

testified otherwise, even regardless of the mistaken identity. Charles Ashman was at all relevant times, Eugene Lucci's bailiff, an agent of Eugene Lucci. Eugene Lucci admitted at trial that he had his bailiff engage in various conduct on June 3, 2009, including summoning Linda Cooper into Eugene Lucci's chambers. (Tr. 818) It cannot be disputed that Mr. Ashman is an agent of Eugene Lucci and that Mr. Lucci directed Mr. Ashman's conduct on June 3, 2009. Even Mr. Ashman admits that he was in the hallway outside of Eugene Lucci's chambers on numerous occasions on June 3, 2009, and did not dispute the fact that after Linda Cooper was in Eugene Lucci's chambers, he went back into the hallway for 15-20 seconds. (Tr. 675-676) Mr. Ashman testified that Eugene Lucci's office which he was coming in and out of on June 3, 2009, displays a "placard or an identification that says 'Judge Eugene Lucci's Chambers'". (Tr. 675)

IV. RESPONSE TO RELATOR'S OBJECTION NO. 1 – RESPONDENT SHOULD NOT BE SUSPENDED FROM THE PRACTICE OF LAW

Relator's demand for this Court to impose an actual sanction against Respondent is unsupported and unmerited. Moreover, the mitigating factors presented at the hearing warrant a dismissal as Relator failed to prove any violation by clear and convincing evidence.

It is clear that the Board did not appreciate the order of filings of the pertinent pleadings and motions in the *Tallisman* case. Respondent filed a Complaint for a Divorce on behalf of Susan Tallisman. James Cahn filed an Answer and a Counterclaim related to a prenuptial agreement. Mr. Cahn also filed a Motion for Summary Judgment based on the prenuptial agreement. Respondent replied with an affidavit of Susan Tallisman claiming that the prenuptial agreement was signed under duress and fraud. This was all in 2005.

In April of 2007, James Cahn noticed that there was no Reply filed to the Counterclaim. Knowing that a default judgment is not available in domestic relations cases, Mr. Cahn moved to have the averments in the Counterclaim deemed admitted. When confronted with Mr. Cahn's

mis-titled default motion, Respondent learned that he never received the Answer and Counterclaim. It was not in his file; in the office; no copy was sent to his client; and there were no copies received by any of the other Defendants. There was and is no evidence that this pleading was served. That same month, Mr. Tallisman was deposed and under oath admitted to hiding, or failing to provide separate marital property and assets.

This evidence was presented at the hearing and was undisputed.

Relator then attempts to argue a course of conduct by imputing the actions of an associate attorney to Respondent. On June 3, 2009, while representing Jeffrey Rymers at a pre-trial for a divorce, attorney Nicholas Gallo was handed a Motion to Intervene on behalf of Judge Eugene Lucci. While waiting in the hall for the pre-trial to begin, an individual repeatedly came out of the doorway of Judge Lucci's chambers and was staring at Mr. Rymers. (Tr. 653) Mr. Rymers identified that person as Eugene Lucci, the man who was currently living with his wife. (Gallo Deposition Transcript p. 23; Tr. 660).

When Mr. Gallo returned to the office, he found a picture of the Judge online and confirmed that was the man he saw in the hallway. (Tr. 653, 661) Mr. Gallo then prepared a detailed memorandum to his supervisor, attorney Gregory Moore. (Ex. 11-L) Based on his good faith belief after his own research and Mr. Rymers' eye-witness identification Mr. Gallo then drafted a Motion to Strike Lucci's Motion to Intervene. (Tr. 650, 652, 653) He also drafted affidavits for himself and Mr. Rymers in support of the Motion to Strike. *Id.*

There was no evidence presented at the hearing that Nicholas Gallo received direction or instruction from Respondent regarding this filing. Consequently, there is no evidence in the record that Respondent instructed Nicholas Gallo to do anything. The evidence proves that

Respondent **did not** make any statements regarding Judge Lucci. Moreover, Respondent did not sign, file or present the Motion to Strike or affidavits to the court.

A. Respondent's Conduct Does Not Warrant a Suspension from the Practice of Law

Relator's reliance upon *Disciplinary Counsel v. Fowerbaugh* (1995), 74 Ohio St.3d 187 ignores the distinct facts in this case and the mitigating factors that exist in the record. In *Fowerbaugh* the attorney engaged in a course of conduct that warranted an actual suspension. In *Fowerbaugh* the Respondent:

(1) neglected a client's case;

(2) failed to file the complaint;

(3) ignored the client;

(4) lied to the client about initiating proceedings on her behalf;

(5) prepared a false document with a time stamp on it to give the impression of a proper filing;

(6) sent false discovery documents;

(7) lied to the client a second time claiming that a hearing had been set for the cases;

(8) the client purchased airline tickets in reliance on the Respondent's misrepresentation;

(9) as the date approached the attorney told the client that the date was cancelled due to the court's scheduling error;

(10) Respondent sent the client a letter returning her retainer fee without explanation.

Based on this conduct, the Supreme Court of Ohio required an actual suspension from the practice of law, noting that "when an attorney engages in a course of conduct that violates attorney discipline rules governing engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, the attorney will actually be suspended from the practice of law."

In the instant case, there is no evidence of a course of conduct, no dishonestly and certainly no fraud deceit or misrepresentation. Indeed, the record establishes that Respondent has practiced law in excess of twenty-five years in the field of Family Law. (Tr. 1087) Respondent is a Certified Specialist as recognized by the Ohio State Bar Association since the program's inception in 1999. (Tr. 1088) Respondent has lectured at various CLE programs on topics of Family Law and Trial Practice. (Tr. 1088) He is the managing partner at Stafford and Stafford which has five attorneys and numerous staff. (Tr. 1087)

There are multiple mitigating factors in this case. Respondent has no prior disciplinary history. BCGD Proc. R. 10(B)(2)(a) He cooperated during the investigatory process. BCGD Proc. R. 10(B)(2)(d) Respondent was not sanctioned at the trial level for any reason. BCGD Proc. R. 10(B)(2)(f) Relator's own witnesses James Cahn and Eugene Lucci acknowledged the reputation of Respondent. Mr. Cahn knows that Respondent tries many cases and is a very good lawyer. (Tr. 352). Eugene Lucci is aware of Respondent's professional reputation and knows that Respondent is a good lawyer. (Lucci Depo Pgs. 11-12) BCGD Proc. R. 10(B)(2)(e) Additional mitigating factors include the fact that Respondent never made any statements about Eugene Lucci. However, upon learning that the person in the hallway was not Judge Lucci, Respondent immediately withdrew the affidavits of Nicholas Gallo and Jeffrey Rymers. BCGD Proc. R. 10(B)(2)(c)

Relator has failed to establish that Respondent engaged in a course of conduct that warrants a suspension from the practice of law. In fact, this case is similar to *Cincinnati Bar Association v. Risenfeld* (1988) 84 Ohio St. 3d 30, where the Supreme Court of Ohio refused to enforce an actual suspension because the two "Respondents' actions were but a few isolated incidents in an otherwise unblemished legal careers, not a course of conduct." The Ohio

Supreme Court recognized that the disciplinary process is not to punish the attorney, but to protect the public, cases are to be reviewed on the individual facts of that case. (*Disciplinary Counsel v. Johnson* (2007), 113 Ohio St.3d 204, citing *Disciplinary Counsel v. O'Neil (2004), 103 Ohio St.3d 204.)*

In *Disciplinary Counsel v. Fumich* (2007), 116 Ohio St.3d 257, the Respondent engaged in a "multiyear course of dishonest behavior culminating in a fabricated settlement" wherein the Respondent failed to inform the client that the case had been dismissed. In continually lying to the client, the Respondent was aware that the client would settle for $25,000.00 and Respondent informed the client that he could settle the case for $16,000.00. The client agreed to settle for $16,000.00 and the Respondent removed the money from his personal retirement account and deposited it into his IOLTA account and ultimately gave the client this money. In addition, Respondent failed to turn over legal documents after requested by another client. The Respondent received a stayed twelve month suspension.

In *Disciplinary Counsel v. Niermeyer* (2008), 119 Ohio St.3d 99 the respondent missed a filing date for a worker's compensation claim and took a photocopy of a time-stamped document from another case and superimposed that date onto a document from the time-barred case. The respondent filed this document relying on the fact that Worker's Compensation Bureau believing that the Bureau Staff would be too overwhelmed to notice the fraudulent document. The Respondent's twelve month suspension was stayed.

In *Disciplinary Counsel v. Potter* (2010), 126 Ohio St.3d 50, the Respondent was the executor of a deceased client's estate and furnished money to a friend to purchase property from the estate for himself without disclosing to the beneficiary of the estate, the probate court or the closing agent. The Respondent received a one year suspension, stayed with conditions.

Where the Respondent "had no prior disciplinary record; there was evidence in regard to reputation, professionalism and competence and otherwise good character; and the allegations involved isolated incidents" the attorneys received a stayed suspension.

Relator's citation to *Disciplinary Counsel v. Gardner* (2003), 99 Ohio St.3d 416, is misplaced, as Eugene Lucci was not acting as a judge in the Rymers' divorce action, and Respondent did not make any of the statements complained of by Relator. The record also establishes that when Respondent learned that the individual in the hallway was not Eugene Lucci, he withdrew the affidavits. The Supreme Court of Ohio held an objective standard to determine whether a lawyer's statement about a judicial officer is made with knowledge or reckless disregard or falsity, it is the appropriate view. **The standard review of attorney statements in terms of what the "reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances" and "focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." The relator bears the burden of proving that a "reasonable attorney" would believe that the statements made were false.**

When applying *Gardner*, Mr. Gallo had a reasonable, factual basis for making the statements given the totality of the circumstances.[17] Further Respondent had a reasonable, factual and good faith basis for relying upon the eyewitness accounts and sworn statements of Mr. Rymers and Mr. Gallo, and the two (2) page, detailed memorandum of Mr. Gallo.

[17] These circumstances include eyewitness accounts and observations of the client, Mr. Rymers, and Mr. Gallo himself, of the events which transpired on June 3, 2009 in the Lake County Courthouse. These circumstances are fully outlined in the memorandum prepared by Mr. Gallo on June 3, 2009. (Ex. 11-L)

The respondent in *Gardner* made accusations of judicial impropriety against an appellate panel after an unfavorable ruling and was found to have violated DR 8-102(B) as well as DR 7-106(C). Mr. Gardner, in a motion for reconsideration made multiple statements against the appellate panel accusing them of distorting the truth and manufacturing a gross and malicious distortion. Among other comments, Mr. Gardner asked why the panel would bend over backwards and ignore well established law to encourage law officers to be slothenly and careless. He also stated that the panel had an obvious prosecutorial bias. Mr. Gardner declared that "any fair-minded judge" would have been "ashamed to attach his/her name" to the opinion.

Mr. Gardner further wrote "[w]ouldn't it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel's desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense-necessarily justify its own corruption of the law and truth? Doesn't an oath to uphold and follow the law mean anything to this panel?" Mr. Gardner maintained his belief at his disciplinary hearing.

Unlike the facts and circumstances in *Gardner*, the evidence presented in the instant matter establish that Respondent did not make any of the statements regarding Eugene Lucci. In this case, Eugene Lucci was not the sitting judge in the Rymers' divorce action, nor was he acting in his official capacity as a judge in his attempt to intervene in the *Rymers* divorce. Respondent had a good faith belief that the information relayed to him by Mr. Gallo and Mr. Rymers was accurate and truthful. Respondent had no reason to question the veracity of Mr. Gallo and Mr. Rymers. Moreover, at this point in the *Rymers* divorce, Eugene Lucci had already made conflicting statements about his basis for intervention. (Ex. 10-U)

As soon as Respondent was presented with the video discs which were disclosed in January of 2010, Respondent immediately withdrew the affidavits of Nicholas Gallo and Jeffrey Rymers. (Ex. 10-Y)

Gardner is also distinguishable from this matter as there was no "attack" on the integrity of Eugene Lucci in the *Rymers* court. The Motion to strike and accompanying affidavits were an attempt at a factual portrayal of the reasonable belief that Mr. Rymers was being intimidated by his wife's boyfriend, *who happens to be a judge*. The record is devoid of any evidence that Respondent made any statement about Eugene Lucci, in a motion, pleading or affidavit. Moreover, there is no evidence that Respondent signed, filed or participated in the writing, drafting or filing of the Motion to Strike or the affidavits of Mr. Rymers and Mr. Gallo.

Likewise, Relator's reliance on *Disciplinary Counsel v. Frost* (2009), 122 Ohio St.3d 219, is misplaced. In *Frost* Ms. Frost arguably suffered mental health issues which are an improper comparison to the facts of this case. From 2003 to 2006, Ms. Frost filed a series of grievances and lawsuits against judges, county officials, and attorneys falsely alleging corruption, bias, racial discrimination and illegal conduct. Ms. Frost was sanctioned in the underlying cases, her complaints were dismissed for lack of merit and on multiple occasions she was ordered to pay restitution. In her disciplinary hearing, Ms. Frost attempted to argue that her statements of corruption and bias were constitutionally protected and therefore she was impervious to the discipline process. None of these facts are present in this case. In fact, the Board in the instant case found that this is <u>not</u> an issue likely to be repeated.

Relator's citation to *Disciplinary Counsel v. Ricketts* (2010), 128 Ohio St.3d 271, is also misplaced. Mr. Ricketts recorded false mortgages to create the appearance of debt in order to deceive his client's creditors. Even considering the more serious nature of the respondent's

misconduct in *Ricketts,* this Court did not sanction Ricketts with an actual suspension from the practice of law. Just as in *Ricketts*, significant mitigating factors are present here.

In reliance on *Stark County Bar Assn. v. Ake* (2006), 111 Ohio St.3d 266 the Board in this case correctly recommend a stayed suspension. Mr Ake was found to have deliberately violated several orders of the court while representing himself in a divorce. In finding that Mr. Ake violated DR 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), and 7-102(A)(1), the Court ***suspended the respondent for six months, with the entire suspension stayed, upon the condition that he commit no further misconduct***.

When the facts in Ake are compared to the facts and circumstances of this matter, it is clear that there was absolutely no evidence presented at the hearing to support Relator's allegation that Respondent engaged in misrepresentation, fraud and deceit when "respondent was confronted with challenging situations" in Tallisman, Rymers, and in "this disciplinary proceeding." (Relator's Objections at p. 30) Although the Board was incorrect in its findings that Respondent committed misconduct, their reliance upon *Ake* was correct.

Further, the respondent in *Dayton Bar Assn. v. Ellison* (2008), 118 Ohio St.3d 128, was found to have engaged in misconduct, **including lying to a client about the status of a case**. The respondent had previously been disciplined for similar conduct, receiving a public reprimand. In *Ellison*, the respondent failed to respond to a summary judgment motion; her client's case was dismissed; and, she lied to the client to conceal the fact that the case had been dismissed. *Despite the finding of misconduct involving fraud, deceit, dishonesty, or misrepresentation; and the prior discipline of a public reprimand; this Court stayed the entire one-year suspension on probationary conditions*.

The Board found that Respondent's alleged transgressions, like those in *Ake*, were isolated, in cases of unusual circumstances and unlikely to recur; contrary to Relator's allegation that Respondent's alleged misconduct occurred over and over. The Panel considered the circumstances in which Respondent's alleged violations arose, considered the nature of the violations found, and considered the authorities cited as well as the matter in aggravation and mitigation of sanction, including Respondent's reputation, and recommended that Respondent's suspension be stayed. The Board adopted this recommendation. There is no evidence in the record that supports Relator's demand for this Court to impose an actual sanction against Respondent.

Relator's cited authority of *Cincinnati Bar Assn. v. Farrell* (2008), 119 Ohio St.3d 529, *Disciplinary Counsel v. Johnson* (2007), 113 Ohio St.3d 344, and *Disciplinary Counsel v. Holland* (2005), 106 Ohio St.3d 372 are each factually and legally distinguishable from this matter. In *Farrell* the respondent created fake documents, forged signatures and lied to at least one attorney.[18] In this matter, Respondent is not alleged to have fabricated letters, forged corporate letterhead, his spouse's signature, or lied about the authenticity of a signature. Relator's reliance upon *Farrell* is misplaced as the allegations in *Farrell* are not similar to the allegations against Respondent in this matter.

The respondent in *Johnson* served as guardian and was found to have pursued legal claims beyond the economic feasibility of recovering for his clients' benefit and by overworking

[18] Mr. Farrell planned and administered a "multistep process to defraud." Mr. Farrell forged letters about job offers, a supposedly official letter assuring the recipients of proper mail service, three letters about a bank's efforts to remedy credit "fraud" that was actually perpetrated by the respondent when he forged his wife's name to a power of attorney, lied about the authenticity of his wife's signature to an attorney, to obtain an increase in their line of credit; all because respondent's wife wanted to stay at home with the minor child and needed the attorney to make more money or the family would need to move to a smaller residence.

in each case beyond what was reasonable and necessary to protect his clients' interest. Mr. Johnson's wards were elderly, mentally incompetent and had already suffered greatly from the actions of a lawyer they trusted. The respondent in *Holland* acted out of self-interest, committed multiple offenses, and engaged in a pattern of wrongdoing because he **repeatedly overcharged the juvenile court for fees**.

The above analysis reveals that the Board's recommendation of a stayed suspension does not depart from this Court's precedent, as argued by Relator, but actually follows the same, and is entirely appropriate in the event that this Court determines a sanction.

In fact, there is ample evidence in the record which was presented at trial which supports this Court's dismissal of Relator's Amended Complaint in its entirety. In *Filkins, supra*, this Court held that relator did not establish by clear and convincing evidence the misconduct alleged, despite the panel finding otherwise. This Court found that while the panel contained "conscientious and dedicated individuals who had an opportunity to see and hear the witnesses and to judge their credibility... we also recognize that we must make the final determination using the clear-and-convincing evidence standard." This Court found that because the charges relied solely on the credibility of the witnesses and the evidence in the record undermined their credibility, the clear-and-convincing standard was not met. This Court disregarded the testimony of an attorney/witness offered by the relator in an attempt to discredit the respondent wherein the attorney claimed that the respondent "can be difficult at times and will fight in cases where others would settle." This Court concluded that while the witnesses "challenged respondent's style of practice, neither she nor any of relator's witnesses presented any evidence to attack respondent's credibility, the issue at stake here." This Court must note the fact that Respondent was the last witness to testify at trial and submitted a mountain of evidence,

testimony and exhibits in support of his defense. Relator had the opportunity to challenge Respondent's testimony and call any rebuttal witnesses, but did not. Respondent's testimony and exhibits were submitted virtually unchallenged by Relator.

V. RESPONDENT'S RESPONSE TO RELATOR'S OBJECTION TWO: RESPONDENT DID NOT VIOLATE RULE 8.4(D) IN COUNT ONE AND THE BOARD PROPERLY DISMISSED RELATOR'S ALLEGATIONS.

Relator's reliance upon *Cuyahoga County Bar Association v. Hardiman*, 100 Ohio St.3d 260, is inapplicable to this matter. Respondent was publically reprimanded for neglect of an entrusted legal matter and receiving a partial retainer and failing to properly deposit it into his account because he did not believe that an attorney client relationship existed. The respondent in *Hardiman* appeared to have engaged in certain actions on behalf of the child and then failed to appear for trial and such actions were found to be prejudicial to the administration of justice.

In *Akron Bar Assn. v. Markovich* (2008), 117 Ohio St.3d 313), in seven different cases the Respondent defied court orders, failed to attend to his clients, exhibited outrageous courtroom behavior and misused a client's trust account. Respondent engaged in a pattern of dishonesty from May of 2004 through March, 2005 in these cases. He failed to comply with a Probate Court Order; neglected the client and attempted to avoid responsibility for his conduct. He also misrepresented the facts regarding in an entry for voluntary dismissal in Federal Court. Likewise *Markovich* is simply not applicable to the facts before this Court.

Relator then cites *Disciplinary Counsel v. Robinson* (2010), 126 Ohio St.3d 371, where Respondent's egregious behavior warranted a one year suspension. In *Robinson*, the Respondent disclosed detailed information about his clients in his client's billing reports from his past law firm in violation of a confidentiality agreement. When the office was empty, Respondent packed

and removed seven boxes of documents which he took to his home. The firm terminated his employment and the following day he accepted a position at a new law firm.

Respondent's former law firm filed a civil lawsuit alleging that he had violated the non-solicitation and non-disclosure covenant of his employment agreement and sought injunctive relief. During the deposition and hearing, Respondent lied about what documents he had in his possession. During the civil case Respondent took his trial notebook into the restroom and destroyed the 2004-2007 billable hours exhibit. He later went home and took the boxes that he had taken from the firm and drove toward Downtown Columbus stopping to tear up and dispose of the confidential firm documents.

The respondent in *Robinson* engaged in those actions solely for his own benefit in an action to gain an advantage. The evidence presented to the Panel in this matter demonstrates that Respondent had no selfish motives but rather pursuant to a good faith belief that he needed to amend the Complaint based on Mr. Tallisman's failure to disclose assets.

The *Tallisman* court was well aware of each party's position in regard to the prenuptial agreement. The validity of that agreement was in dispute before the Court since 2005. There was no evidence presented that Respondent requested or received *ex parte* relief in relation to the Amended Complaints.

VI. CONCLUSION

It is hard to imagine that a fair evaluation of the record in this matter would result in any other conclusion other than that there is insufficient evidence to establish that Respondent violated Professional Rule of Conduct 5.1(c), 8.2(a), 8.4(c), and 8.4(d). Relator was required to prove the allegations by clear and convincing evidence. In Count One the Relator failed to

present more than a hunch proffered by James Cahn that Respondent had a dishonest motive in amending the pleadings.

Indeed, a review of the pleadings and testimony at the hearing confirms that is was undisputed that the validity of the prenuptial agreement was in argued by both parties from 2005 through 2007. It was Mr. Cahn himself who entered the prenuptial agreement into the record by attaching it to his 2005 Motion for Summary judgment. Relator's claim that Respondent had a secret motive is pure nonsense. As pointed out extensively in Respondent's Objections to the Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners, there is not one scintilla of evidence that the Respondent ever attempted to use either the Amended Complaint or the Second Amended Complaint to defend against the fraudulently titled Motion for Judgment on the pleadings.

The evidence presented at the hearing established that Respondent amended the complaint on two separate occasions because Mr. Tallisman was hiding assets. The irrefutable evidence proves that Alan Tallisman, by and through counsel James Cahn and James Lane, failed to turn over complete documentation and information regarding Mr. Tallisman's assets in discovery responses in 2005. The testimony of both attorneys Cahn and Lane at the hearing confirm that Respondent did not have all of the relevant information related to assets, insurance, and trusts accounts until April of 2007 and thereafter.

This testimony is further supported by the record with three motions to compel filed by Respondent, the sworn deposition testimony of Alan Tallisman, and the results of the first and second amended complaint. There is no other logical way to review the evidence. By seeking to amend the complaints to add additional defendants Respondent was following the evidence, and not seeking to mislead the Court.

As it relates to Counts Three, the Relator and the Board wholly ignore the improper motive of Eugene Lucci in his attempt to intervene in his girlfriend's divorce. Not only was his behavior improper, *it was not in a judicial capacity*. Eugene Lucci sought to be a litigant in the *Rymers* divorce. He inserted his judicial position as a sword in the favor of Amy Rymer and against Jeffrey Rymer. His judicial capacity is wholly irrelevant when he chose to become a party litigant.

Count Three turns on the actions in Lake County Common Pleas on June 3, 2009. Nicholas Gallo and Jeffry Rymers were served with Eugene Lucci's Motion to Intervene and witnessed an individual staring at Mr. Rymers in the hallway. Mr. Gallo and Mr. Rymer believed that man to be Eugene Lucci. The unopposed facts prove that Respondent was not present in the Lake County Common Pleas Court on June 3, 2009.

Respondent never claimed to have witnessed Eugene Lucci in the hallway staring at Jeffrey Rymers. He did not make any statements about Eugene Lucci in pleadings or otherwise. He did not instruct his associate to insert statements about Judge Lucci into pleadings or affidavits that were untrue.

The evidence shows that Nicholas Gallo confirmed that the person in the hallway was Eugene Lucci through Jeffrey Rymers eyewitness identification, and through his own independent research. Nicholas Gallo found Eugene Lucci on the internet and confirmed for himself that the person he saw in the hallway was in fact Eugene Lucci. He then prepared a detailed memo and drafted a Motion to Strike with supportive affidavits from himself and Jeffrey Rymers. All of this was done in good faith with a reasonable belief of the allegations asserted. *See Gardner supra.* Only after a grievance was filed did Respondent learn that the person in the

hallway was not Eugene Lucci, but was his bailiff. Respondent immediately withdrew the affidavits when that information came to light.

There is no precedent in Ohio that affords a judge that is a party to litigation special privileges because of his chosen profession. To even suggest so is contrary to the very fiber of our legal system. Respondent should not be sanctioned let alone receive an actual suspension where Relator has failed to prove misconduct by clear and convincing evidence.

Respectfully submitted,

Lawrence A. Sutter (0042664)
Stephanie D. Adams (0081822)
Sutter, O'Connell & Farchione
3600 Erieview Tower
1310 East 9th Street
Cleveland, Ohio 44114
(216) 928-2200
Fax: (216) 928-4400
Attorneys for Respondent

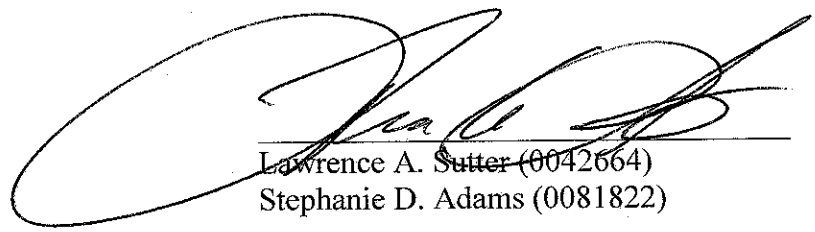
CERTIFICATE OF SERVICE

I hereby certify that the following was mailed via regular, U.S. mail this 17th day of May 2011 to the following:

Jonathan E. Coughlan
Lori J. Brown
Karen H. Osmond
Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

And hand delivered to:

Jonathan W. Marshall
The Supreme Court of Ohio
Board of Commissioners on Grievances and Discipline
65 South Front Street, 5th Floor
Columbus, Ohio 43215-3431



Lawrence A. Sutter (0042664)
Stephanie D. Adams (0081822)

The first part of the decision pertaining to Count One mirrors the Trial Brief of Relator. The Count below outlines the similarities between the two documents.

Decision and Trial Brief

Paragraph of Decision	Trial Brief Page Numbers
8	Page 2 (direct quote)
9	Page 2 (direct quote)
10	Page 2
13	Page 3
14	Pages 3 and 4
19	Page 7
21	Pages 8 and 9
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36	Page 13
37	Pages 13 and 14
39	Page 14
40	Pages 14 and 15
41	Page 15
42	Page 16 (direct quote)
43	Page 16
45	Page 17 (direct quote)
46	Page 17 (direct quote)
47	Page 17 (direct quote)
49	Page 18
50	Page 18 (direct quote)
51	Pages 18 and 19 (direct quote)