IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL	)	Case No. 2018-1746
	)	
Relator,	)	On Certified Report of the Board of
	)	Professional Conduct, Case No.
v.	)	2018-010
	)	
HON. TIMOTHY SOLOMON HORTON	)	
	)	
Respondent.	)	

OBJECTIONS OF RESPONDENT, TIMOTHY SOLOMON HORTON, TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF PROFESSIONAL CONDUCT, AND BRIEF IN SUPPORT

Rick L. Brunner (0012998)
Patrick M. Quinn (0081692)
Brunner Quinn
35 N. Fourth Street, Suite 200
Columbus, Ohio 43215
Telephone: (614) 241-5550
Facsimile: (614) 241-5551
Email: rlb@brunnerlaw.com
pmq@brunnerlaw.com
Attorneys for Respondent

Scott J. Drexel (0091467)
Audrey E. Varwig (0073265)
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Telephone: (614) 461-0256
Facsimile: (614) 461-7205
Email: Scott.Drexel@sc.ohio.gov
A.Varwig@sc.ohio.gov
Attorneys for Relator

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I. Introduction & Statement of Facts

Respondent, Timothy Solomon Horton, was admitted to the practice of law in the state of Ohio on May 13, 1996. Respondent was first elected to an unexpired term as Judge of the Franklin County Court of Common Pleas in November, 2006, where he served continuously until 2015. In February, 2015, Respondent was elected to serve on the Tenth District Court of Appeals.

Subsequent to the Board recommendation in this case, Respondent has submitted his resignation from the Court of Appeals effective February 28, 2019.

The Certified Complaint in this case contained three counts. Count One charged Respondent with violating Jud.Cond.R. 1.2, Prof.Cond.R. 8.4(b), and Prof.Cond.R. 8.4(c), all arising out of Respondent's criminal convictions and the facts underlying those convictions. Specifically, Respondent, on three occasions in 2014, made expenditures from his campaign funds which were excessive in amount given the circumstances, and therefore caused an "inaccurate" campaign finance report to be filed. These three expenditures, which totaled approximately $2,200, were each legitimate in purpose but were "unreasonable and excessive in amount" because they were either made in connection with a fundraiser to which only one person attended or because they were made at a time when Respondent was unopposed for the Court of Appeals seat. Report at ¶30. Respondent reported these expenditures to his campaign treasurer for inclusion of his campaign finance reports, and because they were excessive and unreasonable,

caused the filing of campaign finance reports which were inaccurate. Respondent therefore pled guilty to three first-degree misdemeanor violations of R.C. 3517.13(B), and was sentenced to ten days in jail, restitution, community service, and continued involvement with Alcoholics' Anonymous and the Ohio Lawyers Assistance Program. Report at ¶33. Based on the criminal conviction resulting from Respondent's guilty plea and the underlying misconduct, the Board found Respondent violated Jud.Cond.R. 1.2 and Prof.Cond.R. 8.4(b)[1].

Count Two of the Certified Complaint charged that Respondent instructed or acquiesced in his judicial staff completing campaign related tasks on work time and using Franklin County equipment or resources to complete non-judicial tasks. For example, the evidence adduced during the hearing demonstrated that on two occasions, Respondent asked his staff attorney Emily Vincent to compile information about cases that Respondent had previously decided. Report at ¶41. On one of these occasions, Ms. Vincent simply printed off a certificate of service from a pleading and provided it to Respondent, a task that took less than 15 minutes to complete. Transcript 94-94; Transcript 295. On the other occasions, Ms. Vincent completed the bulk of the requested work on her own personal time and using her own personal computer equipment. Transcript 289-290.

[1] The hearing Panel unanimously dismissed the charged violation of Prof.Cond.R. 8.4(c) in connection with the conviction and underlying misconduct.

Within the Franklin County Court of Common Pleas, each judge is permitted to have a personal staff consisting of a staff attorney, a bailiff, and a secretary[2]. Extensive testimony was introduced throughout the hearing that members of a judge's personal staff are exempt from overtime pay, are not subject to any established laws or policies with regard to timekeeping, and that "as a matter of practice, the [judicial staff] employees had a degree of flexibility in their schedules and working hours." Report at ¶18. *Cf.* R.C. 124.18(A) (establishing "[f]orty hours" as "the standard work week" for all "employees whose salary or wage is paid in whole or in part by the state…").

Count Two additionally charged a violation of Jud.Cond.R. 4.4(B), which required Respondent to "prohibit public employees subject to his or her direction or control from soliciting or receiving campaign contributions." The Rules in turn define "contributions" by reference to general elections laws as a "loan, gift, deposit, forgiveness of indebtedness, donation, advance, payment, or transfer of funds or anything of value . . . which contribution is made, received, or used for the purpose of influencing the results of an election." Jud.Cond.R. 4.6(B) (adopting the definition of "contribution" contained in R.C. 3517.01). Evidence throughout the hearing demonstrated that on fewer than ten occasions, Respondent asked Ms. Wyant to obtain checks payable from his campaign account to third parties (such as a county political party and several not-for-profit

[2] Judicial secretaries in that Court are ordinarily shared between two judges. However, because the General Division of the Franklin County Common Pleas Court consists of 17 judges, one secretary – Respondent's – worked for only one judge.

entities). Ms. Wyant testified that she travelled to the office of Respondent's campaign legal counsel, Attorney Don McTigue, obtained the checks, and delivered them to the applicable payee.

The Panel and the Board concluded Respondent committed each of the violations of Jud.Cond.R. 1.2 and 4.4(B) as charged in Count Two.

Count Three charged Respondent with engaging in inappropriate sexual comments and conduct with two individuals, Elise Wyant (who served as Respondent's judicial secretary and bailiff at the Court of Common Pleas) and M.B. (who served as an intern in Respondent's chambers during the summer of 2013). The Panel and the Board found this conduct violated Jud.Cond.R. 1.2, 1.3, 2.3(B), and Prof.Cond.R. 8.4(h).

Having heard all of the evidence over a five-day period, and finding the violations that it did, the Panel concluded that Respondent be suspended from the practice of law for two years, with the final year stayed on several conditions.

The Board rejected this, instead recommending that Respondent be indefinitely suspended. The Board's recommendation is wrong. It is not supported by the facts, by the precedents cited in the Report, or any other precedent of this Court.

II. Objection & Argument

A. The Panel erred by refusing to permit Respondent to introduce evidence as to the question of whether his conduct was unwelcome or not.

Throughout the entirety of Count Three, Relator was permitted to adduce evidence, particularly from Ms. Wyant and M.B., that they found comments or conduct

by Respondent unwelcome. The Panel and Board would ultimately come to conclude that Respondent subjected these two to unwanted words and deeds. *See, e.g.*, Report at ¶¶64, 74. But when Respondent sought to introduce evidence tending to show that conduct or words were not unwelcome, the Panel declined to allow Respondent to do so, requiring him to proffer for the record evidence that would tend to show that Respondent's conduct and words were not unwelcome. Transcript at 728-733; Transcript at 1109-1110.

This was prejudicial error. One of the specific violations charged was of Jud.Cond.R. 2.3(B), which prohibits Respondent from "in the performance of judicial duties, by words or conduct, manifest[ing] bias or prejudice, or engag[ing] in harassment based upon…sex." The comments to that Rule make clear that sexual harassment incorporates the concept of "verbal or physical conduct of a sexual nature that is unwelcome." Jud.Cond.R.2.3(B), Comment 4. And even more broadly, Relator's entire theory of Count Three has consistently been that Respondent harassed Ms. Wyant and M.B. by subjecting them to words and conduct that was unwelcome. *See, e.g.*, Report at ¶¶64, 72-74.

Thus, this is a case in which one of the charged Rule violations requires proof of conduct which is unwelcome, in which Relator's theory throughout is that Respondent subjected others to unwelcome conduct, and in which witnesses were themselves permitted to testify that conduct was unwelcome. As such, allowing Respondent to present evidence tending to show that his words and deeds—though distasteful, boorish,

and inappropriate—were nevertheless not unwelcome when viewed in their complete context, is an essential component of the basic due process right to defend himself. *See, e.g., Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, 880 N.E.2d 467, ¶32 ("…because of the severity of the sanctions available for violations of the Disciplinary Rules, a respondent's due process rights must be carefully balanced against the public interest in expeditiously resolving complaints of misconduct"); *Cleveland Metro Bar Assn. v. Pryatel*, 145 Ohio St.3d 398, 2016-Ohio-865, 49 N.E.3d 1286, ¶11 (due process in disciplinary proceedings includes the right for the respondent "to explain the circumstances surrounding his actions").

Context matters, and the rulings of the Panel and the Board deprived Respondent from defending himself with reference to that complete context, and deprived this Court of a complete record of the underlying events upon which to base its decision. As a result, this Court should remand for the conduct of a new hearing.

This Court's precedent support doing so. In *Disciplinary Counsel v. Smith*, 143 Ohio St.3d 325, 2015-Ohio-1304, 37 N.E.3d 1192, the essential theory of the charged violations was that the attorney billed clients and third-party administrators for work that was never actually performed. Smith contended that in order to adequately defend himself, he required access to various electronic databases which were maintained by the affected clients or administrators, and which would have shown that his billing practices were consistent with client directives. After he was denied access to those databases, the Board

recommended an indefinite suspension, and this Court reversed "in the interest of justice" for additional discovery and a new hearing.

Although factually quite different, the principle which flows from *Smith* is that a disciplinary respondent must be afforded the opportunity to obtain and present relevant evidence in his or her defense. When Attorney Smith could not do so because of discovery rulings of the Panel and Board, this Court found the interests of justice required a do-over. And here, where Mr. Horton could not present evidence directly relevant to rebut an element of Relator's theory—unwelcomeness—the same interests of justice require the same result here.

B. This Court should dismiss Count Two in its entirety.

The violations found by the Board with respect to Count Two are not supported by the evidence or the law. Boiled to their essence, the alleged violations consist of Respondent allowing the use of the "county time" or "work time" of his personal staff for campaign conduct, Respondent allowing the use of government property or resources for campaign activity, and Respondent failing to prohibit his judicial staff from soliciting or receiving campaign contributions.

Similar violations were alleged, considered, and rejected in *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, which also arose out of the

Franklin County Common Pleas Court[3]. Faced with allegations that Judge O'Neill violated the Code of Judicial Conduct "by utilizing county resources and personnel to promote her campaign…," the panel in that case correctly concluded that because her personal staff were "salaried professional[s] with flexible work hours," it could not be said "that such activities were in fact use of public resources." *Id.*, 103 Ohio St.3d at 302. Faced with allegations that Judge O'Neill used her judicial chambers and personal staff to stuff campaign envelopes, *Id.*, 103 Ohio St.3d at 299, the panel there founds that "processing campaign literature [in] Respondent's chambers…should not have occurred," but was not "habitual or more than minimal" so as to warrant the finding of a violation of the Rules. *Id.*, 103 Ohio.St.3d at 302.

The evidence in this case is the same as was present in *O'Neill*, and the result should have been the same as well. The Panel acknowledged the undisputed evidence that judicial staff in the Franklin County Court of Common Pleas are exempt, not entitled to overtime pay, had "as a matter of practice…a degree of flexibility in their schedules and working hours," and are not subject to established policies regarding timekeeping. Report at ¶18. Unlike employees of the State, there is no statute, rule, regulation, or policy mandating judicial staff of the Franklin County Common Pleas Court to work specific hours or a specific number of hours in a week. *Cf.* R.C. 124.18(A). That being the case, it

[3] Respondent heavily relied upon *O'Neill* in both his oral and written closing arguments. *See* Transcript at 1376-1378; Respondent's Closing Argument at 5-7, 10-11. The Board Report contains no discussion of or even reference to that case.

is impossible to say that any given moment or time of judicial staff "belongs" to the county. Although acknowledging this evidence, the Board never once squares it with the conclusion that Respondent acquiesced in Ms. Wyant or Ms. Vincent functionally stealing from the county by being paid for campaign work.

Similarly, the facts even as found by the Board amount to nothing more than *de minimis* and not "habitual or more than minimal" use of county equipment, like computers. *See* Report at ¶¶44-47 (citing Wyant testimony regarding the mailing of seven form letters). *Cf. O'Neill*, 103 Ohio.St.3d at 302 (judicial discipline not warranted where evidence does not demonstrate more than minimal or habitual use of government equipment).

Finally, the Board's finding of a violation of Jud.Cond.R. 4.4(B) rests upon the foundational legal error of conflating a "contribution" to a judicial campaign committee—which may not be "solicit[ed] or receive[d]" by a judicial employee under that Rule—with an expenditure by a judicial campaign committee to a third-party, which are unregulated by the Code of Judicial Conduct.

The Board acknowledged as such, finding that "Respondent asked Wyant to pick up campaign checks for several different organizations. Each of these checks were from already received campaign funds and represented expenditures made by the campaign committee." Report at ¶48 (record citations omitted). Contributions and expenditures are not the same thing. It is a plain legal error for the Board to simultaneously conclude that

Respondent asked Ms. Wyant to pick up something that constituted an expenditure while also concluding that Respondent violated a Rule regulating the handling of contributions.

Finally, there was testimony concerning a particular fundraiser held at Zanzibar, a local Central Ohio restaurant, in which Ms. Wyant alleged she gathered the contributions received at the end of the evening and took them home with her[4]. But if Judge O'Neill could herself take possession of a lockbox containing the checks received at a fundraiser and conduct the "purely ministerial function" of depositing them in the bank, *O'Neill*, 103 Ohio St.3d 301-302, then there is similarly no violation by Respondent with respect to this event.

At base then, none of the misconduct found by the Board with respect to Count Two is supported by the law or the facts. This Court should dismiss Count Two in its entirety.

C. The sanction recommended by the Board is not supported by this Court's precedents or warranted on the facts.

Overruling the Panel's recommendation of a two-year suspension with one year stayed on conditions, the Board instead recommended an indefinite suspension. This recommendation does not comport with this Court's prior precedents or the facts of this case.

[4] As Respondent noted below, these allegations are wholly absent from the Complaint, and should be disregarded on that basis as well.

As the Panel concluded, *see* Report at ¶129, and as the parties agreed, *see* Transcript 1368 (Relator closing argument) and 1374 (Respondent closing argument), the precedent applicable here comes from two lines of cases—those addressing reporting and financial issues underlying Counts One and Two on the one hand, and those addressing sexual harassment on the other.

In rejecting the Panel's recommendation of a two-year partially stayed suspension and instead recommending an indefinite suspension, the Board relied entirely on precedent from the sexual harassment line of cases. The Board explained that it believed Respondent's conduct was harmful towards vulnerable victims, Ms. Wyant and M.B., and amounted to an abuse of his authority. Report at 41. The Board specifically cited three cases: *Lake Cty. Bar. Assn. v. Mismas*, 139 Ohio St.3d 346, 2014-Ohio-2483, 11 N.E.3d 1180, *Disciplinary Counsel v. Skolnick*, 153 Ohio St.3d 283, 2018-Ohio-2990, 104 N.E.3d 775, and *Disciplinary Counsel v. Sarver*, Slip Op. No. 2018-Ohio-4717.

In *Mimas*, the attorney exchanged sexually inappropriate text messages with a student law clerk and demanded sexual favors as a condition of her continued employment with him. The severity of these messages and demands were such that the law clerk felt compelled to resign her employment with Mismas after only two weeks. Rejecting a Board recommendation of a public reprimand, this Court found that Mismas "did engage in undignified and unprofessional conduct by targeting an aspirant to the profession for sexual harassment," *Id.*, 2014-Ohio-2483 at ¶21, and decried the

respondent's "indicat[ion] that [the law clerk's] continued employment depended on her compliance with his demands and repeatedly insisted that he was not joking." *Id.*, 2014-Ohio-2843 at ¶23. Based on this misconduct, the Court concluded that a one-year suspension with six months stayed was the correct sanction "necessary to protect the public from future misconduct." *Id.*, 2014-Ohio-2843 at ¶26. In contrast, there is no allegation here that participation in sexual comments or contact with Respondent was ever a condition of anyone's job or that they were subject to a *quid pro quo*; as the Panel recognized, Ms. Wyant ceased socializing with Respondent in June, 2014 (four months before her resignation from the Common Pleas Court), was not punished for doing so, and in fact received a promotion to the position of bailiff after doing so.

Attorney Skolnick verbally harassed and degraded a paralegal throughout her entire multi-year employment with his law firm. He "directed frequent profanity-laced verbal tirades toward and sexually harassed a vulnerable employee who needed her job to support her family. During [the paralegal's] two-and-a-half-year tenure, Skolnick berated her for her physical appearance, dress, education, and parenting skills. He called her a bitch, a 'hoe,' a dirtbag, and a piece of shit, and he told her that he hoped she would die." *Skolnick*, 2018-Ohio-2990 at ¶12. Rejecting a board-recommended six month stayed suspension, this Court concluded "that a sanction greater…is necessary not only to protect the public and the dignity of the legal system but also to deter future misconduct

of this nature by Skolnick and other attorneys…," and imposed a one-year suspension with six months stayed. *Id.*, 2018-Ohio-2990 at ¶14.

Attorney Sarver met with a potential client about pending criminal charges against her, had sex with her immediately following their meeting, and later advised her to turn off the GPS tracking system on her phone so she could evade arrest. After Sarver was appointed (at his request) to defend the client, the two engaged in sexual activity over a period of months, during which time Sarver twice lied to the judge presiding over the criminal case by denying the existence of a sexual relationship. Sarver ultimately pled guilty to criminal offenses arising out of this relationship, including to obstructing official business. This Court rejected a Board's recommendation of a fully stayed two-year suspension, for "ignor[ing] the power imbalance between an indigent client and court-appointed defense counsel and…discount[ing] the inherent harm that results when an attorney abuses the attorney-client relationship in pursuit of the attorney's own sexual gratification." *Id.*, 2018-Ohio-4717 at ¶31. Ultimately, the Court imposed a two-year suspension with 18 months stayed due to "Sarver's misconduct of engaging in a sexual relationship with a client in a criminal case—during which he also obstructed official business, committed trespass, and lied about the relationship to a judge…" *Id.* But here, there is no allegation that Respondent obstructed any official proceedings, or that he lied to any authorities, or that he engaged in what have been described as "the most disturbing attorney-disciplinary cases" in which a lawyer engages in sexual conduct

while representing a client against criminal charges. *Id.*, 2018-Ohio-4717 at ¶41 (Fischer, J., concurring and dissenting in part).

In each of the cases relied upon most prominently by the Board, the respondent was sanctioned with an actual suspension of six months and stayed suspensions of varying lengths (six months in *Mismas* and *Skolnick*, and eighteen months stayed in *Sarver*) and conditions. On its face, then, the Board's reliance on these cases imposing partially-stayed suspensions to justify the recommendation of an indefinite suspension is curious.

Perhaps recognizing the absence of applicable precedent to support its recommendation, the Board sought to distinguish the very same cases it relied upon, ruling that Respondent deserved a more severe sanction than in *Mismas*, *Skolnick*, and *Sarver* because of his position as a judge and the presence of multiple victims. Report at 41. The problem with the Board's citation to these factors as warranting an elevation in sanction is that other cases—which were explicitly addressed by the Panel and left unmentioned by the Board—addressed these factors, and even then, still do not support an indefinite suspension.

For example, the Panel additionally cited *Cincinnati Bar Assn. v. Young*, 89 Ohio St.3d 306, 2000-Ohio-160, 731 N.E.2d 631 and *Disciplinary Counsel v. Campbell*, 68 Ohio St.3d 7, 1993-Ohio-8, 623 N.E.2d 24[5].

Attorney Young received a two-year suspension with one stayed. In addition to sexually harassing four of his employees over a three-year period, Respondent explicitly threatened to interfere in an official proceeding involving two of them – pending or contemplated character and fitness applications – and presented minimal evidence in mitigation. *Cincinnati Bar Assn. v. Young*, 89 Ohio St.3d 306, 2000-Ohio-160, 731 N.E.2d 631. In contrast, Respondent here did not threaten to interfere with any official proceeding and has presented substantial mitigation, including substantial evidence that his conduct has improved markedly since becoming sober.

Judge Campbell received an actual one-year suspension for engaging in unwelcome sexual comments or contact. Judge Campbell did so for a time period spanning 14 years. And in "all but one instance, the complainant was someone over

[5] The Panel also cited *Ohio State Bar Assn. v. Mason*, 152 Ohio St.3d 228, 2017-Ohio-9215, 94 N.E.3d 556 for the proposition that disbarment of respondent here would not be improper. Former Judge Mason's conduct is not even remotely comparable to that at issue here. He assaulted his wife, "struck [her] repeatedly in the head, hit [her] head against the armrest, the dashboard, and the window of the passenger door, and bit [her] on [her] face." When his wife was able to escape the car, he "got out and began to strike [her] as she lay on the ground…Mason and [his wife's] two children (ages six and four at the time) were seated in the back seat and witnessed the events." Judge Mason was convicted of attempted felonious assault and sentenced to two years' incarceration. He is presently under indictment for the murder of his wife. Nothing that Respondent has done here, or even been accused of doing, is even remotely comparable to the brutal assault Judge Mason perpetrated on his wife in front of their small children.

whom respondent exercised authority either directly as an employer or as a judge before whom the complainant was required to appear." *Disciplinary Counsel v. Campbell*, 68 Ohio St.3d 7, 1993-Ohio-8, 623 N.E.2d 24. And so, the Court imposed an actual suspension because his behavior continued even after objection from the complainant. *Id.*, 68 Ohio St.3d at 11. Respondent's conduct, even as alleged by Relator, is not part and parcel of a decade-and-a-half campaign of harassment, as was Judge Campbell's conduct. It was confined instead to a discrete period in time, and the unrebutted evidence is that Respondent has not engaged in any inappropriate comments or contact since assuming his seat on the Court of Appeals more than four years ago. It did not occur with attorneys or litigants who appeared before him. And with respect to M.B. in particular, the bulk of the complained-about conduct occurred at a time that Respondent was not her employer.

Harmonizing all of this precedent leads to the conclusion that even the factors highlighted by the Board do not support an indefinite suspension. The Board found multiple victims here; Attorney Young harassed four employees with inappropriate sexually-themed comments, physically assaulted one of them with a telephone and implied to several of them that he could interfere with their Character and Fitness applications. *Young*, 89 Ohio St.3d at 310-311, 312. The Board imposed a heightened sanction because Respondent was a Judge; so was Judge Campbell, who engaged in unwelcome sexual contact and comments over a 14 year time period with multiple persons, all but one of which were "someone over whom respondent exercised authority

either directly as an employer or as a judge before whom the complainant was required to appear." *Campbell*, 68 Ohio St.3d at 7-8. The Board found that the existence of additional violations separate and apart from those springing from his relationships with Ms. Wyant and M.B. warranted a heightened sanction; But so too did Attorney Young, who violated then-applicable DR 9-101(C) by implying that he could improperly influence the Character and Fitness applications of several of the employees who rebuffed his advances or left their employment because of them. Thus, the same factors cited by the Board have been equally present in this Court's prior cases, and they have not resulted in the same recommended sanction.

Finally, that an indefinite suspension is an unduly harsh sanction here is further demonstrated by analogous cases that the Board did not address. *See Disciplinary Counsel v. Quatman*, 108 Ohio St.3d 389, 2006-Ohio-1196, 843 N.E.2d 1205 (fully stayed suspension for attorney who inappropriately touched a client, spoke to her inappropriately, and subsequently engaged in deception during the ensuing disciplinary process); *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 2004-Ohio-743, 804 N.E.2d 423 (fully-stayed suspension for attorney who made unsolicited and inappropriate sexual comments to one client and engaged in an impermissible sexual relationship with another); *Disciplinary Counsel v. Hines*, 133 Ohio St.3d 166, 2012-Ohio-3929, 977 N.E.2d 575 (imposing fully-stayed suspension on attorney who engaged in inappropriate sexual relationship with a vulnerable and who compromised her legal matter by leaving her without counsel at a

critical juncture); *Disciplinary Counsel v. Siewert*, 130 Ohio st.3d 402, 2011-Ohio-5935, 958 N.E.2d 946 (fully-stayed suspension imposed on attorney for engaging in inappropriate sexual relationship with a client; recognizing that "we have publicly reprimanded attorneys for developing a sexual relationship with a client if the affair is legal and consensual and has not compromised the client's interests," but elevating sanction based on prior discipline).

On balance then, the most analogous cases addressing sexual harassment or other non-criminal sexual impropriety should result in a fully stayed suspension.

With respect to the cases involving misreporting or the misuse of government funds or property by attorneys who are public officials, the cases stand for the proposition that a public reprimand or a stayed suspension is the appropriate sanction.

Governor Taft affirmatively failed to disclose, over a seven-year period, more than 50 gifts received worth more than $6,000; he was publicly reprimanded. *Disciplinary Counsel v. Taft*, 112 Ohio St.3d 155, 2006-Ohio-6525, 858 N.E.2d 414, ¶¶5-8. Attorney Gwinn, who was a candidate for county prosecutor, was publicly reprimanded for failing to disclose campaign contributions. *Disciplinary Counsel v. Gwinn*, 138 Ohio St.3d 167, 2014-Ohio-101, 4 N.E.3d 1039, ¶¶1-3. Mayor Costabile failed for almost five years to disclose in excess of $100,000 of reportable income; he too was reprimanded. *Disciplinary Counsel v. Costabile*, 143 Ohio St.3d 331, 2015-Ohio-2082, 37 N.E.3d 1197, ¶¶1-3.

Indeed, when the sorts of non-disclosures or misuse of funds result in a sanction more severe than a reprimand, it is because there are aggravating factors not present here. Attorney Forbes received a fully stayed six-month suspension after failing for ten years to disclose more than $30,000 worth of gifts and travel expenses he had received. He received this fully stayed suspension after being convicted of "accepting gratuities offered to curry favor and obtain substantial and improper influence in the performance of his duties as a public official" – a crime that the average person on the street would reasonably understand to be a form of bribery. *Disciplinary Counsel v. Forbes*, 122 Ohio St.3d 171, 2009-Ohio-2623, 909 N.E.2d 629, ¶18. Attorney General Dann received an actual suspension of six months, but only after receiving and failing to disclose nearly $40,000 of personal benefits paid directly to him, being convicted of illegally soliciting compensation to perform his official duties or acts within his official capacity, and after having already been previously disciplined by this Court. *Disciplinary Counsel v. Dann*, 134 Ohio St.3d 68, 2012-Ohio-5337, 979 N.E.2d 1263, ¶¶6-7

So, the question becomes how to reconcile two lines of cases, one of which suggests that the proper disposition is a term suspension with substantial portions stayed, and the other of which suggests that a public reprimand or fully-stayed suspension is appropriate.

This is not to say that this is an exercise in simple arithmetic. Although the Board's Rules and Regulations proscribe identified aggravating and mitigating factors, this Court

is "not limited to the factors specified in the rule but may take into account 'all relevant factors' in determining what sanction to impose." *Ohio State Bar Assn. v. Resnick*, 128 Ohio St.3d 56, 2010-Ohio-6147, 941 N.E.2d 1175.

One of those relevant factors that cannot be overlooked here is Respondent's battle with alcohol. Respondent acknowledged during the hearing that he is an alcoholic. Transcript at 1287. He has been sober since December 5, 2015. *Id.* He has received outpatient treatment for chemical dependency and was party to an OLAP contract that ran from late 2014 through early 2018. Transcript at 1288-1289; 1039-1040. OLAP Executive Director Mote testified that Respondent successfully completed his OLAP contract. Transcript at 1039-1044. Respondent continues to participate in AA meetings three times per week and maintains regular contact with his sponsor, David Pemberton. Transcript at 1287-1288. Although the Respondent concedes that he did not present evidence of the sort discussed in Gov. Bar. R. V, 13(C)(7), faithful application of the principle that this Court is not bound by the specific factors identified in that rule, *Resnick, supra*, nevertheless supports the notion that Respondent's struggle with alcohol is entitled to be considered in mitigation. *See Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235, ¶8 (identifying alcoholism and subsequent dedication to recovery as a mitigating factor, based solely on the testimony of OLAP Director Mote).

The Board ultimately ascribed little to no weight to Respondent's admitted alcoholism and subsequent treatment, largely on the theory that some of the found

misconduct took place during times when Respondent was not drinking. *See, e.g.*, Report at ¶122. If it is in fact the case that Respondent's use of alcohol played no part in the events at issue, then the Board's imposed conditions of reinstatement on continued participation in Alcoholics' Anonymous and submission to a new OLAP evaluation is unnecessary. The Board cannot logically have it both ways: if Respondent's previous use of alcohol is enough of a factor to warrant steps to guard against relapse as reinstatement conditions, then it necessarily has to also be sufficient to warrant consideration in mitigation.

Furthermore, it should also be recognized that this misconduct at issue in this case is centered around a narrow band of time in an otherwise unblemished career of more than twenty years as a lawyer and public servant. The unrebutted testimony, from those that knew Respondent before he began drinking and those that have interacted with him since he has stopped drinking is that he did not and has not engaged in any misconduct. And, as noted above, Respondent has tendered his resignation as a judge, and will have left the bench entirely by the time this Court considers this matter.

Finally, it is undisputed that Respondent has no prior disciplinary record, Report at ¶114, and the evidence adduced during the hearing is that Respondent maintains a positive reputation in the community, Report at ¶118. With respect to Count One, Respondent has suffered punishment via the criminal process. Report at ¶115.

At base, this Court has repeatedly recognized that "[t]he purpose of the attorney-discipline system is to protect the public and allow us to ascertain a lawyer's fitness to practice law." *Trumbull County Bar Assn. v. Large*, 154 Ohio St.3d 262, 2018-Ohio-4074, ¶23 quoting *Toledo Bar Assn. v. Harvey*, 150 Ohio St.3d 74, 2017-Ohio-4022, 78 N.E.3d 875.

Finally, precedent matters. The Panel discussed several cases in its initial report, the Board considered several others, and even more have been addressed above. What is striking is the absence of comparable or analogous cases which have resulted in indefinite suspensions. We are not here "to punish the errant lawyer, but to protect the public." *Toledo Bar Assn. v. Hales*, 120 Ohio St.3d 340, 2008-Ohio-6201, 899 N.E.2d 130, ¶21. And yet the absence of authority imposing similar sanctions for similar conduct makes it difficult to view the Board's recommendation here as anything other than punitive.

It is noteworthy that although none of the cases cited by the Board impose indefinite suspensions in cases analogous to this one, many of them involve this Court's rejection of Board-recommended sanctions as too lenient. *See, e.g., Mismas*, 2014-Ohio-2483 at ¶20; *Sarver*, 2018-Ohio-4717 at ¶¶2-3; *Skolnick*, 2018-Ohio-2990 at ¶14. The Board's recommendation of an indefinite suspension here suggests that the pendulum has swung too far in the other direction. Rather than attempting to faithfully apply applicable precedent, the Board has instead imposed an overly punitive sanction untethered from case law, the record in this case, or the purposes of the disciplinary process.

What emerges from the record below is judge and a lawyer who made significant mistakes, who has paid for those mistakes, and who expects to continue to pay for those mistakes. But consideration of the mitigating factors, a view towards faithful application of precedent, and an understanding that the goal of this system is not to punish, but rather to protect, the recommendation of the Board should be rejected.

III. Conclusion

For all of these reasons, Respondent respectfully objects to the recommendation of the Board that he be indefinitely suspended. Instead, Respondent respectfully submits that the proper outcome here is (1) to sustain the objection to the refusal to admit evidence relevant to the question of whether Respondent's conduct was unwelcome or not, and remand for a new hearing; or alternatively, (2) to find no violation and dismiss Count Two of the Complaint, and (3) to impose a sanction no greater than a suspension fully stayed on the conditions outlined by the Board.

Respectfully Submitted,

/s Patrick M. Quinn
Rick L. Brunner (0012998)
Patrick M. Quinn (0081692)
BRUNNER QUINN
35 N. Fourth Street, Suite 200
Columbus, Ohio 43215
Telephone: (614) 241-5550
Facsimile: (614) 241-5551
Email: rlb@brunnerlaw.com
pmq@brunnerlaw.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been served via electronic mail this 28th day of January, 2019 upon the following:

Scott J. Drexel
Audrey E. Varwig
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Email: Scott.Drexel@sc.ohio.gov
A.Varwig@sc.ohio.gov
Attorneys for Relator

/s Patrick M. Quinn
Patrick M. Quinn (0081692)