IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	Case No. 2018-1746
	:	
Relator,	:	
	:	
v.	:	On Certified Report by the Board of
	:	Professional Conduct of the Supreme Court,
Timothy Solomon Horton,	:	No. 2018-010
	:	
Respondent.	:	

RELATOR'S ANSWER BRIEF

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INTRODUCTION

This court has declared, "It is of utmost importance that the public have confidence in the integrity and impartiality of the judiciary.' And we have recognized that misconduct committed by a judge vested with the public's trust causes incalculable harm to the public perception of the legal system." *Disciplinary Counsel v. Hoskins,* 119 Ohio St.3d 17, 2008-Ohio-3194, 891 N.E.2d 324, ¶ 84, quoting *Disciplinary Counsel v. Allen*, 79 Ohio St.3d 494, 495, 684 N.E.2d 31 (1997). The respondent, Timothy Solomon Horton, was a judge when he engaged in multiple, dishonest and illegal acts; misused court property, staff and resources in furtherance of his judicial campaign, including directing his staff to solicit, receive, handle and deliver campaign contributions; and abused the power and prestige of his judicial office to sexually harass his female staff both inside and outside the courthouse. An indefinite suspension is appropriate in order to protect the public and the dignity of the judiciary, restore public confidence in the integrity of the judiciary, and deter future misconduct.

STATEMENT OF FACTS

Relator charged Horton with nine ethical violations in a three-count complaint arising from conduct in his personal and judicial capacity that occurred from approximately mid-2013 until one of his employees complained to court administration on October 21, 2014. (Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct, ("Report"). During this time, he was serving as judge of the Franklin County Common Pleas Court. (Report ¶ 11.) The board held a five-day hearing on relator's complaint, during which it heard testimony from seventeen witnesses, including Horton. (*Id.* at ¶ 5, 7; See also, Hearing Transcript.)

After considering the testimony and exhibits entered into evidence, the board issued its Findings of Fact, Conclusions of Law and Recommendation of the Board of Professional Conduct on December 7, 2018. The board found that Horton violated the Code of Judicial Conduct and the Rules of Professional Conduct. (*Id.* at ¶ 37, 58, 109.) The board also found the existence of several aggravating factors, including multiple violations; refusal to accept responsibility; victim blaming; pattern of misconduct; dishonest or selfish motive; lack of credibility; misconduct constituting sexual harassment; and detrimental effect on at least one victim, who was a former employee/legal intern. (*Id.* at ¶ 110.) The only mitigating factors it found were the absence of prior discipline and the imposition of other penalties and sanctions. (*Id.* at ¶ 114-115.) Based upon the violations, the mitigating and aggravating factors, and the court's precedent, the board recommended that the court indefinitely suspend Horton from the practice of law in Ohio. (Report, pp. 41-42.)

Count One – Criminal Conviction

There is no dispute that Horton violated Jud.Cond.R. 1.2 when he committed and was subsequently convicted of three first-degree misdemeanor violations of R.C. 3517.13(B) for willfully reporting expenditures to his campaign treasurer that he knew were excessive and unreasonable in amount, thereby causing inaccurate finance reports to be filed with the Ohio Secretary of State. (*Id.* at ¶ 37.) The board found that this conduct also violated Prof.Cond.R. 8.4(b) because his illegal acts reflect adversely on his honesty or trustworthiness. (*Id.*)

Count Two – Misuse of County Resources and Staff

Count Two involves Horton's misuse of court resources and staff in furtherance of his judicial campaign for the Tenth District Court of Appeals. Horton's staff positions included a staff attorney, secretary and bailiff who were court employees and were expected to work 80

hours in a 2-week period. (Tr. I 183.) In November 2013, Horton held a meeting in chambers with his staff, including his staff attorney, Emily Vincent, his bailiff, Fayth McCallum, and his secretary, Elise Wyant, during which he expressed his expectation that they work on his campaign for the court of appeals. (Report ¶ 40.) Horton subsequently directed his staff attorney, Vincent, to compile information about cases he previously decided in order to assist him in obtaining the mayor's endorsement of his candidacy and to solicit contributions from attorneys who were involved in cases he presided over. (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, "Objections," p. 2; Report ¶ 41.) He never told Vincent not to complete these tasks during the work day. (Tr. I 255.)

Horton also required his secretary, Wyant, to work for his campaign. (Report ¶ 43.) She worked on Horton's campaign during the workday using the county computer and telephone. (*Id.*) Wyant testified, "Whenever something would come across my desk, whether it be text or e-mail, whatever time of the day it was, I was expected to do the work." (Tr. II 436.) Horton knew that Wyant was not using personal time to work on his campaign. (Report ¶ 56; Tr. II 587.) Most days they would go out to lunch for an hour-and-a-half. (Report ¶ 19.) And she rarely worked late. "Maybe a couples times, but nothing regular consistently." (Tr. II 486.) In addition, Wyant attended at least five all-day golf outings with Horton and he specifically told her she did not need to take leave while she did so. (Report ¶ 56.)

Wyant performed various tasks for Horton's campaign. Horton instructed her to prepare letters and make phone calls on his behalf, which she did using the county computer and a county telephone that she used for her work-related tasks. (*Id.* at ¶ 43.) Horton admits that, on multiple occasions, he asked Wyant to obtain checks from legal counsel for his campaign during

the workday and deliver them to the recipients. (Objections at p. 3-4.) Wyant requested issuance of the checks, picked them up, and delivered them – all during her workday. (Report ¶ 48; Tr. II 472-478; Exs. 9, 10.)

These were not the only instances on which Wyant handled campaign funds. On two occasions, attorneys handed Wyant, as Horton's secretary, contribution checks in the courthouse during her workday. (Report ¶ 50.) She then delivered them to Horton's campaign consultant, Bridget Tupes, during the workday. (*Id*. at ¶ 50, 52.) When Wyant informed Horton about these contributions, he did not admonish her for accepting them. Instead, he asked about the amounts of the contributions. (*Id.* at ¶ 52.)

Horton also asked Wyant to handle campaign contributions during a campaign fundraiser after his campaign coordinator, Tupes, left early to celebrate her birthday. (*Id.* at ¶ 53; Tr. II 437.) Horton knew that Tupes would be leaving the fundraiser before it was over. (Tr. II 355.) Wyant did as she was asked and, the next day, she brought the contributions to work and asked Vincent to deliver them to Tupes, because Wyant was going to lunch with Horton. (Report ¶ 53.) Vincent obliged, delivering the contributions to Tupes just outside the courthouse. (*Id.*; Tr. I 255-256.)

The board found that Horton's misconduct violated Jud.Cond.R. 1.2 (a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety) and Jud.Cond.R. 4.4(B) (a judicial candidate shall prohibit public employees subject to his or her direction or control from soliciting or receiving campaign contributions). (Report ¶ 58.)

Count Three – Inappropriate Sexual Conduct

Count Three involves Horton's inappropriate sexual conduct and harassment of his staff inside and outside the courthouse. (*Id.* at ¶ 59.) The board found that respondent repeatedly made sexual and suggestive comments to his staff and others, both inside the courthouse and in public. (*Id.* at ¶ 27.)

The board did not find that Horton's staff desired, initiated or perpetuated his inappropriate sexual conduct. Both Wyant and Horton's former female intern, MB, testified that Horton's harassing words and actions were not welcome. The panel determined they were "highly credible" witnesses. (*Id.* at ¶ 60, 64, 65, 72-75, 77, 83, 93, 95.)

Horton's campaign consultant, Bridget Tupes, witnessed Horton's harassment of Wyant. On three to five occasions, she heard Horton say that Wyant looked "sexy." (*Id.* at ¶ 82; Tr. II 407-408.) She heard him make this comment about other women as well. (*Id.*) Tupes also heard Horton say that he wanted to have sex with women, typically Wyant. (*Id.*) Horton sometimes even made these comments when Wyant was not present. (Tr. II 405-406.)

Horton initiated the flirtation with Wyant. (Tr. II 398, 400.) Tupes never heard Wyant say that Horton looked sexy. (*Id.* at 407.) Likewise, Tupes "frequently" heard Horton make comments to Wyant about her body, but Tupes never heard Wyant make a similar comment to Horton. (*Id.* at 409.)

Tupes never experienced this degree of sexual innuendo or suggestion of intercourse in any other campaign. (*Id.* at 414.) It made her uncomfortable. (*Id.* at 365.)

Horton also made inappropriate sexual comments to his staff attorney, Vincent. He once told her that the tights she was wearing were "sexy." (Report ¶ 75.) This made Vincent uncomfortable, so she never wore those tights again. (*Id.*)

On another occasion, during a happy hour Vincent attended with Horton and two of Horton's other female employees, Horton talked about how he would make over each of them, including how he would dress them and style their hair. (*Id.*) When he got to Vincent, Horton stopped himself, stating, "Oh, I'm going to stop now before I get in trouble." (*Id.*) Horton's comments made Vincent uncomfortable but she never mentioned them to anyone because "he's a sitting judge and there's a – an imbalance of power there." (*Id.*) Horton did not proffer any testimony that his physical assessment of Vincent and his other female employees was "not unwelcome" or that they initiated and perpetuated his comments.

Horton groomed his employees to follow his lead. (Report ¶ 70, 73.) He repeatedly talked to them about loyalty. (*Id.* at ¶ 71; Tr. II 434-435; III 641, 659; IV 903.) He emphasized the power he had as a judge by discussing attorneys whom he helped advance in their careers. (Report ¶ 71.)

Wyant understood that she was expected to be at Horton's "beck and call." (*Id.* at ¶ 63.) He often told her that she was "sexy" and "hot." (*Id*.) He also told her that wanted to have sex with her. (*Id*.) He made the same comments to his former intern, MB. (*Id.* at ¶ 70.) He also told MB that he wanted to "fuck [her] in the ass," a comment he had previously made to Wyant. (*Id*. at ¶ 70, 60.) On three separate occasions, Horton insisted that his friends grope MB on her bottom and bare breasts. (*Id*. at ¶ 74.) She eventually consented to having oral sex with Horton because it was what he wanted. (*Id.* at ¶ 73.)

The explicit details of countless instances on which Horton sexually harassed his employees, and other women, through written words, spoken words, and physical acts are set forth at length in paragraphs 60 through 107 of the board's report. Significantly, Horton did not object to these factual findings and credibility determinations.

Horton may have been drinking when he engaged in sexual harassment of his employees while he was outside the courthouse, but he was sober when he made sexual and suggestive comments to them during the workday. (*Id.* at ¶ 111; Tr. III 633, 645-646, 722; IV 907, 1110.) Horton agrees that he did not meet the requirements for mitigating credit due to the existence of a substance abuse or other disorder under Gov.Bar R. V(13)(C)(7). (Objections at p. 20.)

The board found that Horton violated Jud.Cond.R. 1.2 (a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety); Jud.Cond.R. 1.3 (a judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so); Jud.Cond.R. 2.3(B) (a judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice or engage in harassment); and Prof.Cond.R. 8.4(h) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law). (Report ¶ 109.)

Almost two months after the board issued its report, Horton submitted his resignation as judge on the Tenth District Court of Appeals. (Objections at p. 1.) At approximately the same time, Horton objected to the board's report, claiming that the board: (1) violated his due process rights; (2) wrongly decided Count Two; and (3) recommended a sanction that is not supported by precedent or warranted by the facts.

Horton's objections are without merit. In order to protect the public and the dignity of the judiciary, restore public confidence in the integrity of the judiciary, and deter future misconduct, relator respectfully submits that the court overrule Horton's objections, adopt the board's recommendation and indefinitely suspend Horton from the practice of law.

ARGUMENT

Answer to Objection No. 1:
Horton's due process rights were satisfied because the board afforded him the opportunity to explain the circumstances surrounding his actions.

"[D]ue process requirements in attorney-discipline proceedings have been satisfied when the respondent is afforded a hearing, the right to issue subpoenas and depose witnesses, and an opportunity for preparation to explain the circumstances surrounding his actions." *Disciplinary Counsel v. Character*, 129 Ohio St.3d 60, 2011-Ohio-2902, 950 N.E.2d 177, ¶ 76, quoting *In re Judicial Campaign Complaint Against Carr*, 76 Ohio St.3d 320, 322, 667 N.E.2d 956 (1996). Since Horton was afforded all of these opportunities, the board did not violate his due process rights. Horton's reliance upon *Disciplinary Counsel v. Smith* is misplaced because he was not prevented from utilizing subpoenas like the respondent in that case. 143 Ohio St.3d 325, 2015-Ohio-1304, 37 N.E.3d 1192.

The result in this case is not the result of a lack of due process. During the five-day hearing, Horton had the opportunity to explain the circumstances surrounding his actions. He testified that his words and actions towards the victims of his misconduct were "not unwelcome." With respect to Wyant, Horton testified that no one told him that she was uncomfortable or that she found his comments of a sexual nature unwelcome or unwanted. Tr. V 1254. With respect to his former intern, MB, Horton asserted that, "based on her activities and what she said and did, there was no question that this was consensual contact, and that's putting it kindly." Tr. V 1279. The board determined that Horton was not credible. Report ¶ 112.

Not only did the board reject Horton's "they gave as good as they got" defense, but it found that it amounted to victim blaming and determined it to be an aggravating factor to his

misconduct. Report ¶ 110. Since the board considered Horton's defense, the court need not remand the case for a new trial to receive further evidence of victim blaming.

Horton claims that the board denied him due process because it prohibited him from eliciting testimony from certain witnesses that would purportedly tend to show his harassing words and actions were "not unwelcome." This court reviews the panel chair's evidentiary rulings under an abuse-of-discretion standard. *Disciplinary Counsel v. Gaul*, 127 Ohio St.3d 16, 2010-Ohio-4831, 936 N.E.2d 28, ¶ 49. Unless the panel chair abused his discretion, his ruling will not be overturned.

Abuse of discretion is defined as conduct that is unreasonable, arbitrary or unconscionable. *State v. Beasley*, 152 Ohio St.3d 470, 2018-Ohio-16, 97 N.E.3d 474, ¶ 12, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). And "an 'arbitrary' decision is one made 'without consideration of or regard for facts [or] circumstances.'" *Id.* quoting *Blacks Law Dictionary* 125 (10th Ed. 2014). In *Beasley*, the court reviewed a decision by a trial court that rejected a plea consistent with its blanket policy of not accepting no-contest pleas. The court found that such a policy does not consider the facts and circumstances of each case and is, therefore, arbitrary.

Here, the panel chair limited Horton's presentation of evidence for various reasons based upon the facts and circumstances. In response to relator's objections, the panel chair limited Horton's cross-examination of MB and Wyant based upon relevance (Tr. II 532, 534, 556, 577; III 697 698, 706, 707, 709), improper attempts at impeachment (Tr. III 703, 708, 709), repetition (Tr. III 715), and improper tone (Tr. II 538). In addition, Horton's direct examination of Atiba Jones was limited on the basis of relevance. Tr. IV 1106-1107.

On one occasion, the panel chair explained that each and every instance in which Wyant talked to Horton about her sex life was not relevant to the proceedings. The panel chair stated, "But considering she's not subject to the canons of the Judicial Code or to the Code of Professional Conduct, I'm not certain they're relevant so it's proffered for the record, but go on to your next topic." Tr. 11 534. It cannot be said that the panel chair was unreasonable, arbitrary or unconscionable.

Horton also sought to introduce testimony from Wyant regarding her sexual relations with other men. Tr. III 728-731. It appears that Horton would have this court infer that, because Wyant engaged in sexual relations with other men, she welcomed sexual harassment from Horton. Since this proposition is illogical, the panel chair's decision to exclude the proffered testimony was not unreasonable, arbitrary or unconscionable.

Horton also proffered testimony from the former court administrator, Atiba Jones, regarding Wyant and MB's behavior when they were at a bar one evening with Horton. Tr. IV 1109-1110. The panel chair explained that Jones' assessment of Wyant and MB's activity that night was irrelevant. Tr. IV 1107. Horton later testified himself regarding Wyant and MB's activity that night. Tr. V 1277. Therefore, any error in limiting Horton's examination of Jones was harmless.

Ultimately, the facts do not support Horton's "they gave as good as they got" defense. The panel and the board concluded that Horton's harassment of Wyant and MB was not welcome. Report ¶ 60, 64, 65, 72-75, 83, 93, 95. Both Wyant and MB testified that Horton's harassing words and actions were not welcome and the panel determined Wyant and MB were "very credible." *Id.*

Additional witness testimony showed that Horton's "they gave as good as they got" defense is not based in reality. Horton's campaign consultant, Bridget Tupes, witnessed Horton's misconduct firsthand and her testimony does not support Horton's claim that it was initiated or perpetuated by his victims. On three to five occasions, Tupes heard Horton say that Wyant looked "sexy." Report ¶ 82; Tr. II 407-408. She heard him make this comment about other women as well. *Id.* Tupes also heard Horton state that he wanted to have sex with women, typically Wyant. Report ¶ 82. Horton sometimes even made these comments when Wyant was not present. Tr. II 405-406.

Tupes further testified that Horton initiated the "flirtation" with Wyant and it was not mutual. Tr. II 398, 400. "I – I would say there was a – there was a burden on one side versus the other." Tr. II 398. Tupes heard Horton say many times that Wyant was sexy, but she never heard Wyant say that Horton looked sexy. Tr. II 407. Likewise, Tupes "frequently" heard Horton make comments to Wyant about her body, but Tupes never heard Wyant make a similar comment to Horton. Tr. II 409.

Tupes never experienced this degree of sexual innuendo or suggestion of intercourse in any other campaign. Tr. II 414. It made her uncomfortable. Tr. II 365. She explained, "the Judge was flirtatious and conversational around other people's relationships and interactions with me, and including commentary around other people's like, physical appearance and things like that, and it just wasn't, for me, a comfortable environment." Tr. II 365. The panel and board found Tupes to be credible. Report ¶ 112.

Horton's staff attorney, Emily Vincent, testified to Horton's harassment of her and other staff. Horton once told Vincent that the tights she was wearing were "sexy." Report ¶ 75. Horton would apparently have this court believe that Vincent initiated this harassment by

wearing "sexy" tights in the first place because there is absolutely no evidence that Vincent initiated Horton's comment. Horton's harassing words made Vincent uncomfortable, so she never wore those tights again. *Id.*; Tr. I 263.

On another occasion, during a happy hour Vincent attended with Horton and two of Horton's other female employees, Horton talked about how he would make over each of them, including how he would dress them and style their hair. Report ¶ 75. When he got to Vincent, Horton stopped himself, stating, "Oh, I'm going to stop now before I get in trouble." *Id.* Horton's comments made Vincent uncomfortable but she never mentioned them to anyone because "he's a sitting judge and there's a – an imbalance of power there." *Id.* Horton did not proffer any testimony that his physical assessment of Vincent and his other female employees was "not unwelcome" or that they initiated and perpetuated his comments. Therefore, the violation of Jud.Cond.R. 2.3(B), which prohibits sexual harassment, could be based upon Vincent's testimony alone.

The testimony of credible witnesses refuted Horton's "they gave as good as they got" defense. Horton was afforded the opportunity to present this defense, and the panel and board found that it was an aggravating factor to his misconduct. Since due process requirements were satisfied and the panel chair's evidentiary rulings were not unreasonable, arbitrary or capricious, the court should overrule Horton's objection.

Answer to Objection No. 2:
The violations of Jud.Cond.R. 1.2 and 4.4(B) in Count Two are supported by the evidence.

The panel's factual findings and credibility determinations will not be overturned unless the record weighs heavily against them. *Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, 880 N.E.2d 467, ¶ 39, citing *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14,

2003-Ohio-6649, 800 N.E.2d 1117, ¶ 8. Consistent with the panel's findings, the record demonstrates that Horton disregarded the rules for his own selfish reasons – his judicial campaign for the court of appeals. In doing so, Horton failed to avoid even the appearance of impropriety and violated his duty to prohibit public employees subject to his direction or control from soliciting or receiving campaign contributions. Since the evidence in this case supports the charged violations of Jud.Cond.R. 1.2 and 4.4(B) in Count Two, the court should overrule Horton's objection.

Despite Horton's attempts to minimize his misuse of his staff and county resources to advance his judicial campaign for the Tenth District Court of Appeals, his abuses were not *de minimis*. Rather, they were a regular occurrence.

Horton instructed his law clerk, Emily Vincent, to complete campaign-related tasks. She compiled information about cases he previously decided to assist him in obtaining the mayor's endorsement of his candidacy and in soliciting contributions from attorneys who were involved in cases he presided over. Objections p. 2; Report ¶ 41. Horton never told Vincent not to complete these tasks during the workday. Tr. I 255. The panel found Vincent to be very credible. Report ¶ 77.

Horton also required his secretary, Wyant, to work for his campaign. Report ¶ 43. She worked on Horton's campaign during the workday using the county computer and telephone. *Id.* Wyant stated, "Whenever something would come across my desk, whether it be text or e-mail, whatever time of the day it was, I was expected to do the work." Tr. II 436. Horton knew that Wyant was not using personal time to work on his campaign. Report ¶ 56; Tr. II 587. Most days they would go out to lunch for an hour-and-a-half. Report ¶ 19. And she rarely worked late. "Maybe a couple times, but nothing regular consistently." Tr. II 486. In addition, Wyant

attended at least five all-day golf outings with Horton and he specifically told her she did not need to take leave while she did so. Report ¶ 56.

Wyant performed various tasks for Horton's campaign. Horton instructed her to prepare letters and make phone calls on his behalf, which she did using the county computer and a county telephone that she used for her work-related tasks. *Id.* at ¶ 43. Horton admits that, on multiple occasions, he asked Wyant to obtain checks from legal counsel for his campaign during the workday and deliver them to the recipients. Objections at p. 3-4. Wyant requested issuance of the checks, picked them up, and delivered them – all during her workday. Report ¶ 48; Tr. II 472-478; Exs. 9, 10.

These were not the only instances on which Wyant handled campaign funds. On two occasions, attorneys handed Wyant, as Horton's secretary, contribution checks in the courthouse during her workday. Report ¶ 50. She then delivered them to Horton's campaign consultant, Bridget Tupes, during the workday. *Id*. at ¶ 50, 52. When Wyant informed Horton about these contributions, he did not admonish her for accepting them. Instead, he asked about the amounts of the contributions. *Id.* at ¶ 52.

Horton also asked Wyant to handle campaign contributions during a campaign fundraiser after Tupes left early to celebrate her birthday. *Id.* at ¶ 53; Tr. II 437. Horton knew that Tupes would be leaving the fundraiser before it was over. Tr. II 355. Wyant did as she asked and, the next day, she brought the contributions to work and asked Vincent to deliver them to Tupes, because Wyant was going to lunch with Horton. Report ¶ 53. Vincent obliged, delivering the contributions to Tupes just outside the courthouse. Report ¶ 53; Tr. I 255-256.

Horton argues that Wyant's handling of contributions received during the fundraiser should be disregarded because relator did not plead those facts in its complaint. However,

Horton is presumed to have consented to the trial of those facts pursuant to Civ.R. 15(B): "[W]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Horton did not object when Wyant and Tupes testified regarding Wyant's handling of the contributions received during the fundraiser. In fact, he cross-examined both of them regarding the incident. Tr. II 391-394, 570-572. Therefore, he consented to the board's consideration of those facts.

Furthermore, Gov.Bar R. V(27) requires that the board and hearing panels follow the Ohio Rules of Civil Procedure whenever practicable unless a specific provision of Gov.Bar R. V or board hearing procedures and guidelines provide otherwise. It further states: "No investigation or procedure shall be held invalid by reason of any nonprejudicial irregularity or for any error not resulting in a miscarriage of justice." There is no miscarriage of justice in this case because the facts were litigated without objection, and because the board's finding of misconduct is only partly based upon the facts surrounding the fundraiser.

Horton also argues that some of the contributions handled by Wyant were not "contributions" under Jud.Cond.R. 4.4(B). He claims that the distribution of contributions by his staff through checks issued by and in furtherance of his judicial campaign is not violative of the rule. This argument is contrary to his own campaign finance reports, which listed each check as a "contribution." Tr. V 1221-1224; Ex. 6. Horton's argument also ignores the simple fact that campaign expenditures originate as campaign funds. The panel recognized this when it referred to the funds as "already received campaign funds." Report ¶ 48.

Furthermore, the definition of "contribution" in the Code of Judicial Conduct is not limited to funds paid only to the judicial candidate. The objective of the prohibition against public employees handling campaign contributions is "to guard against actual or apparent bias by

restricting the political and fund-raising activity of judges, shielding judicial candidates and the public alike from dangers inherent in the direct solicitation of campaign funds." *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, 815 N.E.2d 286, ¶44. The delivery of campaign funds to a third party by a county employee on behalf of the judicial campaign of his or her employer creates an apparent bias. Therefore, a judge violates Jud.Cond.R. 4.4(B) when he fails to prohibit a public employee from handling "already received" campaign contributions.

Even if the court were to disagree that these funds qualify as contributions, this is just one example of how Horton violated Rule 4.4(B) and the remainder of the instances detailed above support the violation as well.

Contrary to Horton's argument, this prohibition was applied in *O'Neill*. The court found that O'Neill violated former Judicial Canon 7(C)(1), which is the current equivalent of Jud.Cond.R. 4.4(B), as well as former Canons 4 and 7(C)(2)(a), because O'Neill ordered her staff attorney to solicit campaign contributions from two law firms. *Id.* at 298. The panel in that case did not find that campaign activities performed outside the courthouse by O'Neill's staff attorney violated the former Code of Judicial Conduct because her staff attorney spent at least 40 hours per week on her regular job duties. *Id.* at 302. Similarly, the panel did not find that campaign activities performed by volunteers who were not employees did not violate the former Code of Judicial Conduct. *Id.* Relator did not object to these findings and the court did not address them in its decision.

Here, Horton's staff attorney and his secretary regularly handled campaign contributions and performed campaign activities during the workday. Therefore, the court should adopt the panel's and board's findings of fact and conclusions of law.

Answer to Objection No. 3:
An indefinite suspension is supported by the court's precedent.

The recommended sanction of an indefinite suspension is supported by this court's precedent and warranted by the facts. The board determined that Horton committed multiple violations, including violations of Jud.Cond.R. 1.2, 4.4(B), 1.3, 2.3(B) and Prof.Cond.R. 8.4(b) and 8.4(h). Report ¶ 37, 58, 109. In doing so, the board found, in each count of the complaint, that Horton failed to act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary and failed to avoid impropriety and the appearance of impropriety. *Id.* With respect to Horton's judicial campaign activities, the board found that Horton committed an illegal act that reflects adversely on his honesty or trustworthiness and that he failed to prohibit public employees subject to his direction or control from soliciting or receiving campaign contributions. *Id.* at ¶ 37, 58. The board also found that Horton sexually harassed his staff and abused the prestige of his judicial office. *Id.* at ¶ 109. Horton's sexual harassment of his staff was so egregious that the board found it adversely reflects on his fitness to practice law. *Id.* The cumulative severity and the egregious nature of these multiple violations justify an indefinite suspension.

There exists no disciplinary case in which a judge was found to have violated the same rules as Horton, which is why the board properly considered the sanctions issued in two categories of cases -- campaign finance violations and sexual harassment -- to reach its recommended sanction. Horton claims that the board relied entirely upon the sexual harassment line of cases in determining the appropriate sanction. However, the board also considered *Ohio State Bar Assn. v. Mason*, in which the court indicated that the ultimate sanction of disbarment is appropriate when a judge engages in fraud, dishonesty, protracted or premeditated acts, or the abuse of judicial office. 152 Ohio St.3d 228, 2017-Ohio-9215, 94 N.E.3d 556, ¶ 17, 33.

The panel and board properly considered *Mason* because it found that Horton engaged in dishonest conduct and abused his judicial authority on a protracted basis. Report ¶ 41. Horton's multiple illegal acts reflect adversely on his honesty or trustworthiness. *Id.* at ¶ 37. And, Horton's abuse of his judicial position was "predatory." *Id.* at ¶ 108. He repeatedly talked to his employees about loyalty. *Id.* at ¶ 71; Tr. II 434-435; III 641, 659; IV 903. He also emphasized the power he had as a judge by discussing attorneys whom he helped advance in their careers. Report ¶ 71.

As a result of this grooming, Horton's former female intern, MB, endured being groped on her bottom and bare breasts by Horton's friends at his insistence on three separate occasions. *Id*. at ¶ 74. Horton told MB that she was "sexy" and he wanted "fuck [her] in the ass." She eventually consented to having oral sex with Horton because it was what he wanted. (*Id.* at ¶ 73.)

Similarly, Wyant understood that Horton expected her to be at his disposal. *Id.* at ¶ 63. He often told her that she was "sexy" and "hot." *Id*. He also told her that wanted to have sex with her. *Id*. The fact that Horton promoted Wyant to bailiff after she ceased socializing with him does not negate the fact that she believed socializing with him was a requirement of continued employment. His judicial authority created the equivalent of a quid pro quo because his employees felt they had to participate in his misconduct or face negative consequences at work or in their careers for years to come.

This court recently reviewed cases involving attorneys who abused their power in an attorney-client relationship for their own sexual gratification and rejected any mitigating credit due to the client's consent to the sexual activity. *Disciplinary Counsel v. Sarver*, Slip Opinion No. 2018-Ohio-4717, ¶ 17-22. The court has recognized that the imbalance of power between

the criminal defense attorney and his client prevents the client from consenting to sexual activity during the representation. *Id.* at ¶ 16, 24. When one party is in a position of dominance, the apparent consent of the party in a position of dependence and vulnerability does not mitigate the misconduct. *See id.* at ¶ 24.

The imbalance of power between Horton and his staff is no different than the imbalance of power in *Sarver*. Horton's employees were in a position of dependence and vulnerability because they wanted to continue to be employed, to earn a greater salary, and to receive positive recommendations from Horton during their careers. Therefore, this court should not temper Horton's sanction because of their acquiescence or submission to his demands. In other words, their apparent consent does not mitigate his misconduct.

The court suspended Sarver for two years with 18 months stayed on conditions. Horton's misconduct is more egregious because he was a judge and abused a position of public trust.

In arguing for a fully stayed suspension, Horton also fails to recognize the significance of the aggravating factors in this case. The board found that Horton committed multiple violations; he refuses to accept responsibility for his misconduct; he attempted to shift the blame to his victims and former employees; he engaged in a pattern of misconduct; he acted with a dishonest or selfish motive; he lacks credibility; he sexually harassed his former employees; and his actions had a detrimental effect on at least one of his former employees. Report ¶ 110. These aggravating factors negate the mitigating factors of no prior discipline and the imposition of other penalties and sanctions.

Although Horton recognizes that his position as a judge and the presence of multiple victims are factors to consider in determining the appropriate sanction, Horton claims that the board failed to give enough weight to the court's decision in *Disciplinary Counsel v. Campbell*,

68 Ohio St.3d 7, 1993-Ohio-8, 623 N.E.2d 34. *Campbell* involved a judge who subjected multiple women to harassing words and actions over more than a decade. The board recommended an indefinite suspension but the court imposed a one-year suspension. *Id.* at 10. However, the societal perspective on sexual harassment has significantly evolved since *Campbell* was decided in 1993, and the makeup of this court has changed. The court's very recent decision in *Disciplinary Counsel v. Sarver* reflects these changes. Slip Opinion No. 2018-Ohio-4717, ¶ 17-22.

Horton also claims that the board failed to address a number of cases involving sexual harassment, but those cases did not involve judges and they are instructive only to the extent that the sanction in this case should be greater because Horton was a judge. This court has stated that judges must maintain a standard of personal and professional conduct above that expected of attorneys. *Disciplinary Counsel v. Hoskins*, 119 Ohio St.3d 17, 2008-Ohio-3194, 891 N.E.2d 324, ¶ 79. Recognizing this, the board determined that a substantial sanction is appropriate. Report ¶ 128.

This court has also stated that "[m]embers of the judiciary have an even greater duty to obey the law, and the breach of that duty has been met with the full measure of our disciplinary authority." *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235, ¶ 18. The fact that Horton committed multiple illegal acts while he was a judge also supports a substantial sanction.

The board appropriately considered the applicable case law and determined that an indefinite suspension is appropriate based upon the cumulative severity and egregious nature of the multiple violations as well as the overwhelming aggravating factors. Therefore, the court should accept its recommendation of an indefinite suspension.

Horton argues that he was entitled to consideration of a less severe sanction due to his "battle with alcohol." The board appropriately considered and dismissed Horton's use and abuse of alcohol because Horton admittedly failed to meet the requirements of Gov.Bar R. V(13)(C)(7). Report ¶ 120; Objections, p. 20. Horton did not present evidence that he was diagnosed with a disorder by a qualified chemical dependence professional. Report ¶ 121. He also failed to present evidence that the disorder contributed to cause his misconduct. *Id.* at ¶ 118. To the contrary, Horton engaged in misconduct when he was not drinking. *Id.* at ¶ 122.

Since there is no causal link between Horton's alcohol use and his misconduct, Horton's reliance upon *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235, is misplaced. In *Connor*, the court found that the criminal act at issue, a second drunk-driving conviction in five years, "clearly arose from his addiction to alcohol." *Id.* at ¶ 20. The *Connor* decision also predates Gov.Bar R. V(13)(C)(7), which was effective January 1, 2015.

Connor is instructive, however, because the court noted that mitigating credit for a disorder may not overshadow the egregiousness of the misconduct. *Connor* ¶ 19. The court cited to *Disciplinary Counsel v. Gallagher*, in which a judge was convicted for distributing cocaine and later tested positive for cocaine and marijuana use. 82 Ohio St.3d 51, 1998-Ohio-592, 693 N.E.2d 1078. In *Gallagher*, the court declared that, "Mitigating factors have little relevance, however, when judges engage in illegal conduct involving moral turpitude." *Gallagher* at 53. The court imposed the ultimate sanction of permanent disbarment in that case because "mitigating factors relevant to this individual attorney pale when he is viewed in his institutional role as a judge." *Id.*

Here, as in *Gallagher*, the egregiousness of Horton's misconduct negates the mitigating factors. Therefore, the sanction should not be tempered because he has no prior discipline and he served a criminal sentence.

Even though Horton was not entitled to mitigating credit for a disorder under Gov.Bar R. V(13)(C)(7), the board's inclusion of a condition of reinstatement on continued participation in Alcoholics Anonymous and submission to a new OLAP evaluation was appropriate. Horton testified that he has a problem with alcohol, he has relapsed on more than one occasion, and he did not seek assistance from OLAP until after Disciplinary Counsel's investigation commenced. When the board issued its recommendation, Horton was still a judge. Although Horton has given up his seat on the Tenth District Court of Appeals for now, he is not precluded from running for a judicial seat at some point in the future. Therefore, the conditions of continued participation in Alcoholics Anonymous and a new OLAP evaluation are necessary in light of the court's mandate to protect the public.

CONCLUSION

The cumulative severity and the egregious nature of the multiple violations of the Code of Judicial Conduct and the Rules of Professional Conduct committed by Horton in this case, combined with the aggravating factors, warrant an indefinite suspension. Horton abused his judicial office and engaged in dishonest conduct while he was a sitting judge. In doing so, he caused incalculable harm to his victims and to the public perception of the legal system. In order to protect the public and the dignity of the judiciary, restore public confidence in the integrity of the judiciary, and deter future misconduct, relator respectfully submits that the court should overrule Horton's objections, adopt the board's recommendation and indefinitely suspend Horton from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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