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IN THE SUPREME COURT OF OHIO

Disciplinary Counsel

Relator,

v.

Mark Stewart Bennett, Esq.
Attorney Registration No. 0069823

Respondent.

Case No. 2023-0471

RESPONDENT'S OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF PROFESSIONAL CONDUCT

(REQUEST FOR ORAL ARGUMENT)

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I. INTRODUCTION

Now comes Respondent, Mark Stewart Bennett, by and through counsel, and hereby respectfully submits his Objections to the Findings of Fact, Conclusions of Law and Recommendation ("Report") of the Board of Professional Conduct ("Board").

This matter came before the Hearing Panel and Board having been fully stipulated to by the Relator, Office of Disciplinary Counsel of the Supreme Court of Ohio, and by Mr. Bennett which comprehensively included:

1. The entire set of facts regarding Mr. Bennett's misconduct and inappropriate interactions with J.S.[1], a legal intern employed by the U.S. Attorney's Office for the Northern District of Ohio ("USAO") while Mr. Bennett was employed as an Assistant United States Attorney ("AUSA") with that same office. [Stipulations, ¶¶ 1-44; Board Report at ¶¶ 5-47];
2. All eight (8) Joint Exhibits admitted into evidence at the hearing; [Stipulations, p. 7; ¶Board Report at ¶ 48; Joint Ex. 1-8];
3. Mr. Bennett's violation of Prof.Cond.R. 8.4(h) [A lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law]; [Stipulations, ¶ 45; Board Report at ¶ 49];
4. The two (2) aggravating factors, as listed in Gov.Bar R. V(13)(B), of: (i) a dishonest or selfish motive and (ii) the vulnerability of and resulting harm to victims of the misconduct; [Stipulations, p. 6 ¶ 1,(a)-(b); Board Report at ¶ 51];
5. The four (4) mitigating factors, as listed in Gov.Bar R. V(13)(C), of: (i) the absence of

[1] The Initials "J.S." are being used in this brief, as they were in the record of the proceedings before the Panel and Board, to protect the identity of the person affected by Mr. Bennett's misconduct.

a prior disciplinary record, (ii) full and free disclosure to the board or cooperative attitude toward proceedings, (iii) character or reputation; and (iv) the imposition of other penalties or sanctions as it relates to the loss of Mr. Bennett's employment as an AUSA; [Stipulations, pp. 6-7, ¶ 2,(a)-(d); Board Report at ¶ 52; Joint Ex. 4 & 8];

6. The acknowledgement that Mr. Bennett voluntarily sought and continues to engage in mental health treatment, has been diagnosed, and had commenced and continues to engage in treatment for Adjustment Disorder with anxiety and depressed mood, and for which above-stated diagnosis his treatment provider has expressed a favorable opinion that Mr. Bennett has gained awareness, is capable of setting appropriate professional boundaries, and has exhibited positive growth; [Stipulations, ¶ 40; Board Report at ¶ 45; Joint Ex. 5, 6 & 7]; and
7. A joint recommended sanction of a fully stayed six (6) month suspension, with the condition that Mr. Bennett commits no further acts of misconduct and continues with his current course of mental health counseling. [Stipulations, p. 7; Board Report at ¶ 54].

After the hearing held in the instant matter, the Panel and Board found and accepted, by clear and convincing evidence, all of the above stipulations of Mr. Bennett and Relator, save and except the joint recommended sanction of a six (6) month stayed suspension with conditions, but rather recommended an actual six (6) month suspension with those same conditions.

In view of all the stipulated facts, the stipulated misconduct, the stipulated aggravating and mitigating factors, which are all supported and were accepted by the clear and convincing evidence standard set forth in this Honorable Court's Rules for Government of the Bar[2] as well as all relevant

[2] Gov.Bar R. V(12)(I)

case law, and upon the consideration of pertinent precedent, Mr. Bennett objects to the sanction recommended by the Panel and Board of an actual six (6) month suspension from the practice of law with conditions and, respectfully and humbly, states that the appropriate sanction to be issued align with this Honorable Court's applicable prior precedent which has been jointly recommended by Relator and Mr. Bennett – a fully stayed six (6) month suspension from the practice of law, on the condition that he commit no further acts of misconduct and continue with his current course of mental health counseling.

II. STATEMENT OF THE FACTS

A. Mr. Bennett's Legal Career

Mark Bennett was admitted to the practice of law in 1998. Thirteen (13) of the over twenty-four (24) years since his admission were in federal service as an AUSA with the USAO. [Board Report ¶¶ 5, 6]. Following his admission, Mr. Bennett spent the first seven (7) years of his career in private practice and subsequently, beginning in 2005, Mr. Bennett began his many years of public service – first, with the Ohio Attorney General, where he served as the Senior Deputy Attorney General in the Cleveland Office, [Tr. 49] and later, from 2007 until 2020, as an AUSA with the USAO. [Tr. 50, 51].

Mr. Bennett began his tenure with the USAO in the general crimes unit prosecuting various crimes including, but not limited to, felony drug possession cases, bank robberies, and other cases that include an element of assault. Then, from 2008 until 2013, Mr. Bennett served in the economic crimes unit prosecuting mortgage fraud, securities fraud, health care fraud, tax fraud, and bank fraud cases. [Tr. 58, 59]. In recognition of his service as a prosecutor in the economic crimes unit, Mr. Bennett was presented with an award by the U.S. Department of Housing and Urban Development in 2015. [Tr. 59].

Later, Mr. Bennett transferred from the USAO Cleveland office to the Akron office where he prosecuted various types of cases including drug cases involving large drug organizations as well as white-collar crimes. Mr. Bennett's final assignment while employed as an AUSA was serving in the national security unit which prosecutes international and domestic terrorism crimes. [Tr. 59]

Serving as an AUSA was Mr. Bennett's dream job. He aspired to serve in that position with the hope of doing his part of making the world a better place and desired to stay in that position his entire career serving our country and its citizenry. As a result of his misconduct which gave rise to this attorney discipline matter, the Department of Justice Office of the Inspector General ("OIG") conducted an investigation and recommended that Mr. Bennett be terminated from his employment with the USAO. [Board Report ¶ 43]. Rather than prolonging the process, Mr. Bennett resigned from his employment knowing that he was ultimately going to be removed. [Board Report ¶ 43; Tr. 21, 60].

Following his resignation from the USAO in December, 2020, Mr. Bennett re-entered the private practice of law as a solo practitioner in January of 2021, maintaining an office in Parma, Ohio. [Tr. 50] His current practice of law includes, but is not limited to, the following areas: business litigation, business counseling, criminal defense, and probate. [Tr. 52].

B. Mr. Bennett's Professional Affiliations, Activities, Awards, and Community Service

In addition to his practice of law, Mr. Bennett is, and throughout his career has, dedicated himself to serving the community. In the past Mr. Bennett served on various committees of the Cleveland Bar Association, now the Cleveland Metropolitan Bar Association. As a member of that organization, Mr. Bennett led the Justice for All Committee, the volunteer and pro bono arm

of the Bar Association and, as part of that service, established opportunities for attorneys to engage in *pro bono* work. [Tr. 53] For his work with Justice for All Committee, Mr. Bennett was honored by being named the volunteer of the year [Tr. 54].

In addition to that volunteer service, Mr. Bennett has exemplified his strong dedication to our society by volunteering his time, knowledge, and skills in a variety of endeavors. He has served as a board member for the Cleveland Bar Foundation, as a trustee for the Cleveland Bar Association, and as a board member of the Legal Aid Society. During his time serving on the board of the Legal Aid Society, Mr. Bennett contributed to starting the Brief Advice Clinics for *pro se* litigants. For that work, Mr. Bennett was awarded the Ohio State Bar Association's volunteer of the year for attorneys under the age of 40. [Tr. 53, 54].

Mr. Bennett is also a member of the Federal Bar Association and, since becoming a solo practitioner in 2021, Mr. Bennett has joined the Parma Bar Association and the West Shore Bar Association in the greater Cleveland area. [Tr. 52].

Toward the community at large, Mr. Bennett has volunteered with Business Volunteers Unlimited and has also served on the board of Cleveland Reads, a nonprofit that helps people with literacy challenges. Additionally, he has served on the board of Cleveland Public Theatre for several years and participated in the Bridge Builder program, a precursor program for younger lawyers for an organization known as Leadership Cleveland. [Tr. 55].

In addition to both his legal and non-legal community service, Mr. Bennett has served on various committees within the Republican Party of Cuyahoga County. For his service to that organization, Mr. Bennett was honored as its volunteer of the year in 2006. [Tr. 54, 55].

Committed to helping aspiring lawyers, Mr. Bennett has previously served as an adjunct professor at Cleveland State University College of Law[3] where he taught advanced brief writing, focusing on appellate practice, appellate brief writing, and conducting an oral argument. For many years, Mr. Bennett served as a mentor through the Supreme Court of Ohio's "Lawyer to Lawyer Mentoring Program" and as a mentor for law students through the alumni mentoring program offered by the CSU College of Law. [Tr. 51, 80; See also Joint Exhibit 4, character testimonial letter written by MacKenna Daus]. Mr. Bennett has also assisted coaching the moot court teams at the CSU College of Law. [Tr. 50-51].

C. Mr. Bennett, devoted husband and father

Moot court is near and dear to his heart since, as a student in law school, Mr. Bennett met his wife, Rebecca, to whom he has been married 23 years. [Tr. 50; Tr. 71]. Together, Mr. and Mrs. Bennett have a young daughter who they adore. As a dedicated and loving father, Mr. Bennett has enjoyed coaching his daughter's T-ball team and frequently leaves his law office in time to greet his daughter as she arrives home off the bus to care for her after school. [Tr. 55; 23].

D. Mr. Bennett's Stipulated Misconduct Involving J.S.

Mr. Bennett and Relator have fully stipulated to the facts involved which gave rise to his misconduct involving J.S. - a legal intern with the USAO from May, 2017 until November, 2017 in the Akron office and then again later, in the Youngstown office, where her boyfriend at the time lived[4], from August, 2018 until June 2019. . See *Stipulations*; see also Board Report ¶¶ 5-44.

While J.S. was a legal intern with the USAO, Mr. Bennett engaged in unprofessional behavior by making inappropriate remarks intended as joking and banter, which encompassed

[3] At the time, known as Cleveland-Marshall College of Law, Cleveland State University.
[4] As is inferred by the text exchange described in Stipulation ¶ 22; See also Joint Ex. 1, p. 102.

sexual inuendo. While he worked with J.S. on a project-to-project basis, Mr. Bennett did not have supervisory authority over J.S. as part of her internship, nor did he have the ability to hire or terminate her internship. [Board Report ¶ 66; Ex. 2., p.5 at 2-5].

At the time Mr. Bennett and J.S. worked together, Mr. Bennett mistakenly believed that his interactions with J.S. were mutual (which he now realizes and has admitted was not the case) and he did not realize that his actions were offensive towards J.S. or unwelcome. [Board Report ¶¶ 41. 42]. J.S.' sworn statements to OIG[5] are helpful in shedding some light and explanation (but not an excuse) as to why Mr. Bennett thought the intended joking and banter to be mutual:

- J.S. is a flirtatious person [Joint Exhibit 2, p. 10, at 13-16; p. 18, at 22-23; p. 18, at 22-23, p. 19, at 3-5];
- J.S. probably, at one point, told Mr. Bennett he was attractive for an older guy [Joint Exhibit 2, p. 10, at17-20];
- J.S. also probably, at some point in time, made a joking comment to Mr. Bennett about being his mistress [Joint Exhibit 2, p. 14, at 11-16];
- J.S. joked with Mr. Bennett which may have, at first, led him to believe that he could flirt back with her. [Joint Exhibit 2, p. 19, at 8-12]. See Board Report at ¶ 39.

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[5] Joint Exhibits 1-3 were sealed by the panel pursuant to an unopposed motion stating that:

> "[OPR] requested that relator take steps to maintain the confidentiality of the documents to the extent possible during relator's investigation and in any subsequent disciplinary proceedings. These documents are part of the federal investigation conducted by OPR and are not otherwise publicly available. Under Sup.R. 45(E)(2)(c), "A court shall restrict public access to information in a case document, or, if necessary, the entire document, if it finds by clear and convincing evidence that "the presumption of allowing public access is outweighed by a higher interest after considering * * * [w]hether any state, federal, or common law exempts the document or information from public access; [or w]hether factors that support restriction of public access exist, including * * * individual privacy rights and interests." Motion to Restrict Public Access, 1/26/2023.

Not recognizing during the time when Mr. Bennett worked with J.S., that his behavior and interactions were unwelcomed, offensive, and inappropriate [Board Report ¶¶ 41, 42], Mr. Bennett continued his inappropriate conduct throughout J.S.' two stints of internship. Whether or not intended as consensual sexual inuendo, joking, or banter, Mr. Bennett now recognizes and has freely admitted that his conduct was unprofessional and inappropriate.

Mr. Bennett's conduct giving rise to this matter, as is contained and further described in the parties' Stipulations, include, but is not limited to, making sexually inappropriate comments about her, having consensual conversations with J.S. about his marital sex life, commenting on her appearance, asking about J.S.' sex life and suggesting that they might be sexual partners, requesting nude photos of J.S. on social media, offering to buy J.S. clothing, having inappropriate social media and texting conversations with J.S. (which caused her to block his number and block him on those platforms), reaching across J.S.' body for a book in the law library causing the touching of her breasts with the back of his hand and arm as he reached (which touching J.S. has said she believed to be intentional but which belief, not action, Mr. Bennett contests), and asking what he would get in return when J.S. requested a letter of recommendation (on a separate occasion, Mr. Bennett provided a letter of recommendation requested by J.S. without making any inuendo). [Board Report ¶¶ 5-35].

Though Mr. Bennett now realizes that his conduct as described in the preceding paragraph crossed appropriate and professional boundaries during their time working together at the USAO, Mr. Bennett always liked J.S. as a person, thought she was going to be a good lawyer, and wanted to help her in her career. [Tr. 76 - 77]. He not only provided J.S. with the requested letters of recommendation, but also by providing her with information regarding a recruiting event that included employment prospects with federal law enforcement agencies which J.S. was interested

in [Joint Exhibit 1, p. 102 at 9-12], and Mr. Bennett set up several meetings for J.S. with agents with various federal agencies.

E. Mr. Bennett's Separation from Employment

In March of 2019, during J.S.' second internship with the USAO, Mr. Bennett inappropriately sent a message on Facebook Private Messenger to J.S. that was seen by J.S.' then boyfriend which caused a "huge fight" between J.S. and her boyfriend. Her boyfriend questioned J.S. as to why she would not report Mr. Bennett's conduct, since J.S. did not want to report Mr. Bennett and preferred to simply finish out the few months remaining of her internship. [Joint Exhibit 1, pp. 44-45]. After her interaction with her boyfriend, J.S. informed a colleague about her interactions with Mr. Bennett and, subsequently, OIG conducted an investigation. [Board Report ¶ 36]. During the OIG investigation, J.S. stated that she did not report Mr. Bennett's conduct because she was raised thinking it was just something that she would have to deal with and she did not want to do anything that might hurt her career. [Board Report ¶ 37].

Following the investigation, OIG recommended that Mr. Bennett be removed from his employment as an AUSA with the USAO. Mr. Bennett believed that he would ultimately be terminated regardless of whether he further contested those administrative proceedings and resigned his employment rather than prolonging the inevitable outcome of the process. [Board Report ¶ 43; Tr. 21, 60; See also Board Report ¶ 48, Joint Ex. 8; Affidavit of Christopher Landrigan, Esq. who represented Mr. Bennett in that administrative employment process.]

F. Mr. Bennett Accepts Responsibility and Seeks Mental Health Treatment.

After experiencing the loss of his employment, Mr. Bennett self-reported his misconduct to the Office of Disciplinary Counsel and, shortly thereafter, the Department of Justice also informed Relator of its investigation. [Board Report ¶ 44; Tr. 56].

Mr. Bennett also voluntarily sought mental health treatment, was diagnosed, and commenced treatment for Adjustment Disorder with anxiety and depressed mood. [Board Report ¶ 44; Tr. 56; Joint Ex. 5, 6 & 7]. Since June of 2021, Mr. Bennett has attended monthly counseling sessions with his mental health provider through the date of the hearing[6] which he intends to continue regardless of whether or not it is imposed as a condition of any sanction resulting from this attorney discipline matter. [Tr. 65-66]. Mr. Bennett's treatment provider has expressed a favorable opinion that he has gained awareness of setting appropriate professional boundaries and has exhibited positive growth.

At the hearing, Mr. Bennett testified that he sought and engaged in his counseling because he wanted to be certain that he would not repeat the same behavior toward others in any and all future instances [Tr. 64-65]. Mr. Bennett realizes that his counseling has helped him to be able to take a step back from the situation and recognize, to his chagrin, that his conduct towards J.S. was inappropriate. With the help of his counseling, Mr. Bennett now further understands that regardless of whether his comments were welcomed (which he now clearly understands that they were not), those types of comments and conduct are inappropriate, not only in the in the workplace but also in social settings. [Tr. 68]. Mr. Bennett has learned to place himself in another person's shoes and to be sensitive to how any comment that he might make could possibly cause that person offense or harm, even if not intended. Additionally, Mr. Bennett's counseling has helped him to fully understand the imbalance in the power dynamic which existed between him, as an AUSA, and J.S., as a legal intern. [Tr. 69-70].

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[6] Mr. Bennett has continued his counseling in the months since the hearing was held, but that fact is obviously not part of the record in these proceedings.

Without intending to submit his mental health diagnosis and treatment into evidence as mitigation as set forth by Gov.Bar R. V(13)(C),(7), and certainly not in an effort to utilize his mental health disorder as an excuse or justification for his conduct towards J.S., Mr. Bennett shared with the Panel at the hearing held that – through his counseling – he now realizes and understands that his behavior towards J.S. was inappropriate and harmful. Until he received that insight through his counseling, Mr. Bennett believed that his sexually over-toned interactions with J.S. were mutual. [Tr. 81].

The Board found that Mr. Bennett expressed regret and remorse for his misconduct, testifying at the hearing that, "… looking back and reading the conduct, it's -- in some ways, you know, I don't recognize the person. It's -- it's completely offensive and inappropriate. But I did it." [Tr. 61, at 14-19; see also Board Report ¶¶ 42, 46]. When asked now how he felt when reading the comments that he made to J.S., he affirmed that, "It's embarrassing. They're offensive. I am heartbroken if -- that they caused J.S. harm. I feel poorly for disrespecting my wife in any way. And I also think about my daughter and think I would hate to think she would have to ever go through something like this. So, I'm extremely disappointed in myself and sorry that I've caused her or anyone else harm." [Tr. 70 at 21-25, 71, 1-5].

Mr. Bennett continued by explaining, " … the fact that I used my position to cause harm to somebody who -- again, I liked J.S.. I thought she was a good person. I thought she was going to be a good lawyer. And I -- I, given the opportunity, would have apologized profusely if I had found out during the time that what I said had caused her harm." [Tr. 76 - 77].

In expressing that he would like to be able to apologize to J.S., Mr. Bennett further explained that he was advised to avoid further communication with her out of an abundance of caution for her feelings and he has followed that advice. [Board Report ¶ 46; Tr. 76-77.

G. Mr. Bennett's current ability to engage in the competent and ethical practice of law.

Mr. Bennett's mental health treatment provider, Christy Sugarman, PCC, LIDC, in discussing his diagnosis and treatment, opined under oath that Mr. Bennett currently possesses the ability to engage in the ethical and competent practice of law and that he is unlikely to repeat his misconduct. [Joint Ex. 7, Christy Sugarman Depo. Tr., pp. 28-29].

Likewise, Attorney Kelly Zacharias, a solo practitioner who has and continues to share office space with Mr. Bennett since he opened his solo private practice in January, 2021, testified at the hearing as a character witness on his behalf. [Board Report ¶ 48; Tr. 25-45]. Ms. Zacharias testified as to Mr. Bennett's good reputation and his character traits for honesty, ethical practice, serving the community, and respect within the legal profession. [Tr. 41-43].

Ms. Zacharias further testified that, by and through her experience sharing office space with Mr. Bennett, that she has interacted with him regularly (on average several times a week) and has also seen him interact with other members of the legal profession and his clients. Ms. Zacharias shared that she has never experienced or observed Mr. Bennett act inappropriately towards her or anyone else, and that she has always found him to be polite, professional, and to maintain appropriate boundaries. [Tr. 36-38]. Critically important, in counsel's view to this Honorable Court's determination of appropriate sanction in this case, Ms. Zacharias opined that Mr. Bennett has the current ability to engage in the competent and ethical practice of law, and that he is a valuable asset to the public as a member of the legal profession. [Tr. 41-43].

III. RESPONDENT'S OBJECTIONS TO THE BOARD'S RECOMMENDED SANCTION

"The purpose of the disciplinary proceedings is to investigate the conduct and fitness of the attorney to practice law in order "to safeguard the courts and to protect the public from the

misconduct of those who are licensed to practice law." *Akron Bar Ass'n v. Groner*, 2012-Ohio-222, 131 Ohio St. 3d 194, 963 N.E.2d 149 quoting *Ohio State Bar Assn. v. Weaver,* 41 Ohio St.2d 97, 100, 70 O.O.2d 175, 322 N.E.2d 665. Thus, this Honorable Court's oft stated purpose underlying a disciplinary sanction is not to punish the offender but to protect the public. *Id.* citing *Disciplinary Counsel v. O'Neill*, 103 Ohio St. 3d 204, 2004 Ohio 4704, 815 N.E.2d 286, ¶ 53.

In determining a sanction designed to protect the public, this Honorable Court weighs "the aggravating and mitigating factors to decide whether circumstances warrant a more lenient or exacting disposition." *Disciplinary Counsel v. Roberts*, 117 Ohio St.3d 99, 2008-Ohio-505, 881. Because each disciplinary case is unique, this Honorable Court takes all relevant factors into account. *Disciplinary Counsel v. Harter*, 154 Ohio St.3d 561, 2018-Ohio-3899, 116 N.E.3d 1255, ¶28.

Mr. Bennett and Relator stipulated, and the Panel and Board found (in accepting all of the proffered stipulations *in toto*, save and except the stipulated sanction), by clear and convincing evidence, that Mr. Bennett's conduct towards J.S. violated Prof.Cond.R. 8.4(h) [A lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law]. [Stipulation, ¶ 45; Board Report ¶ 49].

The parties further stipulated to the aggravating factors as listed in Gov.Bar R. V(13)(B) of a dishonest or selfish motive; and the vulnerability of and resulting harm to the victim of the misconduct. [Stipulations, p. 6 ¶ 1,(a)-(b); Board Report ¶ 51].

Regarding the mitigating factors as listed in Gov.Bar R. V(13)(C), the parties stipulated and the Board found as mitigation: (i) the absence of a prior disciplinary record, (ii) full and free disclosure to the Board or cooperative attitude toward proceedings, character or reputation, and

(iii) the imposition of other penalties or sanctions. [Stipulations, pp. 6-7, ¶ 2,(a)-(d); Board Report ¶ 52].

Additionally, it is strongly posited that this Honorable Court should consider the sanctions imposed in similar cases. *Disciplinary Counsel v. Sarver*, 2020-Ohio-5478, 163 Ohio St. 3d 371, 170 N.E.3d 799 citing *Dayton Bar Assn. v. Sullivan*, 158 Ohio St.3d 423, 2020-Ohio-124, 144 N.E.3d 401, ¶ 28.

OBJECTION NO. 1: The Board erred in recommending that Mr. Bennett should serve an actual suspension for six (6) months with imposed conditions. The Court should instead order a fully stayed six (6) month suspension with conditions, as was stipulated by the parties.

This Honorable Court's comparative prior precedents support a fully stayed suspension.

You have previously recognized that attorneys must guard against inappropriate conduct with law clerks employed in their office. *Lake County Bar Assn v. Mismas*, 139 Ohio St.3d 346, 2014-Ohio-2483, 11 N.E.3d 1180, ¶ 22. It is axiomatic that "[u]nwelcome sexual advances are unacceptable in the context of any employment," *Id.* at ¶ 23. In determining the issue of an appropriate sanction, you have previously focused on the offensiveness of unwanted advances and the power imbalance between the parties in determining the sanction.

With those standards in view, this Honorable Court's prior precedents, when compared to the fully stipulated facts as well as the stipulated aggravating and mitigating factors and stipulated misconduct in the instant matter, provide the guidance that the appropriate sanction to be issued relative to Mr. Bennett is a fully stayed six (6) month suspension.

A. Pertinent Precedent as Stipulated by the Parties.

1. *Disciplinary Counsel v. Berry*, 166 Ohio St.3d 112, 2021-Ohio-3864, 182 N.E.3d 1184. The instant matter is similar to *Disciplinary Counsel v. Berry* (six-month suspension, fully

stayed) which involved a judicial officer and not a practicing attorney. In that case, Judge Berry sent numerous Facebook messages to a courthouse staff member. Berry invited her to lunch or to have drinks multiple times. *Id.* at ¶¶ 6, 8. He also sent numerous unwanted messages that were "overtly partisan or vulgar." *Id.* at ¶ 10. Berry, like Mr. Bennett, acknowledged that his comments were inappropriate, but stated he was unaware that they were unwelcome to the recipient at the time.

This Honorable Court in *Berry* imposed a fully stayed suspension *because* "[j]udges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust." *Id.* at ¶ 19 (internal quotations omitted), quoting *Disciplinary Counsel v. Horton*, 158 Ohio St.3d 76, 2019-Ohio-4139, 140 N.E.3d 561, ¶ 72 . Arguably, based upon the above-cited rationale, a lesser sanction may have been issued had Berry not been a judicial officer but, rather, was a practicing attorney.

The facts in *Berry* are similar to this matter. The Board ineffectively attempted to distinguish *Berry*, which involved a judge held to a higher standard, when it stated that "Respondent's actions are more severe than those in *Berry*, wherein the respondent-judge had no authority over the victim whatsoever …" [Board Report ¶ 49]. *Berry* involved a courthouse staff member who was a court reporter for another judge in the same courthouse who Judge Berry attempted to date and to whom he sent numerous inappropriate messages. In that matter, the parties stipulated that, had the courthouse staff member been called to testify at Berry's disciplinary hearing, she would have stated that she gave the judge her phone number because *she felt like she could not refuse, considering his status as a judge*. *Berry*, 2021-Ohio-3864 at [P5] (emphasis added). That fact is very similar to the facts here, where J.S. testified, as part of the OIG investigation, as to almost identical reasons why she did not report Mr. Bennett's conduct to her

supervisor. [Board Report ¶¶ 37, 38]. Regardless of direct supervisory authority, both the courthouse staff member in *Berry* and J.S. felt powerless to object to the misconduct exhibited towards them due to the imbalance of power and status.

As is stated in the parties' Joint Hearing Brief on Sanction, "... while the recipient of Judge Berry's unwelcome messages did not work in Berry's courtroom, she was in the untenable position of receiving messages from an elected judge. Judges are not subject to normal Human Resources proceedings because, they can be investigated internally but cannot be disciplined. Although Berry had no direct authority over the staff member, the staff member also had no meaningful process to address Berry's behavior." In contrast, J.S. had a path to address Mr. Bennett's behavior as is evidenced by the OIG investigation conducted and Mr. Bennett ultimately losing his employment.

While recognizing the fact that Mr. Bennett was not J.S.' supervisor, yet fully appreciating the imbalance of his status and influence as an AUSA as it relates to J.S. as a legal intern, certainly the respondent-judge in *Berry* had similar, if not superior status, influence, and power imbalance in regard to the court reporter who worked for another judge in the same courthouse.

It should be further noted that while two of the same mitigating factors of no prior discipline and full cooperation with the disciplinary process were found in *Berry* as, here, the Board also found the additional mitigating factor of the imposition of additional sanction or penalty (which was not present in *Berry*) due to Mr. Bennett's loss of his employment with the USAO. [Board Report ¶ 52; See also Joint Exhibit 8].

Berry's inappropriate comments, social media messages, and invitations for drinks and lunch are similar to Mr. Bennett's conduct towards J.S. as are the comparisons between the matters relative to the imbalance of power, status, and influence. Judge Berry, a judicial officer appropriately being held to a higher standard, received a fully stayed six (6) month suspension

from this Honorable Court. Therefore, the same sanction should be ordered for Mr. Bennett for his misconduct.

2. Lake County Bar Assn v. Mismas, 139 Ohio St.3d 346, 2014-Ohio-2483, 11 N.E.3d 1180. In determining the sanction for inappropriate conduct in employment contexts, this Honorable Court has also looked to factors such as whether the attorney conduct is aggressive, demanding, or threatening. As the court noted in *Mismas*, 139 Ohio St.3d 346 at ¶ 9:

> Mismas advised Ms. C. that she would "need to take a few beatings" before she could learn to give one. He rephrased this statement in sexual terms and then asked Ms. C. if she had ever engaged in the type of sex act he had referred to. Ms. C. told him to stop, stating that they were only speaking metaphorically, but Mismas insisted that he was serious. Ms. C. advised him that his question was inappropriate and that she would not answer it. Mismas then told her that there needed to be some level of trust between them saying, "[I]f you can't trust me with personal issues then that's a problem." * * *

Thus, Mismas aggressively steered the conversation to sex. Even after Ms. C. expressly told him the question was inappropriate, he continued to imply that Ms. C. needed to be more accommodating. Later that night, Mismas again pushed the conversation towards sex:

> A little before midnight, Mismas began to quiz Ms. C. about an arbitration agreement that he had given her to review. The conversation then turned to how Mismas could ensure that Ms. C. would be loyal to him. He told her, "I have an idea but your [sic] not going to like it," and stated that she would "bolt" if he said it. After she responded that he had already taken the conversation pretty far and that she had not bolted, he suggested that she perform a sex act for him. Ms. C. flatly rejected Mismas's suggestion, but he continued to press the issue. When she told him to stop and urged him to admit that he was joking, he repeatedly refused and insisted that her employment depended on her compliance, telling her, "If you show up at 11 you know what's expected." He further stated, "So its your choice. Ok. I'll be there at 11. If you show up great. You know what you gptt. GoTta do [sic]. If not Good luck to you." * * * *Id.* at ¶ 10 (errors in original).

A week later, Mismas attempted to get Ms. C. to take an out-of-town trip with him. He also asked her to join him on an overnight trip to Washington, D.C. *Id.* at ¶ 12. When she refused, Mismas "belittled her for her rejection and pressured her to go by suggesting that her refusal would

have adverse consequences for her employment, texting her, 'That's strike 1 for you. 3 strikes and you are out.' The following day, Ms. C. resigned her employment." *Id.*

The court suspended Mismas for one year, with six months stayed, for engaging in conduct that adversely reflected on his fitness to practice law in violation of Prof.Cond.R. 8.4(h) – the same amount of actual suspension time from the practice of law as recommended by the Board here. *Id.*

Yet, while the Board agreed with the parties in this matter that Mr. Bennett's misconduct did not rise to the level of that in *Mismas*, it recommends a similar sanction. [Board Report ¶ 65]. By contrast to the facts present in Mr. Bennett's case, Mismas knew that Ms. C. found his comments offensive and inappropriate because she repeatedly told him so, yet he continued to try to force her to have sex with him. J.S. never voiced her objection to Mr. Bennett's intended joking and banter prior to the OIG investigation which he mistakenly believed to be mutually acceptable. While Mr. Bennett now understands that he should have never engaged in this behavior, he would have stopped his interactions and apologized to J.S. had he realized he was causing her discomfort and harm.

Mr. Bennett also admitted that he improperly conditioned a professional favor with sexual innuendo when he asked what he would get in exchange for a letter of recommendation. However, Mr. Bennett ultimately, in fact, did provide the letter of reference to J.S., upon J.S.' request for a reference on a separate occasion without any inuendo by Mr. Bennett. [Stipulations ¶ 29]. A striking and seminal difference exists between Mismas' and Mr. Bennett's misconduct - Mismas repeatedly threatened Ms. C. that her job depended on her compliance with his sexual demands. While not seeking to minimize Mr. Bennett's actions, it is patently obvious that Mismas' threats to terminate Ms. C. are objectively worse than Mr. Bennett's inuendo in desiring to know what he could get in exchange for a letter of recommendation.

Additionally, this Honorable Court should consider the degree of the power imbalance between the two parties to determine the harm the unwanted sexual comments could have caused. The greater the imbalance, the more likely a victim is to feel powerless and coerced, leading to stress, anxiety, and potential capitulation. Law clerks or legal interns are at a particularly vulnerable point in their careers; they are building nascent professional networks and are acutely aware of their supervising attorneys' power over their immediate future and long-term career prospects. *Mismas* at ¶ 22. Thus, sexual advances are "particularly egregious when they are made by attorneys with the power to hire, supervise, and fire the recipient of those advances." *Id.* at ¶ 26.

Mr. Bennett did not have the power to hire or fire J.S., nor was he her supervisor. His authority over her was transitory, based on individual projects which he and J.S. worked on together. [Joint Exhibit 2, pg. 4]. Although Mr. Bennett directed and evaluated J.S.' work on certain tasks, she did not consider him a supervisor, which fact she provided in her sworn statement to the investigator. This is in no way meant to say that Mr. Bennett's authority was inconsequential. As an experienced attorney in the prestigious position of an AUSA, Mr. Bennett had the potential to sway the future of J.S.' career by introducing her to other lawyers, expressing favorability of her work product, and giving her professional recommendations. These are not trivial accolades for a law clerk to acquire, and they could potentially "set the course for a new attorney's entire legal career." *Mismas* at ¶ 22. However, compared to *Mismas*, there is far less of an inherent power imbalance.

For example, in *Mismas*, it appears that Mismas had unfettered authority to hire, supervise, and fire Ms. C as he implied in his threats to coerce sex. Therefore, Mismas had the power to wreck Ms. C.'s immediate employment opportunities and her legal reputation within the

profession. He also threatened to inform her law school professors "what a stupid decision she had made" when she resigned, *Id.* at ¶ 25, potentially affecting her legal education and her ability to seek recommendations from her professors. Mr. Bennett did not have the authority to hire, supervise, and fire J.S. and, it must be noted, never, at any point, demanded sexual favors or threatened J.S. in any way, whatsoever.

In considering aggravating factors in *Mismas*, the Court ultimately found two (2) aggravating factors of (a) dishonest or selfish motive and (b) the vulnerability of and resulting harm to the victim. It found four (4) mitigating factors: (a) the absence of a prior disciplinary record, (b) his full and free disclosure to the board and cooperative attitude toward the proceedings, (c) his good character and reputation, and (d) his alcohol dependency. *Id.*

Here, the parties stipulated and the Board found that Mr. Bennett's case, as in *Mismas*, involves the same two (2) aggravating factors of (a) dishonest or selfish motive and (b) the vulnerability of and resulting harm to the victim. While the parties stipulated that the same aggravating factors exist [Board Report ¶ 51], the parties agreed, through the stipulations accepted by the Board, that Mr. Bennett has *less* culpability for J.S.' vulnerability because he did not have the same unfettered authority to hire, supervise, and fire J.S. as did Mismas with Ms. C.

This matter also involves four (4) (the same number as in *Mismas*) stipulated and found mitigating factors: (a) the absence of a prior disciplinary record, (b) Mr. Bennett's full and free disclosure to the board and cooperative attitude toward the proceedings, (c) his good character and reputation, and (d) the imposition of other sanctions incurred through the loss of employment. [Stipulations ¶¶ 41, 42; Board Report ¶¶ 51, 52]. [While *Mismas* included mitigation involving his alcohol dependency, the parties stipulated and the Board found in Mr. Bennett's case the mitigation factor of the imposition of other penalties or sanctions which was not present in *Mismas*.]

Additionally, while Mr. Bennett did not ask the Board to find a formal mitigating factor of a mental health disorder under Gov.Bar.R. V(13)(C)(7), the parties stipulated and the Board found that Mr. Bennett voluntarily sought on-going mental health treatment which has led to Mr. Bennett understanding the power imbalance that existed between him and J.S., the wrongfulness of his conduct, and his exhibiting positive growth as well as awareness of and setting appropriate professional boundaries. [Board Report ¶¶ 45, 53; Tr. 69-70; Joint Exhibit 7].

It is also noteworthy that Mr. Bennett did not act against J.S. after he became aware of her allegations while he was employed at the USAO and cooperated with the OIG investigation conducted by the U.S. Department of Justice. As a result of the investigation, Mr. Bennett self-reported his misconduct to Relator and has fully cooperated with the disciplinary investigation and process stipulating to all facts and misconduct.

Therefore, in keeping with the principle that the primary purpose of attorney discipline is to protect the public and not to punish the offender, the sanction imposed in this matter should be a fully stayed six (6) month suspension as opposed to the actual suspension levied in *Mismas*.

3. *Disciplinary Counsel v. Skolnick*, 153 Ohio St.3d 283, 2018-Ohio-2990, 104 N.E.3d 775. In *Disciplinary Counsel v. Skolnick*, the respondent engaged in two-and-a-half years of verbal abuse and sexual harassment against his paralegal. He "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." *Id.* at ¶ 12. Skolnick also sexually harassed his victim: "While Skolnick drove L.D. and another female employee to lunch, he remarked that the two women should give him 'road head' so that he could rate their performances on a scale from one to ten." *Id.* at ¶ 5.

While Mr. Bennett made inappropriate critical comments about some of J.S.'s personal and romantic choices, his comments were nowhere near as demeaning as the ones in *Skolnick*. Mr. Bennett made isolated comments about J.S.' appearance (joking about her putting on weight in response to J.S. making a comment about her own appearance), her decision to work in a distant office, and her relationship with her then-boyfriend. By contrast, Skolnick, as noted above, berated L.D. for her "appearance, dress, education, and parenting skills" and called her "a bitch, a 'hoe', a dirtbag, and a piece of shit, and he told her that he hoped she would die." *Skolnick* at ¶ 12. While Mr. Bennett's comments were unwelcome, they did not approach, by any means, those made by Skolnick, as the Board in its Report agreed.

The victim in *Skolnick* was also powerless. The court noted that L.D. quickly began looking for a new job but, despite responding to over 100 employment advertisements, she was unable to obtain one, Skolnick at ¶ 4, and she had to suffer Skolnick's abuse for two-and-half years. Even after L.D. eventually found another job, a clinical psychologist later diagnosed her with symptoms that met some of the criteria for post-traumatic stress disorder. *Id.* At ¶ 6.

The Court noted that Skolnick's "extreme, obnoxious, and humiliating attack," *id.* At ¶ 13, on the victim was "longstanding and pervasive," *Id.* At ¶ 14, warranting a one-year suspension with six months stayed – the same amount of actual suspension time recommended by the Board for Mr. Bennett.

Yet, the parties and the Board agree that Mr. Bennett's conduct was not nearly as egregious as Skolnick's. [Board Report ¶ 65]. For example, there is no evidence that Mr. Bennett directly requested that J.S. perform any sexual act on him, let alone oral sex, as did Skolnick. Rather, Mr. Bennett believed, albeit mistakenly, that J.S. was not offended by his comments but, rather, mistakenly considered them mutually acceptable banter. [J.S. admitted in the OIG investigation

that she made flirtatious comments to Mr. Bennett and joked that she could be his mistress.] Regardless of his then misconception of mutuality, through the help of his counseling over the past two (2) years which remains on-going, Mr. Bennett now understands that his actions crossed into unwanted sexual comments towards J.S.

In light of both the facts present herein and the previously discussed precedent, the sanction imposed in this matter upon Mr. Bennett should be a fully stayed six (6) month suspension rather than an actual six (6) month suspension, which would be akin to the one (1) year suspension with six (6) months stayed in *Skolnick.* This suggested, stipulated sanction would adequately protect the public, helping to ensure that Mr. Bennett continues to set appropriate professional boundaries, while recognizing, as opined by Ms. Zacharias, that Mr. Bennett adds value to the legal profession and that Mr. Bennett possesses the current ability to engage in the competent and ethical practice of law.

B. Additional Precedent Cited by the Board

In addition to the *Berry, Mismas,* and *Skolnick* cases cited by the parties in their Joint Hearing Brief on Sanctions, the Panel and Board considered three (3) additional cases involving sexually-related inappropriate conduct by a male attorney towards women in the work setting.

1. *Cincinnati Bar Assn. v. Young*, 89 Ohio St.3d 306, 2000-Ohio-160 [Board Report ¶ 60]. In *Young*, three (3) female law students were hired to work for the respondent as legal assistants. Young asked them questions whether they had boyfriends, inquired of one student if she was a virgin, and suggested to another that she could fill the position of his girlfriend. He also threatened all three (3) female students that he could positively or adversely affect their bar admission through a negative reference and aggressively harassed each of them. Young also went so far as to tell one of the women that she should be sleeping around and suggested she should be

his mistress. In so doing, he gave her a demeaning nickname.

Young also regularly yelled at one law student until she became upset and on a number of occasions insisted upon receiving a hug which the woman told him made her uncomfortable. In one instance while yelling at one of the women, he hit her in the head. *Id.*, at p. 310.

Young is more on the scale of *Mismas* and *Skolnick*. *Young* exceeds the misconduct in this case and really does not compare to this matter at all. Young's conduct involved three (3) women, all of whom he had the authority to hire, fire, and supervise, and his conduct constituted eight (8) separate ethical violations between the three (3) women. He hit one of the women in the head and expressly threatened them with unfavorable recommendations for the bar exam. *Young*, at 310.

The Court issued a two (2) year suspension with one (1) year stayed for Young's misconduct finding that he violated DR 1-102(B) [A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability] and 1-102(A)(6) [Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law] as well as an additional violation of DR 9-101(C) [stating or implying that he was able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official)] relative to Young's actions as to two (2) of the women. The only mitigation presented in *Young* was his religious faith and that he was dealing with the death of his mother. *Id.* Unlike Mr. Bennett, Young contested the factual allegations in the disciplinary proceeding and entered into an undisclosed financial settlement with one of the women for sexual harassment.

Given the extent of Young's misconduct involving three (3) women with numerous ethical violations for which his actual time of suspension was one (1) year, *Young*, if relevant at all, respectfully, supports a fully stayed six (6) month suspension for Mr. Bennett.

2. Disciplinary Counsel v. Campbell, 68 Ohio St.3d 7, 1993-Ohio-8. Frankly, *Campbell* does not compare at all to Mr. Bennett's case and should not have even been considered by the Board, let alone cited in the Board Report. [Board Report ¶ 61]. First, for clarification and to correct the Board's misstatement, this Honorable Court suspended Campbell for one (1) year and not indefinitely as stated in the Board Report. *Campbell*, at [28] see also Board Report ¶ 61. Additionally, *Campbell* included misconduct that spanned over fourteen (14) years while the respondent was in private practice and later serving as a judge. The six (6) count complaint against Campbell, to which Campbell disputed many facts, involved repeated instances of forcible kissing and touching as well as making comments with sexual overtones with multiple women, over all of whom he had supervisory authority or who otherwise appeared in his court room. *Campbell* also involved both attorney and judicial ethical violations.

Given that this judicial officer was suspended for one (1) year for a six (6) count complaint that involved forcible touching and kissing over fourteen (14) years with many women, all while disputing many of those facts (unlike Mr. Bennett who stipulated to all facts and the single ethical violation with J.S.), the egregiousness of *Campbell* also in comparison to the instant matter, if it stands for any precedent, supports a fully stayed six (6) month suspension for Mr. Bennett.

3. In Columbus Bar Assn. v. Baker, 72 Ohio St.3d 21, 1995-0hio-77. [Board Report ¶ 59]. In *Baker*, the Court issued a six (6) month stayed suspension and a two (2) year probation for using inappropriate, vulgar, sexually explicit, and suggestive language in the presence of a 17-year-old student who Baker employed in his office. The minor student employee was embarrassed and disgusted by the language used. Also, Baker failed to timely pay the student-employee's wages which she had earned. As a result, the court found that Baker committed two (2) counts of misconduct involving violations of DR 1-102(A)(3) [illegal conduct involving moral turpitude]

and 1-102(A)(6) [conduct that adversely reflects on fitness to practice law].

Given the young age of the employee over whom Baker presumably had authority to hire, fire, and supervise and the multiple ethical violations including one (1) which arose from failing to timely pay the student-employee's wages, *Baker* – which resulted in a six (6) month stayed suspension - would support the same suspension for Mr. Bennett.

Therefore, in light of the court's precedent in *Berry*, *Mismas*, *Skolnick, Young*, *Campbell*, *and Baker*, the appropriate sanction that this Honorable Court should order relative to Mr. Bennett is a fully stayed six (6) month suspension, on the conditions that he continue with his current mental health counseling and commit no further acts of misconduct.

OBJECTION NO. 2: The Board erred in considering cases with Prof. Cond. R. 8.4(h) violations involving relationships and sexually related misconduct with clients.

In the Board's Report, the Panel stated that it found it informative to consider cases with Prof. Cond. R. 8.4(h) violations involving relationship with clients. [Board Report ¶ 62]. While fully acknowledging the power imbalance between an attorney and a law clerk in an employment setting as discussed above, respectfully, the sanctity of the attorney-client relationship is paramount and the power imbalance between an attorney and a client, particularly at a time of peril or crisis in the client's life, and whether or not their interests are protected by the attorney, do not merit comparison.

Seminally, as often stated repeatedly by this Honorable Court, "The primary purpose of the disciplinary process is to protect the public from lawyers *who are unworthy of the trust and confidence essential to the attorney-client relationship* and to allow us to ascertain the lawyer's fitness to practice law." *Disciplinary Counsel v. Sarver*, 2020-Ohio-5478, 163 Ohio St. 3d 371,

170 N.E.3d 799 (emphasis added) citing *Disciplinary Counsel v. Sabroff*, 123 Ohio St.3d 182, 2009-Ohio-4205, 915 N.E.2d 307, ¶ 20.

With the above in mind, there, in fact, exists a separate and express rule prohibiting sexual relationships between lawyers and clients which is not relevant herein, and is over and above the letter and spirit of Prof.Cond.R. 8.4(h). Prof.Cond.R. 1.8(j) prohibits a lawyer from engaging in consensual sex with a client unless that consensual sexual relationship predates the attorney-client relationship because "[t]he *client's reliance on the ability of her counsel in a crisis situation has the effect of putting the lawyer in a position of dominance and the client in a position of dependence and vulnerability*," *Disciplinary Counsel v.. Porter*, 2021-Ohio-4352, 166 Ohio St. 3d 117, 182 N.E.3d 1188 (emphasis added) quoting *Disciplinary Counsel v. Booher*, 75 Ohio St.3d 509, 510, 1996-Ohio-248, 664 N.E.2d 522.

While appreciating and recognizing the power imbalance between J.S. as a legal intern and Mr. Bennett as an AUSA, the same degree of trust, confidence, dependence, and vulnerability which exists within the attorney-client relationship, particularly during times of crisis when clients come to their attorneys in great need to protect the clients' interests, is not present in this case. Therefore, this line of precedent of attorney sexual misconduct involving clients should not have been considered at all let alone relied upon by the Panel and Board in recommending a sanction. These cases are discussed below to explain why they are not instructive in the instant matter.

A. Inapplicable Precedent Considered by the Board of Prof. Cond. R. 8.4(h) Violations Involving Relationships and Sexually Related Misconduct with Clients.

1. *Akron Bar Assn. v. Miller*, 130 Ohio St.3d 1, 2011-Ohio-4412. In *Miller*, the Court issued a six (6) month stayed suspension with one (1) year of probation for misconduct committed by an attorney towards a client resulting in a Prof. Cond. R. 8.4(h) violation. Miller was appointed

by the Summit County Court of Common Pleas, Domestic Relations Division, to represent a client in defending against a show-cause order which required the client to show why she should not be held in contempt for failing to make court-ordered child support payments. *Id.* During a telephone conversation with the client, Miller asked his client about her breast size, stated that she should show him her breasts as a reward, and made a suggestion that she perform a sexual act on him. At the disciplinary hearing, the client testified that the conversation, "made her uncomfortable", that receiving the call was "like being raped without being touched", and that she felt as though she were reduced to mere property. *Id.* at [P11].

This Honorable Court, in determining the sanction in *Miller*, acknowledged that it "consistently disapproved of lawyers engaging in sexual conduct with clients where the sexual relationship ''arises from and occurs during the attorney client relationship,' and such misconduct 'warranted a range of disciplinary measures depending on the relative impropriety of the situation …'" *Id.* at [P18] (string citations omitted). The Court further noted that, "although the misconduct in this case did not involve an actual sexual relationship, it did involve a violation of the client's trust and a deliberate (and successful) attempt to demean her by exploiting her vulnerabilities." *Id.* at [19].

Miller's misconduct came at a time in his client's life when she was facing being held in contempt of court for failure to pay child support and, thereby, facing potential incarceration, at a time when she had no job and no driver's license. She was completely vulnerable and dependent upon Miller to protect her interests. In *Miller*, the aggravating factors, as in the instant matter, of selfish motive and harm to a vulnerable client were found. The Court also found mitigating factors of no prior disciplinary record, cooperation, evidence of good character and reputation, and the existence of a mental impairment. *Id.* Appreciating the power imbalance and vulnerability of J.S.

as Mr. Bennett has so stipulated, the degree and level of power imbalance which exists in *Miller*, respectfully, does not compare to that between an attorney and intern including the facts of the instant matter.

Nonetheless, the Board in an effort to, in counsel's view, inappropriately advocate for a sanction for Mr. Bennett greater than the agreed stipulated six (6) month stayed suspension, as imposed in *Miller,* points to the existence of the mitigation of mental impairment in *Miller*. [Board Report [at ¶65]. Momentarily setting aside that, as stated above, *Miller* and cases like it with Prof. Cond. R. 8.4(h) violations involving relationships with dependent clients should not be considered at all as comparisons to the instant matter, the Board's point about the lack of mental health mitigation, here, is misplaced. Though there is evidence, albeit with no formal mitigation finding of mental impairment in the instant matter, the Panel and Board found, as was stipulated by the parties, the applicability of mitigation evidence of imposition of other penalties or sanctions relating to Mr. Bennett's loss of employment. That same mitigation factor is not present in *Miller*.

No one mitigation factor listed in Gov.Bar R. V(13)(C) should be afforded more weight than another by the Board in simply seeking to recommend and enhance a sanction. Therefore, while preserving the above objection that *Miller* should not have been considered in determining sanction, given the degree of power imbalance in *Miller* between attorney and vulnerable, dependent client in a moment of crisis, Mr. Bennett should certainly receive no greater sanction than the same six (6) month stayed suspension issued.

2. *Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207. In all candor, as a case involving relationships with dependent clients, the *Lockshin* case is not at all applicable to the current matter, is wholly irrelevant, and should not have even been considered at all by the Board in recommending a sanction for Mr. Bennett. [See Board Report at ¶ 64]. In

Lockshin, the court issued an indefinite suspension for an eight (8) count amended complaint alleging that the respondent violated DR 1-102(A)(3), DR 1-102(A)(4), DR 1-102(A)(6), and DR 7-102(A)(5) by engaging in inappropriate sexually related misconduct with a potential witness, a law-enforcement officer, and *five (5) different clients*, and for failing to file a timely appeal on a client's behalf thereby violating Prof. Cond. R. 1.3, 8.4(d), and 8.4(h). *Lockshin*, 125 Ohio St.3d 529.

One of Lockshin's clients with whom he engaged in misconduct was a 16-year-old female in a juvenile matter whom he frequently called and asked personal questions that were entirely unrelated to her case and sent instant messages to initiate "flirtatious" conversations which turned sexual. *Id.* at [P10]. Later, when the girl was 17 years old and incarcerated at a juvenile-detention center, Lockshin visited her at the detention facility, engaged in inappropriate personal conversations, "played footsie" with her, touched her leg, and informed her that he was sexually aroused. *Id.* at [P11].

In another matter while interviewing a witness for a client in a criminal matter, Lockshin commented on her appearance, implied that he had sex with clients, and touched the back of her neck when she got up to leave. When he later attempted to call her, the witness' grandmother told Lockshin that he made her granddaughter feel uncomfortable and to never call again. *Id.* at [P14, P15].

In a third count of misconduct, Lockshin showed pictures of a "scantily clad" female client to another attorney while having lunch and contacted the client to request another photograph of her to motivate him to do well in court that afternoon. *Id.* at [P17].

The fourth count of misconduct involved a client that Lockshin represented relative to a domestic violence charge and, later, in a divorce. The client testified that almost every conversation

she had with Lockshin turned sexual and that on one occasion, Lockshin told her that he wanted to meet her at a hotel to have sex, talking to her on the phone sexually aroused him, he would be satisfied just giving her oral sex, and he wanted to see and touch her breasts. During a visit to his office, he cornered the client, grabbed her by the arm, pushed himself up against her, put his arm around her, and tried to kiss her. During a third representation, the client had to block his number after Lockshin called her at home every day and sent her inappropriate text messages asking her to send him naked pictures and meet him at motels. *Id.* at [P18], [P20].

With yet another client in a divorce matter, Lockshin touched her leg and rubbed her shoulders during a meeting and asked her to meet him at a hotel. The client said that Lockshin "made her feel that she would lose custody of her young children if she did not cooperate." *Id.* at [P23], [P24].

In another count of misconduct, Lockshin represented a woman in related criminal and children services matters. While the client was incarcerated, Lockshin showed her two pictures of clients who were exotic dancers, telling her that one of them wanted to pay for his services with sexual favors and sent the client a letter which suggested that they get a hotel room. *Id.* at [P27].

Clearly, all of these clients were extremely vulnerable and dependent upon Lockshin to protect their interests as his clients in moments of crisis in their lives and his acts violated the requisite trust and confidence that a client places in an attorney. The power imbalances which existed in *Lockshin* between attorney and clients do not and should not in any way be compared to the facts present in this matter.

Though the Board Report [¶65] ultimately reaches the correct conclusion in finding that Mr. Bennett's misconduct does not rise to the level of that in *Lockshin*, respectfully, it was error to consider this case involving relationships with dependent clients in recommending a sanction

for Mr. Bennett. Such consideration only could have been made, for some inexplicable reason, to inappropriately seek to an enhance upward the recommended sanction to an actual suspension rather than a six (6) month stayed suspension for Mr. Bennett as was jointly recommended by the parties and supported by the pertinent case law set forth in *Berry*, *Mismas*, *Skolnick*, *Young*, *Campbell*, and *Baker* involving relationships with law clerks and other employees.

B. Additional, Similar Client-Impacted Precedent Supporting a Stayed Suspension Not Considered by the Board.

Should the Court disagree with Mr. Bennett's second objection and determine that it is appropriate to consider Prof. Cond. R. 8.4(h) cases involving relationships with clients, there are several, additional such cases that were not cited in the Board Report which more readily compare to the instant matter and support the issuance of a fully stayed suspension.

1. *Disciplinary Counsel v. Hines*, 133 Ohio St.3d 166, 2012-Ohio-3929, 977 N.E.2d 575. Hines engaged in a sexual relationship with a client. He also hired his client to work at his law firm and moved her and her children into his home while representing her in a domestic-relations case. As the relationship deteriorated, Hines filed aggravated-menacing and domestic-violence charges against the client and obtained a temporary protection order against her. After an adverse judgment in the client's domestic-relations case was issued, Hines terminated his legal representation and left her without counsel at a critical juncture in her case. The Court found that Hines violated Prof.Cond.R. 1.8(j) *and* 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law), and the court imposed a six (6) month conditionally stayed suspension for his misconduct.

Though the power imbalance between attorney and client is greater when the client's interests are dependent (in this case the client was also employed by the lawyer) and the attorney

and client shared a sexual relationship, Hines received a six (6) month conditionally stayed suspension. It is then only appropriate that the same sanction be imposed upon Mr. Bennett.

2. *Disciplinary Counsel v. Hubbell*, 2015-Ohio-3426, 144 Ohio St. 3d 334, 43 N.E.3d 397. Hubbell attempted to initiate a romantic relationship with a client he was representing *pro bono* in a custody dispute. The relator charged Hubbell with violating Prof.Cond.R. 1.8(j) and 8.4(h). This Court accepted the consent to discipline agreement reached by the parties in that matter that Hubbell violated Prof.Cond.R. 1.8(j) [dismissing the alleged violation of Prof.Cond.R. 8.4(h)] and that this conduct warranted a stayed six (6) month suspension from the practice of law. The same sanction imposed in *Hubbell* would be appropriate in this matter.

3. *Akron Bar Ass'n v. Fortado*, 2020-Ohio-517, 159 Ohio St. 3d 487, 152 N.E.3d 196. The Court ordered a conditionally stayed one (1) year suspension for Fortado for engaging in a sexual relationship with a client while in a committed, long-term relationship that outlasted the attorney-client relationship. In *Fortado*, the court recognized that the court typically required attorneys who engaged in inappropriate sexual relationships with their clients to serve actual time away from the practice of law when: (1) the attorney engages in additional rule violations or (2) when other aggravating factors were present. See also *Disciplinary Counsel v. Bunstine*, 136 Ohio St.3d 276, 2013-Ohio-3681, ¶ 32, 995 N.E.2d 184 [imposing a conditionally stayed one (1) year suspension on an attorney who, in his second disciplinary matter, solicited sex from a client in lieu of payment for his fees]. Mr. Bennett did not commit additional rule violations beyond his violating Prof.Cond.R. 8.4(h), nor are the additional aggravating factors (such as, prior discipline, multiple violations, lack of cooperation, submission of false evidence, or refusal to acknowledge wrongful nature of conduct) present in this case that would support a sanction of serving an actual suspension rather than a stayed suspension.

Respectfully, it seems fundamentally unfair and unjust that an attorney does not receive any actual suspension time for actually having a sexual relationship with a client during an attorney-client relationship (regardless of whether the misconduct compromised the client's interests) when compared to the misconduct of Mr. Bennett towards J.S. if an actual suspension is imposed against Mr. Bennett.

4. *Disciplinary Counsel v. Siewert*, 130 Ohio St.3d 402, 2011-Ohio-5935, 958 N.E.2d 946. The Court imposed a fully stayed six (6) month suspension when an attorney engaged in an improper sexual relationship with a chemically dependent client who had retained him to represent her in her divorce, a domestic-violence matter, and a related civil-protection-order proceeding. Siewert stipulated that his misconduct adversely reflected on his fitness to practice law and materially limited his ability to represent his client.

In furthering the discussion of power imbalance and vulnerability in consideration of a sanction, respectfully, the acknowledged power imbalance between Mr. Bennett and J.S. does not rise to that in *Siewert*; and, therefore, if there is any consistency to be applied by this Honorable Court, Mr. Bennett should not have a greater suspension imposed than the stayed six (6) month suspension in *Siewert*.

5. *Cleveland Metro. Bar Ass'n v. Paris*, 148 Ohio St.3d 55, 2016-Ohio-5581, 68 N.E.3d 775. The Court disciplined the attorney in *Paris* who, not only made unwelcome sexual advances toward a client, but also failed to attend the client's sentencing hearing. Although the Court found that Paris had acted with a selfish motive, engaged in multiple offenses, and harmed a vulnerable client, the Court imposed a fully stayed six (6) month suspension for his misconduct.

Additionally, unlike Mr. Bennett, the Board also found that Paris did not understand or accept the wrongful nature of his conduct or make a particularly strong showing of remorse,

neglected to attend her sentencing hearing, and yet this Honorable Court issued a fully stayed suspension in *Paris*. So should be the result in this matter.

6. *Toledo Bar Ass'n v. Burkholder*, 109 Ohio St. 3d 443, 2006-Ohio-2817, 848 N.E.2d 840. Burkholder repeatedly, for months, asked a client out even though the client told him she was not interested in dating. On one occasion at his home, Burkholder asked the client whether she wanted to see his penis. On another occasion, Burkholder touched the client while they were at a bar, putting his arm around the client, pulling her close to him, touching her shoulders and leg, and the client had to ask him twice to remove his hand from her thigh. The client testified that the respondent's actions were inappropriate and made her feel nervous and uncomfortable.

The Court held that a stayed six (6) month suspension is the appropriate sanction for misconduct in which the respondent who engaged in two (2) violations of misconduct: DR 1-102(A)(6) [prohibiting conduct that adversely reflects on a lawyer's fitness to practice law] and DR 5-101(A)(1) [barring an attorney from accepting employment if the exercise of professional judgment on behalf of the client reasonably may be affected by the lawyer's financial, business, property, or personal interests]. *Id.* In delivering its rationale for the stayed suspension, the Court noted some of its other decisions:

> We have imposed stayed suspensions in other cases involving unwanted sexual advances. See *Disciplinary Counsel v. Quatman*, 108 Ohio St.3d 389, 2006 [***843] Ohio 1196, 843 N.E.2d 1205 (imposing a stayed one-year suspension and two years' probation on an attorney who had inappropriately touched a client's breasts, had made an inappropriate comment to her, and then had submitted false statements and engaged in deceptive practices during the disciplinary process); *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 2004 Ohio 734, 804 N.E.2d 423 (imposing a stayed one-year suspension and two years' probation on an attorney who had made unsolicited and inappropriate sexual [*446] comments to a client and had engaged in consensual sexual relations with another client). [**P13] Unlike the attorney in the *Quatman* case, respondent cooperated in the disciplinary process and did not falsely blame his misconduct on alcohol abuse. And unlike the attorney in the *Moore* case, respondent confined his misconduct to one client.

Thus, Burkholder received a stayed six (6) month suspension for persistently asking a client out when she expressly told him that she was not interested in dating, making sexually inappropriate comments to a client and repeatedly touching her despite her objections. It would be only fair, just, and appropriate for Mr. Bennett to receive the same stayed six (6) month suspension for far less egregious conduct.

C. A fully stayed six (6) month suspension with conditions is the appropriate sanction.

Should this Honorable Court determine it appropriate in determining the sanction in the instant matter to consider cases with Prof. Cond. R. 8.4(h) violations involving relationships with clients and sexually related misconduct of attorneys, the dictates of fairness require that the Court's announcements in *Hines*, *Hubbell*, *Fortado*, *Siewert, Paris, Burkholder, Moore*, and *Quatman* compel the imposition of the same fully stayed six (6) month suspension for Mr. Bennett rather than impose an actual suspension as inappropriately recommended by the Board.

As it specifically relates only to the cases discussed above regarding Prof. Cond. R. 8.4(h) violations involving a law clerk, legal intern, paralegal, or other employee (i.e., *Berry, Mismas,* and *Skolnick*), Mr. Bennett raises one distinction for this Honorable Court's consideration and acknowledges one other difference between those cases and his. First, while Mr. Bennett fully accepts responsibility for his misconduct and acknowledges that his misconduct is his own, one fact that is not present in the facts of the case law discussed above is that, at least initially, J.S. has acknowledged that both she and Mr. Bennett engaged in the flirting. [Joint Exhibit 2, p. 10, at 13-20; p. 14 at 11-16; p. 18, at 22-23; p. 18, at 22-23, p. 19, at 3-5. 8-12; See also Stipulation ¶ 36 & Board Report ¶ 39]. Despite the fact that Mr. Bennett believed the flirtation to be mutual in the beginning, Mr. Bennett admits his engagement in that activity was wrong from the beginning, and both regrets and is remorseful for the harm he caused to J.S. [Board Report ¶ 46].

The other difference is, admittingly, that this case involves an act of unwelcome, but unintended, physical contact. However, in all of the cases involving relationships with clients discussed above and those cited by the Board Report where physical contact occurred, the contact involved intentional, sometimes egregious, touching and some involved actual sexual relationships.

In August or September 2017, respondent and J.S. were in the Akron office's library when Mr. Bennett moved his arm across her body in reaching for a book, and in so doing, touched her breasts with the back of his hand and arm. J.S. has indicated that she believed the contact was intentional. While Mr. Bennett admits that the act took place, was inappropriate, and that J.S. believed it to be intentional, Mr. Bennett did not intend the action to offend or hurt J.S. or to be for purposes of his sexual gratification. In entering into the Stipulations [¶¶ 12-14] in fully cooperating with this disciplinary process and acting with sensitivity for the harm he caused J.S., Mr. Bennett has consistently expressed when asked about the touching that, though he does not clearly recall the incident, if J.S. said it happened, then it must have happened. It should be noted that, though he maintains that the touching was inadvertent and certainly not for the purposes of his own sexual gratification, Mr. Bennett stipulated that J.S. believed the touching to be intentional. [Stipulation ¶ 13]. Regardless of J.S.' belief as to whether the touching was intentional, the touch was an isolated incident, and Mr. Bennett never attempted to touch J.S. again over the next two years.

Mr. Bennett, in no way, seeks to minimize his actions. He abused a position of authority over a legal intern by subjecting her to unwanted sexual comments and an unwelcome physical touch. This conduct caused J.S. anxiety and fear over her future job prospects. However, this Honorable Court has previously imposed a fully stayed suspension where an attorney has touched

a client's breast. *See Disciplinary Counsel v. Quatman*, 108 Ohio St.3d 389, 2006-Ohio-1196, 843 N.E. 2d 1205, ¶¶ 6, 26 (fully stayed one (1) year suspension for putting hands on client's breasts and saying "You have very nice breasts."). The parties have noted that, when compared to relevant case law, Mr. Bennett's conduct is less egregious than those where this Honorable Court imposed actual suspensions. See also *Hines*, *Fortado*, *Siewert*, *Burkholder*, and *Moore*, supra.

In addition, as discussed in detail above, Mr. Bennett has been subject to other penalties or sanctions related to his stipulated misconduct through the loss of his employment with the USAO, a mitigating factor not present in the other cases discussed and compared.

As a momentary aside, counsel posits to this Honorable Court that counsel is extremely troubled by the Panel's statement in the Board Report, in making its recommended sanction of a heightened actual suspension rather than a stayed suspension as jointly recommended by the parties, that the panel is "troubled" that "(Mr. Bennett's) behavior was open and notorious" and that "there was evidence that other colleagues had similar experiences." [Board Report, ¶ 66]. In making this statement, the Panel cites and seemingly relies on pure hearsay statements made by J.S. in her statements as part of the OIG investigation - which statements were marked as Joint Exhibits 1 and 2, and sealed from public access in being included as part of this record. Those Joint Exhibits were submitted by the parties for the sole purposes of supporting their Stipulations by the evidentiary standard of clear and convincing evidence pursuant to Gov.Bar.R. V(12)(I) as to Mr. Bennett's misconduct involving J.S. while giving sensitive consideration to not requiring and subjecting J.S. to appear and testify at the hearing. -

Relator did not, in making its determination to bring charges of misconduct against Mr. Bennett, assert any other claims or counts of misconduct or factual allegations against Mr. Bennett for any interactions that he may have had with anyone other than J.S. Likewise, no such

interactions were part of the Stipulations entered into by the parties and there was no testimony, whatsoever, by J.S. or anyone else at the hearing about any subject other than Mr. Bennett's misconduct involving J.S. As a result of the Panel's statement in ¶ 66 of the Board Report, Mr. Bennett was not afforded his basic due process rights regarding any alleged interactions with persons other than J.S. including, but not limited, opportunity to confront and cross-examine any witnesses relative to any such issue. For example, J.S. statements regarding any such conduct were, at best, hearsay as she testified that, "that's just what (she) heard" from " ... just another intern, because he had heard it from Cleveland, ..." and the identity of such intern J.S. could not clearly recall, but could only speculate. [Joint Exhibit 2, pp. 6-7].[7] It was not the intent or stipulation of the parties that J.S.' additional hearsay statements about things she heard from others as included in Joint Exhibits 1 and 2 were to be considered in any way shape or form.

Thus, any reference by the Panel in the Board Report that it was "troubled" by any hearsay statements of J.S. outside the parties' Stipulations and hearing testimony does not, under any legal or factual standard, meet the evidentiary burden of clear and convincing evidence and the due process protections afforded by the attorney discipline process. It was clearly error for the Panel and Board to consider those statements of other rumored behavior and then rely upon those same statements in recommending the greater sanction of an actual suspension rather than the stayed suspension as jointly recommended by the parties and supported by the applicable case law.

Finally, in adhering to this Honorable Court's oft stated purpose underlying a disciplinary sanction that it is not to punish the offender but to protect the public, Mr. Bennett's mental health

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[7] In addition, there are sworn statements of other witnesses interviewed as part of the same OIG investigation who contradict J.S.' statements that they witnessed the things J.S. reported to the investigator. However, those witness statements are (appropriately) not part of the record in this matter as any allegations regarding Mr. Bennett's behavior involving anyone other than J.S. are not, and have not, been included in this matter.

treatment provider has opined that Mr. Bennett currently possesses the ability to engage in the ethical and competent practice of law and that he is unlikely to repeat his misconduct. [Joint Ex. 7, Christy Sugarman Depo. Tr., pp. 28-29]. Mr. Bennett's colleague and officemate, Ms. Zacharias, who has worked with Mr. Bennett and interacted with him closely these past two (2) years, has also testified to Mr. Bennett's, overall character, value to the profession, and current ability to engage in the ethical and competent practice of law. [Tr. 41-43]. Accordingly, a fully stayed six (6) month suspension will appropriately fulfill this Honorable Court's purpose of protecting the public.

Therefore, respectfully and humbly, with full regret and remorse for his misconduct, and in view of *Berry, Mismas, Skolnick, Young*, *Campbell, and Baker*, Mr. Bennett prays that this Honorable Court reject the recommended sanction of the Panel and Board of an actual suspension from the practice of law and, instead, order a fully stayed six (6) month suspension, on the condition that Respondent commit no further acts of misconduct and continue with his current course of mental health counseling.

IV. CONCLUSION

In light of all the above, it is clear that Mr. Bennett has and continues to treat this process with the utmost respect which we would hope all members of our profession would devote to the process, but which is not always the case as exemplified by the matters distinguished above.

In light of all of the stipulated facts, the aggravating and mitigating factors, the Joint Exhibits, the testimony taken and legal precedent discussed, as well as the joint recommendation of sanction of Mr. Bennett and Relator, Mr. Bennett respectfully requests that this Honorable Supreme Court of Ohio find, agree, and order the sanction of a stayed six (6) month suspension from the practice of law conditioned upon his continued mental health treatment, payment of all

costs in these proceedings, and engagement in no further misconduct, which will adequately protect the public of the State of Ohio as well as appropriately address the misconduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been served via e-mail on this **2nd** day of May, 2023 upon:

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APPENDIX

1. April 7, 2023, Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct.

2. April 13, 2023, Order to Show Cause

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

In re:

Complaint against	**Case No. 2022-034**
Mark Stewart Bennett **Attorney Reg. No. 0069823**	**Findings of Fact,** **Conclusions of Law, and** **Recommendation of the** **Board of Professional Conduct**
Respondent	
Disciplinary Counsel	
Relator	

OVERVIEW

{¶1} This matter was heard on February 2, 2023 before a panel consisting of Lori A. Herf, and Thomas M. Green, Elizabeth E. Cary, panel chair. None of the panel members resides in the district from which the complaint arose. Respondent waived a probable cause determination by the Board pursuant to Gov. Bar R. V, Section 11(B).

{¶2} Respondent was present at the hearing and represented by Bryan L. Penvose, who appeared in person, and Richard S. Koblentz, who attended remotely. Matthew A. Kanai appeared on behalf of Relator.

{¶3} This case involves the ongoing sexual harassment by Respondent towards J.S., an intern with his then-employer. While Respondent did not have a supervisory position over J.S., he was a senior attorney in the office whom J.S. felt was vital to her career prospects. The harassment took place inside and outside the office for a period of approximately 16 months.

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

precedents, the panel recommends that Respondent serve a six-month suspension with additional conditions on his reinstatement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to the practice of law in Ohio on November 9, 1998 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. Stipulations ¶¶1-2.

{¶6} During the period referenced below, Respondent was employed as an Assistant United States Attorney in the U.S. Attorney's Office for the Northern District of Ohio (USAO) in the Cleveland and Akron offices. Stipulations ¶¶3, 21.

J.S.'s Initial Internship

{¶7} In May 2017, J.S. was 24 years old and started an internship at the Akron office of the USAO, coinciding with her second year of law school. Her internship ended in November 2017. However, she was reinstated as an intern in the Youngstown office in August 2018, and worked at the USAO until June 2019. J.S. worked variously in the Cleveland, Akron, and Youngstown offices. Stipulations ¶4.

{¶8} J.S. became acquainted with Respondent in 2017. Stipulations ¶5.

{¶9} At various times during the internship, J.S. believed that Respondent attempted to look up J.S.'s skirt or would be "looking at [her] butt" on different occasions. Stipulations ¶6.

{¶10} J.S. heard from a male intern that Respondent had made sexually inappropriate comments about her. Stipulations ¶7.

{¶11} During the internship, Respondent had consensual conversations with J.S. about his marital sex life. Stipulations ¶8.

{¶12} Respondent also asked J.S. about her sex life and suggested that he could be J.S.'s sexual partner. Stipulations ¶9, Hearing Tr. 17.

{¶13} According to J.S., Respondent requested that J.S. send him nude photos of herself on Snapchat at some point during the internship. Stipulations ¶10, Hearing Tr. 17.

{¶14} During the internship, Respondent offered to buy J.S. clothing from J. Crew, Victoria's Secret, and Brooks Brothers. Stipulations ¶11.

{¶15} In August or September 2017, Respondent and J.S. were in the Akron office's library. Respondent told J.S. he needed a copy of the 2015 Sentencing Guidelines. He then reached across her body, touching her breasts with the back of his hand. Stipulations ¶12, Hearing Tr. 18.

{¶16} J.S. believed the touching was intentional because Respondent made and held eye contact with her during the touching. Stipulations ¶13, Hearing Tr. 18.

{¶17} According to J.S., Respondent removed the back of his hand at the time another attorney came into the library. Stipulations ¶14.

{¶18} Respondent began communicating with J.S. through various media, including Snapchat, Facebook, and text messaging. Stipulations ¶15.

{¶19} Eventually, J.S. began blocking Respondent's methods of communicating with her, including refusing Snapchat requests, blocking his phone number, and blocking him on Facebook. Stipulations ¶16.

{¶20} When Respondent questioned J.S. about her not being visible on social media, she would feign ignorance, claiming that she did not know it happened. Stipulations ¶17.

J.S.'s Second Internship

{¶21} After her first internship ended in 2017, J.S. left the USAO. - However, J.S. decided to try to return in 2018, and she reached out to Respondent to ask who she should contact. Stipulations ¶18.

{¶22} Respondent replied, asking what she was willing to do to get back into the office. J.S. believed his question had sexual overtones and did not pursue the matter with Respondent. Stipulations ¶19, Hearing Tr. 19.

{¶23} J.S. was reappointed as an intern in late 2018. Stipulations ¶20.

{¶24} J.S. asked to be stationed in the Youngstown office rather than the Akron or Cleveland offices where Respondent was primarily stationed. Stipulations ¶21.

{¶25} However, on January 2, 2019, Respondent texted J.S. about why she was in Youngstown, including inquiring into her sex life:

Respondent: why do you love YNG2 so much??? back with the same guy???

J.S. mayyybeeeeee

Respondent: what is wrong with you??? havent you learned yet? I thought you were finally going to just focus on finishing school and getting a real job???

J.S. i am!!!! i have been applying to jobs like crazy

Respondent: but you are driving 2 hours out of ur way??? and it obviously didnt work out the first time...is IT really that good??

J.S. omg im getting back to work.

Respondent: fine... what do i care anyway if u flunk out...

Stipulations ¶22.

{¶26} In or around January or February of 2019, J.S. asked Respondent for a letter of recommendation for a clerkship. Stipulations ¶23.

{¶27} Respondent replied by asking what he would get in exchange for the letter of recommendation. Stipulations ¶24, Hearing Tr. 19.

{¶28} J.S. decided not to pursue the recommendation and, instead, got recommendations from other attorneys. Stipulations ¶25.

{¶29} On a previous occasion, J.S. had requested a letter of recommendation and Respondent freely provided J.S. the recommendation without any innuendo or inappropriate suggestion. Stipulations ¶26.

{¶30} In March 2019, at around 4:00 a.m., Respondent Facebook messaged J.S., "Why do you haunt my dreams?" Stipulations ¶27, Hearing Tr. 19.

{¶31} J.S. also had to report to the Akron office during her second term. During her time in the Akron office, J.S. stated that she disliked interacting with Respondent so much that if she saw him looking for her, she would leave the area. Stipulations ¶28.

{¶32} She also asked a colleague to let her use their workstation so Respondent would not know she was in the office. Stipulations ¶29.

{¶33} Respondent continued to text J.S., which she felt was unwelcome and which she ignored. Stipulations ¶30.

{¶34} In a June 2019 text message exchange, Respondent said, "Nice. Can't wait to have it," in reference to J.S.'s butt, which he informed her "was looking wide for a while there" in response to a comment J.S. had made about her own appearance. Stipulations ¶31, Hearing Tr. 20.

{¶35} Respondent also texted her, "Damn u for making me think about it again," referring to sexual activity. Stipulations ¶32, Hearing Tr. 20.

DOJ Internal Investigation

{¶36} After J.S. informed a colleague about her interactions with Respondent, the Department of Justice, Office of the Inspector General investigated the allegations against Respondent. Stipulations ¶33.

{¶37} During the OIG investigation, J.S. stated that she did not report Respondent's conduct because she was raised in a background where "this is what you deal with and you don't say anything because then you're going to hurt your chances at a career[.]" Stipulations ¶34.

{¶38} J.S. has also stated, "I can't put my foot down because I'm an intern and he would always be like, oh I play poker with judges every Thursday and I'm so well connected[.]" Stipulations ¶35.

{¶39} During the OIG and relator's investigation, J.S. admitted that she has a flirtatious personality and that when J.S. and Respondent began interacting, she probably made flirtatious jokes to Respondent such as jokes about being his mistress. However, J.S. did not believe that she misled Respondent into believing that she wanted a sexual relationship with him or that she was receptive to his sexual comments. Stipulations ¶36.

{¶40} During the investigation, Respondent admitted that he may have asked J.S. for nude photos on Snapchat. Stipulations ¶37.

{¶41} He also stated that he was unaware of J.S.'s discomfort, and he inappropriately believed that his interactions with J.S. were mutually acceptable. Stipulations ¶38.

{¶42} Respondent admits that his actions were inappropriate, and that he did not realize how offensive they were to J.S. Stipulations ¶39, Hearing Tr. 17, 20, 22.

{¶43} The OIG recommended that termination proceedings be commenced as a result of Respondent 's violation of the office sexual harassment policy. Respondent believed he would have been terminated even if he contested those proceedings. Hearing Tr. 21, 60.

{¶44} As a result of the investigation, Respondent resigned from the USAO and subsequently reported his actions to Relator. A short time later, the Department of Justice

informed the Office of Disciplinary Counsel of its investigation of Respondent. Stipulations ¶43, Hearing Tr. 60.

Respondent's Disciplinary Hearing Testimony

{¶45} On June 20, 2021, Respondent voluntarily sought treatment, was diagnosed, and commenced treatment for anxiety and depression. Respondent testified that through counseling he has gained awareness of setting appropriate professional boundaries and putting himself in others' shoes. Hearing Tr. 63-70, 82. Respondent's treatment provider has expressed the same and a favorable opinion that Respondent has exhibited positive growth. Stipulations ¶40, Exhibits 5-7. Respondent remains in counseling at this time. Stipulations ¶41, Hearing Tr. 66-67.

{¶46} Respondent has expressed regret and remorse for his actions towards J.S. He would like to apologize but was advised to avoid further communication with J.S. and he has followed that advice. Stipulations ¶42, Hearing Tr. 76-77.

{¶47} Since resigning from USAO, Respondent has opened his own law practice, sharing office space with other solo practitioners, in the Greater Cleveland area. Stipulations ¶44.

{¶48} The parties stipulated to eight exhibits, which included documents from the OIG's investigation (under seal Joint Ex.. 1-3), 15 character reference letters (Joint Ex. 4), the deposition transcript and two treatment letters from Respondent 's counselor (Joint Ex. 5-7), and an affidavit from Respondent 's attorney during the OIG investigation advising that Respondent 's resignation was in lieu of termination and was effectively a sanction for his misconduct (Joint Ex. 8). In addition, attorney Kelly Zacharias appeared in person to testify as to Respondent 's good character while sharing office space with him after his resignation from the USAO. Hearing Tr. 28-45.

Rule Violation

{¶49} The parties stipulated (Stipulations ¶45, Hearing Tr. 77-78), and the panel finds by clear and convincing evidence, that Respondent's conduct violated Prof. Cond. R. 8.4(h) [a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law].

AGGRAVATION, MITIGATION, AND SANCTION

{¶50} When recommending sanctions for attorney misconduct, the panel must consider all relevant factors, including the ethical duties violated by Respondent, precedent established by the Supreme Court, and the existence of aggravating and mitigating factors. Gov. Bar R. V, Section 13(A).

Aggravating Factors

{¶51} The parties stipulated and the panel finds by clear and convincing evidence that the following aggravating factors as listed in Gov. Bar R. V, Section 13(B) were present:

- A dishonest or selfish motive; and
- The vulnerability of and resulting harm to victims of the misconduct.

Mitigating Factors

{¶52} The parties stipulated and the panel finds by clear and convincing evidence that the following mitigating factors as listed in Gov. Bar R. V, Section 13(C) were present:

- Absence of a prior disciplinary record;
- Full and free disclosure to the Board or cooperative attitude toward proceedings;
- Evidence of good character or reputation; and
- Imposition of other penalties or sanctions.

{¶53} Although the parties offered evidence of Respondent's diagnosis and treatment, it was not offered as a mitigating factor nor did the panel find any evidence to support it as a mitigating factor.

Sanction

{¶54} The parties recommended a fully stayed six-month suspension on the condition that Respondent commit no further acts of misconduct and continue with his current course of mental health counseling. The parties submitted a joint hearing brief in support of this sanction that cited cases focused on the offensiveness of unwanted advances and the power imbalance between the parties in determining the sanction. The parties assert this case is most like *Disciplinary Counsel v. Berry*, 166 Ohio St.3d 112, 2021-Ohio-3864 wherein the Court issued a fully stayed, six-month suspension. In that case, Judge Berry sent numerous Facebook messages to a courthouse staff member. Berry invited her to lunch or to have drinks multiple times. *Id.* at ¶¶6, 8. He also sent numerous unwanted messages that were "overtly partisan or vulgar." *Id.* at ¶10. Berry, like Respondent, acknowledged that his comments were inappropriate but stated he was unaware that they were unwelcome to the recipient at the time. The Court imposed the fully stayed suspension because "[j]udges are held to higher standards of integrity and ethical conduct than attorneys or other persons not invested with the public trust." *Id.* at ¶19 (internal quotations omitted), quoting *Disciplinary Counsel v. Horton*, 158 Ohio St.3d 76, 2019-Ohio-4139, ¶72.

{¶55} The joint brief also cited *Lake Cty. Bar Assn. v. Mismas*, 139 Ohio St.3d 346, 2014-Ohio-2483 and *Disciplinary Counsel v. Skolnick*, 153 Ohio St.3d 283, 2018-Ohio-2990 but argued that the actions in these cases were more severe than Respondent 's. Mismas hired a third-year law student and immediately began sending her inappropriate, sexually explicit text message, tried to gauge her sexual experience, and suggested that she perform a sexual act for him and that her employment depended on her compliance. He also invited her to travel with him on business and after she declined due to prior commitment, he threatened her employment. The law clerk resigned her employment the next day. Mismas then became hostile and threatened to tell her professors

about the "stupid decision she had made." The Court found aggravating factors of vulnerability and harm to a victim of the misconduct and a dishonest or selfish motive. Mitigating factors included full and free disclosure and cooperative attitude, good character and reputation, and a substance abuse impairment. The Court issued a one-year suspension with six months stayed.

{¶56} In *Skolnick*, immediately after hiring a paralegal, Skolnick began to criticize and verbally harass her, calling her "stupid, dumb, fat, 'whorey,' and bitch." The verbal insults and harassment continued during her two-and-a-half-year tenure with the firm. At one point he sexually harassed the paralegal by making reference to a sexual act he would like her to perform. Later a clinical psychologist diagnosed the paralegal with PTSD due to Skolnick's misconduct. Aggravating factors included a pattern of misconduct and harm to a vulnerable employee. Mitigating factors of no prior discipline, evidence of good character, cooperation, acknowledgement of misconduct, and remorse were found. The Court issued a one-year suspension with six months stayed.

{¶57} The joint brief noted that one difference between this case and the cited cases is that this case involves an act of unwelcome physical contact. The parties cite one case of physical contact with a client wherein respondent was issued a fully stayed one-year suspension for putting hands on client's breasts and saying, "You have very nice breasts." *Disciplinary Counsel v. Quatman*, 108 Ohio St.3d 389, 2006-Ohio-1196, ¶¶6, 26.

{¶58} The panel also identified the following cases as relevant.

{¶59} In *Columbus Bar Assn. v. Baker*, 72 Ohio St.3d 21, 1995-Ohio-77, Baker used inappropriate, vulgar, sexually explicit, and suggestive language in the presence of a 17-year-old student who worked in his office. The student employee was embarrassed and disgusted by the language used. The Court issued a six-month stayed suspension and a two-year probation.

{¶60} In *Cincinnati Bar Assn. v. Young*, 89 Ohio St.3d 306, 2000-Ohio-160, three female law students were hired to work for Young as legal assistants. Young asked them questions as to whether they had boyfriends, asked one student if she was a virgin, and suggested to one that she could fill the position of his girlfriend. He also told all three students that he could positively or adversely affect their bar admission. Young told one student that she should be sleeping around, suggested she should be his mistress and have sex with him, and gave her a nickname. Young also would regularly yell at one law student until she became upset and then console her with a hug. The Court concluded that Young's conduct constituted a hostile work environment prohibited by law. The Court determined that the mitigating factors, including no prior discipline, were not sufficient to reduce the sanction. The Court issued a two-year suspension with one year stayed and probation.

{¶61} In *Disciplinary Counsel v. Campbell*, 68 Ohio St.3d 7, 1993-Ohio-8, Campbell was both a private lawyer and judge engaged in several instances of misconduct that included unwelcome and offensive sexual remarks and/or physical contact with young lawyers. In all but one of the incidents, the target was someone over whom Campbell exercised authority. The Court issued an indefinite suspension for violations of former DR 1-102(A)(6) [now Prof. Cond. R. 8.4(h)], DR 1-102(A)(5) [now Prof. Cond. 8.4(d)], and Canons 1, 2(A), 3(A)(3) of the former Code of Judicial Conduct.

{¶62} The panel also found it informative to consider the following cases of Prof. Cond. R. 8.4(h) violations involving relationships with clients and third parties.

{¶63} In *Akron Bar Assn. v. Miller*, 130 Ohio St.3d 1, 2011-Ohio-4412, during a telephone conversation, Miller asked a client about her breast size, stated that he should show him her breasts as a reward, and made a suggestion that she perform a sexual act on him. Aggravating factors of

selfish motive and harm to a vulnerable client were found. Mitigating factors included no prior disciplinary record, cooperation, evidence of good character and reputation, and the existence of a mental impairment. The Court issued a six-month stayed suspension with one year of probation.

{¶64} In *Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, Lockshin engaged in inappropriate sexual communications with clients, a potential witness, and a law enforcement officer. Lockshin engaged in unwanted physical contact with some of the individuals. One mitigating factor of no prior discipline was found. Aggravating factors included multiple offenses, submission of false evidence, harm to vulnerable young women, a pattern of misconduct, and a dishonest or selfish motive. The Court issued an indefinite suspension.

{¶65} The panel is persuaded that while offensive and unacceptable, Respondent's actions did not rise to the level of those in *Mismas, Skolnick, Young, Campbell*, or *Lockshin,* each of whom received a suspension of greater than six months. Nevertheless, the panel finds that Respondent's actions are more severe than those in *Berry*, wherein the respondent-judge had no authority over the victim whatsoever and did not engage in any physical contact. Although *Quatman*, which resulted in a fully stayed one-year suspension and involved a single incident of physical touch is similar to this case, the ongoing harassment present here poses a different dynamic. *Miller*, which resulted in a six-month stayed suspension with one year of probation, is also on point, but contains an additional mitigating factor of mental impairment and single instance of improper conduct that is not present in this case.

{¶66} Although Respondent did not have the power to hire or fire J.S, his authority was not inconsequential. As an experienced attorney in the prestigious position of an AUSA, Respondent had the potential to sway the future of J.S.'s career by introducing her to other lawyers and judges with whom he was "so well connected" (Stipulations ¶35), expressing favorability of

her work product, and giving her professional recommendations. These are not trivial accolades for a law clerk to acquire from someone of Respondent's position, and they could potentially "set the course for a new attorney's entire legal career." *Mismas* at ¶22. Respondent's presence and authority was sufficient for J.S. to inconvenience herself by working in a different geographical location and essentially hiding out when she was in Respondent 's home office. Stipulations ¶¶21, 22, 28, 29. The panel is also troubled by the fact that Respondent 's behavior was open and notorious and witnessed by at least one of J.S.'s colleagues (Stipulations ¶7), and there was evidence that other colleagues had similar experiences. See Joint Ex. 1 at 10-11, 20-21 and 50; Joint Ex. 2 at 5-7.

{¶67} A quote from *Campbell, supra* rises to the forefront:

> [Campbell] was either directly or indirectly in a position of influence over the complainant. Similarly, his actions were almost exclusively directed at those most likely to be intimidated by his position * * * inexperienced attorneys engaged in a new job early in their legal career.
>
> *Campbell*, 68 Ohio St.3d at 11.

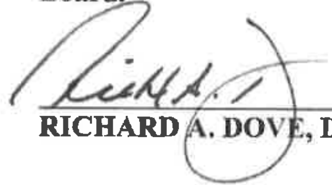
{¶68} Based upon the foregoing, the panel finds that an actual suspension is appropriate and recommends that Respondent receive a six-month suspension, with no time stayed. The panel further recommends that, as a condition of reinstatement, Respondent be required to provide proof that he has continued with his current course of mental health counseling.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on April 7, 2023. The Board voted to adopt findings of fact, conclusions of law, and recommendation of the hearing panel and recommends that Respondent, Mark Stewart Bennett, be suspended from the practice of law in Ohio for six months and ordered to pay the costs of these proceedings. The Board further recommends that, as a condition of reinstatement in addition to

the requirements of Gov. Bar R V, Section 24, Respondent be required to provide proof that he has continued with his current course of mental health counseling for the duration of his suspension or as otherwise recommended by a qualified healthcare professional.

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



RICHARD A. DOVE, Director

The Supreme Court of Ohio

Disciplinary Counsel,
Relator,
v.
Mark Stewart Bennett,
Respondent.

Case No. 2023-0471

ORDER TO SHOW CAUSE

The Board of Professional Conduct of the Supreme Court of Ohio filed a final report in the office of the clerk of this court. In this final report the board recommends that pursuant to Gov.Bar R. V(12)(A)(3), respondent, Mark Stewart Bennett, Attorney Registration No. 0069823, be suspended from the practice of law in Ohio for six months. The board further recommends that, as a condition of reinstatement in addition to the requirements of Gov.Bar R V(24), respondent be required to provide proof that he has continued with his current course of mental health counseling for the duration of his suspension or as otherwise recommended by a qualified healthcare professional. The board further recommends that the costs of these proceedings be taxed to respondent in any disciplinary order entered, so that execution may issue.

On consideration thereof, it is ordered by the court that the parties show cause why the recommendation of the board should not be confirmed by the court and the disciplinary order so entered. It is further ordered that any objections to the findings of fact and recommendation of the board, together with a brief in support thereof, shall be due on or before 20 days from the date of this order. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

It is further ordered that in lieu of objections, the parties, individually or jointly, may file a no-objection brief in support of the recommended sanction of the board pursuant to Gov.Bar R. V(17)(B)(2) within 20 days from the date of this order. It is further ordered that in lieu of objections or a no-objection brief, the parties may file a joint waiver of objections within 20 days from the date of this order.

After a hearing on the objections, or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper which may be the discipline recommended by the board or which may be more severe or less severe than said recommendation.

It is further ordered that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings and further that unless clearly inapplicable, the Rules of Practice shall apply to these proceedings. All documents are subject to Sup.R. 44 through 47 which govern access to court records.

It is further ordered that service shall be deemed made on respondent by sending this order, and all other orders in this case, to respondent's last known address.

Sharon L. Kennedy
Chief Justice