

IN THE SUPREME COURT OF OHIO

In Re: : Case No. 06-461  
SCOTT D. MAYBAUM :  
Respondent :  
CUYAHOGA COUNTY BAR ASSOCIATION :  
Relator :

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**RELATOR'S BRIEF IN OPPOSITION TO RESPONDENT'S OBJECTIONS TO  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION  
OF THE BOARD OF COMMISSIONERS ON  
GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO**

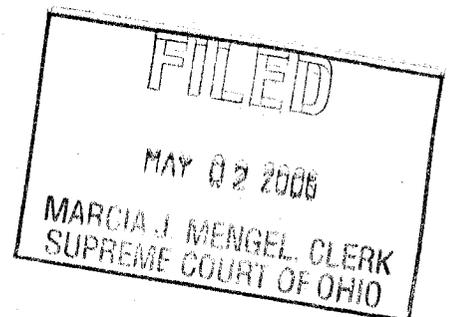
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**TABLE OF CONTENTS**

	Page
<b>TABLE OF AUTHORITIES</b> .....	ii
<b>STATEMENT OF FACTS</b> .....	1
<b>Procedural Background</b> .....	1
<b>Statement of Facts</b> .....	2
<b>ARGUMENT</b> .....	6
<b>CONCLUSION</b> .....	12
<b>PROOF OF SERVICE</b> .....	12
<b>APPENDIX</b>	Appx. Page
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO</b> .....	1

**TABLE OF AUTHORITIES**

Page

**CASES:**

Lorain County Bar Assn. v. Fernandez, (2003) 99 Ohio St.3d 426, 428. ....	9
Cleveland Bar Assn. v. Dixon, (2002) 95 Ohio St.3d 490. ....	9
Cuyahoga County Bar Assn. v. McClain (2003) 99 Ohio St.3d 248 . . . . .	9
Cleveland Bar Assn. v. Glatki (2000), 88 Ohio St.3d 381, 384 . . . . .	9
Disciplinary Counsel v. Wise (1999), 85 Ohio St.3d 644,645 . . . . .	9,11
Disciplinary Counsel v. Connaughton (1996), 75 Ohio St.3d 169,171. ....	9
Dayton Bar Assn. v. Gerren (2004) 103 Ohio St.3d 21, 2004-Ohio-4110 . . . . .	10
Toledo Bar Assn. v. Kramer (2000), 89 Ohio St.3d 321, 2000-Ohio-163. ....	10
Cleveland Bar Assn. v. Clavner (2003), 99 Ohio St.3d 53. ....	10
Columbus Bar Assn. v. Port (2004) 102 Ohio St.3d 395. ....	11
Cuyahoga County Bar Assn. v. McClain (2003) 99 Ohio St.3d 248 . . . . .	11

**RULES FOR THE GOVERNMENT OF THE BAR:**

BCGD Proc. Reg. 10(B)(2)(g). ....	8
DR1-102(A)(4) . . . . .	1
DR1-102(A)(5) . . . . .	1
DR 6-101(A)(3) . . . . .	1

DR 9-102(A)(3) ..... 1  
DR 9-102(B)(4) ..... 1

## STATEMENT OF FACTS

### Procedural Background

Relator Cuyahoga County Bar Association, (hereinafter "Relator"), filed a multi-count Amended Complaint against Respondent Scott D. Maybaum, (hereinafter "Maybaum" or "Respondent"), arising out of his representation of two clients, Dianne Cannon-Barron and Melissa Taylor-Diffenbacher. The formal complaint was certified, as amended, by the Board of Commissioners on Grievances and Discipline, (hereinafter "the Board"), on July 15, 2005. A hearing was conducted before a Panel of the Board on October 14, 2005. Expert testimony regarding the Respondent's mental health status was provided by Donald J. Weinstein, Ph.D. on behalf of Relator and Douglas McLaughlin, D.O. (via deposition) on behalf of Maybaum.

The Board issued its Findings of Fact and Conclusions of Law and Recommendation on March 6, 2006. The Board declined to find violations related to the representation of Melissa Taylor-Diffenbacher as alleged in Count Two of the Complaint. The Board did find violations with respect to the representation of Dianne Cannon-Barron as alleged in Count One of the Complaint, specifically DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(6) [conduct adversely reflecting on fitness to practice law]; DR 6-103(A)(3) [neglecting an entrusted legal matter]; DR 9-102(B)(3) [failing to maintain complete records of all funds of a client and failing to render appropriate accounts to this client]; and DR

9-102(B)(4) [failing to promptly pay or deliver to the client as requested by the client the funds in possession of the lawyer which the client is entitled to receive]. The Board recommended an indefinite suspension with conditions for reinstatement related to mental health treatment as delineated by the Panel.<sup>1</sup>

An Order to Show Cause was issued by the Supreme Court on March 16, 2006. By leave of Court, Maybaum's Objections were filed with the Court and served upon Relator's counsel on or about April 25, 2006.

### **Statement of Facts<sup>2</sup>**

In 1999, respondent settled a personal injury claim on behalf of his client Diane Cannon-Barron. Respondent had not provided his client with a written fee agreement, but it is undisputed that Respondent was to be paid a contingent fee amounting to 33-1/3% of the settlement proceeds. In March 1999, Respondent received a total of \$28,000.00 from the responsible insurance companies in settlement of the claims<sup>3</sup>.

Diane Cannon-Barron had several unpaid medical bills related to the injuries she suffered. A "Projected Distribution" summary prepared by Respondent on or about March 22, 1999, and

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<sup>1</sup> The panel recommended a suspension of 24 months, with 18 months stayed on condition that reinstatement be granted only upon proof of successful and continuing medical treatment which restored Respondent's ability to practice law ethically, plus a three-year term of probation, including *inter alia* mental health treatment.

<sup>2</sup> The relevant facts related to the allegations contained in Count One of the Amended Complaint involving Respondent's representation or involvement with Diane Cannon-Barron were stipulated.

<sup>3</sup> \$5,000.00 was received from the client's insurer under her Med-Pay coverage; the balance was from the tortfeasor's insurance.

signed by his client, reflected that Respondent was retaining in escrow funds sufficient to cover the unpaid medical expenses, and that Respondent would attempt to negotiate a reduction in the amount due to those providers.

Respondent deposited the settlement funds into an IOLTA account, from which he paid Cannon-Barron \$13,007.21 and he paid himself \$15,688.33, which included his contingent fee and expenses. He retained \$6,976.12 to cover the medical expenses.<sup>4</sup>

In May 1999, Respondent withdrew the remaining funds from his IOLTA account and used the money to pay his own personal and business expenses.

In 2003, Cannon-Barron became aware from several medical providers that the outstanding medical bills had not been paid. She contacted Respondent and advised him that she was being contacted regarding the unpaid bills. In response, by letter dated August 19, 2003, Respondent wrote Cannon-Barron a letter acknowledging his failure to attend to the matter and his intention to do so. He indicated that he was sending letters to the medical providers acknowledging his responsibility for the non-payment. No such letters were sent by Respondent to the medical providers, although it is clear that at some point prior to August 2003, Respondent did make contact with at least one of the providers in an attempt to negotiate a reduced payment.

Cannon-Barron met with Respondent on August 26, 2003. Following that meeting, on August 28, 2003, Respondent sent a letter to his client acknowledging that he had paid himself

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<sup>4</sup> The "Projected Distribution" separates the Med-Pay as a "case expense" and the sum of \$1,976.12 "to be paid by client" and held by Respondent pending negotiations regarding a reduction of those medical expenses.

out of the personal injury settlement proceeds for his prior representation of Cannon-Barron in her 1995 divorce, and that he had overpaid himself in the amount of \$100.00.<sup>5</sup> He also indicated that he had reached an agreement with one of the medical providers for a reduced payment.

On July 1, 2004, Respondent advised Cannon-Barron by letter that he had communicated with another of the medical providers regarding payment. He further explained that he intended to pay the medical providers from funds he received in another case.

On or about July 3, 2004, Cannon-Barron filed her complaint against Respondent with the Cleveland Bar Association.<sup>6</sup> Subsequent to being notified of the Complaint, Respondent satisfied some of the client's outstanding medical bills and paid to her the balance of the unexpended settlement proceeds by IOLTA check dated July 28, 2004. He detailed the transaction in a letter to his client dated August 2, 2004

Dr. Weinstein concluded, based upon his personal observation of Maybaum, tests administered under his direction, and his review of the medical records of Maybaum's treating doctors which were submitted to him, that: (1) Respondent suffers from bi-polar disorder which requires medication as well as non-medication therapies; (2) that Respondent is non-compliant with his required treatment; (3) that Respondent additionally suffers from an Axis II personality

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<sup>5</sup> There was no written or verbal agreement permitting Respondent to pay his domestic relations fees from the personal injury settlement.

<sup>6</sup> The matter was forwarded to Cuyahoga County Bar Assn. because of a pending matter involving Respondent.

disorder<sup>7</sup> (4) that Respondent has a history of being non-compliant with his treatment; (5) that Respondent is not aware of the extent of his illness; (6) that Respondent's illness did not contribute to the dishonest conduct about which the Complaint was filed; and (7) that Respondent remains a risk to clients so long as his illness is not controlled and he is not compliant with the recommended treatment regimen. Quoting from one of the clinical profiles from Respondent's MMPI-2 profile, with which Respondent expressed agreement and which Dr. Weinstein found consistent with his observations, "[Maybaum] shows long-standing pattern of poor impulse control and lack of acceptance of societal standards. He may also be angry about his present situation and may blame others for his problems. He may attempt to manipulate others through his symptoms in order to escape responsibility for his problems." (TR<sup>8</sup> 144). Dr. Weinstein also testified that "[he] was struck with the egocentricity and Mr. Maybaum's somewhat laissez faire attitude about his responsibility towards other people." (TR 146). To a reasonable degree of psychological certainty, Dr. Weinstein concluded that Maybaum "is a risk to his clients because of a lack of compliance with his medical regime with a lack of insider recognition to the [sic] the problems he presents with and what appears to be a lack of, again, motivation to change these things." (TR 162; 175). Dr. Weinstein testified that in 1999 when [Maybaum] obtained client funds, kept them and used them for his own purposes his conduct was not the result of his mental health disorders. (TR 171).

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<sup>7</sup> Axis II personality disorder is defined in the Diagnostic Statistical Manual, used in making diagnoses of mental health disorders.

<sup>8</sup> References to the transcript of testimony at the hearing will be designated as "TR".

Dr. McLaughlin, Respondent's treating doctor and his expert witness, was unaware of the specific factual allegations against his patient when he opined that Maybaum was presently capable of ethically practicing law:

Vaguely. I wouldn't say we've gone into detail. I know the nature of the charges. My understanding is that a few years ago he behaved unethically with poor judgment, maybe even – well, I'll leave it at that. Withholding money from a client that – he was supposed to pay the client and he withheld the money. And that ultimately he made do [sic] and paid the client.

(McLaughlin TR 43). McLaughlin did acknowledge that his patient was historically and consistently non-compliant with his medical treatment regimen; that he was not confident that Maybaum would be compliant in the future; and that past behavior is a good indicator of future behavior. (McLaughlin TR 22,32,50).

#### ARGUMENT

Respondent's treating psychiatrist Dr. McLaughlin did not relate Respondent's mental health issue to the charged misconduct. Indeed, the medical records supplied by Respondent do not disclose any significant, long-term interruption in Respondent's professional practice. On the other hand, in response to Dr. Weinstein's inquiry, Respondent indicated that he took money from the Cannon-Barron escrow because his practice was financially unprofitable and he needed the funds for personal expenses. This is the same reason he gave in his earlier disciplinary case. Dr. Weinstein noted that in response to the MMPI-2 results, Respondent "agreed" with the test interpretation that "He shows long-standing pattern of poor impulse control and lack of acceptance of societal standards. He may also be angry about his present situation and may blame others for his problems. . . he may attempt to manipulate others through his symptoms in

order to escape responsibility for his problems.” [Trial Exh. “A” Weinstein report, p. 5]. The fact that the escrowed money he took was not his did not seem to have entered into Respondent’s thought process – not because he suffered from bipolar disorder but, rather, because he lacked the internal ethical compass which should have guided him. This personality defect is unlikely to change. [Trial Exh. “A” Weinstein report, p. 5].

Respondent made no attempt to repay the money for more than five years, and only did so after (1) he was made aware that Ms. Cannon-Barron had suffered collection efforts by some of the doctors, (2) after he lied to his client about the status of the payments to the providers and to her; and (3) after he learned that his client had complained to the Cleveland Bar Association.

Respondent does not dispute the validity of the conclusions of Dr. Weinstein regarding Maybaum’s mental health and his ability to ethically practice law and attend to the interests of his clients. He does not dispute the stipulated facts which establish that Respondent failed to pay Diane Cannon-Barron’s medical bills for five years, until after she filed the grievance, because he used the funds to pay his personal and office expenses. He does not dispute that he misrepresented to his client the status of the payment of her medical bills. He argues, rather, that Cannon-Barron was not harmed by his conversion of her funds to his own use. He discounts the reasonable assumption that when she was contacted by her medical providers that they required payment on bills which she had every right to assume had been paid, she was unharmed. He discounts that the providers suffered harm because of his failure to pay them as he had promised to do. He discounts the harm resulting in the delay in providing his client with the funds not expended on her medical bills. Respondent contends that by frustrating the medical providers for

five years, he was able to negotiate a lower payment to them; this, his misuse of the funds and the dishonesty related thereto actually benefitted his client. There is no recognition in that position of any ethical obligation which Respondent had to his client and the medical providers whose fees he had guaranteed to pay from the settlement proceeds. There is no basis in the law for that nuanced definition of professional ethics.

The Board carefully analyzed the mental health issues and whether they were mitigating pursuant to BCGD Proc. Reg. 10(B)(2)(g). It found that the mental illness was not mitigating based upon the testimony of the two expert witnesses. The mental illness did not cause Respondent to rely upon client funds to pay his personal expenses, nor did it cause him to withhold the truth of the situation from the client until she had complained to the Bar Association. Further, based upon the record, the Board found that Respondent had not demonstrated a period of successful treatment.

Respondent completely mischaracterizes his prior discipline. The case involved more than a mere fee dispute. His own testimony demonstrates his lack of comprehension about the obligations he has as an attorney with respect to client funds and the disciplinary process. He does, as Dr. Weinstein and the Board noted, tend to blame everyone else for his own misconduct and minimize its impact on others.

The sanction recommended by the Board is lenient where there has been a willful misuse of client funds under circumstances where the Respondent is not compliant with the instructions of his medical providers and that, based upon that history, non-compliance was likely to continue in the future. The recommended sanction is lenient where the Respondent failed to introduce any

credible medical testimony that mental illness contributed to the present misconduct or to the prior disciplinary case. The sanction is lenient where Respondent engaged in a course of misconduct, making multiple voluntary – and unethical – decisions to misuse client funds; to lie by omission in dealing with the client regarding the payment of her medical bills; to ignore his client’s inquiries as a means of avoiding his responsibilities; his dishonesty with respect to his actual efforts to negotiate the medical payments. By his testimony and his continued assertion that his client actually benefitted from his dishonesty, Respondent has shown that he does not understand and acknowledge the wrongfulness of his conduct.

Where there is a misappropriation of client funds, the presumptive sanction is disbarment. Lorain County Bar Assn. v. Fernandez, (2003) 99 Ohio St.3d 426, 428; Cleveland Bar Assn. v. Dixon, (2002) 95 Ohio St.3d 490; Cleveland Bar Assn. v. Glatki (2000), 88 Ohio St.3d 381, 384; Disciplinary Counsel v. Wise (1999), 85 Ohio St.3d 644,645; Disciplinary Counsel v. Connaughton (1996), 75 Ohio St.3d 169,171.

The Court’s discussion in Dixon regarding the consideration to be given to the existence of a mental illness and to Respondent’s pre-hearing restitution is particularly relevant to Maybaum:

Here, both the panel and the board explicitly *rejected* [sic] the existence of Dixon’s psychological issues as a mitigating factor. The board specifically found that Dixon’s psychological problems were “peripherally related” to her misconduct and concluded that Dixon’s “mental state did not cause and does not justify her dishonest conduct.”

We have independently reviewed the testimony and written report of the clinical and forensic psychologist . . . . Both contain evidence of unfortunate circumstances in Dixon’s history that have resulted in mainly personality and

interpersonal relationship difficulties. Neither, however, contains a sufficiently compelling causal link between Dixon's stated psychological issues and her misappropriation of [client funds].

We discount the mitigating value of Dixon's have made "full restitution prior to any court ordered compulsion to do so. . . . While Dixon had indeed made restitution . . . , she completed it well over a year after learning of the grievance.

Cleveland Bar Assn. v. Dixon at 494.

Respondent seeks a sanction which grossly under-assesses the wrongfulness of his misconduct. He relies on Dayton Bar Assn. v. Gerren (2004) 103 Ohio St.3d 21, 2004-Ohio-4110; and Toledo Bar Assn. v. Kramer (2000), 89 Ohio St.3d 321, 2000-Ohio-163. In neither case was the misconduct charged as egregious as Respondent's. In Gerren, the attorney retained in escrow funds from a personal injury settlement. He promptly paid all but one of the medical providers from those funds, and attempted to negotiate a discounted payment to the remaining provider. While those negotiations were pending, Gerren ran for political office and essentially closed his practice. He knowingly used the client's escrowed funds for personal purposes. Immediately upon learning that the provider had begun collection proceedings, Gerren attempted to pay off the debt. Mitigating evidence included the absence of any prior discipline, acknowledgment without excuse that the conduct was wrong, and a long history of community service. Gerren was subjected to an actual suspension of six months.

In Kramer, the attorney had used escrowed personal injury proceeds instead of paying medical providers. As in Gerren, there was no evidence that the attorney lied to his client about the status of negotiations and/or payments to the medical providers. Although Kramer used the funds, he replaced them and paid the providers within six months. He received a stayed six

month suspension.

There is a prior history of financial misconduct resulting from Respondent's personal financial circumstances. As a result of Respondent's deliberate misappropriation of his client's money, not only was Diane Cannon-Barron deprived of funds belonging to her, her medical providers were deprived of their payments for five years. Therefore, the imposition of disbarment is justified. Cleveland Bar Assn. v. Clavner (2003), 99 Ohio St.3d 53. Absent the presence of the psychiatric condition from which Respondent suffers – even though that condition did not contribute to the misconduct – Relator would seek that ultimate sanction. However, Relator recognizes that the lesser sanction of indefinite suspension may be warranted, with reinstatement conditioned upon a demonstration of (1) restored mental functioning and judgment; (2) abstinence from alcohol and non-prescribed, mind-altering substances; (3) full compliance with mental health and substance abuse treatment; and (4) restitution. Columbus Bar Assn. v. Port (2004) 102 Ohio St.3d 395; Cuyahoga County Bar Assn. v. McClain (2003) 99 Ohio St.3d 248; Wise, supra, at 171.

### CONCLUSION

The misconduct stipulated in this case warrants a disbarment. However, if a lesser sanction is warranted, an indefinite suspension, as recommended by the Board is appropriate because Respondent's reinstatement should be conditioned upon a clear demonstration of his ability to competently, ethically and honestly return to the practice of law. Cuyahoga County Bar Assn. v McClain, supra. No other avenue exists for the Supreme Court to control Respondent's re-entry to the profession.

CUYAHOGA COUNTY BAR ASSOCIATION

BY:

Robert L. Steely  
Robert L. Steely

Jeremy T. Browner  
Jeremy T. Browner

Ellen S. Mandell  
Ellen S. Mandell

### PROOF OF SERVICE

A copy of the foregoing Relator's Brief in Opposition to Respondent's Response to Order to Show Cause and Objections to Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio was sent by ordinary United States mail to counsel for Respondent: William T. Doyle, 1370 Ontario Street, 2000 Standard Building, Cleveland, OH 44113, on this 1<sup>st</sup> day of May, 2006.

Ellen S. Mandell  
Ellen S. Mandell #0012026  
Bar Counsel

## APPENDIX

**BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

<b>In Re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 05-008</b>
<b>Scott D. Maybaum</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0030587</b>	:	<b>Conclusions of Law and</b>
	:	<b>Recommendation of the</b>
<b>Respondent</b>	:	<b>Board of Commissioners on</b>
	:	<b>Grievances and Discipline of</b>
<b>Cuyahoga County Bar Association</b>	:	<b>the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	

This matter was heard on October 14, 2005, upon the Complaint of the Cuyahoga County Bar Association, Relator, against Scott D. Maybaum, Attorney Registration No. 0030587. Mr. Maybaum was admitted to practice in Ohio in 1978.

The members of the hearing panel were the Honorable Beth Whitmore, Chair, Jeffrey T. Heintz, and David C. Comstock. None of the panel members is from the Eighth District in which the complaint arose or served on the probable cause panel that certified the matter to the Board of Commissioners on Grievances and Discipline of the Supreme Court (Board).

Robert L. Steely, Ellen S. Mandell and Jeremy T. Browner appeared as counsel for Relator. Respondent was represented by William T. Doyle.

## PROCEDURAL HISTORY

Relator's complaint was certified on February 7, 2005 and an amended complaint was filed on June 10, 2005. Respondent answered the amended complaint on July 14, 2005.

Relator's amended complaint is in two counts, the first alleging five violations of the disciplinary rules arising from Respondent's representation of Dianne Cannon-Barron and the second alleging seven violations of the disciplinary rules arising from his representation of Melissa Taylor-Diffenbacher. These are discussed separately below.

## FINDINGS OF FACT

At the time of the hearing, Respondent was 54 years of age. He graduated from Case Western Reserve University School of Law in 1976. Respondent has been practicing in Ohio since 1978. He estimates that 80% of his current practice is domestic relations, with the remainder in general civil and probate.

### Count One - Dianne Cannon-Barron

Relator's complaint alleged that Respondent violated the following sections of the Code of Professional Responsibility regarding Dianne Cannon-Barron ("Barron"): 1) DR 1-102(A)(4), conduct involving dishonesty, fraud, deceit, or misrepresentation; 2) DR 1-102(A)(6), conduct adversely reflecting on his fitness to practice law; 3) DR 6-101(A)(3), neglecting an entrusted legal matter; 4) DR 9-102(B)(3), failing to maintain complete records of all funds of a client and failing to render appropriate accounts to his client; and 5) DR 9-102(B)(4), failing to promptly pay or deliver to the client as requested by the client the funds in possession of the lawyer which the client is entitled to receive.

The parties stipulated to the following facts regarding Count I. On or about June 9, 1998, Respondent represented Barron in a lawsuit concerning injuries she suffered in an automobile accident. Respondent previously represented Barron in her divorce in 1995. Respondent did not provide a written fee agreement to Barron, but he was to be paid pursuant to a contingency fee arrangement. On or about March 1999, Respondent settled Barron's claim against the tortfeasor and her own insurer for a total amount of \$23,000; Barron also received \$5,000 from her insurer for payments toward her medial expenses. Barron's medical expenses as a result of the accident totaled \$6,976.12. On or about March 22, 1999, after Respondent had prepared a "Projected Distribution" summary, Barron executed the summary and accepted her portion of the distribution of funds, which were reduced to cover her unpaid divorce fees due Respondent. The parties agreed that Respondent would attempt to negotiate a discount on Barron's outstanding medical bills and that he would retain \$6,976.12 as the undiscounted amount until such time as he resolved the medical bills. Respondent was to forward the negotiated medical payments to the providers and Barron would receive any money that remained. Respondent was not charging Barron for the negotiation services. On or about March 22, 1999, Respondent deposited \$6,976.12 in his IOLTA account, but did not immediately negotiate Barron's medical payments. Instead, Respondent used the funds for his personal and office expenses. On or about July 2004, Respondent forwarded Barron a sum, which represented the difference between the \$6,976.12 and the amount negotiated with the medical providers, and other sums due Barron from Respondent.

The panel accepted the stipulations of the parties and adopts them as findings of fact in regards to the alleged violations arising from Respondent's representation of Barron.

Count II- Melissa Taylor-Diffenbacher

Relator's complaint alleged that Respondent violated seven sections of the Code of Professional Responsibility regarding Melissa Taylor-Diffenbacher ("Diffenbacher"), however, Relator withdrew five of the allegations and the matter went to hearing on the remaining two sections: 1) DR 5-103(A), avoiding acquisition of interest in litigation, and 2) DR 5-104(A), limiting business relations with a client.

In the spring of 2004, Respondent represented Diffenbacher in her divorce. Three separate attorneys had previously represented Diffenbacher in the matter. Per agreement, Diffenbacher was to pay Respondent \$400 every two weeks. It is undisputed that not all of Diffenbacher's payments were timely or made in full.

Diffenbacher testified that a couple of weeks prior to the trial, Respondent told her he needed \$20,000. Then on August 16, the day of trial, Respondent presented Diffenbacher with a note and mortgage on her home. Diffenbacher testified that she was not able to read the documents and that she informed Respondent that she wanted her family attorney to review them with her. The following day, Diffenbacher again requested time to speak to an attorney and Respondent informed her that the documents were just a promise to make sure he was compensated for his services. Diffenbacher testified that Respondent told her if she did not sign the documents he would not be able to represent her. Diffenbacher stated that on August 23 Respondent again presented the documents to her and she signed them because of the "look" in Respondent's eyes.

Diffenbacher testified that Respondent did not explain the note or mortgage to her and that she called him after signing it and left a message regarding her questions and concerns about the documents. She only received a copy of the mortgage. Diffenbacher did admit to knowing that her three prior attorneys had to receive permission from the court before they could withdraw, but she denied knowing Respondent would have to obtain the same permission before he could withdraw as her counsel.

During Respondent's disciplinary hearing he testified to the following regarding Diffenbacher. He mentioned the note and mortgage to Diffenbacher before August 16. Respondent explained that he has a habit of explaining things to his clients; his procedure for obtaining client signatures is to have them identify the document they are about to sign, ask them basic questions about it, ensure they understand it, and confirm that they are not under duress and that their signature is voluntary. Although he could not specifically remember following his procedure with Diffenbacher, he was certain he did. He denied Diffenbacher's contention that she requested time to speak with her family lawyer about the note and mortgage before signing them. Respondent also testified that he gave Diffenbacher copies of both documents.

Neither witness to the signing of the note or mortgage could recall details of the event, including what day the documents were signed or if Respondent explained the documents to Diffenbacher. However, both testified that Diffenbacher did not appear to be in duress. Specifically, Mr. Patterson testified that Diffenbacher agreed that her signature was a voluntary and free act.

## CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the panel finds by clear and convincing evidence that Respondent violated the following provisions of the Code of Professional Responsibility on Count One:

<u>Code Section</u>	<u>Narrative</u>	<u>Grievant</u>
DR1-102(A)(4)	Conduct involving dishonesty, fraud, deceit, or misrepresentation.	Barron
DR1-102(A)(6)	Conduct adversely reflecting on fitness to practice law.	Barron
DR6-101(A)(3)	Neglecting an entrusted legal matter.	Barron
DR9-102(B)(3)	Failing to maintain complete records of all funds of a client and failing to render appropriate accounts to his client.	Barron
DR9-102(B)(4)	Failing to promptly pay or deliver to the client as requested by the client the funds in possession of the lawyer which the client is entitled to receive.	Barron

We decline to find that Respondent committed any violations in his representation of Diffenbacher in Count Two. Relator failed to present clear and convincing evidence to substantiate the allegations. The testimony revealed that Diffenbacher had three prior attorneys withdraw and that she knew the process for such withdrawals. The panel found Diffenbacher's answers evasive when asked if she knew Respondent would have to receive permission from the judge before withdrawing from her case. We believe Diffenbacher knew the process and while she may have been worried about Respondent's future representation of her, she did not sign the documents because she thought he was going to withdraw immediately. Attorneys Patterson and Nicrenburg provided credible

testimony that Diffenbacher did not appear in duress when she signed the documents and that she informed them that her signatures were voluntary.

Given the evidence and this panel's observation of Diffenbacher during the hearing, we have serious doubts that Diffenbacher signed the documents based on the look in Respondent's eyes. No evidence was presented to substantiate the "look" or convince this panel that Diffenbacher could be forced or coerced into doing something against her wishes. We do not believe Diffenbacher was taken advantage of or was incompetent in signing the documents. Diffenbacher had been involved in her divorce proceeding for some time when Respondent began representing her; she was an educated and employed individual; she even testified that she had taken some business and legal courses; she knew the general meaning of a mortgage; and she formerly ran her own business. Moreover, Diffenbacher's divorce trial had already begun by the time she signed the documents, which undermines her testimony that she signed the documents because Respondent would withdraw if she did not sign them. Based on the foregoing, we find that the evidence presented does not establish a violation of DR 5-103(A) or DR 5-104(A) by clear and convincing evidence. This count was unanimously dismissed by the panel in an entry dated February 21, 2006.

#### **MITIGATING FACTORS**

Pursuant to BCGD Procedural Regulations<sup>1</sup>, this panel considers the following mitigating factors when determining the proper sanction: "(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) timely good faith effort to make restitution or to rectify consequences of misconduct; (d) full and free

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<sup>1</sup> The Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline of the Supreme Court.

disclosure to disciplinary Board or cooperative attitude toward proceedings; (e) character or reputation; (f) imposition of other penalties or sanctions; (g) chemical dependency or mental disability \*\*\*; (h) other interim rehabilitation.” BCGD Proc. Reg. 10(B)(2)(a-h). We find the following factors relevant to this case.

**BCGD Proc. Reg. 10(2)(B)(d)- Full and Free Disclosure**

Respondent gave full and free disclosure to the panel and cooperated with the disciplinary proceedings.

**BCGD Proc. Reg. 10(2)(B)(e)- Character or Reputation**

Mr. Fumich, a long-time friend of Respondent and fellow attorney, testified that he believed that Respondent was capable of practicing law. However, Mr. Fumich also testified that it is never proper for a lawyer to use funds from a client’s IOLTA account for the lawyer’s own use.

**BCGD Proc. Reg. 10(B)(2)(g)- Chemical Dependency or Mental Disability**

Respondent has argued against a strict sanction on the assertion that his mental and emotional status affected his performance and judgment. “To have a significant mitigating effect under BCGD Proc. Reg. 10(B)(2)(g), a mental disability must be supported by all of the following: (1) a qualified health-care professional, (2) a determination that the mental disability contributed to cause the misconduct, (3) a sustained period of successful treatment, and (4) a prognosis from a qualified health-care professional that the attorney will be able to return, under specified conditions if necessary to the competent, ethical, and professional practice of law. BCGD Proc. Reg. 10(B)(2)(g)(i), (ii), (iii), and (iv).” *Disciplinary Counsel v. Hunter*, 106 Ohio St.3d 418, 2005-Ohio-5411, at ¶26.

Respondent submitted the following deposition testimony of his psychiatrist, Dr. McLaughlin in support of mitigating factor (2)(g), mental disability. Dr. McLaughlin began treating Respondent for bi-polar disorder in 2002. Dr. McLaughlin categorized Respondent as compliant and “able to function at a fairly high level, all things considered.” Dr. McLaughlin believed Dr. Weinstein’s report on Respondent was “poorly written” and “portrays [Respondent] in a very negative light and doesn’t really encompass the full picture[.]” He stated that the report had many “presumptuous statements and inaccuracies[.]” Dr. McLaughlin believed that Respondent was moving forward and that there should be no restrictions on his ability to practice law. When questioned by Relator’s counsel, Dr. McLaughlin admitted that Respondent was not compliant, in that it takes repeated requests and reminders for him to do as directed in regards to his treatment, but he “ultimately gets the job done.” Respondent’s bi-polar disorder fits into the moderate to severe range. In the past Respondent has stopped taking his medication and altered his dosages and Dr. McLaughlin was not confident that Respondent would refrain from that behavior in the future. Dr. McLaughlin’s testimony revealed that it took nearly a year for Respondent to comply with his request for lab tests. Moreover, Dr. McLaughlin testified that failing to report for lab tests is a chronic problem for Respondent.

We find that Respondent failed to establish mental disability as a mitigating factor. From the competent and credible evidence presented we are unable to find that Respondent’s bi-polar disorder contributed to his misconduct, that Respondent sustained a period of successful treatment, or that a qualified health-care professional found that Respondent would be able to return to the practice of law in a competent, ethical, and

professional manner. Rather we find that the testimony of Dr. Weinstein, and even Dr. McLaughlin, shows that Respondent's bi-polar disorder did not cause his misconduct, that Respondent is not compliant with his treatment, and that he is not currently able to return to the practice of law in a competent, ethical, and professional manner.

The record is void of testimony that Respondent's bi-polar disorder contributed to his conduct; Dr. McLaughlin failed to testify on the issue and Dr. Weinstein's testimony weighs against a finding of mitigation. Dr. Weinstein testified that he did not believe to a psychological degree of medical certainty that Respondent's bipolar disorder contributed to his misconduct. Accordingly, we find that Respondent has failed to establish the second prong of the test for a mitigating factor for mental disability.

Moving on to the third prong of the test, both Dr. Weinstein and Dr. McLaughlin testified that Respondent is non-compliant with his treatment; he repeatedly failed to appear for lab work, he admittedly changed the dosages of his medications, specifically from March-June of 2004, and he failed to report to appointments, for example, he missed appointments in August and October of 2002, March of 2003, and January of 2005. The testimony showed a pattern of blaming others and his mental health issues for his problems rather than accepting responsibility for and changing his behavior; Dr. McLaughlin's testimony that Respondent's lack of compliance is often part of his illness aids in the explanation of Respondent's behavior, but it does not change the fact that he is noncompliant with his treatment. Accordingly, we find that Respondent has not sustained a period of successful treatment.

Respondent has also failed to establish the final prong of the test. While Dr. McLaughlin testified that he believed Respondent could practice law without restrictions,

he did not testify that Respondent could return to the competent, ethical, and professional practice of law. Given Dr. McLaughlin's admission that Respondent is non-compliant and that Dr. McLaughlin did not really understand the allegations against Respondent or discuss them with him; we are not persuaded by Dr. McLaughlin's testimony that Respondent is capable of practicing law. We do, however, find credibility in Dr. Weinstein's testimony; he testified that if allowed to continue practicing Respondent presented a risk to his clients and to society.

Based on the foregoing, we find that Respondent has failed to establish mental disability as a mitigating factor.

#### **AGGRAVATING FACTORS**

Pursuant to the BCGD procedural regulations, this panel considers the following aggravating factors when determining sanctions: "(a) prior disciplinary offense; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) lack of cooperation in the disciplinary process; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of and resulting harm to victims of the misconduct; and (i) failure to make restitution." BCGD Proc. Reg. 10(B)(1)(a-i). We find the following factors relevant to this case.

#### **BCGD Proc. Reg. 10(B)(1)(a)- Prior Disciplinary Offense**

As stipulated by the parties, Respondent was previously subject to disciplinary action, Cuyahoga Cty. Bar Assn v. Maybaum, 98 Ohio St.3d 507, 2003-Ohio-2062. The Ohio Supreme Court found that Respondent commingled funds belonging to him with those belonging to his client in violation of DR 9-102(A)(2), that he engaged in conduct

prejudicial to the administration of justice in violation of DR 1-102(A)(5), and that he failed to complete a recommended mediation in violation of Gov. Bar R. V(4)(G). Respondent was suspended for a six-month period, but the suspension was stayed on the condition that no other formal complaints of misconduct were filed against him

During the trial in the instant matter, Respondent testified to the following regarding his prior disciplinary matter. After reaching an agreement during mediation regarding the amount Respondent owed his former client, Respondent decided not to pay the agreed amount. Respondent provided the following explanation of his decision: "I decided later that I was above the mediation process. I was a little arrogant—I was a lot arrogant that I really owed him only \$200 and that I decided to make a mountain out of a molehill." Respondent testified that his decision not to pay was "stupid." Respondent did not cite lack of medication or other mental disability issues as the reason for his actions, rather he cited "bad lack of judgment", "arrogance", and a lack of money. When questioned about the quality of his explanation, Respondent responded "I'm sorry. I can't do much about it." This panel finds that Respondent's self admitted "arrogance" in regard to the non-payment of the agreed amount due his former client is typical of Respondent's attitude towards his compliance with his treatment and the rules of life in general.

**BCGD Proc. Reg. 10(B)(1)(b)- Dishonest or Selfish Motive**

Respondent's motive was clearly dishonest and selfish because he admittedly used the funds intended for Barron and the payment of her medical bills for his own personal use. During the trial Respondent testified to the following: "I knew it was wrong at the time I took the funds out of my IOLTA account." Moreover, Respondent

admitted that he thought he could get away with using the funds for his own personal use. When asked about his misuse of Barron's funds Respondent stated "I thought I was better than that and I could just get away with it." Once again, Respondent's attitude was arrogant and his actions showed complete disregard for others, especially his clients.

**BCGD Proc. Reg. 10(B)(1)(c)- Pattern of Misconduct**

We find a pattern of misconduct in that after Respondent violated the Code of Professional Responsibility by improperly using the IOTLA funds, his improper behavior continued by his failure to reimburse Barron's medical providers and his failure to timely reply to Barron's inquiries regarding the outstanding debt to the providers. The stipulations make clear that it took Respondent over four years to pay Barron's medical providers. This panel finds that Respondent did virtually nothing to negotiate with the providers, which is evident from the correspondence Barron received from her providers due to lack of payment. This panel finds it absurd that providers, such as Dr. Nickels, and collection agencies, such as Pinnacle Financial Group, would write and call Barron complaining of her lack of payment if Respondent was actually negotiating with them regarding said payment. In fact, a representative from Dr. Nickels' office specifically stated that her calls to Respondent regarding payment were not returned. Once again, Respondent's lack of compliance is evident. Moreover, Respondent's testimony only reflects contact with two of Barron's providers/creditors, but the spread sheet showing the un-reimbursed companies lists four companies; accordingly, Respondent's own testimony shows he did not contact all of the providers/creditors regarding negotiating a reduced payment.

**BCGD Proc. Reg. 10(B)(1)(d)- Multiple Offenses**

The aggravating factor of multiple offenses is present in our finding that Respondent violated five sections of the Code of Professional Responsibility. We recognize that each violation arose from Respondent's initial misuse of his IOLTA account, but we find that with each violation he made a choice to disregard his duties and responsibilities as a lawyer. Therefore, we find that he committed multiple offenses.

**BCGD Proc. Reg. 10(B)(1)(g)- Refusal to Acknowledge Wrongful Nature of Conduct**

While we believe that Respondent is remorseful, we question if he is remorseful for what he did or if he is remorseful for getting caught. We agree with Dr. Weinstein that Respondent fails to comprehend fully the consequences of his actions regarding the handling of Barron's settlement money or his refusal to follow his treatment plan. Respondent's behavior during the disciplinary process highlighted his continued attitude that he is a victim and that he is not responsible for his behavior or its consequences. When questioned about his compliance with his treatment plans, rather than admit what the evidence showed, Respondent debated the meaning of "compliance." He insisted that his behavior fell within a "spectrum of compliance." Under Respondent's explanation of compliance he felt he was compliant because he informed his doctor that he was disregarding a medical directive; such contorted reasoning mirrors Respondent's failure to take responsibility for his actions and his refusal to follow any rules or restrictions put upon him, be it by society, the bar, or his physicians.

Respondent repeatedly blames others and life circumstances for his actions; for example, when he was sharing office space with other attorneys and the business relationship did not develop as he desired, he decided not to pay his portion of the rent blaming the other attorneys' lack of interest in working with him as justification for his

not paying his rent. In addition, the check he finally wrote to Barron bounced and Respondent blamed it on the bank. Respondent uses every day life occurrences as excuses for poor judgment and improper behavior rather than just admitting he did something wrong; he consistently answers questions regarding his behavior or choices with an excuse. Moreover, he fails to see the cyclical relationship between his lack of compliance with his treatment and his poor judgment and behavior.

In his statement to the panel, Respondent claimed that he was “truly sorry” about what had happened and that it had never happened before. Either Respondent forgot about his prior disciplinary action or he thought the dishonesty and arrogance he exhibited in that case was different from the dishonesty and arrogance exhibited in the instant matter. We find that Respondent’s statements purporting remorse in the instant matter were not genuine.

**BCGD Proc. Reg. 10(B)(1)(h) and (i)- Vulnerability of and Resulting Harm to Victims of the Misconduct and Failure to Make Restitution**

We find that although Barron’s medical providers were ultimately compensated, she spent years dealing with the providers and collection agencies contacting her regarding the lack of payment; such circumstances are not taken lightly by this panel. We are also particularly cognizant of the fact that even after Respondent was contacted by Barron about the delay in reimbursing her medical providers, Respondent still took several years to make the payments.

**Other Factors**

A violation of DR 1-102(A)(4) generally requires an actual period of license suspension. *Disciplinary Counsel v. Fowerbaugh* (1995), 74 Ohio St.3d 187, 190.

Where sufficient mitigating circumstances exist, however, a lesser sanction may be warranted. See *Disciplinary Counsel v. Heffter*, 98 Ohio St.3d 320, 2003-Ohio-775; *Dayton Bar Assn. v. Kinney* (2000), 89 Ohio St.3d 77. This panel does not find sufficient mitigation to outweigh the seriousness of Respondent's violations. Rather, we find the aggravating factors far outweigh any mitigating factors. Specifically, Respondent's personality disorder as described by Dr. Weinstein, along with its longstanding antisocial consequences, proved to be an aggravating factor rather than the mitigation urged by Respondent.

After evaluating Respondent, Dr. Weinstein found that based on Respondent's non-compliance and unaddressed mental health issues, at the present time he presents a risk of harm to his clients. Respondent admitted to Dr. Weinstein that he may attempt to manipulate others through his symptoms to escape responsibility for his actions. Dr. Weinstein found that Respondent had poor impulse control and a lack of acceptance of societal standards. Dr. Weinstein determined that Respondent did not exhibit true remorse for his behavior. Dr. Weinstein also determined that Respondent was not likely in the foreseeable future to be able practice law without presenting risk to his clients or the public. Specifically, Respondent's personality disorder, not his bi-polar disorder, could lead to deceitfulness, stealing money from clients, selfishness, and not following guidelines. Dr. Weinstein found Respondent to be a risk to clients because of his lack of compliance with medical directives, lack of recognition of the problems he causes, and lack of motivation to change. Dr. Weinstein testified that Respondent's lack of compliance with his mental health treatment and heart condition treatment was especially troubling. Respondent also showed a tendency to set his own rules.

### **RELATOR'S RECOMMEDATION SANCTION**

Relator has recommended permanent disbarment. If this panel does not find disbarment appropriate, Relator has recommended indefinite suspension with a condition of reinstatement being full compliance with all treatment plans and an independent evaluation prior to reinstatement.

### **RESPONDENT'S RECOMMENDATION SANCTION**

Respondent has recommended that any suspension be stayed.

### **RECOMMENDATION OF THE PANEL**

The panel declines to adopt the Relator's recommendation that Respondent be disbarred; however, we do recommend a suspension from practice. It is clear from the evidence before this panel that Respondent's arrogance has resulted in his self-centered attitude towards his practice and his daily life activities. We find that Respondent is in denial and refuses to recognize the seriousness of the issues he is facing, both professionally and personally. Such denial clouds his judgment and results in poor choices and disregard for others. We are compelled to note that we are especially troubled by the fact that Barron was not only Respondent's client, but also a friend; Respondent testified how he first met her through the Kiwanis Club. He testified that he knew she was having personal and financial problems; he even stated that she has trouble leaving her own home. Respondent showed no regard for Barron when he violated not only their professional relationship, but also their personal relationship.

We recognize Respondent's mental disability diagnosis, the various health problems he has suffered in the past several years, and his wife's injuries from her car accidents, however, such factors did not cause nor do they excuse his behavior. The

evidence shows that Respondent has been given a chance to modify his behavior in the past, that he has a family that is supportive of his treatment, and that he has a doctor that believes in Respondent's ability to deal with his mental disability; unfortunately, the evidence also shows that Respondent has chosen to repeat the mistakes of his past and is again before a disciplinary panel and that he chooses to disregard the directives of medical professionals and fails to follow treatment plans. We find that Respondent has not sincerely or adequately addressed any of the issues that put him before this panel. Accordingly, we agree with Dr. Weinstein's testimony that Respondent is unable to currently continue to practice law in an ethical, professional, and competent manner.

Based on the evidence before us, the panel recommends the following sanction:

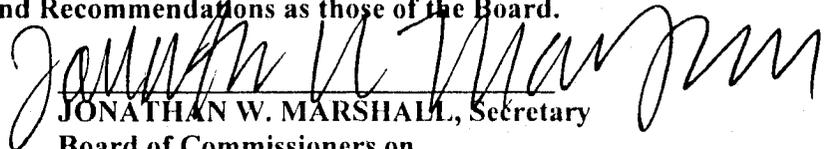
- 1) Respondent receive a 24 month suspension from the practice of law, with 18 months stayed; accordingly, Respondent would be suspended from the practice of law for six months.
- 2) As a condition of Respondent's return to the practice of law after the initial six months of actual suspension, he must present an opinion to a degree of medical certainty from a qualified physician, that he has successfully completed a treatment program, is continuing treatment, and to a medical degree of certainty can return to the competent, ethical, and professional practice of law.
- 3) Upon said return Respondent must serve probation for three years during which the following conditions must be met: a) Respondent must continue treatment with a qualified mental health professional, and follow all recommendations of his doctors, including, but not limited to, taking all

mediations as prescribed and reporting for lab work; b) Respondent must have regular visits to his treating mental health professional, either psychiatrist or psychologist, at a frequency to be determined by said professional; and c) Respondent must refrain from any further misconduct. Quarterly reports of Respondent's treatment and progress shall be submitted to the Relator by Respondent's treating physician. While on probation Respondent shall be supervised by a monitor selected by Relator. Said Relator shall counsel Respondent on case management, financial responsibility, and client communication skills.

**BOARD RECOMMENDATION**

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 10, 2006. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board, however, recommends an indefinite suspension with reinstatement based on satisfying the mental health conditions contained in the panel's report. The recommendation of an indefinite suspension is based on Respondent's continuing, repeated patterns of dishonesty and misconduct. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**

  
JONATHAN W. MARSHALL, Secretary

**Board of Commissioners on  
Grievances and Discipline of  
The Supreme Court of Ohio**