

IN THE SUPREME COURT OF OHIO

**Disciplinary Counsel**  
Relator

v.

**Jerry D. Robertson**  
Respondent

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:

**CASE NO. 2006-1638**

**RELATOR'S ANSWER TO  
RESPONDENT'S  
OBJECTIONS TO THE  
BOARD OF COMMISSIONERS'  
REPORT AND RECOMMENDATIONS**

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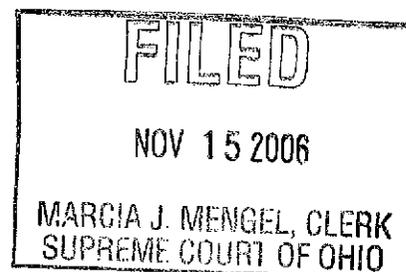
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## TABLE OF CONTENTS

<u>DESCRIPTION</u>	<u>PAGE</u>
TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES	ii.
FACTS	1
LAW AND ARGUMENT	11
CONCLUSION	14
CERTIFICATE OF SERVICE	15
APPENDIX BCGD Proc. Reg.(D)	

## TABLE OF AUTHORITIES

### CASES

### PAGE(S)

<i>Columbus Bar Assn. v. Farmer</i> , 111 Ohio St.3d 137, 2006-Ohio-5342	12
<i>Cuyahoga Cty. Bar Assn. v. Aldrich</i> , 104 Ohio St.3d 159, 2004-Ohio-6407	12
<i>Dayton Bar Assn. v. Gerren</i> , 103 Ohio St.3d. 21, 2004-Ohio-4110	14
<i>Dayton Bar Assn. v. Green</i> , 97 Ohio St.3d. 119, 2002-Ohio-5314	13
<i>In re Varbel</i> 897 P2d 1337 (Ariz.1995)	11
<i>Stark Cty. Bar Assn. v. Watterson</i> 103 Ohio St.3d 322, 2004-Ohio-4776	12

### RULES, STATUTES, AND OTHER AUTHORITIES

### PAGE(S)

#### **DISCIPLINARY RULES**

BCGD Pro. Reg. 3(D)	14
DR 1-102(A)(4)	7, 9, 10, 11, 12, 13, 14
DR 1-102(A)(6)	7
DR 2-106(A)	8
DR 4-101(B)((3)	5, 7
DR 5-101(A)(1)	5, 7
DR 5-104(A)	5, 7
DR 9-102(A)	9, 10, 13
DR 9-102(B)	14
DR 9-102(B)(1)	5
DR 9-102(B)(2)	5, 9
DR 9-102(B)(3)	5, 8, 9
DR 9-102(B)(4)	8

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---

Now comes relator, Disciplinary Counsel, and hereby submits its answer to respondent's objections.

**STATEMENT OF FACTS**

**Introduction**

On December 5, 2005 a four-count disciplinary complaint against respondent was certified by the Board of Commissioners on Grievances and Discipline. Relator alleged that respondent misused funds belonging to two clients, accepted an excessive fee from a third client, and failed to properly maintain his IOLTA. These matters were brought to relator's attention through a grievance filed by respondent's former bookkeeper, Rebecca Witt. (Am. Stip. 5)

Respondent was admitted to the practice of law in Ohio in November 1974. He became board certified in estate planning and trust and probate law in 2003. (Am. Stip. 1,4; Relator's Ex. 19, p. 112)

At all relevant times, respondent was a sole practitioner in Oak Harbor, Ohio whose practice consisted of estate planning and administration, transactional real estate law, and business entity planning. (Am. Stip. 2,3) Prior to the disciplinary hearing on this matter respondent sold his law practice and relocated to the state of Colorado to be closer to his children. (Report at 8)

At the hearing before the panel the parties submitted lengthy amended stipulations regarding the facts and exhibits, as well as a recommended sanction.

## **COUNT I**

### **The Grieger Matter**

Margaret Grieger died on November 8, 2004 at the age of 79. She was unmarried and had no children. (Am. Stip. 8, Relator's Ex. 19, p. 42)

Grieger had been a client of respondent's predecessors' firm for many years and ultimately became respondent's client. Respondent performed various legal work for Grieger over the years, including preparing her living will and other estate planning documents. Respondent was also Grieger's power of attorney. (Am. Stip. 6,7)

When Grieger entered a nursing home in 2002, her prior landlord provided respondent with three jars of coins and some cash that had been found in her home. Respondent kept Grieger's coins and cash in his office, but did not keep any records of the exact amounts. (Am. Stip. 8, 9, 10) The jars of coins eventually disappeared, and respondent is unaware of their whereabouts. At Grieger's request respondent would periodically provide her with small amounts of the cash received from her landlord for use at the nursing home, but respondent kept no records of the transactions. The funds were depleted at some unknown time prior to Grieger's death. (Am. Stip. 11,12)

Respondent stipulated that in 2003 Grieger expressed concern to him about her financial situation, including her ability to pay current and future bills, and the interest rates she was receiving on various investments. Respondent suggested that Grieger loan him money and that he would offer her a better interest rate than what she could otherwise obtain. Respondent stipulated that at that time he had significant financial obligations, including a mortgage on an expensive home, debt for office equipment, and college tuition payments for his child. (Am. Stip. 13,14)

On February 9, 2004 respondent wrote a check to himself from the joint bank account in his and Grieger's name in the amount of \$1,000.00. (Am. Stip. 15) No documentation was prepared at this time reflecting any terms of this transaction.

On April 14, 2004 respondent wrote another check to "Robertson Law Center" from the joint account in the amount of \$1,000. (Am. Stip. 16) Again, no documentation was prepared at this time concerning the transaction.

On June 8, 2004 respondent executed a promissory note payable to Grieger in the amount of \$40,000. Respondent prepared this note which provided that he would repay Grieger \$40,000 at an interest rate of 5% per annum. The note was payable on demand and no payment due date was specified. (Am. Stip. 17)

On June 16, 2004 respondent negotiated an ESOP (Employee Stock Option Purchase Plan) check in the amount of \$13,189.38. The check was payable to Grieger from Gordon Lumber Company, her former employer. Respondent retained these funds for his own use. (Am. Stip. 19)

Respondent continued to write checks from the joint account either to himself or "Robertson Law Center":

- July 1, 2004 in the amount of \$9,000
- July 3, 2004 in the amount of \$200
- July 6, 2004 in the amount of \$9,000
- July 9, 2004 in the amount of \$900
- July 14, 2004 in the amount of \$7,000 (Am. Stip. 17)

On July 19, 2004 respondent executed another promissory note to Grieger in the amount of \$28,000. The terms of this note were identical to the first, repayment of the principal would be made at 5% per annum on demand. (Am. Stip. 18) He then continued to write checks to himself or his law firm from the joint account:

- July 22, 2004 in the amount of \$1,000
- August 3, 2004 in the amount of \$5,000
- August 10, 2004 in the amount of \$4,000
- September 1, 2004 in the amount of \$3,000
- September 3, 2004 in the amount of \$500
- September 9, 2004 in the amount of \$5000
- September 21, 2004 in the amount of \$9,500 (Am. Stip. 18)

Respondent stipulated he took a total of \$69,289.38 from the joint account for his own use. (Am. Stip. 20)

Respondent stipulated he never advised Grieger that his appropriation of her funds created a conflict of interest, that he never advised Grieger to seek independent counsel, and that he never offered or provided Grieger with any collateral. (Am. Stip. 20)

On October 21, 2004, after receiving relator's letter of inquiry, respondent deposited \$70,391.88 into the joint account. (Am. Stip. 22; Relator's Ex. 2) Respondent

obtained these funds by cashing in his own investments, stocks, and bonds. (Am. Stip. 22, 23)

Respondent stipulated that his conduct with respect to Grieger violated DR 4-101(B)(3), (a lawyer shall not knowingly use a confidence or secret of a client to his own advantage); DR 5-101(A)(1), (a lawyer shall not accept employment if the exercise of professional judgment will or reasonably may be affected by the lawyer's financial, business, property, or personal interests); DR 5-104(A), (a lawyer shall not enter into a business transaction with a client without full disclosure); DR 9-102(B)(1), (a lawyer shall promptly notify the client of receipt of all client funds or property); DR 9-102(B)(2), (a lawyer shall identify and safekeep all property of a client); and DR 9-102(B)(3), (a lawyer shall maintain complete records of all property of a client in his possession). (Am. Stip. 25)

## **COUNT II**

### **John Charles Lane**

John Clifford Lane was a client of respondent's predecessors' firm and thereafter both he and his son, John Charles Lane, became respondent's clients. John Charles Lane is presently in his sixties and retired. (Am. Stip. 26, 30)

John Clifford Lane died on May 5, 2002, and his beneficiaries were his grandson and his son, John Charles Lane. (Am. Stip. 27)

Respondent was the attorney and fiduciary of John Clifford Lane's estate, the value of which was approximately \$550,000. (Am. Stip. 28)

At respondent's suggestion, the John C. Lane Living Trust was prepared by respondent, and was executed by John Charles Lane on February 14, 2003. Both

respondent and John Charles Lane were named co-trustees of the trust, which was funded from funds and property inherited from John Charles Lane's father. (Am. Stip. 31, 32)

After the formation of the trust, respondent obtained, between March 2003 and October 2004, \$41,284.91 from the trust by writing checks from the trust account. (Am. Stip. 32) The checks were made payable to respondent or respondent's personal and business creditors. (Am. Stip. 32) At no time did respondent prepare a writing setting forth the terms of these transactions. John Charles Lane testified that he did not remember if respondent took the money with his permission, but if respondent said he had his permission, John Charles Lane would not disagree. (Am. Stip. 32)

Respondent admits he never advised John Charles Lane to seek independent counsel to review the transactions or of any conflict of interest, and that he never offered to provide John Charles Lane with any collateral. (Am. Stip. 33)

Respondent was notified of the grievance filed against him in connection with the John C. Lane trust on October 9, 2004. On October 18, 2004 respondent resigned as John Charles Lane's co-trustee and repaid the sum of \$41,284.91 into the trust account on October 20, 2004. Respondent obtained these funds by cashing in his own investments, stocks, and bonds. (Am. Stip. 34, 36)

When respondent repaid the funds to John Charles Lane, he advised him to retain other counsel to negotiate an appropriate amount of interest. John Charles Lane did not retain other counsel, but prior to the hearing he and respondent agreed that the sum of \$1,000 would be an appropriate amount of interest to be paid. Respondent paid said amount. (Am. Stip. 35)

Respondent stipulated that his conduct with respect to John Charles Lane violated DR 1-102(A)(6), (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law); DR 4-101(B)(3), (a lawyer shall not knowingly use a confidence or secret of a client to his own advantage); DR 5-101(A)(1), (a lawyer shall not accept employment if the exercise of professional judgment will or reasonably may be affected by the lawyer's financial, business, property, or personal interests); and DR 5-104(A), (a lawyer shall not enter into a business transaction with a client without full disclosure). (Am. Stip. 37)

Prior to the hearing, the parties stipulated to the dismissal of relator's allegation that respondent violated DR 1-102(A)(4), (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). (Am. Stip. 37)

### **COUNT III**

#### **Luella Michelsen**

Luella Michelsen became respondent's client in 2001. She died in February, 2005. (Am. Stip. 38, 43)

In January 2004 respondent and Michelsen learned that she had been named the beneficiary of an annuity. Respondent began to represent Michelsen in connection with receipt of the annuity funds. (Am. Stip. 39)

Michelsen received a check in the amount of \$36,427.95 as her benefit from the annuity, and on March 9, 2004, the check was endorsed by Michelsen and was deposited into respondent's IOLTA. (Am. Stip. 40)

On March 9, 2004 respondent wrote two checks from the IOLTA, one to Michelson in the amount of \$27,320.95, and another to himself in the amount of \$9,107.

(Am. Stip. 41) Respondent stipulated that the \$9,107 was for fees for past services that had not been billed and for services he would render to Michelsen in the future. (Am. Stip. 41) respondent also stipulated that at the time he retained the \$9,107, he was unaware of the future services he would perform for Michelsen, and the only documentation he possessed reflected \$350 for past services. (Am. Stip. 42)

Respondent stipulated his conduct with respect to Michelsen violated DR 2-106(A), (a lawyer shall not charge or collect a clearly excessive fee); DR 9-102(B)(3), (a lawyer shall maintain complete records of all funds or property of a client); and DR 9-102(B)(4), (a lawyer shall promptly pay or deliver all funds or property in his possession to the client). (Am. Stip. 44)

#### **COUNT IV**

#### **IOLTA**

Respondent closed his IOLTA in April, 2004, allegedly because he only received flat fees for his work at that time. (Am. Stip. 47; Relator's Ex. 19, pp. 27-30) However, prior to closing the IOLTA, numerous checks were written from the account to Blumburg Excelsior, an office supply company from which respondent purchased record books for clients. (Am. Stip. 48)

Respondent stipulated that his practice was to quote a fixed fee to a client, and once the work was performed and fee received, the amount of the cost of the record books was deposited into his IOLTA, and checks were then written to Blumburg Excelsior for the record books for that particular client. The remaining fee received for work performed was deposited into respondent's general account. (Am. Stip. 49)

Respondent stipulated that his former employee, Rebecca Witt, performed all bookkeeping responsibilities during the relevant time period. Respondent stipulated he never reviewed Witt's work, the IOLTA, or any bank records. (Am. Stip. 50)

Respondent stipulated that his conduct violated DR 9-102(B)(2), (a lawyer shall identify and label all funds of a client); and DR 9-102(B)(3), (a lawyer shall maintain complete records of all funds or property of a client). (Am. Stip. 51)

Prior to the hearing, the parties stipulated to dismissal of relator's allegation that respondent violated DR 9-102(A), (all funds of a client must be deposited into an identifiable bank account). (Am. Stip. 51)

#### **MITIGATION**

The parties stipulated to three mitigating factors- that respondent repaid all funds to Grieger and Lane plus interest, that he had no prior disciplinary record, and that he cooperated throughout the disciplinary investigation. (Am. Stip. 52, 53, 54)

#### **PARTIES' RECOMMENDED SANCTION**

Based upon the evidence obtained throughout the investigation and the stipulated facts and exhibits, the parties agreed to a recommended sanction of a two-year actual suspension from the practice of law. (Am. Stip. 56)

#### **PANEL HEARING**

At the commencement of the hearing, the panel advised the parties that it would not accept their stipulation of the dismissal of the allegation of a violation of DR 1-102(A)(4) in Count II, the Lane matter, or the dismissal of the allegation of a violation of

DR 9-102(A) in Count IV, the IOLTA matter. The panel reserved these issues for consideration. (Report at 2,3)

Respondent testified at the hearing, and was questioned extensively by the panel. (Tr. at 31-84) John Charles Lane also briefly testified and answered to one question posed by the panel chair. (Tr. at 86-88)

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The panel submitted Findings of Fact and Conclusions of Law, which were adopted by the board. The panel and board agreed that the allegation of a violation of DR 1-102(A)(4) in Count II should be dismissed on the basis that the evidence, "though compelling, does not rise to the level of clear and convincing". (Report at 2-3)

The panel and board also found no evidence of a violation of DR 9-102(A) in Count IV, and therefore accepted the parties' stipulated dismissal of this allegation. (Report at 3)

The panel and board accepted the stipulated mitigating factors which the parties presented and also noted that respondent submitted twelve character letters on his behalf. (Report at 5)

Although no aggravating factors were stipulated by the parties, the panel and board found a number of aggravating factors existed:

- A dishonest or selfish motive
- Multiple offenses
- The victims/clients were vulnerable
- Respondent made false statements to and was not forthcoming with the panel.

- Respondent failed to admit any wrongdoing. (Report at 5-8)

Based on its evaluation of the stipulations and testimony and exhibits, the panel concluded and the board agreed that respondent should be indefinitely suspended from the practice of law. (Report at 13-14) Respondent objects to that recommendation.

## **LAW AND ARGUMENT**

### **I. Respondent's Due Process Rights were not violated**

The panel found that respondent's deceit and dishonesty constituted an aggravating circumstance. (Report at 8-13) Respondent argues that this finding violates his due process rights because the panel found no clear and convincing evidence of a violation of DR 1-102(A)(4) in Count II, the Lane matter, and respondent was not charged with such a violation in the remaining counts.

The fact that there is not clear and convincing evidence of a violation of DR 1-102(A)(4) does not preclude a finding that respondent's dishonesty or deceit constitutes an aggravating circumstance.

The Supreme Court of Arizona addressed this very issue in *In re Varbel*, 897 P.2d 1337 (Ariz.1995), in which the court stated:

Because even under our criminal jurisprudence (except in death penalty cases), aggravating circumstances need only be supported by reasonable evidence, [citations omitted], it is difficult to believe that a higher standard of proof could or should be required in attorney discipline cases. We therefore find no inconsistency in this aggravating circumstance being considered despite our conclusion that the bar did not prove by clear and convincing evidence that respondent deliberately lied. *Id.* at 1341

This court has held that an attorney's failure to cooperate constituted an aggravating circumstance in a disciplinary case, even though there was no such charge

in the complaint. See, *Cuyahoga Cty. Bar Assn. v. Aldrich*, 104 Ohio St.3d 159, 2004-Ohio-6407, *Stark Cty. Bar Assn. v. Watterson* 103 Ohio St.3d 322, 2004-Ohio-4776.

In *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-5342, the court held that the panel and the board improperly found that Farmer violated DR 1-102(A)(4) by misleading Disciplinary Counsel during an investigation because relator had not charged Farmer with such misconduct in the complaint. Even so, the court found that respondent's deceit constituted an aggravating circumstance as "these falsehoods certainly exacerbate the misconduct committed in this case, even though due process precludes a finding of a disciplinary rule violation on this basis".

In this case, the panel evaluated the evidence and respondent's testimony in concluding that he was dishonest and deceitful. Respondent admitted that he used his elderly clients as a line of credit and borrowed money from them to avoid paying the taxes and fees he would incur by utilizing his own funds. (Report at 6)

The panel noted that the two promissory notes respondent prepared in the Grieger matter only identified him as an obligor, yet respondent wrote checks from Grieger's joint account to both himself and his law firm. (Report at 7-8) The panel found this lack of understanding of contract principles by an attorney of respondent's experience could only be explained as dishonest or deceitful. (Report at 7-8; 9-10) The panel was also concerned with a number of other facts: the notes were payable on demand, respondent used his position to obtain the funds, respondent knew the arrangement was not a safe investment for Grieger, and two checks totaling \$2,000 were written prior to the preparation of the promissory notes. (Report at 10-11)

With respect to Lane, the panel was concerned that no promissory notes were prepared despite the fact respondent had prepared notes for Grieger. (Report at 11) The panel also believed it significant that when respondent repaid the debts to Grieger and Lane, he specifically indicated on the memo line of the check that the monies were for "loan repay", but the checks respondent wrote to himself or his law firm from client accounts lacked any such designation. (Report at 12)

The panel found respondent's testimony as to Michelsen inconsistent. Respondent testified that he and Michelsen agreed he was to receive 25% of her annuity funds, but he stipulated he was to receive a \$9,107 fee for services rendered in the past and to be rendered in the future. The panel was "hard-pressed to comprehend" how respondent could justify the amount of the fee by writing a few letters, having a few phone conversations, and meeting with a client two or three times. (Report at 11-12)

Thus, there was support for the panel's conclusion that respondent was dishonest and deceitful, and that that evidence constituted an aggravating circumstance.

**II. A sanction of an indefinite suspension may be ordered even without a finding of a violation of DR 1-102(A)(4)**

Respondent argues that because the only allegation of a violation of DR 1-102(A)(4) was dismissed due to a lack of clear and convincing evidence an indefinite suspension is not appropriate. However, case law provides that an indefinite suspension may be ordered even without a finding of a violation of DR 1-102(A)(4).

For example, in *Dayton Bar Assn. v. Green*, 97 Ohio St.3d 119, 2002-Ohio-5314, the court ordered that Green be indefinitely suspended for violations of DR 9-102(A),

(failing to keep client funds in a separate identifiable bank account), and DR 9-102(B), (failing to maintain complete records). There was no finding of a violation of DR 1-102(A)(4).

In *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110, the court discussed the imposition of a sanction in misappropriation cases. In ordering a six month suspension, the court discussed the varying sanctions available:

And despite respondent's remorse, his character and standing in the community, and the dismissal of other charges of misconduct, including a violation of DR 1-102(A)(4), (barring an attorney from dishonesty, fraud, deceit or misrepresentation), respondent's infractions constituted serious misconduct. The misappropriation of a client's funds can be cause for disbarment (see *Cleveland Bar Assn. v. Dixon* (2002) 95 Ohio St.3d 490, 769 N.E. 2d 816), and even without dishonesty or deceit, misappropriation of client's money can warrant the indefinite suspension of an attorney's license. *Dayton Bar Assn. v. Green*, 97 Ohio St.3d 119, 2002-Ohio-5314, 776 N.E. 2d 1060. An exception may be made, however, when the misappropriation represents an isolated incident in an otherwise unblemished career. *Toledo Bar Association v. Kramer* (2000), 89 Ohio St. 3d 321, 323, 731 N.E. 2d 643. (Emphasis added)

Thus, the type of sanction to be ordered in a particular case is not absolute, but absence of a violation of DR 1-102(A)(4) does not render an indefinite suspension inappropriate.

### CONCLUSION

Neither the panel or board is required to accept any stipulations or recommendations of the parties in a disciplinary case. (BCGD Proc. Reg. 3(D) Here, the panel and board analyzed all of the facts and determined that an indefinite suspension should be recommended, and case law supports that conclusion. Of course, the ultimate determination lies with this court, which is free to construe the facts and the law

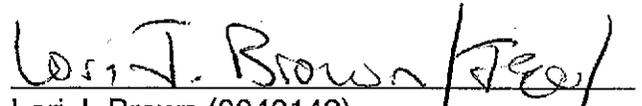
as it deems fit and order any sanction it deems appropriate.

Respectfully submitted,



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Disciplinary Counsel, Relator



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Lori J. Brown (0040142)  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, James D. Caruso, Esq., and upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5<sup>th</sup> Floor, Columbus, Ohio 43215-3431 this 15th day of November, 2006.



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Carol A. Costa  
Counsel for Relator

## APPENDIX

conduct detailed in Gov.Bar R. IV or Section 6(a) of Gov.Bar R. V and cite the disciplinary rule allegedly violated by the Respondent. The panel and Board shall not be limited to the citation to the disciplinary rule(s) in finding violations based on all the evidence.

(B) The Relator in the complaint shall set forth the Respondent's attorney registration number and his last known address where the Board shall serve the complaint.

(Effective 10-8-90)

### Section 2. Pleadings and Motions.

(A) Within the period of time permitted for an answer to the complaint, Respondent may file any motion appropriate under Rule 12 of the Ohio Rules of Civil Procedure, supported by a brief and affidavits if necessary. A brief and affidavits, if appropriate, in opposition to such motion may be filed within twenty days after service of such motion. No oral hearing will be granted, and rulings of the Board will be made by the Chairman of the Board or any member designated by the Secretary of the Board. All motions shall be made in accordance with this rule.

(B) The chairman or a member of the panel shall rule on all motions subsequent to the appointment of a panel.

(C) For good cause, the Chairman of the Board, or, after appointment of a panel, the chairman or member of the panel may grant extensions of time for the filing of any pleading, motion, brief or affidavit, either before or after the time permitted for filing.

(D) Every pleading after the complaint shall show proof of service.

(Effective 10-8-90)

### Section 3. Rules of Procedure.

(A) The Board and hearing panels shall follow the Ohio Rules of Civil Procedure wherever practicable unless a specific provision of Gov. Bar R. V provides otherwise.

(B) Depositions taken in Gov. Bar R. V proceedings shall be filed with the Secretary of the Board as Rule 32 of the Ohio Rules of Civil Procedure prescribes.

(C) If Relator and Respondent stipulate to facts, the chairman or member of the panel may either cancel a hearing and deem the matter submitted in writing or order that a hearing be held with all counsel and the Respondent present.

(D) Notwithstanding the agreement of Relator and Respondent on a recommended sanction for Respondent, the hearing panel and the Board are not bound by the joint recommendation and retain sole power and discretion to make a final recommendation to the Ohio Supreme Court on the appropriate sanction.

(Effective 10-8-90; amended, eff 6-1-00)

### Section 4. Manner of Service.

Whenever provision is made for the service of any notice, order, report, or other paper or copy upon any complainant, relator, respondent, petitioner, or other party, in connection with any proceeding under these rules, service may be made upon counsel of record for such complainant, relator, respondent, petitioner, or other party, either personally or by certified mail.

(Effective 7-1-92)

### Section 5. Quorum of Panel or Board.

A majority of the members of the Board of Commissioners, or a panel thereof, shall constitute a quorum for all purposes, and the action of a majority of those present comprising the quorum shall be the action of the Board of Commissioners or a panel of the Board; except for the granting of a motion for default pursuant to section 6(F) of Gov.Bar R. V, or a dismissal of the complaint at the conclusion of the hearing pursuant to section 6(H) of Gov.Bar R. V, which shall require the unanimous action of a hearing panel.

(Effective 7-1-92)

### Section 6. Manner of Service on Clerk; Record of Such Service a Public Record.

All notices shall be served by the Secretary of the Board upon the Clerk of the Supreme Court by leaving at the office of the Clerk a true and attested copy of the notice and any accompanying document and by sending to the respondent, by certified mail, postage prepaid, return receipt requested, a like, true, and attested copy, with an endorsement thereon of service, upon the Clerk of the Supreme Court, addressed to the respondent at the respondent's last known address. The receipt indicating the certified mail number shall be attached to and made a part of the return of service of such notice by the Secretary. The panel or Board or court before which there is pending any proceeding in which notice has been given as provided in this section may order a continuance as is necessary to afford the respondent reasonable opportunity to appear and defend. The Clerk of the Supreme Court shall keep a record of the day and hour of service upon the Clerk of notice and any accompanying document, which shall be a public record in the office of the Clerk.

(Effective 7-1-92)

### Section 7. Power to Issue Subpoenas.

In investigations and proceedings under this rule, upon application by Disciplinary Counsel, the Secretary, or chair of a Certified Grievance Committee authorized to sign a certificate under section 4(I)(7) of Gov. Bar R. V, the Special Investigator, respondent, relator, chair of the hearing panel of the Board, and its Secretary shall have the authority to cause testimony to be taken under oath before the