

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel, : Case No. 06-738
Relator, : (BCGD Case No. 05-044)
v. :
Thomas J. Manning, :
Respondent. :

RESPONDENT'S MOTION FOR RECONSIDERATION

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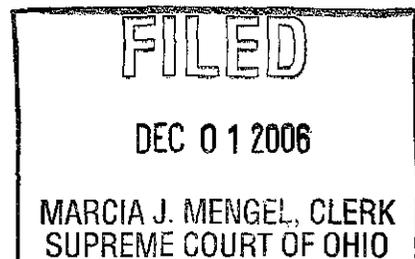


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<i>CODE OF PROFESSIONAL RESPONSIBILITY</i>	
DR 1-102(A)(4)	<i>passim</i>

MOTION FOR RECONSIDERATION

Now comes Respondent, Thomas J. Manning, by and through counsel, and, pursuant to S.Ct. R. XI(2), does hereby move this Honorable Court to reconsider its decision of November 22, 2006, imposing a two-year suspension from the practice of law upon Respondent.

ANALYSIS

Respondent submits that this Court's imposition of a two-year actual suspension is excessive given similar cases decided regarding violations of DR 1-102(A)(4) since the date of the oral argument held on this case: July 18, 2006. Respondent also wants to point out his concession in response to questioning at oral argument that a period of actual suspension (or "time out" to use the court's parlance), is appropriate in this case. Respondent therefore asks this Court to reconsider its decision of November 22, 2006, and impose a lesser suspension in place of the imposed two-year suspension, or in the alternative to leave intact the two-year suspension currently imposed but stay some period of that suspension. In support of this argument, Respondent is submitting authorities decided since July 18, 2006 and which therefore could not be presented at oral argument.

In *Mahoning Cty. Bar Assn. v. Olivito* (2006), 110 Ohio St.3d 64, 2006-Ohio-3564, the Respondent had been retained to represent clients in a bankruptcy matter. The clients paid Respondent a flat fee as a retainer. Respondent then neglected the file until some months later. Prior to filing of the bankruptcy petition, Respondent failed to have the clients review the petition, forged the clients' signatures to the petition, and falsely represented to the bankruptcy court in the petition that he had not received any fees from the clients. Respondent then failed to communicate with the clients and failed to appear for a creditor's meeting. Thereafter, Respondent then made numerous misrepresentations to his clients and to the bankruptcy court

regarding his attempt to withdraw from the case, his failure to appear at the creditor's meeting, and his handling of the bankruptcy itself.

This Court found that the clients were harmed by Respondent's conduct, and also that Respondent was not cooperative in the proceedings, and did not engage in full and free disclosure. Respondent had no prior disciplinary record and submitted character letters on his behalf. This Court imposed a two-year suspension, but stayed one year of the suspension.

In *Iowa Supreme Ct. Atty. Disciplinary Bd. v. Frerichs* (Iowa 2006), 718 N.W.2d 763, the Iowa Supreme Court imposed a three-month suspension upon the Respondent. In this case, the Respondent filed an untimely response to a forfeiture petition, and then failed to appear for the forfeiture hearing, resulting in an adverse ruling against Respondent's client. Respondent then filed a motion to set aside the adverse ruling, and falsely claimed in the motion that he had been prevented by a judge in another county from contacting the court to participate in the hearing by telephone. The falsehoods were revealed when the two judges involved spoke with one another and realized Respondent was not being honest. Further, Respondent failed to timely respond to the disciplinary complaints against him. In addition to the numerous ethical violations found, Respondent had **five** previous disciplinary actions against him between 1998 and 2005. Nevertheless, the Court held that a three-month suspension of Respondent was appropriate.

In *Cincinnati Bar Assn. v. Lukey* (2006), 110 Ohio St.3d 128, 2006-Ohio-3822, this Court imposed a two-year suspension with eighteen months stayed. Respondent had been retained to represent a couple in regard to dependency proceedings regarding their 13-year-old grandson. The couple was being investigated for having locked the grandson in the basement while they were at work in an attempt to control him. Respondent then assumed representation of the grandson in related criminal proceedings against the grandson despite the fact that he continued

to represent the grandparents in the dependency proceeding. Respondent then negotiated a plea deal on behalf of the grandson, and failed to point out to the juvenile court facts that would have revealed the conflict of interest regarding his dual representation. Respondent further failed to present facts to the court on behalf of the grandson which would have mitigated the criminal charges. At sentencing, the court discovered the conflict, and another attorney later negotiated a better plea deal for the grandson.

Part of the numerous ethical violations found against Respondent was the fact that his conduct intentionally damaged the grandson, who spent time in detention because Respondent failed to properly represent him. Respondent had no prior discipline and was cooperative and truthful during the disciplinary process. However, the panel felt that Respondent was not genuinely remorseful for the harm to the grandson. As mentioned above, Respondent was given a two-year suspension, but the last eighteen months of same was stayed with Respondent placed on probation.

In *Disciplinary Counsel v. Novak* (2006), 110 Ohio St.3d 134, 2006-Ohio-3823, the Respondent failed to file an appeal for which he had been retained, and then falsely told the client on more than one occasion that the appeal had been filed. Also, in another case, Respondent failed to advise opposing counsel he was unavailable for a trial date, and failed to oppose motions for sanctions and for summary judgment, leading to an adverse finding against his client. Additionally, in a third matter, Respondent failed to file a motion to enforce a settlement agreement, despite assuring the client that he had, attempting to blame the court instead. Respondent then failed to return the client's files. Finally, Respondent failed to advise his clients he did not carry malpractice insurance, and failed to respond to several investigative inquiries from the disciplinary counsel.

Respondent had no prior disciplinary history, and eventually cooperated in the disciplinary process. His failure to respond to the inquiries was partly explained by a psychologist. This Court suspended Respondent for two years, but stayed the second year on conditions he be monitored.

In *Disciplinary Counsel v. Bowman* (2006), 110 Ohio St.3d 480, 2006-Ohio-4333, the Respondent violated numerous disciplinary rules in regard to three separate cases. First, Respondent had been retained to defend clients in regard to a cognovit note suit. The holder of the note made a settlement offer, which the clients rejected. In spite of the rejection, Respondent forged the signatures of the clients and their former attorney on the settlement agreement. The case was then dismissed with prejudice. Even after being confronted with his deception by his firm, Respondent continued to lie, at first blaming the clients, then only admitting the truth while being questioned by police.

Second, Respondent represented Miami University in a lawsuit in federal court. The adverse party contacted Respondent and made a settlement offer, which was withdrawn when Respondent did not timely respond. Respondent then failed to submit a counteroffer from the adverse party to Miami, and then falsely advised opposing counsel that Miami had indeed accepted the counteroffer. Respondent later lied to both his co-counsel and Miami's general counsel that the adverse party had accepted Miami's offer, not that he had represented that Miami had accepted the other side's counteroffer. Respondent then cut and pasted a signature onto a bogus settlement agreement, forwarded it to Miami, and sent along a \$5,000.00 check, which was supposed to be a payment on the settlement agreement, but in fact was the retainer from the clients in the cognovit suit mentioned above. Still later, Respondent sent Miami's general counsel a letter with a copy of a bogus cashier's check which he falsely represented to

comprise the final settlement payment. He then paid the remainder of the settlement from personal funds. Upon discovery of the fraud, Miami later obtained relief from judgment and won a permanent injunction against the adverse party.

Third, Respondent represented a client in regard to a lawsuit pending in federal court. Respondent failed to timely provide discovery and disclose experts, and in response to a motion for sanctions, moved to dismiss the lawsuit with prejudice without the consent of the client. Respondent lied to his firm about the status of the case, and was fired as a result of all of the above misconduct.

Respondent had no prior discipline, was cooperative and remorseful, and had made restitution to the clients this Court found that he had harmed. Relator sought an indefinite suspension. However, due in part to Respondent's mental condition, despite the sheer number of ethical violations spread over three separate clients, all of whom this Court found had been harmed by Respondent, this Court imposed a two-year suspension, the same sanction imposed in this case.

In *Disciplinary Counsel v. Ault* (2006), 110 Ohio St.3d 207, 2006-Ohio-4247, Respondent was a municipal court judge who used deception to obtain narcotic painkillers from multiple providers to feed an addiction. After an investigation by the Ohio Pharmacy Board, criminal charges were brought against Respondent, who entered a rehabilitation program. Respondent then plead no contest to two misdemeanors related to his misconduct. Respondent had no prior disciplinary record, had been cooperative, and was remorseful, and received a two-year stayed suspension, due to his addiction.

Disciplinary Counsel v. Keller (2006), 110 Ohio St.3d 240, 2006-Ohio-4354, presents a very similar situation to the case at bar, but with several instances which render the conduct

much more egregious than the conduct at issue in this case. In this case, Respondent was retained by an elderly woman regarding injuries she sustained in a car accident. Respondent failed to advise the client that he did not carry malpractice insurance. Respondent thereafter failed to follow through with the tortfeasor's insurance carrier, and falsely advised the client that he had filed a lawsuit and was pursuing it. After the client left Respondent a message to the effect that she was terminating his services, Respondent contacted the client and falsely advised her that he had received a \$30,000.00 offer from the insurance company, and that if she accepted the offer, he would not charge her a fee. Respondent intended to pay the "settlement" out of personal funds. Thereafter, the client retained new counsel, who discovered that no lawsuit had been filed and that the statute of limitations had run. The client later sued Respondent, and obtained a default judgment in the amount of \$102,800.00, which remained unsatisfied.

Respondent had no prior disciplinary record, was cooperative and remorseful, and did not have evidence of chemical dependency. In contrast with this case, where the Board found that there was no harm to the client, the Respondent in *Keller* was found to have harmed a vulnerable client, as shown by the default judgment rendered against Respondent. Relator, consisting of the same counsel as in the case at bar, recommended a one-year suspension with six months stayed. This Court imposed a two-year suspension with eighteen months stayed.

In *Disciplinary Counsel v. Rooney* (2006), 110 Ohio St.3d 349, 2006-Ohio-4576, the Respondent was retained in June 2002 to handle an estate. For a year and a half, Respondent assured the client that he was taking care of the matter for her, and ultimately that the estate would be resolved by the end of 2003. In early 2004, Respondent ceased most contact with the client, and then failed to send the client paperwork he promised to send her. In June 2004, the client contacted the probate court, which confirmed that no estate had ever been opened. There

was apparently no harm to the client, the Respondent had no prior disciplinary record, was cooperative, and was remorseful. This Court imposed a six-month suspension as recommended by Relator.

In *Columbus Bar Assn. v. Farmer* (2006), 111 Ohio St.3d 137, 2006-Ohio-5342, the Respondent was retained to handle a criminal appeal, in which a brief had already been filed by another attorney. Respondent, claiming to the family to have reviewed the brief, disparaged it and promised the family that he would prepare and file a new brief. However, Respondent admittedly had not read the brief when he made these statements. Respondent also boasted to the family that he could get his client out of prison, which was implausible given the circumstances. Respondent then visited the defendant in prison and made similar claims to him as had been made to the family.

Respondent thereafter obtained leave to withdraw his predecessor's brief, and filed a new brief nearly four months later. The brief filed by Respondent was nearly identical to the brief filed by his predecessor, with some material added. Upon being confronted by the defendant's family, Respondent admitted his misconduct, but promised he would continue to pursue the case as far as needed. The family later discharged Respondent. Respondent then represented to the family that discharging him would be a mistake because he had been told that a witness against the defendant would recant their testimony. Respondent then falsely advised the Disciplinary Counsel that he had retained an investigator to locate and question potentially exculpatory witnesses.

Respondent also was retained by the fiancé of another client regarding possible post conviction relief for the client. Despite the fact that Respondent was paid nearly \$5,000.00 over a two-year period, no papers were filed on the client's behalf, and Respondent apparently

performed little or no services for the client. Upon his discharge, Respondent failed to account for his time in the case or how the retainer was utilized.

Relator sought a two-year suspension, with a stay of no more than six months. This Court imposed a two-year suspension, with the second year stayed on condition of the monitoring of Respondent's practice.

In *Disciplinary Counsel v. Stollings* (2006), 111 Ohio St.3d 155, 2006-Ohio-5345, Respondent represented a client in a lawsuit for recovery of money owed to him by a former employer. Some months later, the employer made attempts to settle the case, but subsequent attempts at settlement were fruitless. Thereafter, the court sent notice to counsel on two occasions indicating that they believed the case had been settled, and ultimately stated that the case would be dismissed if there was no response given to correct that belief. With no response received from either side, the case was dismissed. Respondent failed to advise the client of the dismissal, and soon thereafter relocated out of state. Months later, Respondent contacted the client and falsely told him the court was planning to set a settlement conference. Several months later, Respondent again wrote the client, falsely advising him that he was having local counsel take over the case.

Respondent had no prior disciplinary record, was cooperative and remorseful, and submitted references as to his good character. Further, Respondent had made restitution to the client who had been harmed by the misconduct. Both Relator and Respondent proposed a six-month suspension, which this Court imposed. Importantly, this Court held that a six-month suspension was "consistent with the sanction imposed in similar cases." 2006-Ohio-5345 at ¶14 (citations omitted).

In *Stark Cty. Bar Assn. v. Ake* (2006), 111 Ohio St.3d 266, 2006-Ohio-5704, the Respondent committed several acts of misconduct stemming from self-representation in his own divorce action. Respondent violated several court orders in the case: he withdrew funds from a bank account and encumbered the marital residence, both in violation of a restraining order, violated another court order concerning care of the couple's pets, failed to provide life insurance information in violation of a court order, and failed to pay certain expenses for his wife, again in violation of a court order.

Respondent had no prior disciplinary violations, and had cooperated and submitted character references in his favor. However, the Board found that Respondent refused to acknowledge that he had committed any ethical violations, and that he was guilty of multiple acts of self-serving misconduct. This Court imposed a six-month suspension.

In a decision announced just two days ago, in *Cuyahoga Cty. Bar Assn. v. Paulson* (2006), 111 Ohio St.3d 415, 2006-Ohio-5859, the Respondent had been retained to represent a client in a federal civil rights case. Respondent dismissed the case with prejudice without the consent of the client, and then failed to timely file an appellate brief in her case. Respondent then failed to communicate with the client or successor counsel, and he also failed to provide any portion of her case file to successor counsel.

Respondent had no prior disciplinary violations, and had failed to cooperate in any aspect of the disciplinary process, refused to acknowledge that his conduct was wrongful, and had caused harm to a vulnerable victim. There were no mitigating factors. Despite this, this Court imposed the same two-year suspension imposed to Respondent in this case.

ARGUMENT

Respondent is not submitting these cases in an attempt to claim he did nothing wrong, or that his misconduct does not warrant a suspension. As stated above, that was conceded at oral argument. Respondent is merely showing this Court that a lesser period of suspension is appropriate given the misconduct at issue and this Court's prior case law. Whether this comes in the form of a straight "time out" or a suspension with time stayed is immaterial. Respondent's misconduct in this case was very serious. This Court insinuated in its decision that Respondent herein did not grasp the seriousness of his misconduct, and did not understand how damaging such misconduct can be to the legal system. Nothing could be further from the truth. Respondent's candor, cooperation, and serious remorse from the date on which he was first confronted with his misconduct evidences this. Respondent made no attempts to deceive anyone other than his clients, and when confronted by an outside party, freely admitted his wrong doing and offered complete cooperation. This timeframe is also consistent with a situation where, as here, the clients were not harmed by Respondent's misconduct.

Respondent understands and accepts that a "time out" is warranted, but submits that a two-year "time out" is excessive given this Court's recent pronouncements in similar situations.

A summary of these recent decisions is as follows:

<u>RESPONDENT</u>	<u>DATE OF DECISION</u>	<u>SUSPENSION IMPOSED</u>	<u>PORTION STAYED</u>
<i>Olivito</i>	7/26/2006	2 years	1 year
<i>Frerichs (Iowa)</i>	7/28/2006	90 days	none
<i>Lukey</i>	8/9/2006	2 years	18 months
<i>Novak</i>	8/9/2006	2 years	1 year
<i>Bowman</i>	8/23/2006	2 years	none
<i>Ault</i>	8/30/2006	2 years	all

<u>RESPONDENT</u>	<u>DATE OF DECISION</u>	<u>SUSPENSION IMPOSED</u>	<u>PORTION STAYED</u>
<i>Keller</i>	9/6/2006	2 years	18 months
<i>Rooney</i>	9/20/2006	6 months	None
<i>Farmer</i>	11/1/2006	2 years	1 year
<i>Stollings</i>	11/1/2006	6 months	none
<i>Ake</i>	11/15/2006	6 months	none
<i>Paulson</i>	11/29/2006	2 years	none

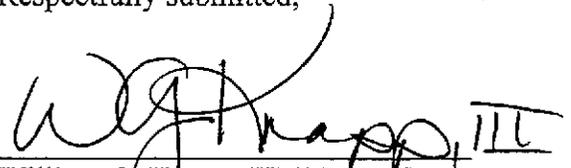
As this Court can see, the only decisions other than the one in the instant case where a two-year suspension was imposed without any stay whatsoever were in *Bowman* and *Paulson*. In all the other cases where a two-year suspension was imposed, a one-year or eighteen-month stay was granted. As discussed above, *Bowman* involved numerous instances of deception and other ethical violations, including the fabrication of documents with forged signatures, lies to co-counsel, opposing counsel, and his employer. In fact, *Bowman* would have been an indefinite suspension case had it not been for the mitigating factor of Respondent's mental condition. Further, as discussed above, *Paulson* involved deception and other ethical lapses concerning one client, with a failure to cooperate in the disciplinary process, prior discipline, harm to a vulnerable client, failure by the Respondent to acknowledge his misconduct as wrongful, and no mitigating factors.¹

All of the other cases, most of which involved numerous ethical violations, imposed lesser periods of suspension. Modification of the two-year suspension imposed herein to a lesser suspension would be commensurate with the cases decided since the date of the oral argument in this matter, and would still represent punishment in line with the misconduct at issue. As such,

¹ Respondent asks this Court to recall that the misconduct in this case involved one client as well, and only one matter handled for the client. As discussed at oral argument, Respondent also represented Alfred & Nollie Combs in regard to an auto accident claim, and Respondent's handling of said claim was found to be proper and ethical.

Respondent would ask this Court to reconsider its decision of November 22, 2006, and modify the two-year suspension imposed to a lesser actual suspension, or a two-year suspension with a period of time stayed.

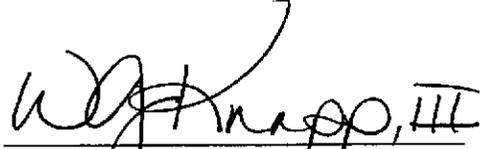
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent to Jonathan E. Coughlan, Esq./Joseph M. Caliguri, Esq., Office of Disciplinary Counsel, 250 Civic Center Drive, Suite 325, Columbus, OH 43215, this 1st day of December, 2006.



William G. Knapp, III
Counsel for Respondent