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

In Re:	:	07-0344
Complaint against:	:	**Case No. 05-040**
Howard V. Mishler, **Attorney Reg. No. 0007281**	:	**Findings of Fact,** **Conclusions of Law and**
Respondent	:	**Recommendation of the** **Board of Commissioners on**
Cleveland Bar Association,	:	**Grievances and Discipline of** **the Supreme Court of Ohio**
Relator	:	

This matter was heard on August 21 and 22, 2006 and October 11, 2006 in Cleveland, Ohio, before a panel consisting of members Martin J. O'Connell, Shirley J. Christian and Judge Arlene Singer, Chair. None of the panel members resides in the judicial district from which the complaint arose or served on the probable cause panel that reviewed the complaint. Attorney Lester Potash represented respondent and attorneys Robert J. Hanna and Benjamin C. Sassé represented relator.

PROCEDURAL BACKGROUND

The Complaint in this matter was filed with the Board on April 18, 2005. An Amended Complaint was filed January 26, 2006. The complaint as amended alleged the following ethical violations.

FILED
FEB 21 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

Count 1 - Dellipoala

DR 1-102 (A) (3) illegal conduct involving moral turpitude; (4) conduct involving dishonesty, fraud, deceit, or misrepresentation; (5) conduct that is prejudicial to the administration of justice; (6) conduct that adversely reflects on the lawyer's fitness to practice law.

DR 7-101 (A) A lawyer shall not intentionally (1) Fail to seek the lawful objectives of his client; (3) Prejudice or damage his client during the course of the professional relationship.

DR 9-102 (B) (1) promptly notify a client of the receipt of his funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.
(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

Count 2- Dellipoala

DR 2-106 (A) charge an illegal or clearly excessive fee.

DR 9-102 (B)(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

Count 3 -Walton

DR 1-102 (A) (5) Engage in conduct that is prejudicial to the administration of justice;(6) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

DR 2-106(A) charge an illegal or clearly excessive fee.

DR 2-107 (A) Division of fees by lawyers who are not in the same firm may be made only with the prior consent of the client and if all of the following apply: (1) The division is in proportion to the services performed by each lawyer or, if by written agreement with the client, all lawyers assume responsibility for the representation; (2) The terms of the division and the identity of all lawyers sharing in the fee are disclosed in writing to the client; (3) The total fee is reasonable.

DR 9-102(B) (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

Stipulations were filed on August 16, 2006.

FINDINGS OF FACT

Based on the stipulations submitted and the evidence presented, the panel unanimously finds the following facts were proven by clear and convincing evidence:

Respondent was admitted to the practice of law in Ohio on November 3, 1973.

Dellipoala

Franco J. Dellipoala , Jr. retained respondent in the October of 2000 in connection with a dispute with his former employer, The Geon Corporation, aka PolyOne Corporation, regarding his termination, allegedly because he refused to shave his beard.

Dellipoala testified that he was to pay respondent $10,000 for state court, $2,000 for federal court, or 40% of what was recovered after suit. Dellipoala paid respondent a total of $17, 600 in several payments.

On December 12, 2000, Respondent filed a complaint on Dellipoala's behalf in the Cuyahoga County Common Pleas Court, for numerous claims based on discrimination.

Geon filed a motion for summary judgment on May 21, 200l and respondent filed an opposing brief on behalf of Dellipoala. Geon's motion was granted on June 29, 200l. Respondent timely filed a notice of appeal, for which respondent charged an additional $3,000 pursuant to an oral agreement. Respondent had also filed a federal action in the U.S. District Court on behalf of Dellipoala on June 8, 2001. On February 12, 2002, an order dismissing the federal case was issued which stated that "Counsel has notified the court that the above-captioned case is settled and dismissed, with prejudice. Parties may file additional documentation evidencing the settlement."

Respondent and counsel for The Geon Company filed a joint stipulation with the state court of appeals that the matter had been settled on March 5, 2002, and on March 15, 2002, the

court dismissed the case, "Pursuant to parties' joint stipulation to cancel oral argument due to settlement..."

Dellipoala was unaware of the settlement and did not authorize respondent to settle his claims. Further, he did not know that the joint stipulations to cancel oral argument were filed or that the federal action was dismissed, until months later.

On November 14, 2002 respondent sent Dellipoala a letter stating that "My recollection of the state case was that we had already filed Appellant's Brief and we were awaiting for [sic] the oral arguments which did not ensue because of the illness which had gripped myself and other members of my family causing me to develop exacerbated and prolonged illness." The letter further stated that there had been an "offer for settlement" of $7,500, that he had received a letter "indicating that as a courtesy to me, that the offer, hence the case, remained unresolved as of October 2002." At that time respondent forward a copy of that letter and settlement agreement which he stated he had received in October 2002.

On December 6, 2002 respondent sent a cover letter and settlement agreement to the Geon Company's counsel purporting to bear the signature of Dellipoala. On December 10, 2002, the Geon Company's lawyer forwarded a check dated March 4, 2002 in the amount of $7,500 payable to "Franco Dellipoala and attorney." The cancelled check purportedly bears the endorsement of Dellipoala. Dellipoala denied that he signed the agreement and or that he endorsed the check.

In his answer to the original grievance filed by Dellipoala (March 17, 2003), respondent stated that at an attorneys' conference at the appellate court in July 2001, Geon made a settlement offer of $7,500; that oral argument was continued because of his illness; the

settlement offer was still open; and the dismissed appellate case could be reactivated if Dellipoala did not want to accept the settlement.

On August 19, 2004, Dellipoala sent respondent a letter asking to be contacted about the status of his case and return of the $17,600.

On April 1, 2005 Mishler sent a check to Dellipoala for $8000, but it was returned because of a problem with the address.

Respondent has characterized his fee agreement with Dellipoala inconsistently, referring to "fees", "costs" and "expenses" as amounts to be paid by Dellipoala to him. Set forth are some examples of this practice:

- An engagement contract dated October, 2000 (day not specified) included a $1000 retainer (for investigating and filing complaint); out-of-pocket costs estimated at $10,000; plus 33 1/3% of settlement received before filing suit and 40% of any settlement received after a suit was filed. The agreement excluded state and federal appeals. The agreement was signed but not witnessed.

- Another contract for engagement bearing a June (no day specified), 2001 date and purportedly signed by Dellipoala and witnessed, included a retainer of $1,000 and 33 1/3% of any settlement proceeds before suit and 40% after commencement of lawsuit; estimated "cost of this matter" $10,000, also excluding state or federal appeals. Dellipoala denies signing it.

- In respondent's answer to the original grievance directed to the Cleveland Bar Association he stated that "The Grievant was quoted a fee of Ten Thousand and No/100 Dollars ($10,000.00), plus one-third (1/3) of any settlement proceeds."

- In an invoice dated February 1, 2001, respondent referenced:

Estimated *Fee*	$10,000
previous Balance	$1,000
Payment- thank you	$1,000
Current Balance	-0-

- In "Breakdown of Expenses and Fees" prepared by respondent and given in response to discovery, respondent submitted the following:

State Case No. 425184

Retainer/Investigation.....	$1,000.00
Expenses	
Filing Fee	$100.00
Xeroxing & Postage	$100.00
Computer Research by John Terk	$600.00
Monroe Arlen, M.D.	$500.00
Mitchell Wax, PH.D	$440.00
Mr. Dellipoala Deposition	$731.75
Mr. Jeff Aimes Deposition	$630.00
Mr. Mike Guyer Deposition	$810.00
Expenses	$3,893.75 [1]

Additional Anticipated Depositions

Francois Cote	$500.00 - Anticipated Cost
Denny Lugar (Safety).....	$500.00 – Anticipated Cost
Marty Doleman	$500.00 – Anticipated Cost
Craig DiFlippio.....	$500.00 – Anticipated Cost
Kirk Simmons	$500.00 – Anticipated Cost
Dr. Robert Alcorn.....	$500.00 – Anticipated Cost
Mitchell Wax.....	$500.00 – Anticipated Cost

State Case Appeal No. 80023

[1] Panel calculates $3911.75

Fixed Fee.....	$3,000.00
Filing.....	$100.00
Xeroxing & Postage.....	$100.00
Computer Research by John Terk.....	$500.00
	$3,700.00

Federal Case 1-01-01417

Retainer.....	$1,000.00
Filing Fee.....	$150.00
Xerox & Postage.....	$100.00
	$1,250.00

Anticipated Depositions:

Willie Winnon.....	$500.00- Anticipated Cost
Mike Winnon.....	$500.00- Anticipated Cost
Greg Rothman.....	$500.00- Anticipated Cost
Jose Lojo.....	$500.00- Anticipated Cost
Supplemental deposition of Mr. Dellipoala..	$500.00- Anticipated Cost
Monroe Arlen	$1,500.00 – Anticipated Cost

Earned Attorney Fees From All Three (3) Cases.....$8,000.00
Actual Expense Cost.....$4,843.00[2]

Monies Received.....$17,400.00[3]

Less Fees and Expenses ..... $10,361.00 [4]
Attorney Fees - $8000.00

What hourly rate would be at $150.00 per hour.....$21,714.75

- In the "Final Account" submitted as an exhibit for the for the panel's hearing Respondent submitted:

[2] Respondent's numbers total $4843.75; Panel calculates $4861.75.
[3] Respondent was paid $17,600.
[4] Panel is unable to determine the basis of this number.

"RECEIPTS:

Monies Advanced for Cost	$17,600.00
Settlement Proceeds	$7,500.00
Total	$25,100.00

DISBURSEMENTS:

Investigative Fee	$1,000.00
Filing Fee	$100.00
Monroe Arlen, MD Report	$500.00
State Appeal – Agreed Fee	$3,000.00
Rhonda's Secretarial Service –Deposition of Mike Guyer	$471.00[5]
Rhonda's Secretarial Service –Deposition of Jeffrey Ames	$590.00[6]
Filing Fee	$100.00
Copy of Franco Dellipoala's Deposition	$731.75
Mitchell Wax, Ph.D Report	$440.00
Xeroxing and Postage	$40.00
Attorney Fees for Settlement (1/3 of $7,500)	$2,500.00[7]
Distribution to Franco Dellipoala of Settlement Proceeds And Costs ($8,627.25 & $4,500) (Check #6142 for $8,627.25, Account 0166168) (Check # 1492 for $4,500, Account 0689090	$13,127.25
Total Disbursements	$25,100.00[8]
Balance	0[9]

- In a letter of February 21, 2005 to a Patrolman Eagleye, who was investigating forgery of Dellipoala's signature by respondent's paralegal, respondent stated that the " case was estimated at $10,000." He further stated that "Howard V. Mishler received a $1000 retainer, non-refundable, and was to receive a third of any settlement proceeds plus out-of pocket reimbursement." In the closing paragraph of the letter he wrote that "It is Howard V. Mishler's

[5] In a document described in previous paragraph, respondent reported the cost as $810.
[6] In a document described in previous paragraph, respondent reported the cost as $630.
[7] Respondent testified at hearing that this should have been 40% of settlement proceeds - $3000.
[8] Panel calculates Total Disbursements = $22,600. (If $3000 contingent fee amount used per respondent's testimony, the Total Disbursements =$23,100).
[9] Panel calculates the Balance at $2,500.

position that he is entitled to the value of his services at $21,000.00 or one-third of the settlement proceeds, which Franco J. Dellipoala does not acknowledge."

Respondent did not keep or prepare an accounting for his client until he attempted to comply with disciplinary discovery and in preparation of the hearing.

Walton

In July 2002, Bruce Walton retained respondent in connection with his termination as an at-will employee by his former employer, Rolls-Royce, pursuant to A Notification of Reduction in Workforce. Walton also had a severance package offered to him by Rolls Royce of 12 weeks salary and 12 weeks of insurance. Respondent and Walton agreed to pursue claims based on discrimination, including theories of "antiquated education" and "physiognomy." Respondent guaranteed Walton a probability of success ranging from between 70 percent and 90 percent, which guarantees induced Walton to retain respondent and forgo his severance package. Respondent claims that he assumed Walton had rejected the severance package and did not advise him further about it. Walton paid respondent two payments of $2500 each ($5000 total). The agreement also required Walton to pay respondent a 1/3 contingency fee. No attorney fee agreement was signed. Mishler said he told Walton that the fee would be $1000 and expenses, and Walton would be a witness in another case for a client who was a Rolls Royce employee.

Respondent filed a complaint against Rolls-Royce on behalf of Walton in the federal district court on September 26, 2002. At a December 12, 2003 deposition, attorney Russell Ezolt appeared on Walton's behalf, without prior notification or consent of Walton. Ezolt also appeared at a mediation session, again, without Walton's prior notification or consent. Respondent paid Ezolt for his services, on a per diem basis. Ezolt was not a member of respondent's firm. Walton did not consent to a fee division. Ezolt's identity was not disclosed to

him in writing. Ezolt and respondent claim that Ezolt was an independent contractor, who was paid $20 an hour for work for various cases of respondent.

The trial court granted summary judgment in favor of Rolls-Royce as to Walton's federal law claims and dismissed Walton's remaining state law claims without prejudice.

On June 22, 2004, Respondent timely filed a notice of appeal which was voluntarily dismissed by stipulation of the parties on November 24, 2004. The appeal was dismissed voluntarily by Walton in exchange for Rolls-Royce agreeing not to pursue a claim for costs. Afterward, respondent quoted a fee of $7,500 to file the state law claims, but no suit was filed.

CONCLUSIONS OF LAW

The panel unanimously finds by clear and convincing evidence that the respondent violated:

Count 1 - Dellipoala - DR 1-102 (A)(4), (5)and(6); DR 7-101 (A)(1)and (3); DR 9-102 (B)(1) and (4);

Count 2- Dellipoala - DR 2-106 (A) and DR 9-102 (B)(3);

Count 3 –Walton - DR 1-102 (A)(5) and(6); DR 2-106(A);DR 2-107(A); DR 9-102(B)(3).

The panel dismissed the DR 1-102(A)(3) allegation in Count I.

AGGRAVATION AND MITIGATION

The panel finds pursuant to BCGD Proc. Reg. 10 (B) (2) in mitigation that the respondent has no prior disciplinary record and has submitted letters attesting to his honesty and good character from attorneys and a former colleague.

The panel finds pursuant to BCGD Proc. Reg. 10 (B) (1) in aggravation there is a selfish motive, a pattern of misconduct and multiple offenses.

Respondent tendered checks totaling $13,127.25 to Dellipoala and $638.75 to Walton at the hearing. He also sent a check for $8,000 in April, 2005 to Dellipoala, but it was returned undelivered.

While he responded in a timely manner during the disciplinary process, the panel does not feel that the respondent has made full and free disclosure. Whether this reticence was calculated to deceive, to protect himself or another from possible further disciplinary or criminal consequence or a personality trait, it hindered the progress and heightened the adversary nature of the disciplinary process.

The respondent has no understanding of the consequences of his actions. He testified that he now realizes that an attorney is also accountable to his client "for funds to the penny." The closest he came to an apology was to say he was sorry "that I didn't really have that," presumably meaning an understanding of this accountability, after 33 years of practice. He continued to contradict the allegations of the grievants and admitted no wrongdoing, other than the financial record keeping and accountability.

PANEL'S RECOMMENDATION

The panel is mindful that the Supreme Court of Ohio in determining the sanctions in attorney discipline cases considers "the duties violated, the actual or potential injury caused, the lawyer's mental state, the existence of aggravating or mitigating circumstances, and the sanctions imposed in similar cases." *Disciplinary Counsel v. Connors,* 97 Ohio St.3d 479, 2002-Ohio-6722, ¶16; *Stark Cty.Bar Assn. v. Buttacavoli,* 96 Ohio St.3d 424, 2002-Ohio-4743, ¶16 and *Cuyahoga Cty. Bar Assn. v. Rutherford,* 112 Ohio St.3d 159, 2006-Ohio-6526, ¶ 13.

The panel found that respondent violated multiple duties owed to his clients who were caused, at least, financial injury. Testimony and evidence regarding any mitigation or

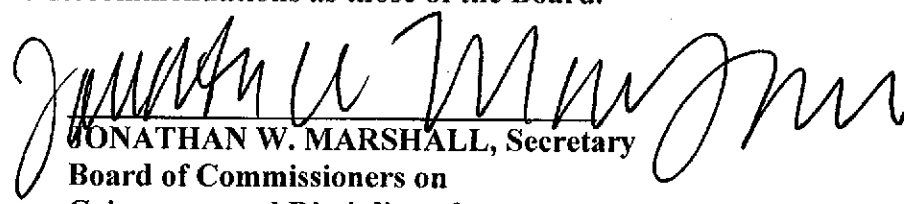
aggravation was minimal, but not as scarce as testimony as to respondent's mental state. The panel can only guess why respondent seemingly failed to pay such little attention to his duties and to his clients, leaving it with little to compare to sanctions in other disciplinary matters.

The panel recommends that respondent be suspended from the practice of law for one year, with 6 months suspended, on condition that he does not commit any other ethical violations and that he gives an accurate and full accounting to Walton and Dellipoala and refund any monies owed to them. The panel also recommends that the last 6 months be stayed in favor of a probationary period of 1 year, during which time respondent is to set up an office system to accurately account for all client funds held and disbursed, in compliance with the Ohio Rules of Professional Conduct.

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 9, 2007. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the panel and recommends that the Respondent, Howard V. Mishler, be suspended from the practice of law in the State of Ohio for one year, with six months stayed followed by one year probation on the conditions specified by the panel. 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