

No. 2007-0344

In the Supreme Court of Ohio

APPEAL FROM THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
CASE No. 05-040

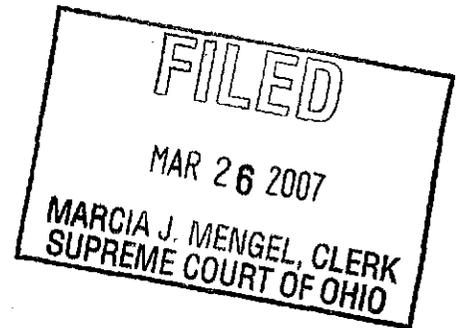
CLEVELAND BAR ASSOCIATION,

Relator,

v.

HOWARD V. MISHLER,

Respondent.



RELATOR CLEVELAND BAR ASSOCIATION'S OBJECTIONS TO FINAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

LESTER S. POTASH
55 Public Square, Suite 1717
Cleveland, OH 44113
Tel: (216) 771-8400

*Attorney for Respondent
Howard V. Mishler*

ROBERT J. HANNA (0037230)
(COUNSEL OF RECORD)
BENJAMIN C. SASSÉ 0072856)
TUCKER ELLIS & WEST LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, Ohio 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009

*Attorneys for Relator
Cleveland Bar Association*

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I. INTRODUCTION

The Final Report issued by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (the “Board”) in this matter adopted in their entirety the Findings of Fact, Conclusions of Law and Recommendation of the Hearing Panel. (See Appendix (“Appx.”) 12, Final Report at 12.) While Relator Cleveland Bar Association (“Relator”) does not object to the Findings of Fact or Conclusions of Law adopted by the Board, Relator objects to the Recommendation. The Recommendation adopted by the Board — a one-year suspension with six months stayed, followed by one year of probation — is far too light a sanction. As explained more fully below, based on the Findings of Fact and Conclusions of Law adopted by the Board, Relator respectfully suggests that, at a minimum, Respondent Howard V. Mishler (“Respondent”) should be indefinitely suspended from the practice of law.

II. STATEMENT OF FACTS

A. The Hearing Panel Found that Respondent Violated Numerous Disciplinary Rules By Settling Dellipoala’s Lawsuits Without His Consent and Failing to Pay Dellipoala the Settlement Proceeds.

Grievant Franco J. Dellipoala, Jr. (“Dellipoala”) hired Respondent in October 2000 to represent him in a dispute over his termination by The Geon Company (the “Geon Dispute”). (Appx. 3, Final Report at 3.) During his representation of Dellipoala, Respondent filed lawsuits in both state and federal court. (Id.) The Hearing Panel found by clear and convincing evidence that both the state court and federal court action were dismissed on account of a purported settlement in early 2002. (Id.) The Hearing Panel

further found that Dellipoala was unaware of the settlement and did not authorize Respondent to settle his claims. (Id. at 3-4, Final Report at 3-4.)

Instead of notifying Dellipoala of the (unauthorized) settlement, Respondent kept quiet for nearly 10 months. And when he finally communicated with Dellipoala, he misrepresented the status of the case: The Hearing Panel found that Respondent sent Dellipoala a letter on November 14, 2002, enclosing a draft settlement agreement, stating that a settlement offer for \$7,500 remained outstanding, and asserting that the case “*remained unresolved as of October 2002.*” (Appx. 4, Final Report at 4.) Of course, the representation that the case “remained unresolved” was false — both the state and federal court action had been settled.

Dellipoala denied ever signing the settlement agreement. (Appx. 4, Final Report at 4.) Nevertheless, on December 6, 2002, Respondent forwarded to Geon what purported to be an executed settlement agreement. (Id.) Respondent received the settlement funds shortly thereafter — on December 10, 2002, Geon forwarded a settlement check for \$7,500. (Id.) While the cancelled check purports to bear Dellipoala’s endorsement, he denies endorsing it. (Id.)

After settling the case without authorization, and after receiving the settlement check, Respondent did not promptly pay Dellipoala his portion of the settlement proceeds. Instead, the facts found by the Hearing Panel demonstrate that Respondent misappropriated the settlement funds in an effort to conceal the unauthorized settlement. For *more than two years* following his receipt of the settlement funds, Respondent failed to even attempt to deliver any of the settlement proceeds to Dellipoala. Indeed, unaware

of the purported settlement, Dellipoala wrote Respondent on August 19, 2004, asking to be contacted about the status of his case and requesting the return of money *he paid Respondent*. (Appx. 5, Final Report at 5.) In April 2005, over two years after Geon forwarded the settlement check, and *after* Dellipoala filed his grievance, Respondent attempted to send Dellipoala a check for \$8,000, which was returned undelivered. (Id.)

Respondent did not follow up to ascertain Dellipoala's correct address. Instead, he made no further attempts to send Dellipoala any money until Respondent tendered a check in connection with the Hearing in this matter for \$13,127.25 (purporting to represent Dellipoala's portion of the settlement and unused money advanced as "costs"). (Appx. 8, 11, Final Report at 8, 11.) The Hearing began in August 2006 — over four years after the purported settlement, and nearly four years after Respondent received the settlement check. Moreover, the "Final Account" concerning Dellipoala demonstrates that Respondent did not even attempt to pay accrued interest on Dellipoala's money; Respondent simply added the face-value of Dellipoala's checks to the face-value of the settlement check, subtracted amounts claimed as costs, and tendered *a portion*¹ of the balance. (Appx. 7-8, Final Report at 7-8.)

Based on these facts, the Hearing Panel found by clear and convincing evidence that Respondent violated: DR 1-102(A)(4), DR 1-102(A)(5), DR 1-102(A)(6), DR 7-

¹ The Hearing Panel correctly found that the purported "[b]alance" of "0" appearing in the Final Account was erroneous; it should have indicated an outstanding balance of \$2,500. (Appx. 8, Final Report at 8.) To the best of Relator's knowledge, the remaining \$2,500 has never been tendered to Dellipoala.

101(A)(1), DR 7-101(A)(3), DR 9-102(B)(1) and DR 9-102(B)(4). (Appx. 10, Final Report at 10, Count I.)

B. The Hearing Panel Found that Respondent's Fee Arrangement With Dellipoala and Failure to Account For Monies Paid by Dellipoala Violated DR 2-106(A) and 9-102(B)(3).

The Hearing Panel found that throughout Respondent's representation of Dellipoala, in correspondence with the police, and during the course of these proceedings, Respondent has characterized his fee arrangement with Dellipoala inconsistently — referring at various times to amounts paid by Dellipoala as either “fees,” “costs” or “expenses.” (Appx. 5, Final Report at 5.) Among these inconsistent characterizations are the following:

- An October, 2000 engagement contract including a \$1,000 retainer, out-of-pocket costs estimated at \$10,000, and a large percentage of any settlement (33 1/3% of any pre-suit settlement, and 40% of any settlement after the lawsuit was filed);
- A June, 2001 engagement contract including a retainer of \$1,000, estimated “cost of this matter” of \$10,000, and a large percentage of any settlement (33 1/3% of any pre-suit settlement, and 40% of any settlement after the lawsuit was filed);
- Respondent's Answer to Grievance in this matter, which stated that “[t]he Grievant was quoted a fee of Ten Thousand and No/ 100 Dollars (\$10,000.00), plus one-third (1/3) of any settlement proceeds”;
- An invoice dated February 1, 2001, which referred to an “Estimated Fee” of \$10,000; and
- A February 21, 2005 letter by Respondent to Patrolman Eagleye, stating that the “case was estimated at \$10,000,” that Respondent “received a

\$1,000 retainer, non-refundable, and was to receive a third of any settlement proceeds plus out-of-pocket reimbursement,” and that Respondent was “entitled to the value of his services at \$21,000.00 or one-third of the settlement proceeds[.]”

Not only did Respondent characterize his fee arrangement with Dellipoala inconsistently, Respondent was also inconsistent in his description of various amounts purportedly spent on behalf of Dellipoala. (Appx. 6-8, Final Report at 6-8.) For example, a “Breakdown of Expenses and Fees” prepared by Respondent calculates the expenses for the depositions of Jeff Aimes and Mike Guyer as totaling \$630 and \$810, respectively. (Appx. 6, Final Report at 6.) A “Final Account” introduced into evidence by Respondent at the Hearing listed the expenses for those same two depositions as totaling \$471 and \$590, respectively. (Appx. 8, Final Report at 8.) Respondent offered no explanation for these inconsistencies.²

Finally, the Hearing Panel found by clear and convincing evidence that Respondent’s various attempts at accounting for his expenditures were riddled with errors. (Appx. 6-8, Final Report at 6-8 & nn. 1-3, 8.) For instance, the Breakdown of Expenses and Fees lists Respondent’s “[e]xpenses” for Dellipoala’s state court lawsuit as \$3,893.75; based on the numbers included in the Breakdown of Expenses and Fees, the Hearing Panel calculated \$3,911.75. (Appx. 6, Final Report at 6 & n. 1.) The Breakdown of Fees and Expenses listed an “[a]ctual [e]xpense [c]ost” of \$4,843 and

² The February 21, 2005 letter to Patrolman Eagleye referred to by the Hearing Panel, which appears in the record as Relator’s Exhibit 13, contains yet another set of numbers for the same two depositions: It lists the costs for the Jeff Aimes deposition as \$490, costs for the Mike Guyer deposition as \$371, and asserts that the court reporter charged an appearance fee of \$200.

“[m]onies [r]eceived” as \$17,400; the Hearing Panel calculated those amounts as \$4,861.75 and \$17,600, respectively. (Appx. 7, Final Report at 7 & nn. 2-3.) And on a line marked “[l]ess Fees and Expenses,” the Breakdown of Expenses and Fees listed \$10,361; the Hearing Panel was unable to determine the basis of this amount. (Appx. 7, Final Report at 7 & n. 4.)

Similar errors appeared in the Final Account introduced into evidence in these proceedings. (Appx. 7, Final Report at 7 & nn. 5-9.) Under the heading “[d]isbursements,” the Final Account listed \$2,500 as “[a]ttorney [f]ees for [s]ettlement”; the Hearing Panel noted that Respondent testified that the amount should have been \$3,000. (Appx. 8, Final Report at 8 & n. 7.) The Final Account listed “[t]otal [d]isbursements” of \$25,100; the Hearing Panel calculated \$22,600. (Appx. 8, Final Report at 8 & n. 8.) And the Final Account listed a “[b]alance” of 0; the Hearing Panel calculated a balance due Dellipoala of \$2,500. (Appx. 8, Final Report at 8 & n. 9.)

Based on these facts, the Hearing Panel found by clear and convincing evidence that Respondent violated DR 2-106(A) and DR 9-102(B)(3). (Appx. 10, Final Report at 10, Count II.)

C. The Hearing Panel Found that Respondent Violated Numerous Disciplinary Rules in Offering Walton Guarantees of Success, Dividing Fees Without Walton’s Consent, and Failing to Account For Funds Paid by Walton.

In July of 2002, Grievant Bruce Walton (“Walton”) hired Respondent to represent him in a dispute with Rolls-Royce (the “Rolls-Royce Dispute”) concerning his termination following a reduction in force. (Appx. 9, Final Report at 9.) In connection

with the reduction in force, Rolls-Royce offered Walton a severance package consisting of 12 weeks salary and 12 weeks of insurance. (Id.) Respondent told Walton he could pursue claims based on novel “antiquated education” and “physiognomy” discrimination theories, and surprisingly guaranteed Walton a probability of success ranging from between 70 and 90 percent on these novel claims. (Id.) The Hearing Panel found by clear and convincing evidence that Respondent’s guarantees of success induced Walton to retain Respondent and reject the severance package. (Id.)

Walton paid Respondent \$5,000 for his services in two payments of \$2,500. (Appx. 9, Final Report at 9.) An oral fee agreement also required Walton to pay Respondent a 1/3 contingency fee. (Id.) Respondent asserted that Walton was charged a \$1,000 fixed fee on account of his willingness to testify in another case against Rolls-Royce. (Id.) According to Respondent, the remaining \$4,000 was an advance for costs. (Id.) Respondent, however, did not provide sufficient documentation to demonstrate that he incurred \$4,000 in costs; Respondent eventually tendered a check for \$638.75 to Walton in connection with the Hearing of this matter — almost two full years after the case was settled. (Appx. 11, Final Report at 11.)

Respondent filed a complaint in federal court relating to the Rolls-Royce Dispute. (Appx. 9, Final Report at 9.) But Respondent did not appear and defend Walton on the first day of his deposition in the federal court lawsuit. (Id.) Instead, Respondent sent Russell Ezolt (“Ezolt”) in his place, without prior notification to or consent from Walton. (Id.) Ezolt also appeared at a later mediation session concerning the Rolls-Royce Dispute on Walton’s behalf, again without advance notice to or consent from Walton. (Id.)

Respondent paid Ezolt for his services on what Respondent characterized as a “per diem” basis. (Id.) The Hearing Panel found by clear and convincing evidence that Ezolt was not a member of Respondent’s firm, Ezolt’s identity was not disclosed to Walton in writing, and Walton did not consent to a division of fees. (Id. at 10, Final Report at 10.)

Despite Respondent’s guarantees of success, the federal court granted summary judgment in favor of Rolls-Royce as to Walton’s federal law claims and dismissed the remaining state law claims without prejudice. (Appx. 10, Final Report at 10.) An appeal was voluntarily dismissed by Walton in exchange for an agreement from Rolls-Royce not to pursue a claim for costs against him. (Id.)

Based on these facts, the Hearing Panel found by clear and convincing evidence that Respondent violated DR 1-102(A)(5), DR 1-102(A)(6), DR 2-106(A), DR 2-107(A) and DR 9-102(B)(3). (Appx. 10, Final Report at 10, Count III.)

D. The Hearing Panel Recommends and the Board Adopts a One-Year Suspension with Six Months Stayed.

The Hearing Panel found that Respondent exhibited a selfish motive, engaged in a pattern of misconduct and committed multiple offenses. (Appx. 10, Final Report at 10.) The Hearing Panel also found that Respondent “caused, at least, financial injury” to his clients. (Appx. 11, Final Report at 11.) The Hearing Panel further found that Respondent did not make “full and free disclosure” during the disciplinary proceedings, a failure that “hindered the progress and heightened the adversary nature of the disciplinary process.” (Id.) And the Hearing Panel found that Respondent “has no understanding of the consequences of his actions” after 33 years of practice, and that Respondent

“continued to contradict the allegations of the grievants and admitted no wrongdoing, other than the financial record keeping and accountability.” (Id.)

The only mitigating factors found by the Hearing Panel were that Respondent had no prior disciplinary record and had submitted letters attesting to his honesty and good character. (Appx. 10, Final Report at 10.) Nevertheless, notwithstanding the numerous disciplinary violations described above, the Hearing Panel recommended only that Respondent be suspended from the practice of law for one year with six months stayed, followed by one year of probation on conditions specified by the panel.³ (Id.)

III. LAW AND ARGUMENT

A. Standard of Review.

This Court, “not the board, ‘makes the ultimate conclusion, both as to the facts and as to the action, if any, that should be taken.’” *In re Complaint Against Judge Harper* (1996), 77 Ohio St.3d 211, 215, quoting *Cincinnati Bar Assn. v. Heitzler* (1972), 32 Ohio St.2d 214, 220. Indeed, this Court has repeatedly recognized that it “is not bound by the conclusion of either the panel or the board regarding the facts or law when determining the propriety of an attorney’s conduct and the appropriate sanction,” *Office of Disciplinary Counsel v. Furth* (2001), 93 Ohio St.3d 173, 181, citing *Ohio State Bar Assn. v. Reid* (1999), 85 Ohio St.3d 327, 330. But, “[u]nless the record weighs heavily against a hearing panel’s findings, [this Court] defer[s] to the panel’s credibility

³ The Hearing Panel’s recommendation specified that during the probationary period “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.” (Appx. 12, Final Report at 12.)

determinations, inasmuch as the panel members saw and heard the witnesses firsthand.”

Cuyahoga County Bar Assn. v. Wise, 108 Ohio St.3d 164, 2006-Ohio-550, at ¶ 24.

B. Respondent’s Violation of DR 1-102(A)(4) and Misappropriation of Client Funds, Along With Numerous Other Disciplinary Violations, at a Minimum, Warrants a Sanction of Indefinite Suspension.

The attorney disciplinary process in Ohio is designed to “protect clients and the public, to ensure the administration of justice, and to maintain the integrity of the legal profession.” *Cleveland Bar Assn. v. Dadisman*, 109 Ohio St.3d 82, 2006-Ohio-1929, at ¶39, quoting *Disciplinary Counsel v. Hunter*, 106 Ohio St.3d 418, 2005-Ohio-5411, at ¶32. Accordingly, in determining the appropriate sanction for attorney misconduct, this Court considers “the duties violated, the actual or potential injury caused, the attorney’s mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases.” *Cuyahoga County Bar Assn. v. Maybaum*, 112 Ohio St.3d 93, 2006-Ohio-6507, at ¶ 21. As explained more fully below, the Hearing Panel’s Recommendation represents an unwarranted departure from sanctions approved by this Court in similar cases, and from the presumptive sanction for the kinds of misconduct committed by Respondent. Relator respectfully suggests that, at a minimum, Respondent should be indefinitely suspended from the practice of law.

1. Respondent’s misappropriation of client funds standing alone carries a presumptive sanction of disbarment.

The Hearing Panel found that Respondent violated DR 1-102(A)(4) (forbidding fraud and deceit) and numerous other disciplinary rules when he settled Dellipoala’s

claims without Dellipoala's knowledge or consent, misrepresented the status of Dellipoala's claims in subsequent correspondence, and misappropriated funds belonging to Dellipoala for a period of several years to conceal the fraud.⁴ The Hearing Panel also found that Respondent violated several disciplinary rules by inducing Walton to reject a severance agreement and file a lawsuit through inflated guarantees of success, contracting with another attorney to represent Walton at his deposition without Walton's prior knowledge or consent, and failing to account for Walton's funds. Key to determining the appropriate sanction for Respondent's misconduct in this case is the presumptive sanction for the duties he violated.

Standing alone, Respondent's misappropriation of client funds would warrant a presumptive sanction of disbarment. Misappropriation of a client's funds "violates basic notions of honesty and integrity, and it endangers public confidence in the legal profession." *Cleveland Bar Assn. v. Dadisman*, 109 Ohio St.3d 82, 2006-Ohio-1929, at ¶41. As a result, misappropriation of a client's funds carries the presumptive sanction of disbarment. E.g., *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, at

⁴ As explained above at page 3, Respondent never even attempted to pay Dellipoala interest on the settlement funds (or other monies Respondent claimed at the hearing were actually advances of "costs"). In addition, the Final Account Respondent prepared for purposes of the Hearing demonstrates that Respondent owes Dellipoala another \$2,500. (Appx. 8, Final Report at 8.) Unfortunately, Respondent's utter failure to maintain contemporaneous records of the funds he received from Dellipoala, Geon and Walton, makes it impossible to ascertain whether Respondent put these funds in IOLTA accounts, or whether Respondent made unauthorized withdrawals from these funds during the years that he failed to return the money. Nevertheless, Respondent's retention of his client's funds under these circumstances is a form of misappropriation. See *Cuyahoga County Bar Assn. v. Maybaum*, 112 Ohio St.3d 93, 2006-Ohio-6507, at ¶7 (characterizing attorney's retention of settlement funds as misappropriation).

¶15 (“Because misappropriation of client funds is among Dixon’s acts of admitted misconduct, we must begin our consideration with the presumptive sanction of disbarment.”). The fact that Respondent combined his misappropriation of client funds with other misconduct concerning the two Grievants, including conduct involving fraud and deceit, certainly does not serve to lessen the presumptive sanction. An analysis of the appropriate sanction for Respondent’s misconduct, therefore, must begin with the presumptive sanction of disbarment.

2. Insufficient mitigating circumstances exist to justify a sanction of less than an indefinite suspension.

In determining whether sufficient mitigating circumstances exist to warrant a lesser sanction than disbarment, this Court is “guided by Section 10 of the Rules and Regulations Governing Procedure and Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline.” *Dixon*, 2002-Ohio-2490, at ¶15. The Hearing Panel found several aggravating factors under Section 10 in this case, including that Respondent acted with a selfish motive, that he engaged in a pattern of misconduct and that he committed multiple offenses. (Appx. 10, Final Report at 10; see, also, Appx. 21, BCGD Proc. Reg. 10(B)(1)(b)-(d).)

In addition, the Hearing Panel *refused* to find that Respondent made full and free disclosure during the disciplinary proceedings, commenting that “[w]hether 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.” (Appx. 11, Final Report at 11; see, also,

Appx. 21, BCGD Proc. Reg. 10(B)(2)(d).) And the Hearing Panel did not find that Respondent was not suffering from a mental disability; it found that testimony concerning Respondent's mental state was "scarce," and "the panel can only guess why respondent seemingly failed to pay such little [sic] attention to his duties and his clients." (Appx. 12, Final Report at 12; see, also, Appx. 21, BCGD Proc. Reg. 10(B)(2)(g).) Cf. *Disciplinary Counsel v. Bowman*, 110 Ohio St.3d 480, 2006-Ohio-4333, at ¶¶35-39 (finding respondent's actions in settling a case without his client's permission by fabricating signatures on the settlement agreement "abhorrent to our legal system," but refusing to impose indefinite suspension in light of mental-health disability).

Finally, Respondent has not shown remorse for his actions. Indeed, the Hearing Panel found that Respondent had no appreciation for the consequences of his actions:

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.

(Appx. 11, Final Report at 11.)

It is possible to conclude that Respondent's actions in settling Dellipoala's claims without his knowledge or consent, misrepresenting the status of his claims in later correspondence, and misappropriating the settlement funds, combined with Respondent's actions in inducing Walton to reject the severance agreement through inflated guarantees of success, contracting with another attorney to represent Walton at deposition, and

failing to account for Walton's funds, warrant disbarment. Particularly when viewed through the lens of Respondent's failure to appreciate the consequences of his actions after 33 years of practice, and failure to make full and free disclosure during the disciplinary proceedings, disbarment may be necessary to maintain the continuing public confidence in the judicial system. Cf. *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, at ¶¶27-28 (ordering disbarment where the board found that Dixon "has committed disciplinary rule violations involving incompetence, neglect, dishonesty and misrepresentation involving commingling and misappropriation of a client's funds, an attempt to charge an excessive fee, and failure to cooperate initially in the disciplinary process until she was advised to do so by retained counsel").

At a minimum, however, a long line of decisions of this Court supports the imposition of an indefinite suspension. See *Cuyahoga County Bar Assn. v. Maybaum*, 112 Ohio St.3d 93, 2006-Ohio-6507, at ¶¶26-27; *Columbus Bar Assn. v. Cooke*, 111 Ohio St.3d 290, 2006-Ohio-5709, at ¶¶33-34; *Akron Bar Assn. v. Dietz*, 108 Ohio St.3d 343, 2006-Ohio-1067, at ¶¶23-24; *Cincinnati Bar Assn. v. Rothermel*, 104 Ohio St.3d 413, 2004-Ohio-6559, at ¶¶20-22; *Columbus Bar Assn. v. Port*, 102 Ohio St.3d 395, 2004-Ohio-3204, at ¶¶29-31; *Disciplinary Counsel v. Wise*, 85 Ohio St.3d 169, 171, 1999-Ohio-457. Each of these cases finds an indefinite suspension appropriate where the misconduct at issue included misappropriation of a client's funds. To the extent that this Court does not find disbarment appropriate in light of the additional disciplinary violations described above, the existence of such disciplinary violations only reinforces the need to impose a sanction of at least an indefinite suspension from the practice of law.

Moreover, there are no extenuating circumstances in this case that would justify a lesser sanction. The Hearing Panel found only two mitigating circumstances in this matter: 1) the absence of a prior disciplinary record; and 2) letters attesting to Respondent's honesty and good character. (Appx. 10, Final Report at 10; see, also, Appx. 21, BCGD Proc. Reg. 10(B)(2)(a) and (e).) Whether considered singularly or together, neither factor is sufficient to justify a sanction of less than an indefinite suspension.⁵ See *Akron Bar Assn. v. Dietz*, 108 Ohio St.3d 343, 2006-Ohio-1067, at ¶¶23-24 (imposing indefinite suspension even though respondent had practice law for over 20 years with no disciplinary violations "and another Summit County lawyer testified at his disciplinary hearing about respondent's good character").

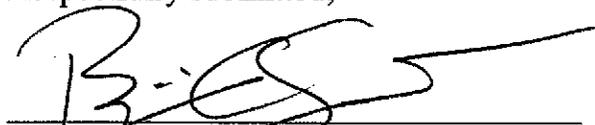
IV. CONCLUSION

While Relator does not object to the Findings of Fact or Conclusions of Law adopted by the Board, Relator objects to the Recommendation. Based on the Findings of

⁵ When this Court has imposed a sanction less severe than an indefinite suspension for misconduct including misappropriation of funds, it has done so because the act at issue was an isolated incident in the context of an otherwise unblemished legal career, the attorney cooperated fully in the disciplinary process and there were no aggravating factors. See *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110 (six month suspension where misconduct "fell under the isolated-incident exception," and, among other things, respondent fully cooperated in the disciplinary proceedings and expressed contrition and remorse); *Toledo Bar Assn. v. Kramer*, 89 Ohio St.3d 321, 2000-Ohio-163 (one year suspension stayed where, at the time of the misappropriation, respondent was seeing a counselor for depression and respondent showed remorse and fully cooperated with the investigation). Here, as explained in the text above, Respondent's misappropriation was not an isolated incident; the Hearing Panel did not find that Respondent cooperated fully in the disciplinary process; and the Hearing Panel found several aggravating factors.

Fact and Conclusions of Law adopted by the Board, Relator respectfully suggests that, at a minimum, Respondent should be indefinitely suspended from the practice of law.

Respectfully submitted,



Robert J. Hanna (0037230)

(COUNSEL OF RECORD)

Benjamin C. Sasse (0072856)

TUCKER ELLIS & WEST LLP

925 Euclid Avenue, Suite 1100

Cleveland, Ohio 44115-1414

Tel: (216) 592-5000

Fax: (216) 592-5009

E-mail: robert.hanna@tuckerellis.com

benjamin.sasse@tuckerellis.com

Attorneys for Relator

Cleveland Bar Association

CERTIFICATE OF SERVICE

A copy of the foregoing **Relator Cleveland Bar Association's Objections to Final Report of the Board of Commissioners on Grievances and Discipline** has been served this 23rd day of March, 2007, by U.S. Mail, postage prepaid, upon the following:

Lester S. Potash
55 Public Square, Suite 1717
Cleveland, OH 44113

*Attorney for Respondent Howard V.
Mishler*



*One of the Attorneys for Relator
Cleveland Bar Association*

APPENDIX

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

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

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.

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, 2001 and respondent filed an opposing brief on behalf of Dellipoala. Geon's motion was granted on June 29, 2001. 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 \$3,893.75¹

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.....	<u>\$500.00</u>
	\$3,700.00

Federal Case 1-01-01417

Retainer.....	\$1,000.00
Filing Fee.....	\$150.00
Xerox & Postage.....	<u>\$100.00</u>
	\$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.

⁴Panel is unable to determine the basis of this number.

"RECEIPTS:

Monies Advanced for Cost	\$17,600.00
Settlement Proceeds	<u>\$7,500.00</u>
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)	\$13,127.25
(Check #6142 for \$8,627.25, Account 0166168)	
(Check # 1492 for \$4,500, Account 0689090)	
Total Disbursements	<u>\$25,100.00⁸</u>
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.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall", written in a cursive style.

**Jonathan W. Marshall, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio**

APPENDIX II

THE RULES AND REGULATIONS GOVERNING PROCEDURE ON COMPLAINTS AND HEARINGS BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT

Section 1. Complaint Requirements

(A) The complaint shall allege the specific misconduct detailed in Gov. R. IV or Section 6(a) of Gov. 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.

[Section 1 Approved by Supreme Court of Ohio, October 8, 1990]

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.

[Section 2 Approved by Supreme Court of Ohio, October 8, 1990]

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.

[Section 3 (A), (B), (C), (D) Approved by Supreme Court of Ohio, October 8, 1990; Section 3 (A), (B) Amended by Supreme Court of Ohio, effective June 1, 2000]

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.

[Section 4 Approved by Supreme Court of Ohio, July 1, 1992]

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.

[Section 5 Approved by Supreme Court of Ohio, July 1, 1992]

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 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.

[Section 6 Approved by Supreme Court of Ohio, July 1, 1992]

Section 7. Power to Issue Subpoenas, Foreign Subpoenas

(A) 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 Special Investigator, Disciplinary Counsel, a Certified Grievance Committee, or a hearing panel of the Board. All subpoenas shall be signed and issued by the chair of the hearing panel, the chair or vice-chair of the Board, or its Secretary and served as provided by the Ohio Rules of Civil Procedure. A motion to quash a subpoena issued under this section shall be filed with the Secretary of the Board and ruled upon the chair or vice-chair of the Board.

(B) Subpoena pursuant to law of another jurisdiction

(1) A foreign disciplinary authority, pursuant to the law of that jurisdiction and where the issuance of the subpoena has been duly approved, if such approval is required by the law of that jurisdiction, may request issuance of a subpoena for use in an attorney or judicial discipline or disability proceeding. The Secretary shall issue a subpoena upon such request as provided in this rule.

(2) A subpoena issued pursuant to this rule may be issued to compel the attendance of witnesses and production of documents in the county where the witness resides, is employed or as otherwise agreed by the witness. Service, enforcement, and challenges to such subpoenas shall be as provided in these rules.

(C) Request for foreign subpoena in aid of proceeding in this jurisdiction

Disciplinary Counsel, Certified Grievance Committees, and respondents may apply for the issuance of subpoenas in other jurisdictions pursuant to the rules of those jurisdictions in the furtherance of attorney or judicial discipline or disability proceedings in the State of Ohio. The Secretary may provide assistance to facilitate these requests.

[Section 7 Approved by Supreme Court of Ohio, July 1, 1992; Amended by Supreme Court of Ohio, effective, June 1, 2000; July 18, 2005.]

Section 8. Master Commissioner

(A) Appointment

With the approval of a majority of the Board of Commissioners on Grievances and Discipline, the Chair of the Board may appoint one or more master commissioners, who shall be attorneys or judges admitted to active practice in Ohio and who shall have former service as a member of the Board. At the request of a hearing panel chair, the master may assume any or all case management responsibilities occurring between the appointment of a hearing panel and the formal hearing on the complaint set forth in Gov. Bar R. V(6)(G). The master shall not exercise adjudicatory powers under Gov. Bar R. V.

(B) Compensation

The compensation for the services of the master shall be on the same basis as members of the Board.

(C) Proceedings and Powers

The order of reference to a master shall be signed by the chair of a hearing panel. The order of reference may specify or limit the master's powers and may direct the master to report only upon particular issues or to perform particular acts. Unless so specified or limited, the master may perform all of the following:

(1) Assist the parties and counsel in making all discovery disclosures including the use of interrogatories, depositions, and requests for admission;

(2) Conduct pre-trials with counsel and supervise the amendment of pleadings, the use of stipulations between the parties, the preparation of witness lists and exhibits;

(3) Rule on all motions and interlocutory matters after consultation with the panel chair occurring between the time of the appointment of a hearing panel and the formal hearing on the complaint;

(4) Fix a date for the formal hearing before the hearing panel after consultation with the panel chair.

(D) Report

The master shall prepare a written report upon the matters submitted to or considered by the master after consultation with the parties and the panel chair. The master shall serve a copy of the report on each party and file the report with the Secretary of the Board. The report shall become the order of the Board unless a party files a written objection to the report within ten days of the filing with the Board. All objections shall be decided by the chair of the hearing panel as set forth in Gov. Bar R. V, (6)(D)(3).

[Section 8 Approved by Supreme Court of Ohio, November 1, 1995]

Section 9. Time Guidelines for Pending Cases

(A) Pre-hearing Conference

1) Within sixty days of the assignment date of a hearing panel, the panel chair shall conduct a pre-hearing conference to accomplish the following objectives:

- (a) simplification of the issues;
- (b) necessity of amendment to the pleadings;
- (c) establishment of a discovery timetable;
- (d) identification of anticipated witnesses and the exchange of reports of anticipated expert witnesses;
- (e) identification and exchange of copies of anticipated exhibits;
- (f) the possibility of obtaining:
 - (i) stipulations of fact;
 - (ii) stipulation of the admissibility of exhibits;
- (g) such other matters as may expedite the hearing;
- (h) establish a final hearing date.

At the discretion of the panel chair, a pre-hearing conference may be held by telephone, and may be continued from day to day. The hearing date shall be no more than one hundred fifty days following the date of assignment.

The Board shall adopt a form for use in a pre-hearing conference as well as an entry setting the conference time.

(2) Continuances of the hearing date shall not thereafter be granted due to counsel's or respondent's scheduled appearance before any state court or public agency, except the Supreme Court of Ohio or this Board as set forth in Rule 41(B)(2) of the Rules of Superintendence for the Courts of Ohio.

(B) Submission of Panel Reports

(1) The report of the panel for all hearings not conducted on an expedited basis shall be submitted to the full Board within forty days of the filing of the transcript for consideration at the next regularly scheduled meeting of the Board. For good cause shown, the Secretary, at the request of the panel chair, may extend the date for the filing of the hearing panel report with the Board.

(2) To be considered at the Board meeting, the panel report should be submitted to the Secretary at least seven days prior to that date.

(C) Failure by the Board to meet the time guidelines set forth in Section 9 of this rule shall not be grounds for dismissal of the complaint.

(D) Voluntary Dismissals and Amendments

Following the filing of the complaint, the relator may not voluntarily dismiss the complaint without permission of the chair of the hearing panel. A motion to voluntarily dismiss must be accompanied by a memorandum setting forth the basis for the dismissal with supporting affidavits, depositions, or documents, if required by the panel, that support the dismissal. The panel chair may conduct a hearing on the motion to dismiss and may require the testimony of witnesses and production of documents.

The relator may not amend the complaint within thirty days of the scheduled hearing without a showing of good cause to the satisfaction of the panel chair.

(E) Probable Cause Panels

(1) Two probable cause panels will convene on the day of the Board meeting to consider all new formal complaints filed with the Board during the interim period preceding the week of the Board meeting and any other new complaints that may be otherwise pending since the Board last met.

(2) Both probable cause panels will be available to convene by telephone conference call between scheduled Board meetings if required by extraordinary circumstances. On that occasion probable cause panels would consider and decide new complaints received by the Board since the Board last met. Copies of the complaints will be sent by the Secretary and will be reviewed by panel members prior to the scheduled conference call.

[Section 9 Adopted by the Supreme Court of Ohio, effective June 1, 2000]

Section 10. Guidelines for Imposing Lawyer Sanctions

(A) Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

(B) In determining the appropriate sanction, the Board shall consider all relevant factors; precedent established by the Supreme Court of Ohio; and the following:

(1) Aggravation. The following shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction:

- (a) prior disciplinary offenses;
- (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;
- (i) failure to make restitution.

(2) Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe 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 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 when there has been all of the following:

(i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;

(ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;

(iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;

(iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(h) other interim rehabilitation.

[Section 10 Adopted by the Supreme Court of Ohio, effective June 1, 2000;
amended effective February 1, 2003]

Section 11. Consent to Discipline.

(A) As used in this section:

(1) "Misconduct" has the same meaning as used in Gov. Bar R. V, Section 6(A)(1);

(2) "Sanction" means any of the sanctions listed in Gov. Bar R. V, Section 6(B)(3), (4), or (5).

(B) Pursuant to Gov. Bar R. V, Section 11(A)(3)(c), the relator and respondent may enter into a written agreement wherein the respondent admits to alleged misconduct and the relator and respondent agree upon a sanction to be imposed for that misconduct. The written agreement may be entered into after a complaint is certified by the Board, but no later than sixty days after appointment of a hearing panel. The written agreement shall be signed by the respondent, respondent's counsel, if the respondent is represented by counsel, and relator, and shall include all of the following:

(1) An admission by the respondent, conditioned upon acceptance of the agreement by the Board, that the respondent committed the misconduct listed in the agreement;

(2) The sanction agreed upon by the relator and respondent for the misconduct admitted by the respondent;

(3) Any aggravating and mitigating factors, including but not limited to those listed in Section 10, that are applicable to the misconduct and agreed sanction;

(4) An affidavit of the respondent that includes all of the following statements:

(a) That the respondent admits to having committed the misconduct listed in the agreement, that grounds exist for imposition of a sanction against the respondent for the misconduct, and that the agreement sets forth all grounds for discipline currently pending before the Board;

(b) That the respondent admits to the truth of the material facts relevant to the misconduct listed in the agreement;

(c) That the respondent agrees to the sanction to be recommended to the Board;

(d) That the respondent's admissions and agreement are freely and voluntarily given, without coercion or duress, and that the respondent is fully aware of the implications of the admissions and agreement on his or her ability to practice law in Ohio.

(e) That the respondent understands that the Supreme Court of Ohio has the final authority to determine the appropriate sanction for the misconduct admitted by the respondent.

(C) The agreement shall be filed with the Secretary of the Board and submitted either to the hearing panel or a master commissioner appointed pursuant to Section 8. Relator and respondent may file a brief in support of the agreement. If the hearing panel, by majority vote, or master commissioner recommends acceptance of the agreement and concurs in the agreed sanction, the matter shall be scheduled for consideration by the Board in accordance with Section 9. If the agreement is not accepted by the hearing panel or master commissioner, the matter shall be set for hearing in accordance with Section 9.

(D) If the agreement is submitted to the Board, the Board, by majority vote, may accept or reject the agreement. If the board accepts the agreement, the agreement shall form the basis for the certified report submitted to the Supreme Court pursuant to Gov. Bar R. V, Section 6(L). If the Board rejects the agreement, the matter shall be returned to the hearing panel and set for a hearing in accordance with Section 9.

(E) If the agreement is not accepted by the hearing panel or the Board, the agreement shall not be admissible or otherwise used in subsequent disciplinary proceedings.

(F) Nothing in this section shall prevent the relator and respondent from entering into stipulations and a recommended sanction against the respondent pursuant to Section 3.

(G) Nothing in this section shall affect the jurisdiction of the Supreme Court of Ohio to determine the appropriate sanction for the misconduct admitted by the respondent in accordance with Gov. Bar R. V, Section 8.

[Section 11 Adopted by the Supreme Court of Ohio, effective May 1, 2001]

Sections 12-19 [Reserved]

Section 20. Regulation for the Issuance of Advisory Opinions

(A) Procedure for Issuance

(1) Pursuant to Section 2(C) of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio issues informal, nonbinding advisory opinion letters to members of the Bar and the Judiciary in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary of Ohio, the Ohio Rules of Professional Conduct, the Code of Professional Responsibility, the Code of Judicial Conduct, or the Attorney's Oath of Office. Pursuant to Section 102.08 of the Ohio Revised Code and in a manner consistent with Rule V and these regulations, the Board issues advisory opinions regarding the application of Chapter 102. or section 2921.42 or 2921.43 of the Ohio Revised Code.

(2) The Chair of the Board shall appoint five or more members of the Board to serve on an Advisory Opinion Subcommittee. The Advisory Opinion Subcommittee is a regular standing subcommittee of the Board. The subcommittee shall meet prior to each regularly scheduled Board meeting. The Chair shall appoint one subcommittee member to serve as Chair of the Advisory Opinion Subcommittee. Each subcommittee member shall serve for a period of one year from the date of appointment and shall be eligible for reappointment by the Chair.

(3) Requests for advisory opinion shall be submitted in writing to the Secretary of the Board or staff attorney. A letter acknowledging the receipt of the request will be sent to the requester.

(4) The Advisory Opinion Subcommittee reviews requests for advisory opinions. Within its discretion, the subcommittee may accept or decline a request for an advisory opinion. In making such determination the subcommittee strives to select prospective or hypothetical questions of broad interest or importance to the Bar or Judiciary of Ohio and to avoid questions involving the proposed conduct of someone other than the person requesting the opinion, questions regarding completed conduct, questions of law, questions pending before a court, questions that are too broad, questions that lack sufficient information, or questions of narrow interest.

(5) The requester of an advisory opinion will be notified of the subcommittee's determination to accept or decline a request.

(6) As an alternative to selecting or declining a request, the subcommittee may direct the staff attorney to provide guidance in a staff letter. The staff letter may be based upon past opinions of the Board, the subcommittee's views, and or other relevant information. A staff letter will contain language to indicate that it is a nonbinding staff letter not an advisory opinion of the Board.

(7) Draft opinions will be researched and prepared by the Board's legal staff.

(8) Draft opinions will be forwarded to the subcommittee for review approximately three weeks before a Board meeting. The subcommittee will review the draft, make comments or suggestions, and by majority decision approve or disapprove of the draft.

(9) The subcommittee and legal staff will complete the process of researching, drafting, and review as expeditiously as possible, preferably within two to six months after selection of the request.

(10) Each draft opinion approved by the subcommittee will be sent to Board members for review approximately two weeks prior to a Board meeting. Upon review, Board members may direct comments, suggestions, or objections to the Board's Staff Attorney.

(11) If objections are received, the draft opinion will be placed on the agenda for discussion at the Board meeting. If no objections are received, the draft opinion will be adopted without discussion by majority vote of the Board at the Board meeting. Minor or non-substantive changes are not considered as objections to a draft opinion.

(12) A copy of an adopted opinion will be issued to the requester. Copies of issued opinions will be submitted for publication in the ABA/BNA Lawyers' Manual on Professional Conduct, the Ohio State Bar Association Report, and other publications or electronic communications as the Board deems appropriate. Copies of issued opinions will be forwarded to the Law Library of the Supreme Court of Ohio, County Law Libraries, Office of Disciplinary Counsel, and local and state bar associations with certified grievance committees. In addition, copies of opinions relating to judges will be forwarded to the Ohio Ethics Commission, Ohio Elections Commission, Ohio Judicial Conference, Ohio Judicial College, Secretary of State of Ohio, and the American Judicature Society.

(13) Issued opinions shall not bear the name of the requester and shall not include the request letter. However, the requester's name and the request letter are not private and will be made available to the bar, the judiciary, or the public upon request.

(B) Procedure for Maintenance

(1) A copy of each advisory opinion will be kept in the Board's offices.

(2) An advisory opinion that becomes withdrawn, modified, not current, or affected by other significant changes will be marked with an appropriate designation to indicate the status of the opinion.

(3) The designation "Withdrawn" will be used when an opinion has been withdrawn by majority vote of the Board. The designation indicates that an opinion no longer represents the advice of the Board.

(4) The designation "Modified" will be used when an opinion has been modified by majority vote of the Board. The designation indicates that an opinion has been modified by a subsequent opinion.

(5) The designation "Not Current" will be used at the discretion of the Board's attorney staff to indicate that an opinion is not current in its entirety. The designation that an opinion is no longer current in its entirety may be used to indicate a variety of reasons such as subsequent amendments to rules or statutes, or developments in case law.

(6) The designation "CPR Opinion" will be used when an opinion provides guidance under the Ohio Code of Professional Responsibility that is superseded by the Ohio Rules of Professional Conduct, effective February 1, 2007. The designation indicates that the opinion provides guidance regarding the Board's advice under the superseded rules.

(7) Other designations, as needed, may be used by majority vote of the Board.

(8) The Advisory Opinion Index will include a status list identifying the opinions and the designations.

[Regulation for the Issuance of Advisory Opinions Adopted effective March 1, 1997; Numbered as Section 20 effective June 1, 2000; February 1, 2007.]