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 ANSWER BRIEF TO OBJECTION OF RESPONDENT HOWARD V. MISHLER

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FILED
APR 09 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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I. INTRODUCTION

Respondent Howard V. Mishler's ("Respondent") sole objection concerns the Hearing Panel's finding that Respondent violated DR 2-107(A) by entering into a fee agreement with Russell Ezolt ("Ezolt") for Ezolt's services without providing notice to Grievant Bruce Walton ("Walton"), and without Walton's consent. As explained more fully below, the Hearing Panel properly found that Respondent's fee agreement with Ezolt for his work on Walton's case violated DR 2-107(A). DR 2-107(A) requires an attorney who employs another to assist him in the representation of a client to fully disclose to his client the fee agreement with the employed attorney. *King v. Housel* (1990), 52 Ohio St.3d 228, 230. Respondent's failure to notify Walton of his fee agreement with Ezolt and obtain Walton's consent therefore violates DR 2-107(A).

II. COUNTERSTATEMENT OF FACTS

A. Respondent is a Sole Practitioner of Employment Law.

Respondent is a sole practitioner. (Tr., Vol. II, at 462.) His practice focuses on employment law matters. (Tr., Vol. I, at 41; Tr., Vol. II, at 461-62.) Despite his status as a sole practitioner, Respondent has contracted on numerous occasions with what he characterizes as "per diem attorney[s]." (Tr., Vol. I, at 43.) According to Respondent, these "per diem attorney[s]" are "independent contractors" — not employees or members of his firm — whom Respondent "call[s] on as-needed." (Id.; Vol. II, at 474-75.)

B. Respondent Contracts with an Immigration Lawyer to Assist in His Employment Practice.

One of the "per diem attorney[s]" used by Respondent was Russell Ezolt ("Ezolt"). (Tr., Vol. I at 43.) Respondent began using Ezolt as an "independent contractor" in November 2003. (Tr., Vol. II, at 410, 431, 474.) Ezolt performed various assigned "tasks" for Respondent, such as covering pretrials and depositions. (Id. at 474-75.) After a task was assigned to Ezolt by Respondent, Respondent claims he had no right to control the means, manner or method of Ezolt's performance. (Id. at 474-75.)

Ezolt's experience, however, was in immigration law — not employment law. Ezolt worked as an immigration lawyer from 1976 to 2002, when he retired from his job with the Immigration and Naturalization Service ("INS"). (Tr., Vol. II, at 405, 409.) Ezolt never participated in a deposition as an immigration attorney. (Id. at 450.) Ezolt had no experience in employment litigation at least as late as 2002. (Id. at 411.) And he had no malpractice insurance. (Id. at 451.) Moreover, when he started working with Respondent, Ezolt was only working with immigration law firms. (Id. at 412.)

Nevertheless, Ezolt entered into an oral agreement with Respondent to pay him $20 per hour for his services in connection with Respondent's employment practice. (Tr., Vol. II, at 429; Appx. 10, Final Report at 10.) Ezolt not only billed for his time, but also sought reimbursement from Respondent for costs and expenses he incurred. (Id. at 426-27.) Ezolt sent Respondent invoices for his services. (Id. at 435, 475.) The only check produced by Respondent concerning payment to Ezolt for his services was drawn on Respondent's IOLTA account. (Tr., Vol. I, at 149-150.)

C. Walton Hires Respondent in July 2002 to File an Employment Lawsuit.

Walton hired Respondent in July 2002 — some 16 months before Respondent started using Ezolt as an "independent contractor" — to represent him in a dispute with Rolls-Royce concerning his termination (the "Rolls-Royce Dispute"). (Appx. 9, Final Report at 9.) Walton paid Respondent $5,000 for his services in two payments of $2,500. (Id.) An oral fee agreement also required Walton to pay Respondent a one-third contingency fee. (Appx. 9, Final Report at 9.) After being retained by Walton, Respondent filed a Complaint in federal court relating to the Rolls-Royce Dispute in September 2002. (Appx. 9, Final Report at 9.)

D. Without Prior Notice or Consent, Respondent sends Ezolt to Walton's Deposition and a Mediation Session.

Walton was deposed in connection with his federal lawsuit in December 2003 — approximately one month after Respondent began using Ezolt as an "independent contractor," but over a year after Walton's lawsuit was filed. (Appx. 9, Final Report at 9.) Respondent did not appear on Walton's behalf on the first day of Walton's deposition. (Id.) Instead, Respondent sent Ezolt to defend Walton's deposition due to a scheduling conflict. (Id.) Ezolt reviewed Walton's file for one hour before Walton's deposition, and he spent 30 minutes meeting with Walton immediately before the deposition. (Tr., Vol. II, at 422, 438.) Ezolt testified that Walton was "concerned" and "surprised" to see him. (Id. at 439.)

Ezolt was paid for his work on the Walton case. (Tr., Vol. II, at 445.) The Hearing Panel found by clear and convincing evidence that Walton was not notified that

Ezolt would be appearing at the deposition on Walton's behalf and did not consent to Ezolt's appearance. (Appx. 9, Final Report at 9.) And Walton's deposition is not the only occasion on which Ezolt appeared on Walton's behalf without prior notice and consent. Ezolt also appeared at a mediation session concerning the Rolls-Royce Dispute without prior notice or Walton's consent. (Appx. 9, Final Report at 9.)

E. The Hearing Panel Finds that Respondent Violated DR 2-107(A).

Based on the evidence presented at the hearing, including the facts recited above, the Hearing Panel found by clear and convincing evidence that Ezolt was not a member of Respondent's firm, that Ezolt's identity was never disclosed to Walton in writing, and that Walton never consented to a division of fees. (Appx. 9-10, Final Report at 9-10.) The Hearing Panel further found that Respondent violated DR 2-107(A).

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. But, "[u]nless the record weighs heavily against a hearing panel's findings, [this Court] defer[s] to the panel's credibility 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. <u>The Hearing Panel Properly Found that Respondent Violated DR 2-107(A).</u>

The Hearing Panel properly found that Respondent's fee agreement with Ezolt for his work on Walton's case violated DR 2-107(A). Despite Respondent's protestations to the contrary, this is not a case of first impression. For over 15 years, it has been the law in the State of Ohio that DR 2-107(A) requires an attorney who employs another to assist him in the representation of a client to fully disclose to his client the fee agreement with the employed attorney. *King v. Housel* (1990), 52 Ohio St.3d 228, 230; see, also, *Disciplinary Counsel v. Zingarelli*, 89 Ohio St.3d 210, 220, 2000-Ohio-140 (following *King* and holding that "respondent violated DR 2-107(A) by failing to disclose in writing Villwock's identity and Villwock's portion of the fees").

King construed an agreement between attorney Robert Housel ("Housel") and another lawyer (King) to assist Housel with trial preparation in a personal injury case. 52 Ohio St.3d at 228. Housel represented his clients on a contingent fee basis; King and Housel agreed that King would be paid $75 per hour for his assistance in preparing the case for trial. Id. at 229. The agreement, however, was not in writing, and King asserted that he was also entitled to 10% of the contingency fee. Id. Housel argued that the fee agreement was not enforceable because it was not in a writing disclosed to the client.

King noted that "DR 2-107(A) contemplates that the duty of informing a client of the hiring of another attorney to assist in a case and to fully disclose the fee agreement falls on the attorney retained by the client." 52 Ohio St.3d at 230. *King* explained that "DR 2-107(A)(1) requires full disclosure of *any fee agreement*," and that "*the rule*

required that the $75 per hour agreement, as well as a ten-percent contingency fee agreement, if there was one, *be disclosed to the client.*" Id. (emphasis supplied). And while *King* held that a lawyer's violation of DR 2-107(A) may not be used by the non-complying lawyer to avoid payment, *King* also held that an attorney has a duty to fully disclose to his client all fee agreements with another attorney:

> Based on the foregoing, *we hold that an attorney who employs another to assist him in the representation of a client has a duty to fully disclose to his client the fee agreement with the employed attorney.* DR 2-107(A)(1). The duty of full disclosure requires that the amount to be paid and manner of payment, as well as other relevant fee agreements, be disclosed to the client by his attorney.

Id. (emphasis added).

While less in amount, the $20 per hour fee Respondent paid Ezolt for his work on Walton's case is no different in substance from the $75 per hour fee agreement in *King* that this Court held must be disclosed to the client. Respondent advances two principle arguments in support of his contention that his fee agreement with Ezolt did not violate DR 2-107(A): 1) there was no violation because Respondent's payment to Ezolt did not depend on his receipt of payment from Walton; and 2) there was no violation because the cost of Ezolt's services was part of Respondent's "normal overhead." Both arguments are foreclosed by this Court's opinion in *King* and its progeny. Respondent's $20 per hour fee agreement with Ezolt, therefore, had had to be disclosed to Walton under DR 2-107(A) and Respondent had to obtain Walton's consent to the agreement.

First, Respondent's assertion that "Ezolt expected payment regardless of the fee arrangement between Mishler and Walton, regardless of the outcome of the Walton

matter, and regardless whether Mishler received any payment whatsoever," is irrelevant. (Resp.'s Obj., at 4.) The same expectations would have flowed from the $75 per hour fee agreement in *King*, since Housel was representing his clients on a contingent fee basis and, therefore, could have recovered nothing. Nevertheless, this Court held that the $75 per hour fee agreement in *King* had to be disclosed under DR 2-107(A). See 52 Ohio St.3d at 230.

Second, Respondent relies exclusively on *Columbus Bar Ass'n v. Brooks*, 87 Ohio St.3d 344, 1999-Ohio-137 to argue that Mishler paid Ezolt as part of his "normal overhead." Respondent's reliance on *Brooks* is puzzling. *Brooks* did not construe DR 2-107(A); *Brooks* analyzed whether an attorney charged a clearly excessive fee by separately collecting secretarial and law clerk expenses not included in the written fee agreement. As Respondent correctly notes, *Brooks* suggested secretarial and law clerk expenses were part of the "normal overhead subsumed in the percentage fee." 87 Ohio St.3d at 345-46. The secretary and law clerk in *Brooks*, however, were employees of the respondent attorney. Id. at 344 (noting that "amount owed" consisted of "hourly fees for respondent's secretary and law clerk"). Here, Respondent has no employees and Ezolt is neither a secretary nor a law clerk. Ezolt acted on Walton's behalf as a lawyer, and Respondent was adamant that he had no right to control the means, manner or method of Ezolt's performance. (Tr., Vol. II, at 474-75.) Nothing in *Brooks* suggests that payments to another attorney who is not a member of the same firm can be characterized as "overhead" for purposes of determining compliance with DR 2-107(A). Nor does *Brooks* purport to limit *King* and its progeny in any way.

Finally, Respondent asserts that arranging for "backup" is common among solo practitioners. But nothing in DR 2-107(A) prevents Respondent — or any other attorney — from arranging for "backup" to cover a status conference or pretrial when necessary. What DR 2-107(A) requires is notice to the client in writing that such "backup" will occur and the client's consent as to any fee agreement concerning the "backup." Any other rule would pose a significant risk that a client will be misled as to who or what entity is representing him or her.

Ethical Consideration 2-21 states that, "[w]ithout the prior consent of his or her client, a lawyer should not associate in a particular matter another lawyer outside his or her firm." EC 2-21. The circumstances of this case illustrate well the dangers of permitting a lawyer to engage other counsel without his client's consent. Walton gave up a significant severance agreement to retain Respondent to pursue employment discrimination claims on his behalf. (Appx. 9, Final Report at 9.) Respondent held himself out as an employment lawyer, and induced Walton to reject his severance package by offering high probabilities of success ranging from 70% to 90% in Walton's employment discrimination suit. (Id.) Walton was not told at that time that any other lawyers would be participating in his case. (Id.) Nor was he told that an immigration lawyer, who had no previous experience in employment law, and had never before participated in a deposition, would be covering the first (and perhaps most important) day of his deposition. The Hearing Panel's finding should be adopted by this Court — notice to Walton was required and Walton should have had the option to say no to this arrangement.

IV. CONCLUSION

For all of the above reasons, this Court should overrule Respondent's Objection and adopt the Hearing Panel's finding that Respondent's engagement of Ezolt under the circumstances of this case violated DR 2-107(A).

Respectfully submitted,

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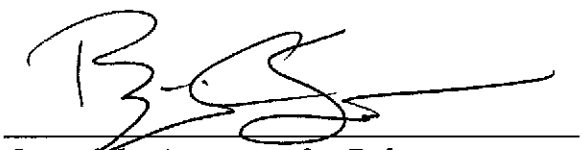
CERTIFICATE OF SERVICE

A copy of the foregoing **Relator Cleveland Bar Association's Answer Brief to Objection of Respondent Howard V. Mishler** has been served this 6th day of April, 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**
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.

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 $3,893.75 [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)	$13,127.25
(Check #6142 for $8,627.25, Account 0166168)	
(Check # 1492 for $4,500, Account 0689090	
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

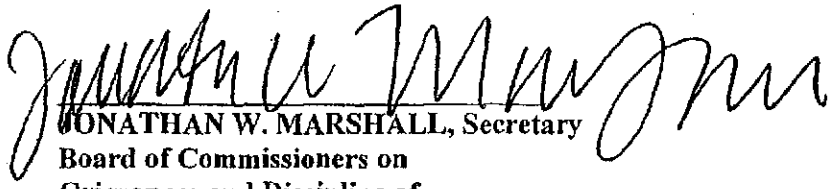
aggravation was minimal, but not as scarce as testimony as to respondent's mental state. The panel can only guess why respondent seemingly failed to pay such little attention to his duties and to his clients, leaving it with little to compare to sanctions in other disciplinary matters.

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