

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel

Relator,

Case No. 2007-0733

Board No. 05-076

v.

William Mark Fumich, Jr.

Respondent.

ANSWER BRIEF OF RESPONDENT WILLIAM MARK FUMICH, JR. TO
RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS
OF LAW AND THE RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO

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Relator

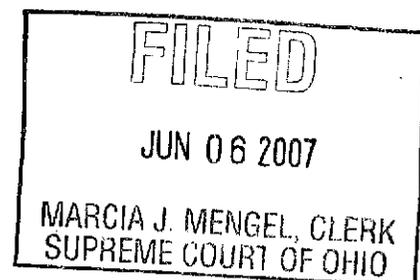


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Answer Brief of Respondent William Mark Fumich, Jr. to Relator's Objections to the Findings of Fact, Conclusions of Law and the Recommendation of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

Respondent William Mark Fumich, Jr. hereby submits his Answer Brief to Relator's Objections to the Findings of Fact, Conclusions of Law and the Recommendation of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio ("board"), certified to this court on April 24, 2007. A copy of the board's Final Report ("Report") adopting the panel's findings of fact, conclusions of law and recommendations is attached hereto as Exhibit A.

I. INTRODUCTION

Relator filed his two count amended complaint against respondent on June 15, 2006. The first count arises from respondent's representation of the estate a family relative in a medical malpractice action. The action was dismissed when respondent was unable to locate a cost-justified expert witness to testify on behalf of the estate as to the proximate cause of the loss of his relative's toe. The first count is based on respondent's failure to inform his client that the complaint has been dismissed and on his later payment of \$16,000.00 of his own personal funds to the client. (Amended Complaint, ¶¶ 36, 49).

The second count alleges that respondent failed to return documents of another relative client at her request. Respondent filed his answer on July 26, 2006.

A panel of the board heard this matter on February 22, 2007. The parties submitted stipulated facts, exhibits and violations and the panel took testimony to provide additional substantive background and context.

As to the first count, the parties stipulated to violations of DR 1-102(A)(4), DR 1-102(A)(6), DR 6-101(A)(3)¹ and DR 9-102(A). As to the second count, the parties stipulated to violation of DR 9-102(A).

Relator recommended to the board that respondent be given a twelve-month suspension, with six months stayed. In light of the context of the underlying facts and the mitigating factors, respondent recommended that the board issue a twelve-month stayed suspension.

The board issued its Report in which it adopted the panel's recommended sanction, a twelve-month stayed suspension.

The board, while acknowledging that it would ordinarily embrace relator's recommendation in light of the violation of DR 1-102(A)(4), found the violation "primarily because respondent was deceitful to his client." (Report, p.4). Distinguishing cases in which an actual suspension was imposed for violation of DR 1-102(A)(4), the board found that "the dishonesty and selfish motive found in cases where an actual suspension was imposed, was noticeably lacking here." (Report, p.4). The board further found compelling, among other

¹ An issue arose before the panel regarding the scope of the stipulation as to DR 6-101(A)(3) (neglect of a legal matter). Relator stated pre-hearing that the neglect with which respondent was charged was solely in connection with respondent's failure to inform his client that the lawsuit was dismissed and that he did not intend to assert that respondent's representation in the lawsuit gave rise to a violation of DR 6-101(A)(3). (Respondent's Post-hearing Brief, p.8, fn. 1 and Ex. 1 attached thereto). Respondent therefore stipulated to the charge and did not further address the issue at hearing. Relator, however, sought to extend the charge beyond the stipulation in closing. (Tr. 168-171).

things, “the absence of harm to a client (arguably the clients received a benefit from the conduct of Respondent relative to the tenuous merits of the malpractice case).” (Report, pp. 4-5).

Relator objects to the stay of the entire suspension contending that (1) the board’s mitigation factors do not support stay of the entire suspension, (2) contrary to the board’s findings, respondent acted with selfish motives, and (3) a stayed suspension is not appropriate in light of this court’s decision in *Disciplinary Counsel v. Manning*, 111 Ohio St.3d 349, 2006-Ohio-5794.

Respondent asserts that the board’s recommended sanction is entirely appropriate and is consistent with this court’s cases and the board’s guidelines. The board heard the evidence and carefully considered the context of respondent’s conduct. The board acknowledged that the matter does not parallel cases in which an actual suspension was imposed and judiciously found the recommended punishment to be a stayed suspension. Respondent requests that this court adopt the board’s report and recommended sanction.

II. STATEMENT OF FACTS RELEVANT TO THIS CASE

Respondent was admitted to the practice of law in Ohio on November 19, 1976 and is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio. (Report, ¶1; Stip., ¶ 1).

Respondent currently practices law as a sole practitioner in Westlake, Ohio. (Stip., ¶ 2). Prior to this matter, respondent had never been the subject of disciplinary proceedings. (Report, ¶ 2). With regard to both counts of the amended complaint, respondent was counsel for relatives. (Stip., ¶ 3).

(A) Count One

Janko Klepac, now deceased, was a relative of respondent’s, and Nada Bukszar and Danica Jelovic are Mr. Klepac’s daughters. (Stip., ¶ 3). In February 1980, respondent began

representing Mr. Klepac, including preparing estate planning documents for him. (Stip., ¶ 4). Respondent drafted a will and a trust for Ms. Bukszar and her husband and a will for Ms. Jelovic and her husband. (Stip., ¶ 5). Respondent has done legal work for almost all of his family members. (Tr. 125-126).

Mr. Klepac passed away in June 1998 at the age of 76. The cause of death identified on the death certificate is congestive heart failure. (Report, ¶ 6; Stip., ¶ 7). Shortly after Mr. Klepac's death, Ms. Bukszar and Ms. Jelovic asked respondent to assist in the probate of Mr. Klepac's will. (Report, ¶ 4; Stip., ¶ 7).

Respondent agreed to the representation, and he filed the estate in the Cuyahoga County Probate Court on November 30, 1998. (Stip., ¶ 8). Ms. Bukszar was named as the executor of Mr. Klepac's estate. (Stip., ¶ 9).

Ms. Bukszar and Ms. Jelovic also asked respondent to review the circumstances that led to the amputation of Mr. Klepac's toe prior to his death. (Report, ¶ 5; Stip., ¶ 11). At the end of 1998 or early in 1999, respondent agreed to pursue a medical malpractice action on behalf of the estate as a result of circumstances that led to the amputation. (Report, ¶ 7; Stip., ¶ 13).

Respondent asserts that he discussed a contingency fee arrangement with Ms. Bukszar and Ms. Jelovic of one-third of any recovery and that they would pay all expenses of the action. (Stip., ¶ 14). Ms. Jelovic asserts that there was no agreement as to any fee to be paid. (Tr. 91-92).

In any event, respondent was not paid a fee or his costs for his representation of the estate in the malpractice action. (Report, ¶ 21). Although he never issued an invoice, he recorded time reflecting fees in the amount of \$13,823.00 costs in the amount of \$678.95 on the malpractice matter. (Ex. 4).

On March 22, 1999, respondent timely filed a medical malpractice action in the Cuyahoga County Court of Common Pleas on behalf of the estate against Metrohealth Medical Center (“Metro”), St. Vincent Charity Hospital (“St. Vincent”), and Grace Hospital (“Grace”), seeking \$500,000 in damages. (Report, ¶ 8; Stip., ¶ 16).

A case management conference was held on June 29, 1999 and, as a result, respondent was required to submit an expert witness report by November 30, 1999. (Stip., ¶ 17).

Respondent tried but had difficulty finding an expert witness willing to testify on behalf of the estate. (Report, ¶ 9-10). Dr. Alexander, a vascular surgeon, had previously told Ms. Jelovic and respondent that he believed that substandard medical care was the cause of Mr. Klepac’s gangrenous toe. (Stip., ¶ 19). He would not, however, testify against the hospitals. (Tr. 69). On February 17, 2000, respondent filed a voluntary dismissal of the action on behalf of the estate, and the case was dismissed without prejudice on February 25, 2000. (Stip., ¶ 20).

Respondent re-filed the case in the Cuyahoga County Court of Common Pleas on February 20, 2001, with identical claims and identical parties. (Stip., ¶ 21). Respondent tried to locate an expert witness but continued to have difficulty retaining an expert witness to establish causation and the standard of care. (Report, ¶ 9-10; Stip., ¶ 22).

Respondent spoke with Ms. Jelovic extensively on or about September 26, 2001 to discuss, among other things, the difficulties in locating an expert witness and the inability to maintain a claim against St. Vincent. (Tr. 120-123). Respondent’s time records reflect .30 hours on that date recorded for a telephone call with Ms. Jelovic and 2.55 hours of time recorded for meeting with Ms. Jelovic and for letters to opposing counsel. (Ex. 4, p.10). Respondent also informed Ms. Jelovic that the two remaining defendants would also be filing motions for summary judgment. (Tr. 122-123). Respondent filed a stipulation of voluntary dismissal of St. Vincent on behalf of the estate. (Ex. 11).

Despite his prior statement to Ms. Jelovic and respondent, Dr. Alexander then submitted an affidavit now stating that there was no substandard care. (Tr. 116, Ex. 29). Respondent consulted Drs. Javier, Baird and Gianakopoulous who would not opine that there was a deviation from the standard of care. (Tr. 117-120, Ex. 5). He also reviewed, without success, the possibility of establishing malpractice through the back door by addressing nursing and JCAHO standards. (Tr. 37, 145). Because respondent was not able to find an expert witness, he did not file an expert witness report within the court-imposed deadline. (Stip., ¶ 25).

The remaining two defendants, Metro and Grace, then filed for summary judgment. (Report, ¶ 11, Stip., ¶ 26). Respondent did not file a response to the summary judgment motions. (Stip., ¶ 27). Respondent asserts that he did not do so because he had no expert witness to support opposition to the motion. (Tr. 36-38; Stip., ¶27).

The court granted both summary judgment motions, and the case was dismissed as of February 12, 2002. (Report, ¶ 12; Stip., ¶ 28).

The board's action emanates from respondent's failure to inform Ms. Bukszar or Ms. Jelovic that the case was dismissed. Respondent testified that he did not inform them because of the disappointment of informing a family member that he did not get a good result. (Tr. 61-63).

Thereafter, respondent would see Ms. Bukszar and Ms. Jelovic at family functions, and he continued to represent Ms. Jelovic's husband in business matters. (Stip., ¶ 31).

In May 2004, Ms. Jelovic telephoned respondent to inquire about the status of the case. (Stip., ¶ 32). Respondent did not inform Ms. Jelovic that the case had been dismissed in February 2002. (Stip., ¶ 33). Ms. Jelovic informed respondent that she wanted to settle the case for \$25,000.00. (Report, ¶ 14; Stip., ¶ 24). On Friday, June 11, 2004, Respondent withdrew \$16,000.00 from his personal account at Merrill Lynch. (Stip., ¶ 36). Respondent then deposited the \$16,000.00 from his personal Merrill Lynch account into his IOLTA account at National City

Bank. (Stip., ¶ 37). Respondent ran the \$16,000 through his IOLTA account because he wanted the money to be paid to Ms. Jelovic on an “attorney check.” (Stip., ¶ 38).

Respondent took a check from his IOLTA account and met with Ms. Jelovic at her place of employment on the afternoon of Friday, June 11, 2004. (Stip., ¶ 39). Respondent wrote check #3266 from his IOLTA account to Ms. Jelovic for \$16,000.00. (Report, ¶ 15-16; Stip., ¶ 40).

At their meeting on June 11, 2004, respondent did not inform Ms. Jelovic that the money that he gave her was from his personal funds. (Stip., ¶ 43). After respondent gave Ms. Jelovic the \$16,000.00 check, he had her sign an authorization form from his law firm authorizing him to close the file. (Stip., ¶ 44). Execution of the authorization form was a practice done on all files to be closed in respondent’s practice. (Tr. 56-58).

(B) Count Two

Nelson Neubig, now deceased, was respondent’s uncle. Kathleen Neubig is a daughter of Nelson Neubig and is respondent’s first cousin. (Stip., ¶ 49). Respondent represented Mr. Neubig on various legal matters between 1976 and December 2004, ranging from representation in connection with tax returns, dealing with real estate, default on a note, neighbor difficulties and estate planning. (Stip., ¶ 50; Tr. 124). As a result of the deterioration of Mr. Neubig’s health, the influence exerted over him by Ms. Neubig, and the contents of the will of which he knew Ms. Neubig would not approve, Mr. Neubig informed respondent that he did not want Ms. Neubig to know about the contents of his will. (Tr. 126-127). Mr. Neubig told respondent “Bill, I can’t let Kathleen know I’m doing this.” (Tr. 127). Mr. Neubig later became hard of hearing, had eyesight difficulties and was beginning to form dementia. (Tr. 127).

For many years prior to Mr. Neubig’s death on April 6, 2006, he and Ms. Neubig resided together in Chesterland, Geauga County, Ohio. (Stip., ¶ 52). Prior to Mr. Neubig’s death, Ms. Neubig was his primary caregiver. (Stip., ¶ 53; Tr. 124-127).

On June 19, 2004, Mr. Neubig executed a Power of Attorney authorizing Respondent and Ms. Neubig to act on his behalf. (Stip., ¶54).

Ms. Neubig sought possession of Mr. Neubig's files. (Tr. 128). Respondent could not accede to her request because Mr. Neubig expressly instructed respondent to not allow Ms. Neubig to have the documents. (Tr. 126-127). In February 2005, Ms. Neubig filed a grievance against respondent unrelated to the return of her files. (Stip., ¶ 57). The grievance instead related to return of her father's files. (Tr. 124-125; 130-132).

Respondent had represented Ms. Neubig on several legal matters, including misdemeanor criminal charges, and estate planning matters. (Stip., ¶ 51). The only document of Ms. Neubig that respondent possessed was a conformed copy of her will. (Tr. 129).

Although not charged in the amended complaint and certainly not, as a result, addressed in respondent's presentation of evidence, relator argued in closing that respondent took the interest of one client over another when he refused to provide Ms. Neubig with Mr. Neubig's files. (Tr. 167-168). The board agreed. (Report, ¶ 23).

The record is devoid of evidence as to when respondent had represented Ms. Neubig or the scope of the representation. There is no evidence as to when that relationship ended because it was not even an issue until raised by relator in closing. There is no evidence that respondent represented Ms. Neubig with respect to her father's will and trust documents. Nevertheless, the context of count two is that Ms. Neubig wanted her father's files. Respondent did not give her father's files to her. Almost as an afterthought, she also requested her files. However, the only document respondent had was a copy of her will.

(C) Respondent's Physical and Mental Condition

There are physical and mental mitigating factors which assist in explaining the context of respondent's conduct. First, respondent's mother passed away in November, 2000, following a

five year course of treatments and several surgeries due to lymphatic cancer. (Tr. 132-134). Also, beginning in September, 2000 Mr. Fumich began to experience weight loss and a severe lack of energy. His weight decreased to 120 pounds from 160. (Tr. 136). The loss of energy so affected his professional life that any hurdle, no matter how minor, became an impediment to getting things accomplished. (Tr. 135-136). Finally, in April, 2004, the cause of respondent's condition was diagnosed as diabetes by the Cleveland Clinic following a colonoscopy. (Tr. 134-135). Although his medical and mental condition do not excuse his actions, his condition does provide some context for what happened. (Tr. 135-137).

Respondent made abundantly clear at the hearing that he recognizes that his handling of the dismissal of the lawsuit and of later dealings with complainant did not satisfy the standards of the profession or the standards he sets for himself.

RESPONSE TO RELATOR'S OBJECTIONS

I. THE BOARD'S CONSIDERATION OF THE FACTS AND CONTEXT OF THIS MATTER SHOWS THAT IT APPROPRIATELY STRUCK A BALANCE BETWEEN PUNISHMENT OF RESPONDENT AND PROTECTION OF THE PUBLIC

In determining the appropriate length of a suspension and related conditions, this court instructs that the primary purpose of disciplinary sanctions is not to punish the offender but to protect the public. *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510 ¶ 10, citing *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704, ¶ 53, *Ohio State Bar Ass'n v. Weaver* (1975), 41 Ohio St.2d 97, 100. Here, based on the context of respondent's representation and conduct, the board balanced the need to punish respondent with the need to protect the public.

Respondent recognizes that when an attorney engages in a course of conduct that violates DR 1-102(A)(4) the attorney will ordinarily be actually suspended for an appropriate period of

time. *Disciplinary Counsel v. Beeler*, 105 Ohio St.3d 188, 2005-Ohio-1143. Mitigating evidence, however, can justify a lesser sanction. *Disciplinary Counsel v. Agopian, supra*.

The board noted its cognizance of this court's holdings on sanctions for violation of DR 1-102(A)(4). (Report, p.4). However, with this awareness, the board viewed the facts and the context of those facts to find that a stayed suspension was the appropriate sanction.

In mitigation, the board found the absence of a prior disciplinary record, respondent's acknowledgement of the wrongful nature of his conduct, that respondent made restitution, that respondent cooperated in the proceedings and that respondent's character and reputation is generally excellent. The board further found that there was an absence of a dishonest or selfish motive relative to personal financial gain and that respondent lost \$16,000.00 in personal funds in an effort to appease relatives on a matter of tenuous merit. The board also found that he performed legal services on their behalf for free. (Report, p.4).

To try to minimize the mitigating factors found important by the board, relator emphasizes that respondent deceived his clients by failing to tell them that the case was dismissed "due to his failure to respond to a dispositive motion." (Objection, pp 7-8). Relator's insistence on focusing on the mechanics of "how" the case was dismissed ignores the context obviously viewed by the board as the more crucial question of "why" the case was dismissed. Relator's emphasis on the side issue also further distances the analysis from where it should be, that is, on respondent's admitted failure to inform his client that the case has been dismissed.

Over the course of his representation, respondent and his office spent at least eighty (80) hours working on the matter. (Ex 4, p.13-14). Further, an expert witness, Dr. Alexander, who initially told respondent and Ms. Jelovic that there was malpractice with respect to treatment of Ms. Klepac's toe, backed away from his opinion when he realized that he would have to take a position adverse to one of the hospitals involved. (Tr. 115-116).

Respondent also attempted, without success, to obtain the services of other expert physicians, Drs. Javier, Baird and Gianakopoulous, to provide favorable testimony. (Tr. 117-120; Ex. 5). Respondent was also not able to approach the matter as a failure to satisfy nursing standards, although he tried. (Tr. 37, 120). Respondent's recourse was to find a "hired gun" expert to assist. He even contacted a professional witness company but found that the cost of retaining such an expert did not justify the expense in light of the damages sought to be proved. (Tr. 146-147). Ms. Jelovic was aware that one defendant, St. Vincent, was to be dismissed for lack of proof and that the two remaining hospitals would be filing motions for summary judgment as a result of the inability to provide expert testimony. (Tr. 121-122, Ex. 4, p. 10).

This matter is certainly not one in which an attorney was retained by a client only to ignore the file and/or the client.

To support its objection to the sanction, relator seeks to compare respondent's conduct to those of the respondent in *Disciplinary Counsel v. Rooney*, 110 Ohio St.3d 349, 2006-Ohio-4576. However, the background context reveals that the mitigating factors in *Rooney* do not favorably compare in a meaningful way with the mitigating factors herein.

In *Rooney*, counsel was paid a retainer plus court costs to administer a decedent's estate. For almost one year, the executor spoke regularly with counsel about the estate. During each conversation, counsel assured the executor that he was taking care of all probate matters. Counsel then informed the executor in November 2003 that the estate would be finalized by the end of the year. In 2004, the executor called counsel often, but the calls were rarely returned. In May 2004, counsel promised, but failed, to send the documents to close the estate's bank accounts.

The executor finally called the court and found that no documents had, in fact, been filed in connection with the estate. Upon termination, counsel sent the file to a new attorney but did

not refund the retainer until after Disciplinary Counsel filed a complaint against him. The board found that counsel, among other rules, violated DR 1-102(A)(4) in misleading his client.

Some of the mitigating factors found in *Rooney* are indeed similar to the mitigating factors found herein. However, the board found the following factors in mitigation herein that were not found in *Rooney*: (1) respondent's acknowledgment of the wrongful nature of his conduct, (2) absence of financial harm to respondent's clients, (3) respondent's loss of \$16,000 out of pocket, and (4) performing legal services for free on his relative's behalf. Moreover, the restitution mitigation factor found important in *Rooney* must be viewed with some cynicism because the restitution was not made until after Disciplinary Counsel filed his complaint.

Viewed with the background that respondent did, in fact, devote substantial time and effort in the underlying representation of his relatives herein, the comparison with *Rooney*, a case in which counsel apparently did nothing, is like mixing apples and oranges.

Finally, to provide additional context to the panel's consideration of sanctions, respondent points to other cases in which violations of DR 1-102(A)(4), among others, have been found. The cases range from stayed suspension to actual suspensions. *Disciplinary Counsel v. Markijohn*, 99 Ohio St.3d 489, 2003-Ohio-4129 (six months stayed suspension), *Disciplinary Counsel v. Robinson*, (1998), 83 Ohio St.3d 319 (six months stayed suspension and treatment), *Dayton Bar Association v. Kinney*, 89 Ohio St.3d 77, 2000-Ohio-445 (six months stayed suspension), *Columbus Bar Ass'n v. Bowen* (1999), 87 Ohio St.3d 126 (six months suspension), *Disciplinary Counsel v. Wallace* (2000), 89 Ohio St.3d 113 (six months suspension).

II. THE BOARD'S FINDING OF LACK OF A DISHONEST AND SELFISH MOTIVE IS CONSISTENT WITH THE EVIDENCE

A. The Board Correctly Found That Respondent Did Not Act For Selfish Financial Gain In Paying \$16,000.00 of His Personal Funds To His Clients.

In his second objection, relator asserts that “it would seem that the board’s recommendation to stay the entire suspension is based on the conclusion that respondent acted without a dishonest or selfish motive.” (Objection, p.9). Although respondent agrees that his motive played a role in the board's recommendation, it was by no means the only factor considered by the board.

The mitigating factors found by the board do relegate motive to lack of personal financial gain:

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- (f) Absence of a dishonest or selfish motive relative to personal financial gain. In fact, Respondent lost \$16,000.00 out of pocket in an effort to appease relatives and performed services on their behalf without fees. (Report, p.4).

The board does not find that BCGD Proc. Req. 10(B)(2)(b) limits motive as a mitigating factor to the absence of financial gain. (Objection, p.10). Reading too much into the board’s Report, relator ignores that the absence of financial gain as a motive may be a mitigating factor. The board was careful in crafting its Report to specifically find that respondent did not have a motive based on personal financial gain. It did not find that other motives were lacking and therefore limited its finding as to the mitigation standard. The board, in fact, made no finding as to such other subjective motivations. Instead, the board properly limited its finding on motive to what the record clearly showed – that respondent’s motive was not for personal financial gain.

That the board later distinguished this matter from other DR 1-102(A)(4) cases by stating that “the dishonesty and selfish motive found in cases where an actual suspension was imposed, was noticeably lacking here,” must therefore obviously be taken as the board’s acknowledgment of the comparative weighing of mitigation factors which the board found important in reaching its conclusion.

In balancing the aggravating and mitigating factors, the board noted that, in fact, the client arguably received a benefit from respondent’s conduct relative to the tenuous merits of the

malpractice case. This certainly does not condone respondent's conduct. However, compared to *Rooney* in which counsel paid restitution to his client only after a disciplinary proceeding was commenced, here, respondent paid \$16,000.00 to his client prior to any action being taken on an underlying claim of dubious merit.

Relator's focus on the board's alleged failure to consider cowardice and/or embarrassment as motive is therefore misplaced. The board made no finding as to respondent's motive other than he did not act for his own financial gain. Simply put, Relator sets up a straw man so that the straw man may be knocked down.

Finally, Relator's attempt to compare counsel's conduct in *Disciplinary Counsel v. King*, 103 Ohio St.3d 438, 2004-Ohio-5470, to respondent's conduct herein is misplaced. Counsel in *King* had been disciplined on two prior occasions for violation of DR 1-102(A)(4). Counsel's hair-splitting in *King* regarding the appreciation of his wrongful conduct was likewise found crucial. Moreover, counsel in *Rooney* paid to settle the legal malpractice case only after the action had been filed and after relator filed a complaint against him.

Here, respondent has no prior disciplinary record and fully acknowledges and appreciates that his conduct was wrong (Tr. 64-66, 137).

B. The Execution Of The Form Used By Respondent In All Cases To Close A File Is Insufficient To Show Selfish Motive.

Taking one fact of many presented in this matter, relator next seeks to attribute a selfish motive to respondent's request to Ms. Jelovic that she execute a form authorizing him to close the file in accordance with his typical procedures. Setting up yet another straw man, relator contends that having Ms. Jelovic sign the form "is obviously unrelated to any altruistic motive to satisfy Ms. Jelovic's need of funds." (Objection, p. 14).

The form was an office form used in every case to close a file. (Tr. 57-58). Respondent testified that after seven (7) years, the executed form would then allow his office to destroy the file. (Tr. 58, Ex. 3). Relator suggests, however, that it furthered Ms. Jelovic's belief that the case was settled and authorized respondent to "destroy the case file as evidence of misconduct in the case." (Objection, p. 14).

A bureaucratic form that allows destruction of a file in seven (7) years that is employed in closing all cases can hardly be extrapolated, as relator appears to suggest, as a sinister attempt by respondent to destroy the file to hide evidence.

C. Respondent's Duty To Nelson Neubig Required Him To Withhold Mr. Neubig's Files From His Daughter

Count two pertains solely to the failure to return Kathleen Neubig's file. Relator nevertheless extends the record beyond what it contains in stating that respondent "further(ed) the interest of his favored client, Nelson Neubig, over the interest of his disfavored client, Kathleen Neubig." (Objection, p. 15).

The only item of Ms. Neubig that respondent had was a conformed copy of Ms. Neubig's will. (Tr. 127). The files that Ms. Neubig wanted were her father's files. Mr. Neubig, elderly, frail and with failing eyesight, had specifically informed respondent that he did not want Ms. Neubig to have his documents. (Tr. 126-129).

Mr. Neubig did not want Ms. Neubig to have his will and trust because he knew that Ms. Neubig would force Mr. Neubig to alter his will in accordance with her wishes. *Id.* Ironically, after this proceeding was commenced and before Mr. Neubig died, that is precisely what happened. (Tr. 149-150).

In any event, respondent's "sense of obligation" to Mr. Neubig with respect to his files had nothing to do with his past representation of Ms. Neubig. The "sense of obligation" was, in

fact, respondent's iron-clad duty as an attorney to abide by his client's wishes. His willingness to abide by these wishes even in the face of this proceeding hardly reflects a "selfish motive" as relator accuses.

Respondent did not represent Ms. Neubig with respect to Mr. Neubig's will and trust documents. She had no right to her father's documents and Mr. Neubig specifically told respondent that he did not want his daughter to have the documents.

Nevertheless, Relator's last-minute argument inferring that respondent had a conflict of interest was not charged and was not addressed, as a result, in the evidence presented at the hearing. To now attempt to bootstrap such an argument into support for a selfish motive is not appropriate and is not supported by the record.

First, there was no evidence presented that respondent represented Ms. Neubig other than on a misdemeanor criminal charge and on her own estate planning matter. There is no evidence as to when that representation took place, what the representation entailed or the scope of the representation. Also, Respondent's representation of Ms. Neubig was not addressed by respondent in the record because it was not something that was addressed in relator's amended complaint and was not something from which the violations emanated. It was only in relator's closing argument that respondent heard, for the first time, that he "took the side" of one client over another. (Tr. 167-168). Such a conflict-based argument and finding are inherently beyond the scope of the pleadings and evidence. Respondent is entitled to due process notice of additional charges and was not given the proper notice or opportunity to present evidence of the conflict argument.

In any event, relator failed by clear and convincing evidence to establish either a conflict or a selfish motive because there is no evidence of the context, timing or scope of respondent's

former representation of Ms. Neubig. Respondent also failed to establish a duty on respondent's part to act contrary to Mr. Neubig's wishes so that his daughter could have his legal documents.

III. RELATOR'S COMPARISON OF THIS MATTER WITH *DISCIPLINARY COUNSEL V. MANNING* LACKS THE CONTEXT FOUND CONVINCING BY THE BOARD

Relator lastly tries to compare the activity of the attorney in *Disciplinary Counsel v. Manning*, 111 Ohio St.3d 349; 2006-Ohio-5794, to respondent's conduct herein in an attempt to bolster an argument that there should be an actual suspension. *Manning*, however, is not comparable.

In *Manning*, respondent Manning was retained to represent clients in a potential medical malpractice action. Four months later, Manning contacted another attorney to act as co-counsel. The clients paid a \$1,000.00 retainer to Manning for tender to the co-counsel as the retainer. Respondent instead deposited the client's \$1,000.00 in his own law firm's operating account.

About one year later, the clients learned that co-counsel had never been involved in the case and that the \$1,000.00 had not been given by Manning as a retainer to the alleged co-counsel. When confronted, Manning told them that he decided to handle the matter without co-counsel.

Manning then falsely informed the clients several times that he had filed a medical malpractice action. He also lied about receiving settlement offers from medical providers. He finally falsely told them that he had a \$47,500.00 settlement offer even though there was no such offer and no lawsuit.

Manning then drafted a release and confidentiality agreement which he had the clients execute. According to the fraudulent agreement, the clients were to receive three installment payments summing to \$47,500.00. Manning gave the client \$5,221.14 of the purported first installment of \$10,000.00, stating that attorneys fees and expenses were subtracted.

When the clients asked about the second installment, Manning falsely told the clients that he did not know when the (non-existent) insurer would be sending the money.

The clients finally contacted another attorney who, after researching the matter, informed them that Manning had not filed a medical malpractice case. When confronted, Manning admitted to the attorney that he failed to file a lawsuit and that he fabricated the release and confidentiality agreement to avoid being sued for legal malpractice. He said he intended to pay the clients the full \$47,500.00 from personal funds. However, he made only one additional \$1,000.00 payment.

Manning was charged with violating DR 1-102(A)(4) (engaging in conduct involving fraud, deceit, dishonesty or misrepresentation), 1-102(A)(5) (engaging in conduct prejudicial to administration of justice), 2-106 (charging a clearly excessive fee), 2-110(A)(3) (requiring return of unearned fees), 6-102 (trying to limit liability to client), 7-101(A)(2) (intentionally failing to carry out a contract of professional employment) and 9-102(A) (maintaining client funds in a separate, identifiable bank account).

The panel and board recommended a two-year suspension. This court approved, finding determinative the “number and intricacy of respondent’s lies” and Manning’s fabrication of a release executed by his clients containing a confidentiality provision to cover his tracks.

Respondent undertook the representation of the Estate of Janko Klepac in connection with potential medical malpractice as a result of loss of Mr. Klepac's toe. The evidence shows that respondent expended considerable time and effort during the course of his representation and procured and analyzed a significant number of Mr. Klepac’s medical records. (Ex 27).

This is clearly not a case, as in *Manning*, in which the attorney took on a representation and informed the client that a lawsuit had been filed when, in fact, one had not been filed. This is also not a case, as in *Manning*, in which the clients were affirmatively assured that work was

being done on the cases when, in fact, no work was done. Indeed, respondent herein exerted a great deal of work on and attention to the case. That respondent was unable to locate an expert witness willing to testify that one of the hospitals was negligent after one such expert backed out does not detract from the distinction with *Manning*.

Respondent spoke with his client and informed her that one defendant, St. Vincent Hospital, must be dismissed and that the remaining two defendants would be filing motions for summary judgment. Respondent's client was well aware that there was difficulty in locating an expert witness to link negligent medical care with the loss of Mr. Klepac's toe.

Respondent continued to seek an expert witness even after the motions for summary judgment were filed for the two remaining defendants. (Ex 5). Respondent testified that he could have tried a "hired gun" expert, but that the expense associated with such an expert was not justified based on the extent of the injury.

Respondent's problems commenced when he did not inform his client that he had not filed and could not file a response to the motions for summary judgment. He then failed to inform the client that the lawsuit was dismissed after summary judgment was granted and did not so inform his client in 2004 when the client said she wanted the case settled.

He then wrote a check to Ms. Jelovic for \$16,000.00 from his IOLTA account and ensured sufficient funds for the check by depositing personal funds of the identical amount into the account. He did not discuss with Ms. Jelovic the origin of the funds, nor did he represent that the matter remained pending, although respondent admitted that the impression would have been left.

This matter involves family members, which combined with respondent's undiagnosed health condition and loss of his mother, perhaps explains but does not condone, how respondent conducted himself in this matter. It was evident that respondent wanted to "make things right"

with his family members by tendering \$16,000.00 derived from his own personal funds. His conduct was wrong and will not be repeated.

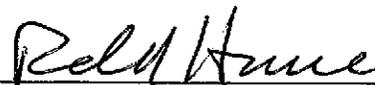
Respondent's conduct herein did not involve an exploitative motive. See *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510, ¶ 11. Respondent's conduct, as found by the board, does not involve a selfish motive involving financial gain.

The purpose of sanctions, that of protecting the public rather than punishing the offender, will not be served with an actual suspension of this case. What happened in this case did not arise from an attorney who, with sinister motives, preyed on clients for his own personal benefit. Respondent nevertheless fully understands the gravity of his conduct in this matter and the court can rest assured that there is absolutely no danger of repeat behavior. Respondent submits that the board, based on the stipulated facts and on the evidence it heard to provide proper context, properly recommended an appropriate one year stayed suspension and that "an actual suspension is not a just result under the facts and circumstances of this case." (Report, p.5).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the court overrule relator's objections and adopt the recommendation of the board as to the one-year stayed suspension.

Respectfully submitted,



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Attorneys for Respondent
William Mark Fumich, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer Brief of Respondent William Mark Fumich, Jr. to Relator's Objections to the Findings of Fact, Conclusions of Law and The Recommendation of the Board of Commissioners On Grievances and Discipline of The Supreme Court of Ohio was served by ordinary U.S. mail, postage prepaid upon the following this 6th day of June, 2007.

Jonathan E. Coughlan
Philip A. King
Office of Disciplinary Counsel
The Supreme Court of Ohio
250 Civic Center Drive
Suite 325
Columbus, Ohio 43215-7411

Jonathan W. Marshall
Secretary
Board of Commissioners on
Grievances and Discipline
65 South Front Street
5th Floor
Columbus, Ohio 43215-3431



Ronald L. House

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

IN RE: :

Complaint against : **Case No. 05-076**

William Mark Fumich, Jr. : **Findings of Fact,**
Atty. Reg. No. 0022600 : **Conclusions of Law and**

Respondent : **Recommendation of the**
Board of Commissioners on
Disciplinary Counsel, : **Grievances and Discipline of**
the Supreme Court of Ohio

Relator :

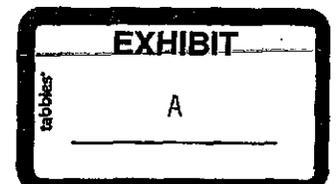
INTRODUCTION

This matter came on for hearing on the 22nd day of February, 2007, at the courthouse of the Ohio Seventh District Court of Appeals in Youngstown, Ohio. The hearing panel representing the Board of Commissioners consisted of John Siegenthaler, Martha Butler and Judge Joseph J. Vukovich, Panel Chair. Relator was represented by Attorneys Jonathan Coughlin and Phillip King. Respondent was present and was represented by Attorneys Ronald House and C. David Paragas. At the hearing, the parties jointly submitted stipulations of fact, violations of the Code of Professional Responsibility, and factors of mitigation as contemplated by BCGD Proc. 10(B). Said stipulations are attached hereto as Exhibit A. Based upon the aforementioned stipulations and the evidence adduced at the hearing, the panel makes the findings hereinafter set forth.

FINDINGS OF FACT

1. Respondent has been practicing law since November 19, 1976.
2. Prior to the matters before the panel, Respondent has never been the subject of disciplinary proceedings.
3. In both counts of the complaint, Respondent was legal counsel for relatives.

COUNT ONE



4. Respondent was initially consulted to represent the family of Janko Klepac, deceased, to probate his last will and testament and his estate.

5. Subsequently, Respondent was asked to review the circumstances of the amputation of Mr. Klepac's toe prior to his death.

6. Mr. Klepac was a diabetic and had died of congestive heart failure.

7. While providing legal counsel to the estate of Mr. Klepac, Respondent agreed to pursue a medical malpractice action on behalf of the estate concerning the aforementioned amputated toe which allegedly occurred due to negligent post-operative care.

8. Respondent timely initiated the malpractice action.

9. Pursuant to a case management order of the court where the malpractice action was pending, the estate was ordered to submit a report of an expert showing the purported negligence in post-operative care.

10. Despite his efforts to locate and/or secure an expert witness (see, e.g. Exhibit 4, "Pre-bill worksheet," attached to the stipulations of the parties) Respondent was unable to locate an expert witness willing to testify on behalf of the estate.

11. The defendants to the malpractice action filed for, and obtained, a summary judgment.

12. Respondent did not respond to the motions for summary judgment which resulted in the dismissal of the estate's complaint on February 12, 2002.

13. Respondent never advised his clients of his inability to secure an expert witness or that the action had been dismissed.

14. In May and June, 2004, one of Respondent's clients was pressuring him to settle the malpractice case for \$25,000, being unaware that the action had been terminated over two years earlier.

15. Instead of telling the family of the deceased the truth of the matter, Respondent met with one of the daughters of the deceased (Ms. Jelovic, the other daughter being the executrix of the estate, Ms. Bukszar) and told her he could settle the case for \$16,000.

16. Upon being advised that the \$16,000 "offer" was acceptable, Respondent, in the presence of Ms. Jelovic, obtained a blank check from his IOLTA account and drafted a \$16,000 check payable to "Donna Jelovic."

17. Contemporaneous with the aforementioned transaction, Ms. Jelovic executed a form authorizing Respondent to close his file on the malpractice case.

18. Ms. Jelovic cashed the check from Respondent's IOLTA account and gave one-half to her sister, Ms. Bukszar, the executrix of the estate of Janko Klepac.

19. The source of the \$16,000 paid to Ms. Jelovic was from the personal funds of Respondent, i.e. his Merrill Lynch account. (See stipulations 36-38.)

20. Neither Ms. Jelovic nor Ms. Bukszar was advised by Respondent or were aware that the malpractice action of their father's estate was in fact dismissed for over two years, or that the money they received was from Respondent's personal funds.

21. Respondent never charged the estate, or filed a request for payment, or received any payment for the probate work he performed, or for the work he performed in the malpractice action.

COUNT TWO

22. Paragraph 49 through 63 of the stipulations of the parties attached hereto are incorporated by reference as if fully rewritten.

23. In summation, Respondent represented his uncle Nelson Neubig and Nelson's daughter, Kathleen Neubig. Respondent and Kathleen Neubig possessed a power of attorney for Nelson Neubig. Respondent believed that if he provided Kathleen access to certain documents of Nelson or pertaining to Nelson's assets, he would violate his obligation to Nelson. In the words of Relator, Respondent represented two clients and took the interest of one over the other. Respondent failed to return documents or the file of Kathleen upon her request or the request of Relator.

CONCLUSIONS OF LAW

The panel finds the admissions and stipulations of Respondent and the evidence adduced to be clear and convincing evidence that Respondent has violated the following Disciplinary Rules:

COUNT ONE

(1) DR 1-102(A)(4). A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(2) DR 1-102(A)(6). A lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law;

(3) DR 6-101(A)(3). A lawyer shall not neglect a legal matter entrusted to him; and

(4) DR 9-102(A). No funds belonging to a lawyer or law firm shall be deposited into the attorney's trust account.

COUNT TWO

(5) DR 9-102(B)(4). A lawyer shall promptly deliver upon request from the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

AGGRAVATION

The panel finds none of the factors set forth in BCGD Proc. Reg. 10(B)(1)(a-i).

MITIGATION

Pursuant to BCGD Proc. Reg. 10(B)(2)(a-h), the panel finds the following mitigating factors:

(a) Absence of a prior disciplinary record. (Stipulated).

(b) Respondent acknowledges the wrongful nature of his conduct. (Stipulated).

(c) Respondent has made restitution to the Estate of Janko Klepac. (Stipulated).

(d) Respondent has fully cooperated in these proceedings. (Stipulated).

(e) Character or reputation is generally excellent.

(f) Absence of a dishonest or selfish motive relative to personal financial gain. In fact, Respondent lost \$16,000 out of pocket in an effort to appease relatives and performed legal services on their behalf without fees.

(g) Absence of financial harm to his clients.

SANCTION RECOMMENDATION

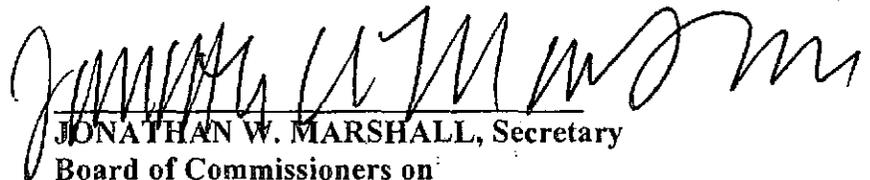
Relator recommended a sanction of a 12 month suspension with 6 months stayed. Respondent requested a 12 month suspension with all of the suspension stayed. The rule violation which would ordinarily cause this panel to embrace the recommendation of Relator is one involving DR 1-102(A)(4). However, the panel accepted that stipulated violation primarily because Respondent was deceitful to his client. Accordingly, the dishonesty and selfish motive found in cases where an actual suspension was imposed, was noticeably lacking here. Moreover, the absence of any harm to a client (arguably the clients received a benefit from the

conduct of Respondent relative to the tenuous merits of the malpractice case), the good character and reputation of Respondent, his cooperation and clean disciplinary record, necessitate a conclusion that an actual suspension is not a just result under the facts and circumstances of this case. Therefore, the panel recommends that Respondent receive a 12 month suspension, all of it stayed.

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 April 13, 2007. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, William Mark Fumich, Jr., be suspended from the practice of law in the State of Ohio for a period of one year with the entire one year stayed. 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**

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

In re:

Complaint against

William Mark Fumich, Jr., Esq.
Seeley, Savidge & Ebert
800 Bank One Center, 8th Floor
600 Superior Avenue, East
Cleveland, OH 44114-2655

AGREED STIPULATIONS

Attorney Registration No. (0022600)

BOARD NO. 05-076

Respondent,

FILED

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

FEB 23 2007
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

Relator.

Relator, Disciplinary Counsel, and respondent, William Mark Fumich, do hereby stipulate to the admission of the following facts, the following violations of the Code of Professional Conduct and the authenticity and admission of the attached exhibits.

STIPULATED FACTS

1. Respondent, William Mark Fumich, was admitted to the practice of law in the state of Ohio on November 19, 1976. Respondent is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.
2. Respondent is currently practicing law as a sole practitioner in Westlake, Ohio.

COUNT I – THE ESTATE OF JANKO KLEPAC

3. Janko Klepac, now deceased, was a relative of respondent's, and Nada Bukszar and Danica ("Donna") Jelovic are Mr. Klepac's daughters.
 4. In February 1980, respondent began representing Mr. Klepac, including preparing estate planning documents for him.
 5. Respondent drafted a will and a trust for Ms. Bukszar and her husband and a will for Ms. Jelovic and her husband.
-
6. Mr. Klepac passed away in June 1998 at the age of 76. The cause of death identified on the death certificate is congestive heart failure.
 7. Shortly after Mr. Klepac's death, Ms. Bukszar and Ms. Jelovic asked respondent to assist in the probate of Mr. Klepac's will.
 8. Respondent agreed to the representation, and he filed the estate in the Cuyahoga County Probate Court on November 30, 1998. The estate was assigned case number 1998 EST 0013596.
 9. Ms. Bukszar was named as the executor of Mr. Klepac's estate.
 10. Respondent never charged the estate or filed a request for payment with the probate court for the work that he performed.
 11. Ms. Bukszar and Ms. Jelovic also asked respondent to review the circumstances that led to the amputation of Mr. Klepac's toe prior to his death.
 12. Respondent agreed to review the matter.
 13. At the end of 1998 or early in 1999, respondent agreed to pursue a medical malpractice action on behalf of the estate as a result of circumstances that led to the amputation of one of Mr. Klepac's toes.

14. Respondent asserts that he discussed the terms of the representation with Ms. Bukszar and Ms. Jelovic, and he asserts that they agreed to pay him a contingent fee of one-third of any recovery and to pay all expenses of the action.
15. The fee agreement was never reduced to writing.
16. On March 22, 1999, respondent filed a medical malpractice action in the Cuyahoga County Court of Common Pleas on behalf of the Estate of Janko Klepac against Metrohealth Medical Center ("Metro"), St. Vincent Charity Hospital ("St. Vincent"), and Grace Hospital ("Grace"), seeking \$500,000 in damages. The case was assigned case number CV-99-380595.
17. A case management conference was held on June 29, 1999, and as a result of the case management conference, respondent was required to submit an expert witness report by November 30, 1999.
18. Respondent was granted an extension to file the expert witness report.
19. Respondent had difficulty finding an expert witness to establish causation of death and the standard of care on the medical malpractice claim. Dr. Alexander, a vascular surgeon, had previously told Ms. Bukszar, Ms. Jelovic and Respondent that he believed that substandard medical care was the cause of Mr. Klepac's gangrenous toe.
20. On February 17, 2000, respondent filed a voluntary dismissal of the action on behalf of the estate, and the case was dismissed without prejudice on February 25, 2000.

21. Respondent re-filed the case in the Cuyahoga County Court of Common Pleas on February 20, 2001, with identical claims and identical parties. The case was assigned case number CV-01-430681.
22. Respondent continued to have difficulty retaining an expert witness to establish causation of death and the standard of care.
23. Dr. Alexander, the vascular surgeon who previously informed Ms. Bukszar, Ms. Jelovic and Respondent that substandard care led to the gangrenous toe, stated that he would not so testify because he was associated with one of the hospitals. Dr. Alexander submitted an affidavit now stating that there was no substandard care.
24. Respondent filed a Stipulation of Voluntary Dismissal of St. Vincent on September 25, 2001.
25. Respondent was not able to find an expert witness to establish causation of death, so he did not file an expert witness report within the deadline.
26. Metro and Grace filed for summary judgment.
27. Respondent did not file any response to the summary judgment motions. Respondent asserts that he did not do so because he had no expert witness to support opposition to the motion.
28. The court granted both summary judgment motions, and the case was dismissed as of February 12, 2002.
29. Respondent took no further action in the case.
30. Respondent never informed Ms. Bukszar or Ms. Jelovic that the case was concluded.

31. Thereafter, respondent would see Ms. Bukszar and Ms. Jelovic at family functions, and he continued to represent Ms. Jelovic's husband in business matters.
 32. In May 2004, Ms. Jelovic telephoned respondent to inquire about the status of the case.
 33. Respondent did not inform Ms. Jelovic that the case had been dismissed in February 2002.
-
34. On Friday, June 4, 2004, Ms. Jelovic telephoned respondent. She indicated that she wanted to settle and that she wanted the case settled by June 11, 2004 for \$25,000.
 35. Respondent did not inform Ms. Jelovic that the case had been dismissed.
 36. On Friday, June 11, 2004, respondent withdrew \$16,000 from his personal account at Merrill Lynch.
 37. Respondent then deposited the \$16,000 from his personal Merrill Lynch account into his IOLTA account at National City Bank (account # 2214600).
 38. Respondent ran the \$16,000 through his IOLTA account because he wanted the money to be paid to Ms. Jelovic on an "attorney check."
 39. Respondent took a check from his IOLTA account and met with Ms. Jelovic at her place of employment on the afternoon of Friday, June 11, 2004.
 40. Respondent wrote check #3266 from his IOLTA account to Ms. Jelovic for \$16,000.
 41. Ms. Jelovic accepted the check.

42. At their meeting on June 11, 2004, respondent did not inform Ms. Jelovic that the case had been dismissed in February 2002.
43. At their meeting on June 11, 2004, respondent did not inform Ms. Jelovic that the money that he gave her was from his personal funds.
44. After respondent gave Ms. Jelovic the \$16,000 check, he had her sign a form from Seeley, Savidge & Ebert authorizing him to close the file.
45. On Monday, June 14, 2004, when Ms. Jelovic spoke with respondent to ask additional questions about the settlement, he was at the post office attending to the business of a client.
46. Respondent did not have any other conversations with Ms. Jelovic or Ms. Bukszar regarding the case after June 14, 2004.
47. Ms. Jelovic filed the grievance herein on July 16, 2004.
48. Respondent failed to keep Ms. Bukszar and Ms. Jelovic informed about the status of the medical malpractice case.

COUNT II – NEUBIG

49. Nelson Neubig (now deceased) was respondent's uncle, and Kathleen Neubig is a daughter of Nelson Neubig and respondent's first cousin.
50. Respondent represented Mr. Neubig on various legal matters between 1976 and December 2004.
51. Respondent represented Ms. Neubig on several legal matters, including misdemeanor criminal charges and estate planning matters.
52. For many years prior to Mr. Neubig's death on April 6, 2006, he and Ms. Neubig resided together in Chesterland, Geauga County, Ohio.

53. Prior to Mr. Neubig's death, Ms. Neubig was his primary caregiver.
 54. On June 19, 2004, Mr. Neubig executed a Power of Attorney authorizing Respondent and Ms. Neubig to act on his behalf.
 55. On January 15, 2005, Ms. Neubig sent respondent a letter by certified mail.
 56. Respondent received the letter from Ms. Neubig.
 57. In February 2005, Ms. Neubig filed a grievance against respondent unrelated to the return of her files.
-
58. Respondent received a copy of the grievance that Ms. Neubig filed.
 59. On May 11, 2005, relator sent respondent a letter of inquiry by certified mail requesting that respondent provide a written response to the allegations raised in the grievance filed by Ms. Neubig.
 60. Respondent received the letter from relator, but respondent did not return any documents to Ms. Neubig.
 61. The July 26, 2005 letter requested that all of Ms. Neubig's legal documents in respondent's possession be returned.
 62. The July 26, 2005 letter was sent to respondent by certified mail.
 63. Respondent received the July 26, 2005 letter, but respondent did not return copies any documents to Ms. Neubig.

STIPULATED VIOLATIONS

- 64 Respondent's conduct as set forth in Count I herein violates the Code of Professional Responsibility: DR 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 1-

102(A)(6) (a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law); DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him); and DR 9-102(A) (no funds belonging to a lawyer shall be deposited into the attorney's trust account).

65 Respondent's conduct as set forth in Count II herein violates the Code of Professional Responsibility: DR 9-102(B)(4) (a lawyer shall promptly deliver to the client as requested by the client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive).

STIPULATED MITIGATING FACTORS

Relator and respondent stipulate to the following mitigating factors as listed in BCGD Proc. Reg. § 10(B)(2):

- (a) absence of a prior disciplinary record.
- (b) Respondent acknowledges the wrongful nature of his conduct.
- (c) Respondent has made restitution to the Estate of Janko Klepac.
- (d) Respondent has fully cooperated in these proceedings.

STIPULATED EXHIBITS

1. Check # 3266 dated 6/11/2004 from William Fumich IOLTA account to Donna Jelovic (front and back);
2. Check stub from William Fumich IOLTA in connection with check # 3266;
3. Form entitled "Authorization;"
4. Pre-bill worksheet for Estate of Janko Klepac from Seeley, Savidge & Ebert, Co. LPA;
5. Fax dated 10/9/01 from Seeley, Savidge & Ebert, Co. LPA to Dr. Baird and George Gianakopoulous;

6. Complaint from Cuyahoga County Case # CV 99-380595 Estate of Janko Klepac v. Metrohealth Medical Center, et al;
7. Docket from Cuyahoga County Case # CV 99-380595 Estate of Janko Klepac v. Metrohealth Medical Center, et al;
8. Notice of Dismissal pursuant to Rule 41(A) in # CV 99-380595 Estate of Janko Klepac v. Metrohealth Medical Center, et al;
9. Complaint filed in Cuyahoga County Case # CV 01-430681 Estate of Janko Klepac v. Metrohealth Medical Center, et al;
10. Docket from Cuyahoga County Case # CV 01-430681 Estate of Janko Klepac v. Metrohealth Medical Center, et al;
11. Stipulation of Dismissal of defendant St. Vincent Charity Hospital in Case # 430681, Estate of Janko Klepac v. MetroHealth Medical Center, et al;
12. Journal Entry granting Motion for Summary Judgment on behalf of defendant Grace Hospital in Case # 430681, Estate of Janko Klepac v. MetroHealth Medical Center, et al;
13. Journal Entry granting Motion for Summary Judgment on behalf of defendant Metrohealth Medical Center in Case # 430681, Estate of Janko Klepac v. MetroHealth Medical Center, et al;
14. May 9, 2005 written response of William Fumich to relator's letter of inquiry dated August 3, 2004;
15. June 2004 statement of William Fumich's IOLTA #2214600;

16. June 30, 2005 written response of William Fumich to relator's letter dated June 13, 2005;
17. October 18, 1999 bill for legal services in the "Estate of Janko Klepac" submitted by respondent to Ms. Nada Bukzsar;
18. October 18, 1999 letter from William Fumich to Ms. Nada Bukzsar, re: Estate of Janko Klepac;
19. Copy of October 22, 1999 money order in the amount of \$2,457.58 made out to William Fumich;
20. Docket from the Cuyahoga County Probate Court case # 1998 EST 0013596; decedent Janko Klepac;

21. One page of William Fumich's Merrill Lynch Account showing a withdrawal of \$16,000 on June 11, 2004;
22. January 15, 2005 letter from Nelson R. Neubig and Kathleen Neubig to respondent;
23. June 21, 2005 letter from respondent to relator;
24. January 13, 2006 letter from relator to respondent;
25. March 31, 2006 letter from respondent's counsel to relator;
26. Billing summary for Klepac lawsuit representation
27. Medical Record summary for Klepac lawsuit representation
28. 9/25/01 Plaintiff's Motion for Enlargement of Time to Provide Expert Report in Klepac lawsuit
29. 10/15/01 Affidavit of Jeffrey Alexander, M.D.
30. Character Letters

CONCLUSION

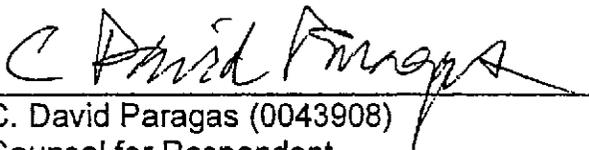
The above are stipulated to and entered into by agreement by the undersigned parties on this 22nd day of February, 2007.



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