

**IN THE SUPREME COURT OF OHIO**

**Disciplinary Counsel,** : **CASE NO. 2007-1570**  
 :  
**Co-Relator,** :  
 :  
**v.** :  
 :  
**Clifford Scott Portman (0073390)** : **ANSWER OF CO-RELATOR,**  
 : **DISCIPLINARY COUNSEL, TO**  
**Respondent.** : **RESPONDENT'S OBJECTIONS TO**  
 : **THE BOARD OF COMMISSIONERS'**  
 : **REPORT AND RECOMMENDATIONS**  
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**ANSWER OF CO-RELATOR, DISCIPLINARY COUNSEL, TO RESPONDENT'S  
OBJECTIONS TO THE BOARD OF COMMISSIONERS' REPORT AND  
RECOMMENDATIONS**

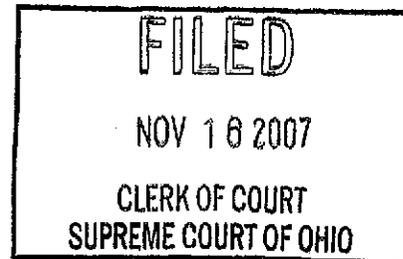
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DISBARMENT IS WARRANTED WHERE AN ATTORNEY COMMITS MULTIPLE ACTS OF MISCONDUCT, INCLUDING REPEATED ACTS OF NEGLIGENCE, FAILURE TO RETURN CLIENT FUNDS, ACCEPTING FEES FROM CLIENTS WHILE PERFORMING NO WORK ON THEIR CASES, AND FAILURE TO COOPERATE IN DISCIPLINARY INVESTIGATIONS.	
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### **DISCIPLINARY RULES**

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**IN THE SUPREME COURT OF OHIO**

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**Respondent.**

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Now come the co-relator, Disciplinary Counsel<sup>1</sup>, and hereby submits its answer to respondent's objections to the report and recommendations of the Board of Commissioners on Grievances and Discipline (board).

**STATEMENT OF THE CASE AND FACTS**

The statement of the case and facts set forth in respondent's objections is accurate except that the board also found that respondent violated DR 1 -104(A) (An

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<sup>1</sup> Co-Relator, Butler County Bar Association, will file a separate answer.

attorney must advise his client in writing that he does not maintain professional liability insurance).

## **ARGUMENT**

### **First Proposition of Law**

**The procedural rules governing disciplinary actions do not permit a party to supplement the record or present evidence of mitigation for the first time after the Court issues a show cause order following the filing of the report and recommendations of the Board of Commissioners on Grievances and Discipline.**

Case law clearly holds that a respondent may not submit evidence in the first instance to the Supreme Court in a disciplinary matter. In *Columbus Bar Assn. v. Sterner*, 77 Ohio St.3d. 164, 1996-Ohio-324, the Court refused to accept respondent's evidence of mitigation (his alleged attention deficit disorder), when he sought to introduce this evidence for the first time in his brief and in oral argument opposing the board's recommendation of disbarment after a default motion had been filed. *Id.* at 167. The Court discussed the Rules for the Government of the Bar of Ohio which set forth the procedural rules for disciplinary actions, and pointed out that there is no provision for the introduction of evidence in a brief filed with the Court or in oral argument. *Id.* at 167-168. The Court further stated:

If respondent has any objection here, it must be to the findings and recommendations of the board. The entire record sent to us from the board consists of the pleadings, the default motion, the affidavits, and other material filed in support of the motion, and the findings of fact and recommendations of the board after respondent failed to answer, otherwise plead, or appear before the panel. Matters in excuse and mitigation do not appear in that record, nor do exceptional circumstances exist that would allow such evidence

to be introduced for the first time by way of brief or oral argument in response to the order to show cause. *Id.* at 168.

The *Stern* Court upheld the board's recommendation that the respondent be disbarred from the practice of law in the state of Ohio.

The Court reached the same conclusion in *Columbus Bar Assn. v. Finneran*, 80 Ohio St.3d. 428, 1997-Ohio-286. In that case, the respondent also attempted to present evidence for the first time in his objections to the board's recommendations after a motion for default had been filed. The Court cited *Stern*, *supra*, and refused to accept this evidence.

Respondent here had ample opportunity to participate in the disciplinary investigations, provide evidence to the co-relators, answer the complaint and amended complaint, and appear before the panel to present whatever documentation or testimony he so desired. He did nothing until he received the notice to show cause. To permit respondent to "supplement the record" at this stage of the proceedings would set a dangerous precedent which would encourage respondents to ignore procedural rules to attempt to introduce evidence at the eleventh hour.

### **Second Proposition of Law**

**Disbarment is warranted where an attorney commits multiple acts of misconduct, including repeated acts of neglect, failure to return client funds, accepting fees from clients while performing no work on their cases, and failure to cooperate in disciplinary investigations.**

This Court has long held that disbarment is the appropriate sanction for an attorney who accepts fees from clients and then fails to do any work, particularly when such misappropriations are combined with other misconduct including

misrepresentations of filings never made. In this case, respondent has admitted the following misconduct:

- Respondent accepted fees from clients but performed no work on their cases.
- Respondent lied to a client as to work he allegedly performed.
- Respondent failed to timely return fees to clients despite their repeated requests.
- Respondent accepted a fee from a client for which he was appointed counsel, yet also submitted a request and was reimbursed for fees from the county.
- Respondent failed to respond to six letters, as well as a subpoena to appear for a deposition from the Office of Disciplinary Counsel.
- Respondent failed to produce any documents to the Butler County Bar Association despite his testimony under oath that he would do so.
- Respondent failed to advise his clients that he permitted his malpractice insurance to lapse.

In *Cincinnati Bar Assn. v. Weaver*, 102 Ohio St.3d. 264, 2004-Ohio-2683, respondent was disbarred for neglecting three client matters, failing to perform as promised, failing to account for client funds, and failure to participate in the disciplinary proceedings. This Court noted:

Taking retainers and failing to carry out contracts of employment is tantamount to theft of the fee from the client. (Citation omitted) The presumptive disciplinary measure for such acts of misappropriation is disbarment. (Citation omitted) Moreover, when faced with misappropriation and other professional misconduct that respondent has committed, including misrepresentations of filings never made, we have imposed our strictest sanction. *Id.* at ¶ 16

Respondent argues that an indefinite suspension should be imposed due to his last minute attempt to present mitigation evidence to the Court. After the Court issued its notice to show cause, respondent filed a motion to supplement the record and objections to the board's recommendations. This was respondent's first appearance in this matter. In his pleadings, respondent argues that he made restitution to his clients and to the Butler County Auditor, and that he suffers from a "mental condition" warranting leniency for his misconduct.

Neither of respondent's assertions qualify as mitigating factors. The only factor that would qualify is respondent's lack of prior disciplinary history, but that alone is not sufficient to justify any sanction less than disbarment.

BCGD Proc. Reg. 10(B)(2)(c) states that the following may be considered as mitigation:

[A] timely good faith effort to make restitution or to rectify consequences of misconduct. (Emphasis added)

The investigations regarding respondent's misconduct began nearly two years ago. However, it was not until October 16, 2007, the day before respondent's objections to the board's report and recommendations were to be filed, that he forwarded refunds to the affected clients, as well as the Butler County Auditor. Further, respondent also testified under oath in March, 2006 before the Butler County Bar Association that he would refund fees to his client within a few days. Respondent's last minute restitution can hardly be considered timely or reflective of good faith.

In his testimony to the bar association on March 16, 2006, respondent made no mention at all of any "mental condition" that contributed to his misconduct.

Just again, I want you to know I'm not making an excuse, but I have had some difficult times, and I'm kind of opening my heart here to tell you that. But I'm doing a great deal better now with regard to my business and finances, and that's really all that it's been about. It's no problems with drugs or alcohol or anything like that. I'm saying financially, I'm getting on my feet and making the right decisions, I think, and covering my bases. I just want you to keep that in mind.

I will return these funds to these people, you know, within the next few days. I'll make sure that that's taken care of immediately, if that makes a difference. . . (Co-relators' Motion for Default, Exhibit 14, pp.137-139)

...

BCGD Proc. Reg. 10(B)(2)(g) also lists specific requirements in order for a "mental condition" to be considered as a mitigating factor.

- (i.) A diagnoses of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor.
- (ii.) A determination that the chemical dependency or mental disability contributed to cause of the misconduct.
- (iii.) . . . in the event of a mental disability, a sustained period of successful treatment.
- (iv.) A prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

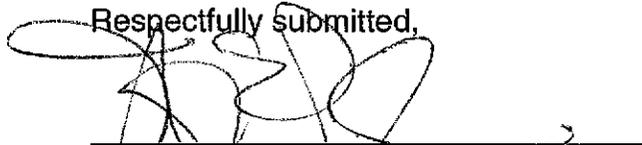
None of these factors have been established by timely or proper evidence.

### **CONCLUSION**

Respondent misappropriated client and county funds, lied to clients, failed to perform work on cases for which he was paid, and failed to cooperate in investigations by two disciplinary authorities. These multiple acts of misconduct clearly demonstrate

respondent lacks the character and fitness to practice law in the state of Ohio, and should be disbarred.

Respectfully submitted,



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Jonathan E. Coughlan (0026424)  
Disciplinary Counsel, Co-Relator



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Assistant Disciplinary Counsel, Co-Relator  
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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Co-Relator, Disciplinary Counsel's Answer to Respondent's Objections to the Board of Commissioners' Report and Recommendations was served via U.S. Mail, postage prepaid, upon respondent's counsel, Alvin Mathews, Bricker & Eckler, 100 South Third Street, Columbus, Ohio, 43215, Co-Relator, Richard Hyde, Esq., Holcomb, Hyde & Gmoser, LLP, 311 Key Bank Building, 6 S. Second Street, Hamilton, Ohio, 45011, and via hand delivery upon Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio, 43215 this 16th day of November, 2007.



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Carol A. Costa  
Assistant Disciplinary Counsel

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

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

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

(E) Probable Cause Panels

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

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

(Effective 6-1-00)

Section 10. Guidelines for Imposing Lawyer Sanctions

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

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

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

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) lack of cooperation in the disciplinary process;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of and resulting harm to victims of the misconduct;

(i) failure to make restitution.

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

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;
- (e) character or reputation;
- (f) imposition of other penalties or sanctions;
- (g) chemical dependency or mental disability when there has been all of the following:

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

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

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

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

(h) other interim rehabilitation.

(Effective 6-1-00; amended, eff. 2-1-03)

Section 11. Consent to Discipline.

(A) As used in this section:

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

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

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

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

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

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

tarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. If in the course of an investigation by a grievance or ethics committee of a bar association or by the office of disciplinary counsel it is found that persons involved in the investigation may have violated federal or state criminal statutes, it is the duty of the investigatory agency to notify the appropriate law enforcement or prosecutorial authority of such alleged criminal violation. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

(Amended, eff 6-11-79)

**EC 1-5.** A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

**EC 1-6.** An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license, or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

#### DISCIPLINARY RULES

##### **DR 1-101. MAINTAINING INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.**

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

##### **DR 1-102. MISCONDUCT.**

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule or, as a judicial candidate as defined in Canon 7 of the Code of

Judicial Conduct, the provisions of the Code of Judicial Conduct applicable to judicial candidates.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(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.

(B) A lawyer shall not engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability. This prohibition does not apply to a lawyer's confidential communication to a client or preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

(Amended, eff 7-1-94; 7-1-95)

##### **DR 1-103. DISCLOSURE OF INFORMATION TO AUTHORITIES.**

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) Any knowledge obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems shall be privileged for all purposes under DR 1-103, provided the knowledge was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation.

(Amended, eff 6-17-87; 9-1-95; 2-1-03)

##### **DR 1-104. DISCLOSURE OF INFORMATION TO THE CLIENT**

(A) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be

provided to the client on a separate form set forth following this rule and shall be signed by the client.

(B) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(C) The notice required by division (A) of this rule shall not apply to a lawyer who is engaged in either of the following:

- (1) Rendering legal services to a governmental entity that employs the lawyer;
- (2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

**NOTICE TO CLIENT  
Required by DR 1-104**

**Ohio Code of Professional Responsibility**

Pursuant to DR 1-104 of the Ohio Code of Professional Responsibility, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Attorney's Signature

**CLIENT ACKNOWLEDGEMENT**

I acknowledge receipt of the notice required by DR 1-104 of the Ohio Code of Professional Responsibility that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Client's Signature

\_\_\_\_\_  
Date

**CASE NOTES AND OAG**

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Discrimination  
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Misrepresentation to court  
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**Discrimination**

A finding of discrimination by the Ohio civil rights commission, the equal employment opportunity commission, or a state or federal court is not a prerequisite to the board of commissioners on grievances and discipline finding that an attorney violated DR 1-102(B); Cincinnati Bar Assn. v. Young, 89 Ohio St. 3d 306, 731 N.E.2d 631 (2000).

**Judicial misconduct**

A judge acts in a manner "prejudicial to the administration of justice" within the meaning of DR 1-102(A)(5) when the judge engages in conduct that would appear to an objective observer to be unjudicial and prejudicial to the public esteem for the judicial office; Cleveland Bar Assn. v. Cleary, 93 Ohio St. 3d 191, 754 N.E.2d 235 (2001).

**Letterhead**

When an attorney engages in a course of conduct that violates DR 1-102(A)(4), the attorney will be actually

suspended from the practice of law for an appropriate period of time; Disciplinary Counsel v. Fowerbaugh, 74 Ohio St. 3d 187, 658 N.E.2d 237 (1995).

**Misrepresentation to court**

When a lawyer intentionally misrepresents a crucial fact to a court in order to effect a desired result to benefit a party, the lawyer will be suspended from the practice of law in Ohio for an appropriate period of time; Disciplinary Counsel v. Greene, 74 Ohio St. 3d 13, 655 N.E.2d 1299 (1995).

**Moral turpitude**

Proof of a criminal conviction is generally not conclusive of the issue of moral turpitude, which requires consideration of all the circumstances surrounding the illegal conduct; Disciplinary Counsel v. Burkhart, 75 Ohio St. 3d 188, 661 N.E.2d 1062 (1996).

**CANON 2**

**A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available**

*ETHICAL CONSIDERATIONS*

**EC 2-1.** The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

*Recognition of Legal Problems*

**EC 2-2.** The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers acting under proper auspices should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Such educational programs should be motivated by a desire to benefit the public rather than to obtain publicity or employment for particular lawyers. Examples of permissible activities include preparation of institutional advertisements and professional articles for lay publications and participation in seminars, lectures, and civic programs. But a lawyer who participates in such activities should shun personal publicity.

**EC 2-3.** Whether a lawyer acts properly in volunteering advice to a layman to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The