

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

06-738

IN THE MATTER OF: : Case No. 1:06MC93-SSB

THOMAS MANNING (#0059759) :

ORDER

Respondent Thomas J. Manning, through counsel, has opted to challenge the imposition of a two-year suspension from the practice of law in this Court in conformity with the Ohio Supreme Court's suspension of Respondent's privilege to practice law in the state courts entered on November 22, 2006.

Standard of Review

The Model Rules of Disciplinary Enforcement as adopted by this Court and specifically Rule II (D)(1), (2), (3) and (4) provide that this Court "shall impose the identical discipline [imposed by the Ohio Supreme Court] unless the respondent-attorney demonstrates, or this Court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or
3. that the imposition of the same discipline by this Court would result in grave injustice; or
4. that the misconduct established in (sic) deemed by this Court to warrant substantially different discipline."

The Rule does not contemplate a review de novo or further evidentiary proceedings, rather this Court reviews the existing record before the Ohio Supreme Court.

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Analysis

I. Respondent's position

Respondent argues that the two-year suspension ordered by the Ohio Supreme Court "was unduly harsh, and that a lesser suspension, most likely one of six months" would be more appropriate. (Doc. No. 2 at *2.) He does not specifically reference any of the grounds listed in Rule II (D)(1)-(4) of the Model Rules of Disciplinary Enforcement which guides this Court. However, it appears that he seeks relief under subsection (3) or (4).

Respondent points out that no harm was caused to his clients. He attaches his objections to the Board's actions from the state proceedings. He first protests the Board's failure to specifically cite or consider three letters in mitigation attesting to his "good character and reputation." (Doc. No. 2 at 6.) He cites BCGD Proc. Reg. 10(B)(2) as authority for this position. He overlooks, however, the precise language of that Regulation, which states that the Board may consider mitigation evidence in favor of recommending a less severe sanction. While this Court does not discount the value of the letters in support of Respondent from a sitting Montgomery County Common Pleas Judge, as well as, a letter from the Assistant Executive Director of the Dayton Bar Association and one of Respondent's former clients, we note that not unlike medical malpractice, Respondent's ethical failure here does not necessarily reflect upon his entire career or character.

Respondent complains that the Board did not refer to any of the many cases to which he compares his case in the text of its decision. He interprets this as a failure to adequately consider other disciplinary sanctions imposed in similar cases, so that the penalty here is not "commensurate with the circumstances in this case." (Id at 9.) He cites thirty-eight cases ranging in age from 1995 to 2006 from Ohio Supreme Court precedents to New York and Florida precedents. Respondent argues that other attorneys have committed more egregious ethical lapses yet suffered lighter disciplinary action.

Findings of Fact

The Court found the following facts by clear and convincing evidence and Respondent concedes that they are accurate:

1. Respondent Thomas Manning was licensed to practice on November 9, 1992, having graduated from the University of Dayton College of Law and is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.
2. On or about March 12, 2000, Respondent was hired by Alfred and Nollie Combs (hereinafter referred to as the Combs) for a medical malpractice action.
3. In July 2000, the Respondent contacted Attorney John Lafferty from the Toledo, Ohio Law Firm of Williams, Jilek, Lafferty, Gallagher & Scott for assistance in evaluating and litigating the case.
4. On July 21, 2000, Lafferty requested a fee of \$1,000.00 for an expert to evaluate the case.
5. On November 21, 2000, at Respondent's request the Combs paid the \$1,000.00, which the Respondent deposited into his personal bank account on November 28, 2000.
6. The Combs contacted the Respondent over a period of time and ultimately contacted Lafferty on or around February 21, 2001. Lafferty informed the Combs that neither he nor the firm had any involvement in the case and had not received any money from the Respondent.
7. When confronted by the Combs, the Respondent admitted that he decided to handle the case himself and did not retain Lafferty.

8. Over a period of time, the Respondent falsely stated to the Combs on numerous occasions that he had filed the malpractice action in the Montgomery County Court of Common Pleas.
9. The Combs requested the case number of the action, but the Respondent never gave them any information.
10. Sometime before December 11, 2003, Respondent falsely stated to the Combs that there were some settlement offers on the malpractice case.
11. Respondent advised Alfred Combs to accept the \$47,500 settlement, despite the fact that no such offer existed.
12. The Respondent created a structured settlement that provided for three installment payments as follows:

First Installment:	\$10,000 on or before December 8, 2003.
Second Installment:	\$10,000 on or before February 10, 2004.
Third Installment:	\$27,500 on or before February 10, 2005.
13. On or near December 11, 2003, while at the Combs' residence, Respondent provided the Combs with documents purporting to be a Release and Confidentiality Agreement, and an Itemized Statement for the Personal Injury Distribution.
14. The statement did not mention the initial \$1,000.00 deposited with the Respondent.
15. The purported Release and Confidentiality Agreement ostensibly released the treating physicians and hospitals in exchange for a \$47,500 structured settlement.
16. On that same day, Respondent provided the Combs with a \$5,221.14 check drawn on Respondent's IOLTA account at Fifth Third Bank,

account no. ****7356.

17. Respondent falsely informed the Combs that the \$5,221.14 check was the first installment from the medical providers under the terms of the alleged structured settlement agreement.
18. In February 2004, the Combs contacted the Respondent for the second installment payment, which was to include the \$1,000.00 initial deposit.
19. The Respondent falsely stated that he did not know when the money would be wired to his IOLTA account.
20. The Combs contacted Attorney Jennifer Steel to investigate the matter.
21. When Steel discovered that the Respondent never filed a medical malpractice action for the Combs, she contacted the Respondent.
22. The Respondent admitted to Steel that he had fabricated the settlement agreement to avoid a malpractice claim against himself and that he intended to pay the \$47,500 from his own personal funds.
23. The Respondent testified at the hearing that he refunded the initial \$1,000 to the Combs approximately six weeks prior to the disciplinary hearing.
24. The Respondent testified that Alfred Comb's medical malpractice case was compromised by his underlying health, to wit, he had advance heart disease.

Based upon the stipulations and Respondent's testimony, the Panel unanimously found the following violations of the Code of Professional Responsibility had been demonstrated by clear and convincing evidence:

DR 1-102(A)(4), Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

DR 1-102(A)(5), Engage in conduct that is prejudicial to the administration of justice;

DR 1-102 (A)(6), Engage in conduct that adversely reflects on the lawyer's fitness to practice law;

DR 2-106(A), Enter into an agreement for, charge, or collect an illegal or clearly excessive fee;

DR 2-110(A)(3); A lawyer who withdraws from employment shall refund promptly part of a fee paid in advance that has not been earned;

DR 6-101(A)(3), Neglect a legal matter entrusted to him;

DR 6-102, A lawyer shall not attempt to exonerate himself from or limit liability to a client for personal malpractice;

DR 7-101(A)(2), Intentionally fail to carry out a contract of employment entered into with a client;

DR 9-102(A), All funds paid to a lawyer or law firm, other than for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein.

It specifically considered that the facts reflect dishonesty and a pattern of misconduct on the part of the Respondent, but that he had no prior disciplinary record, "provided full and free disclosure" (Doc. No. 2-2 at 35) and "exhibited a cooperative attitude towards the proceedings." (Id.) The Board noted that Respondent is a solo practitioner and at the time of the pertinent events was experiencing personal pressures in the form of a newly purchased home and the discovery that his wife was pregnant with their first child. He missed his client's medical malpractice statute of limitations deadline and events thereafter devolved into the cause of the state disciplinary process.

While there may have been some question about the merit of the client's medical malpractice cause of action, Respondent ultimately accepted responsibility for his actions in trying to cover up his misdeeds and expressed remorse for his actions.

The Board specifically mentions considering three cases cited by the Relator

Disciplinary Counsel v. Insley, 819 N.E.2d 1109 (Ohio 2004); In re Vivas, 692 N.Y.S.2d 742 (N.Y. App. 1999) and Disciplinary Counsel v. Fowerbough, 658 N.E.2d 237 (Ohio 1995). In Fowerbaugh, the Supreme Court of Ohio concluded that "in all cases where an attorney engages in a pattern of conduct of misleading or lying to a client concerning a legal matter entrusted to the lawyer by the client" (Id. at 239), "the attorney will be actually suspended from the practice of law for an appropriate period of time." Id. at 240. In particular, the case references violation of DR 1-102 (A)(4). Since that decision, the Court has repeatedly cited that ruling as a touchstone standard for the imposition of discipline in cases falling under that section of the Code of Professional Responsibility. Nothing in any of the cases cited by Respondent indicates that the Supreme Court of Ohio or this Court should retreat from that standard. Thus, in light of Respondent's Stipulation that he has violated DR 1-102 (A)(4) among other Disciplinary Rules, it seems clear that some suspension of Respondent's privilege to practice law in both the state and federal courts is appropriate. Only the length of the suspension is in issue.

In Fowerbaugh, the Respondent engaged in conduct constituting violations of DR 6-101 (A)(2) for handling a legal matter without preparation adequate in the circumstances and DR 1-102 (A)(4) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Over a period stretching from April 1992 to November 1993, Fowerbaugh falsely represented to his client Patricia Veale that he was proceeding on obtaining a parentage and child support order for her minor child. Although Respondent reached an out of court agreement with the putative father for payment of \$450 per month to Veale, he did not pursue the paternity action in the Summit County Juvenile Court, the specific matter for which he had been engaged. Additionally, he repeatedly told Veale that he was, indeed, pursuing the paternity action and produced a fake copy of a complaint purporting to have been filed in the Summit County Juvenile Court. Respondent continued his pattern of dishonest conduct by falsely claiming that a hearing had been scheduled by the Court, calling Veale to confirm the date (causing Veale to purchase an airline ticket to attend the hearing) and

then falsely representing that the hearing had been cancelled. The Court noted a series of aggravating and mitigating circumstances that it considered in reaching its decision to suspend Respondent from the practice of law for six months. The client did not suffer financial harm or pecuniary loss as a result of Respondent's conduct. Respondent had an otherwise unblemished record of 30 years in the practice of law and had been candid with the panel. During the period of the deception, Respondent had suffered undefined personal problems and an "upheaval in his office," both of which had been corrected prior to the Court's final determination. However, the Court recognized that "this conduct may hereafter require more severe discipline than we have previously imposed." *Id.* at 239. Clearly, the Court was seeking to drive home a point. Presumably, Respondent here believes that the discipline imposed in Fowerbaugh would be appropriate here. The Court chooses to review the intervening decisions between Fowerbaugh in 1995 and Manning in 2006 of the Supreme Court of Ohio to attempt to discern any trends or constants.

This Court notes that Respondent has cited Disciplinary Counsel v. Insley, 819 N.E.2d 1109 (Ohio 2004) in an effort to persuade us that the sanction in this case is excessive. In Insley, the Court found six violations of the disciplinary rules: Insley had failed to pursue obtaining a temporary custody order to allow a student to remain in the high school of his choice after his mother had moved out of the school district. Perhaps most egregiously, Insley had created a bogus court order with photocopied signatures of a magistrate and common pleas court judge purporting to grant the temporary custody needed. Insley had no prior disciplinary record, but after some initial cooperation, she ceased her participation in the investigation. The Court concluded that an indefinite suspension of Insley's privilege to practice law was the most appropriate sanction rather than the board's more lenient recommendation of a two-year suspension with the second year of suspension stayed on certain conditions. The Court particularly noted "the dearth of extenuating circumstances." *Id.* at 1112.

¹Id.

The Respondent has also cited In Re Vivas, 692 N.Y.S.2d 742 (N.Y. App. 1999), to what end we are uncertain. In that case respondent was suspended from the practice of law for a period of two years for fabricating a set of motion papers and committing a fraud upon her client. The Court noted that Vivas had expressed remorse, cooperated fully and was under severe personal and professional pressures as described in the decision, yet concluded that the two-year suspension was justified.

None of these cases appears to inure to the benefit of Respondent. However, he has cited another 35 cases which we have dutifully reviewed. Initially, the Court notes that Respondent has cited four additional cases from outside this jurisdiction: Matter of LeBlanc, 674 N.Y.S.2d 524 (N.Y. App. 1998); Florida Bar v. Jemmer, 753 So.2d 555 (Fla. 1999); Matter of Levantino, 712 N.Y.S.2d 575 (N.Y. App. 2000) and Matter of Haberman, 807 N.Y.S.2d 621 (N.Y. App. 2006). None of these cases seems especially apposite. Moreover, it appears obvious that these two other jurisdictions view ethical lapses by attorneys in their professional activities very differently from the Supreme Court of Ohio and this Court. LeBlanc is a *per curiam* decision so lacking in detail as to be unhelpful. Little can be gleaned from the decision. In LeBlanc, respondent "misrepresented the status of a case to two clients, altered the date on a summons on which his clients' signatures were notarized, and presented a fictitious order to his clients." Id. LeBlanc had an "otherwise unblemished record and expressed remorse for his misconduct." Id. Although it appears superficially similar to Respondent's case, this Court does not accept LeBlanc's case as comparable to the matter under consideration. A perfunctory page and one half decision leaves us with no clear understanding of the basis for the decision. Jemmer is wholly inapposite, as it deals with the consequences of respondent's drug abuse, which did not directly affect her legal practice, together with respondent's rehabilitative efforts. Levantino involved a one-year suspension for neglect of a legal matter and misrepresentation to the client about the neglect. There the New York court imposed a one-year suspension where the client suffered no harm and respondent expressed remorse, provided full cooperation and offered an altruistic motive for his actions. This Court cannot say that

the facts of Levantino and those of Respondent's case are wholly different, but Levantino's "depressed emotional state emanating from marital problems and the death of his brother" together with his altruistic motivation for his actions, *id.* at 577, may have moved the New York court to a more lenient than usual sentence. In general these matters do not lend themselves to mathematically precise comparisons, but this Court finds none of these cases sufficiently close to this matter to be helpful in our analysis. In Haberman, the respondent neglected a client's annulment matter over the course of seven years. The New York court concluded that a "public censure" would suffice as a sanction. It noted that three attorneys had testified to respondent's otherwise good professional reputation. The Court confesses complete befuddlement at the New York court's rationale for its choice of an essentially *de minimus* sanction and rejects it as wholly unsupported and unsupportable. It must be disregarded as an aberration.

Thus, this Court turns to the Ohio cases that may fruitfully be compared to the present facts and stipulated violations. Several cases cited by Respondent can be immediately distinguished from the matter at hand. Cincinnati Bar Assn. v. Fidler, 700 N.E.2d 323 (Ohio 1998) (*per curiam* opinion, so sketchy as to be unhelpful; three Code of Professional Responsibility violations with discipline of 18 months suspension from the practice of law with one year stayed pending successful completion of a one-year probation period); Disciplinary Counsel v. Eisenberg, 690 N.E.2d 1282 (Ohio 1998) (*per curiam* opinion, inapposite on the facts; public reprimand for tracing probate beneficiaries' signatures as a convenience to the parties, not under oath, no harm); Dayton Bar Assn. v. Kinney, 728 N.E.2d 1052 (Ohio 2000), (*per curiam* opinion, respondent misrepresented purchase price of a bar in connection with a liquor permit application/transfer process, no harm to client or the state, lengthy unblemished legal career; six-month suspension stayed); Disciplinary Counsel v. Allison, 737 N.E.2d 955 (Ohio 2000) (respondent failed to report full amount received as attorney fee in probate matter; respondent failed to answer complaint; two-year suspension with second year stayed upon repayment of excess unreported fee amount within first year); Toledo Bar Assn. v. Kramer, 731 N.E.2d 643 (Ohio 2000) (*per curiam* opinion, failure to pay client's

medical bills from settlement funds and misappropriation of portion of settlement funds, respondent under treatment for depression, paid medical bills in full; no prior disciplinary record in 19 years of practice; public reprimand); Disciplinary Counsel v. Markijohn, 794 N.E.2d 24 (Ohio 2003) (*per curiam* opinion, falsifying contributions to own retirement account, filed false state and federal income tax returns; respondent corrected the misconduct and self-reported these ethical lapses to the disciplinary counsel; six-month suspension stayed on condition of no further misconduct during term); Portage County Bar Assn. v. Mitchell, 800 N.E.2d 1106 (Ohio 2003) (respondent allowed non-lawyer convicted felon to work in his office without clear disclosure of his status to clients; respondent expressed remorse, made fee restitution to client, no prior disciplinary record, respondent experiencing divorce and financial difficulties during pertinent period, no dishonest or selfish motive; six-month suspension stayed on condition of no further disciplinary rule violations during term); Disciplinary Counsel v. Cuckler, 804 N.E.2d 966 (Ohio 2004) (*per curiam* opinion, respondent referred to himself as "counsel to Speaker of House of Representatives" prior to obtaining license to practice law; public reprimand); Disciplinary Counsel v. Hutchins, 807 N.E.2d 303 (Ohio 2004) (respondent fabricated magistrate's order relating to disbursement of proceeds of sale of marital home in connection with divorce proceedings and provided opposing counsel with misleading closing statement, no prior disciplinary sanction, no mitigation; six-month suspension); Toledo Bar Assn. v. Abood, 821 N.E.2d 560 (Ohio 2004) (failure to pay federal income taxes, criminal conviction and sentence for same, some mitigating circumstances; standard one-year suspension for violation of DR 1-102 (A)(6) and 9-102 (A) imposed with last six months stayed on condition of no violations and payment of costs); Cleveland Bar Assn. v. Lehotsky, 824 N.E.2d 534 (Ohio 2005) (failure to prepare wills, failure to return retainer, failure to cooperate, no prior discipline; one-year suspension); Columbus Bar Assn. v. Dougherty, 825 N.E.2d 1094 (Ohio 2005) (respondent notarized signature without actually witnessing signature; public reprimand - but see, Chief Justice Moyer dissented favoring a six-month suspension); Mahoning County Bar Assn. v. Melnick, 837 N.E.2d 1203 (Ohio 2005) (respondent notarized signatures without actually witnessing signatures, no prior disciplinary record,

cooperated fully, did not act in self-interest, tried to rectify wrongdoing; public reprimand); Disciplinary Counsel v. Runyan, 840 N.E.2d 623 (Ohio 2006) (*per curiam* opinion, respondent judge had sought to discipline police detective who had caused a mistrial, ruled on former client's motion to terminate prison sentence; public reprimand); and Erie-Huron Counties Joint Certified Grievance Committee v. Huber, 843 N.E.2d 781 (Ohio 2006) (*per curiam* opinion, respondent accepted retainers in at least three matters, but took no action in clients' behalf, failed to return one or more retainers, failed to produce proof of claimed malpractice insurance, no prior discipline in 50 years of practice; one-year suspension on condition that retainers be refunded - but see, Chief Justice Moyer's dissent favoring indefinite suspension). This Court finds the facts of all of the above cases to be too far removed from the case at bar to provide viable comparators. Thus, we move on to consider the balance of Respondent's citations.

The following group of cases also seem to be lacking in congruity to the present matter. Cincinnati Bar Assn. v. Slatzer, 800 N.E.2d 1117 (Ohio 2003) (respondent conspicuously placed audio tapes on table during deposition suggesting that impeaching and embarrassing matters were on the tapes, when in fact they were blank or irrelevant; no prior discipline; respondent cooperated; six-month suspension stayed on condition of no further misconduct); Disciplinary Counsel v. Jaffe, 809 N.E.2d 1122 (Ohio 2004) (*per curiam* opinion, respondent neglected four matters entrusted to him and misrepresented the status of the matters to his clients, commingled personal and IOLTA funds; no prior discipline in 23 years of practice; respondent cooperated; respondent clinically depressed at the pertinent time, but professional prognosis good; two-year suspension with one year stayed on conditions); Toledo Bar Assn. v. Lowden, 826 N.E.2d 836 (Ohio 2005) (*per curiam* opinion, respondent failed to return client's phone calls, properly prepare case or appear at trial; failed to complete representation in criminal case; prior suspension for non-payment of child support; respondent was Gulf War veteran, suffering from mental illness, not currently practicing law; two-year suspension stayed on conditions); Disciplinary Counsel v. Carroll, 831 N.E.2d 1000 (Ohio 2005) (*per curiam* opinion, stipulated facts as to violations - performed private

practice activities while serving as full-time executive director to Ohio State Barber Board, filing inaccurate, improper time sheets; respondent paid restitution; plead no contest to second-degree misdemeanor dereliction of duty; no prior discipline, full cooperation, prompt payment of restitution, acknowledgment of responsibility, prompt resignation, genuine remorse, no harm to clients and mitigating testimony re: respondent's good character and reputation; six-month suspension stayed on condition of no further misconduct; but note, Chief Justice Moyer dissenting in favor of an actual six-month suspension); Disciplinary Counsel v. Holland, 835 N.E.2d 361 (Ohio 2005) (per curiam opinion, respondent double billed for services rendered in connection with multiple appointments to represent clients in juvenile court; respondent acted out of self-interest, committed multiple offenses, engaged in pattern of wrongdoing, did not acknowledge wrongfulness of conduct balanced by no prior disciplinary history, fully cooperative, good professional reputation, corrected billing practices and reduced fees to atone for previous overpayments; one-year suspension, reinstatement conditioned on full restitution); and Disciplinary Counsel v. Johnson, 835 N.E.2d 354 (Ohio 2005) (*per curiam* opinion, companion case to Holland, *supra*; also double billed for services rendered in connection with multiple appointments to represent clients in juvenile court, this respondent learned the practice from Holland, a veteran practitioner in the Stark County Juvenile Court and was a comparatively inexperienced lawyer; suspended for one year, last six months stayed on conditions of no further misconduct and full restitution of unearned fees). None of these cases provides sufficiently comparable facts and/or sanctions to the case at bar. The Court concludes that a more detailed analysis of these rather easily distinguishable cases would not prove helpful to a realistic assessment of the alleged excessiveness of this Respondent's penalty. Thus, the Court discounts these cases and moves on to consider the balance of Respondent's citations.

The Court notes the variances in discipline meted out among the cases come in the portions of the suspensions that are stayed. Thus the Court is mindful of both the underlying suspension and, equally telling, the portion, if any that is stayed.

In Columbus Bar Assn. v. Torian, 829 N.E.2d 1210 (Ohio 2005) respondent was charged with five counts of misconduct. Count One charged respondent with accepting a retainer fee from a state inmate to assist in obtaining his early release or parole, but apparently took little, if any, action. Count Two charged that respondent had delayed six months in responding to letters from the disciplinary counsel regarding the matter charged in Count One, together with failing to produce documents requested in the *subpoena duces tecum* for her deposition. Count Three charged respondent with allowing her professional liability insurance to lapse and failing to advise her clients of that fact. Count Four charged respondent with accepting a retainer fee to obtain an executive pardon for her client. Respondent took no action in the client's behalf, never responded to his requests for his file and return of the retainer, never returned his file or fee. Additionally, respondent ignored the disciplinary counsel's inquiries regarding the matter. Finally, in Count Five respondent was charged with accepting a retainer to file an application for commutation of sentence with the Ohio Parole Board. Respondent took no action in her client's behalf, never responded to his inquiries, never returned his file or his fee and ignored the investigative inquiries about this matter from the disciplinary counsel. The Court indefinitely suspended respondent from the practice of law, noting her multiple offenses, lack of cooperation, refusal to acknowledge wrongdoing, the vulnerability of her incarcerated clients and her failure to make restitution. The underlying facts in Torian are more egregious than Respondent's matter. However, the indefinite suspension is a harsher outcome than in the matter before the Court. So, perhaps, the lesson to be learned is that circumstances could be worse. Yet this Torian matter does not advance Respondent's argument since Torian is not analogous to the present matter.

In Columbus Bar Assn. v. Moesle, 835 N.E.2d 1259 (Ohio 2005) respondent was indefinitely suspended from the practice of law because he accepted a retainer fee to assist a client in terminating her marriage. Although he filed a divorce complaint, he failed to schedule a hearing on various temporary orders, lied to his client saying that her husband had refused to comply with a court order to cooperate in a paternity test

and that a warrant had been issued for his arrest as a result. Thereafter, respondent failed to return his client's telephone calls, voluntarily dismissed the case without his client's knowledge or consent and failed to refund her retainer. These events gave rise to ten violations of the Code of Professional Responsibility. By comparison, Respondent was found guilty of nine violations. In Moesle, the Court noted nothing by way of mitigation in the evidence, respondent's failure to cooperate, refusal to acknowledge wrongdoing and the harm caused to a vulnerable client. Again in this case, respondent's failures appear at least equally, if not more blame-worthy than Respondent's misdeeds and they were punished more severely. This Court cannot say that the Moesle case favors Respondent's claim that his suspension is excessive when compared to Moesle.

The following cases, cited by Respondent, seem most comparable to the present matter. Disciplinary Counsel v. Crowley, 667 N.E.2d 1183 (Ohio 1996) respondent engaged "in [a] course of dishonesty toward clients, beginning with neglect and a lie and continuing with lengthy inaction and elaborate deception to cover [the] lie" (Syllabus). Crowley undertook representation in a medical malpractice case but never filed a lawsuit or sent a letter of representation to the hospital involved. Crowley told her clients that she had received settlement offers from the hospital when, in fact, none had been received. Crowley fabricated the scheduling of various court hearings and telephone conferences. Finally, after five years of deception, Crowley recommended that her clients voluntarily dismiss the non-existent lawsuit because it was meritless. In another matter, Crowley undertook to pursue a claim for crime victim reparations, but failed to file before the statutory deadline. In still another matter, Crowley undertook to conduct an investigation of a citizen's complaint of criminal damage for the city of Rossford, Ohio. She did conduct the investigation and reached a conclusion about the advisability of criminal prosecution versus civil litigation. However, Crowley failed to prepare any report of her findings and conclusions or notify the city or the complaining witnesses of the results of her investigation despite receipt of two certified letters of inquiry. Lastly, Crowley practiced law during a five-month period during the 1991/1993

biennium without being registered as an attorney. Crowley, upon being charged, readily admitted her misconduct, offered no excuses and sought to make restitution to the first two injured clients mentioned above. Moreover, Crowley had enjoyed "an outstanding reputation as a conscientious and trusted city prosecutor," *id.* at 1183. During the pertinent period, Crowley had suffered several personal difficulties, including the death of her mother, separation from her husband and dissolution of her marriage, a ruptured spinal disc requiring surgery and extended wearing of a cervical collar, together with serious depression requiring counseling and treatment. The Court in a *per curiam* decision concluded that a two-year suspension with one year stayed on condition of continued treatment for her depression and proof after the first year of suspension that further treatment would not be necessary. But see, Justice Cook's dissent favoring an indefinite suspension. Crowley's matter involved five violations of the Code of Professional Conduct and two of the Ohio Governance of the Bar Rules. She neglected three matters entrusted to her care, but there was considerable mitigating evidence and she "was regarded as honest and highly professional." *Id.* She "possessed a strong work ethic [and] had exceptional legal abilities." *Id.* Moreover, she "readily admitted her misconduct and offered no excuse." *Id.* All in all, Ms. Crowley seems more entitled to a stay of the second year of suspension than Respondent.

In Cincinnati v. Buckley, 763 N.E.2d 116 (Ohio 2002), respondent engaged in sham settlement negotiations to "advance his personal interests," *id.* at 117, signed a joint pretrial statement that contained false and inaccurate stipulations and did not prepare his client's case for trial causing "substantial financial damages," *id.* Additionally, respondent had no malpractice insurance. The panel concluded that respondent's transgressions were largely the result of a 30 year severe dependence upon alcohol. During the pendency of the disciplinary process, respondent entered into a recovery contract with the Ohio Lawyers Assistance Program, Inc. ("OLAP") and by the time of the hearing had complied with the terms of his contract. The Court noted respondent's lack of prior disciplinary record and cooperative attitude. Ultimately, the Court concluded that a two-year suspension with the second year stayed on conditions

including continued compliance with all terms of his OLAP recovery contract, extension of that contract to be coterminous with respondent's period of suspension and maintenance of professional liability insurance. This Court concedes that this case seems close to the present matter. However, Buckley did not commingle client funds advanced for the purpose of securing an expert assessment of his case as Respondent did. Nor does it seem that Buckley engaged in an elaborate ongoing ruse involving lies about whether the case had actually been filed, lies about settlement offers and lies about a proposed structured settlement. Could the Supreme Court of Ohio have followed this example and suspended the second year of Respondent's two-year suspension without doing violence to case precedents? Probably yes. Does the Supreme Court of Ohio's decision in this matter rise to the level of "grave injustice" under Rule II (D)(3) so as to justify this Court imposing a different discipline? We think not. The fact that this Court might have followed a more lenient path in this matter does not amount to a finding of "grave injustice." We cannot say, based upon this case that Respondent's two-year suspension should be overturned or modified here under the established standard of review under Rule II (D)(4) either.

In Dayton Bar Association v. Suarez, 778 N.E.2d 569 (Ohio 2002), respondent failed to keep her client apprised of the proceedings in his divorce, tried to hide her neglect and failed to cooperate in the investigation of her misconduct. Indeed, respondent lied to the Dayton Bar Association regarding what work she had done for her client, claiming to have done computerized research for his case. The research, however, was done three months after her client's final divorce decree was entered as shown by her own printout of the work. The panel further noted that respondent had previously received a public reprimand for misconduct. Furthermore, the panel was troubled by respondent's apparent "lack of candor, remorse, and inability to take responsibility for her misconduct," *id.* at 571. On the mitigating side, respondent returned her client's money and the client ultimately secured custody of his children although not until after they had suffered domestic assaults. Suarez attributed the entire series of lapses to an office staffer's failures and tampering with her files. The

Supreme Court of Ohio imposed an eighteen-month suspension with nine months suspended on condition of no further misconduct. But see the dissent by Justice Cook stating that she would have followed "the recommendations of both the panel and the board to suspend Suarez for eighteen months," id. Again this Court concedes similarity between Suarez and Respondent's case. Could the Supreme Court of Ohio have followed this example and suspended Respondent for eighteen months with nine months suspended without doing violence to case precedents? Probably so. Could it just as easily have suspended Respondent for eighteen months as the panel, the Board and Justice Cook suggested in Suarez? Probably yes. Can this Court say that Respondent's discipline amounts to a "grave injustice" under Rule II (D)(3) so as to justify substituting its judgment for that of the Supreme Court of Ohio? We think not. Again the fact that this Court might have varied from the choice made by the Supreme Court of Ohio does not amount to a finding of "grave injustice." We cannot say based upon this case that Respondent's two-year suspension should be overturned or modified here under the established standard of review under Rule II (D)(4) either.

In Disciplinary Counsel v. Claffin, 836 N.E.2d 564 (Ohio 2005), respondent failed to return a signed and notarized release form to an insurance company required as part of a case settlement and also failed to deliver the settlement funds to his client for 32 months. Respondent deposited the settlement funds in his office account and used them to pay office expenses and personal expenses. He intentionally misled the Cuyahoga County Bar Association, by claiming that the delay in dispersing the settlement funds was a result of a disagreement about the proposed language in the release. The Board noted that Claffin's client was a vulnerable minor, who delayed his college education for lack of funds. On the other hand, it noted the absence of any prior disciplinary record. Both the Board and the panel recommended a two-year suspension with one year of suspension stayed. The Supreme Court of Ohio, however, stated that "the presumptive disciplinary measure for acts of misappropriation is disbarment." Id. at 567. Yet the court, in light of respondent's "otherwise unblemished record (id.)" and the fact that he had paid his client the settlement funds that were due

prior to the commencement of the disciplinary proceedings, chose a less severe penalty. Ultimately, the court imposed a two-year suspension with one year of that suspension stayed. But see Justice O'Connor's dissent where she would stay only six months of the suspension. Again as with the two previous cases, the Court concedes that this case seems comparable to Respondent's case and it seems that a two-year suspension with one year of the suspension stayed would be adequate to punish Respondent. The key is, however, that the disparity between the disciplines imposed in Claflin versus Respondent's case are not sufficient to amount to the "grave injustice" contemplated in Rule II (D)(3) nor is this Court left with a firm conviction that "a substantially different discipline" as contemplated in Rule II (D)(4) is justified.

In Cuyahoga County Bar Association v. Freedman, 836 N.E.2d 559 (Ohio 2005), respondent had not filed tax returns for ten years, failed to file an answer in a foreclosure matter and mishandled a bankruptcy matter resulting in the repossession of his client's car. The board noted several mitigating factors including free disclosure to the panel, a cooperative attitude during the proceedings and substantial evidence of respondent's good character and reputation from magistrates, attorneys, clients and friends. Perhaps most important was the finding that respondent suffered from a mental disability - depression for which he had been under treatment for two years with good progress. Additionally, respondent had secured the services "of a professional management consultant to help him set up more effective procedures in his law office," id. at 561. The court imposed a one-year suspension. But see Justices Lanzinger and O'Connor dissenting in favor of an indefinite suspension. This Court cannot say that a comparison of Freedman to Respondent's case leaves us with a firm conviction that a "grave injustice" has been done here nor that "a substantially different discipline" ought to be substituted for that imposed by the Supreme Court of Ohio. (Rule II (D)(3) and (4)).

In Muskingum County Certified Grievance Committee v. Greenberger, 842 N.E.2d 1042 (Ohio 2006), the Supreme Court of Ohio found that respondent had neglected matters entrusted to him and engaged in other misconduct representing a

continuing pattern that adversely affected multiple clients. The court recited six individual cases that respondent had either neglected or mishandled. It then noted that respondent had failed to appear for oral argument as scheduled and paid only a "small fraction of the restitution that he had promised to pay his clients more than a year" before the scheduled hearing. *Id.* at 1048. The court then imposed a two-year suspension with the last six months of the suspension stayed on condition that respondent refund all unearned fees and costs to his wronged clients and petition for reinstatement pursuant to Gov. Bar R. V(10) (C) through (G). This Court concedes that Greenberger seems to be a more egregious offender than Respondent. We note, however, that Greenberger's actual suspension was eighteen months compared to Respondent's two-year actual suspension. We cannot say that by comparison Respondent's discipline constituted a "grave injustice" nor do we conclude that "a substantially different discipline" is required in light of Greenberger.

In Cincinnati Bar Association v. Greenberger, 863 N.E.2d 167 (Ohio 2007), a sequel to the above cited matter, the same respondent was found to have stolen \$1850 from seven clients, failing to deposit their monies into a client trust account and using the money as his own. The Supreme Court of Ohio imposed a one-year suspension consecutive to the eighteen-month suspension already in place with the same restriction upon his ability to secure reinstatement. While we are left to ponder why this respondent was not disbarred or indefinitely suspended, the case does not assist this Court in evaluating the appropriate discipline for our Respondent. We, thus, take nothing from a comparison of this case to Respondent's case. It is inapposite.

In Toledo Bar Association v. Hickman, 839 N.E.2d 24 (Ohio 2005), respondent intentionally misled his clients and caused them irreparable harm by allowing the statutes of limitation to run on two of their cases. Hickman stipulated to the facts in two counts of the complaint and relator dismissed two other counts. In each case, respondent spun a web of lies in order to conceal his neglect of the matters entrusted to him and his other misconduct in the same matters. The Supreme Court of Ohio noted

that respondent had practiced for 25 years with no prior disciplinary offenses; that he had appeared in the disciplinary proceedings and expressed remorse for his misconduct. The court further noted that respondent had been a sole practitioner since 1991 with a concentration in domestic relations and criminal defense matters. He was not familiar with medical malpractice cases. He agreed, in the future, to refer such matters to other counsel more competent in this field than himself. Additionally, he had become affiliated with another veteran attorney with a similar concentration of practice. He also submitted letters from two judges, a magistrate and four attorneys attesting to his "character, reputation, competence, and professionalism." *Id.* at 25. The court chose to impose a one-year suspension with a six-month stay of the suspension on condition of no further misconduct during the period of the stay. In Toledo Bar Association v. Hickman, 863 N.E.2d 169 (Ohio 2007), the respondent was again disciplined for lapses similar to those in his first disciplinary proceeding arising out of two mishandled matters. The Supreme Court of Ohio imposed a one-year suspension with little comment. Why this respondent was not more severely disciplined we cannot discern. However, Hickman does not assist this Court in evaluating the justice of Respondent's discipline. The cases are not comparable. Even if they were superficially similar the divergence of the disciplines is not so great as to rise to the point of showing a "grave injustice" nor does this Court conclude that "a substantially different discipline" should be imposed in Respondent's case. (See Rule II (D)(3) and (4)).

In Disciplinary Counsel v. King, 816 N.E.2d 1040 (Ohio 2004), the Supreme Court of Ohio, in a *per curiam* decision, suspended respondent's privilege to practice law for a period of two years with the second year stayed. King had two prior disciplinary actions. The first time in 1990, respondent was suspended for one year for filing false individual income tax returns in 1984 and 1985. The second time in 1996, respondent was suspended for a period of six months for neglecting to refile a civil case and repeatedly lying to his client asserting that he had refiled the case. King's third disciplinary matter arose out of an engagement to recoup his client's \$350,000 investment from her brother-in-law. King did file the lawsuit, but when confronted with

defendant's motion for summary judgment, chose to voluntarily dismiss the complaint. King then refiled the complaint which was again met with defendant's motion for summary judgment. This time, King failed to timely respond to the motion as well as associated interrogatories and a request for production of documents. The common pleas court granted the motion for summary judgment. Thereafter, King filed a Civ. R. 60(B) motion for relief from judgment which was initially granted by the trial court, but that decision was ultimately reversed by the court of appeals. During the period between the trial court's grant of the Civ. R. 60(B) motion, the court of appeal's reversal and the trial court's final entry of summary judgment in defendant's favor, King lied to his client about the status of the case claiming that the trial would require more time than originally allotted on the court's calendar, necessitating a rescheduling of the trial. When King finally confessed the true status of the client's case to her, she fired him, sued him for legal malpractice and reported his defalcations to the Disciplinary Counsel. Thereafter, King cooperated in the disciplinary proceedings, settled the legal malpractice case, expressed remorse for his actions and demonstrated his good character and reputation in the legal community, as well as, the altruistic nature of his motivations in this matter. The court noted that this was King's third disciplinary case involving DR 1-102(A)(4) (engaging in conduct prejudicial to the administration of justice) among other ethical lapses, but also noted that a substantial question existed as to the viability of his client's claims due to the applicable statute of limitations. In the end, the Supreme Court concluded that a two-year suspension with the second year stayed, plus costs, would adequately protect the public and punish respondent. Justice O'Connor, however, dissented in favor of a full two-year suspension, stating that respondent had developed a pattern of dishonesty. She pointed out that King distinguished withholding information from a client from telling a client a lie - a fine, if not, illusory difference. Moreover, King's failure to maintain professional liability insurance was quite troubling to Justice O'Connor. To the extent that this case contrasts with Respondent's case in that the discipline seems inadequate and by extension Respondent's discipline seems excessive, it is a relevant comparator. We note that the Ohio Supreme Court seems to consistently impose suspensions of one to

two years in cases where lawyers have neglected one or more clients' affairs and then attempted to forestall discovery of their misdeeds by further exacerbating the situation with acts of dishonesty, fraud, deceit or misrepresentation. This case seems dissonant with the results in Respondent's case and this Court is troubled by it. Respondent here was a first time offender, while King had two prior disciplinary suspensions. There do not appear to be any mitigating circumstances in King's matter to account for the disparity in disposition. By comparison, the Court deems Respondent's misconduct more in line with a two year suspension with the second year stayed upon appropriate conditions. We respectfully suggest to the Supreme Court of Ohio that it consider staying the remaining balance of Respondent's two year suspension, assuming that Respondent has engaged in no professional misconduct during the period of his suspension, upon the imposition of such conditions as it deems sufficient. We cannot say that we are convinced that a "grave injustice" has been done to Respondent by the discipline imposed by the Supreme Court, but reiterate that the length of the suspension, with no portion stayed, is troubling. Moreover, we cannot say that this Court would, with any degree of certainty, impose a "substantially different discipline." As we do not sit in review of that court's decisions in these matters, we merely suggest a limited review of the length of Respondent's unstayed suspension.

This Court's independent research has discovered no more recent cases that might benefit our analysis of this matter. Thus, this Court **ORDERS** that Thomas Manning shall be suspended from the practice of law before this Court for a period of two years beginning retroactively on November 22, 2006; that the name of Thomas Manning be stricken from the roll of attorneys admitted to practice law before the United States District Court for the Southern District of Ohio, pursuant to Gov. Bar R. V, Sec. 6(B)(3) of the Supreme Court Rules for the Government of the Bar of Ohio, and Rule II of the Model Federal Rules of Disciplinary Enforcement adopted by this Court on February 5, 1979. He is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appeal on behalf of another before this Court. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for

others or in any manner perform services of any kind for others which would constitute the practice of law in this Court. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the Bar of this Court.

IT IS FURTHER ORDERED that the Respondent, Thomas Manning, surrender his certificate of admission to practice in this Court to the Clerk of this Court, forthwith, and that his name be stricken from the roll of attorneys maintained by this Court. It is further ordered that on or before April 30, 2008, the Respondent shall:

1. Notify all clients being represented in pending matters in this Court and any co-counsel of his suspension and his consequent disqualification to act as an attorney after the effective date of this Order, and, in the absence of co-counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;
2. Regardless of any fees or expenses due Respondent, deliver to all clients being represented in pending matters in this Court any papers or other property pertaining to the clients, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;
3. Regarding any actions pending in this Court, refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in possession or control of Respondent;
4. Notify opposing counsel in pending litigation in this Court, and in the absence of counsel, the adverse parties, of his disqualification to act as an attorney after the effective date of this Order;

5. All notices required by this Order shall be by certified mail and shall contain a return address where communications may thereafter be directed to Respondent;
6. File with the Clerk of this Court an affidavit showing compliance with this Order and Proof of Service of Notices required therein. Such affidavit shall set forth the address where the affiant may receive communications and the Clerk shall be kept advised of any change of address;
7. Retain and maintain a record of the various steps taken by Respondent pursuant to this Order.

IT IS FURTHER ORDERED that the Clerk of this Court issue certified copies of this Order to the Disciplinary Counsel of the Supreme Court of Ohio, to the Clerks of the Supreme Court of the United States and the United States Court of Appeals for the Sixth Circuit, to the National Discipline Data Bank and to its Divisional Offices.

8. Readmission to practice before this Court shall require the filing of an application for reinstatement with James Bonini, Clerk of Court, Joseph P. Kinneary U.S. Courthouse, 85 Marconi Boulevard, Room 260, Columbus, Ohio 43215. The application shall include an affidavit from Respondent that the Ohio Supreme Court has reinstated him to the practice of law in Ohio and that he is in good standing with that Court.

Upon receipt of the application, the Clerk shall refer the application to the Chief Judge of this Court, who may require the Respondent to take the next available bar examination for admission to practice in this Court. Additionally, the Chief Judge may require Respondent to appear in person to demonstrate clear and convincing evidence that he has the moral qualifications, competency and learning in the law required for admission to practice law before this Court and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest. Should the Court find the

attorney unfit to resume practice before this Court, the application shall be dismissed. No application for reinstatement shall be filed within one year following an adverse judgment upon an application for reinstatement filed by or on behalf of the same attorney.

If the attorney is found fit to resume practice before this Court, the judgment shall reinstate him, provided that, if the attorney has been suspended for two years or more, reinstatement is conditioned upon the attendance of the attorney at a Federal Court Practice Seminar. A copy of the Certificate of Training for successfully completing the Federal Court Practice Seminar should accompany the application for reinstatement. Registration in the Court's CM/ECF system will also be required.

All attorneys admitted to practice in this Court are required to submit a written notice of a change of business address and/or email address to the Clerk upon the change in address.

IT IS SO ORDERED.

Date: April 1, 2008

SSB
s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court