

ORIGINAL

IN THE SUPREME COURT OF OHIO

OFFICE OF DISCIPLINARY COUNSEL,

:

Relator

:

Case no.: 2009-1144

vs.

:

:

JUSTIN M. SMITH, ESQ.,

:

:

Respondent

:

RESPONDENT'S OBJECTIONS TO, AND BRIEF IN SUPPORT OF
 THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED
 SANCTION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
 AND DISCIPLINE OF THE SUPREME COURT OF OHIO

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COUNSEL FOR RELATOR

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Now comes Justin M. Smith, by and through counsel, and pursuant to this Honorable Court's Order to Show Cause filed on July 1, 2009, herein posits his objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline which were forwarded to this Honorable Court on or about June 22, 2009.

As will be discussed more fully herein, Mr. Smith objects to the findings made by the Panel and Board that he violated Ohio Code of Professional Responsibility Disciplinary Rules (hereinafter "DR") 2-106 (a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee); and DR 6-101(A)(1) (handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it). Based on the foregoing belief that no violation of the Ohio Code of Professional Responsibility was committed, Mr. Smith also objects to the sanction recommended by the Board, to-wit: a public reprimand; based upon its finding and/or concluding that he violated the Disciplinary Rules set forth above, in his representation of Louis and Florence Reiger, in his capacity as an employee-associate attorney employed by an entity known as The Chapman Law Firm, an entity totally owned and controlled by its principal, Frank D. Chapman, Esq..

These objections are predicated upon the Panel and Board's finding of misconduct allegedly committed by Mr. Smith on facts, evidence and law adduced which, whether in the body of the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline (hereinafter "Board Opinion") itself, the testimony adduced at trial, and/or controlling law, is contradictory to said findings. As such, Relator did not meet its requisite burden

of proof as it pertains to Mr. Smith. Further, and again based on the content of the Board Opinion as well as the testimony adduced at the hearing held in this matter on December 18, 2008, any measure of sanctions so imposed would, in the view of counsel for Mr. Smith, be utterly contrary to the oft-stated purpose of attorney discipline proceedings in the State of Ohio, i.e., to protect the public and not punish the attorney, as well as violate the law which controls the imposition of attorney discipline in our state.

I. FACTS

As this Honorable Court is aware, prior to the hearing had in the instant matter, counsel for Relator and counsel for Mr. Smith, as well as Mr. Smith himself, entered into a set of 34 agreed factual stipulations as it pertained to his representation of the Reigers; said stipulations being filed with the Board on December 5, 2008. In addition, numerous stipulated exhibits were placed before the Panel and Board prior to the hearing of the instant matter, and have been included in the record of this case.

As such, very little of the facts underlying the instant matter are in dispute. In fact, only one of the findings of fact made by the Panel and Board pertaining to this case are in dispute. However, a brief recitation of the facts of Mr. Smith's representation of the Reigers and the proceedings that followed are presented herein for ease of further discussion.

Since his admission to the practice of law in the State of Ohio in May, 2000, and up until May, 2008, Mr. Smith had been an associate attorney with The Chapman Law Firm in Cleveland, Ohio. At all times relevant to the instant matter, The Chapman Law Firm was a three-attorney entity, with only Frank D. Chapman, Esq. having an equity stake in this concern. Mr. Smith was an employee of Frank D. Chapman, Esq..

Shortly after the motor vehicle accident involving the Reigers occurred in May, 2002, they contacted The Chapman Law Firm, and in particular Frank D. Chapman, Esq., based on an advertisement Mr. Chapman placed in a telephone directory, to represent and/or safeguard their interests in connection with various and sundry claims that they may have possessed arising out of this motor vehicle accident. In turn, Frank Chapman assigned this case to his associate and employee, Mr. Smith.

Thereupon, Mr. Smith commenced the law firm's representation of the Reigers pursuant to a Chapman Law Firm fee agreement executed by them. As part of this representation, Mr. Smith, upon insistence of the Reigers, did cause suit to be filed in the Portage County, Ohio Court of Common Pleas, naming the driver of the vehicle that the Reigers were passengers in at the time of the accident, and said driver's insurance company.

Notwithstanding the fact of the Reigers being residents of the State of New York, and the driver of the vehicle being a resident of the State of Texas, Mr. Smith obtained a favorable settlement of the insurance limits on behalf of the Reigers prior to trial, resulting in a recovery amount sufficient to cover their substantial medical expenses and provide them with some measure of compensation for their loss.

Critical to the disposition of the instant matter, however, is the fact that any funds received on the Reigers' behalf by Mr. Smith's efforts were processed solely through Frank D. Chapman, Esq., the sole principal of The Chapman Law Firm. Moreover, Frank Chapman alone made the decisions regarding disbursement of said funds to the appropriate entities; whether they be medical providers, other service providers, or the

apportionment of attorney fees he believed had been earned pursuant to The Chapman Law Firm fee agreement.

Mr. Smith was not, at any time relevant to the instant matter, entrusted or empowered by Frank D. Chapman, Esq., or The Chapman Law Firm as an entity, to disburse any funds that may have been received by the firm in connection with any matter. As a matter of common experience, for Mr. Smith to have done otherwise, in view of the work and/or practice environment that existed at The Chapman Law Firm at the time, attributable solely to the dominating personality of Frank Chapman, would have certainly resulted in the termination of Mr. Smith's employment with The Chapman Law Firm and made no difference in any monetary distribution to the firm's clients. Put another way, whether framed as an employment-related issue, or as a matter of practice, Mr. Smith had no control over the fee decision-making process at The Chapman Law Firm; that decision, as Mr. Smith was plainly told, was solely within Mr. Chapman's province. In any case, Mr. Smith was assigned to the Reigers' matter as a representative of The Chapman Law Firm, diligently advocated on behalf of their interests, and obtained the maximum monetary result on their behalf. In short, as it pertained to the Reigers, Mr. Smith did an exemplary job.

After Mr. Smith had obtained the full recovery for the Reigers in his role as an employed attorney of The Chapman Law Firm, Mr. Smith, Frank D. Chapman, Esq., and The Chapman Law Firm as an entity were sued by the Reigers on a claim of legal malpractice. The sole basis of this claim was predicated upon The Chapman Law Firm, via Frank D. Chapman, Esq., collecting an excessive fee from the gross recovery obtained for the Reigers by Mr. Smith. This case was settled, with the Reigers receiving

those funds which represented the excessive fee charged to them by The Chapman Law Firm as well as an amount from the malpractice carrier for The Chapman Law Firm, which, according to the testimony of insurance defense counsel, represented a business decision by the insurer to pay an additional amount to the Reigers rather than dedicate additional resources to the litigation.

Additional facts found by the Panel and Board, however, are critical to the ultimate disposition of the instant matter, yet inimical to the conclusions of law and, based upon the finding of violations, the recommended sanction pertaining to Mr. Smith. First, the Panel found that at that time of his representing the Reigers, Mr. Smith was an employed associate attorney in The Chapman Law Firm. Board Op. at ¶ 11. Second, the Panel and Board found that the Reigers signed a contingent fee contract with The Chapman Law Firm. Board Op. at ¶¶ 12-13. Third, the Panel and Board found that “Respondent obtained the maximum compensation that could be obtained from available insurance sources for Louis and Florence Reiger for the injuries they suffered in the accident of May 22, 2002.” Board Op. at ¶ 48.

Further, and based upon opinion testimony provided by Howard Mishkind, Esq. on behalf of Relator, which opinion testimony was relied upon heavily by the Panel and Board in its Board Opinion, Mr. Mishkind confirmed that the contract executed by the Reigers for legal representation arising out of the May 22, 2002 accident was a Chapman Law Firm contract. Moreover, Mr. Mishkind acknowledged that the fee both charged and collected for Mr. Smith’s representation of the Reigers was done so by The Chapman Law Firm, i.e., Frank D. Chapman, Esq.. Tr. at p. 146, Ins. 6-13.

With these facts in mind, both expounded upon and corroborated by the record below, it remains to consider whether Relator herein met its requisite burden of proof with regard to the allegations of misconduct levied against Mr. Smith.

II. LAW AND ARGUMENT

A. DR 2-106

DR 2-106 (A) provides that a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee. Ohio Code of Prof. Resp., DR 2-106(A) (Baldwin, 2000). In this instance, and as stipulated to by Mr. Smith, there is little question that the attorney fee charged and collected by The Chapman Law Firm for Mr. Smith's representation of the Reigers was excessive. However, and as further spread throughout the record of the instant matter, Mr. Smith had no authority, much less input, in terms of the fee being charged by The Chapman Law Firm for his representation of the Reigers, much less any discretion as to how this fee was collected. In short, Mr. Smith did not enter into an agreement, charge or collect the attorney fee which forms the gravamen of this prosecution.

The term "attorney" has been defined as "a person who has legal authority to act on behalf of another." New Webster's Dictionary and Thesaurus of the English Language, p. 61 (1992). The term "charge" has been defined as "to ask a price," or "to ask payment." Id. Finally, the word "collect" has been defined as "to gather in or together," or an item "to be paid for by the recipient." Id.

On the facts as set forth herein, there is no question that Mr. Smith in his representation of the Reigers, was acting as their attorney. However, and as found by the Board and testified to by Mr. Mishkind, Mr. Smith did not charge, much less collect,

the excessive fee charged to the Reigers; rather, it was The Chapman Law Firm, in the person of Frank D. Chapman, Esq.. In fact, Mr. Smith did ask Mr. Chapman to reduce the fee being charged to the Reigers and was, by all accounts unsuccessful. Tr. at pp. 100-101; p. 147 at lns. 2-18.

To that end, it can be gainsaid that Relator failed to meet the requisite burden of proof in proving its allegation that Mr. Smith violated DR 2-106 as it pertains to his representation of the Reigers. As this Honorable Court is doubtless aware, the requisite burden of proof to be borne by a Relator in attorney disciplinary proceedings conducted in the State of Ohio is that of "clear and convincing." Gov. Bar R. V, §6(J) (Baldwin, 2000). *See also Findlay/Hancock Cty. Bar Assn. v. Filkins*, 90 Ohio St. 3d 1, 3 (2000).

"Clear and convincing evidence" has been defined as "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *In re: Estate of Haynes*, 25 Ohio St. 3d 101, 103-104 (1986).

With these facts, definitions, and law in mind, it cannot be gainsaid that on the record of the instant matter, Mr. Smith violated DR 2-106 (A) in his representation of the Reigers. Mr. Smith was an associate attorney and employee of The Chapman Law Firm. The fee contract executed as between the Reigers and The Chapman Law Firm for Mr. Smith's representation was a Chapman Law Firm contract. As such, The Chapman Law Firm set forth the fee to be charged to the Reigers for Mr. Smith's representation. Finally, the excessive fee that was collected (and eventually disgorged)

to the Reigers was collected by The Chapman Law Firm. Simply put, there was no evidence placed on the record of the instant matter that Mr. Smith either entered into an agreement, charged, or collected the excessive fee charged by The Chapman Law Firm to the Reigers. In fact, and as spread throughout the record, any such excessive fee charged and collected pertaining to Mr. Smith's representation of the Reigers was done by The Chapman Law Firm in the person of Frank D. Chapman, Esq..

At this juncture, it is of some note, if not import, to the instant matter that by motion filed on Mr. Smith's behalf by undersigned counsel on or about June 6, 2008, Mr. Chapman was requested to be added as a party to this matter, pursuant to the Ohio Rules of Civil Procedure which, as this Honorable Court is aware, govern the litigation of attorney discipline matters. Said motion was denied by Order of the Panel Chair on or about June 26, 2008.

It remains the opinion of the undersigned that Frank D. Chapman, Esq. is a party needed for just adjudication of this matter, and as such, should be joined; as it is beyond cavil that he alone controlled the collection of and eventual disbursement of any funds forwarded to The Chapman Law Firm. In fact, the Panel and Board reached the same conclusion as it pertains to the instant matter. Board Op. at ¶ 62.

It remains to consider whether the authority cited by the Panel and Board in the Board Opinion to support its conclusion that Mr. Smith violated DR 2-106 in his representation of the Reigers is persuasive. In the view of the undersigned, it is not.

In Disciplinary Counsel v. Johnson, 106 Ohio St. 3d 365 (2005), respondent therein was charged, *inter alia*, with violating DR 2-106(A). Factually, this case is distinguishable from the instant matter inasmuch as generally speaking, this case dealt

with the respondent falsifying and/or “padding” fee bills submitted to the Stark County Juvenile Court for representation of indigent defendants. Further, respondent therein conceded to having violated DR 2-106. Id. at 370. Moreover, it would appear that respondent therein was a sole practitioner who charged and collected the fee, rather than an employee of a law firm or another attorney, who, as is the case here, charged and collected the fee.

As such, Johnson is inapposite of the instant matter. In fact, and as set forth in the hearing brief provided to the Panel presiding over this matter on December 18, 2008, filed with the Board of Commissioners on Grievances and Discipline on December 15, 2008 there is no precedent contained in Ohio attorney discipline jurisprudence to lend any guidance, from a similar factual perspective, to the instant matter. Respondent’s Hearing Brief at pp. 5-6. Absent any legal authority supporting the position taken by the Board, Mr. Smith and his counsel would submit that the plain language of DR 2-106 is controlling.

With all of the foregoing in mind, Mr. Smith and his counsel would respectfully submit to this Honorable Court that Relator did not sustain its requisite burden of proof as it pertains to the DR 2-106 violation charged against Mr. Smith and that on the record placed before this Court, no such violation could have been found, much less made Mr. Smith amenable to professional sanction for such violation.

B. DR 6-101

DR 6-101 provides in pertinent part that “a lawyer shall not ... [h]andle a legal matter which he knows or should know that he is not competent to handle, without

associating with him a lawyer who is competent to handle it.” Ohio Code of Prof. Resp., DR 6-101 (Baldwin, 2000).

As it pertains to the Board Opinion, it is the discussion of the facts allegedly underpinning its finding that Mr. Smith violated DR 6-101 in his representation of the Reigers, that is perhaps most troubling to Mr. Smith and the undersigned. On the one hand, the Panel finds that Mr. Smith “obtained the maximum compensation that he could have obtained from available insurance sources for Louis and Florence Reiger for the injuries they suffered in the accident of May 22, 2002.” Board Op. at ¶ 48.

On the other hand, and seemingly most pertinent to the Panel and Board's conclusion that Mr. Smith violated DR 6-101, is their discussion of Mr. Smith's handling of a provision of New York law pertaining to payment of medical and hospitalization expenses known as personal injury protection (hereinafter “PIP”) coverage for which the Reigers were eligible under their policy with State Farm Mutual Automobile Insurance Company. After explaining that PIP coverage is a no fault insurance paid without a finding of liability and so paid out upon application by medical providers, the Panel and Board state that neither Mr. Smith nor Frank D. Chapman, Esq. were well-versed in this provision of New York insurance law. However, the Panel and Board go on to say that Mr. Smith did, in fact, apply for PIP coverage on behalf of the Reigers and, assisted them by either negotiating or following up on PIP payments made to the care providers for the Reigers in Ohio and obtained the full benefit of that PIP coverage. Board Op. at ¶¶ 20-28.

While it may be true that Mr. Smith was not conversant in New York tort and/or insurance law having some impact on the Reigers' matter, he did take, according to the

Panel and Board, appropriate action in assisting them to obtain this coverage. Moreover, in recognition of his professional inexperience on this issue, Mr. Smith did, in fact, ask Mr. Chapman about PIP coverage, and was assured by Mr. Chapman as to not only the nature of such coverage but that he (Mr. Chapman) as Mr. Smith's superior, would make further inquiry into the nature of this type of insurance; a type not available in Ohio. Tr. pp. 54-56; 115-116.

Again, there appears to be a certain cognitive dissonance within the Board Opinion with regard to its findings of fact and conclusions of law that Mr. Smith violated DR 6-101 in his representation of the Reigers. If the presumption is made that the Reigers hired The Chapman Law Firm to obtain for them the maximum recovery available to them for the injuries they sustained in the May 22, 2002 motor vehicle accident, it is beyond cavil that Mr. Smith did so. See Board Op. at ¶ 48. As such, Mr. Smith and the undersigned are at a loss to discern how Mr. Smith somehow "incompetently" obtained this maximum recovery on their behalf.

If the Panel and Board's difficulty with this particular issue is in how Mr. Smith (and Mr. Chapman) handled the New York PIP coverage issue, the fact remains that this coverage was obtained; at policy limits for Louis Reiger, and in an amount sufficient to cover the medical expenses for Florence Reiger. The only issue arising from the New York PIP issue appears to be the assessment of attorney's fees arising therefrom; which, as the evidence overwhelmingly demonstrates, was the decision of Mr. Chapman and the Chapman Law Firm, not Mr. Smith. See Board Op. at ¶ 62. Simply put, Mr. Smith and counsel are at a loss to divine what matter of disciplinary violation was committed by Mr. Smith in his representation of the Reigers.

Mindful of Relator's burden of proof in this matter, the record of this case simply does not contain clear and convincing proof that Mr. Smith acted incompetently in his representation of the Reigers. Moreover, and as set forth in Respondent's Hearing Brief there is little or no precedent in the whole of Ohio attorney discipline jurisprudence, on facts similar to those presented herein, where an attorney has been sanctioned for a violation of DR 6-101. Further, it is of no small import to Mr. Smith and the undersigned that nowhere in the Board Opinion is there any precedent cited to support its finding that Mr. Smith violated DR 6-101 in his representation of the Reigers.

In light of all the foregoing, Mr. Smith and the undersigned would respectfully submit to this Honorable Court that contrary to the Board Opinion submitted to it in connection with the instant matter, Relator did not sustain its requisite burden of proof with regard to the allegation that Mr. Smith violated DR 6-101 in his representation of the Reigers, and as such it was error for the Panel and Board to so find and/or conclude.

C. The purpose of attorney discipline proceedings in Ohio

As this Honorable Court has stated:

The purpose of disciplinary actions, Lord Mansfield wrote in 1778, 'is not by way of punishment; but the courts on such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not.' [Citation omitted.] The guiding principle in this case, as in all our disciplinary proceedings is the public interest in an attorney's right to continue to practice a profession imbued with public trust. We have previously emphasized that respect for the law and our legal system is the *sine qua non* of that right to continuance on the rolls. Disciplinary Counsel v. Trumbo, 76 Ohio St. 3d 369, 372-373 (1996).

Moreover, this Honorable Court has recently modified the pronouncement articulated in Trumbo supra, to state that "[W]e are always mindful that the disciplinary

process exists not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship and to allow us to ascertain the lawyer's fitness to practice law." Akron Bar Assn. v. Catanzarite, 119 Ohio St. 3d 313, 319 (2008).

Reading the Board Opinion in light of the above-quoted language from earlier decisions of this Honorable Court, it is apparent that the overall tone and content of said opinion is inappropriately punitive. Whether in the Hearing Panel's or Board's collective inability to discern, much less conclude, that The Chapman Law Firm in the person of Frank D. Chapman, Esq., and not Justin Smith, was the person and/or entity who charged and collected the excessive fee assessed to the Reigers, or in the logical disconnect employed in its finding that Mr. Smith somehow "incompetently" represented the Reigers in obtaining the maximum recovery on their behalf, it is clear to the undersigned that the Panel and Board were searching for unproven misconduct in order to levy some measure of sanction as against Mr. Smith. As set forth above, this approach is inimical to the attorney discipline process in Ohio.

Again, it is clear on the record of the instant matter, whether by documentary or testimonial evidence, that Mr. Smith did not enter into an agreement, charge or collect an excessive fee from the Reigers. Nor did he, in obtaining the maximum recovery and/or compensation for the Reigers, do so incompetently. Simply put, Mr. Smith, despite the findings and conclusions contained in the Board Opinion, did not commit any manner of sanctionable misconduct in his representation of the Reigers. As such, and as the record of this case more than amply demonstrates, Mr. Smith is in fact worthy "of the trust and confidence essential to the attorney-client relationship" and

clearly possesses the requisite character and fitness to practice law in the State of Ohio.

Id.

III. CONCLUSION

For all of the above reasons, Respondent Justin M. Smith and the undersigned would pray that this Honorable Court not accept the Findings of Fact, Conclusions of Law, and Recommended Sanction proffered to this Honorable Court by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, appropriately and justly employ its duty to review this matter de novo, and dismiss the allegations against Mr. Smith as contained in Relator's Certified Complaint, permitting him to go hence without the permanent, indelible taint that a finding of a violation of the Ohio Code of Professional Responsibility would mark him with for the remainder of his career.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing has been served, via regular U.S. Mail, upon Jonathan E. Coughlin, Esq. and Heather L. Hissom, Esq., at the Office of Disciplinary Counsel of the Supreme Court of Ohio, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411, this 20th day of July, 2009.



RICHARD S. KOBLENTZ
CRAIG J. MORICE
ATTORNEYS FOR JUSTIN M. SMITH

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APPENDIX A

FILED

The Supreme Court of Ohio

JUL 01 2009

Disciplinary Counsel,
Relator,

Case No. 2009-1144

CLERK OF COURT
SUPREME COURT OF OHIO

v.

Justin Martus Smith,
Respondent.

ORDER TO SHOW CAUSE

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has filed a final report in the office of the clerk of this court. This final report recommended that pursuant to Rule V(6)(B)(5) of the Supreme Court Rules for the Government of the Bar of Ohio the respondent, Justin Martus Smith, Attorney Registration Number 0072044, be publicly reprimanded. The board further recommends that the costs of these proceedings be taxed to the respondent in any disciplinary order entered, so that execution may issue. Upon consideration thereof,

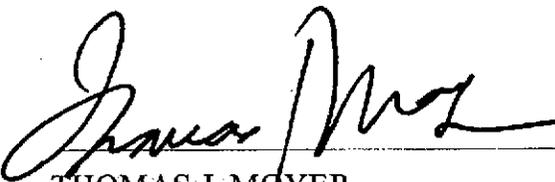
It is ordered by the court that the respondent show cause why the recommendation of the board should not be confirmed by the court and the disciplinary order so entered.

It is further ordered that any objections to the findings of fact and recommendation of the board, together with a brief in support thereof, shall be due on or before 20 days from the date of this order. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

After a hearing on the objections or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper which may be the discipline recommended by the board or which may be more severe or less severe than said recommendation.

It is further ordered, sua sponte, that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings and further that unless clearly inapplicable, the Rules of Practice shall apply to these proceedings.

It is further ordered, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, by certified mail to the most recent address respondent has given to the Office of Attorney Services.



THOMAS J. MOYER
Chief Justice

APPENDIX B

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

In Re:	:	
Complaint against	:	Case No. 08-019
Justin Martus Smith	:	Findings of Fact,
Attorney Reg. No. 0072044	:	Conclusions of Law and
Respondent	:	Recommendation of the
Disciplinary Counsel	:	Board of Commissioners on
Relator	:	Grievances and Discipline of
	:	the Supreme Court of Ohio
	:	
	:	

¶1. This matter was heard December 18, 2008, in Cleveland Ohio, before a panel composed of Board Members Lisa M. Lancione Fabbro, Sheffield Lake, Ohio, David E. Tschantz, Wooster, Ohio, and panel chair, Retired Judge Thomas F. Bryant, Findlay, Ohio.

¶2. None of the panel members resides in the appellate district from which this matter arose, or served as members of the probable cause panel in this case.

¶3. Relator Disciplinary Counsel was present, represented by Assistant Disciplinary Counsel, Heather L. Hissom, Esq.

¶4. Respondent, Justin Martus Smith was present, represented by his counsel, Richard S. Koblentz, Esq. and Craig Morice, Esq.

¶5. Relator's complaint alleges respondent has violated the following disciplinary rules in effect at the times alleged:

DR 2-106. FEES FOR LEGAL SERVICES.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 6-101. FAILING TO ACT COMPETENTLY.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

¶6. By his Answer to the Complaint, respondent admitted most of the allegations of fact set forth in the Complaint but denied that his conduct violated any of the disciplinary rules because he has practiced law for only two years in a law firm in which he was required to follow the orders of the principal lawyer of the firm, including the actions and omissions here alleged to be professional misconduct.

¶7. Relator and respondent have entered into 34 stipulations of fact, have stipulated the admissibility of 19 relevant documents, and have stipulated to 2 of the mitigating factors recognized by BCGD Proc. Reg. § 10 (B)(2), all appended to this report. The panel adopts the stipulations and has incorporated them in large part in the narrative findings that follow. Additional findings are drawn from the testimony of respondent and the other witnesses who testified at the panel hearing. All findings and conclusions by the panel are based on evidence the panel finds to be clear and convincing.

FINDINGS OF FACT

¶8. Respondent, Justin Martus Smith, was admitted to the practice of law in the state of Ohio on May 22, 2000. Respondent is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.

¶9. On May 22, 2002, Marvin Seltzer, his wife, and their passengers Louis and Florence Reiger were travelling in Seltzer's automobile from New York to Missouri for a vacation. Seltzer and his wife were residents of Texas. Louis Reiger and Florence Reiger were residents of the state of New York. While the car was traveling westbound on I-76 in Portage County, Ohio, Seltzer lost control causing the car to flip into the median. Seltzer alleged that a phantom vehicle caused him to overcorrect, resulting in the accident. The motorist driving behind Seltzer also reported the actions of the phantom driver, but no other witnesses confirmed the existence of the phantom driver. Mr. Seltzer was not cited for a traffic violation. (Stip. ¶ 5)

¶10. Mr. and Mrs. Seltzer, riding in the front seat with seat belts fastened were not injured. Both Mr. and Mrs. Reiger, napping at the time in the back seat of the automobile without seat belts fastened, were injured, however. Louis Reiger, age 84, was seriously injured and required extensive medical treatment, hospitalization and rehabilitation. Florence Reiger was less seriously injured, but required medical treatment and hospitalization.

¶11. Members of the Reiger family contacted the Chapman Law Firm of Cleveland in response to the firm's advertisement in the Yellow Pages of the telephone directory. At that time, respondent was an associate in the Chapman Law Firm and assigned to the Reiger's inquiry. Respondent visited Mrs. Reiger at her hospital room in Akron General Hospital on May 24, 2002, and undertook representation of Mrs. and Mr. Reiger pursuant to a written contingent fee agreement. (Ex. 2.)

¶12. The fee agreement provides that attorney fees will be 33 1/3 percent of the gross amount if settlement is achieved without filing suit; 40 percent of the gross

settlement or judgment if suit is filed; and 45 percent of the gross settlement or judgment following trial and/or appeal.

¶13. Respondent signed the agreement on behalf of the Chapman Law Firm. Louis Reiger was a patient at Cleveland MetroHealth Hospital in Cleveland at the time and did not meet with respondent or talk to him. Florence Reiger signed the fee agreement in her own behalf and signed in behalf of her husband Louis as "POA." Florence Reiger did not hold Louis' power of attorney, however, then or ever. (Tr. 34)

¶14 On July 18, 2002, respondent sent a letter to Marla Cino, a daughter of the Reigers, requesting her to have Louis Reiger sign a fee agreement and return it to him. This document was never executed or returned to respondent or to the Chapman Law Firm.

¶15. Marvin Seltzer, who was driving the automobile in which Louis and Florence Reiger were riding at the time of the accident in which they were injured, was insured by a Geico automobile policy with liability limits of \$100,000 per person for personal injury. Seltzer did not have any other assets to provide additional recovery. (Stip ¶ 9)

¶16. On September 11, 2002, as counsel of record for both Florence and Louis Reiger, respondent filed a lawsuit, Case Number 2002 CV O1017 in the Portage County Court of Common Pleas, naming only Marvin Seltzer as defendant. Respondent brought no action against any other defendants and did not amend the complaint against Seltzer at any time. The complaint did not include an underinsured claim or any other claim against State Farm, the Reigers' insurance carrier. (Ex. 4). Respondent did not send Geico a demand for settlement before filing the lawsuit.

¶17. Geico paid the full amount of its \$100,000.00 per person policy limits for Florence Reiger on October 6, 2003 and the full amount of its \$100,000.00 per person policy limits for Louis Reiger on May 6, 2004. (Stip. ¶9)

¶18. Upon receiving the checks from Geico, respondent endorsed the back of the Geico check made payable to Florence Reiger (No. N68219844) by signing Florence Reiger's name, Louis Reiger's name and his own name. (Ex. 6).

¶19. Respondent endorsed the back of the Geico check made payable to Louis Reiger (No. N70155036) by signing both Florence Reiger's name and Louis Reiger's name, (Ex. 7) placing the letters "POA" after each client's name on the back of this check. At no time did respondent have a power of attorney from either client. Respondent also did not have permission to sign his clients' names to the Geico checks. (Tr. 41-42)

¶20. Louis Reiger and Florence Reiger were insured by State Farm Mutual Automobile Insurance Company (State Farm) in New York. As part of their policy, they had personal injury protection (PIP) coverage, of \$175,000.00 per person.

¶21. New York PIP coverage is no-fault insurance paid without a finding of liability. PIP claims for medical and hospitalization expenses are paid upon application of the providers of such services without the necessity for the intervention of counsel. New York statutes as interpreted by New York courts do not permit payment or collection of attorney fees on PIP claims paid.

¶22. Neither respondent nor the managing principal attorney of the Chapman Law Firm was trained or familiar with New York tort or insurance law, did little research on the subject, and did not associate with a lawyer trained or familiar with the provisions of New York law applicable to the Reigers' PIP insurance.

¶23. On November 14, 2002, respondent applied for PIP coverage on behalf of both Louis Reiger and Florence Reiger by filling out paperwork sent to him from State Farm. Respondent signed the PIP coverage forms as "POA" for Louis Reiger and Florence Reiger.

¶24. Cleveland MetroHealth Hospital had already submitted its claim to State Farm on behalf of Louis Reiger and received the policy limits of \$175,000.00 directly from State Farm.

¶25. Respondent negotiated a \$6,000.00 settlement with State Farm regarding subrogation rights on the PIP no-fault medical coverage of Florence Reiger. (Stip. 16).

¶26. State Farm paid directly to Akron General Hospital \$33,152.91 on its claim for services rendered to Florence Reiger.

¶27. At no time did respondent, the Chapman Law Firm, or either of the Reigers receive any of the funds paid by State Farm to the hospitals under the PIP coverage.

¶28. No efforts were required of Respondent for the Reiger's PIP coverage to pay their hospital and medical expenses directly to the providers pursuant to the terms of that no-fault medical coverage and applicable New York State Statutes.

¶29. On December 9, 2003, respondent sent to Louis Reiger and Florence Reiger a letter referenced "release and status update." (Stip. 17, Ex. 10).

¶30. That document itemizes Florence Reiger's recovery as:

\$100,000 from Geico + \$39,152.92 from State Farm for a gross recovery
of \$139,152.92,
less deductions for the following:
\$6,000.00 State Farm subrogation claim
\$55,661.00 Legal fees (at 40 percent)
\$3,500 Comprehensive asset investigation of Marvin Seltzer
Florence Reiger's net recovery: \$34,839.00.
(Stip. 18)

¶31. No check to Florence Reiger accompanied the letter of December 9, 2003, or was issued in December 2003. No disbursement of any kind to Florence was made until September 2004. (Stip. 19)

¶32. One of the expenses listed in the December 9, 2003 "release and status update" is \$3,500.00 for a "comprehensive asset investigation of Marvin Seltzer." The letter explains that this expense is for the benefit of Louis Reiger to determine if Seltzer had any assets from which to seek additional recovery. (Stip. 20)

¶33. On September 22, 2004, Respondent sent a "disbursement of funds" sheet to Louis and Florence Reiger listing recovery and expenses for Louis and Florence Reiger jointly rather than calculating each client's recovery and expenses separately. This disbursement sheet recites that the total recovery from State Farm and Geico was \$414,152.92. Attorney fees of \$165,661.17 are calculated on the total recovery at 40%. After deduction of expenses, the Reigers received a total joint disbursement of \$8,207.46, for which amount a check was sent. (Stip. ¶ 23)

¶34. On October 5, 2004, after receiving a complaint from one of the Reigers' children, respondent sent a letter to his clients explaining the disbursement form.

¶35. Another of Louis and Florence Reiger's children lodged a grievance with Disciplinary Counsel respecting the attorney fees charged by respondent.

¶36. The Office of Disciplinary Counsel sent respondent a letter on January 31, 2005, requesting additional information regarding respondent's actions in the case involving the Reigers, specifically requesting information about the calculation of attorney's fees.

¶37. Respondent sent a response to Disciplinary Counsel on February 15, 2005.

¶38. On February 22, 2005, respondent sent a letter and a revised disbursement sheet to his clients showing a reduced total recovery of \$408,152.92 after subtraction of the \$6,000 subrogation from the State Farm PIP payments for Florence Reiger. Her total recovery from State Farm was listed as \$33,152.92. The new attorney fee is \$163,261.17, calculated at 40% of the revised total recovery.

¶39. The revised disbursement sheet does not calculate separate percentages for the recovery from Geico and State Farm, despite the fact that State Farm was never a defendant in the law suit filed by respondent in behalf of Mr. and Mrs. Reiger. Since the fee agreement permits a 40% fee only after suit was commenced against a party, if any fee should have been taken from the State Farm PIP recovery, at the contract rate of 33 1/3% before suit was filed, the clients would have received an additional \$13,883.79.

¶40. On the revised disbursement sheet, the expenses were still combined and not separated by client. The State Farm \$6,000.00 subrogation on behalf of Florence Reiger initially deducted to arrive at the revised total recovery was then deducted a second time as an expense further reducing the clients' net recovery.

¶41. Because of the adjustment to the total recovery shown by the revised disbursement document, the total to be disbursed to the clients was calculated to be \$10,607.46 rather than the \$8,207.46 originally remitted with the initial disbursement document. The Reigers were sent a check for the \$2,400.00 difference.

¶42. At the panel hearing, Relator presented the expert testimony of Howard Mishkind, Esq., whose qualifications were stipulated by Respondent's counsel. Eighty to Ninety per cent of Mr. Mishkind's current law practice concerns catastrophic

personal injury, medical negligence, wrongful death, and other and major personal injury cases. He works on a contingency fee basis. Among Mr. Mishkind's clients are out-of-state clients whose claims involve out-of-state insurance policies and otherwise require application of the laws and the interpretation of the laws of other states and nations. He has experience in matters of legal ethics and grievances as a member of a local grievance committee since 1998 and has served as Chair of that committee.

¶43. Mr. Mishkind testified that in his opinion, the attorney fee charged the Reigers was excessive. He delivered his opinion that any fee was excessive when taken on the client's no-fault medical coverage payable directly to medical providers for their services provided for covered injuries and not to the clients or their attorneys, especially when forbidden by state law. He testified further that combining the amounts recovered for the client's separate claims for calculating attorney fees resulted in an excessive fee.

¶44. Mr. Mishkind based his opinion in part also on the facts that the Geico policy limits were paid in settlement of the claims against the tortfeasor after suit was filed. The no fault medical coverage payments were paid by the clients' insurer, State Farm, that had not been sued. Thus, adding the tortfeasor's Geico policy limits to the no fault medical coverage payments paid by the clients' insurer for the purpose of calculating a 40% attorney fee also resulted in an excessive fee, for any attorney fee payable on the no-fault payments by non-party State Farm, would have been limited to 33 1/3% by the terms of the Reigers' fee contract with the attorneys. (Tr. 129-136.)

¶45. Respondent stipulated that the fee charged was excessive.

¶46. Following their receipt of the recalculated distribution sheet and explanation sent by respondent, Mr. and Mrs. Reiger sued respondent, Frank Chapman, and the Chapman Law Firm for malpractice and excessive fees.

¶47. In a settlement of the Reigers' lawsuit, the Chapman Law Firm disgorged the attorney fees taken on the PIP coverage in the amount of \$83,261.17. The Reigers also recovered \$18,738.83 from the malpractice insurance policy held by Chapman Law Firm.

¶48. From the evidence presented at the panel hearing, the panel finds that respondent obtained the maximum compensation that could be obtained from available insurance sources for Louis and Florence Reiger for the injuries they suffered in the accident of May 22, 2002. Any further claim of lost recovery or overcharge was apparently resolved by settlement of the Reigers' malpractice suit against respondent.

CONCLUSIONS OF LAW

¶49. Expert Howard Mishkind gave his opinion that an inexperienced associate in a law firm does not escape ultimate ethical responsibility by following orders or example of a superior to perform unethically. (Tr. 140-142.)

¶50. The panel concludes that Mr. Mishkind's expert opinion is in accord with recent decisions of the Supreme Court of Ohio. See *Disciplinary Counsel v. Johnson*, 106 Ohio St.3d 365, 2005-Ohio-5323, *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, *Disciplinary Counsel v. Suarez* (1998), 84 Ohio St. 3d 4. In *Disciplinary Counsel v. Johnson*, the Supreme Court explained: "Respondent (Johnson) was a comparatively inexperienced lawyer at the time she committed her misconduct. And although new lawyers are just as accountable as more seasoned professionals for

not complying with the Code of Professional Responsibility, we have made some allowances in the past for novice practitioners. *Columbus Bar Assn. v. Moreland*, 97 Ohio St.3d 492, 2002-Ohio-6726, 780 N.E.2d 579; *Columbus Bar Assn. v. Taylor* (1998), 84 Ohio St.3d 149, 702 N.E.2d 411. Moreover, respondent was following the example of a lawyer whose judgment she had trusted for many years before she was admitted to the bar. Her reliance was misplaced, but understandable.” *Johnson*, at ¶ 39.

¶51. Accordingly, adopting the expert opinion of expert witness, Howard Mishkind, and the stipulation of respondent that the fee charged Louis and Florence Reiger was excessive, the panel concludes that respondent, Justin Martus Smith, has violated DR 2-106 (a) a lawyer shall not *** charge or collect a clearly excessive fee.

¶52. Respondent had no knowledge of the no-fault aspects of the Reiger’s PIP coverage or of the provisions of New York law governing the medical coverage and the additional optional coverage purchased by the Reigers. He did little research to learn about New York law and the PIP coverage, and did not associate with a lawyer knowledgeable in matters of New York law and practice. Thus he did not learn that no attorney fees were permitted to be taken from the medical payments made pursuant to the PIP coverage. As noted by expert witness Mishkind, since respondent did not know this vital fact, he could not properly advocate for his clients or advise his principal, Frank Chapman, of the impropriety of the Chapman Law Firm taking a fee on the PIP payments made by State Farm. The panel thus concludes that in that regard respondent violated DR 6-101(A)(1) by handling a legal matter which he knew or should have

known that he was not competent to handle, without associating with a lawyer who was competent to handle it.

AGGRAVATION AND MITIGATION

¶53. Relator and Respondent have stipulated to the following mitigating factors pursuant to BCGD Proc. Reg. § 10 (B)(2):

(a) absence of a prior disciplinary record;

(b) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

¶54. Respondent Smith testified in his own behalf, that he was an associate, not a principal in the Chapman Law Firm. He testified that all decisions for the law firm were made by the owner of the firm, Frank Chapman, and that he, as an associate licensed to practice law for only two years, was bound to follow Chapman's instructions. He testified that Frank Chapman approved all settlements and calculated or directed the calculation of all fees. For his efforts on behalf of the firm, Respondent received a salary and a percentage of the fees he earned for the firm.

¶55. Respondent also introduced the testimony of Nicholas Satullo, Esq., Brandon Henderson, Esq., Eric Norton, Esq., all practicing attorneys, and of Robert Morway, a second year evening law student at the University of Akron. Attorney Satullo was respondent's, Frank Chapman's, and the Chapman Law Firm's lawyer who defended the malpractice action against them brought by Louis and Florence Reiger. Attorneys Henderson and Norton and Mr. Morway all were prior employees of the Chapman Law Firm. All four witnesses testified to respondent's good character and reputation and all

testified that from personal knowledge they knew Frank Chapman made all financial decisions for the Chapman Law Firm.

¶56. The Supreme Court has instructed that because each disciplinary case is unique, BCGD Proc. Reg. § 10 (B) does not limit our consideration to the aggravating and mitigating factors listed there, but that all relevant factors may be taken into account when determining the appropriate sanction to be imposed when misconduct has been found.

¶57. In *Cincinnati Bar Association v. Mullaney, supra*, respondent Mullaney was a recently admitted attorney working for a law firm with established practices and procedures involving using a person or organization to recommend or promote the lawyers services, aiding non-lawyers in the practice of law, sharing legal fees with non-lawyers, and handling legal matters without adequate preparation. In deciding the appropriate sanction to impose upon Mullaney for his participation in the misconduct found and considering relevant factors included and not included specifically in BCGD Proc. Reg. § 10 (B), the Supreme Court said “Because each disciplinary case is unique, we are not limited to the aggravating and mitigating factors specified in BCGD Proc.Reg. 10(B) but may take into account ‘all relevant factors’ in determining what sanction to impose. In Mullaney’s case, we find that though he is subject to sanction for his failure to comply with the cited Disciplinary Rules, he was also an inexperienced associate of the Brooking firm at the time of his misconduct. As a new attorney, Mullaney devoted many hours trying to assist the clients assigned to him; however, practices in place at the Brooking firm necessarily constrained his efforts. For his part

in representing Foreclosure Solutions customers, a public reprimand is appropriate.”

Mullaney, at ¶ 40.

RECOMMENDATIONS FOR SANCTION BY PARTIES

¶58. Relator recommends that respondent be suspended from the practice of law for a period of one year with the entire suspension stayed.

¶59. Respondent’s counsel asks that the entire complaint be dismissed, but suggests in the alternative that, if respondent’s misconduct be found, a public reprimand be given.

PANEL RECOMMENDED SANCTION

¶60. A number of recent Supreme Court decisions have considered the appropriate sanction to be imposed upon an attorney for charging an excessive attorney fee accompanied by other disciplinary violations. Six months stayed suspensions were imposed in *Akron Bar Assn. v. Watkins*, 120 Ohio St.3d 307, 2008-Ohio-6144, *Cuyahoga Cty. Bar Assn. v. Cook*, 121 Ohio St.3d 9, 2009-Ohio-259, and *Toledo Bar Assn. v. Johnson*, 121 Ohio St.3d 226, 2009-Ohio-777, three cases involving experienced attorneys. In *Toledo Bar Assn. v. Sawers*, 121 Ohio St.3d 229, 2009-Ohio-778 and *Cincinnati Bar Assn. v. Mullaney*, supra, public reprimands were given to relatively inexperienced lawyers for their misconduct arising in circumstances in which they were associated with more experienced lawyers in authority.

¶61. Respondent’s employer, the owner of the Chapman Law Firm, Frank Chapman, is not a party to the Complaint before the panel and his testimony was not introduced at the panel hearing.

¶62. However, all the evidence introduced indicates that Chapman calculated the excessive fees respondent charged. Other testimony confirms that respondent was an inexperienced attorney obliged to take his orders from and to conform his conduct to the directions of his more experienced employer, Frank Chapman.

¶63. Although attorney Satullo, who represented respondent in the Reiger malpractice action, testified at the panel hearing that it was clear that no attorney fee should have been taken on the PIP payments, he nevertheless testified that Chapman was in charge of the fee calculations.

¶64. Mr. Satullo also noted respondent's good character and reputation for honesty.

¶65. Three more of respondent's acquaintances who testified at the panel hearing affirmed respondent's reputation for good character and honesty. Several character letters were also submitted on respondent's behalf.

¶66. Applying the considerations quoted above from *Disciplinary Counsel v. Johnson* and from *Cincinnati Bar Assn. v. Mullaney*, the panel recommends that respondent be publicly reprimanded for his misconduct

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 June 11, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Justin M. Smith, be publicly reprimanded in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendations as those of the Board.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall". The signature is written in a cursive, somewhat stylized font.

**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

FILED

DEC 05 2008

BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

Justin Martus Smith
J. M. Smith Co., L.P.A.
55 Erieview Plaza, Suite 630
Cleveland, OH 44114

Attorney Registration No.: (0072044)

AGREED
STIPULATIONS

BOARD NO. 08-019

DISCIPLINARY COUNSEL
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

AGREED STIPULATIONS

Relator, Disciplinary Counsel, and respondent, Justin Smith, do hereby stipulate to the admission of the following facts and exhibits.

STIPULATED FACTS

1. Respondent, Justin Martus Smith, was admitted to the practice of law in the state of Ohio on May 22, 2000. Respondent is subject to the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.
2. On May 22, 2002, Louis Reiger and Florence Reiger were passengers in a vehicle driven and owned by Marvin Seltzer when it was involved in an accident. The car was traveling westbound on I-76 in Portage County, Ohio when the driver lost control causing the car to flip into the median.
3. Louis Reiger and Florence Reiger were at all times residents of the state of New York. The driver, Seltzer, and his wife were residents of Texas. The couples were on their way to Missouri for vacation.

4. Louis Reiger and Florence Reiger suffered physical injuries in the accident. Florence Reiger suffered injuries that were less severe than her husband. Louis Reiger, 84, suffered severe injuries including a degloving injury of the scalp, bilateral hemorrhage contusions of the brain, right open-globe injury of the eye and a cervical spine fracture at C1. Louis Reiger required extensive hospitalization and rehabilitation.
5. No one was cited out of the accident. The driver, Seltzer, alleges that a phantom vehicle caused him to overcorrect, resulting in the accident.
6. At the time, Respondent was an associate attorney with the Chapman Law Firm in Cleveland, Ohio. The Reigers contacted the Chapman Law Firm through an advertisement in the yellow pages.
7. The fee agreement states fees will be earned in the following percentages:
 - 33 1/3 percent of the gross amount if settlement achieved without filing suit;
 - 40 percent of the gross settlement or judgment of suit if filed; and
 - 45 percent of the gross settlement or judgment following trial and/or appeal.
8. On July 18, 2002, respondent sent a letter to Marla Cino, a daughter of the Reigers, requesting her to have Louis Reiger sign a fee agreement and return it to him.
9. The driver, Seltzer, was insured through Geico. His policy had a limit of \$100,000 per person for personal injury. Geico paid the full amount for Florence Reiger on October 6, 2003 and for Louis Reiger on May 6, 2004. Seltzer did not have any assets to provide additional recovery.
10. Louis Reiger and Florence Reiger had insurance through State Farm Mutual Automobile Insurance Company (State Farm) in New York. As part of their policy, they had personal

injury protection (PIP) coverage. PIP coverage is also known as no-fault insurance as it is paid without a finding of liability. The policy limit was \$175,000 per person.

11. On November 14, 2002, respondent applied for PIP coverage on behalf of both Louis Reiger and Florence Reiger by filling out paperwork sent to him from State Farm. Respondent signed the PIP coverage forms as "POA" for Louis Reiger and Florence Reiger.
12. At the time that respondent completed the paperwork, Cleveland MetroHealth Hospital had already applied for coverage on behalf of Louis Reiger.
13. Cleveland MetroHealth directly received \$175,000 on behalf of Louis Reiger.
14. Akron General Hospital directly received \$33,152.91 on behalf of Florence Reiger.
15. At no time did respondent or the Chapman Law Firm receive any of the funds paid to the hospitals under the PIP coverage.
16. Respondent negotiated with State Farm regarding subrogation rights for Florence Reiger's recovery in the amount of \$6,000. The subrogation was negotiated on the PIP coverage, which is no-fault liability insurance.
17. On December 9, 2003, respondent sent a letter to Louis Reiger and Florence Reiger which is referenced as "release and status update."
18. The letter breaks down Florence Reiger's recovery as: \$100,000 from Geico + \$39,152.92 from State Farm (PIP coverage) for a gross recovery of \$139,152.92. The following expenses were deducted from the gross recovery:
 - \$6,000.00 State Farm subrogation claim
 - \$55,661.00 Legal fees (at 40 percent)
 - \$3,500.00 Comprehensive asset investigation of Marvin Seltzer

19. Respondent listed Florence Reiger's net recovery as \$34,839.00. Florence Reiger did not receive a check in December 2003. She did not receive any disbursements until December 2004.
20. One of the expenses listed in the December 9, 2003 letter is \$3,500 for a "comprehensive asset investigation of Marvin Seltzer." Respondent's letter explains that this expense is for the benefit of Louis Reiger to determine if Seltzer had any assets from which to seek additional recovery.
21. On September 22, 2004, Respondent sent a "disbursement of funds" sheet to Louis and Florence Reiger. Respondent listed recovery and expenses for Louis and Florence Reiger jointly. Their recovery and expenses are not calculated separately.
22. In this disbursement sheet, respondent states that the total recovery from State Farm and Geico was \$414,152.92. Attorney fees are calculated on the total recovery at 40% for \$165,661.17.
23. After deduction of the listed expenses, the Reigers received a total joint disbursement of \$8,207.46 out of a total recovery of \$414,152.92. A check for \$8,207.46 was sent to the Reigers.
24. On October 5, 2004, after receiving a complaint from Marla Cino, one of the Reigers' children, respondent sent a letter to his clients explaining the disbursement form.
25. The Office of Disciplinary Counsel sent respondent a letter on January 31, 2005 requesting additional information regarding respondent's actions in the case involving the Reigers. Disciplinary Counsel specifically requested information about the calculation of attorney's fees. Respondent sent a response to Disciplinary Counsel on February 15, 2005.

26. On February 22, 2005, Respondent sent a letter and a revised disbursement sheet to his clients.
27. Respondent's revised disbursement sheet lists a total recovery of \$408,152.92. The \$6,000 subrogation claim was subtracted from the State Farm recovery for Florence Reiger at the top of the disbursement sheet. Her total recovery from State Farm is then listed as \$33,152.92.
28. On the revised disbursement sheet, the attorney fees are listed at \$163,261.17. The fees are calculated at 40% of the revised total recovery. The revised disbursement sheet does not calculate separate percentages for the recovery from Geico and State Farm, despite the fact that State Farm was never a defendant in the law suit.
29. The fee agreement for called for a 40% fee after suit was commenced. If fees were taken from the State Farm PIP recovery at 33 1/3%, the Reigers would have received an additional \$13,883.79.
30. On the revised disbursement sheet, the expenses were still combined and not separated by client. The State Farm subrogation claim on behalf of Florence Reiger was also listed under expenses. It was deducted from the recovery twice. It was deducted from the amount of her State Farm recovery and as an expense.
31. The revised disbursement resulted in an increase to the clients of \$2,400 due to the adjustment in the amount of total recovery. The total disbursed to the clients was listed as \$10,607.46.
32. The Reigers were sent a check for the difference between the two disbursement sheets (\$2,400.00).

33. Respondent, Frank Chapman and the Chapman Law Firm were sued by the Reigers for malpractice and excessive fees. In a settlement of the claims, the Chapman Law Firm disgorged the attorney fees taken on the PIP coverage in the amount of \$83,261.17. The Reigers also recovered \$18,738.83 from the malpractice insurance policy held by Chapman Law Firm.
34. Respondent agrees that he currently understands the fee charged to the Reigers was clearly excessive.

STIPULATED EXHIBITS

1. Traffic Crash Report #67-846-67, dated May 22, 2002
2. Contingent Fee Agreement for Legal Services, dated May 24, 2002
3. State Farm Mutual policy limits, Louis and Florence Reiger
4. *Louis Reiger and Florence Reiger vs. Marvin Seltzer*, Portage County Court of Common Pleas, case # 2002 CV 01017
5. Letter to Marla Cino, dated July 18, 2002
6. Check from Geico General Insurance Company (#N68219844)
7. Check from Geico General Insurance Company (#N70155036)
8. State Farm PIP application for Florence Reiger, November 14, 2002
9. State Farm PIP application for Louis Reiger, November 14, 2002
10. Letter to Louis Reiger and Florence Reiger, dated December 9, 2003
11. February 22, 2005 letter to Louis & Florence Reiger
12. Letter to Louis Reiger and Florence Rieger, dated September 24, 2004
13. Letter to Louis Reiger and Florence Rieger, dated October 5, 2004
14. Disbursement of funds, October 2004

15. Disbursement of funds, February 2005
16. Cashier's check from Chapman Law Firm, February 22, 2005
17. Deposition of Justin Smith, given in Cuyahoga Court of Common Pleas, case no. 565521
18. Justin Smith letter to Disciplinary Counsel dated December 20, 2004, response to letter of inquiry
19. Justin Smith letter to Disciplinary Counsel dated February 15, 2005, response to request for additional information

STIPULATED VIOLATIONS

Relator and respondent have been unable to reach stipulations as to violations.

The parties leave the determination of whether or not violations have been proven by clear and convincing evidence to the discretion of the panel.

STIPULATED SANCTION

The parties are unable to reach a stipulated sanction in this matter. Instead the parties leave the determination as to appropriate sanction to the wisdom and discretion of the panel if the panel finds violations have been proven by clear and convincing evidence.

STIPULATED MITIGATION

Relator and Respondent stipulate to the following mitigating factors pursuant to BCGD Proc. Reg. § 10 (B)(2):

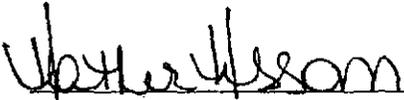
- (a) absence of a prior disciplinary record;
- (b) full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 5th day of December, 2008.


Jonathan E. Coughlan (0026424) 0040142)
Disciplinary Counsel

Richard S. Koblentz (0002677)
Craig J. Morice (0065424)
Counsel for Respondent
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55 Public Square, Suite 1170
Cleveland, Ohio 44113

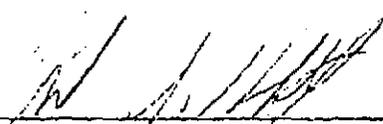

Heather L. Hissom (0068151)
Assistant Disciplinary Counsel

Justin Martus Smith (0072044)
Respondent
J. M. Smith Co., L.P.A.
55 Erieview Plaza, Suite 630
Cleveland, OH 44114

CONCLUSION

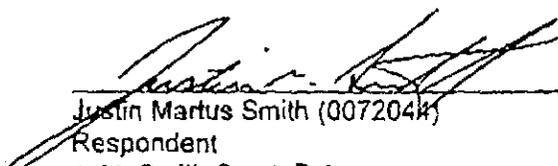
The above are stipulated to and entered into by agreement by the undersigned parties on this ____ day of December, 2008.

Jonathan E. Coughlan (0026424)
Disciplinary Counsel



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Craig J. Morice (0065424)
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