ORIGINAL

THE SUPREME COURT OF OHIO

AKRON BAR ASSOCIATION Relator	}	CASE NO. 2009-1522
v.	}	
MICHELLE A. SMITHERN Respondent	}	

FILED
SEP 24 2009
CLERK OF COURT
SUPREME COURT OF OHIO

DISCIPLINARY PROCEEDING

Respondent's Objection to the Recommendation of the Board of Commissioners On Grievances and Discipline of the Supreme Court of Ohio and Brief in Support

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Filed on Behalf of Respondent, Michelle A. Smithern

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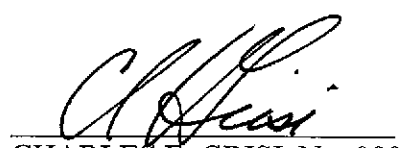
THE SUPREME COURT OF OHIO

AKRON BAR ASSOCIATION Relator v. MICHELLE A. SMITHERN Respondent	}	CASE NO. 2009-1522 OBJECTION TO THE RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO AND BRIEF IN SUPPORT

Respondent, Michelle A. Smithern, hereby objects to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Specifically, Respondent objects to the Board's recommended sanction of indefinite suspension. The reasons for Respondent's objection are set forth in the attached Brief in Support of Respondent's Objection.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Objection to the Recommendation of the Board of Commissioners On Grievances and Discipline of the Supreme Court of Ohio and Brief in Support was sent by First Class U.S. Mail this 23rd day of September, 2009 to:

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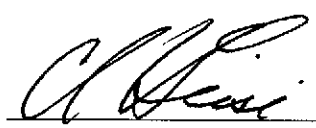

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THE SUPREME COURT OF OHIO

AKRON BAR ASSOCIATION	}	CASE NO. 2009-1522
Relator	}	
v.	}	
	}	
MICHELLE A. SMITHERN	}	
Respondent	}	

DISCIPLINARY PROCEEDING

BRIEF IN SUPPORT OF RESPONDENT'S OBJECTION

Filed on Behalf of Respondent, Michelle A. Smithern

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BRIEF IN SUPPORT OF RESPONDENT'S OBJECTION

OBJECTION NO. 1

The appropriate sanction in this case is an actual suspension for an extended and definite period, with part of the suspension stayed on conditions of restitution and continued treatment for addiction.

Michelle Smithern is an unblemished attorney that faltered under the weight of addiction. In 2004, Ms. Smithern gambled online, not realizing she had become addicted to gambling. As she continued to gamble online, she also began to use alcohol in excess. Gambling requires money. Alcohol impairs judgment. The weight and effect of these addictive vices led Ms. Smithern to misappropriate her law firm's funds to feed her addictions.

The only issue before this Court is whether the recommended sanction of indefinite suspension is appropriate for an attorney with no prior disciplinary record whose misconduct was motivated by addiction. Based on this Court's precedent in similar cases, Respondent submits that the appropriate sanction is a suspension for an extended and definite period, with part of the suspension stayed on condition that Ms. Smithern pay restitution and continue treatment for her addiction.

I. SUMMARY OF FACTS

The facts as stated in the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (August 24, 2009, attached as Appendix A) (hereinafter "Recommendation") are not disputed.

Ms. Smithern graduated from the University of Akron Law School and was licensed to practice in 1986. (Recommendation, p. 1) She worked for Buckingham, Doolittle & Burroughs,

LLC (Buckingham) for her entire career, and was a partner at Buckingham at the time of her misconduct. (Recommendation, p. 1-2)

Between 2004 and 2006, Ms. Smithern converted to her own use approximately $108,000 of funds belonging to Buckingham. (Recommendation, p. 2) Ms. Smithern voluntarily ceased the practice of law on November 3, 2006 (Recommendation, p. 6), and entered into treatment with Dr. Karen Cimini, Ph.D. in December 2006. (Recommendation, p. 4) Dr. Cimini's primary diagnosis was gambling addiction, with a secondary diagnosis of alcohol addiction. (Recommendation, p. 4)

In July 2007, a Summit County Grand Jury indicted Ms. Smithern for one count of aggravated theft. (Recommendation, p. 2) On July 19, 2007, Ms. Smithern entered a plea of guilty to the lesser charge of theft, a felony of the fourth degree. (Recommendation, p. 2) On October 23, 2008, Respondent was sentenced to twelve months incarceration, suspended, and placed on five years of probation. (Recommendation, p. 2) In conjunction with the plea, Ms. Smithern entered into a settlement agreement with Federal Insurance Company (Buckingham's insurer) to repay the misappropriated funds using a payment schedule. (Recommendation, p. 5) On February 17, 2009, this Court placed Ms. Smithern on interim suspension as a result of her pleading guilty to a felony. (Recommendation, p. 6)

The Akron Bar Association initiated disciplinary proceedings against Ms. Smithern, who admitted to violating DR 1-102(A)(4), DR 1-102(A)(6), and DR 9-102(A) and (B)(3) for each of the 32 counts in the Relator's complaint asserted at the disciplinary hearing. (Recommendation, p. 3) The Relator withdrew one count contained in the complaint prior to the hearing. (Recommendation, p. 3) Additionally, the Panel unanimously dismissed allegations in the

complaint that Ms. Smithern violated DR 7-101(A)(3) for each of the 32 counts presented in the complaint. (Recommendation, p. 3)

II. THE BOARD'S RECOMMENDATION

The Board of Commissioners adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Ms. Smithern be indefinitely suspended retroactive to the date of her interim suspension, and that before she can be readmitted to the practice of law, the following conditions must be complied with:

1. Respondent must enter into a contract with OLAP and be in compliance with any requirements required by OLAP;
2. Respondent must be in compliance with all terms of her probation in the associated criminal case;
3. Respondent must be in compliance with the settlement agreement between her and Federal insurance Company and stay current on her payments of restitution;
4. There must be a prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that Respondent will be able to return to competent, ethical professional practice of law.

(Recommendation, p. 6)

Based on the facts of this case and the precedent of this Court, Ms. Smithern respectfully disagrees with the Panel and the Board of Commissioners that an indefinite suspension is the appropriate sanction in this case.

III. LAW AND ARGUMENT: SANCTIONS

A. Standard of Review

When imposing sanctions for attorney misconduct, the Court considers relevant factors, including the duties violated by the lawyer and the sanctions imposed in similar cases. *Dayton Bar Assn. v. Schram*, 122 Ohio St.3d 8, 907 N.E.2d 311, 2009-Ohio-1931 at ¶8. In making a final determination, the Court also weighs evidence of the aggravating and mitigating factors listed in Section 10 of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline ("BCGD Proc.Reg."). Id. Because each disciplinary case is unique, the Court is not limited to the factors specified in the rule but may take into account "all relevant factors" in determining what sanction to impose. Id., citing BCGD Proc.Reg. 10(B).

B. Sanctions Imposed in Similar Cases

In other cases, this Court has adopted a specific rationale in determining an appropriate sanction when addiction is a mitigating factor in a case. In *Cincinnati Bar Ass'n v. Washington*, this Court stated, "Our goal in this and other cases involving attorneys whose misconduct was motivated by a drug or alcohol addiction is to tailor the sanction to assist and monitor the attorney's recovery." 109 Ohio St.3d 308, 847 N.E.2d 435, 2006-Ohio-2423 at ¶9, citing *Disciplinary Counsel v. Connor*, 105 Ohio St.3d 100, 2004-Ohio-6902, 822 N.E.2d 1235.

In *Washington*, the respondent was charged with violating DR 1-102(A)(4), 2-106(A) and (B), and 9-102(A). Id. at ¶4. In a continuing course of conduct, the respondent billed multiple insurance-company clients more than $91,000 for work that he did not perform, and converted $4,000 in retainers from two other clients for personal use. The respondent's law firm returned

the $91,000 to the insurance company clients and returned the $4,000 in retainers to the other clients from respondent's capital account.

Evidence presented at the hearing revealed that the respondent had a cocaine and alcohol addiction during the eighteen months in which he violated the disciplinary rules. At the time of the hearing, the respondent had entered into a 30-day treatment program, regular outpatient treatment, and entered into a recovery contract with OLAP.

This Court noted the aggravating factors in the case were respondent's dishonest or selfish motive and his pattern of misconduct over an 18-month period. Id. at ¶6. The mitigating factors were the absence of any disciplinary record, the payment of full restitution to all victims, respondent's full disclosure and cooperative attitude during the disciplinary process, and respondent's diagnosed cocaine and alcohol dependency, which the board found was a primary cause of respondent's misconduct. Id.

Although the board recommended a one-year suspension with the entire suspension stayed on conditions, this Court disagreed, and thought a lengthier suspension with conditions was more appropriate for an attorney dealing with addiction, setting forth the rationale that sanctions in cases involving addiction should be tailored to assist and monitor the attorney's recovery. Id. at ¶9. Accordingly, the Court issued a two-year suspension with eighteen months stayed on the conditions that (1) respondent is supervised by a monitoring attorney during the stayed suspension, (2) respondent complies with the terms of his OLAP contract, and (3) respondent commits no other misconduct. Id. at ¶10.

Other disciplinary cases have followed *Washington's* lead, and have focused on sanctions tailored to assist and promote recovery. In *Toledo Bar Ass'n v. Shousher*, 112 Ohio St.3d 533, 861 N.E.2d 536, 2007-Ohio-611, the respondent had commingled or misappropriated funds from

fourteen clients over a several month period between 2003 and 2004, and had obtained a credit card in his wife's name without permission. The respondent was charged with violating DR 1-102(A)(4), DR 1-104, DR 6-101(A)(3), and DR 9-102(A) and (B)(4). The respondent pleaded guilty in criminal court to two counts of forgery and one count of identity theft. The relator recommended indefinite suspension. The board, citing *Washington*, recommended a two-year suspension with 18 months stayed on conditions. Id. at ¶¶ 33, 35. This Court adopted the board's recommendation, agreeing that *Washington* was analogous to the case and demonstrated the appropriate sanction. Id.

In *Dayton Bar Association v. Rohrkaste*, 111 Ohio St.3d 224, 855 N.E.2d 868, 2006-Ohio-5487, the respondent had solicited funds from a client's relative for attorney's fees, then spent the money to buy illegal drugs. Respondent was addicted to crack cocaine and alcohol, but had ceased using and had entered into treatment programs at the time of the disciplinary hearing. The Board recommended, and this Court adopted, a two-year suspended sentence with the entire two years stayed on conditions centered around treatment for addiction and CLE requirements. Id. at ¶¶ 13 -15.

The facts of the present case are closely analogous to those in *Washington*. The infractions in both cases are nearly identical, and were the result of addiction. Further, the aggravating and mitigating factors for the attorneys in both this case and *Washington* are also analogous.

C. Aggravating Circumstances

In determining the appropriate sanction, the Court must also weigh evidence of the aggravating and mitigating factors listed in Section 10 of the Rules and Regulations Governing

Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline. *Schram* at ¶8.

The aggravating circumstances to be considered are: (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) lack of cooperation in the disciplinary process; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of and resulting harm to victims of the misconduct; and (i) failure to make restitution. BCGD Proc.Reg. 10(B)(1).

The Board did not specifically reference any aggravating circumstances in its Recommendation. However, in this case, as in *Washington*, the applicable aggravating factors are BCGD Proc.Reg. 10(B)(1)(b) and (c). Ms. Smithern's use of the funds for her personal use constitutes a dishonest or selfish motive, and her continued course of misconduct, occurring from April 2004 through October 2006, establishes a pattern of misconduct.

D. Mitigating Circumstances

Mitigating circumstances are listed in BCGD Proc.Reg. 10(B)(2): (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) timely good faith effort to make restitution or to rectify consequences of misconduct; (d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings; (e) character or reputation; (f) imposition of other penalties or sanctions; (g) chemical dependency or mental disability when there has been all of the following: (1) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor; (2) A determination that the chemical dependency or mental disability contributed to cause the

misconduct; (3) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment; (4) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions; and (h) other interim rehabilitation.

The mitigating circumstances applicable in this case are (a), (c), (d), (e), (f), and (g). As stated above, there have been no other disciplinary actions against Ms. Smithern during her twenty years as a member of the Ohio Bar. Ms. Smithern voluntarily entered into an agreement to pay Federal Insurance Company restitution and has cooperated with the Disciplinary Committee and Buckingham throughout the disciplinary process. (Recommendation, p. 5) As evidenced by the transcript, Ms. Smithern self-reported her misconduct, cooperated with Buckingham to ensure the efficient transfer of her client's cases to other attorneys in the firm. Ms. Smithern has acknowledged the wrongfulness of her actions and willingly stipulated to the facts of her misconduct.

Over the course of practicing law for nearly twenty years, Ms. Smithern has established her good character and built a solid reputation. The present disciplinary action is the only blemish on Ms. Smithern's twenty-year career. Several members of the Akron legal community have opined on Ms. Smithern's character and reputation. The Honorable Carol Dezso, Judge of the Summit County Domestic Relations Court, Attorney Wayne Jones of Roetzel & Andress, LLP, and Frank Mazgaj of Hanna, Campbell & Powell, LLP, have all submitted letters of character to the disciplinary committee on Ms. Smithern's behalf. (Recommendation, p. 5)

BCGD Proc.Reg. 10(B)(2)(f) considers the imposition of other penalties or sanctions as a mitigating factor. In the criminal proceedings arising from the same events that underlie this

action, the Summit County Court of Common Pleas sentenced Ms. Smithern to twelve months incarceration, suspended, five years of probation, and full restitution. (Recommendation, p. 2)

Finally, Dr. Karen Cimini, a licensed psychologist, has diagnosed Ms. Smithern as having an alcohol and gambling addiction, and Ms. Smithern has admitted to same. (Recommendation, p. 4) Ms. Smithern was suffering from both addictions throughout the time of her misconduct, and both addictions contributed to Ms. Smithern's misconduct. (Recommendation, p. 4-5) Ms. Smithern has been attending meetings to treat her gambling addiction since January 2007 and since February 2008 has been attending meetings to treat her alcohol addiction. (Recommendation, p. 5) She also completed an in-house treatment program for alcohol addiction at Glenbeigh Hospital in Cleveland in February 2008. (Recommendation, p. 4-5) Dr. Cimini's prognosis is that Ms. Smithern can overcome her addictions with continued treatment. (Recommendation, p. 5)

IV. CONCLUSION

Gambling and alcohol addiction were the primary contributing cause of Ms. Smithern's misconduct. Since December 2006, Ms. Smithern has made the conscious decision to face those addictions and head down the path to recovery.

Ms. Smithern understands the seriousness of her misconduct and that a suspension is warranted in her case. She is not attempting to minimize the wrongfulness or egregiousness of her actions. However, considering Ms. Smithern's lack of prior disciplinary violations during twenty years of practice, her ongoing compliance to make full restitution, the fact that addiction was a contributing cause, and the fact that Ms. Smithern has not practiced law since November 2006, an indefinite suspension is not appropriate in this case.

In order to facilitate and monitor Ms. Smithern's recovery, a sanction similar to that in *Washington* is more appropriate, i.e. an actual suspension for an extended and definite period, with part of the suspension stayed on conditions of restitution and continued treatment for addiction.

Accordingly, Respondent suggests that the appropriate sanction is a two-year suspension from the practice of law, beginning on the date of her interim suspension, with 18 months of the suspension stayed on the condition that:

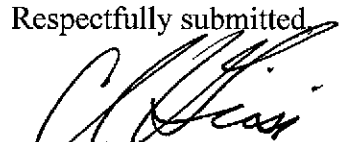
1. Respondent must enter into a contract with OLAP and be in compliance with any requirements required by OLAP;

2. Respondent must be in compliance with all terms of her probation in the associated criminal case;

3. Respondent must be in compliance with the settlement agreement between her and Federal insurance Company and stay current on her payments of restitution;

Additional conditions this Court may wish to impose are a requirement that Ms. Smithern stay current on all CLE requirements during her suspension, and that she periodically issue a written report to Relator during the stayed suspension showing compliance with the conditions. Additionally, Ms. Smithern recognizes that a probationary period, with conditions similar to the suspension period, may be appropriate in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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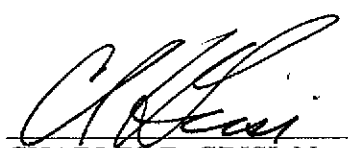
Respectfully submitted,



CHARLES E. GRISI, No. 0002599
Attorney for Respondent

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

In Re:	:	
Complaint against	:	**Case No. 08-036**
Michelle A. Smithern **Attorney Reg. No. 0032850**	:	**Findings of Fact,** **Conclusions of Law and**
Respondent	:	**Recommendation of the** **Board of Commissioners on**
Akron Bar Association	:	**Grievances and Discipline of** **the Supreme Court of Ohio**
Relator	:	
	:	

This matter was heard on May 15, 2009, in Akron, Ohio before a panel consisting of members Judge Arlene Singer of Toledo, Martha L. Butler of Columbus, and Joseph L. Wittenberg of Toledo, Chair of the panel. 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. Relator was represented by Nathan A. Ray and Vincent J. Alfera. Respondent was represented by Charles E. Grisi. Respondent was present at the hearing.

INTRODUCTION

Respondent graduated from the University of Akron Law School and was licensed to practice law in 1986. While in law school, Respondent worked full time as a legal secretary and in her third year of law school, started working for the law firm of Buckingham, Doolittle & Burroughs (Buckingham). Respondent clerked full time for Buckingham while in law school and began working with Buckingham as an attorney in 1986. At the time of her termination

from Buckingham, she was a shareholder/partner in the firm.

In her early years at Buckingham, Respondent practiced primarily litigation law. She basically did defense work for insurance companies, product liability cases, personal injury claims, and other type cases. Eventually as Respondent became a more senior associate, she started handling domestic relation cases and that then became her area of expertise at the law firm.

Between 2004 and 2006, Respondent converted to her own use approximately $108,000 of funds that belonged to Buckingham.

In July 2007, Respondent was indicted by the Summit County Grand Jury for one count of aggravated theft, a felony of the third degree.

The indictment set forth that, from on or about June 2004 through on or about November 2006, Respondent deprived Buckingham, Doolittle & Burroughs of U.S. currency in an amount in excess of $100,000. On July 19, 2007, Respondent entered a plea of not guilty. On July 29, 2008, Respondent entered a plea of guilty to a lesser charge of theft, a felony of the fourth degree. On October 23, 2008, Respondent was sentenced to twelve months of incarceration which was suspended, and she was placed on five years of probation.

During the times of the thefts, Respondent was a partner at Buckingham. Clients would retain Respondent for legal representation, at which time they would pay her a retainer. The checks that were payable to Respondent individually were converted by Respondent to her own use when she needed money and were not deposited into Buckingham's IOLTA account. Respondent would endorse the checks to herself and place them into her own personal account. There are thirty-three separate allegations in the complaint where Respondent took

funds from clients and misappropriated them for her personal use.

A thirty-three count complaint was filed against Respondent by the Akron Bar Association. At the hearing count twenty-five was withdrawn by Relator and of the remaining thirty-two counts, each count alleged violations of the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation];

2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];

3. DR 7-101(A)(3) [intentional prejudice or damage to a client during the course of the professional relationship];

4. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

The panel unanimously found that the evidence presented by Relator as to a violation of DR 7-101(A)(3) alleged in all thirty-two counts was not clear and convincing and therefore the violation of DR 7-101(A)(3) in all thirty-two counts was unanimously dismissed.[1]

Findings of Fact as to Counts 1 through 33

In her answer, Respondent admitted to every rule violation alleged in all thirty-two counts of Relator's complaint with the exception of DR 7-101(A)(3), which as previously noted, the panel unanimously dismissed. At the hearing Respondent admitted she stole money from Buckingham. (Tr. 87)

Conclusions of Law

Based on Respondent's admission to Relator's complaint and Respondent's

[1] Pursuant to Gov. Bar R. V(6)(H), the panel unanimously dismissed all alleged violations of DR 7-101(A)(3).

testimony at the hearing, the panel finds by clear and convincing evidence that Respondent with respect to all thirty-two counts of the complaint, violated the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation];

2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];

3. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

Mitigation and Aggravation

Respondent was admitted to practice law in the State of Ohio in 1986 and has no prior disciplinary record. She has cooperated throughout these proceedings.

A licensed Psychologist, Karen T. Cimini, Ph.D., testified that she began seeing Respondent in December 2006 and has continued to see her over thirty-one times. (Tr. 33) She testified that Respondent was a workaholic in that she became fiercely competitive. She was working many hours a day, seven days a week, and immersed herself in whatever she did. (Tr. 34) The primary diagnosis by Dr. Cimini was that Respondent suffers from a gambling addiction. In addition, she was using alcohol in excess. The alcohol addiction became interactive with the gambling addiction. (Tr. 36)

Dr. Cimini recommended that Respondent get an independent assessment at an institution known as Glenbeigh and treatment if necessary. Glenbeigh is a recognized, certified hospital, which provides inpatient and outpatient treatment for different kinds of addictions. Respondent did go to Glenbeigh, which is located in Cleveland. After Respondent's experience at Glenbeigh, Dr. Cimini testified that Respondent understood her gambling addiction. In addition, she understood she had an alcohol addiction.

Dr. Cimini testified that she believes the gambling and alcohol addictions were the cause

of Respondent's stealing money from Buckingham. (Tr. 45) It is Dr. Cimini's opinion that Respondent can overcome her addictions with continued treatment.

Respondent has been attending meetings since February 2008 regarding her alcohol addiction and since January 2007 has been attending meetings regarding her gambling addiction. (Tr. 48)

At the present time Respondent works as a waitress at a restaurant in Cleveland, Ohio approximately 12 hours a day. Respondent had been the primary breadwinner for the family. Her husband is a high school football coach and she has two children in high school and a child in college. Her home is currently in foreclosure. (Tr. 43)

Character letters were written on behalf of Respondent by Judge Carol J. Dezso of the Domestic Relations Division of the Summit Court of Common Pleas, Attorney Wayne M. Jones of Akron, Ohio, and Attorney Frank G. Mazgaj of Akron, Ohio. The character letters are attached to this report.

Respondent did enter into a settlement agreement with Federal Insurance Company whereby she agreed to pay all funds back she stole. Federal Insurance Company is the company that insures Buckingham. Attached to this report is a copy of the settlement agreement.

Sanction

In determining the appropriate sanction, this panel gave consideration to the guidelines for mitigation and aggravation.

Relator recommends that Respondent receive an indefinite suspension, and that the indefinite suspension be retroactive from October 23, 2008, which is the date of her sentencing on the fourth degree felony.

Respondent urges that she be given a two year suspension with eighteen months suspended and receive credit from the date of her interim suspension, which was February 17, 2009.

From the beginning, Respondent has acknowledged the wrongfulness of her actions and has been cooperative with her former law firm, Relator, and the Akron Police Department. Respondent voluntarily ceased the practice of law on November 3, 2006, when she was terminated from Buckingham. The panel recommends that Respondent be given an indefinite suspension with credit from the date of her interim suspension on February 17, 2009, and before she can be readmitted to the practice of law, the following conditions must be complied with:

1. Respondent must enter into a contract with OLAP and be in compliance with any requirements required by OLAP;

2. Respondent must be in compliance with all terms of her probation in the criminal case;

3. Respondent must be in compliance with the settlement agreement between her and Federal Insurance Company and stay current on her payments of restitution;

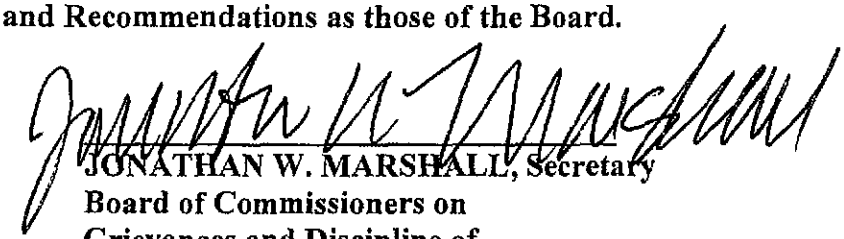
4. There must be prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that Respondent will be able to return to competent, ethical professional practice of law.

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 August 14, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Michelle A. Smithern, be indefinitely suspended retroactive to the date of her interim suspension upon the conditions contained in the panel report. 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.



JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

ROETZEL & ANDRESS
A LEGAL PROFESSIONAL ASSOCIATION

222 SOUTH MAIN STREET
AKRON, OH 44308
330.849.6682 DIRECT
330.376.2700 MAIN
330.376.4577 FAX
wjones@ralaw.com

September 3, 2008

To Whom It May Concern:

I have known Michelle Smithern for nearly 30 years. During that time, I have had an opportunity to observe Michelle graduate from the University of Akron, attend law school and enter private law practice at Buckingham, Doolittle, and Burroughs. I have also watched her as a mother raise her three children into fine young adults. In fact, all of her children have been excellent students and very good athletes.

Over the years, I have known many people whom Michelle has represented in domestic relations cases, as well as other cases, and her integrity and reputation in the legal community has always been stellar. In fact, I have referred her clients who were very happy with her professionalism and client care. She is an excellent lawyer and somebody that I trust. I am an attorney, in private practice at Roetzel & Andress Co., LPA, admitted to the practice of law in 1989.

What happened to Michelle over the past few years is completely out of character. I firmly believe that she was taken in by the alcohol and gambling addictions. I know that she is very sorry and embarrassed by her actions. In the conversations that I have had with Michelle since she has been charged with this offense, she has openly, honestly and readily admitted her wrongdoing to me and has tremendous remorse for what she has done. This is a situation where a really good person did a bad thing, but is willing to make it right. No client was harmed and the firm will get its money back.

I would ask the court to consider the above facts when considering her sentence on September 10th.

Very Truly Yours,

Wayne M. Jones

Wayne M. Jones

Frank G. Mazgaj

Direct Dial 330.670.7330
Direct Fax 330.670.7450
E-mail FMazgaj@hcplaw.net

HANNA,
CAMPBELL
& POWELL, LLP
ATTORNEYS AT LAW

3737 Embassy Parkway
P.O. Box 5521
Akron, Ohio 44334

Office 330.670.7300
Fax 330.670.0977

August 29, 2008

To Whom it May Concern:

I have known Michelle Smithern for almost 30 years. I have considered Michelle and her husband, Dave, to be very good friends. In addition to being very close social friends with Michelle and Dave, I worked for 12 years with Michelle at Buckingham, Doolittle & Burroughs. I had the opportunity to see first hand Michelle's passionate commitment to the practice of law and more importantly, her clients. Michelle routinely worked 60-80 hours per week handling clients' problems at all times of the day and night. I know of her spending many holidays on the telephone trying to resolve a client's problem concerning visitation rights of his/her children. Clients always came first for Michelle.

Needless to say, I was shocked at the allegations and subsequent criminal charges filed against Michelle. Since being charged, I have talked with Michelle and her husband on several occasions. I do not know to what extent any of the allegations against her are accurate. I do know that the allegations and subsequent criminal charges have been devastating to Michelle and her family from many perspectives. Michelle is humiliated and no longer is the familiar face in her community. On a regular basis, she was extremely active with sports and other activities of her children. She is obviously embarrassed by the charges.

Financially, Michelle's family is struggling. As you are aware, literally all of their assets have been depleted. They are not receiving any significant family help. They are finding it difficult to pay many of the expenses common to all of us in raising a family. Michelle's legal career is essentially over. She realizes that her ability to practice law in any capacity in the future is lost. One positive point is that Michelle's husband and children have remained supportive of her throughout this horrible ordeal. Michelle has not blamed others for the problems she has created. In talking to her, it is obvious that she wants to try and put this matter behind her and move forward so that she can try to support her husband and children. She is extremely remorseful regarding what has happened.

Michelle has a lot of good to offer society. She is an extremely bright and caring individual. Incarceration would be of no benefit to society or Michelle's family. Although there is no excuse for Michelle's alleged actions, she and her family have already suffered greatly. She desperately wants to pick up the pieces and right this terrible wrong. I respectfully ask that you give Michelle and her family that chance. I commit to the Court that I will continue to work with Michelle and her family to help them move forward.

I would be more than happy to address the Court "on the record" if it would be helpful. Thank you for your consideration.

Sincerely,

Frank G. Mazgaj

FGM/mrs

446983

SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is entered into this ____ day of _____, 2008, between Federal Insurance Company ("Federal") and Michelle A. Smithern ("Smithern"), (all collectively referred to hereinafter as the "Parties") settling all claims, controversies and disputes as well as any potential or possible claims, controversies and disputes between them arising out of the facts and circumstances relating directly or indirectly to Federal's contentions that Smithern improperly obtained monies during her employment at Buckingham, Doolittle & Burroughs, LLP (hereinafter refered to as "BDB").

NOW THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree as follows:

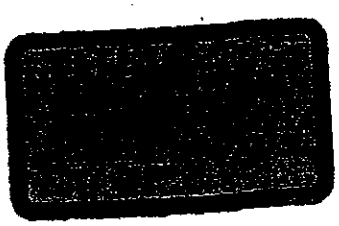
1. **Warranties**

   a) The Parties warrant and represent, each to the other, that they have been fully informed and have full knowledge of the terms, conditions, and effects of this Agreement;

   b) The Parties warrant and represent, each to the other, that no promise or inducement has been offered or made except as herein set forth, and that this Agreement is executed without reliance upon any statement or representation by any other party or his agent.

2. **Consent Judgment**

As part of this Agreement, Smithern shall execute a Consent Judgment, attached hereto as Exhibit "A". The Consent Judgment will remain in full force and effect until all principal (and interest, if any) has been paid in full by Smithern, as further set forth herein.



3. **Payment to Federal**

Smithern shall pay Federal the principal sum of Ninety Two Thousand Six Hundred Seventy-Eight and 45/100 Dollars ($92,678.45), plus interest payable at the rate of eight percent (8%) per annum, as follows:

i) Smithern shall pay Federal monthly installments, on the 1st day of each month, beginning October 1, 2008, of not less than Five Hundred and no/100 Dollars ($500.00) each. Smithern is allowed a five (5) day grace period for payment of each monthly payment. Should Smithern obtain employment (of any nature) wherein she is earning at least $20,000.00 annually, her monthly payment shall immediately increase to Eight Hundred and no/100 Dollars ($800.00);

ii) Once Smithern has paid the total sum of $92,678.45 (so long as she is not in default of any of her obligations contained herein), Federal will consider the Consent Judgment paid in full and shall file a satisfaction with the Court.

Each payment made shall be applied first to principal and then to any accrued interest. No interest shall accrue so long as Smithern is not in default, as defined herein, otherwise interest shall accrue from November 3, 2006 per the Consent Judgment. Federal agrees not to execute on the Consent Judgment so long as there is no default as defined herein. If any payment required by this Agreement is not paid when due (including the grace period), then Federal may immediately execute on the Consent Judgment, at Federal's sole option without notice or demand. All payments shall be made in certified funds, money order or check only, and payable to "Federal Insurance Company". Every payment shall be timely delivered to: Andrew R. Kasle, Esq., Hazelwood & Kasle, 1310 Ohio Savings Plaza, 1801 East Ninth Street, Cleveland, Ohio 44114, or at any other place hereafter designated by Federal in writing to Smithern.

Any other payments received by Federal from and/or on Smithern's behalf shall be applied to her then unpaid balance due, including payment of Smithern's partnership share as set forth below.

4. **BDB Partnership Share**

Federal is entitled to receive payment of Smithern's full share of her partnership interest in BDB, currently valued at Twenty Seven Thousand Five Hundred and no/100 Dollars ($27,500.00). When payment of the partnership share is received by Federal, the same shall be applied to Smithern's debt. Smithern agrees to promptly execute any and all documentation as requested by Federal for Federal to obtain payment of her partnership share from BDB.

5. **2008 and 2009 Tax Returns**

Smithern shall pay to Federal any and all of Smithern's 2008 and 2009 federal, State of Ohio and local tax refunds amounts. Each refund payment due Federal is to be paid to Federal within fourteen (14) days of the receipt of the refund by Smithern. All tax refund monies received from Smithern shall be applied to her debt to Federal. If Smithern files a joint return, Federal is entitled to 50% of the entire joint return refund amount, if any. If Smithern files a single return (married or not married), Federal is entitled to 100% of the return refund amount.

During the pendency of this Agreement, Smithern shall timely provide Federal with a copy of each and every federal, state and local filed tax return she files, either jointly or otherwise (regardless if a refund is due or not) with the returns to be delivered to Federal within fourteen (14) days of the filing of the returns.

6. **Life Insurance**

Regarding Minnesota Life Insurance Company variable group universal life insurance policy number 0055043 (Contract No. 258466) issued to Smithern on or about January 1, 2006, and Midland National Life Insurance Company policy number 1700704721 issued to Smithern on or aboutJune 3, 1996, (individually and collectively referred to as the "Policies"), on or before September 10, 2008, Smithern shall do the following: 1) change the primary beneficiary to show

Federal as the only named primary beneficiary on each of the Policies; 2) advise Minnesota Life Insurance Company, Midland National Life Insurance Company and Smithern's local agent(s), _____ and any other insurance agents involved with the Policies that Federal is to be provided immediate notice of: i) any attempt (by anyone) to cancel and/or terminate any of the Policies; ii) any attempt (by anyone) to change any of the Policies' primary beneficiary (after Federal is named as such); iii) any attempt (by anyone) to cash-out or otherwise dispose of any of the Policies; iv) any attempt (by anyone) to change ownership of any of the Policies; or, v) any possible lapse of any of the Policies due to unpaid premiums. Notice regarding item (v) is to be provided by Minnesota Life Insurance Company and/or Midland National Life Insurance Company to Federal at lease fifteen (15) days before the actual lapse date. Federal is allowed the option-but not the obligation-of paying any of the Policies premiums due.

During the pendency of this Agreement, Smithern agrees to timely pay any and all premiums and other expenses as due on the Policies and do all other things necessary to maintain the Policies in full force and effect. Further, Smithern agrees not to: i) cancel and/or terminate the Policies; ii) remove Federal as the Policies' primary beneficiary; iii) cash-out or otherwise dispose of the Policies; or, iv) change ownership of the Policies. Semi-annually, Smithern shall provide Federal with proof of timely payment of any and all premiums and expenses concerning the Policies.

During the pendency of this Agreement, Smithern shall not purchase or maintain any policy of insurance in her name and/or for her benefit with the Chubb Group of Insurance Companies, its affiliates or subsidiaries, including but not limited to Federal.

Smithern may name the Policies' contingent beneficiaries. Federal shall only be entitled to paid under the Policies to the extent monies are owed by Smithern to Federal at the time of Smithern's death. By way of example, should Smithern owe Federal $50,000 at the time of her

death, the first $50,000 of insurance proceeds from these Policies shall be paid to Federal with the remainder paid to the Policies' contingent beneficiaries. In the event Federal receives payment of insurance proceeds under the Policy, any said proceeds remaining after payment of the then remaining outstanding balance due Federal pursuant to the Agreement shall be returned to Minnesota Life Insurance Company and/or Midland National Life Insurance Company, accordingly, for disbursement to any designated contingent beneficiaries.

Minnesota Life Insurance Company and Midland National Life Insurance Company are to be advised of the provisions contained herein and Smithern agrees to have written confirmations sent directly from Minnesota Life Insurance Company and Midland National Life Insurance Company to Federal's counsel acknowledging the same by October 1, 2008.

In the event Federal elects, at its sole discretion, to make any payment of premiums or other expenses due under any of the Policies, such sums shall be repaid by Smithern to Federal. The amount of monies paid by Federal towards any of the Policies will be added to the then outstanding balance due Federal from Smithern under this Agreement. Federal may, at its sole discretion and without notice, discontinue its election to make payment of premiums or other expenses due under any of the Policies.

7. **Default**

Smithern will be in default of this Agreement if anything listed below happens; (1) Smithern fails to do anything required under the Agreement; (2) if any of the terms and conditions set forth herein are not timely fulfilled; (3) if Federal receive actual notice of proceedings brought by or against Smithern under bankruptcy or insolvency laws, or Smithern cannot pay her debts as they fall due; (4) if any material statement or information which Smithern has given Federal to induce Federal to enter into this Agreement turns out to be false or misleading; (5) if Smithern fails to make

any payment of premiums or other expenses due under any of the Policies and/or otherwise allows the insurance coverage under the Policies to lapse; and, (6) if any payment due under this Agreement is not timely received by Federal. If there is a default, Federal may immediately execute on the Consent Judgment ~~and/or foreclose upon the mortgage without notice~~. Failure on Federal's part to exercise any right in the event of any one default shall not constitute a waiver of such right if there is a later default.

8. **Agreement Binding**

This Agreement shall be binding upon Smithern, her heirs, personal representatives, executors, administrators, successors and assigns.

9. **Commercial Transaction**

This Agreement is made in connection with a settlement between the Parties and is not being made in connection with a consumer transaction and arises out of an obligation owed by Smithern to Federal.

10. **Pre-Payment**

Smithern shall have the right to prepay all or any portion of the indebtedness evidenced by this Agreement without premium or penalty.

11. **Waiver**

No delay on Federal's part in exercising any power or right as set forth in this Agreement and/or the Consent Judgment shall operate as a waiver of any said power or right.

12. **Change of Address/Employment**

Smithern shall keep Federal apprised of any changes in her current address and place of employment (including salary changes) by written notice to Federal within five (5) days of any such change. Every notice Smithern is required to give to Federal under this Agreement shall be

timely delivered to: Andrew R. Kasle, Esq., Hazelwood & Kasle, 1310 Ohio Savings Plaza, 1801 East Ninth Street, Cleveland, Ohio 44114, or at any other place hereafter designated by Federal in writing to Smithern.

13. **Entire Agreement**

This Agreement constitutes the entire agreement among the Parties pertaining to matters herein contained. The article headings contained herein have been inserted for convenient reference only and shall not in any way affect the construction, interpretation or meaning of the text.

If any provision herein is prohibited by Ohio law or any other jurisdiction held to be applicable, such provision shall be limited to the extent necessary so that it does not render this Agreement invalid, unlawful, or unenforceable in whole or in part under such laws; all other provisions of this Agreement shall remain in full force and effect.

14. **Liability Not Admitted**

It is understood and agreed that this Agreement is the compromise and settlement of disputed claims, that the payments herein are not made to be construed as any admission of liability by Smithern and Smithern herein denies liability therefor and intends merely to avoid litigation and buy Federal's peace.

15. **Counterpart**

This Agreement may be executed in counterpart by the Parties with the copies so executed constituting one complete Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement on the day and year above written.

Date: 9/2/08

Michelle A. Smithern

Michelle A. Smithern

Federal Insurance Company

Date:_____

By:_____

Title:_____

DOCUMENT NOT SCANNED
PURSUANT TO SUPERINTENDENCE
RULE 45

APPENDIX II

THE RULES AND REGULATIONS GOVERNING PROCEDURE ON COMPLAINTS AND HEARINGS BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT

Section 1. Complaint Requirements

(A) The complaint shall allege the specific misconduct detailed in Gov. R. IV or Section 6(a) of Gov. R. V and cite the disciplinary rule allegedly violated by the Respondent. The Panel and Board shall not be limited to the citation to the disciplinary rule(s) in finding violations based on all the evidence.

(B) The Relator in the complaint shall set forth the Respondent's attorney registration number and his last known address where the Board shall serve the complaint.

[Section 1 Approved by Supreme Court of Ohio, October 8, 1990]

Section 2. Pleadings and Motions

(A) Within the period of time permitted for an answer to the complaint, Respondent may file any motion appropriate under Rule 12 of the Ohio Rules of Civil Procedure, supported by a brief and affidavits if necessary. A brief and affidavits, if appropriate, in opposition to such motion may be filed within twenty days after service of such motion. No oral hearing will be granted, and rulings of the Board will be made by the Chairman of the Board or any member designated by the Secretary of the Board. All motions shall be made in accordance with this rule.

(B) The chairman or a member of the panel shall rule on all motions subsequent to the appointment of a panel.

(C) For good cause, the Chairman of the Board, or, after appointment of a panel, the chairman or member of the panel may grant extensions of time for the filing of any pleading, motion, brief or affidavit, either before or after the time permitted for filing.

(D) Every pleading after the complaint shall show proof of service.

[Section 2 Approved by Supreme Court of Ohio, October 8, 1990]

Section 3. Rules of Procedure

(A) The Board and hearing panels shall follow the Ohio Rules of Civil Procedure wherever practicable unless a specific provision of Gov. Bar R. V provides otherwise.

Section 10. Guidelines for Imposing Lawyer Sanctions

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

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

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

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) lack of cooperation in the disciplinary process;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of and resulting harm to victims of the misconduct;

(i) failure to make restitution.

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

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) timely good faith effort to make restitution or to rectify consequences of misconduct;

(d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;

(e) character or reputation;

(f) imposition of other penalties or sanctions;

(g) chemical dependency or mental disability when there has been all of the following:

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

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

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

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

(h) other interim rehabilitation.

[Section 10 Adopted by the Supreme Court of Ohio, effective June 1, 2000; amended effective February 1, 2003]

Section 11. Consent to Discipline.

(A) As used in this section:

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

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

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

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

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

DR 1-102. MISCONDUCT.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule or, as a judicial candidate as defined in Canon 7 of the Code of Judicial Conduct, the provisions of the Code of Judicial Conduct applicable to judicial candidates.

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

(3) Engage in illegal conduct involving moral turpitude.

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

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

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

[Effective: October 5, 1970; amended effective July 1, 1994; July 1, 1995.]

DR 9-102. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT.

(A) All funds of clients paid to a lawyer or law firm, other than advances 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 except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) A lawyer, law firm, or estate of a deceased lawyer who sells a law practice shall transfer all funds held pursuant to DR 9-102(A) to the lawyer or law firm purchasing the law practice at the time client files are transferred.

(D) Nothing in the Code of Professional Responsibility shall be interpreted to prohibit compliance by a lawyer, a law firm, or an ancillary business related to the practice of law in which the lawyer is a principal with the provisions of sections 3953.231, 4705.09, and 4705.10 of the Revised Code and any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

(E) No lawyer, law firm, or ancillary business related to the practice of law shall fail to do any of the following:

(1) Maintain funds of clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code;

(2) Notify the Ohio Legal Assistance Foundation, in a manner required by rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code, of the existence of an interest-bearing trust account;

(3) Comply with the reporting requirement contained in Gov. Bar R. VI, Section 1(F).

[Effective: October 5, 1970; amended effective June 19, 1985; November 1, 2002; February 1, 2003.]