

**IN THE SUPREME COURT OF OHIO**

Cincinnati Bar Association, : Case No. 2010-2254  
: (Formerly Board No. 10-036)  
Relator, :  
: v. :  
: G. Timothy Dearfield :  
: Respondent. :

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**RESPONDENT'S OBJECTIONS TO THE FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND RECOMMENDATION OF THE  
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

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## STATEMENT OF THE CASE AND FACTS

This matter arises from a five count Complaint filed by the Cincinnati Bar Association (“Relator”) against G. Timothy Dearfield (“Respondent”). (See Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline (“Board Recommendation”), December 23, 2010, at 3). Respondent was admitted to practice law in the State of Ohio in 1988 and is a partner at Dearfield, Krueger & Company, LLC. (Board Recommendation, at 1). Respondent’s legal practice focuses almost exclusively on providing legal services to individuals and businesses that are in or considering bankruptcy or other forms of debt relief. (See Transcript of Formal Hearing, at 68).

A panel of the Board of Commissioners on Grievances and Discipline (the “Board”) heard this matter at Formal Hearing on October 7, 2010, at which Respondent participated *pro se*. After the hearing, the panel recommended a sanction of a one-year suspension with six months stayed. (Board Recommendation, at 8). On December 23, 2010, the Board concluded that the Respondent had committed three of the five ethical rule violations charged in the Complaint.<sup>1</sup> *Id.* at 7. The Board went on to adopt the recommended sanction of the panel, imposing a one-year suspension with six months stayed. *Id.* at 8.

The subject matter of Relator’s Complaint consists of the circumstances surrounding Respondent’s representation of Jeffrey M. Hallet (“Hallet”). On May 8, 2009, Hallet first sought legal advice from Respondent regarding his options with respect to filing for individual bankruptcy. (Transcript of Formal Hearing, at 9). On June 30, 2009, Respondent accepted a

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<sup>1</sup> The Board found, by clear and convincing evidence, that Respondent violated Prof. Cond. R. 1.15(c) (failing to deposit court costs into an IOLTA), 1.5(d)(3) (treating monies paid to an attorney as nonrefundable), and 8.4(d) (conduct prejudicial to the administration of justice). The Board found that the Relator failed to demonstrate by clear and convincing evidence that Respondent had violated Prof. Cond. R. 1.5(b) (failure to provide client with a copy of the retainer agreement), or Gov. Bar R. V(4)(G) (failure to cooperate with the disciplinary process).

\$700 retainer to represent Hallet in a contemplated Chapter 13 bankruptcy proceeding. Later, Hallet requested that Respondent file a Chapter 7 bankruptcy, rather than Chapter 13. In order to perpetuate the Chapter 7 filing, Respondent received an additional retainer in the amount of \$399 on July 30, 2009.<sup>2</sup>

On August 15, 2009, Hallet advised Respondent that he had elected not to file bankruptcy, thereby ending Respondent's representation of Hallet in the matter. Subsequently, Hallet contacted Respondent to request a refund of his court costs. Respondent advised Hallet that the court costs were being applied to fees owed, as Respondent had incurred in excess of \$1,500 in fees at the time the attorney-client relationship ended. (See Transcript of Formal Hearing, at 91). After Hallet filed a Complaint with Relator, Respondent was contacted by G. Mitchell Lippert ("Lippert"), investigator for Relator, at which time Respondent agreed to refund the court costs to Hallet. On February 26, 2010, Respondent refunded court costs of \$299 to Hallet in an attempt to resolve the fee dispute. *Id.*

### **LAW AND ARGUMENT**

#### **OBJECTION 1: The Board's Recommended Sanction of a One Year Suspension with Six Months Stayed is Inconsistent with Supreme Court of Ohio Precedent and Should not be Adopted by this Court**

##### **A. Supreme Court of Ohio Precedent Establishes that a Public Reprimand is the Appropriate Sanction for a Violation of Prof. Cond. R. 1.5(c)**

In its first conclusion of law, the Board found that Respondent violated Prof. Cond. R. 1.15(c), stating, "Respondent failed to keep the unused court costs in his IOLTA account." (Board Recommendation, at 7). Rule 1.15(c) provides: "[a] lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the

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<sup>2</sup> Respondent's standard retainer agreement stated that a Chapter 7 bankruptcy required a retainer of \$800 plus court costs of \$299, for a total of \$1,099. Because Respondent had originally received a retainer of \$700 on June 30, 2009 to file a Chapter 13 bankruptcy, an additional payment of \$399 was obtained to bring Hallet's total retainer to \$1,099, commensurate with the stated Chapter 7 fees terms.

lawyer only as fees are earned or expenses incurred.” The Board found that Respondent violated this rule by virtue of the fact that he failed to deposit the \$399 check received on July 30, 2009, into his IOLTA account.

Under Supreme Court of Ohio precedent, it is clear that a public reprimand is the appropriate sanction for a violation of Prof. Cond. R. 1.15(c). In *Cincinnati Bar Ass’n v. Helbing*,<sup>3</sup> the Respondent committed four violations of Prof. Cond. R. 1.15, including two violations of 1.15(c). The respondents conduct consisted of 1) failing to maintain a current record of a client’s balance and outstanding checks; 2) failing to maintain a record of which client’s funds were affected by each IOLTA credit and debit; 3) failing to maintain the balance advanced by a client for litigation expenses in his IOLTA account; and 4) causing an IOLTA account deposit belonging to a client to be misapplied to cover an overdraft. *Id.*

The Supreme Court adopted the Board’s recommended sanction of a public reprimand, stating that, “[w]e have previously imposed public reprimands for conduct similar to that of respondent.” *Id.* at ¶ 9, (citing *Medina County Bar Ass’n v. Piszczek*, 115 Ohio St.3d 228, 2007-Ohio-4946, 874 N.E.2d 783; *Akron Bar Ass’n v. Holda*, 111 Ohio St. 3d 418, 2006-Ohio-5860, 856 N.E.2d 973).

In *Holda*, the respondent kept a \$2,000 retainer in a lockbox because she did not have an IOLTA account. *Holda*, at ¶ 4. The client subsequently terminated the attorney’s services and requested a refund of the retainer. When Respondent refunded the retainer, a \$2,000 check was drawn on her business account that did not have sufficient funds to cover the check. *Id.* at ¶ 7.

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<sup>3</sup> 124 Ohio St. 3d 510, 2010-Ohio-955, 924 N.E.2d 364, at ¶ 7.

Despite violations of numerous other disciplinary rules,<sup>4</sup> the Court agreed with the Board that Respondent's conduct warranted a public reprimand. *Id.* at ¶ 14.

In the case *sub judice*, while still in violation of the rule, Respondent's transgression was a failure to deposit the check for court costs into his IOLTA. Respondent did not fail to maintain records, cause his IOLTA to become overdrawn, or fail to maintain the balance at the level required for advanced litigation costs. Respondent's conduct is less severe than that attributed to the respondents in *Helbing* and *Holda*, and therefore a public reprimand is the more appropriate sanction in this instance.

**B. Supreme Court of Ohio Precedent Establishes that a Public Reprimand is the Appropriate Sanction for a Violation of Prof. Cond. R. 1.5(d)(3)**

The Board's second conclusion of law states that Respondent violated Prof. Cond. R. 1.5(d)(3) by treating all monies paid to the lawyer as non-refundable. (Board Recommendation, at 7). Rule 1.5(d)(3) provides:

A lawyer shall not enter into an arrangement for, charge, or collect any of the following: (3) a fee denominated as "earned upon receipt," "nonrefundable," or in any similar terms, unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation.

Respondent was found to have violated Rule 1.5(d)(3) by providing Hallet with a retainer agreement that stated, "All retainer payments are good for one year from the date made and will be credited to the attorney fees and court costs then applicable for filing. Any monies paid on retainer are non-refundable except in unusual circumstances and only at the discretion of an attorney employed by the Law Firm." (Board Recommendation, Exhibit A, at ¶ 12).

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<sup>4</sup> The Respondent in *Holda* also violated former Disciplinary Rules DR 2-110(A)(2) (requiring a lawyer to take reasonable steps to prevent damage or prejudice to a client before withdrawing from representation), and DR 6-101(A)(3) (prohibiting a lawyer from neglecting an entrusted legal matter).

Prior disciplinary cases heard before the Supreme Court of Ohio demonstrate that a public reprimand is the appropriate sanction for a violation of Rule 1.5(d)(3). In one such case, an attorney had her client sign a contract for legal services in which the client agreed to pay an hourly rate of \$195 as well as a \$3,300 nonrefundable retainer. *Dayton Bar Ass'n v. Schram*, 98 Ohio St. 3d 512, 2003-Ohio-2063, 787 N.E.2d 1184, at ¶ 2. The panel found that the respondent had violated former DR 2-106(A) by charging a nonrefundable fee, as well as DR 9-102(B)(4) by not promptly returning her client's money. *Id.* at ¶ 6. The Court agreed with the Board and issued a public reprimand, taking into consideration that the respondent had no prior disciplinary record, had cooperated in the disciplinary proceedings, and made restitution to her client. *Id.* at ¶¶ 7–9.

In another disciplinary case involving a fee dispute, the Court relied on *Schram* in holding that a public reprimand was the appropriate sanction where the respondent's conduct did not involve an exploitative motive, and where the respondent had not intended to keep more money than he earned. *Disciplinary Counsel v. Agopian*, 112 Ohio St. 3d 103, 2006-Ohio-6510, 858 N.E.2d 368, at ¶¶ 11–13 (“While we do not condone the billing practices employed in this case, the conduct involves neither a deliberate effort to deceive in order to generate funds not earned nor an effort to collect for services not rendered”).

In a case distinguishable from *Schram*, *Agopian*, and the case at hand, the Supreme Court found that a sanction of a six-month suspension, stayed on remedial conditions was proper for an attorney that violated Rules 1.5(d)(3) and 1.15(c) because the attorney's disciplinary record weighed against him. See *Cuyahoga County Bar Ass'n v. Cook*, 121 Ohio St. 3d 9, 2009-Ohio-259, 901 N.E.2d 225 (decided under former analogous rules DR 2-106(A) and DR 9-102(A)).

The attorney had previously been convicted of a felony for assisting in transactions funded by a client's illicit drug sales. *Id.* at ¶ 10.

Therefore, a public reprimand is the appropriate sanction for Respondent's violation of Rule 1.5(d)(3) because Respondent: 1) has no prior disciplinary history, 2) cooperated in the disciplinary process, 3) made full restitution to Hallet, and 4) did not deceive Hallet in order to generate funds that were not earned.

**C. A Public Reprimand or Alternatively a Suspension Stayed in Whole are Appropriate Sanctions for Respondent's Violation of Prof. Cond. R. 8.4(d) in Light of Substantial Mitigating Factors**

In its third conclusion of law, the Board found that Respondent violated Prof. Cond. R. 8.4(d) by "using the refund of the court costs as leverage to obtain a release of all grievance claims." (Board Recommendation, at 7). Rule 8.4(d) states, "[i]t is professional misconduct for a lawyer to do any of the following: (d) engage in conduct that is prejudicial to the administration of justice."

The Board concluded that the Respondent violated Rule 8.4 by entering into an agreement with Hallet at the time Hallet was refunded unused court costs in the amount of \$299 (the "Disciplinary Settlement"). The settlement stated that the payment was:

[I]n full and complete satisfaction of any claims you may have against same and or any of its attorney, paralegals, etc. Said claims include any and all claims such as legal malpractice, ethical violations, or other complaints to overseeing bodies including the Ohio Supreme Court, the Ohio State Bar Association, the Cincinnati Bar Association or any other applicable entities.<sup>5</sup>

In imposing the sanction of a one-year suspension with six months stayed, the Board cites to *Cuyahoga County Bar Ass'n v. Berger* (1992), 64 Ohio St. 3d 454, 597 N.E.2d 81. (Board Recommendation, at 8). However, *Berger* contained both facts and violations of the Rules of

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<sup>5</sup> Board Recommendation, Exhibit B, at ¶ 16.

Professional Conduct that are clearly distinguishable from the facts and rule violations in this case. The two respondents in *Berger* were each given a one-year suspension for violating the following former disciplinary rules:

DR 2-106(A) (charging a clearly excessive fee); 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation); 9-102(B)(4) (refusing to promptly pay funds to a client which client is entitled to receive); Gov.Bar R. V(5)(a) (neglecting or refusing to assist the grievance committee's investigation); DR 1-102(A)(2), (5), (6) and 1-103(A) (circumventing a Disciplinary Rule through actions of another; *engaging in conduct prejudicial to the administration of justice*; engaging in conduct adversely reflecting on one's fitness to practice law; and failing to report unprivileged knowledge of a violation of DR 1-102 to a tribunal or other investigative authority).<sup>6</sup>

Of these five rule violations, only one overlaps with the conduct of Respondent--“engaging in conduct prejudicial to the administration of justice.” Therefore, the Board’s use of a one-year suspension as a baseline in this matter is inappropriate given the stark contrast between the conduct of Respondent and that of the attorneys in *Berger*.

Many other disciplinary decisions imposing suspensions for violations of Rule 8.4(d) are also inapplicable because they deal specifically with attorney neglect of client matters. See *Cleveland Metro. Bar Ass’n v. Gresley* (2010), 2010-Ohio-6208, 2010 Ohio LEXIS 3178 (imposing a two-year suspension for failing to perform agreed upon legal work and failing to cooperate in the Board’s investigation); *Disciplinary Counsel v. Meade*, 2010-Ohio-6209, 2010 Ohio LEXIS 3177 (imposing an indefinite suspension for failing to act on behalf of her client with reasonable diligence and promptness and failing to cooperate in disciplinary investigations); *Disciplinary Counsel v. Horton*, 124 Ohio St. 3d 434, 2010-Ohio-579, 923 N.E.2d 141 (imposing a two-year suspension where the attorney settled her clients’ case without their permission,

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<sup>6</sup> *Berger*, 64 Ohio St. 3d at \*1 (emphasis added).

forged her client's signatures, converting settlement proceeds for personal use, and falsely informing clients she had filed a suit).

A suspension is not the appropriate sanction for Respondent's violation of Rule 8.4(d) because he was at all times attentive to the legal matters entrusted in him by Hallet. Unlike the slew of disciplinary cases involving client neglect, Respondent's conduct did not prejudice the administration of justice in Hallet's bankruptcy proceedings or in any other legal matter. Rather, Respondent unknowingly violated Rule 8.4(d) by making an effort to ensure that the refund of court costs in the amount of \$299 would make Hallet whole and resolve the dispute over fees. (See Transcript of Formal Hearing, at 21–22).

A public reprimand or a suspension, stayed in whole, is the appropriate sanction for Respondent's violation of Rule 8.4(d) given that Respondent's conduct did not approach the conduct described in the *Berger* case and that Respondent did not neglect client matters. Additionally, in light of several mitigating factors fully set forth in Objection 2, Respondent respectfully objects to the Board's recommended sanction of a one-year suspension with six months stayed.

**OBJECTION 2: The Board Failed to Consider Favorable Mitigating Factors in Adopting the Recommended Sanction of the Panel**

**A. Standard for Imposing Sanctions for Violations of the Rules of Professional Conduct**

When imposing a sanction, several factors are considered. The Supreme Court of Ohio considers the duties violated, the actual injury caused, the attorney's mental state, and sanctions imposed in similar cases. *Stark County Bar Ass'n v. Buttacavoli*, 96 Ohio St. 3d 424, 2002-Ohio-4743, 775 N.E.2d 818, at ¶ 16. In making a final determination, the Court also weighs evidence of the aggravating and mitigating factors listed in Rules and Regulations Governing

Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline ("Board Proc. Reg.") § 10(B). *Disciplinary Counsel v. Broeren*, 115 Ohio St. 3d 473, 2007-Ohio-5251, 875 N.E.2d 935, at ¶ 21. "Because each disciplinary case is unique, we are not limited to the factors specified in the rule but may take into account 'all relevant factors' in determining what sanction to impose." *Disciplinary Counsel v. Vivyan*, 125 Ohio St. 3d 12, 2010-Ohio-650, 925 N.E.2d 947, at ¶ 6.

The Board concluded that, "in mitigation, there is an absence of prior disciplinary record." (Board Recommendation, at 8). Respondent respectfully requests that this Court consider other mitigating factors contained in Board Proc. Reg. 10(B), as well as other relevant factors in determining what sanction to impose.

**B. At the Time Respondent asked Hallet to Sign the Disciplinary Settlement it was Unclear whether such Action was Improper under Prof. Cond. R. 8.4(d)**

As an initial matter, it is important to note that the Ohio Rules of Professional Conduct do not explicitly state that it is improper to enter into a settlement with a client in which the client agrees to withdraw or refrain from filing a disciplinary grievance. See *Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2010-3* (June 11, 2010), at 2 ("[N]either Prof. Cond. R. 8.4(d) nor 8.4(h) specifically mentions a lawyer's attempts to avoid a disciplinary grievance"). In fact, at the time Respondent and Hallet entered into the Disciplinary Settlement, it was unsettled as to whether such an agreement ran afoul of the Rules of Professional Conduct.

It is telling that the Board's Recommendation cites to an Opinion that it issued just eight months ago, and issued *after* Respondent's misconduct. See Board Recommendation, at 7, citing *Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2010-3* (June 11, 2010). In the Opinion, the Board addressed the following question, "As part of a the

settlement of a legal malpractice claim, is it proper for a lawyer to require a current or former client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance?" *Opinion 2010-3*, at 1. The Board concluded that it is improper to do so under Prof. Cond. R. 8.4(d). However, Respondent did not have the benefit of this Opinion on February 26, 2010, the date that he and Hallet entered into the Disciplinary Settlement.

The Opinion also noted that only one disciplinary case has considered the conduct of avoiding discipline since the adoption of the Ohio Rules of Professional Conduct, effective February 1, 2007. *Id.* at 2, citing *Disciplinary Counsel v. Chambers*, 125 Ohio St. 3d 414, 2010-Ohio-1809, 928 N.E.2d 1061. However, the *Chambers* decision was handed down on April 29, 2010, over two months after Respondent's execution of the Disciplinary Settlement with Hallet. On February 26, 2010, Respondent was not on notice of any Supreme Court of Ohio precedent holding that such an agreement was a violation of the Rules of Professional Conduct, effective February 1, 2007.

Respondent acknowledges that attorney discipline cases prior to the enactment of the new Rules of Professional Conduct have previously held that attempts to avoid discipline were improper under former Disciplinary Rule 1-102(A)(5). Respondent also acknowledges that it is his obligation to stay apprised of attorney discipline decisions handed down by the Supreme Court of Ohio. However, Respondent asks this Court to consider, as a mitigating factor, the fact that at the time Respondent and Hallet entered into the Disciplinary Settlement, it was unclear whether such an act violated the new Rules of Professional Conduct. The lack of clarity with respect to this issue is evidenced by *Opinion 2010-3*, and the absence of precedent from the Supreme Court of Ohio prior to February 26, 2010.

**C. Counsel for the Relator Served as Independent Counsel to Hallet in Advising him to Sign the Disciplinary Settlement**

Another relevant factor that substantially mitigates Respondent's violation of Prof. Cond. R. 8.4(d) is the fact that Counsel for Relator, G. Mitchell Lippert ("Lippert"), advised Hallet to sign the Disciplinary Settlement. On February 26, 2010 Hallet visited the offices of Respondent to pick up refunded court costs in the amount of \$299. According to Hallet's own testimony, before signing the Disciplinary Settlement he called Lippert from Respondent's office and asked whether he should sign the agreement. Lippert responded by advising Hallet to sign the agreement. (See Transcript of Formal Hearing, at 57-58). The Court should consider this as a mitigating factor in imposing an appropriate sanction.

As a member attorney of a Certified Grievance Committee, the Cincinnati Bar Association, Lippert was presumably aware that such an agreement was improper under the rules. On the other hand, if the counsel for Relator did not know that this was a violation of Rule 8.4(d), that may demonstrate the uncertainty that existed at that time surrounding the propriety of this particular conduct by an attorney.<sup>7</sup> Therefore, regardless of whether Lippert knew the Disciplinary Settlement was a violation of the rules, and based on this record as constituted, his advice to Hallet should be considered a mitigating factor.

At the October 7, 2010 hearing, during his cross-examination of Hallet, Lippert attempted to cast some doubt as to whether Hallet actually read the contents of the Disciplinary Settlement during the telephone call. (See Transcript of Formal Hearing, at 65-66). Logic tells us that it is highly unlikely that an attorney would advise a client to sign a settlement agreement without having full knowledge of its contents. However, assuming *arguendo* that Hallet did not share all of the provisions of the agreement with Lippert, this Court should still consider the

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<sup>7</sup> See *Supra*, Objection 2, Section B.

circumstances surrounding the signing of the Disciplinary Settlement as a substantial mitigating factor.

**D. Mitigating Factors Listed in Board Proc. Reg. § 10(B) were not Considered by the Board**

The Board correctly considered Respondent's absence of a prior disciplinary record as a mitigating factor, but failed to consider other applicable factors listed in Board Proc. Reg. § 10(B). In adopting a less severe sanction than that recommended by the Board, this Court should also consider the absence of a dishonest or selfish motive, and Respondent's timely good faith effort to make restitution or to rectify consequences of misconduct.

Rather than considering the Respondent's absence of a dishonest or selfish motive as a mitigating factor, the Board erroneously found that Respondent harbored a dishonest or selfish motive. (Board Recommendation, at 8). However, it is clear that none of Respondent's three rule violations were motivated by dishonesty or selfishness. The record is simply devoid of facts that would reach such a determination.

Respondent's violation of Prof. Cond. R. 1.15(c) (failure to deposit the \$399 check in an IOLTA) was an administrative error and not motivated by dishonesty. Respondent was mistakenly operating under Supreme Court of Ohio precedent that interpreted former Disciplinary Rule 9-102(A), which did not require court costs to be deposited into a client trust account. See Transcript of Formal Hearing, at 70, citing *Columbus Bar Association v. Flanagan* (1997), 77 Ohio St. 3d 381, 674 N.E.2d 681. Respondent now understands that this precedent has been overruled by the adoption of the Ohio Rules of Professional Conduct, and is operating in full compliance with Rule 1.15(c). This violation was caused by Respondent's misunderstanding of the current rules, and was not motivated by a dishonest or selfish motive.

Likewise, Respondent's violation of Prof. Cond. R. 1.5(d)(3) (treating monies paid to the lawyer as nonrefundable) was again not motivated by dishonesty or selfishness. Respondent's retainer agreement stated, in relevant part, "monies paid on retainer are non-refundable *except in unusual circumstances.*" (Board Recommendation, Exhibit A, at ¶ 12) (emphasis added). The goal of the retainer agreement was to inform the Respondent's clients that, the vast majority of the time, a small individual bankruptcy retainer of a few hundred dollars would become quickly depleted and thus would only be refunded under unusual circumstances. (See Transcript of Formal Hearing, at 76). Therefore, Respondent's motivation was to be forthright and honest with his clients about the likelihood of a retainer being refunded. (See Transcript of Formal Hearing, at 76).

Lastly, Respondent's violation of Prof. Cond. R. 8.4(d) (conduct prejudicial to the administration of justice) was not motivated by dishonesty or selfishness. Respondent entered into the Disciplinary Settlement in an attempt to ensure that there was no further fee dispute. Respondent refunded the \$299 in court costs to Hallet as a final resolution to the dispute, and Respondent was unaware it was a violation of Rule 8.4(d) to include a provision in the settlement releasing him from disciplinary actions. Therefore, Respondent's violation of Rule 8.4(d) was motivated by reaching a resolution of the dispute with Hallet, and not by dishonesty or selfishness. To the contrary, Respondent estimates that he had accumulated \$1,500 in fees, and accepted final payment of only \$800. (See Transcript of Formal Hearing, at 91).

This Court should also consider the Respondent's timely good faith effort to make restitution or to rectify consequences of misconduct. Board Proc. Reg. § 10(B)(2)(c). It is undisputed that Respondent made full restitution by refunding \$299 in court costs to Hallet on February 26, 2010. Prior to refunding the court costs to Hallet, Respondent had stated that he

was offsetting the \$299 with accrued fees for time spent on the case. When Respondent was instructed by counsel for Relator that it was improper to do so, Respondent refunded the court costs to the client approximately two weeks later. The delay was caused by logistical problems in coordinating the schedules of Respondent and Hallet. (See Transcript of Formal Hearing, at 81).

Therefore, this Court should consider the fact that Respondent made full restitution to Hallet as a mitigating factor in imposing an appropriate sanction.

**OBJECTION 3: The Board Considered Aggravating Factors that were not Supported by the Evidence when it Adopted the Recommended Sanction of the Panel**

**A. Respondent was not Motivated by a Dishonest or Selfish Motive**

Respondent incorporates the argument contained within Objection 2, Section D as fully restated herein. The Respondent did not possess a dishonest or selfish motive, and thus the Board should have considered this factor in mitigation, rather than aggravation.

**B. Respondent Cooperated Fully in the Disciplinary Process**

The Board contends that Respondent did not cooperate fully with the disciplinary process. However, the only fact to support this contention is the Respondent's use of the Disciplinary Settlement. As previously stated, this was not an attempt by Respondent to be uncooperative with Hallet or counsel for Relator. In fact, quite the opposite is true. Respondent was using what he thought was an acceptable means of settling a fee dispute with a client. While this action may have been imprudent and misguided, it was not to avoid cooperation. Respondent was merely attempting to reach a global resolution, and was unaware that the agreement was in violation of the Rules of Professional Conduct. (See Transcript of Formal Hearing, at 83). Respondent has since recognized and admitted the wrongfulness of this conduct. *Id.*

During the course of the investigation Respondent fully cooperated with the requests of counsel for Relator and spent an estimated thirty (30) hours working on the resolution of the fee dispute with Hallet. (See Transcript of Formal Hearing, at 80). Accordingly, because Respondent was more than cooperative, this Court should not consider “lack of cooperation in the disciplinary process” as an aggravating factor.

**C. Respondent did not Employ Deceptive Practices during the Disciplinary Process**

Respondent objects to the Board’s finding that Respondent used deceptive practices during the disciplinary process. There is no evidence to support the contention that Respondent ever attempted to deceive either counsel for Relator or Hallet at any time during the investigation. The record is devoid of any such evidence by which the Board could reach this finding.

Again, Relator is likely relying on the Disciplinary Settlement as evidence that Respondent was deceptive during the disciplinary process. However, the facts of this case clearly demonstrate that neither Hallet nor counsel for Relator was deceived by the signing of the Disciplinary Settlement. Hallet cannot claim to have been deceived by the Disciplinary Settlement because he consulted with outside counsel prior to signing it. Likewise, counsel for Relator cannot claim to have been deceived by the agreement when he not only was aware of the document, but advised Hallet to sign it.

Respondent was not attempting to deceive anyone by entering into the Disciplinary Settlement-- he was merely trying to resolve a fee dispute with his client. Respondent believed that it was proper for him to enter into such a settlement in order to reach a global resolution. At the time Respondent entered into the agreement he was unaware that such conduct was a violation of the Rules of Professional Conduct, and thus he could not have been trying to deceive

Hallet or counsel for Relator. Therefore, this Court should not consider deceptive practices as an aggravating factor in imposing the appropriate sanction.

**D. Respondent has Acknowledged the Wrongful Nature of his Conduct**

The final aggravating factor considered by the Board was Respondent's "refusal to acknowledge wrongful nature of conduct." (Board Recommendation, at 8). Respondent has recognized and acknowledged that his conduct was in violation of the Rules of Professional Conduct and has modified his practices accordingly.

With respect to the violation of Rule 1.15(c), Respondent was previously under the impression that filing fees were not to be deposited into an IOLTA pursuant to *Columbus Bar Association v. Flanagan*.<sup>8</sup> Respondent has since recognized that *Flanagan* is no longer controlling precedent, as the decision was superseded by the adoption of Rule 1.15(c).

Respondent has also acknowledged that the language formerly used in his standard retainer agreement was in violation of Rule 1.5(d)(3). Respondent has since changed his standard fee agreement to comply with the Rule 1.5(d)(3) by employing a quantum meruit approach. (See Transcript of Formal Hearing, at 96).

Lastly, Respondent has acknowledged that he violated Rule 8.4(d) by entering into the Disciplinary Settlement with Hallet. "I have learned not to resolve any fee dispute with a bar complaint settlement." (Transcript of Formal Hearing, at 96). Therefore, because Respondent has acknowledged that his actions were in violation of the Rules of Professional Conduct, and because he has since taken steps to fully comply with the rules, this Court should not consider his alleged refusal to appreciate the wrongful nature of his conduct as an aggravating factor.

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<sup>8</sup> (1997), 77 Ohio St. 3d 381, 674 N.E.2d 681.

## CONCLUSION

In conclusion, Respondent respectfully requests that this Court not adopt the Board's recommended sanction of a one-year suspension with six months stayed. Supreme Court of Ohio case law indicates that a public reprimand is the appropriate sanction for violations of Prof. Cond. R. 1.15(c) and 1.5(d)(3). Furthermore, a public reprimand, or alternatively, a suspension stayed in whole is appropriate for Respondent's violation of Prof. Cond. R. 8.4(d). A lesser sanction is warranted given the substantial mitigating factors surrounding the circumstances of this case. These relevant factors include the uncertainty of whether entering into the Disciplinary Settlement was a violation under the Rules of Professional Conduct at the time of Respondent's actions, and the fact that, based on this record, counsel for Relator may have advised Respondent's client to sign the Disciplinary Settlement.

Respondent respectfully requests that this honorable Court impose a sanction of a public reprimand, or in the alternative, a suspension, stayed in whole on conditions that this Court deems proper under the circumstances.

Respectfully Submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Respondent's Objection to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline has been served via First-Class U.S. Mail, postage prepaid, upon G. Mitchell Lippert, 11137 Main Street, Sharonville, Ohio 45241, and Arthur E. Phelps, Jr., 1 West Fourth St. Suite 900, Cincinnati, OH 45202, on this 14<sup>th</sup> day of February, 2011.



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Blake C. Jones (0086357)