

IN THE SUPREME COURT OF OHIO

In re
Complaint Against

G. TIMOTHY DEARFIELD (#0039684)
RESPONDENT

Case No. 2010-2254

CINCINNATI BAR ASSOCIATION
RELATOR

RELATOR'S ANSWER
BRIEF

**RELATOR'S ANSWER BRIEF TO RESPONDENT'S OBJECTION TO THE
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION
OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

Arthur E. Phelps, Jr. (#0029938)
1 West Fourth St., Ste. 900
Cincinnati, OH 45202
Phone: 381-9305
Fax: (513) 381-9206
aphelps@rendigs.com
Counsel of Record for Relator

Karl H. Schneider (#0012881)
Maquire & Schneider, LLP
250 Civic Center Dr., Ste. 500
Columbus, OH 43215
Phone: (614) 224-1222
Fax: (614) 224-1236
khschneider@ms-lawfirm.com
Counsel of Record for Respondent

G. Mtichell Lippert (#0028211)
11137 Main St.
Sharonville OH 45241
Phone: (513) (513) 563-6161
Fax: (513) 563-6981
mainstreet@zoomtown.com
Counsel for Relator

Blake C. Jones (#0086357)
Maquire & Schneider, LLP
250 Civic Center Dr., Ste. 500
Columbus, OH 43215
Phone: (614) 224-1222
Fax: (614) 224-1236
bjones@ms-lawfirm.com
Counsel for Respondent

RECEIVED
MAR 01 2011
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAR 01 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
ARGUMENT.....	4
PROPOSITION OF LAW I	4
PROPOSITION OF LAW II	7
CONCLUSION.....	15
CERTIFICATE OF SERVICE.....	16

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE:</u>
<i>Akron Bar Ass'n. v. Holder</i> , 102 Ohio St. 3d 307, 2004-Ohio-2835.....	6, 12
<i>Akron Bar Ass'n. v. Markovich</i> , 117 Ohio St. 3d 313.....	6
<i>Akron Bar Ass'n. v. Wittbrod</i> , 122 Ohio St. 3d 394, 2009-Ohio-3549.....	5
<i>Cincinnati Bar Ass'n. v. White</i> , 79 Ohio St. 3d 491, 493 (Ohio 1997).....	11
<i>Cleveland Bar Ass'n. v. Kodish</i> , 110 Ohio St. 3d 162, 2006-Ohio-4090.....	5
<i>Columbus Bar Ass'n v. Smith</i> , 108 Ohio St. 3d 146, 2006-Ohio-413.....	5
<i>Columbus Bar Ass'n v. Flanagan</i> , 77 Ohio St. 3d 381.....	13
<i>Columbus Bar Ass'n. v. Haliburton-Cohen</i> , 106 Ohio St. 3d 98, 2005-Ohio-3956.....	9
<i>Cuyahoga County Bar Ass'n. v. Berger</i> , 125 Ohio St. 3d 414, 2010-Ohio-1809.....	5, 7-9
<i>Cuyahoga Cty Bar Ass'n. v. Cook</i> , 121 Ohio St. 3d 9, 2009-Ohio-259.....	8
<i>Cuyahoga Cty Bar Ass'n. v. Poole</i> , 120 Ohio St. 3d 361, 2008-Ohio-6203.....	9
<i>Disciplinary Counsel v. Chambers</i> , 125 Ohio St. 3d 414, 2010-Ohio-1809.....	4, 5

<u>DISCIPLINARY RULES</u>	<u>PAGE:</u>
DR 1-102 (a)(5).....	5, 9
DR 6-102.....	6

<u>RULES FOR THE GOVERNMENT OF THE BAR</u>	<u>PAGE:</u>
Gov. Bar R. V.....	11
Gov. Bar R. V (4)(G).....	6, 12

<u>RULES OF PROFESSIONAL CONDUCT:</u>	<u>PAGE:</u>
1.15 (c).....	2, 13
1.5 (d)(3).....	2, 12-13
8.4 (d).....	2, 5, 7-9, 14

<u>OTHER AUTHORITIES</u>	
ABA Standards for Imposing Lawyer Sanctions, p. 28 (1992).....	11
Board of Commissioners on Grievances and Discipline Opinion 2010-3.....	4, 5

<u>APPENDIX</u>	
Findings of Fact, Conclusion of Law and Recommendation of the Board	

IN THE SUPREME COURT OF OHIO

In re

Complaint Against

G. TIMOTHY DEARFIELD (#0039684)
RESPONDENT

Case No. 2010-2254

CINCINNATI BAR ASSOCIATION
RELATOR

RELATOR'S ANSWER
BRIEF

**RELATOR'S ANSWER BRIEF TO RESPONDENT'S OBJECTION TO THE
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION
OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

STATEMENT OF FACTS

In June 2009, Respondent was hired to represent Mr. Jeffery Hallet in a Chapter 13 bankruptcy proceeding. (Respondent's Answer, ¶ 1). Mr. Hallet paid Respondent \$700 in fees. (Hearing Transcript, p. 77). Respondent deposited this sum into the firm's business account. (Hearing Transcript, p. 77). Mr. Hallet ultimately decided to file a Chapter 7 bankruptcy. (Hearing Transcript, p. 28; Respondent's Deposition, July 16, 2010, p. 42). Mr. Hallet mailed Respondent a check for \$399, including an additional \$100 for the retainer and \$299 for filing fees. (Hearing Transcript, p. 30). Respondent deposited this check into his business account, not his IOLTA account. (Hearing Transcript, p. 78).

Respondent's retainer agreement contained a provision which stated, "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." (Hearing Transcript, p. 75).

Mr. Hallet subsequently dismissed Respondent from the case, choosing not to file bankruptcy. (Hearing Transcript, p. 79). Mr. Hallet requested an itemized billing statement, a refund of court costs, his case file, and a copy of the retainer agreement. (Hearing Transcript p. 80, Exhibit E). Respondent informed Mr. Hallet he could come pick up his property, but the money he paid was not refundable, due to the fact that the attorney's fees earned were higher than the initial retainer paid by Mr. Hallet. (Hearing Transcript, p. 80).

Respondent eventually agreed to refund Mr. Hallet's court costs, after the grievance investigation had begun. (Hearing Transcript, p. 80-81). When Mr. Hallet arrived at Respondent's office to receive his refund, he was asked to sign a release. (Hearing Transcript, p. 83). This stated that the \$299 was "in full and complete satisfaction of any claims you may have against same and any of its attorneys, paralegals, etc. Said claims include any and all claims such as legal malpractice, ethical violations, and other complaints to overseeing bodies including the Ohio Supreme Court, the Ohio State Bar Association, the Cincinnati Bar Association, or any other applicable entities." [Findings of Fact, Conclusions of Law, and the Recommendation of the Board (Board Opinion), p. 6].

The Board found violations of Professional Conduct Rules 1.15 (c), 1.5 (d)(3) and 8.4 (d). (Board Opinion, p. 6-7). The Board found the aggravating factors of a selfish or dishonest motive, lack of cooperation in the disciplinary process, deceptive practices

during the disciplinary process, and refusal to acknowledge the wrongful nature of the conduct. (Board Opinion, p. 7-8). The Board found the mitigating factor of no prior disciplinary record. (Board Opinion, p. 7-8).

Relator recommended a one year suspension, partly stayed on conditions. (Board Opinion, p. 8). Respondent requested the sanction should be small and at most a reprimand, preferably private. (Board Opinion, p. 8). The panel recommended a one year suspension with six months stayed. (Board Opinion, p. 8). The Board adopted the panel recommendation. (Board Opinion, p. 8-9).

ARGUMENT

PROPOSITION OF LAW I

Respondent refused to refund costs which had been advanced by the client and not expended in the case. When the client complained to Relator, Respondent sought to condition the refund on the client's withdrawal of the disciplinary grievance. A consistent line of cases from this Court has held such conduct to be improper

Relator supports the recommended sanction of the Board and asks that it be imposed in this case. Respondent's contention that there was no applicable precedent to look to in regards to his release agreement is inaccurate. The nature of Respondent's misconduct and the aggravating factors found to be present support the Board's recommendation of a one year suspension with six months stayed. Finally, the Board made the appropriate determination of the aggravating and mitigating factors in this case and this determination was supported by clear and convincing evidence.

Applicable Precedent Pertaining to Respondent's Settlement Agreement and Violation of Rule 8.4 (d)

Respondent asserts that the Court should consider in mitigation the lack of precedent as to settlement agreements and Rule 8.4 (d) violations when assessing Respondent's sanction. (Respondent's Objections Brief, p. 9). Respondent argues that because Board Opinion 2010-3 and *Disciplinary Counsel v. Chambers*¹ were published after his conduct took place, there was no precedent for him to look to when preparing the release agreement. (Respondent's Brief, p. 9). However, the assertion that there was no precedent is incorrect.

¹ 125 Ohio St. 3d 414, 2010-Ohio-1809

Even without Board Opinion 2010-3, there is ample case law which consistently recognizes the public policy of prohibiting lawyers from requiring a lawyer to condition the settlement of a dispute with a client upon the withdrawal of a grievance claim.²

Respondent cites *Disciplinary Counsel v. Chambers*³ as the only case supporting a violation of Rule 8.4 (d) when a lawyer attempts to have a client withdraw a grievance. This case was decided after Respondent's conduct occurred, and Respondent argues that because this case was not decided at the time he asked Mr. Hallet to sign the release, the law in this area was unsettled and Respondent did not know this conduct violated the Rules of Professional Conduct.

While *Chambers* is the most recent case to find a violation of a lawyer's duty to refrain from conduct that is prejudicial to the administration of justice, similar decisions have preceded *Chambers*. In fact, in *Chambers*, the Board and the Court cited *Cuyahoga County Bar Ass'n. v. Berger*⁴ in support of the 8.4 (d) violation.⁵ In *Berger*, two lawyers settled a dispute they had with a client.⁶ The settlement agreement included a provision that required the client to tell bar investigators only that the matter had been resolved, and nothing else.⁷ This Court found a violation of DR 1-102(a)(5), which is identical in language to Rule 8.4 (d).⁸

Berger sets out a clear precedent that an attorney cannot prevent a client from speaking with disciplinary authorities in a settlement agreement. Respondent's release

² Board Opinion 2010-3 alone cites additional cases in support *Cleveland Bar Ass'n. v. Kodish*, 110 Ohio St. 3d 162, 2006-Ohio-4090; *Columbus Bar Ass'n v. Smith*, 108 Ohio St. 3d 146, 2006-Ohio-413; *Akron Bar Ass'n. v. Wittbrod*, 122 Ohio St. 3d 394, 2009-Ohio-3549

³ 125 Ohio St. 3d 414, 2010-Ohio-1809

⁴ 64 Ohio St. 3d 454 (Ohio 1992)

⁵ *Chambers* at ¶ 14.

⁶ *Berger* at 456.

⁷ *Id.*

⁸ *Id.*

did just that. While the release did not specify exactly what Mr. Hallet should say in dealing with investigators, it did require Mr. Hallet to release any ethical complaints concerning Respondent in order to receive his refund. Unfortunately for Respondent, this provision angered rather than intimidated Mr. Hallet, and he continued speaking to Relator's investigators.

Another case which was published before Respondent's conduct took place is *Akron Bar Ass'n. v. Markovich*⁸. In this case, the respondent was dismissed by his client. After the client filed a grievance, the respondent offered her a refund of her filing fees in exchange for dropping the grievance.⁹ The respondent was charged with a violation of DR 6-102, prohibiting a lawyer from trying to limit malpractice liability.¹⁰ While this is not the same charge the instant Respondent received, it still put him on notice that his conduct was inappropriate.

Additionally, *Akron Bar Ass'n. v. Holder*¹¹ also serves as precedent upholding the wrongful nature of attempting to cause a client to withdraw his or her grievance. In *Holder*, the Respondent attempted to interfere with the grievance investigation by attempting to negotiate the withdrawal of the grievance through settlement negotiations.¹² The Board and this Court found a violation of Gov. Bar R. V(4)(G).¹³ While this is not the same violation as Respondent was charged with, it served to put Respondent on notice that his conduct was not appropriate and violated his ethical duties as an attorney.

⁸ 117 Ohio St. 3d 313

⁹ *Id.* at ¶ 5.

¹⁰ *Id.* at ¶ 6.

¹¹ 102 Ohio St. 3d 307, 2004-Ohio-2835

¹² *Id.* at ¶ 31.

¹³ *Id.* at ¶ 31, 35

Finally, Respondent's argument presupposes that he researched this issue before drafting the release form, found the outcome of the research unclear and made a judgment call in asking Mr. Hallet to sign the release. This is not the case. Respondent testified at hearing that he did not check the Rules of Professional Conduct before presenting the release agreement to Mr. Hallet. (Hearing Transcript, p. 86). Respondent cannot claim mitigation on the basis that the case law in this area unclear when in fact he did not even attempt to research the case law until after the complaint against him had been filed.

ARGUMENT

PROPOSITION OF LAW II

The Board of Commissioners on Grievance and Discipline of the Supreme Court of Ohio properly recommended a one year suspension with six months stayed. This is consistent with this Court's case law for an attorney who failed to deposit client funds in a trust account, charged a non-refundable retainer, and committed conduct prejudicial to the administration of justice. The Board properly identified four aggravating factors.

The Board's Recommended Sanction is Appropriate

The Board's recommended sanction of a one year suspension with six months stayed is appropriate in this case, and is consistent with the prior case law of this Court.

Respondent's conduct is more comparable to the conduct in the *Berger* case than his brief admits. (Respondent's Brief, p. 7). While it is true there is only one violation that is identical, the 8.4 (d) violation discussed above, the respondents in *Berger* had

other similar violations. *Berger* and his partner were found to have charged an excessive fee, and charged with a failure to promptly return client property.¹⁴ Under the now applicable Rules of Professional Conduct, this conduct would have been charged as violations of Rules 1.5 and 1.15. While Respondent's conduct is not identical, Respondent also violated Rule 1.5 by charging a non-refundable fee. Respondent violated rule 1.15 by failing to place unearned fees in his trust account.

In *Berger*, the respondents had additional violations and were given a one year suspension.¹⁵ In the instant case the recommended sanction is appropriate because it acknowledges the severity of Respondent's conduct while not imposing a punishment as harsh as that imposed in *Berger*, where there were additional violations.

Other cases that include attorney fee and trust account violations, but do not include the Rule 8.4 (d) violation, suggest a stayed suspension is appropriate for those violations. In *Cuyahoga Cty Bar Ass'n. v. Cook*¹⁶, the respondent took a non-refundable fee, did not account for funds held in his trust account and did not deposit unearned fees in his trust account.¹⁷ The respondent had a prior disciplinary action but was found to have cooperated with the disciplinary process.¹⁸ This Court held that non-refundable fees are not acceptable except in the case of the client hiring an attorney for any contingencies that arise, thus causing the attorney to pass up other employment opportunities.¹⁹ The respondent received a six month stayed suspension.²⁰

¹⁴ *Berger* at 455

¹⁵ *Id.* at 455-456

¹⁶ 121 Ohio St. 3d 9, 2009-Ohio-259

¹⁷ *Id.* at ¶ 4

¹⁸ *Id.* at ¶ 10

¹⁹ *Id.* at ¶ 7

²⁰ *Id.* at ¶ 12

In *Columbus Bar Ass'n. v. Haliburton-Cohen*²¹, the respondent charged a non-refundable “lost opportunity” fee, though the Board and Court found that she had not actually lost any employment opportunities.²² The respondent also failed to return unearned fees.²³ She had prior disciplinary action, but was cooperative in the investigation.²⁴ She also received a six month stayed suspension.²⁵

In *Cuyahoga Cty Bar Ass'n. v. Poole*²⁶, the respondent neglected cases and refused to return unearned fees.²⁷ The respondent had no prior discipline, expressed remorse, and made restitution, but failed to cooperate in the disciplinary process, committed misconduct in more than one case, and harmed vulnerable clients.²⁸ He received a one year stayed suspension.²⁹

Respondent herein should receive a one year suspension with 6 months stayed due to the additional Rule 8.4 (d) violation and the extensive aggravating factors found in this case. In *Berger*, the Board found that the respondent’s conduct in violating DR 1-102 (a)(5) [now Rule 8.4 (d)] “struck at the heart of the disciplinary system and ethical rules established by the Ohio Supreme Court”.³⁰ Respondent here should not receive a stayed suspension for his conduct, especially in light of his attempt to derail the grievance process with the release he provided Mr. Hallet.

Additionally, Respondent here was found to have several aggravating factors in the case. The Board found the aggravating factors of a selfish or dishonest motive, lack of

²¹ 106 Ohio St. 3d 98, 2005-Ohio-3956

²² *Id.* at ¶ 3, 16

²³ *Id.* at ¶ 11.

²⁴ *Id.* at ¶ 12-13.

²⁵ *Id.* at ¶ 18.

²⁶ 120 Ohio St. 3d 361, 2008-Ohio-6203

²⁷ *Id.* at ¶ 4-8

²⁸ *Id.* at ¶ 16

²⁹ *Id.* at ¶ 21

³⁰ *Berger* at 456

cooperation in the disciplinary process, deceptive practices during the disciplinary process, and refusal to acknowledge the wrongful nature of the conduct. The only mitigating factor found by the board was no prior disciplinary history. The respondents in *Cook* and *Haliburton-Cohen* who received 6 month stayed suspensions each had only one aggravating factor, either prior discipline or a lack of cooperation. The respondent in *Poole* had multiple aggravating factors, but had more than one mitigating factor, and received a longer stayed suspension. Respondent was not only found to have failed to cooperate, but the Board determined he was deceptive in the disciplinary process. Due to these aggravating factors and Respondent's additional Rule 8.4 (d) violation, Respondent should receive a harsher punishment than a stayed suspension.

The Board's Application of Aggravating Factors is Appropriate

The Board correctly assessed the mitigating and aggravating factors in this case. Respondent argues that in mitigation, his repayment of Mr. Hallet's court costs should be considered. (Respondent's Brief, p. 13-14). Respondent also disagrees with each aggravating factor found by the Board. (Respondent's Brief, p. 14-16). In fact, Respondent asks that rather than finding an aggravating factor of a dishonest or selfish motive, the Court find there is mitigation in the lack of a dishonest or selfish motive. (Respondent's Brief p. 12-13, 14). Each of Respondent's contentions will be discussed below.

First, Respondent argues that his refund of court costs to Mr. Hallet should be considered by this Court as a mitigating factor. Under the ABA Standards for Imposing Lawyer Sanctions, compelled or forced restitution is a factor which is not aggravating or

mitigating.³¹ While Ohio has no listed neutral factors in Gov. Bar R. V, the ABA Standards are helpful in determining whether or not conduct should be considered as mitigating. Here, Respondent refunded Mr. Hallet's court costs because he thought refunding the money would end the grievance process and settle the matter. (Hearing Transcript, p. 80). Respondent refunded the money only after Relator's investigator told him it would be wise to do so. Without the grievance investigation, it is highly unlikely that Respondent would have refunded Mr. Hallet's money. Therefore, Respondent's begrudging refund of unused court costs should not be considered in mitigation.

Second, Respondent argues that he was without a selfish or dishonest motive in attempting to keep Mr. Hallet's unused court costs. Respondent did not want to refund Mr. Hallet's court costs because the fee he had earned in preparing the unfiled bankruptcy exceeded the retainer paid by Mr. Hallet. (Hearing Transcript, p. 80). However, this Court held in *Cincinnati Bar Ass'n. v. White* that a lawyer is prohibited from using client funds he holds in a fiduciary capacity to offset personal claims.³² In *White*, the respondent withheld settlement funds from a client in order to offset rent payments owed to the respondent by the client.³³ The Court found this to be improper, as the lawyer was holding the funds in a fiduciary capacity and could not use those funds to satisfy debts he held against the client.³⁴

³¹ ABA Standards, p. 28 (1992); located at http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.authcheckdam.pdf

³² 79 Ohio St. 3d 491, 493 (Ohio 1997)

³³ *Id.*

³⁴ *Id.*

Here, Respondent held the unused court costs in a fiduciary capacity. When Mr. Hallet chose not to file for bankruptcy, Respondent attempted to keep the filing fees because he was “offsetting against fees owed.” (Hearing Transcript, p. 80).

The Board properly found a selfish or dishonest motive, as Respondent impermissibly attempted to convert an unused filing fee to satisfy extra fees he believed Mr. Hallet owed.

Third, Respondent argues that the Board improperly found aggravating factors of failing to cooperate in the disciplinary process and employing deceptive practices in the disciplinary process. Both aggravating factors derive from Respondent’s use of the release form when returning Mr. Hallet’s court costs. As discussed above, in *Holder*, the Court found a violation of Gov. Bar R. V(4)(G) for failing to cooperate in the disciplinary proceedings.³⁵ While Respondent was not found to have violated Gov. Bar R. V(4)(G) for his attempt to cause Mr. Hallet to withdraw his grievance, his actions still support a finding in aggravation of a failure to cooperate and of employing deceptive practices. While Respondent continues to insist that he was just “thinking in terms of a global settlement,” the fact is that Respondent attempted to prevent Mr. Hallet from cooperating in the disciplinary process in exchange for a refund of his unused court costs. (Hearing Transcript, p. 83). Clearly, these actions were an attempt to derail the grievance process and leave Mr. Hallet with the belief that he could not legally continue to cooperate with Relator’s investigators. This is clear and convincing evidence of a failure to cooperate and employing deceptive practices in the disciplinary process.

Lastly, Respondent argues that the Board should not have found that there was a refusal to acknowledge the wrongful nature of the conduct. Respondent argues that

³⁵ *Holder* at ¶ 31, 35.

because he has changed his contract and practices to fall within the rules, he has shown acknowledgement of the wrongful nature of the conduct. However, his statements at the hearing suggest that while Respondent has come into compliance, he still does not believe his actions should be punished under the Rules of Professional Conduct.

As for the Rule 1.15 (d)(3) violation for failing to maintain Mr. Hallet's retainer and court fees in his trust account, Respondent repeatedly cites the *Flanagan* case³⁶. Respondent insisted throughout the proceedings that he believed this case was controlling, despite the fact that the Disciplinary Rule it interpreted had been changed. At hearing, Respondent stated that he did "not understand the rule" to require him to place retainers and court fees in trust, but later agreed that the "general rule" is to deposit the funds in a trust account. (Hearing Transcript, p. 70). This seems to indicate that Respondent believes the "general rule" of Rule 1.15 does not apply to him. This in no way acknowledges the wrongful nature of the conduct.

When questioned on the Rule 1.5 (c) violation for collecting a non-refundable retainer, Respondent first attempted to shift the blame, insisting that his partner was the one who drafted the contract provision. (Hearing Transcript, p. 74). When questioned further, Respondent asserted that the language requiring an attorney to notify a client he or she may be entitled to a refund of unearned retainer funds was located in the retainer provision of the contract, just not in the exact language of the statute. (Hearing Transcript, p. 74). Respondent seems to be referring to the provision which stated a client could obtain a refund of their retainer only at the approval of the attorney and only in extraordinary circumstances. Again, Respondent tried to minimize his blame in the situation and twist the meaning of the rule in order to fit his needs.

³⁶ 77 Ohio St. 3d 381

Lastly, Respondent argued that he did not see his release provision and violation of Rule 8.4(d) as “an exact fitting within the code itself as being an exact prohibition.” (Hearing Transcript, p. 86). Again Respondent continues to argue that because the rule does not prohibit his very specific actions, it does not apply.

Throughout the hearing, Respondent repeatedly showed an unwillingness to take responsibility for any of his wrongdoing. He repeatedly stated that it was his partner’s job to check the ethics rules. (Hearing Transcript, p. 74, 86). Respondent did not try to avail himself of the current ethics rules and refused to acknowledge their application to his situation, making the Board’s decision in assessing an aggravating factor for refusal to admit wrongdoing proper.

CONCLUSION

Relator respectfully requests that this Court imposed the sanction recommended by the Board of a one year suspension with 6 months stayed on conditions. The Board's recommended sanction is appropriately within the sanctions imposed by this Court for similar conduct, and the Board's assessment of the mitigating and aggravating factors in this case was appropriate and proven by clear and convincing evidence.

Respectfully submitted,

CINCINNATI BAR ASSOCIATION

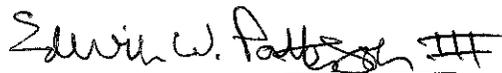
By: Arthur E. Phelps, Jr.
Arthur E. Phelps, Jr. (#0029938)
One W. Fourth St., Ste. 900
Cincinnati, OH 45202
Phone: 381-9200
E-mail: aphelps@rendigs.com

*EWP (# 0019701)
per authorization*

G. Mitchel Lippert (#0028211)
11137 Main St.
Cincinnati, OH 45241
Phone: (513) 563-6161
Email: mainstreet@zoomtown.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Relator's Answer Brief to Respondent's Objections to the Findings of Fact, Conclusions of Law, And Recommendation of the Board of Commissioners on Grievances and Discipline has been served via regular U.S. Mail, postage prepaid, this 28th day of February, 2011 upon Karl H. Schneider and Blake C. Jones, Counsel for Respondent, Maquire & Schneider, LLP, 250 Civic Center Dr., Ste. 500, Columbus, OH 43215.



Edwin W. Patterson III (#0019701)
General Counsel
Cincinnati Bar Association
225 E. Sixth St., Second Fl.
Cincinnati, OH 45202
Phone: (513) 381-8213

APPENDIX

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

FILED
DEC 23 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	Case No. 10-036
G. Timothy Dearfield	:	Findings of Fact,
Attorney Reg. 0039684	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Cincinnati Bar Association	:	the Supreme Court of Ohio
	:	
Relator	:	

¶1. The panel heard this matter in Columbus, Ohio, on October 7, 2010. The panel from consisted of Sharon L. Harwood of Norwalk, Alvin R. Bell of Findlay, and panel chair, Keith A. Sommer, of Martins Ferry.

¶2. The hearing on the merits was conducted pursuant to Gov. Bar R. V(6)(G). None of the panel members resides in the appellate district from which the complaint originated or served as a member on the probable cause panel that certified this matter to the Board.

¶3. Representing Relator were G. Mitchel Lippert and Arthur E. Phelps, Jr. Respondent proceeded pro se.

¶4. Respondent, G. Timothy Dearfield, was admitted to the practice of law in the State of Ohio in 1988 and is a partner at Dearfield, Kruer & Company, LLC.

RELATOR'S COMPLAINT

¶5. The pertinent allegations of the complaint alleged as follows:

- On June 30, 2009, Respondent undertook to represent Jeffery M. Hallet in a Chapter 13 bankruptcy proceeding and accepted a \$700 retainer, but failed to provide Mr. Hallet a copy of his standard retainer agreement (Para. 2 and 3).
- Mr. Hallet requested Respondent to file a Chapter 7 bankruptcy, and Respondent accepted a \$399 additional retainer (Para. 4, Exhibit A).
- Mr. Hallet paid Respondent \$399 by check on July 30, 2009, and Respondent deposited this check into his business operating account and not his IOLTA account (Para. 5 and 6).
- On August 15, 2009, Mr. Hallet dismissed Respondent and decided not to file bankruptcy. Respondent had prepared a Chapter 13 bankruptcy (Para. 7).
- Mr. Hallet requested an itemized billing statement and a refund of his court costs, his file and a copy of the retainer agreement (Para. 8).
- Respondent's office informed Mr. Hallet that they would keep the court costs as additional fees and failed to provide Mr. Hallet with a copy of his standard retainer agreement until after he had been dismissed. He provided the agreement to Mr. Hallet but did not return court costs. (Para. 9 and 10).
- Respondent's standard retainer agreement stated a Chapter 7 bankruptcy fee was an additional \$800 retainer, plus court costs of \$299. Mr. Hallet was under the impression that the entire \$399 was for court costs (Para. 11).
- Respondent's standard retainer agreement 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 the 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." (Para. 12, Exhibit A).
- On February 5, 2010, and February 11, 2010, Respondent told Relator's investigator that he would be refunding Mr. Hallet's court costs within the next few days but failed to do so (Para. 13 and 14). On February 26, 2010, Respondent refunded the court costs to Mr. Hallet in cash (Para. 15).
- Respondent required Mr. Hallet to sign a letter stating the \$299 in cash was "in 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." (Para. 16, Exhibit B).

RELATOR'S ALLEGED VIOLATIONS

¶6. Relator's complaint asserted that Respondent violated his oath of office and the Rules of Professional Conduct, specifically:

- Prof. Cond. R. 1.5(b), for failing to provide Mr. Hallet with his standard retainer agreement within a reasonable time after beginning representation.
- Prof. Cond. R. 1.5(d)(3), for treating all monies paid to the lawyer as non-refundable.
- Prof. Cond. R. 1.15(c), for failing to keep the unused court costs in his IOLTA account.
- Prof. Cond. R. 8.4(d), prohibiting conduct that is prejudicial to the administration of justice, for using the refund of the court costs as leverage to obtain a release of all grievance claims made by Mr. Hallet.
- Gov. Bar R. V(4)(G), for failing to cooperate with the disciplinary process by requiring Mr. Hallet to sign a release before refunding the unused court costs.

RESPONDENT'S ANSWER

¶7. In answer to the complaint, Respondent disagreed that he failed to provide Mr. Hallet with a copy of his standard retainer agreement and stated that the agreement clearly discloses the Chapter 13 fees as \$3,000 which are pursuant to the Southern District of Ohio "no look" fees allowed per Local Bankruptcy Rule 2016(b)(2)(A) which recognizes the nearly impossible task of segregating time entries for consumer bankruptcy attorneys (Para. 3).

¶8. Respondent disagreed that Hallet requested him to file a Chapter 7 bankruptcy and stated there were multiple post-engagement discussions as to the propriety of filing Chapter 13 versus Chapter 7 (Para. 4).

¶9. Respondent agreed that he accepted \$399 in addition to the \$700 by check, and that the check was deposited in Respondent's business account. He stated the deposit of the check in his business checking account was proper as the fees had been earned up to \$3,000. He quoted

US Bankruptcy Judge Barbara Sellers as stating in open court in the middle 1990's that this was appropriate. Respondent asserted that it was an administrative burden to deposit all checks in the IOLTA account and then transfer the same to his regular operating account, and the likelihood of bounced consumer checks could result in disciplinary actions for bounced IOLTA checks (Para. 6).

¶10. Respondent agreed that Hallet dismissed his firm and decided not to file bankruptcy. He further agreed that Hallet requested an itemized billing statement, a refund of court costs, his case file, and a copy of the retainer agreement. Respondent stated that Hallet was told by telephone he could pick up his property, but that the monies paid were not refundable per the retainer agreement as the same were earned because substantially more fees were earned given the preparation of the case and the more than normal amount of counseling with Hallet (Para. 8). Respondent further agreed that Hallet contacted him by telephone about the refund of court costs, and he was told the money would be kept as earned fees as the agreement was to pay \$3,000 in attorney fees. Respondent disagreed that he failed to provide Hallet with a copy of the standard retainer agreement until after he had been dismissed (Para. 9 and 10). Respondent agreed that the standard retainer agreement stated a Chapter 7 bankruptcy fee was \$800 plus court costs of \$299 (Para. 11).

¶11. Respondent agreed that the standard retainer agreement stated "All retainer payments are good from the date made and will be credited to the attorney fees and court costs then applicable for the 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." (Para. 12).

¶12. Respondent agreed that he told the investigator he would be paying Hallet \$299 but this was to settle any/all claims and stated that no specific date for payment was given as his checkbook was in his Covington, Kentucky office and it would take a few weeks (Para. 13). Respondent stated the \$299 was paid and Respondent did not commit a definite date given the logistics of getting a check from his Covington, Kentucky, office (Para. 14).

¶13. Respondent's answer then stated that the \$299 in cash was to settle a fee dispute and was "in full and complete satisfaction of any claims you may have against same and of any of its attorneys, 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" and referred to Exhibit B. (Para. 15 and 16).

¶14. Respondent's answer stated that Hallet's original intake sheet acknowledges his receipt of the standard fee agreement (Exhibit 1) and that Congress has preempted Ohio and "occupied the field" as to bankruptcy attorney fee agreements and cited *Milavetz, Gallop & Milavetz, P.A., v. U.S.* (March 2010). Respondent asserted that the standard fee agreement states that refunds are made at the discretion of an attorney.

¶15. In response to Prof. Cond. R. 1.5(b), Respondent stated that he provided the retainer agreement on two separate occasions, the first upon the initial consultation when Mr. Hallet executed the consultation form acknowledging receipt of the retainer agreement (Exhibit 1).

¶16. In response to Prof. Cond. R. 1.5(d)(3), Respondent stated he agreed to represent Hallet for \$3,000 attorney fees and earned fees substantially in excess of the \$1,099 paid by Hallet, plus the \$299 paid to settle the claim.

¶17. Respondent disagrees that he violated Prof. Cond. R. 1.15(c) for failing to keep the unused court costs in his IOLTA account.

FINDINGS OF FACT

¶18. Exhibit F is the background information sheet signed by Mr. Hallet on 5/8/09. The last paragraph states that "it is necessary to pay Law Firm a retainer in the amount required under the Law Firm's Standard Retainer Agreement, a copy of which you acknowledge receiving also by signing below." Hallet testified that he did not know if this was included in the packet that he received at the outset. Respondent testified the retainer agreement was included in the packet given to Hallet at the outset.

¶19. Respondent testified that he did not keep the court costs in his IOLTA account and deposited the same into his business operating account.

¶20. Respondent admitted to the preparation and execution of Exhibit B which is the letter addressed to Hallet dated February 26, 2010, wherein Hallet acknowledged receipt of the \$299 in cash from his office which states "in 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."

CONCLUSIONS OF LAW

¶21. The Relator charged Respondent with violating the Ohio Rules of Professional Conduct and the Panel finds by clear and convincing evidence that the Relator has proven the following violations:

- Prof. Cond. R. 1.15(c)—Respondent failed to keep the unused court costs in his IOLTA account.
- Prof. Cond. R. 1.5(d)(3)—Treating all monies paid to the lawyer as non-refundable. Rule 1.5(d)(3) provides a lawyer shall not enter into an arrangement for a fee denominated as “earned upon receipt,” “non-refundable,” 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.
- Prof. Cond. R. 8.4(d)—Prohibiting conduct that is prejudicial to the administration of justice, for using the refund of the court costs as leverage to obtain a release of all grievance claims. See *Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2010-3* (June 11, 2010) which states attempts by a lawyer to avoid discipline by asking the client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance is improper.

¶22. The panel does not find by clear and convincing evidence that the Relator has proven the following violations:

- Prof. Cond. R. 1.5(b)—Failing to provide Mr. Hallet with his standard retainer agreement within a reasonable time after beginning representation.
- Gov. Bar R. V(4)(G)—Failing to cooperate with the disciplinary process by requiring Mr. Hallet to sign a release before refunding the unused court costs. Gov. Bar R. V(4)(G) states that the certified grievance committee may call upon an attorney to assist in an investigation or testify in a hearing before the board or a panel and that no attorney shall neglect or refuse to assist or testify in an investigation or hearing.

MITIGATION AND AGGRAVATION

¶23. Concerning aggravating factors as set out in BCGD Proc. Reg. 10(B)(1), the panel finds the following:

- Dishonest or selfish motive;
- Lack of cooperation in the disciplinary process;
- Deceptive practices during the disciplinary process; and

- Refusal to acknowledge wrongful nature of conduct.

¶24. In mitigation, there is an absence of a prior disciplinary record.

¶25. In *Cuyahoga Cty. Bar Assn. v. Berger* (1992), 64 Ohio St. 3d 454, the hearing panel concluded that respondents charged an excessive fee, denied a client access to settlement proceeds, and attempted to suppress the bar association's investigation, and recommended that the respondents be suspended from the practice of law for one year. The hearing panel noted that the respondents refused to accept any ethical responsibility for their conduct. The Supreme Court of Ohio upheld their suspension from the practice of law in Ohio for one year.

RECOMMENDED SANCTION

¶26. Relator cited several Supreme Court cases where a respondent committed violations similar to the violations by Respondent Dearfield that resulted in stayed suspensions. Relator then stated Respondent's aggravating actions can be used to urge an actual suspension, and the release language used by Respondent warrants a stricter sanction of a one year suspension with part or all stayed on conditions.

¶27. Respondent states the sanction, "if any," should be small and in the nature of merely a reprimand, preferably private.

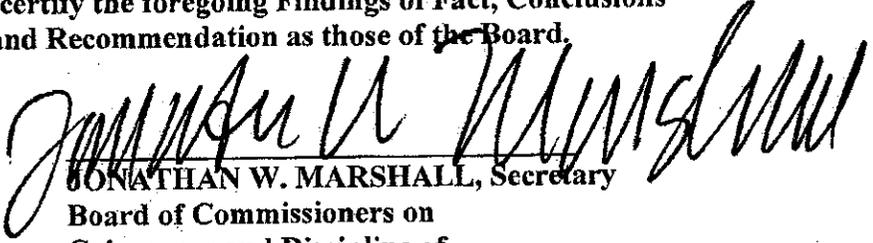
¶28. The panel recommends a one-year suspension with six months stayed.

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 December 2, 2010. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, G. Timothy Dearfield, suspended for one year with six months of

the sanction stayed. 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 Recommendation as those of the Board.



JONATHAN W. MARSHALL, Secretary

**Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**