

BEFORE THE SUPREME COURT OF OHIO

DAYTON BAR ASSOCIATION :

Relator : Case No. 2011-0340
Board No. 09-064

v. :

GEORGIANNA I. PARISI :

Respondent. :

**RESPONDENT'S ANSWER BRIEF TO RELATOR'S OBJECTIONS AND MERIT
BRIEF**

Dianna M. Anelli (0062973)
ANELLI HOLFORD, LTD.
6099 Riverside Drive, Suite 207
Dublin, Ohio 43017-2004
(614) 228-7710
(866) 460-2901 fax
danelli@ethicalmysterycures.com

Counsel for Respondent

Mark A. Tuss (0006209)
137 N. Main Street, Suite 712
Dayton, OH 45402-1773
(934) 434-3556
(934) 436-0008 fax
popptuss@sbcglobal.net

Counsel for Relator

Dayton Bar Association
109 North Main Street, Suite 600
Dayton, OH 45402

Relator

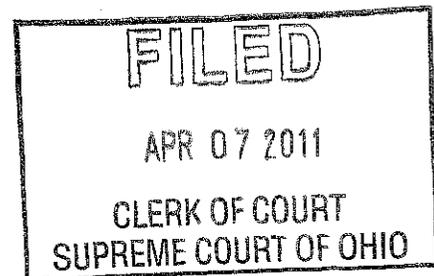


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INTRODUCTION

Relator begins its introduction by erroneously saying that it has brought its formal complaint filed before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Board”) on behalf of two elderly individuals, Sylvia Demming and Royal John Greene. Relator is the Dayton Bar Association, which is certified by the Board to investigate and prosecute claims of attorney and judicial misconduct. (Gov. Bar R. V(4)(C)). As such, relator, like Disciplinary Counsel, is acting as an arm of the Supreme Court. Indeed, neither Sylvia Demming nor Royal John Greene filed grievances with either relator or any other disciplinary entity. Rather, the grievances were filed by Carl Sherrets in the Demming matter, and Robert Langford¹ in the Greene matter. Mr. Sherrets was the attorney for Lisa Carroll, an individual unrelated to Sylvia Demming, who filed a competing Application for Guardianship of Ms. Demming. (Tr. p. 639; Exh. “J”).² As Ms. Parisi’s Objections to Findings of Fact, Conclusions of Law and Recommended Sanction of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (“Objections”) more fully explains, Ms. Carroll had interests that were antagonistic to the interests of Ms. Demming. Accordingly, Ms. Demming found Ms. Carroll’s application for guardianship to be repugnant to her wishes. (Exh. “A”, pp. 7-10). Mr. Langford is Mr. Greene’s nephew. (Stip. ¶ 13). Ironically, neither Mr. Sherrets nor Mr. Langford testified at the hearing. Moreover relator’s investigator, was conspicuously absent from the proceedings.

¹ Mr. Langford, a Dayton Police Department Lieutenant became involved and Ms. Parisi received a subpoena from George Patricoff from the economic crimes division of the Montgomery County Prosecutor’s office during her guardianship application for Mr. Greene. A grand jury heard the matter but never issued an indictment.

² References to the Agreed Stipulations entered into between the parties appears as “Stip.” Reference to the transcript of proceedings appears as “Tr.” Reference to the exhibits appears as “Exh.”

Ms. Parisi has practiced Estate Planning, Trusts and Probate for most of the past 29 years and has been certified as a specialist by the Ohio State Bar Association since 2003. (FFCL ¶ 6, Stip. ¶ 2; Tr. p. 73). At the request of both Ms. Demming and Mr. Greene, Ms. Parisi performed services for them in separate matters as an attorney and pursuant to a Durable Power of Attorney, acting as their attorneys-in-fact. (Tr. p. 631, Exh. "QQ", pp. 5-7).

Ms. Demming initially requested that Ms. Parisi get her out of a nursing home. Later Ms. Demming requested Ms. Parisi's assistance in obtaining admission into an assisted living facility, in guardianship proceedings and in protecting her rights under a trust set up for her benefit. (Tr. pp. 625; FFCL ¶ 10, 16, 32, 33; Exh. "A", pp. 7-10). Ms. Parisi fulfilled all of these tasks until the Warren County Probate Court removed Ms. Parisi for what it concluded was a conflict of interest. (Exh. "1", "2", "3"). The result of the disqualification is that Ms. Demming's finances have actually suffered at the hands of Ms. Carroll, who was appointed as the guardian of the estate in Ms. Demming's guardianship. Ms. Carroll has refused to pursue the trustee of a \$500,000 trust set up to pay Ms. Demming's living expenses. (Tr. p. 1020-1021; Exh. "DD").

Mr. Greene first requested that Ms. Parisi act as his attorney-in-fact under a Durable Power of Attorney. Thereafter, he requested that she act as health care power of attorney for him. (Exh. "QQ", pp. 5-7; Exh. "PP", Tr. p. 894). Often powers of attorney are used in place of a guardianship (Tr., p. 656) and, with regard to Mr. Greene, this was the intent of the document. (Exh. "FFFF", p. 30-31). At his desire and request, Ms. Parisi represented Mr. Greene for three years ensuring that his medical, physical and monetary needs were secured. (FFCL, ¶¶ 38; Exhs. "PP", "QQ"). Ms. Parisi performed these tasks well. (FFCL, ¶ 61). When she was removed as attorney-in-fact, Mr. Greene's nephew, former City of Dayton Police Lieutenant Robert

Langford,³ took over. A wound on the bottom of Mr. Greene's foot, a complication of his diabetes and end stage renal failure, was nearly healed at that time. (Tr. p. 1022). Within weeks of Mr. Langford's appointment, the wound was neglected and deteriorated. Mr. Greene suffered immense pain and agony for two weeks as the wound turned gangrenous and became infected with MRSA. (Exh. "HHHH", pp. 47, 52). Ultimately, Mr. Greene's leg was amputated, and he died a mere week later. (Tr. p. 1023-1024). Mr. Greene died four month after Mr. Langford took over his care from a medical condition nearly resolved prior to his appointment.

In four days of hearings, relator did its best to portray Ms. Parisi as a money grubbing, lying, cheating, predator feasting on helpless elderly and feeble individuals, her sole motive to deplete them of their funds. The evidence clearly demonstrated that nothing could be further from the truth. The tenor of the Board's Findings of Fact, Conclusions of Law and Recommended Sanction ("FFCL") makes it abundantly clear that Ms. Parisi did her job for both of these individuals and did it superbly. (FFCL ¶ 40, 61)

Ms. Parisi is filing her own Objections to the Board's FFCL. She agrees with the Board's conclusion that she did a professional job caring for Mr. Greene. The proof of the ultimate value of Ms. Parisi's services is that she accomplished Mr. Greene's objectives: she kept him out of a nursing home and allowed him to retain his lifestyle and standard of living until nearly the end of his life. When Robert Langford took over, Mr. Greene's health deteriorated rapidly and within four months, Mr. Greene passed away after enduring the consequences of the same infection which was nearly eradicated on Ms. Parisi's watch.

³ Mr. Langford ultimately left the Dayton Police Department with charges pending for logging and collecting payment for hours not worked. Relator decided not to call Mr. Langford to testify.

Furthermore, the evidence shows that as a consequence of Ms. Parisi having been ousted from the Demming guardianship case, Ms. Demming's finances have actually suffered at the hands of Ms. Carroll. Ms. Demming has been deprived of the full benefit of a half million dollar trust set up for her care. (Tr. p. 1020-1021; Exh. "DD").

Relator tries to portray Ms. Parisi as sucking both of these elder clients dry using the powers of attorney. In reality, Ms. Demming's fee bill was \$18,000 reduced from \$27,000 to fight a competing guardianship application where in excess of \$500,000 in trust funds was at issue. Somehow, it was acceptable, though, for Ms. Demming to pay for the attorney fees for the Interim Guardian/Guardian Ad Litem, court appointed attorney, Ms. Carroll's attorney (Mr. Sherrets), and Ms. Manchi's attorney. Relator did not allege that Ms. Parisi charged a clearly excessive fee to Ms. Demming.

The record is devoid of any evidence as to what a reasonable fee would be for the extensive services Ms. Parisi performed in the Greene matter.

I. FACTS

A. DEMMING

In her Objections, Ms. Parisi has set forth in detail with references to the record the facts of this matter and incorporates those facts herein by reference. Ms. Parisi takes exception to some of the facts in the Merit Brief of Relator Dayton Bar Association ("Merit Brief"), which are explained below.

When Ms. Parisi received a copy of the 12/24/07 letter that Ms. Demming signed alleging that she did not know Ms. Parisi, Ms. Parisi consulted with her client. Ms. Demming assured Ms. Parisi that she did not understand the letter when it was presented to her. She requested Ms.

Parisi to continue with the guardianship and to continue representing her. (Tr. p. 642). Ms. Demming signed no fewer than four documents indicating that she wanted Ms. Parisi to act as her guardian and as her attorney so that Ms. Parisi would fight for her rights under the trust set up for her. (Tr. pp. 642-645; Exh. "A", p. 7-10; Exh. "I").

Neither a physician nor a court investigator can certify an individual to be incompetent. R.C. 2111.02(A). Rather, a Probate Court must make that determination after hearing and upon proof by clear and convincing evidence. R.C. 2111.02(C)(1). The Statements of Expert Evaluation filed in Ms. Demming's case (Exh. "D", pp. 3, 17) specifically states as much.⁴ The physicians only certified that they did an evaluation. Likewise, the Investigator's Report does not certify that Ms. Demming is incompetent. The Investigator makes only a recommendation and certifies that he or she served notice on the alleged incompetent and communicated to her the right to contest the appointment of a guardian and the right to counsel. (Exh. "29", p. 5, 7). Until the court rules, the prospective ward is competent as a matter of law.

Bev Gutmann, the marketing director for Spring Hills, the facility in which Ms. Demming lived, and Ms. Parisi both testified that Ms. Demming understood the Durable Power of Attorney when she signed it. (Tr. p. 645; 803-804). Ms. Gutmann witnessed Ms. Demming's signature. Antoinette Allen, a notary public, certified that the Durable Power of Attorney was read to Ms. Demming and that Ms. Demming voluntarily signed it of her own free act and deed. (Exh. "A", p. 14).

The magistrate appointed to Ms. Demming's guardianship application removed Ms. Parisi as both counsel for Ms. Demming and as counsel for Sylvia Manchi, Ms. Demming's

⁴ "The Statement of Evaluation does not declare the individual competent or incompetent, but is evidence to be considered by the Court. . . ." (Exh. "DD").

niece who applied to be Ms. Demming's guardian. (Tr. pp. 660-665). Removal was ordered notwithstanding that both of these ladies' wanted to have Ms. Parisi represent them. (Exh. "GGGG", p. 29-30; Exh. "A", p. 7, 9). The removal occurred at a pretrial held on March 14, 2008 at which Ms. Demming was not present. (Tr. p. 662; Exh. "1"; Exh. "GGGG", p. 73). The matter involving Ms. Parisi's disqualification was not set for hearing that day; rather, the court was holding a mere pretrial. (Tr. pp. 659-660). Ms. Parisi was removed without ever having proper notice and an opportunity to be heard as to her disqualification as Ms. Manchi's and Ms. Demming's counsel. (Tr. pp. 660-661, 664-665). The disqualification clearly violated Ms. Demming's right to counsel of her choosing in a guardianship proceeding under RC 2111.02(C)(7). It also violated Ms. Parisi's due process rights to notice and an opportunity to be heard. *Kala v. Aluminum Smelting & Refining Co., Inc.* (1998), 81 Ohio St.3d 1, 12-13. Ms. Carroll brought the disqualification motion. (Exh. "1"). Ms. Carroll is not qualified to be Ms. Demming's guardian because she has interests antagonistic to Mr. Demming's interests. RC 2111.02(C)(1). Specifically, Ms. Carroll is a long-time employee of Midwest, the close corporation whose stock comprises, at least in part, the corpus of the Cammerer Trust from which the Demming Trust is derived. (Tr. p. 664). Ms. Carroll's employer is a remainderman under both the Cammerer and the Demming Trusts. (Exh. "A", pp. 4-6).

B. GREENE

Mr. Greene requested that Ms. Parisi be his attorney-in-fact after his former attorney-in-fact, Janet Stookey, mishandled Mr. Greene's assets. (Exh. "FFFF", p. 17-18, 23; Exh. "HHHH", pp. 22-24). Within the first several weeks of the representation, Mr. Greene was presented with a bill showing Ms. Parisi's hourly rates for her and her staff. (Exh. "QQ", pp. 21-

34). Mr. Greene specifically instructed Ms. Parisi not to bring bills to him and to take the funds for the services being rendered from his account using the power of attorney. (Exh. "QQ", p.

35). Mr. Greene chose Ms. Parisi because she is trustworthy and her attorney status gave him an additional layer of protection against theft. (Exh. "FFFF", p. 71-18, 30-31, 73).

The services provided to Mr. Greene were time consuming and, correspondingly, costly. The evidence is that these services would have been costly even had others performed them. (Tr. pp. 399-405). Mr. Greene's goal was to remain out of a nursing home and out of guardianship. (Exh. "HHHH", p. 47; FFCL ¶ 40). Had Ms. Parisi not rendered care for him, Mr. Green's objectives would not have been accomplished. (FFCL ¶ 40). Margaret Hoenigman, a former licensed independent social worker with a master's degree in gerontology who worked as a patient advocated in a nursing home for 26 years, testified that had Mr. Greene gone into a nursing home, his costs would have been much greater than those Ms. Parisi charged. (Tr. pp. 411-412). Even had Mr. Greene hired others to perform the tasks Ms. Parisi and her staff performed, the costs still would have been greater. (Tr. pp. 399-412).

Ms. Parisi was to be paid her regular hourly rate for any and all services rendered under the agreement. (Exh. "FFFF", pp. 25-26). Ms. Parisi testified that she delegated many of the tasks not requiring her direct involvement to her paralegals and law clerks and charged only for her review of the services they rendered. (Tr. pp. 927-928; 1016). Most tasks the paralegals and law clerks performed outside the office were done at a very reasonable flat rate. (Exh. "7", pp. 346-398). The Board did not find that Ms. Parisi double billed for the tasks performed, although de minimus errors in this 404 page billing did occur. ("FFCL" ¶ 51).

While there was no engagement letter, neither Rule 2-106 nor Rule 1.5 requires one. There is, however, a very detailed Durable Power of Attorney which was the charging document under which Ms. Parisi rendered services. (Exh. "PP"; Tr. p. 678).

Respondent paid herself \$231,570.24 for \$259,000 of services of which she retained \$210,000 relating to Mr. Greene. (Exh. "7", p. 389). She did not charge him for \$18,000 worth of attorney and paralegal time. She waived the final \$5,000 in her statement. She waived \$25,000 in fees from representing the executor in Mr. Greene's Probate Estate. Her insurance carrier paid \$21,000 in capital gains taxes to settle malpractice allegations the subsequent Administrator of Mr. Greene's estate brought against her. (FFCL ¶¶ 34, 46, 47). Relator stipulated on the record to the reasonableness of the hourly rates for both Ms. Parisi's and her staff. (Tr. p. 314).

One would expect an individual undergoing dialysis three times or more per week with diabetes and end stage renal failure to become increasingly impaired both mentally and physically. Mr. Greene also expected this. Mr. Greene was a man living on borrowed time and he knew it. (Tr. pp. 717-718). That is why he gave Ms. Parisi a Durable Power to Attorney to take care of him and his affairs because his family refused. (Exh. "HHHH", pp. 7-8, 28, 37-38, 40, 45-46, 62; Exh. "FFFF", 28). Mr. Greene terminated Ms. Parisi's Power of Attorney after Mr. Langford, who had been around Mr. Greene only a handful of times in 40 years, appeared. (Exh. "HHHH", pp. 43-44; 51). Mr. Langford took a cursory glance only at the gross amount that Ms. Parisi charged Mr. Greene for services and concluded that Ms. Parisi was ripping Mr. Greene off. Mr. Langford never bothered to assist Mr. Greene with his daily needs, did not try to discover the services Ms. Parisi rendered, and did not even try to discover the doctor's

appointments and medications Mr. Greene needed when he took over. (Tr. pp. 988-989, 1023-1024). After being appointed attorney-in-fact, Langford neglected his uncle leading to Mr. Greene's leg turning gangrenous and being amputated. (Tr. p. 1023; Exh. "FFFF", pp. 34-35; Exh. "HHHH", p. 51). Had he survived Langford's negligent stewardship, no doubt Mr. Greene would admit that Ms. Parisi rendered far better service to him as attorney-in-fact than did Mr. Langford.

With regard to Mr. Greene's restored Jaguar, the evidence is clear. He loved it even though the restoration was a disaster. (Exh. "FFFF", pp. 35-36; Exh. "HHHH" pp. 38-40). Ms. Parisi advised against it – 10-15 times. (Tr. p. 860-861). Nevertheless, Mr. Greene wished to pursue the restoration. It required rekeying, contracts, repossession, negotiation and constant monitoring. (Tr. p. 116-117, 861-862, 1014-1015; Exh. "QQ", pp. 54, 55). Ms. Parisi had little choice but to continue as Mr. Greene, himself, ordered much of the restoration. Nor would her authority under the Power of Attorney have permitted her to deny to Mr. Greene the ability to spend his money how he saw fit. Mr. Langford continued the restoration as attorney-in-fact. (Tr. p. 1013). Of course, Mr. Langford now has the Jaguar.

II. LAW AND ARGUMENT

A. SYLVIA DEMMING

1. Rule 8.4(d) violation

Relator takes exception to a stayed suspension after the Board's finding of a Rule 8.4(d) violation. An analysis of this issue must begin with Relator's Complaint. In disciplinary proceedings, notice pleading does not apply. Relator must allege specific misconduct and the

rule such misconduct violates. Gov. Bar R. V(4)(I)(2); BCGD Proc Reg. 1(A); *Disciplinary Counsel v. Farmer*, 2006-Ohio-5342, ¶ 25, citing *In re Ruffalo* (1968), 390 U.S. 544.

Although unclear, paragraph 6 of Relator's complaint seems to provide the basis for the Rule 8.4(d) allegation. It states that upon execution of the Durable Power of Attorney, respondent issued checks to herself from Demming's bank account for legal services in violation of §2111.04(D) of the Ohio Revised Code. Respondent has found no law that prohibits an attorney from taking a fee without court approval for representing an applicant while a guardianship application is pending. Indeed, case authority seems to indicate that it is permitted. *Brockway v. Jewell* (1894), 52 Ohio St. 187, 209 (payment by ward to nurse for services rendered after guardianship application filed but before hearing adjudicating incompetence is permitted; ward is not prohibited from making purchases or payments); *In Re Stevenson's Estate* (2nd Dist. 1946), 79 Ohio App. 315, 318 (gift must not involve consideration therefore); *Beach v. Baker* (8th Dist. 1958), 79 Ohio Law Abs 136, 151 N.E.2d 677, 683 ("The payment of a debt is not a sale, gift, conveyance or encumbrance."); 53 Ohio Jur.3d Guardian and Ward § 46 ("The statute does not prohibit an incompetent from making a purchase or payment or from changing the beneficiary on a payable on death account."). Sup.R. 71 and Warren County LR 5.02 provide only that the court must approve all fees **after** the guardianship is established.

The Board takes exception to the fact that the power of attorney under which Ms. Parisi was operating was signed at a time when Ms. Parisi had alleged that Ms. Demming was incompetent by reason of Alzheimer's disease and memory impairment. This is of no moment, however. As Rule 1.14 indicates, obtaining a power of attorney under such circumstances is permitted. (Rule 1.14, Comment [5]). Both Ms. Parisi and Ms. Gutmann testified that Ms.

Demming knew what she was doing when she signed the Durable Power of Attorney. (Tr. 653, 803-804)

In hindsight, Ms. Parisi acknowledges that a better approach could have occurred with regard to obtaining payment of Ms. Demming's fee bill. She could either have waited until the Warren Court Probate Court had dismissed the guardianship, waited until Ms. Manchi was the attorney-in-fact and had her issue the check or wait until another guardianship application was filed in Mahoning County and a guardian appointed and applied to the court. (Tr. p. 671-673). Best practices, however, are not the standard by which attorney discipline is imposed. Indeed, the Rules set forth the minimum standard for attorneys; that which, if violated, subjects the attorney to sanction. Had the Board found misappropriation, coercion, an illegal fee, or that Ms. Parisi had not actually performed the work, the situation may call for a sanction. None of these facts are present here.

Relator cites to *Disciplinary Counsel v. Blair*, 2011-Ohio-767. That case is inapposite. *Blair* involved actual misappropriation of guardianship funds. While acting as guardian, Ms. Blair failed properly to supervise her employees, which resulted in a false accounting and a false affidavit being filed with the Probate Court. *Id.* ¶¶ 1, 2. Ms. Parisi was never Ms. Demming's guardian, never filed an accounting and never filed a false affidavit with the court. The Board specifically held that there is no evidence of misappropriation regarding the Demming matter. (FFCL ¶ 61a).

Relator next points to *Disciplinary Counsel v. Gibson*, 2011-Ohio-628, a case that is also inapplicable. Notably, **relator in *Gibson* withdrew its Rule 8.4(d) allegation.** Consequently, *Gibson* was never disciplined for violating that Rule. More importantly, *Gibson* involves funds

held in escrow for the purpose of performing maintenance and restoration work to the parties' marital home in a domestic relations matter. The escrowed funds were the subject of competing motions in the divorce. Gibson convinced the escrow agent to release the funds to her without informing either opposing counsel or the court. No such situation exists here. The Board specifically dismissed relator's Rule 8.4(b) allegation as not supported by clear and convincing evidence. Relator now attempts to apply a sanction appropriate for Rule 8.4(b) misconduct to Ms. Parisi due to the Board's finding that she violated Rule 8.4(d). This is inappropriate and prosecutorial overreaching.

Relator next turns to *Disciplinary Counsel v. Bandman*, 2010-Ohio-2115. To equate *Bandman* with the instant case is truly offensive given the Board's FFCL. Attorney Bandman established a trust for his client and was paid for that service through the client's attorney-in-fact with funds outside of the trust. The client, who had helped to raise him, insisted he take a fee for administering the trust. Thereafter, he misappropriated \$60,050 in trust funds by writing checks to himself and his law firm, characterizing them as "loans", without the knowledge of either the client or the client's attorney-in-fact.

The differences between *Bandman* and the instant case could not be more plain. Ms. Parisi was Ms. Demming's attorney-in-fact. Believing her services were at an end, Ms. Parisi sent her billing statement to Ms. Manchi for review and approval. It hardly would have helped had Ms. Parisi sent the statement to Ms. Demming as relator would then have accused her of sending the statement to an incompetent. Ms. Parisi, Ms. Demming and Ms. Manchi all fully expected that Ms. Manchi would become either the next attorney-in-fact or guardian for Ms. Demming. Ms. Manchi both reviewed and approved the payment. (Exh. "GGGG", p. 16-17).

Ms. Parisi transferred the funds. When the Warren County Probate Court continued to exercise jurisdiction, Ms. Parisi immediately returned the funds to Ms. Demming. (Exh. "X"). Unlike *Bandman*, Ms. Parisi's actions were not done in secret. Nor does it constitute misappropriation. Ms. Parisi did not loan herself money from Ms. Demming's funds. She paid herself along with others that she was paying, such as the assisted living facility and the physicians, for services rendered to Mrs. Demming. (Tr. pp. 672). Interestingly, Ms. Parisi is now being sanctioned for conduct that the Board suggests she should have taken in Greene to avoid being sanctioned for misconduct. (FFCL ¶ 62).

The Warren County Probate Court actually had no jurisdiction over Ms. Demming once she left Warren County pursuant to R.C. 2111.02(A). *In re Guardianship of Fisher* (1993), 91 Ohio App.3d 212. It obtained jurisdiction once again when Ms. Demming decided to return to Warren County in June 2008. Ms. Parisi obtained the fees at a time when the Warren County Probate Court did not have jurisdiction and prior to Ms. Demming's decision to return to Warren County.

Relator's equating *Bandman* to the instant matter is indicative of its relentless insistence that Ms. Parisi is an elder abuser. Such is simply not true. As the Board found in both instances, Ms. Parisi properly served her clients but was faced with difficult decisions. (FFCL ¶¶ 70, 71).

Ms. Parisi agrees with relator that *Disciplinary Counsel v. Jacobs*, 2006-Ohio-2292 is inapposite to the instant matter. Jacobs represented a physician and his wife for 16 years before representing the physician in a divorce from the wife. While the divorce was pending, Mr. Jacobs prepared a new will for the wife that excluded her husband. During the divorce, Mr. Jacobs represented the physician, revised a trust for him that excluded the wife as successor

trustee, and counseled the physician on the transfer of assets to keep them from the wife. Ms. Parisi, on the other hand, represented both herself and Ms. Manchi in nonadversarial in rem guardianship proceedings. Ms. Demming did not oppose the guardianship so long as either of these two were appointed guardian. (Tr. pp. 631, 642, Exh. "GGGG", p. 18, 28). Ms. Carroll filed a competing application for guardianship. (Exh. "J"). This did not create a conflict of interest between Ms. Parisi and Ms. Demming. It, did, however, cause Ms. Demming to make clear that she did not want Ms. Carroll to be her guardian. (Exh. "GGGG", pp. 17, 31, 32, 39). When Ms. Demming moved the from the Warren County Probate Court jurisdiction, she advised the court that she did not want a guardian. (Exh. "U"). Nevertheless, when Ms. Demming returned to Warren County, neither the court appointed Interim Guardian/Guardian Ad Litem nor Ms. Demming's court-appointed counsel filed an opposition to the guardianship on her behalf. In actuality, it was Ms. Carroll that had an antagonistic interest adverse to Ms. Demming's interest. (Tr. p. 663-664).

Nor is Ms. Parisi's case like *Disciplinary Counsel v. Dettinger*, 2009-Ohio-1429. Mr. Dettinger entered into a business relationship with his client wherein he borrowed \$25,000 giving his client a promissory note without first advising his client of the potential conflict and advising him to consult separate counsel. Ms. Parisi never borrowed money from her client and the Board did not find that she had. Moreover, Ms. Demming's 12/24/07 suggestion to the Warren County Probate Court regarding Ms. Parisi occurred through the trickery of others. Thereafter, Ms. Demming signed at least three documents indicating that she did want Ms. Parisi to be her guardian and that she further wanted Ms. Parisi to represent her. (Exh. "A", pp. 7-10). Far from there being no informed consent or a writing, there is a plethora of both in this case.

Nor is there any suggestion in the evidence that Ms. Parisi unnecessarily complicated Ms. Demming's care or that it was done solely to benefit and compensate herself. Rather, the record overwhelmingly demonstrates that Ms. Parisi fought hard to remain as attorney for her client. Ms. Parisi was the only attorney that was willing to pursue legal action against the trustee of Ms. Demming's trust to ensure that the trust paid Ms. Demming's bills as the terms of the trust required. The Warren County Probate Court removed Ms. Parisi as both Ms. Demming's and Ms. Manchi's counsel. Regarding Ms. Demming, this was a violation of RC 2111.07(C)(7). The result is that Ms. Demming is not enjoying the full benefit of the trust set up for her.

B. ROYAL JOHN GREENE

Ms. Parisi has objected to the Board's FFCL ¶¶ 33, 34, and 38 on the matters set forth in relator's Merit Brief and such objections are incorporated herein by reference.

Relator likens Ms. Parisi's charges to Mr. Greene to those deemed to be clearly excessive in *Disciplinary Counsel v. Johnson*, 2007-Ohio-2074. Although relator has consistently made this representation both at the Board level and now here, such is not the case. Relator's Complaint, ¶ 25 states the basis of its Rule 1.5(a) and DR 2-106(A) allegations as, (1) charging her regular hourly rate for performing non-attorney services and (2) failing to secure the services of non-legal individuals to perform non-legal services. According to the Board, relator selected 80 time entries from a total of 1,750, totaling \$17,693.79, to prove its clearly excessive fees allegation. (FFCL ¶ 50). Unlike *Johnson*, Not one of those billing entries relator points to involves a probate matter. (Exh. "AAAA").

Nor is there any evidence to suggest that Mr. Greene was incompetent during the course of Ms. Parisi's representation of him. Mr. Greene was examined by Greene County Adult

Protective Services the month before Ms. Parisi's representation of him began and was found to be competent. (Tr. p. 893). He was further assessed yearly as required by the assisted living facility. (Tr. pp. 460-461). Not one of those assessments found him to be incompetent prior to June 2007. (Tr. p. 461). When Ms. Parisi filed a guardianship application on July 24, 2007, it was because a physician signed a Statement of Expert Evaluation. (Tr. pp. 461). Relator's suggestion either that Ms. Parisi provided probate services or that Mr. Greene was incompetent prior to that time are simply not true.

Apart from that, unlike *Johnson*, Ms. Parisi testified as to the reasonableness for the time expended in many of the entries relator presented. (Tr. pp. 696-715; Exh. "AAAA"). Ms. Parisi's experts, Matthew Sorg and Thomas Rouse⁵ also testified as to the reasonableness of Ms. Parisi's charges. Mr. Sorg stated that, as a receiver, he is oftentimes required to perform services that are not legal in nature. When he does, he receives his normal hourly billing rate for doing so. (Tr. p. 350, 352). Mr. Sorg reviewed Ms. Parisi's 404-page billing statement and concluded that had she been a receiver, she would have been paid for all of them so long as there was a framework for the services she performed. (Tr. p. 354, 357).

Mr. Rouse's proffered testimony⁶ states that had Ms. Parisi performed these services as probate counsel, she would have been paid. (Proffer, p. 9). Mr. Rouse's proffer also asserts that

⁵ Neither Mr. Sorg nor Mr. Rouse's testimony was refuted as relator offered no expert testimony regarding the excessiveness of Ms. Parisi's fees.

⁶ Mr. Rouse is an attorney licensed to practice law in both Ohio and Kentucky. He serves on the Board of Governors of the Kentucky Bar Association. He served on the Board of Governors of Ethics, Professionalism and Ethics Hotline Committee from 1991 to 2006. He is a member of the Association of Professional Responsibility Lawyers. He is currently appointed to the Kentucky Supreme Court Rules Committee and the Kentucky Bar Association Board of Governors Rules Committee. (Proffer, pp. 2-3). Mr. Rouse's proffer affirms that he reviewed Ms. Parisi's billing records for Mr. Greene (Exh. "7"). (Proffer, p.5).

had Ms. Parisi called him as a member of the Ethics and Professionalism Hotline Committee and asked for advice as to the propriety of her conduct, he would have advised that her actions were ethical. Ms. Parisi, likewise, testified that she is paid as guardian for rendering the same type of services to Mr. Reed, her ward, in *In the Matter of the Guardianship of Warren L. Reed*, Butler County Probate Court Case No. PG06-10-0188. (Tr. p. 875; Exh. “OOO”).

Nor is it true that Ms. Parisi did not consider a cost benefit analysis prior to charging and collecting fees for Mr. Greene. Pages 696-715 of the transcript make that clear. At first blush, some of these charges, such as the Kittyhawk Felines Club, may seem inconsequential. As the Board noted, however, they were important to Mr. Greene. (FFCL ¶ 54, 61, 71). Mr. Christiansen, Mr. Greene’s best friend of over 50 years testified that Mr. Green and his wife had a small business raising and selling Siamese cats. (Tr. pp. 710-711; Exh. “HHHH”, pp 8-10). They made quite a bit on the sale of these animals. Mr. Greene and his wife were founding members of The Kittyhawk Felines Club and very active in it. Many of their friends from around the country were members of that club. It provided a social outlet for Mr. Greene. When his wife died, he lost contact with many of their friends. (Tr. pp. 710-711). Certainly it was worth the expenditure of some time and money to put Mr. Greene back in contact with some of his long lost friends for the purpose of improving his own mental health. Other examples are fully set forth in pp. 41-43 of Ms. Parisi’s Objections and are incorporated herein by reference.

To equate Ms. Parisi’s services rendered to Mr. Greene as similar to those Mr. Johnson rendered in pursuing concealment of assets and malpractice claims that had little, if any, chance of recovery is truly offensive. The two cases are simply not related.

For the first time in its Merit Brief, relator now alleges that Mr. Parisi inflated her billable hours. No such allegation appears in the Complaint. Nor is there any evidence that Ms. Parisi did so as in *Toledo Bar Assn. v. Stahlbush*, 2010-Ohio-3823. Although relator had the opportunity to prove its late allegation at the four days of hearing in this matter, it did not do so. Relator claims it offered evidence of double billing. What it offered, the Board called “unintentional and insignificant billing errors”. (FFCL ¶ 51). Relator offered **NO** evidence that Ms. Parisi either padded her bill or billed for hours not worked. Nor did the Board so find.

Relator repeatedly beat the drum that a billing error appearing on page 170 of her 404 page bill (Exh. “1”) is indicative of the paucity of evidence to support its case. (Tr. pp. 14, 15, 16, 96, 97, 253, 283, 284, 285, 294, 370, 371, 372, 375, 547, 549, 550, 554, 570, 897, 898, 900, 939). Ms. Parisi testified that this entry was an error, it was not supposed to be billed, she would not bill for calling a client on his birthday to wish him happy birthday. (Tr. p. 712, 713, 714, 900). She offered the memo supporting her testimony that the matter should not have been billed. (Exh. “AAAA”, p. 54). In closing, relator argued that the erroneous birthday billing alone meets its burden of establishing that Ms. Parisi charged a clearly excessive fee or else we have all wasted our time. (Tr. p. 1090). It posited that a clearly excessive fees violation cannot be based upon the amount misappropriated or clearly excessively charged. (Tr. p. 1090). It acquiesced, however, that such a charge merits only the most minor of sanctions. (Tr. p. 1090). In the end, the Board did not accept relator’s suggestion that such entry or any of the entries equated to misappropriation of Mr. Greene’s funds. (FFCL, ¶ 64). Rather, the Board acknowledged that the entry was an error. As to the other entries, the Board recognized that Ms. Parisi had to make difficult decisions in rendering good care to Mr. Greene. (FFCL, ¶ 71).

Relator's argument that a single mistaken entry of \$56.25 in a 1,750 entry billing statement amounts to charging a clearly excessive fee is indicative of the manner in which disciplinary matters are investigated and prosecuted in this day and age. Its overreaching is tantamount to raising Rule 1.5 violations to the level of a strict liability offense. Surely this Honorable Court does not believe that a billing error in the amount of \$56.25 constitutes a Rule 1.5(a) violation. Nor is relator reasonable about the sanction it requests. Despite its acquiescence that such conduct merits the least possible sanction, it now suggests that Ms. Parisi be indefinitely suspended from the practice of law. (FFCL ¶ 67).

The overwhelming evidence establishes that Ms. Parisi did not bill for every hour that she spent rendering services to Mr. Greene. She wrote off \$18,000 of attorney time and \$5,000 of paralegal time (FFCL ¶ 35). She waived another \$5,000 in fees (Exh. "7", p. 404). She further waived \$25,370.55 in her representation of Ms. Vayos in the estate proceedings (FFCL ¶ 47). The evidence establishes that Ms. Parisi collected \$231,570.24 for \$259,940.79 worth of services rendered for which she actually retained \$210,570.24. *Stahlbush* is not applicable here.

III. CONCLUSION

Although relator repeatedly portrays Ms. Parisi in despicable terms, the truth is that she enjoys a very good reputation. (FFCL ¶8; Exh. "RRR"). She works tirelessly as an elder law attorney protecting the rights of her clients and providing for their welfare to the best of her ability. She does this well and her clients appreciate it. It is others, with impure motives that bring charges against her for their own benefit. And they have succeeded. As a result of having Ms. Parisi removed in the Demming matter, Mr. Sherrets clients, including the remainderman beneficiaries of the Cammerer and Demming Trusts, were able to get their choice appointed as

guardian of the estate for Ms. Demming. This amounted to a guarantee that no one would go after the trustee for payment of Ms. Demming's bills as the Demming Trust allows. Mr. Langford became Mr. Greene's power of attorney. Through neglect leading to Mr. Greene's death, he ensured that Mr. Greene's money remained intact.

The damage done to this stellar attorney's reputation is monumental. Imagine the damage to an elder law attorney of being disqualified as counsel in a guardianship proceeding, of being charged with theft of two elder clients' funds (even if the charges were dismissed) and of being threatened with criminal prosecution. What attorney could afford to forego \$66,000 in fees (\$49,000 from Greene and \$17,000 from Demming) for services rendered? What attorney could afford the tens of thousands of dollars required to defend such allegations? Ms. Parisi is defending this matter not to be contrary, but to protect her reputation.

That the Board dismissed five of the seven charges relator brought against Ms. Parisi, including the allegations that her conduct reflected adversely on her honesty and trustworthiness and allegations of conduct involving dishonesty, fraud, deceit or misrepresentation, should not be overlooked. Relators should be especially vigilant to ensure that the evidence supports such a violation prior to ever so alleging in a disciplinary matter given the grave consequences to the respondent.

For the foregoing reasons, Ms. Parisi objects to relator's suggestion that she be indefinitely suspended and requests that this Honorable Court dismiss this matter consistent with her arguments set forth in her Objections.

Respectfully submitted.



DIANNA M. ANELLI (0062973)
ANELLI HOLFORD, LTD.
6099 Riverside Drive, Suite 207
Dublin, OH 43017-2004
(614) 228-7710
(614) 228-8618 fax
danelli@ahlawltd.com

KONRAD KUCZAK (0011186)
130 W. Second Street, Suite 1010
Dayton, OH 45402-1588
(937) 228-8363
(937) 228-0520 fax
your_lawyer@sbcglobal.net
Attorneys for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing was served by email delivery, and U.S. Mail, postage prepaid,
this 7th day of April, 2011:

Mark A. Tuss
137 N. Main Street, Suite 712
Dayton, OH 45402-1773



DIANNA M. ANELLI (0062973)
Attorney for Respondent

APPENDIX

of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

Rule 1.14 Client with diminished capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as *reasonably* possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer *reasonably believes* that the client has diminished capacity, is at risk of *substantial* physical, financial, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take *reasonably* necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to division (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent *reasonably* necessary to protect the client's interests.

(Adopted eff. 2-1-07)

Official Comment

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters

while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under division (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in division (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then division (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members; using a reconsideration period to permit clarification or improvement of circumstances; using voluntary surrogate decision-making tools such as durable powers of attorney; or consulting with support groups professional services, adult-protective agencies, or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision; variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian *ad litem*, conservator, or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's

benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to division (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, division (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety, or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent, or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

Comparison to former Ohio Code of Professional Responsibility

There are no Disciplinary Rules that cover directly the representation of a client with diminished capacity. The only comparable provisions are EC 7-11 and 7-12, which discuss the representation of a client with a mental or physical disability that renders the client incapable of making independent decisions.

Rule 1.14 is both broader and narrower than EC 7-12. It is broader to the extent that it explicitly permits a lawyer to ask for the appointment of a guardian *ad litem* in the appropriate circumstance, it explicitly permits the lawyer to take reasonably necessary protective action, and it explicitly permits the disclosure of confidential information to the extent necessary to protect the client's interest.

Rule 1.14 is narrower to the extent that it does not explicitly permit the lawyer representing a client with diminished capacity to make decisions that the ordinary client would normally make. The rule does not address the matter of decision-making, as is the case in EC 7-12, but merely states that the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible.

Comparison to ABA Model Rules of Professional Conduct
Rule 1.14 is identical to the ABA Model Rule.

Rule 1.15 Safekeeping funds and property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

- (1) maintain a copy of any fee agreement with each client;
- (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
 - (i) the name of the client;
 - (ii) the date, amount, and source of all funds received on behalf of such client;
 - (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;
 - (iv) the current balance for such client.
- (3) maintain a record for each bank account that sets forth all of the following:
 - (i) the name of such account;

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

Rule 1.5 Fees and expenses

(a) A lawyer shall not make an agreement for, charge, or collect an *illegal* or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a *reasonable* fee. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) The nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in *writing*, before or within a *reasonable* time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged. Any change in the basis or rate of the fee or expenses is subject to division (a) of this rule and shall promptly be communicated to the client, preferably in *writing*.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.

(1) Each contingent fee agreement shall be in a *writing* signed by the client and the lawyer and shall state the method by which the fee is to be

determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement shall clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

(2) If the lawyer becomes entitled to compensation under the contingent fee agreement and the lawyer will be disbursing funds, the lawyer shall prepare a closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under the agreement. The closing statement shall specify the manner in which the compensation was determined under the agreement, any costs and expenses deducted by the lawyer from the judgment or settlement involved, and, if applicable, the actual division of the lawyer's fees with a lawyer not in the same *firm*, as required in division (e)(3) of this rule. The closing statement shall be signed by the client and lawyer.

(d) A lawyer shall not enter into an arrangement for, charge, or collect any of the following:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of spousal or child support, or property settlement in lieu thereof;

(2) a contingent fee for representing a defendant in a criminal case;

(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 pursuant to division (a) of this rule.

(e) Lawyers who are not in the same *firm* may divide fees only if all of the following apply:

(1) the division of fees is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation and agrees to be available for consultation with the client;

(2) the client has given *written* consent after full disclosure of the identity of each lawyer, that the fees will be divided, and that the division of fees will be in proportion to the services to be performed by each lawyer or that each lawyer will assume joint responsibility for the representation;

(3) except where court approval of the fee division is obtained, the *written* closing statement in a case involving a contingent fee shall be signed by the client and each lawyer and shall comply with the terms of division (c)(2) of this rule;

(4) the total fee is *reasonable*.

(f) In cases of a dispute between lawyers arising under this rule, fees shall be divided in accordance with the mediation or arbitration provided by a local bar association. When a local bar association is not available or does not have procedures to resolve fee disputes between lawyers, the dispute shall be referred to the Ohio State Bar Association for mediation or arbitration.

(Adopted eff. 2-1-07)

Official Comment

Reasonableness of Fee

[1] Division (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in divisions (a)(1) through (8) are not exclusive. Nor will each factor be relevant in each instance.

Nature and Scope of Representation; Basis or Rate of Fee and Expenses

[2] The detail and specificity of the communication required by division (b) will depend on the nature of the client-lawyer relationship, the work to be performed, and the basis of the rate or fee. A writing that confirms the nature and scope of the client-lawyer relationship and the fees to be charged is the preferred means of communicating this information to the client and can clarify the relationship and reduce the possibility of a misunderstanding. When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be established promptly. Unless the situation involves a regularly represented client, the lawyer should furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses, or disbursements in the course of the representation. So long as the client agrees in advance, a lawyer may seek reimbursement for the reasonable cost of services performed in-house, such as copying.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of division (a) of this rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(e). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because

such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] If all funds held by the lawyer are not disbursed at the time the closing statement required by division (c)(2) is prepared, the lawyer's obligation with regard to those funds is governed by Rule 1.15.

Prohibited Contingent Fees

[6] Division (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of spousal or child support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support or other financial orders because such contracts do not implicate the same policy concerns.

Retainer

[6A] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance solely to ensure the lawyer's availability to represent the client and precludes the lawyer from taking adverse representation. What is often called a retainer is in fact an advance payment to ensure that fees are paid when they are subsequently earned, on either a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. An earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. When a fee is earned affects whether it must be placed in the attorney's trust account, see Rule 1.15, and may have significance under other laws such as tax and bankruptcy. The reasonableness requirement and the application of the factors in division (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt," or in similar terms that imply the client would never receive a refund. So that a client is not misled by the use of such terms, division (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation [e.g., factor (a)(2) might justify the entire fee], nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of a refund based upon application of the factors set forth in division (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it is advisable that lawyers maintain contemporaneous time records for any representation undertaken on a flat fee basis.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial lawyer. Division (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. Within a reasonable time after disclosure of the identity of each lawyer, the client must give written approval that the fee will be divided and that the division of fees is in proportion to the services performed by each lawyer or that each lawyer assumes joint responsibility for the representation. Except where court approval of the fee division is obtained, closing statements must be in a writing signed by the client and each lawyer and must otherwise comply with division (c) of this rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rules 1.1 and 1.17.

[8] Division (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes between a client and a lawyer, such as an arbitration or mediation procedure established by a local bar association, the Ohio State Bar Association, or the Supreme Court of Ohio, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

[10] A procedure has been established for resolution of fee disputes between lawyers who are sharing a fee pursuant to division (e) of this rule. This involves use of an arbitration or mediation procedure established by a local bar association or the Ohio State Bar Association. The lawyer must comply with the procedure. A dispute between lawyers who are splitting a fee shall not delay disbursement to the client. See Rule 1.15.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.5 replaces DR 2-106 and DR 2-107; makes provisions of EC 2-18 and EC 2-19 mandatory, as opposed to aspirational, with substantive modifications; and makes the provisions of R.C. 4705.15 mandatory, with technical modifications.

Rule 1.5(a) adopts the language contained in DR 2-106(A) and (B), which prohibits illegal or clearly excessive fees and establishes standards for determining the reasonableness of fees. Eliminated from Rule 1.5(a) is language regarding expenses.

Rule 1.5(b) expands on EC 2-18 by mandating that the nature and scope of the representation and the arrangements

for fees and expenses shall promptly be communicated to the client, preferably in writing, to avoid potential disputes, unless the situation involves a regularly represented client who will be represented on the same basis as in the other matters for which the lawyer is regularly engaged.

Rule 1.5(c)(1) also expands on EC 2-18 and R.C. 4705.15(B) by requiring that all contingent fee agreements shall be reduced to a writing signed by the client and the lawyer. Rule 1.5(c)(2) directs that a closing statement shall be prepared and signed by both the lawyer and the client in matters involving contingent fees. It closely parallels the current R.C. 4705.15(C).

Rule 1.5(d) prohibits the use of a contingent fee arrangement when the contingency is securing a divorce, spousal support, or property settlement in lieu of support. It finds its basis in EC 2-19, which provides that "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." Rule 1.5(d)(2) prohibits the use of contingent fee arrangements in criminal cases and parallels DR 2-106(C).

Rule 1.5(d)(3) prohibits fee arrangements denominated as "earned upon receipt," "nonrefundable," or other similar terms that imply the client may never be entitled to a refund, unless the client is advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund so the client is not misled by such terms. The rationale for this rule is contained in Comment [6A].

Rule 1.5(e) deals with the division of fees among lawyers who are not in the same firm. Rule 1.5(e)(1) restates the provisions of DR 2-107(A)(1), with the additional requirement that in the event the division of fees is on the basis of joint responsibility, each lawyer must be available for consultation with the client. Rule 1.5(e)(2) clarifies DR 2-107(A)(2) and Advisory Opinion 2003-3 of the Board of Commissioners on Grievances and Discipline regarding the matters that must be disclosed in writing to the client.

Rule 1.5(e)(3) is a new provision directing that the closing statement contemplated by Rule 1.5(c)(2) must be signed by the client and all lawyers who are not in the same firm who will share in the fees, except where the fee division is court-approved. Rule 1.5(e)(4) is a restatement of DR 2-107(A)(3) regarding the requirement that the total fee must be reasonable.

Rule 1.5(f) is a restatement of DR 2-107(B) requiring mandatory mediation or arbitration regarding disputes between lawyers sharing a fee under this rule.

Comparison to ABA Model Rules of Professional Conduct

Model Rule 1.5 is amended to conform to Disciplinary Rules and ensure a better understanding of the relationship between the client and the lawyers representing the client, thereby reducing the likelihood of future disputes. Also, the comments are modified to bring them into conformity with the proposed changes to Model Rule 1.5 and clarify certain aspects of fees for the benefit of the bench, bar, and the public.

Although ABA Model Rule 1.5(a) directs that a lawyer shall not charge "unreasonable" fees or expenses, the terminology in DR 2-106 (A) prohibiting "illegal or clearly excessive" fees is more encompassing and better suited to use in Ohio. Charging an "illegal fee" differs from charging an "unreasonable fee" and, accordingly, the existing Ohio language is retained.

Model Rule 1.5(c), while dealing with contingent fees, is expanded and clarified. The closing statement provisions of the Model Rule are expanded to bring them in line with existing R.C. 4705.15(C). Additionally, the Model Rule is divided into two parts, the first dealing with the lawyer's obligations at the commencement of the relationship and the second dealing with the lawyer's obligations at the time a fee is earned.

The provisions of Model Rule 1.5(d) are modified to add division (d)(3) and Comment [6A] in light of the number of disciplinary cases involving "retainers."

Model Rule 1.5(e) and Comment [7] dealing with division of fees are modified to bring both the requirements of the rule and the commentary into line with existing practice in Ohio.

Rule 1.6 Confidentiality of information

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the commission of a crime by the client or other person;
- (3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal or fraudulent* act, in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;
- (6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

(Adopted eff. 2-1-07)

Official Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

DR 2-106. FEES FOR LEGAL SERVICES.

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

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

[Effective: October 5, 1970.]

assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

(Adopted eff. 2-1-07)

Official Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) 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;

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

(Adopted eff. 2-1-07)

Official Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that

have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[2A] Division (c) does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law.

[3] Division (g) 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.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.4 is substantively comparable to DR 1-102 and 9-101(C).

Rule 8.4 removes the "moral turpitude" standard of DR 1-102(A)(3) and replaces it with Rule 8.4(b), which states that a lawyer engages in professional misconduct if the lawyer "commit[s] an illegal act that reflects adversely on the lawyer's honesty or trustworthiness."

Comparison to ABA Model Rules of Professional Conduct

Rule 8.4 is substantially similar to Model Rule 8.4 except for the additions of the anti-discrimination provisions of DR 1-102(B) and the fitness to practice provision of DR 1-102(A)(6). Comment [2A] is added to indicate that a lawyer's involvement in lawful covert activities is not a violation of Rule 8.4(c). The last sentence of DR 1-102(B) is inserted in place of Model Rule Comment [3].

Rule 8.5 Disciplinary authority; choice of law

(a) **Disciplinary Authority.** A lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio, regardless of where the lawyer's conduct occurs. A lawyer not admitted in Ohio is also subject to the disciplinary authority of Ohio if the lawyer provides or offers to provide any legal services in Ohio. A lawyer may be subject to the disciplinary authority of both Ohio and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of Ohio, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a *tribunal*, the rules of the jurisdiction in which the *tribunal* sits, unless the rules of the *tribunal* provide otherwise;

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur.

(Adopted eff. 2-1-07)

Official Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in Ohio is subject to the disciplinary authority of Ohio. Extension of the disciplinary authority of Ohio to other lawyers who provide or offer to provide legal services in Ohio is for the protection of the citizens of Ohio. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this rule. See Rule V, Section 11 of the Supreme Court Rules for the Government of the Bar of Ohio. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of Ohio may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1A] A lawyer admitted in another state, but not Ohio, may seek permission from a tribunal to appear *pro hac vice*. The decision of whether to permit representation by an out-of-state lawyer before an Ohio tribunal is a matter within the discretion of the trial court. Once *pro hac vice* status is extended, the tribunal retains the authority to revoke the status as part of its inherent power to regulate the practice before the tribunal and protect the integrity of its proceedings. Revocation of *pro hac vice* status and disciplinary proceedings are separate methods of addressing lawyer misconduct, and a lawyer may be subject to disciplinary proceedings for the same conduct that led to revocation of *pro hac vice* status.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Division (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the

Any expense that is eligible for quarterly reimbursement, but that is not submitted on a quarterly reimbursement application, shall be submitted no later than the appropriate annual reimbursement application pursuant to division (D)(2)(b) of this section and shall be denied by the Board if not timely submitted. The application for quarterly reimbursement shall include an affidavit with documentation demonstrating that the Certified Grievance Committee incurred the expenses set forth in divisions (D)(2)(b)(i) and (ii) of this section.

(3) **Audit.** Expenses incurred by Certified Grievance Committees and reimbursed under division (D)(2) of this section may be audited at the discretion of the Board or the Supreme Court and paid out of the Attorney Services Fund.

(4) **Availability of Funds.** Reimbursement under division (D)(2) of this section is subject to the availability of moneys in the Attorney Services Fund.

(E) **Public Records.** Except as provided in Section 11(E) of this rule and by state and federal law, documents and records of the Board, the Secretary, and the Disciplinary Counsel, including budgets, reports, and records of income and expenditures, shall be made available for inspection to any member of the general public at reasonable times during regular business hours. Upon request, a person responsible for the records shall make copies available at cost, within a reasonable period of time. The records shall be maintained in a manner that they can be made available for inspection.

Section 4. Investigation and filing of complaints

(A) **Referral by Board.** The Board may refer to a Certified Grievance Committee or the Disciplinary Counsel any matter filed with it for investigation as provided in this section.

(B) **Referral by Certified Grievance Committee.** If a Certified Grievance Committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the chair of the Certified Grievance Committee may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all matters contained in the request and report the results of the investigation to the committee that requested it.

(C) **Power and Duty to Investigate.** The investigation of grievances involving alleged misconduct by justices, judges, and attorneys and grievances with regard to mental illness shall be conducted by the Disciplinary Counsel or a Certified Grievance Committee. The Disciplinary Counsel and a Certified Grievance Committee shall investigate any matter filed with it or that comes to its attention and may file a complaint pursuant to this rule in cases where it

finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.

(D) **Time for Investigation.** The investigation of grievances by Disciplinary Counsel or a Certified Grievance Committee shall be concluded within sixty days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

(1) **Extensions of Time.** Extensions of time for completion of the investigation may be granted by the Secretary of the Board upon written request and for good cause shown. Investigations for which an extension is granted shall be completed within one hundred fifty days from the date of receipt of the grievance. Time may be extended when all parties voluntarily enter into an alternative dispute resolution method for resolving fee disputes sponsored by the Ohio State Bar Association or a local bar association.

(2) **Extension Limits.** The chair or Secretary of the Board may extend time limits beyond one hundred fifty days from the date of filing in the event of pending litigation, appeals, unusually complex investigations, including the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses, or for other good cause shown. If an investigation is not completed within one hundred fifty days from the date of filing the grievance or a good cause extension of that time, the Secretary may refer the matter either to a geographically appropriate Certified Grievance Committee or the Disciplinary Counsel. The investigation shall be completed within sixty days after referral. No investigation shall be extended beyond one year from the date of the filing of the grievance.

(3) **Time Limits not Jurisdictional.** Time limits set forth in this rule are not jurisdictional. No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

(E) **Retaining Outside Experts.** A particular investigation may benefit from the services of an independent investigator, auditor, examiner, assessor, or other expert. A Certified Grievance Committee may retain the services of an expert in accordance with the Board regulations.

(F) **Cooperation with Clients' Security Fund.** Upon the receipt of any grievance presenting facts that may be the basis for an award from the Clients' Security Fund under Gov. Bar R. VIII, the Disciplinary Counsel or a Certified Grievance Committee shall notify the grievant of the potential right to an award from the Fund and provide the grievant with the forms necessary to initiate a claim with the Clients' Security Fund. The Disciplinary Counsel, a Certified Griev-

[APPENDIX II THE RULES AND REGULATIONS
GOVERNING PROCEDURE ON COMPLAINTS
AND HEARINGS BEFORE THE BOARD OF
COMMISSIONERS ON GRIEVANCES AND DIS-
CIPLINE OF THE SUPREME COURT]

Ed. Note: Pursuant to Gov Bar R. V, former section 41, these Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline were adopted by the Supreme Court, effective October 8, 1990.

[APPENDIX II THE RULES AND REGU-
LATIONS GOVERNING PROCEDURE
ON COMPLAINTS AND HEARINGS BE-
FORE THE BOARD OF COMMISSION-
ERS ON GRIEVANCES AND DISCI-
PLINE OF THE SUPREME COURT]

Rule

- 1 Complaint Requirements
- 2 Pleadings and Motions
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- 5 Quorum of panel or board
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- 7 Power to issue subpoenas; foreign subpoenas
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- 9 Time Guidelines for Pending Cases
- 10 Guidelines for Imposing Lawyer Sanctions
- 11 Consent to discipline
- 12 to BCGD Proc Reg 19 [Reserved]
- 20 Regulation for the issuance of advisory opinions

BCGD Proc Reg 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.

(Adopted eff. 10-8-90)

BCGD Proc Reg 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.

(Adopted eff. 10-8-90)

BCGD Proc Reg 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.

(B) Depositions taken in Gov. Bar R. V proceedings shall be filed with the Secretary of the Board as Rule 32 of the Ohio Rules of Civil Procedure prescribes.

(C) If Relator and Respondent stipulate to facts, the chairman or member of the panel may either cancel a hearing and deem the matter submitted in writing or order that a hearing be held with all counsel and the Respondent present.

(D) Notwithstanding the agreement of Relator and Respondent on a recommended sanction for Respondent, the hearing panel and the Board are not bound by the joint recommendation and retain sole power and discretion to make a final recommendation to the Ohio Supreme Court on the appropriate sanction.

(Adopted eff. 10-8-90; amended eff. 6-1-00)

BCGD Proc Reg 4 Manner of service

Whenever provision is made for the service of any notice, order, report, or other paper or copy upon any complainant, relator, respondent, petitioner, or other party, in connection with any proceeding under these rules, service may be made upon counsel of record for

(C) The application shall state what arrangements, if any, have been made with respect to counsel fees. Counsel fees shall be subject to approval by the court.
(Adopted eff. 7-1-97; amended eff. 10-1-97)

Sup R 71 Counsel fees

(A) Attorney fees in all matters shall be governed by Rule 1.5 of the Ohio Rules of Professional Conduct.

(B) Attorney fees for the administration of estates shall not be paid until the final account is prepared for filing unless otherwise approved by the court upon application and for good cause shown.

(C) Attorney fees may be allowed if there is a written application that sets forth the amount requested and will be awarded only after proper hearing, unless otherwise modified by local rule.

(D) The court may set a hearing on any application for allowance of attorney fees regardless of the fact that the required consents of the beneficiaries have been given.

(E) Except for good cause shown, attorney fees shall not be allowed to attorneys representing fiduciaries who are delinquent in filing the accounts required by section 2109.30 of the Revised Code.

(F) If a hearing is scheduled on an application for the allowance of attorney fees, notice shall be given to all parties affected by the payment of fees, unless otherwise ordered by the court.

(G) An application shall be filed for the allowance of counsel fees for services rendered to a guardian, trustee, or other fiduciary. The application may be filed by the fiduciary or attorney. The application shall set forth a statement of the services rendered and the amount claimed in conformity with division (A) of this rule.

(H) There shall be no minimum or maximum fees that automatically will be approved by the court.

(I) Prior to a fiduciary entering into a contingent fee contract with an attorney for services, an application for authority to enter into the fee contract shall be filed with the court, unless otherwise ordered by local court rule. The contingent fee on the amount obtained shall be subject to approval by the court.
(Adopted eff. 7-1-97; amended eff. 10-1-97; 2-1-07)

Sup R 72 Executor's and administrator's commissions

(A) Additional compensation for extraordinary services may be allowed upon an application setting forth an itemized statement of the services rendered and the amount of compensation requested. The court may require the application to be set for hearing with notice given to interested persons in accordance with Civil Rule 73(E).

(B) The court may deny or reduce commissions if there is a delinquency in the filing of an inventory or an account, or if, after hearing, the court finds that the executor or administrator has not faithfully discharged the duties of the office.

(C) The commissions of co-executors or co-administrators in the aggregate shall not exceed the commissions that would have been allowed to one executor or administrator acting alone, except where the instrument under which the co-executors serve provides otherwise.

(D) Where counsel fees have been awarded for services to the estate that normally would have been performed by the executor or administrator, the executor or administrator commission, except for good cause shown, shall be reduced by the amount awarded to counsel for those services.

(Adopted eff. 7-1-97; amended eff. 10-1-97)

Sup R 73 Guardian's compensation

(A) Guardian's compensation shall be set by local rule.

(B) Additional compensation for extraordinary services, reimbursement for expenses incurred and compensation of a guardian of a person only may be allowed upon an application setting forth an itemized statement of the services rendered and expenses incurred and the amount for which compensation is applied. The court may require the application to be set for hearing with notice given to interested persons in accordance with Civil Rule 73(E).

(C) The compensation of co-guardians in the aggregate shall not exceed the compensation that would have been allowed to one guardian acting alone.

(D) The court may deny or reduce compensation if there is a delinquency in the filing of an inventory or account, or after hearing, the court finds the guardian has not faithfully discharged the duties of the office.

(Adopted eff. 7-1-97; amended eff. 10-1-97)

Sup R 74 Trustee's compensation

(A) Trustee's compensation shall be set by local rule.

(B) Additional compensation for extraordinary services may be allowed upon application setting forth an itemized statement of the services rendered and the amount of compensation requested. The court may require that the application be set for hearing with notice given to interested parties in accordance with Civil Rule 73(E).

(C) The compensation of co-trustees in the aggregate shall not exceed the compensation that would have been allowed to one trustee acting alone, except where the instrument under which the co-trustees are acting provides otherwise.

missioner shall issue a scheduling order setting a pretrial, a final conference, and a trial date.

3.07 Civilian Clothing

If defendant is incarcerated, he may appear in civilian clothing at trial only if civilian clothing is provided to the jail the night before the trial. Defendant may then dress at the jail, after the clothing has been cleared by security. Defendant will not be permitted to change into civilian clothing at the courthouse on the day of trial.

Rule 4.00 Broadcasting, photographing or recording within the courthouse

The following rules pertaining to recording or broadcasting within the Courthouse are to be read in conjunction with Canon 3(A)(7) of the Code of Judicial Conduct and Rule 12 of the Rules of Superintendence:

A. All persons who wish to engage in the broadcasting, recording, or photographing of Court proceedings must apply in writing to the assigned trial judge for approval. Approval will be given only to those who are affiliated with the news media.

Those not affiliated with the news media are prohibited from using any video, photographic or audio recording device, including cell phones when used for this purpose, inside the courthouse. The taking of pictures, use of cellular telephones, pagers, beepers or other media type recording devices is strictly prohibited inside the courthouse. The penalty for use of any of the above-mentioned items is forfeiture of the item and a \$100.00 fine.

B. The written application must be made prior to each hearing for which permission is sought, and shall indicate the applicant's news media affiliation, the recording equipment proposed to be used (video camera, still camera, audio recording device), and any special requirements, such as microphone hook-ups or electrical conduits.

C. The trial judge will assign positions in the courtroom to approved media representatives and technicians. They will not be permitted to move about the courtroom, nor to enter or leave the courtroom during active Court proceedings.

D. No one shall record or broadcast activities in the courtroom that take place during the recesses of a hearing, or during the half-hour before or after the hearing.

E. The use of artificial lighting and flash photography is prohibited. Equipment used in the broadcasting or televising of proceedings, such as microphones and television cameras, must be positioned prior to the commencement of the hearing, and must remain in position until the entire proceeding is concluded.

F. If the Court orders that a particular witness or other person in the courtroom is not to be photographed or recorded, it will be the responsibility of

each news media representative to inform his assistants of the trial judge's instructions.

G. The Court may further regulate the conduct of any broadcasting or recording activity so as to avoid distracting the participants and to guarantee a fair trial.

Rule 5.00 Rules of court in receivership

5.01 Appointment

When an application is made for the appointment of a receiver, a hearing on the application will be set by court order, and notice will be sent to all parties. Unless otherwise ordered, a schedule of all creditors, secured and unsecured, shall be filed within seven days of the filing of the application. The Court shall consider any recommendations made by unsecured creditors, or by creditors whose security is threatened, as to the appointment of a particular receiver or his counsel.

When a receiver is appointed, he shall post bond in an amount set by the Court, and shall file an inventory within thirty days of his appointment.

5.02 Application for Fees

In any matter in which a receiver or other fiduciary is appointed by the Court, and seeks compensation through the Court for his fees, he shall:

A. File a written application for compensation, which shall include notice of the time and date of a hearing upon the application. Hearing will be set no less than seven days from the date the application is filed.

B. This rule shall not apply in cases in which the fees sought are less than \$100,000, nor in cases in which the fees have been fixed in a journal entry approved by all counsel in the case.

Rule 6.00 Jury management plan

In accord with Rule 5(B)(2) of the Rules of Superintendence, the Court adopts these rules to ensure the effective use and management of jury resources.

Jury service is an obligation of all citizens, and the opportunity to serve on a jury shall not be denied on the basis of race, gender, religion, income, or occupation.

6.01 Jury Administration

A. The Warren County Common Pleas Court administers the jury system for the County through the office of a Jury Commissioner, and shall from time to time evaluate the system for the effectiveness of summoning and qualification procedures; the inclusiveness of the jury source list; the cost effectiveness of the jury management system; and the responsiveness of individuals to jury duty summonses.

The Jury Commissioner is responsible for summoning persons for jury service and collecting information so that each person's eligibility for service can be