

THE SUPREME COURT OF OHIO

Disciplinary Counsel,

Relator,

Case No. 2011-0464

v.

William Lawrence Summers,

Respondent.

RESPONDENT'S OBJECTIONS AND BRIEF IN SUPPORT

**WILES, BOYLE, BURKHOLDER
& BRINGARDNER, CO., L.P.A.**

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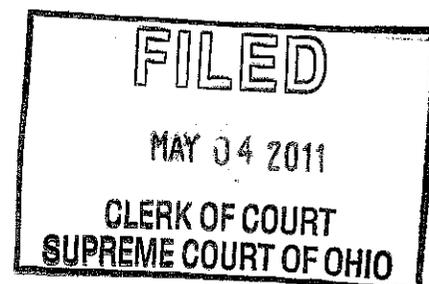


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I. INTRODUCTION

When the emotion is removed from this case as well as the fact that Mr. Summers made a poor witness on his own behalf, Disciplinary Counsel simply failed to carry its burden of proof by clear and convincing evidence. Disciplinary Counsel's complete failure of proof is highlighted by its inability to present any specific evidence through expert testimony or otherwise showing at what point the fee became clearly excessive.

I. STATEMENT OF THE CASE

A complaint was filed by Disciplinary Counsel against Respondent, William Lawrence Summers ("Summers") on April 12, 2010. A hearing was held on September 30th and October 1, 2010. The case was heard by a panel consisting of Judge H.J. Bressler, Judge Arlene Singer and Stephen Rodeheffer. Due to his resignation from the Board of Commissioners, Judge Bressler did not participate in the findings and recommendations made by the Panel.

The Board considered the matter on February 11, 2011, and adopted findings of fact and conclusions of law of the Panel. The Board recommended that William Lawrence Summers be suspended from the practice of law for six (6) months based on the record surrounding the imposition of a non-refundable fee and that full restitution of \$15,000 be paid to the Bells. A copy of the decision of the Board is attached in the Appendix (A-1).

On April 28, 2011, Respondent Summers filed a motion to remand the case to the Board of Commissioners to take additional evidence or supplement the record with remedial actions that have taken place after the panel hearing.

III. FACTS

Summers is an attorney of 41 years with hundreds of jury trials, impressive references from all walks of life, and no prior disciplinary history. Summers has often represented indigent

clients for little or no compensation. Transcript references will be designated as (Tr. Vol. I, p. ____). Both the volume number and page number will be designated.

Anthony Bell (“Anthony”) executed a contract for Summers to represent him in a case in which he was charged with aggravated robbery, carrying mandatory prison time, amongst other felony offenses, including assault on a peace officer, at \$250.00 per hour on April 29, 2008. The initial retainer of \$2,500.00 with a separate check in the amount of \$1,000.00 for expenses would not be paid for approximately two weeks. (Exh. 1; Tr. Vol I, pp. 42 – 43; Vol. II, p. 86)

Following a substantial period of non-payment of the hourly fees of Summers, the Bells entered into a flat fee contract with Summers on September 9, 2008. (Tr. Vol. I, pp. 52 - 53) That contract (Exh. 18) reads, in part:

This firm agrees to represent you, through the investigation of the above referenced case, and, **if necessary**, through the trial, and **if necessary**, sentencing, **or other disposition of the case. The amount of the flat fee agreed upon between us is Fifteen Thousand Dollars (\$15,000), in addition to any and all amounts already paid to us. That is all that you will owe, regardless of the time that we will spend on your behalf.**

It is usual and customary for our office to bill clients on an hourly basis. The normal hourly rate for me, William L. Summers is \$400.00 per hour, billed in minimum increments of one-quarter hour. The normal rate for my associate, Aaron T. Baker, is \$175.00 per hour, also billed in minimum increments of one-quarter hour.

By your signature on this agreement, you are clearly acknowledging your understanding of the non-refundable nature of the retainer paid to the firm. (Emphasis in original)

[Exh. 18; Tr. Vol I, p. 52).

In drafting the second agreement, Attorney Summers, licensed both in Ohio and Kentucky, inadvertently used a word processing template for the State of Kentucky, not Ohio.

The importance of this word processing error is that while both Kentucky and Ohio allow flat fee agreements, Kentucky allows non-refundable flat fees, where Ohio does not and requires the requisite language under R. Prof. Cond. 1.5(d)(3) which informs the client that he “. . . may be entitled to a refund of all or part of the fee based upon the value of the representation.” (Tr. Vol. I, pp. 63 – 66; Respondent’s Exh. D)

The Bells’ claim that they did not receive a copy of this agreement, and did not have a full opportunity to read it. (Tr. Vol. I, pp. 262 - 263) Interestingly, the agreement which they executed contained a fax header indicating they had received it on September 8, 2008 at the fax number of Anthony’s employment. The fax header would not have appeared on the document unless it was received and printed by the machine to which that fax number was assigned. (Tr. Vol. II, pp. 67 - 68) Before executing the flat fee agreement and paying \$15,000 to Summers, Anthony illogically testified that he did not get another lawyer, because he did not have the money to do so. Lorraine, however, testified that they did seek the counsel of another Cleveland attorney, Bob Dixon. (Tr. Vol. I, p. 167)

Summers represented Anthony in a very difficult felony criminal matter, the evidence in which, if the matter had proceeded to trial, would essentially have put the word of Anthony up against the word of City of Cleveland police officers. (Tr. Vol. II, pp. 234 - 237) Though the detailed, itemized and contemporaneously maintained final billing submitted by Summers at the Bells’ request speaks for itself regarding his efforts on behalf of Anthony, it is notable that testimony made it clear that not every task completed on behalf of Anthony was included in the itemization (Exh. 35). This is consistent with the expert testimony that attorneys are often light on their billing in flat fee cases. (Tr. Vol. 1, p. 303) A review of this invoice and the court

docket indicates that Mr. Summers attended multiple pretrials and a show cause hearing. (Exh. 35, 38)

The Bells, Summers, and his associate, Aaron T. Baker (“Baker”) agreed that if there was to be a “smoking gun” in Anthony’s favor, it would be any security video available. To that end, both Summers and Baker immediately sought to ensure that the security video would be preserved by immediately writing a certified preservation letter to the Cleveland Indians. (Tr. Vol. II, pp. 61 – 62; Exh. 3) Baker also wrote a certified letter, making a public records request for any police records, reports, etc. concerning the incident in question. (Exh. 2) Summers, on Anthony’s behalf, retained the services of a private investigator, Susan Daniels, in order to investigate past conduct of one of the officers involved, Lieutenant Timothy Gaertner (“Gaertner”). (Tr. Vol. II, pp. 237, 238)

Summers had a pre-existing personal connection with Gaertner, which Summers found early on, could only have proven to be helpful going forward, and thus, there was no potential conflict. Further, Summers immediately disclosed there could be a relationship with one of the officers to the Bells, and told them he would let them know whether the relationship would prove to be helpful, negative, or indifferent.

The State after arraignment, at a pre-trial, turned over DVD footage of three different security cameras, only one of which captured the altercation between the police and Anthony. The video footage was not helpful, as it was of a poor quality. (Tr. Vol. II, pp. 62 – 63)

Attorneys Summers and Baker consulted with two different digital video experts, Marc Eppler and Steve Cain, each of which indicated that there was nothing they could do with the video, as given its nature as a security video, it was not meant to be enhanced. Digital enhancement of video is, in effect, an alteration of video, as it is merely an approximation or

prediction, making visible what previously was not there. Given that the video involved was security video, it was not meant to be enhanced. (Tr. Vol. II, pp. 62 – 63; 76-79)

Nevertheless, at the urging of the Bells, Summers and Baker spent a great deal of time analyzing the video evidence and looking for anything that would exonerate Anthony, but found nothing of assistance. (Tr. Vol. II, pp. 192 - 193) Once the relevant events erupted on the video, the footage was simply unclear as to what occurred. It did however clearly show Anthony Bell in a disagreement with Officer Gaertner. (Tr. Vol. II, pp. 62 - 63)

Undeterred, Summers and Baker sought access to the security video facilities of the Cleveland Indians. To that end, they obtained an Order from Judge Steven Terry who presided over the case, allowing them to visit the facility. Despite prompt and aggressive service upon the Cleveland Indians, a long time passed before Summers and Baker were allowed access to the security facility. (Tr. Vol. I, p. 117) This inexplicable delay necessitated the filing of a Motion to Show Cause against the Cleveland Indians and attendance at a Show Cause hearing. (Tr. Vol. I, p. 117)

The hearing did not go forward, as counsel for the Cleveland Indians pledged that they would immediately allow access and inspection to both Summers and Baker, as well as their video expert, Marc Eppler. (Tr. Vol. I, pp. 117, 129)

Thereafter, Baker and Eppler went to the stadium, and visited the facility. This visit took two hours of Baker's time which was never recorded in the final documentation of time spent on behalf of Anthony. (Exh. 35; Tr. Vol. I, pp. 127 – 128; Vol. II, p. 141) Despite the extensive efforts required to gain access to the stadium, they ultimately were fruitless, as Summers and Baker concluded, upon advice of their video expert, Eppler, that the video could not be enhanced. (Tr. Vol. II, pp. 78 - 79)

Testimony throughout the hearing of this matter demonstrated that Anthony as well, but more so his parents, Lorraine Bell (“Lorraine”) and Dwayne Bell (“Dwayne”), were extraordinarily difficult to deal with. That was additionally made clear by the Public Defender. (Tr. Vol. II, pp. 34, 50)

Difficulty in the representation, ongoing deception by the Bells, and insistence upon an illegal course of action led Summers to file a Motion to Withdraw, also requesting an oral hearing on January 13, 2009, nearly nine months into the representation.

Despite Relator’s contention that Summers is lying about Dwayne’s insistence upon an illegal course of action, it is notable that though Dwayne Bell was present throughout the hearing of this matter, Relator never called Dwayne to testify or contradict Summers’ testimony.

On February 10, 2009, over nine months into the representation, Summers Motion to Withdraw was granted by the trial court, as a result of “irreconcilable differences,” a deliberately vague description of Summers’ reasons for withdrawal, so as not to prejudice Anthony going forward in the case. (Exh. 30, 38; Tr. Vol. II, pp. 199 - 200) At the time that Summers sought withdrawal, he was in the process of discussing a resolution of the case with one of the three assistant county prosecutors on the case – a plea which would have had a distinct probability of probation, as opposed to prison time. (Tr. Vol. I, pp. 83, 336, 361) There was no evidence that the withdrawal did not comply with Cuyahoga County Court Rules. There is also no evidence that the withdrawal prejudiced Anthony’s defense.

Attorney George George (“George”), an Assistant with the Cuyahoga County Public Defender’s Office, continued the representation of Anthony for the remainder of the case. George testified that following withdrawal, Summers was willing to give any information he

had, was very supportive, and referred him to Daniels who had a lot of information gathered at the direction of Summers. (Tr. Vol. II, p. 37)

Interestingly, George also confirmed how difficult the Bells were to deal with and how unrealistic their expectations were in similar fashion to Summers' and Baker's descriptions. (Tr. Vol. II, pp. 34, 50) George's testimony independently corroborated Summers and Baker's description of the Bells as difficult clients. Though George never received Anthony's case file from Summers, he did not request it, and Summers never refused to turn it over. To the contrary, Summers properly prepared the file but George testified that he never chose to obtain it. (Tr. Vol II, pp. 37, 45, 50)

Anthony would eventually give up his unrealistic and illogical demands of trial in the face of insurmountable evidence against him. He entered a plea of guilty to two felony counts and received a sentence of probation, rather than prison. (Tr. Vol. II, pp. 35 - 36) This was the very result Summers believed was the best for his client and was on the brink of achieving on Anthony's behalf. (Tr. Vol. I, pp. 82 - 83)

Following Summers representation of Anthony, the Bells requested an itemization of tasks completed and time spent on Anthony's behalf, which Summers timely provided. Lorraine testified that they wanted to see the documentation and wanted a refund if there were any funds remaining. (Tr. Vol. I, pp. 114, 183, 184; Exh. 33) After receiving this documentation, Lorraine testified that she did not read the bill carefully, never called to complain about the itemization, never demanded a return of funds, and in fact, never did anything for about a month following their receipt of this documentation, when they filed a grievance with Disciplinary Counsel. (Tr. Vol. I, p. 209)

Summers representation of Anthony was analyzed by two expert witnesses, Attorneys Larry Riehl (“Riehl”) and Kort Gatterdam (“Gatterdam”). Riehl is a Columbus attorney who practices approximately 70% civil law and approximately 30% criminal defense. (Tr. Vol. I, p. 300) Mr. Riehl has over thirty (30) years experience. (Tr. Vol. I, p. 300) Riehl testified that flat fee billing generally causes you to maintain “light” or incomplete hours when documenting the hours you spend on a case. It is not unusual to convert from an hourly fee agreement to a flat fee agreement, as Summers did. (Tr. Vol. I, p. 303)

Additionally, Riehl also provided the opinion that the amount of time spent on the entries listed was professionally reasonable, as well as all of the hourly rates charged appeared to be normal. Riehl opined that the fee charged and collected by Summers was not clearly excessive, but rather, was reasonable. (Tr. Vol. I, pp. 304 - 305)

Further, Riehl held the opinion that the flat fee charged is the limit of collection from the client upon termination before completion of the representation. That is wholly consistent with what Summers had done. (Tr. Vol. I, p. 301)

Gatterdam is a Columbus attorney with twenty-two (22) years experience who practices approximately 90% criminal defense and 10% civil law. (Tr. Vol. I, pp. 325 326) Gatterdam testified that the billing, fee, the flat fee charged, and the detailed billing by Summers were not at all excessive, but were certainly reasonable. Gatterdam, upon analyzing R. Prof. Cond. 1.5 concluded that if the representation terminates early in a flat fee representation, there is no requirement that the attorney give anything back, but instead, whether there is a refund and the amount of the refund depends upon the services rendered. (Tr. Vol. I, pp. 321, 330 - 331)

Additionally, Gatterdam testified that the primary basis for the calculation of whether the fee collected is reasonable is the number of hours spent, and multiplied by a reasonable

hourly rate, after which all of the other R. Prof. Cond. 1.5 factors fall into place. (Tr. Vol. I, pp. 331 – 332, 350) Though Gatterdam made the assumption that Summers, through nine months of representation, probably laid the groundwork for the resolution of the case, it does not matter whether Summers did or did not lay the groundwork for the resolution finally obtained by Attorney George, as neither changed his opinion. (Tr. Vol. I, pp. 335 - 337)

Further testifying, Gatterdam opined that through nine months of representation, it is impossible that Summers would not have laid the foundation for the ultimate resolution of the case. (Tr. Vol. I, pp. 336, 361) With regard to the questioning of individual entries by Disciplinary Counsel, Gatterdam testified that it is acceptable that Summers charged for withdrawal from representation, especially if the client caused the break in the representation, but even if the client did not cause the break in the representation, Summers would not have been ethically barred from billing for his the hours spent in withdrawing from the representation, as they were hours necessitated by the representation of the client. (Tr. Vol. I, pp. 343, 345)

Disciplinary Counsel called no expert witnesses to explain its position that the fees were clearly excessive or to dispute the testimony and an analysis of Riehl and Gatterdam, whose testimony was un rebutted. Disciplinary Counsel offered no specific evidence of any kind delineating at what point the fee became excessive.

III. ARGUMENT

OBJECTION ONE

The Relator failed to prove by clear and convincing evidence that the fee was clearly excessive.

The charges against Summers are based primarily on an alleged violation of *R. Prof. Cond. 1.5(a)*, which reads:

- (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. (A-31)

Therefore, in order to prevail, Disciplinary Counsel had to prove by **clear and convincing evidence** that Summers charged or collected a **clearly** excessive fee. This Court defines “clear and convincing evidence as such evidence as ‘produc[ing] in the mind of the trier of fact a firm belief of conviction as to the facts sought to be established.’” *Landsdowne v. Beacon Journal Pub. Co.* (1987), 32 Ohio St.3d 183, 512 N.E.2d 979 quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118 paragraph three of the syllabus.

Comment [6A] to *R. Prof. Cond 1.5* explains the ethical rules regarding flat fees in Ohio, as they apply to “nonrefundable” or “earned upon receipt” agreements, such as the one at issue here:

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.**

[emphasis added].

The comment demonstrates that retention of the entire fee may be justified, and that keeping contemporaneous time records (as Summers did) and using the number of hours worked multiplied by a reasonable hourly rate in order to calculate whether to refund (as Summers did), as well as how much to refund in instances of early termination by either party and for any reason is an appropriate method to use. This method is consistent with the only expert testimony presented in this case. (Tr. Vol. 1, pp. 304 – 305, 331 – 332)

Despite the fact that the rule references a lawyer of ordinary prudence, a standard which cries out for expert testimony, Relator presented no expert testimony that Mr. Summers' fees were clearly exercise. The only testimony presented by independent lawyers supports Summers. Interestingly, disciplinary counsel correctly relied extensively on expert testimony in *Disciplinary Counsel v. Johnson*, (2007) 113 Ohio St.3d 344, 865 N.E.2d 873.

The significance of expert testimony is consistent with general civil practice where any request for attorney fees is customarily accompanied by attorney testimony as to the reasonableness of those fees. See, *Joseph Stafford & Associates v. Skinner*, (8th Dist. 1996) 1996 WL 631112 at p. 10; *Villella v. Waikem Motors, Inc.*, (1989) 45 Ohio St.3d 36, 543 N.E.2d 464 at p. 41. It is primarily through expert testimony that the factors set forth *R. Prof. Cond. 1.5(a)* can be appropriately balanced. While not always required, expert testimony is customarily the primary means to evaluate the factors under *R. Prof. Cond. 1.5(a)*. See, *Disciplinary Counsel v. Johnson*, (2007) 113 Ohio St.3d 344, 865 N.E.2d 873, 2007-Ohio-2074.

Columbus Bar Association v. Farmer, (2006) 2006-Ohio-5342, 111 Ohio St.3d 137, 855 N.E.2d 462 provides an excellent explanation of this subject.

The law regarding a clearly excessive fee is set out in *Farmer* as follows:

{¶ 31} A lawyer may retain only the reasonable value of legal services actually rendered prior to the lawyer's discharge or withdrawal from representation during an ongoing legal dispute. *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 576, 629 N.E.2d 431; 1994-Ohio-512; *Roberts v. Hutton*, 152 Ohio App.3d 412, 2003-Ohio-1650, 787 N.E.2d 1267, at ¶ 37. Upon a lawyer's discharge or withdrawal, therefore, **the duty to appropriately account requires a prompt and reliable report to the client of the work performed and any remaining unearned fees.** The explanation must be given to ensure that the fee is not excessive and a windfall. *Cincinnati Bar Assn. v. Witt*, (2004) 103 Ohio St.3d 434, 816 N.E.2d 1036; 2004-Ohio-5463, ¶ 15 (a flat fee collected in a criminal case may be deposited directly into an attorney's operating account, but "provisions must be made for refunding all or part of the fee in the event of a discharge or withdrawal so that the attorney's fee is not excessive").

{¶ 32} Upon discharge or withdrawal, **a lawyer may also recover from a client the reasonable value of the services rendered under the doctrine of quantum meruit,** which literally entitles the lawyer to "as much as [is] deserved." Black's Law Dictionary (8th Ed.2004) 1276; see, also, *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, 541 N.E.2d 448, syllabus. To this end, DR 2-106(B) lists factors for determining the value of

services rendered, including the time, labor, and skill required by the representation and the rate customarily charged in the locality for such services. DR 2-106(B)(1) and (3). But whether the lawyer claims client money already in his or her possession or pursues payment through legal action, the lawyer still has the responsibility to accurately justify the reasonable value of charged legal fees to establish entitlement. See, e.g., *Reid*, 68 Ohio St.3d at 576, 629 N.E.2d 431, fn. 3; *Watterson v. King*, 166 Ohio App.3d 704, 2006-Ohio-2305, 852 N.E.2d 1278 ¶ 16.

Farmer at ¶¶ 31-32 [emphasis added]. *Farmer* requires documentation of attorney time which may be based upon a non-contemporaneous recollection. *Farmer* at ¶ 33. However, Summers provided contemporaneous documentation of his time. (Exh. 35) His time recording, in several instances did not account for significant time spent on behalf of Bell. For example, Baker testified that though he spent at least two hours visiting the Cleveland Indians stadium in order to view their security video facilities pursuant to court order, that time was not included in the final documentation of time spent on Bell's behalf. (Tr. Vol. II at 75-79) This is consistent with Mr. Riehl's statement that attorneys are often "light" in recording their time in flat fee situations. (Tr. Vol. I, pp. 301 - 303) Summers testimony regarding his fees was corroborated by Baker and supported by two independent experts.

Additionally, both *Cincinnati Bar Assn. v. Witt* (2004), 103 Ohio St.3d 434 and *Advisory Opinion No. 96-4*, both relied upon by Relator, do not support its theory:

...a flat fee received in a criminal case may be deposited directly into the attorney's operating account, but provisions must be made for refunding all or part of the fee in the event of a discharge or withdrawal so that the attorney's fee is not excessive. See Bd. Of Commrs. On Grievances and Discipline Advisory Opinion No. 96-4 (1996).

Witt at ¶15. Both *Witt* and *Advisory Opinion No. 96-4* rely upon the Ohio Code of Professional Responsibility which was superseded by the Ohio Rules of Professional Conduct, effective February 1, 2007, prior to the events which occurred during Summers representation of Bell.

The Advisory Opinion does not support the contention that a portion of the flat fee in question must ALWAYS be refunded every time an attorney withdraws from representation of a client while the matter remains pending. Rather, the opinion merely supports the proposition that a flat fee cannot be held to be non-refundable. Ohio law is absolutely clear that upon early termination of a flat fee agree that the client, may be entitled to a refund. Any such entitlement can only be determined from the facts and circumstances of each particular case and a determination, usually based on expert testimony on the value of the services rendered by the attorney. In this case, the un rebutted testimony of two (2) experts is that Mr. Summers' fees were reasonable. (Tr. Vol. 1, pp. 304 – 305, 331 – 332)

Ohio law is clear that when dealing with a “nonrefundable” or “earned upon receipt” flat fee, the proper action for an attorney is to multiply the number of hours spent on behalf of the client by a reasonable hourly rate. This is the method to use in order to determine whether the client is entitled to a refund, and further, the amount of the refund if appropriate. See, Farmer, supra. This was exactly the method employed by Summers. While the Board did not find him credible, it ignored without any significant comment the un rebutted testimony of two (2) expenses that were based not on Summers' testimony but on records reviewed by the experts. (Tr. pp. 300 - 350)

In addition to *Farmer*, a key case with regard to attorney fee contracts in Ohio is *Fox & Associates Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69. In *Fox*, this Court held:

. . .that where an attorney is discharged by a client with or without just cause, and whether the contract between the attorney and client is express or implied, the attorney is entitled to recover the reasonable value of services rendered prior to the discharge on the basis of quantum meruit. *See Fracasse v. Brent* (1972), 6 Cal.3d 784, 100 Cal.Rptr. 385, 494 P.2d 9.

Id. At 72. Five years later, this Court reinforced its Fox in *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, (1994) 68 Ohio St.3d 570. All of these cases held that the number of hours worked is a key factor in determining the reasonable value of the services rendered. Despite its burden of proof, Relator has presented no evidence expert or otherwise of the reasonable value of Mr. Summers' services.

Relator may argue that these cases do not apply to this situation, as they deal with a flat fee as opposed to a contingency fee, and deals with termination of the attorney by the client, and not withdrawal of the attorney. However, Relator relied upon this line of cases in its own argument that when looking to a quantum meruit, totality of the circumstances calculation, Summers did not earn the entire flat fee. Further, both *Fox* and *Reid Johnson* have been relied upon in disciplinary opinions dealing with a flat fee scenario. See, e.g., *Farmer*, *supra*, at ¶¶31-32.

Relator, also relied on a little-known 1993 case that is distinguishable, *Butler Cty. Bar Assn. v. Nash*, (1993) 66 Ohio St.3d 101. In *Nash*, the attorney agreed with the client to prosecute a civil suit, not a criminal matter, which proved to be of questionable value and ultimately settled for only \$1,000.00. *Id.* at 102-103. The attorney agreed in writing with the client to proceed on a flat fee of \$10,000.00 divided into two elements: \$5,000.00 for "research, development and representation" and \$5,000.00 "[i]n the event this matter proceeds to trial." *Id.* at 102. The attorney prepared the case for binding arbitration, not trial, but the case settled prior to the hearing. *Id.* at 103. The Panel therein found, and the court agreed, that the attorney had only earned the initial \$5,000.00, but not the additional \$5,000.00, as the matter had not proceeded to trial. *Id.*

Nash differs from this matter and Farmer, in many material ways. Most importantly, the attorney and client therein agreed in writing that \$5,000.00 would only be paid in the event of trial, which did not occur, and yet, the attorney did not return the \$5,000.00 paid. This key fact is missing in this case. Summers brought this matter near resolution short of trial. (Tr. Vol. I, pp. 83, 336) Resolution short of trial is what ultimately occurred. Trial was never specifically promised, nor ethically can it ever be. The fee contract at issue only stated that Summers would represent Bell through trial “if trial were necessary”. This is not the same promise as was at issue in *Nash*. In *Nash*, the attorney collected a fee specifically prohibited by the contract. In this case, the fee collected based on the hours and reasonable hourly rate was not prohibited by the contract.

OBJECTION NO. 2

The Relator failed to prove a violation of *R. Prof. Cond. 1.5(d)(3)* by clear and convincing evidence as there was substantial compliance with that rule and there was no harm as the fee was not excessive.

R. Prof. Cond. 1.5(d)(3) states as follows:

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. (A-31_

The only evidence presented, which the Panel admittedly did not find credible, was that the use of the form was inadvertent of a Kentucky form. (Tr. Vol. 1, pp. 63 – 66, Respondent’s Exh. D) Since the fee was earned based on the hours spent, the reasonable hourly rate and the expert testimony, there was substantial compliance with *R. Prof. Cond. 1.5(a)* as the fee was earned and not excessive. Also, Mr. Summers’ actions in providing an itemized bill were consistent with a refundable retainer.

More importantly, since there was no proof that the fee was clearly excessive, any alleged violation of *R. of Prof. Cond. 1.5(d)(3)* did not cause any harm, as the fee was not proven to be excessive. In fact, the only experts that testified opined that it was reasonable. The Bells were not harmed by this inadvertent violation in light of the ultimate reasonableness of the fees.

OBJECTION NO. 3

As the fee was not excessive, the Relator failed to prove a violation of *Rule Prof. Cond. 8.4(h)* by clear and convincing evidence.

R. Prof. Cond. 8.4(h) states:

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

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law. (A-34)

At the outset, the only conduct pled with the required constitutional specificity related the alleged excessive fee, so there is a complete failure of proof on this charge also. *See, Farmer* at ¶¶ 24 – 25. *Disciplinary Counsel v. O'Brien*, (2008) 120 Ohio St.3d 334, 899 N.E.2d 125; 2008-Ohio-6198 at ¶ 12, FN1. Any alleged violation of this provision flows from a clearly excessive fee and there was insufficient proof of a clearly excessive fee.

OBJECTION NO. 4

In light of Mr. Summers' impeccable record and the lack of any expert or other evidence of the amount to be refunded, the sanction and restitution recommended by the Board were excessive and punitive.

A. RESTITUTION

The Board's findings and the Panel's recommendations on restitution contradict each other. The Panel stated in ¶ 55 of its findings as follows:

The panel is not recommending an order of restitution. Though Relator proved to the panel by clear and convincing evidence that an excessive fee was charged in this case, no testimony was presented or argument made regarding

the amount that should be refunded. The panel declines to make this determination on its own and would defer to the outcome of any court proceedings or a fee arbitration proceeding the Bells wish to commence.

In the very next paragraph, the Board sets out its recommendation as follows:

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 11, 2011. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board recommends that Respondent, William Lawrence Summers, be suspended from the practice of law for a period of six months, and, based on the record surrounding the imposition of a non-refundable fee, that full restitution of \$15,000 be paid to the Bells. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

While the Panel found insufficient evidence for an order of restitution, the Board ordered complete restitution in essence finding that Summers earned none of his fee. The Panel's inability to quantify when the fee became excessive underscores the lack of proof in this case. Had disciplinary counsel presented the appropriate expert testimony or other proof, this Court would have specific evidence on restitution. Most of the cases reviewed by counsel had specific evidence of the amount of the excessive fee. *See, Butler County Bar Association v. Nash*, (1993) 66 Ohio St.3d 101, 609 N.E.2d 531 at p. 104; *Johnson*, 113 Ohio St.3d at ¶ 36.

B. AGGRAVATING AND MITIGATING FACTORS

I. AGGRAVATING FACTORS

The aggravating and mitigating factors are set forth in Reg. 10(B) as follows:

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

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

- (a) prior disciplinary offenses;
- (b) dishonest or self motive;

- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) lack of cooperation in the disciplinary process;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of and resulting harm to victims of the misconduct;
- (i) failure to make restitution.

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

- (a) absence of prior disciplinary record;
- (b) absence of dishonest or selfish motive;
- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;
- (e) character or reputation;
- (f) imposition of other penalties or sanctions;
- (g) chemical dependency or mental disability when there has been all of the following:

* * * *

- (h) other interim rehabilitation.

The Panel's decision lists the alleged aggravating facts in ¶ 53 of its findings. (A-21) The Board makes the conclusory determination that Mr. Summers acted with a dishonest selfish motive. There is no specific evidence to support this conclusion other than the finding of a clearly excessive fee. At best, there was a misunderstanding, and no evidence that Summers intended to deceive the Bells. This finding is also at variance with Mr. Summers long history of pro bono representation including work for three (3) years in a pro bono defense of capital cases in New Mexico.

Finally, the Board noted that no offer of restitution had been made. It is inappropriate to give the lack of restitution much weight for three (3) reasons. First, it is inconsistent with his

position, supported by two (2) independent experts that the fee was not excessive. More importantly, the Bells instead of contacting Mr. Summers or engaging in fee arbitration went directly to Disciplinary Counsel. Finally, no expert testimony was presented that would serve as a basis for restitution. Without a specific figure, even the Panel could not make an informed recommendation.

While the Board found the Bells vulnerable, it failed to acknowledge that they sought out other private counsel. The withdrawal of Mr. Summers was approved by the Cuyahoga County Court of Common Pleas before the case was set for trial. There was no specific evidence that the Bells were prejudiced by the withdrawal as successor counsel, Mr. George, was able to consummate the deal for which Summers had laid the groundwork.

2. MITIGATION

The Board at ¶ 52(b) gives a brief recognition of Mr. Summers' forty (40) plus year's legal career and the extraordinary number of letters of recommendation submitted by lawyers and judges on behalf of Mr. Summers. (A-21) These recommendations provide far more insight into Mr. Summers forty-one (41) year career than the snapshot of one isolated case set in the Panel's findings.

The 40 plus year law career of Bill Summers is in stark contrast to the portrait printed by the Panel which is exclusively based on this one incident. Mr. Summers does not have a prior disciplinary record. Mr. Summers' resume and testimony reflect his dedication to numerous associations, his pro bono work and the absence of self-motive in representing criminal defendants. (Tr. Vol I, p. 301) In this case, the discussion Mr. Summers had with the Bells caused him to discount his normal hourly rate for the first fee agreement. (Tr. Vol. I, p. 30) When the hours on the case began to increase and the Bells were having difficulty paying,

he agreed instead to modify the hourly fee agreement to a flat fee agreement, which covered his services regardless if the time he spent would exceed the amount paid. (Ex. 18; Tr. Vol. I, pp. 109, 175) The evidence reflects the absence of a self-motive by Mr. Summers.

Mr. Summers testified for approximately four hours during the hearing and several hours during his deposition. With the amount of testimony elicited from Mr. Summers, there is no question full disclosure was given to the Panel. While Mr. Summers' testimony may have appeared argumentative at times, Mr. Summers was experiencing a great deal of stress from having his over 40 year career challenged. Mr. Summers acknowledged this and apologized to the Board for his reaction caused by this stress. (Tr. Vol. II, pp. 187- 88, 221)

Perhaps the most telling of the mitigating circumstances is the character and reputation of Mr. Summers. He received reference letters from 50 individuals from across the United States, including 6 judges, 31 attorneys and 13 lay persons, including letters from business professionals, a prior employee, a police officer, clients and family. Some of the letters contain personal stories of the legal representation provided by Mr. Summers, others talk about his dedication to the legal community. Some of the letters discuss his awards and reputation and other letters discuss his pro bono work. However, all of the letters portray Mr. Summers as ethical, competent, having an excellent reputation, selfless, honest, respectful to clients, providing guidance to other members of the legal community, performing pro bono work, participating in committees, receiving awards, being zealous in his representation, dedicated to the practice of law, professional and courteous. The 50 letters from across the country and the differing spectrum of individuals demonstrate the kind of character and reputation Summers has in his over 40 years of practice in the legal community and beyond. The fact that fifty (50)

people, many of them busy professionals, took the time to write these letters speaks volumes about Summers' character and reputation.

It well settled that this Court looks to decisions in similar cases as guidance for the appropriate sanction. *See, Akron Bar Association v. Watkins*, (2008) 120 Ohio St.3d 307, 898 N.E.2d 946 at ¶ 10. While the Panel was correct that there is a wide variance in the sanctions for charging a clearly excessive fee, there is a discernible pattern in cases like this one, which involve an isolated incident. These cases tend to invoke a lesser sanction, which is usually a public reprimand or a suspension stayed with conditions. Not surprisingly, cases involving numerous violations and an ongoing pattern of violations generate more severe sanctions.

A representative case is *Cuyahoga County Bar Association v. Levey*, (2000) 88 Ohio St.3d 146, 724 N.E.2d 395, 2000-Ohio-283. In the *Levey* case, an attorney prepared an improper contingent fee agreement that indicated that no matter whether or not any money recovered that he was still entitled to hourly compensation. The allegation in that case, like in this case, was that this agreement violated the rules. This Court held that a six-month suspension with the entire six-month stayed was the appropriate sanction.

Another case, *Columbus Bar Association v. Mills*, (2006) 109 Ohio St.3d 245, 846 N.E.2d 1253, 2006-Ohio-2290 involved allegations with a clearly excessive fee. The allegation was that the attorney represented multiple clients who had a conflict of interest. The allegations included double billing and extensive billing for secretarial, clerical and other administrative services. This Court agreed that violations occurred, and agreed with the recommended sanction of one (1) year, but the suspension was stayed upon conditions including participation in a fee dispute arbitration program. Summers has never opposed arbitrating this fee dispute.

Another case involving allegations of a clearly excessive fee was *Disciplinary Counsel v. Agopin*, (2006) 112 Ohio St.3d 103, 858 N.E.2d 368; 2006-Ohio-6510. In that case, an attorney submitted inaccurate fees for legal services rendered as court appointed counsel. A review of the bills indicated he had billed in excess of twenty-four (24) hours for several days. The Board found violations of the applicable disciplinary rules and recommended one (1) year stayed suspension. Interestingly, the Panel dismissed the allegations that the fee charge was clearly excessive. This Court, however, modified the sanction imposing a public reprimand. The opinion noted in ¶ 10 that this Court has consistently recognized that in determining the appropriate length of suspension and any other attending conditions, the primary purpose of sanctions is not to punish the offender but to protect the public.

The court in *Agopin* cited *Dayton Bar Association v. Schram*, 98 Ohio St.3d 512, 2003 Ohio 2063, 787 N.E.2d 1184 in which an attorney was accused of charging a non-refundable fee. Based on the attorney's lack of prior disciplinary record, cooperation, and that the attorney had not intended to keep more money than he earned from the client, this Court affirmed a sanction of public reprimand. The *Schram* case is the most analogous to this case as Summers has no prior disciplinary record and according to his testimony and the unrebutted testimony of two (2) experts, he did not intend nor did he keep more than he earned. This Court also affirmed a public reprimand in *Disciplinary Counsel v. Smith*, (2009) 124 Ohio St.3d 49, 918 N.E.2d.

In a more recent case, this Court in *Akron Bar Association v. Watkins*, (2008) 120 Ohio St.3d 307, 898, N.E. 2d 946 addressed allegations of an excessive fee in a case involving a trustee. In that case, the trustee had charged \$46,000.00, and a second lawyer questioned those fees. Evidence was introduced that significant charges were made for picking up the ward's

mail. Interestingly, there was also an expert opinion from the Bar Association establishing that the Respondent in that case had overcharged his client by \$28,344.00. This Court looked at the lack of any prior disciplinary record. This Court also found that the attorney did not act with a dishonest motive. In that case, the attorney was suspended for six (6) months with the entire suspension stayed unless there were additional violations.

The purpose of sanctions, which is to protect the public, militates strongly against the imposition of a suspension in this case. It is clear that this was only an isolated incident. It is also clear that Mr. Summers has rendered exemplary service to the legal profession and community for over forty (40) years. Given his willingness as to represent indigent clients, the public needs more lawyers like Summers and not to be protected from him. Since there is no need to protect the public, the imposition of any actual suspension will not serve the purpose of the disciplinary rules.

V. CONCLUSION

Due to the failure of Disciplinary Counsel to prove any violations by clear and convincing evidence, the Board's findings should be vacated and judgment entered for Mr. Summers. In the alternative, the sanction should be reduced to a public reprimand.

Respectfully submitted,

**WILES, BOYLE, BURKHOLDER
& BRINGARDNER, CO., L.P.A.**



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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent via regular U.S.

Mail this 4th day of May, 2011 upon the following:

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Dale D. Cook (0020707)

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

In Re:	:	
Complaint against	:	Case No. 10-037
William Lawrence Summers	:	Findings of Fact,
Attorney Reg. No. 0013007	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	
	:	

¶1. This matter was heard on September 30 and October 1, 2010, on a complaint filed by Disciplinary Counsel on April 12, 2010. Appearing at the hearing on behalf of Relator was attorney Joseph M. Caligiuri. Respondent appeared represented by attorneys Michael L. Close and Jennifer B. Croghan. The case was heard by a panel consisting of Judge H.J. Bressler, Judge Arlene Singer and Stephen C. Rodeheffer, chair. None of the panel members resides in the appellate district from which the complaint originated or served on the probable cause committee that certified the complaint. Judge Bressler resigned from the Board of Commissioners subsequent to the date of the hearing but prior to the panel's deliberations and recommendation in this case, consequently he did not participate in the findings and recommendations made in the panel's report.

¶2. Respondent was admitted to practice of law Ohio in 1969. He was admitted to the practice of law in Kentucky in 1988. Respondent's practice deals almost exclusively with criminal defense. Respondent has been involved in many high profile criminal cases during his

career including the nationally publicized case of Larry Mahoney who drove left of center on a Kentucky highway and struck a school bus full of children, and the defense of a number of Native Americans who were charged following a confrontation with law enforcement at Wounded Knee. Respondent has been given many national awards in the area of criminal defense including the Robert C. Heeney Memorial Award. He is also a member of multiple state and national criminal defense organizations. Respondent has been admitted to practice in several federal courts, the Supreme Court of the United States and the U.S. Tax Court.

¶3. Notwithstanding these outstanding professional accomplishments and the apparent high esteem with which he is held by his colleagues, the panel found Respondent to be a difficult man whose testimony was evasive, combative and in some instances inaccurate or false.

¶4. Respondent is charged with the following violations of the Ohio Rules of Professional Conduct:

- a. Prof. Cond. R. 1.5(a) – a lawyer shall not make an agreement for, charge or collect an illegal or clearly excessive fee;
- b. Prof. Cond. R. 1.5(d)(3) – a lawyer shall not enter into an agreement for, charge or collect a fee denominated as “earned upon receipt” or “non-refundable,” or any similar terms 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 of all or part of the fee based upon the value of the representation;

c. Prof. Cond. R. 1.16(e) – a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned; and

d. Prof. Cond. R. 8.4(h) – conduct that adversely reflects on the lawyer's fitness to practice law.

¶5. The factual basis for Relator's allegations against Respondent as it relates to Prof. Cond. R. 1.5(a), 1.16(e) and 8.4(h) is that Respondent was paid \$17,726.01 in attorney fees to represent Anthony Bell in a criminal matter, \$15,000 of which was paid pursuant to a written fee agreement wherein Respondent agreed to represent the client "through the trial, and if necessary, sentencing, or other disposition of the case." Respondent terminated his representation of the client before the case was finished and retained all client monies paid to him.

¶6. The factual basis for Relator's allegations against Respondent as it relates to Prof. Cond. R. 1.5(d)(3) and 8.4(h) is that the aforementioned fee agreement provided that the flat fee was "non-refundable" without adding the language required by Prof. Cond. R. 1.5(d)(3) that the client may be entitled to a refund if the representation is not completed.

FINDINGS OF FACT

¶7. The charges against Respondent stem from his representation in 2008 of a then nineteen-year old by the name of Anthony (Tony) Bell. On June 3, 2008, Bell was indicted on multiple felony offenses involving an assault on a police officer during a Cleveland Indians baseball game on April 26, 2008. The evidence provided at the hearing indicated that one of Bell's friends, with whom he was attending the Indians-Yankees game on this date, got into a verbal spat with another fan. An altercation occurred in which Bell became involved. During the altercation a police officer was hurt and Bell was arrested. Bell spent a weekend in jail and

was ultimately released after his family posted a \$35,000 bond through a local bondsman. The bondsman recommended Respondent to the Bells.

¶8. Mr. Summer's representation of Bell commenced on April 29, 2008, when the Bell family consisting of Tony Bell, Lorraine Bell (mother), and Dwayne Bell (father) signed a written fee agreement which, in its material parts, called for the payment of a \$2,500 retainer plus an additional \$1,000 to be used for expenses. The Bells were to be billed for Respondent's services at the rate of \$250 an hour. Respondent contends that the hourly rate was \$100 less than his normal rate, and that he agreed to this reduced rate because he felt sorry for the family. The Bells paid both the retainer and the deposit for the expenses in the case.

¶9. Of critical importance to this case is an understanding of the fact that, from the beginning, Tony Bell and his family insisted on Tony's innocence in the whole affair and made it clear to Respondent that they were prepared to go to trial and were not interested in a plea agreement. Respondent acknowledged in his testimony that he was well aware of the family's position from the inception of the attorney-client relationship. (9/30/10 Tr. 83)

¶10. During the succeeding nine months that Respondent represented Tony Bell, he had an associate by the name of Aaron Baker who had been licensed to practice law for approximately five months.¹ Baker assisted Respondent in the case and, according to the billing records, (Ex. 11 and 35) did a large portion of the work on behalf of Bell.

¶11. Respondent represented Bell from May 1, 2008 until he filed a motion to withdraw on January 13, 2009. During this period of time his fees were paid pursuant to two fee contracts. The first was executed by the family on April 29, 2008, (¶8, supra) and the second

¹ Although Baker had been licensed to practice this short period of time, he graduated from law school in 2006, but did not take the bar until the fall of 2007. According to Respondent, Baker had been with him for five years.

was executed on September 9, 2008. The former called for Respondent to be paid on an hourly basis, and the latter called for the payment of a flat fee of \$15,000.

¶12. Because the principal issue in this case is whether Respondent charged a clearly excessive fee, a summary of Respondent's efforts on behalf of his client is critical to a determination of the issues presented.

¶13. From day one of Respondent's representation of Bell, the primary focus of his activity was to obtain a surveillance video of the incident that was in the possession of the Cleveland Indians organization. Respondent often characterized this video as the "silver bullet" in the defense's case. On May 1, 2008, Respondent wrote a letter to the Cleveland Indians demanding that the organization do nothing to destroy the video until it could be reviewed. He obtained copies of the video from the prosecution at a July 21, 2008 pretrial, however, the poor quality of the video prevented it from shedding any light on what occurred at the game. Efforts were made to have experts look at the copies to see if the quality could be improved. The type of video prevented enhancement and apparently the Cleveland Indians, as a matter of routine, destroy the original of all surveillance videos after a copy is made.

¶14. On June 17, 2008, Respondent filed a document that he entitled "Omnibus-Initial Pretrial Discovery Motion." This document is 34 pages in length and consists of discovery requests, motions to suppress, motion for bill of particulars, and requests for the disclosure of evidence favorable to the defendant. The "Motion" also contains an abundance of case authority relating to the various sections of the motion. At first glance one cannot help but be impressed by the scope of this pleading, with its extensive arguments and citation of case authority. The evidence revealed, however, that this document is essentially a form utilized by Respondent in all his criminal cases that is "tweaked" to fit the particular defendant that Respondent is

representing at the time. It should be further noted that the prosecutor in this case never formally responded to this pleading during Respondent's tenure in the case, including the request for discovery and bill of particulars.²

¶15. Pretrials were conducted in the case on the following dates: July 21, 2008; August 8, 2008; September 9, 2008; October 8, 2008; and December 2, 2008. According to the Bells, the only time Respondent ever met with them was at the courthouse following these conferences. Respondent contends otherwise, but admits to not having a specific recollection of other conferences.

¶16. On June 30, 2008, Respondent's office sent the Bells the first of two bills issued during the course of Respondent's representation of Tony. This bill was calculated on an hourly basis for time spent on the case consistent with the parties' then agreement and covered the period through June 30, 2008. When they received the bill, the Bells were surprised to find that despite the fact that they believed very little progress had been made in the case, Respondent's activity on behalf of Tony had not only exhausted the initial retainer but there was now \$2,461.49 due and owing. Furthermore, the bill calculated Respondent's charges at \$350 an hour rather than the agreed upon \$250. Though taken aback by the amount of the bill, the Bells complained only about the hourly rate. Through an exchange of emails with Baker, the Bells received an assurance that a corrected bill would be sent out. In his final communication Baker told them to "... expect the corrected invoice soon, but in the meantime, if you could pay the corrected amount, it would be appreciated." (Ex. 12) Respondent's office never sent a corrected bill and the Bells never paid anything further over the next two months. Mrs. Bell told the panel that she did not follow Baker's directive because she did not know what the "corrected" amount

² The prosecution eventually responded to the discovery request on January 27, 2009, two weeks after Respondent filed a motion to withdraw from the case.

was and felt that it was Respondent's responsibility to provide that amount. Despite having not received a payment for this invoice, Respondent met with the family at two additional pretrials without registering a complaint. (Ex. 14, 19, 38)

¶17. On September 3, 2008, Respondent sent an email to Tony's father insisting that they have a phone conversation that day. That conversation in fact took place and Respondent testified that at that time he told Dwayne Bell that the family was in breach of the fee agreement and demanded payment of a \$15,000 retainer or he would withdraw from the case. In response to this demand, the Bells sent Respondent an email. (Ex. 15) In this email the family agrees to pay the retainer, but also asks questions typical of clients who are novices to the financial aspect of the attorney client relationship: Are we still operating under the initial contract? Will we get a receipt for the \$15,000 if we pay it? What will this money be used for? Will we get any of the money back if the case is closed? If the case goes to trial will we owe more money? When can we expect to start getting monthly bills? The email ended with a request that Respondent not take offense to these questions noting that they only wanted him to be "up front and honest" regarding the money being paid.

¶18. Respondent apparently did take offense. He sent back a scathing response via email accusing the Bells of not abiding by the original contract, telling them that they will have a cancelled check for a receipt, accusing them of getting advice from "third parties" and losing sight of the fact that Tony was facing "serious, non-probationable allegations." Of importance is the fact that Respondent told the Bells the following:

The fee will be a final flat full and total fee from August 1, 2008 on and that will cover all of the Attorney fees for the matter to the end, regardless of what time we have to spend which is a benefit to you. If you discharge us,

you will however owe us for all of our time spent thus far, less the initial retainer. You will also owe us for bringing the new Lawyer up to speed.

(Ex. 16) [Emphasis, grammatical errors and punctuation from the original document.]

It should be noted that Respondent mentions nothing in this document regarding what happens to this fee if he discharges the client by withdrawing from representation.

¶19. At this point it is necessary to digress from the narrative summary of Respondent's work on behalf of Tony Bell to describe Respondent's attitude toward the Bell family. The aforementioned email is but a glimpse of the generally negative and impatient attitude Respondent seems to have maintained toward the family during most of the time he represented Tony. Even during the disciplinary hearing Respondent took every opportunity to vilify and demonize this family with little supporting corroboration that his complaints against them had any foundation. Because Respondent uses these complaints as a basis for his ultimately discharging the Bells as clients, they need to be discussed here.

¶20. **Repeated and Unnecessary Communications.** Respondent complained that he found himself constantly taking phone calls from the Bells or answering their emails requiring him to explain the same topics or questions over and over again. However, his billing records do not really bear this out. In the first bill to the clients referenced above, his entries show only ten contacts with the client and/or the family over a 60 day period of time. And in his final bill his records indicate that from April 29, 2008 through the end of that year approximately 40 contacts (email, phone calls or conferences) with the clients. (Ex. 11, 35) On average this is less than ten contacts per month with a family whose nineteen-year old son is facing mandatory penitentiary time. Furthermore, after the \$15,000 retainer was paid to Respondent on September 8, 2008, his

billing records only document ten contacts with the Bells. And while it is true Respondent testified that he could not possibly have documented all of the contacts, this testimony does not ring true given the fact that he testified that he kept accurate billing records,³ and the fact that he had every incentive to document these contacts in the final bill since it was produced to justify his keeping all of the money that had been paid to him.

¶21. **The Client's Unrealistic Attitude.** Respondent accused the Bells of not being realistic about Tony's chances for winning at trial and not listening to his advice. Yet Respondent testified that he knew going into this case that this family was adamant that his client had done nothing wrong and wanted a trial. And to whatever extent this fact was not clear to Summers during the first few months of the attorney-client relationship, he was certainly well aware of this attitude when he took a \$15,000 fee from the family in September 2008.

¶22. **Client Dishonesty.** Respondent accused the Bells of lying to him about whether Tony could be reached via cell phone. The actual facts appear to be that an email dated January 4, 2009, authored by Tony's mother but signed "Anthony Bell," was sent to Respondent reminding him that he had not responded to a prior request by the family for a meeting with him. (Ex. 28A) In that same email Respondent was asked to respond to the family's communication by emailing Tony's father, Dwayne, "as my cell phone is temporarily out of order." Respondent testified that upon receiving this email he immediately called Tony on his cell and Tony answered, thus disproving the claim that the phone was out of order. The Bells explained during the hearing that they made this statement because Tony's cell phone was often out of service because he worked in the basement of his employer's building beyond the service provider's signal. While the email may be an intentional mischaracterization of the true facts of Tony's cell phone problems, in reality it was probably nothing more than an awkward attempt by an anxious

³ Respondent testified that his time was "copiously kept." (9/30/10 Tr. 104)

and concerned mother to funnel communications from Respondent to her son through the parents so they could stay informed of the progress on their son's case. Regardless, this small prevarication could not have possibly caused the irreparable damage to Respondent's relationship with the family that he attempted to portray to the hearing panel.

¶23. **Perjury.** Finally, and more seriously, Respondent accused the Bells of directing him to suborn perjury. He told the panel that the Bells insisted on his using a witness that he knew was going to lie under oath.

¶24. Unfortunately this charge by Respondent is the weakest of all of his allegations for a number of reasons. First, in Respondent's initial written response to Disciplinary Counsel regarding the Bells' grievance, Respondent gave Relator a detailed explanation as to why he discharged Tony as a client. His primary reason as set forth in this letter was that the Bells were difficult to deal with and were unrealistic about Tony's prospects for exoneration. Nowhere in this initial communication does Respondent even hint of the Bells asking him to use a witness who was going to commit perjury.

¶25. The first time Respondent makes any allegation of impropriety on the part of the Bells regarding false witnesses is during his discovery deposition in this proceeding. At that time he testified that the Bells told him that they "... had a brand new witness that is not in the video, never identified, never discussed" that would exonerate Tony. Later in the deposition Respondent admits that he never interviewed this witness explaining in a rather vague way that what was going on "was obvious" and he was "not even going to get involved in something like that." (Summer's Depo. 78)

¶26. Respondent's description of the Bells' "witness" changes between his deposition testimony and the hearing. At the hearing Respondent told the panel not that the witness was someone that had seen the altercation, but rather was a witness who was going to testify that the Cleveland Indians had destroyed or tainted the video. He testified that he was suspicious about this witness because the Bells would not give him a name or any other information about the individual, only telling him that they would bring the person to him when it was time. When asked why he thought this conduct was illegal, Respondent responded as follows:

He's telling me he has a witness who is going to testify the opposite of everything that has been produced and everything that has been verified by a nationally-renowned expert to be true. He's going to say – Nothing's been documented. (10/1/10 Tr. 250)

¶27. At the hearing the Bells denied ever suggesting the use of any witness let alone one that was going to commit perjury.

¶28. Respondent took great pains during the hearing to portray the Bells as difficult people whose conduct made continued involvement with them impossible. However, the panel simply does not believe Respondent's allegations and concludes that his complaints regarding the Bells' conduct are nothing more than a fabrication designed to convince the panel that he had an acceptable basis for his eventual discharge of the Bells as clients.

¶29. We return to our findings of fact regarding the representation of the Bells. Notwithstanding the Respondent's caustic communication with the Bells after they asked about the specifics of the \$15,000 payment (¶18, supra), the parties ultimately reached an agreement for Respondent's continued representation that was reduced to a written contract on September 9, 2008. Respondent presented this contract to the Bells just prior to a pretrial conference on that

day and he testified that he went over the agreement with the family line by line. The agreement calls for the payment of a \$15,000 flat fee that was to be considered "non-refundable." The agreement also stated that Respondent would represent Tony Bell through all phases "and, if necessary, through the trial, and if necessary, sentencing, or other disposition of the case." The contract further states that the \$15,000 "is all that you will owe, regardless of the time that we will spend on your behalf." (Ex. 18) However, despite characterizing this fee as non-refundable, the agreement did not have the language required by Prof. Cond. R. 1.5(d)(3) to the effect that if Respondent failed to complete his representation of Bell, the client may be entitled to a refund of all or part of the fee.

¶30. Although the Bells signed the fee agreement and paid the \$15,000, they contend that the agreement was not explained to them and that they did not read the document. Indeed, Mrs. Bell testified that she, even to this date, has never read the document.

¶31. Respondent's explanation for his failure to include language regarding a possible refund as required by Prof. Cond. R. 1.5(d)(3) is less than credible. He contends that because he practices in both Kentucky and Ohio that he has form fee agreements for each state. He told the panel that he accidentally pulled up his Kentucky template from his word processing software when preparing the Bell agreement. Apparently Kentucky permits the use of non-refundable fee agreements without advising the client of his or her right to a refund. However, a review of the agreement reveals multiple references in the document to Ohio law, repeated (and mistaken) references to the Code of Professional Responsibility, and even a reference to the Ohio Supreme Court and its rules regarding trust accounts. Furthermore, in his testimony Respondent repeatedly contradicted the Bells contention that they did not read the document by testifying that he went over this document "word by word" with the family, leading to the inescapable

conclusion that Respondent was at least on notice that his agreement was not in compliance with the Ohio Rules of Professional Conduct.

¶32. The panel concludes that Respondent was well aware that the agreement presented to the Bells on September 9, 2008, did not have the language required by Prof. Cond. R. 1.5(d)(3). Though not germane to the violation, the fact that the document references the Code of Professional Responsibility instead of the Rules of Professional Conduct would indicate that this deficiency was the result of either Respondent's ignorance of the requirement or his failure to update his agreements after the current rules went into effect.⁴

¶33. During the ensuing five months (September 2008 though January 2009) that Respondent was involved in Bell's case, his efforts as documented in his final bill were almost exclusively devoted to obtaining access to the Cleveland Indians video equipment and the original recording of the April 26, 2008 brawl. At the September 9, 2008 pretrial, Respondent obtained a court order from the trial judge permitting inspection of the video and the equipment. On October 1, 2008, Respondent filed a contempt motion against the Cleveland Indians for denying access. He held conferences with his expert, Mark Eppler, and though not itemized in his bill, he claims that he or his associate, Aaron Baker, made at least two trips to Progressive Field to look at the equipment and video. He claims, though again it is not documented, that he made contact with a national expert on video enhancement by the name of Steve Cain in Wisconsin who confirmed that the video recording could not be improved, as Eppler had stated. (10/1/10 Tr. 190-191; 195)

⁴ The Code of Professional Responsibility does not have a similar requirement regarding advising the client that a flat fee may be refundable.

¶34. It should be noted that Respondent's billing records for this time period indicate little or no contact with the clients other than an occasional email and phone call. Mrs. Bell testified that the family decided after paying the \$15,000 on September 9, 2008, that they would give Respondent space and let him proceed without bothering him for updates. Because of this it came as a complete shock to the Bells when Summers informed them on January 6, 2009, that he was leaving the case.

¶35. The panel finds the circumstances of Respondent's withdrawal particularly distressing. The Bell family borrowed the retainer from Tony Bell's employer. These funds are all that they had to pay for their son's legal defense against serious criminal charges and they paid these monies to Respondent under the reasonable assumption that he was now paid and that Tony would be represented by competent legal counsel through the conclusion of the case. When Respondent abruptly terminated his representation, they had no money for substitute counsel and Tony ultimately was forced to use court-appointed counsel.⁵

¶36. When Mrs. Bell requested an accounting for the money received, Respondent presented her with an itemized bill that not only showed that the funds the family had paid were totally exhausted, but that if his services were calculated on an hourly basis the family owed him \$2,586.49, despite the fact that the fee agreement provided for a flat fee for representation to the conclusion of the case.

¶37. The bill, itself, has many interesting and suspicious features. First, the hourly rate is not calculated at \$250 per hour as was set forth in the parties' original arrangement, but \$400 an hour. Second, this final bill adds up Respondent's time back to the beginning of the attorney-client relationship on April 29, 2008. Consequently the bill in part covers the period that was

⁵ The family did talk to another lawyer about the case, but when they were told how much they would need to pay to engage his services they gave up the idea of hiring another lawyer.

covered in the first bill sent June 30, 2008. This second bill adds an additional 7.65 hours of work for this time period that was not itemized in the first bill. And finally, adding insult to injury, Respondent included the following entries in this bill:

2:00	copying bill and preparing file for transfer to Attorney Dixon
1:00	drafting motion to withdraw
:15	reviewing motion to withdraw
1:00	drafting email to investigator
1:30	research and drafting complaint against Susan Daniels ⁶
2:00	attendance at motion to withdraw (Summers)
2:00	attendance at motion to withdraw (Baker)

Thus, 9.75 hours were billed to the Bells for work performed to conclude his withdrawal from the case with an extra two hours for good measure for attending the hearing itself. (Ex. 35)

¶38. Even the hearing the trial court conducted on February 10, 2009, to rule on the Respondent's motion to withdrawal is fraught with chicanery. Prior to that hearing, Respondent contacted the Bells and suggested that a reconciliation might be possible with his firm staying in the case. This coming from an individual that was insisting that the clients were engaging in behavior that was tantamount to a criminal act. At the hearing the Bells were completely excluded from any participation. Rather, Respondent held an ex parte conference with the trial judge in chambers who then signed the order discharging Respondent. The Bells were never told why Respondent was withdrawing and never given an opportunity testify regarding their side of the controversy.⁷

⁶ Susan Daniels was an investigator hired by the Respondent with whom he had a falling out during the course of his representation of Tony Bell.

⁷ On March 5, 2009, Anthony Bell filed a pro se memorandum regarding the withdrawal but, of course, the memorandum came after the withdraw was already allowed.

¶39. It should be noted that when the Bells received Respondent's final bill on March 5, 2009, they did not respond by suggesting a counterproposal or otherwise try to work through the finances. They immediately filed a grievance with Disciplinary Counsel. However, viewed in the context of the circumstances they found themselves in, circumstances that were not of their making, their knee jerk reaction to Respondent's invoice is forgivable. Respondent abandoned his client and kept all his money without justifiable cause at what was, procedurally, an early stage in the criminal proceedings.

¶40. In the end Tony Bell was assigned to the public defender's office and was represented by an attorney by the name of George George. The case was ultimately resolved by Tony Bell pleading guilty to three F-4 offenses on June 29, 2009, and being sentenced to community control. Bell expressed bitterness with the outcome both at the sentencing hearing and at the trial in this disciplinary case.

CONCLUSIONS OF LAW

¶41. The Panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.5(d)(3). The fee agreement (Ex. 18) denotes the \$15,000 as a flat fee and as a non-refundable fee without the client also being told that if the legal work is not completed the client may be entitled to a refund. Prof. Cond. R. 1.5(d)(3) mandates this language in all flat fee contracts. As noted the panel is not impressed with Respondent's protestations that his failure to include the language was an honest mistake.

¶42. Relator's allegations that Respondent violated Prof. Cond. R. 1.5(a) and 1.16(e) are somewhat more problematic. Respondent argues that he was ethically entitled to keep the entire retainer because of the amount of time he had in the case before exiting. Simply stated, he contends that if a lawyer can show that the hours spent on a case multiplied by his hourly rate

equals or exceeds the flat fee paid, that lawyer can keep the fee even though he has not completed the work he was paid to complete. In support of this position, he called attorneys Lawrence A. Riehl and Kort Gatterdam to testify in support of this proposition. Both attorneys are experienced criminal defense attorneys who testified that when an attorney withdraws from a flat fee case, Respondent's approach is the correct approach.

¶43. Relator responds that the a determination of an excessive fees requires more than just an itemization of the time spent by Respondent. Prof. Cond. R. 1.5(a) lists multiple factors that must be considered:

- (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.

Thus, Relator contends the fee retained by the lawyer must be viewed in the broader context of the attorney-client relationship. All aspects of that relationship must be reviewed as opposed to a simple mathematical calculation of time spent.

¶44. A secondary question must also be addressed: is this case really nothing more than a fee dispute that simply does not rise to the level of an ethical violation? Just because the lawyer and client disagree over the fees retained (or charged) by the attorney and the lawyer is ultimately found to be wrong does not mean that in every such instance such the lawyer has charged "a clearly excessive fee."

¶45. The panel concludes that in the end each case presents unique facts and circumstances that must viewed on their own merit. Unfortunately Prof. Cond. R. 1.5 and comment [6(A)] provide little guidance:

This [the possibility of a refund] does not mean a 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 work completed, etc.). . .

The panel agrees with Relator that a simple mathematical calculation of time spent is not determinative to resolving the controversy. The trier of fact must view the time spent by the lawyer in the context of the original agreement between the parties, the benefit that the client derived from the lawyer's efforts, and the stage at which the relationship ended – particularly where, as here, the flat fee was paid to Respondent for completing the case.

¶46. Considering all of these factors and the guidelines set forth in Prof. Cond. R. 1.5(a) the panel concludes that Respondent collected and retained a clearly excessive fee for the following reasons:

¶47. First, Respondent agreed to complete the case through trial. As it happens, other than his misadventures in trying to get the surveillance video enhanced, attending a few pretrials and filing a form motion for discovery, Bell gained very little benefit from Respondent's work. As noted above, no witnesses were interviewed, the prosecutor had yet to turn over his responses to Respondent's discovery requests, no motions to suppress were filed, and no trial date was obtained. It would not be unreasonable to conclude that Respondent completed less than a third of the pretrial work that needed to be done when he terminated the representation of his client.

¶48. Second, Respondent unilaterally and without cause, abandoned Bell knowing full well that the Bells would not be in a position to retain alternate counsel without their receiving a refund. To make matters worse, Respondent has fabricated his reasons for discharging the Bells from the commencement of Relator's investigation through the disciplinary hearing. He said the client's family were constantly making contact with him and wanting answers to the same questions over and over, yet his own meticulous time records simple do not document this fact. He said that the Bells were unreasonable regarding their son's prospects for acquittal, yet he admitted knowing the family's attitude about the case not only from the very beginning of the case, but also four months into the representation when he insisted on payment of the \$15,000 fee. He accused the Bells of being difficult people, yet when the panel observed the Respondent's behavior and attitude during the course of the hearing and contrasted his demeanor with that of the Bell family, clearly it is Respondent who comes across as being the difficult one. He accused the Bells of lying and wanting him to commit unethical acts, yet when cross-

examined on this allegation by Relator's counsel and the panel members during his testimony, Respondent was evasive, vague and totally unpersuasive on this point. Finally, notwithstanding the litany of faults the Bells were alleged to have possessed, Respondent admits that he offered to resume his representation of Bell just prior to the hearing on his withdrawing from the case.

¶49. The third reason why the panel concludes that the fee was excessive in this case is that Respondent's own time records support this conclusion. These time records charge the Bells for drafting the motion to withdraw, reviewing the motion to withdraw, attending the hearing on his motion to withdraw and with drafting Respondent's complaint against an investigator that he hired and fired. Admittedly, even if one subtracts these charges from the final bill of \$21,086.49 the Respondent's billable hours still exceed the \$15,000 that the clients wanted returned. However, the inclusion of these questionable time entries, together with the inclusion of additional hours for the time period covered in the first bill, lead one to the inescapable conclusion that this final statement was "padded" so that Respondent could consume the retainer with these entries.

¶50. Succinctly stated, it is the panel's position that when a lawyer agrees to represent a client through the conclusion of the case and that lawyer withdraws from representation without cause before the work is completed, he cannot retain the entire flat fee by resorting a mathematical calculation of his billable hours. Furthermore, when a lawyer leaves the case with little benefit having been conferred on the client from his work, and then justifies firing the client as Respondent did by making false allegations to justify leaving the case and then padding his billing records, his fee then becomes excessive and in violation of Prof. Cond. R. 1.5(d)(3). To find otherwise would leave clients at the mercy of lawyers that are paid significant flat fees who

later want to pull out of cases they have contracted to complete when the demands of the case become too onerous.

¶51. The panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.5(a), and as a result of his failure to return any of the fee to the Bells that he is also in violation of Prof. Cond. R. 1.16(e). Further, and as a result of all of the findings made by the panel, it finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(h).

AGGRAVATION AND MITIGATION

¶52. The Panel finds the following mitigating factors under BCGD Proc. Reg. 10(B)(2):

- a. Respondent has not been the subject of any prior discipline; and
- b. Respondent is apparently held in high regard by his peers and the judges before whom he has appeared, as evidenced by the more than fifty letters of commendation. There is no question but that Respondent is a competent, well-respected criminal defense attorney.

¶53. The Panel finds the following aggravating factors under BCGD Proc. Reg. 10(B)(1):

- a. Respondent has acted with a dishonest and selfish motive;
- b. Though Respondent has grudgingly cooperated in the disciplinary process, his attitude toward the process, and especially Disciplinary Counsel, has at best been condescending. He has approached the entire proceeding with an attitude of righteous indignation and his testimony during the hearing was laced with lies and evasiveness;
- c. Respondent not only refuses to acknowledge the wrongfulness of his conduct, he does not even evidence a passing concern for the predicament he placed the Bells in when he

retained their money. He insists without wavering that he had a right to keep all of the Bell retainer even though before receiving it he assured them via an email that:

[t]he fee will be a final flat full and total fee from August 1, 2008 on and that will cover all of the Attorney fees for the matter to the end, regardless of what time we have to spend which is a benefit to you. (Ex. 16)

d. The victims in this case were vulnerable. The Bells were unsophisticated, working class people. They borrowed the \$15,000 to pay Respondent from Tony and Dwayne Bell's employer. There was simply no more money to be had for legal fees and other defense costs. Respondent knowingly left Tony Bell destitute and with no alternative but to turn to an overworked, young public defender for legal representation. Miraculously this second lawyer was able to wrest a plea deal from the prosecutor that resulted in probation for Bell; and

e. Finally, the panel finds that Respondent has not made or offered any restitution.

¶54. A review of the sanctions imposed by the Supreme Court against lawyers found to have charged excessive fees follows little, if any, pattern that is instructive here. Sanctions range from public reprimand to disbarment depending on the interplay of the factors set forth in BCGD Proc. Reg. 10. Given Respondent's conduct toward the Bells and his attitude throughout these disciplinary proceedings, the panel is compelled to recommend an actual suspension from the practice of law. It is, therefore, recommended that William Lawrence Summers be suspended from the practice of law for six months.

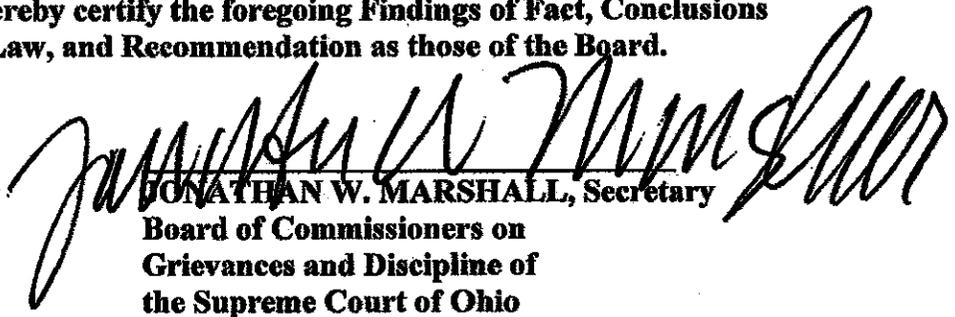
¶55. The panel is not recommending an order of restitution. Though Relator proved to the panel by clear and convincing evidence that an excessive fee was charged in this case, no testimony was presented or argument made regarding the amount that should be refunded. The

panel declines to make this determination on its own and would defer to the outcome of any court proceedings or a fee arbitration proceeding the Bells wish to commence.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 11, 2011. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board recommends that Respondent, William Lawrence Summers, be suspended from the practice of law for a period of six months and, based on the record surrounding the imposition of a non-refundable fee, that full restitution of \$15,000 be paid to the Bells. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

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


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

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.

VIA FAX TO Dwayne Bell 716.8476264

William L. Summers Co., L.P.A.

Attorneys & Counselors at Law

2000 Illuminating Building, 55 Public Square

Cleveland, Ohio 44113

(216) 591-0727-Phone

(216) 591-0740 Fax

William L. Summers

Suzon T. Baker

September 9, 2008

Anthony Bell and Family
1307 Peppertree Drive
Darby, NY 14747

RE: Fee agreement with regard to continuing representation of Anthony Bell in Case No. CR-08-511396-A

Dear Bell Family:

This letter will confirm my discussions regarding my ongoing representation of Anthony Bell in the above-referenced matter. The lawyer's Code of Professional Responsibility requires that terms of employment be set forth in writing by the lawyer to his client. The purpose of this contract, therefore, is to resolve between us the matter of fees and expenses.

A portion of our discussion concentrates upon estimating legal fees in this type of matter. Factors which greatly affect the total legal fees include (1) the amount of time spent collecting relevant documents and interviewing relevant witnesses; (2) the time needed to respond to motions made by the opposing party; (3) the complexity of the issues; and (4) whether the case proceeds all the way to trial.

This firm agrees to represent you, through the investigation of the above referenced case, and, if necessary, through the trial, and if necessary, sentencing, or other disposition of the case. The amount of the flat fee agreed upon between us is Fifteen Thousand Dollars (\$15,000), in addition to any and all amounts already paid to us. That is all that you will owe, regardless of the time that we will spend on your behalf.

CLIENTS INITIALS: D.B. D.B. MRS. D.B. [Signature] A.B. A.B.

Exhibit

18

A-2

VIA FAX TO Dwayne Bell 716.8476264

It is usual and customary for our office to bill clients on an hourly basis. The normal hourly rate for me, William L. Summers is \$400.00 per hour, billed in minimum increments of one-quarter hour. The normal rate for my associate, Aaron T. Baker, is \$175.00 per hour, also billed in minimum increments of one-quarter hour. Where possible, tasks may be delegated to associate attorneys, law clerks and paralegals, strictly under my supervision. We are aware that this is a flat fee arrangement, so we merely outline the above to emphasize the value you are getting.

Where possible, tasks may be delegated to associate attorneys, law clerks and paralegals, strictly under my supervision. Please be assured, however, that I will be primarily responsible for the course of the representation, due to my experience and expertise in handling such matters and because this representation will require this law office to set aside a considerable block of time to protect your son's interests.

In determining the attorneys' flat fees, the following items are considered: the time and labor required; the novelty and difficulty of the issues involved; the skill required to perform the legal services properly; the likelihood that accepting this case precludes me from taking other cases; the fee customarily charged in the locality for similar services; the seriousness of the charges; the time and length of the professional relationship with you as a client; and my experience, reputation and ability as the attorney handling this case. These are most of the factors we consider in determining a final fee. However, because each case is unique, I cannot list every item that affects the fee calculation.

In addition to the attorneys' fees, you are also responsible for all expenses of investigation and defense of this case. These are costs for services such as a process server, private investigator, depositions and court reporter time and expert witness fees. Different cases require different cost expenditures. These expenses will not be incurred without us discussing it beforehand. However, these expenses are often a crucial element of defending a criminal case so you should be prepared for some or all of these costs to be incurred.

As we said in our correspondence last week, the expenses will continue to be charged extra, as must be the case under Ohio law. You deposited a \$1,000.00 expense retainer, your retainer and supplemented it with another \$1000.00 September 4th. The first \$773.99 went to our independent investigator, Susan Daniels.

We delivered \$1,000.00 to the tape expert and met with him extensively to further plan our strategy with his investigation, enhancement and analysis. Therefore you currently have a positive expense balance of \$226.01. As for Susan Daniels, a copy of her itemized statement was provided on several occasions, including last week. We paid her on approximately May 25th from our trust account which is monitored by the Ohio Supreme Court, as an IOLTA Attorney's trust account. [I.O.L.T.A.]

CLIENTS INITIALS: D.B. D.B. MRS. D.B. [Signature] A.B. A.B.

Page 2 of 4

A-28

VIA FAX TO Dwayne Bell 716.8476264

I am not promising or predicting any specific outcome or result of this case. The fees discussed and agreed to are not contingent upon any particular result. Please acknowledge your understanding of this agreement by signing one copy of this letter and returning it to me.

We will bill our out-of-pocket expenses, separately. Separate billing for these is mandated by the code of Professional Responsibility in Ohio. Those expenses which are commonly included, but not limited to; all telephone charges (long distance, cellular, facsimile, etc.), in-house and contract copying charges, postage, automobile mileage and/or cab fare, meal-lodging-transportation expenses, investigation expenses, court reporters' fees, process server's fees, messenger fees, delivery fees, parking costs, computer legal database charges, and all costs fixed by law or assessed by courts and other agencies. In the event that it becomes necessary to hire expert witnesses, consultants, or investigators; I will not hire such persons unless we mutually agree to incur those expenses.

I assure sure you that we will use our best efforts in representing you. You must be aware, however, that due to the Code of Professional Responsibility, I cannot guarantee and/or promise anything regarding the success of this matter. Any comments regarding the outcome are mere expressions of my opinion. I am unable to address any questions relating to the probability of success of the prosecution. It is both unethical, unprofessional and most of all, illegal, for me to do so.

It is the policy of my office to return all telephone calls promptly and to forward copies of all documents mailed on your behalf or received in my office, to the attention of yourself. They will be marked personal & confidential unless you specify otherwise.

Please indicate your agreement with the terms of this agreement by signing the copy of this letter we have provided for that purpose, and by returning the signed copy, to us. You should retain this original letter for your own records. As you are aware, we have already done extensive work on your matter due to the exigencies of time.

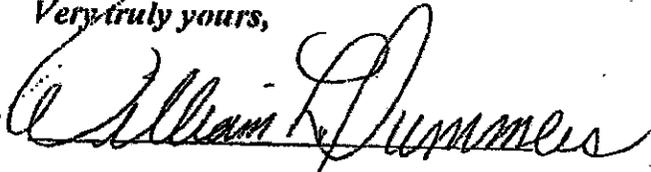
The representation of persons in matters of this nature involves a level of commitment beyond that of most other areas of the practice of law, in that it involves issues of liberty and the potential of a criminal record. While no firm can assure a favorable outcome in handling this type of sensitive matter, we commit ourselves to render our best efforts at your effective representation. The amount of the fee established in your case also reflects this commitment. By your signature on this agreement, you are clearly acknowledging your understanding of the non-refundable nature of the retainer fee paid to the firm.

CLIENTS INITIALS: D.B. DB MRS. D.B. [Signature] A.B. AB

VIA FAX TO Dwayne Bell 716.8476264

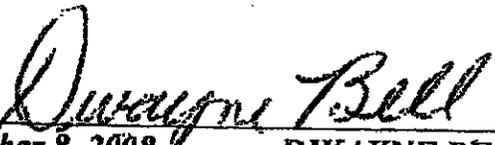
This letter represents the full agreement between the firm and you in this matter. If you have any question or disagreement with this letter, please contact me immediately. Otherwise, please sign the original in the space provided below and return it to me. I have enclosed a copy for your records.

Very truly yours,



WILLIAM L. SUMMERS

I have read the contents of this engagement letter, as well as initialed each page of it, and I understand it to be the full agreement for fees and expenses in this case. I further agree to all of its terms and conditions.



September 8, 2008 DWAYNE BELL



September 8, 2008 Mrs. DWAYNE BELL



September 8, 2008 ANTHONY BELL

CLIENTS INITIALS: D.B. D.B. MRS. D.B. [Signature] A.B. A.B.

C

Baldwin's Ohio Revised Code Annotated Currentness

Ohio Rules of Professional Conduct

▣ Client-Lawyer Relationship

→ 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 divi-

sion (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.

CREDIT(S)

(Adopted eff. 2-1-07)

Current with amendments received through 2/1/11.

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C

Baldwin's Ohio Revised Code Annotated Currentness

Ohio Rules of Professional Conduct

▣ Maintaining the Integrity of the Profession

→ 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.

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(Adopted eff. 2-1-07)

Current with amendments received through 2/1/11.

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