

IN THE SUPREME COURT OF OHIO

**Disciplinary Counsel,** : **CASE NO. 2011-0464**  
:   
Relator, :   
:   
vs. :   
:   
**William Lawrence Summers.** :   
:   
Respondent. :

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**RELATOR'S ANSWER TO RESPONENT'S OBJECTIONS TO THE BOARD OF  
COMMISSIONERS' REPORT AND RECOMMENDATIONS**

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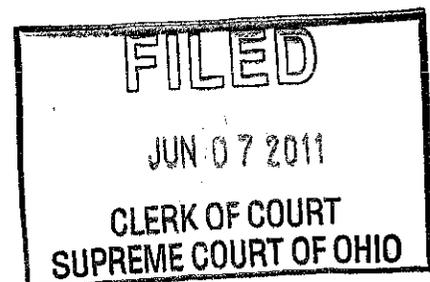
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Now comes relator, disciplinary Counsel, and hereby submits this answer to respondent’s objections.

**STATEMENT OF FACTS**

On April 29, 2008, 19 year-old Anthony “Tony” Bell retained respondent to represent him on first-degree felony charges arising from an altercation at a Cleveland Indians baseball game. [Report of the Board of Commissioners on Grievances and Discipline, “Report,” ¶7]. Neither Bell nor his parents, Dwayne and Lorraine, had any experience with lawyers or the criminal justice system. During the initial consultation, Bell and his parents signed respondent’s fee agreement, which called for a \$2,500 retainer to be billed at \$250 per hour. [Id. ¶8, Ex. 1] In addition to the retainer, respondent required a \$1,000 advance for out-of-pocket expenses. Id. On May 8, 2008, the Bells sent respondent two checks—one for \$2,500 and one for \$1,000. Id. ¶8.

As the board duly noted:

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.

Id. ¶9.

In May 2008, respondent sent a letter to the Cleveland Indians ("Indians") requesting the Indians retain the video of the alleged altercation that led to Bell's arrest in its original format and preserve it for later review. [Ex 3] Respondent characterized the video as the "silver bullet" in the defense's case. [Report, ¶13]

On June 17, 2008, respondent appeared at Bell's arraignment and filed his standard form pre-trial, omnibus discovery motion. Id. at ¶14. On June 30, 2008, respondent sent Bell an invoice requesting \$2,461.49 in additional fees; however, upon receipt, Bell informed respondent's associate, Aaron Baker, that respondent had computed his time at \$350 per hour, rather than the agreed-upon rate of \$250 per hour. Id. at ¶16. Baker acknowledged the billing mistake and promised to send out a corrected invoice, but asked that the Bells pay the "correct" amount in the meantime. [Report, ¶16, Ex. 12]

Respondent never sent a corrected invoice, nor did the Bells pay the outstanding balance. [Report, ¶16]. Despite having not received a payment for the June 30, 2008 invoice, respondent met with the family at two additional pre-trials without any mention of the outstanding balance. Id. On September 3, 2008, respondent informed the Bells that they were in breach of the original contract for failing to pay the outstanding balance and demanded payment of a \$15,000 fee or he would withdraw from Bell's case. Id. at ¶17. In response to respondent's demand, the Bells sent respondent an e-mail in which they agreed to pay the \$15,000 fee, but asked many questions

“typical of clients who are novices to the financial aspect of the attorney client relationship...”

[Report, ¶17, Ex. 15].

Respondent sent back a “scathing” response accusing the Bells of breaching the original contract. [Report, ¶18, Ex. 16]. In the e-mail, respondent told the Bells:

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.

Id.

The Bells were troubled by respondent’s response since they had never received a corrected invoice, but felt they had invested in respondent and decided to borrow the money to fulfill respondent’s demand for a \$15,000 fee. [Tr. V. I, p. 170]

On September 9, 2008, while in court for a pre-trial conference, the Bells signed a new fee agreement, which read, 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 (\$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 per hour, billed in minimum increments of one-quarter hour. The normal rate for my associate, Aaron Baker, is \$175 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.

\* \* \*

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.

[Ex. 18]

Despite classifying the fee as “non-refundable,” respondent failed to simultaneously advise Bell that if respondent did not complete the representation, the client may be entitled to a refund of all or part of the fee, pursuant to Prof. Cond. Rule 1.5(d)(3). [Report, ¶29]

Respondent attended several pre-trial conferences and gained access, via court order, to the Indians stadium, so that respondent’s video expert could inspect the original video and equipment. *Id.* at ¶33. Respondent had to file a Motion to Show Cause before the Indians granted access. Although not documented in the final bill, respondent testified that he or Baker made two trips to Progressive Field to look at the equipment and video. *Id.*

In mid-December 2008, the Bells attempted to set up a meeting with respondent to discuss the case. In a reply e-mail, Baker stated that he “was actually thinking the same thing” and would discuss the matter with respondent. [Ex. 27]. Having not heard from Baker or respondent, on January 5, 2009, the Bells again requested a meeting with respondent. [Ex. 29]. The following day, respondent informed the Bells that he was withdrawing from the case. *Id.* at ¶34. On January 13, 2009, respondent filed a motion to withdraw from representing Bell; however, he never informed the Bells why he was withdrawing from the case. [Ex. 30, Tr. V. I, p. 285]. In his motion to withdraw, respondent requested an oral hearing, which required the Bells to make another trip from Buffalo to Cleveland. [Ex. 30]

The “hearing” on the motion to withdraw was set for February 10, 2009. Although the Bells were in attendance and prepared to present their side of the story, respondent held an ex parte communication with the judge and left the courtroom without speaking to the Bells. [Tr.

V. I, pp. 287-288]. Left with no money to obtain another attorney, Bell was forced to obtain representation through the public defender's office. [Report, ¶35]

On February 18, 2010, the Bells requested an itemized statement and the return of the unused portion of the \$18,500 in fees and expenses paid to respondent.<sup>1</sup> [Ex. 33] Respondent sent Bell an itemized statement of services rendered, which reflected total charges of \$21,086.49 and an amount due of \$2,586.49 (\$21,086.49 - \$18,500). [Ex. 35] Given the minimal amount of work that respondent had performed, the Bells were "shocked" by the amount of the bill. [Tr. V. I, p. 184].

In arriving at the \$21,086.49 figure, respondent multiplied the hours allegedly worked by his and Baker's hourly rates, which respondent unilaterally increased from \$250 and \$125 in April 2008 to \$400 and \$175 respectively in September 2008. [Ex. 35] In addition to respondent's unilateral attempt to convert the flat fee to an hourly fee, the itemized bill contained several "interesting and suspicious features," such as:

- \$1,425 to withdraw from representing Bell;
- \$662.50 for preparing and filing a complaint with the Department of Homeland Security against respondent's private investigator; and,
- Billing 24.5 hours for services rendered through June 30, 2008; despite respondent's original June 30, 2008 invoice (see paragraph 9), which contained only 16.85 hours, a difference 7.65 hours.

[Report, ¶37, Ex. 35]

Despite the fact that respondent had been paid-in-full, agreed to represent Bell through trial, and withdrew well before completing the representation, respondent refused to provide a refund. As the board found, "Respondent abandoned his client and kept all his money without

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<sup>1</sup> In addition to the \$18,500, the Bells paid \$1,000 to respondent's video expert.

justifiable cause at what was, procedurally, an early stage in the criminal proceedings.” Report, ¶39.

In the end, Bell pled guilty to three fourth-degree felony offenses on June 29, 2009 and was sentenced to community control. Id. at ¶40.

### **RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS**

#### **I. RELATOR PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT’S \$17,726.01 FEE WAS CLEARLY EXCESSIVE UNDER PROF. COND. R. 1.5(A).**

After considering the testimony and exhibits presented during the two-day hearing, the board found by clear and convincing evidence that respondent collected and retained a clearly excessive fee in violation of Prof. Cond. R. 1.5(a). Report, ¶46.

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 [to] 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(a)]<sup>2</sup>.

Id. at ¶50.

In arriving at its conclusion, the board found that despite respondent having been paid in full to complete Bell’s case, “Bell gained very little benefit from respondent’s work.” Id. at ¶47. “It would not be unreasonable to conclude that respondent completed less than a third of the

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<sup>2</sup> The board’s report stated “...in violation of Prof. Cond. R. 1.5(d)(3);” however, the preceding text establishes that the board intended to state “...in violation of Prof. Cond. R. 1.5(a).”

pretrial work that needed to be done when he terminated the representation of his client.” Id. (Emphasis added).

In further support of its conclusion that respondent collected and retained a clearly excessive fee, the board found that respondent:

[U]nilaterally 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.

Id. at ¶48.

Finally, the board found that respondent’s own time records supported the finding of a clearly excessive fee. Id. at ¶49. “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.” Id.

This Court has expressed its disdain for “padding” client invoices. “As we said in *Toledo Bar Assn. v. Batt* (1997), 78 Ohio St.3d 189, 677 N.E.2d 349, obtaining fees by padding client bills with hours not worked (and in this case by charging for expenses not incurred) is equivalent to misappropriation of the funds of a client and warrants disbarment.” *Cuyahoga County Bar Assn. v. Okocha* (1998) 83 Ohio St.3d 3, 697 N.E.2d 594.

As evidenced by the board’s findings, relator proved by clear and convincing evidence that respondent collected a clearly excessive fee in violation of Prof. Cond. R. 1.5(a). Respondent collected \$17,726.01 to represent his client, Anthony Bell, through trial or other disposition. Although the fee was reasonable at the time it was charged, the fee became clearly excessive when respondent, despite having been paid-in-full, quit well before he completed the

work, and without refunding the unearned portion of the fee. Because respondent did not complete the work as promised, he did not earn the entire fee.

In *Butler County Bar Assn. v. Nash* (1993), 66 Ohio St.3d 101, 609 N.E.2d 531, Attorney Mary Nash charged her client a \$10,000 flat fee to represent her in a suit against a police officer and the police and sheriff's departments. The first \$5,000 was to cover "research, development and representation in this matter, short of trial." The second \$5,000 was to cover the trial. *Id.* at 102, 609 N.E.2d 531. Eight months into the representation, the parties agreed to submit the matter to arbitration. Consequently, Nash considered the case as "proceeding to trial" and collected the second \$5,000 installment. *Id.* After examining the medical records and observing her client's deposition, Nash recommended that her client accept a \$1,000 settlement. The client refused and remained adamant about proceeding to trial. *Id.* However, three months later, Nash again advised her client to accept the \$1,000 settlement. The client eventually accepted the settlement on the morning of the hearing. Nash did not refund the second \$5,000 because she had performed additional work preparing for the hearing. *Id.* at 103, 609 N.E.2d 531. The Supreme Court of Ohio found that Nash charged a clearly excessive fee in violation of DR 2-106(A), suspended Nash for one year, stayed, and ordered Nash to pay \$5,000 in restitution. *Id.* In reaching its decision, the Court considered the DR 2-106(B) factors, which are identical to the current Rule 1.5(a) factors, along with the terms of the original fee agreement. *Id.*

The *Nash* opinion is germane to the case at bar for two reasons. First, in arriving at its determination that the \$10,000 was clearly excessive, the Court analyzed the factors listed in DR 2-106(B),<sup>3</sup> thus exposing the flaw in respondent's attempt to value his representation based solely upon his inflated hourly rate. Second, the Court considered the plain language of the

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<sup>3</sup> DR 2-106(B) was superseded by Rule 1.5(a).

original fee agreement, which stated, “In the event this matter proceeds to trial, we will need an additional \$5,000 for trial.” Since the case did not proceed to trial, the Court ordered Nash to return the second \$5,000 payment, despite the fact that Nash had performed work in anticipation of the trial and that the settlement occurred the morning of trial. *Id.* In the case at bar, respondent’s fee agreement stated, “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.” [Ex. 18] Respondent withdrew well before trial, sentencing, or other disposition; therefore, consistent with *Nash*, respondent collected a clearly excessive fee.

The Oregon Supreme Court suspended Attorney Jerry Gastineau for one year for collecting clearly excessive fees in five separate cases. *In re Gastineau* (1993), 317 Or. 545, 857 P.2d 136.

The dispute in this case, then is over *when* a fee may be viewed as clearly excessive where the accused fails to perform the services for which the fee was paid. The bar has the better of that argument.

A close examination of the text and context of the excessive fee rule demonstrates that a lawyer may violate DR 2-106(A) by failing to refund an unearned fee under certain circumstances even though the initial advance payment was not unreasonable for the tasks that a lawyer was to perform in the future. DR 2-106(A) provides that “[a] lawyer shall not enter into an agreement for, charge *or collect* an illegal or clearly excessive fee.” (Emphasis added.) The disjunctive use of the work “collect” means that the excessiveness of the fee may be determined after the services have been rendered, as well as at the time the employment began. Also telling in the interpretation of the scope of the rule is the fact that one factor for determining the appropriateness of the amount of a fee, stated in DR 2-106(B)(4), required consideration of “the results obtained.” That wording, at least, suggests that the work for which the fee was agreed has been completed.

This interpretation is consistent with *In re Thomas*, 294 Or. 505, 659 P.2d 960 (1983), where the court stated: “**It would appear that any fee that is collected for services that is not earned is clearly excessive regardless of the amount.**” (Emphasis added.)

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We conclude that a lawyer violates DR 2-106(A) when he or she collects a nonrefundable fee, does not perform **or complete** the professional representation for which the fee was paid, but fails promptly to remit the unearned portion of the fee. In this case, the accused expected the clients to live up to the letter of the contract whether or not he performed the agreed services that his part of the contract promised. He acted in accordance with that interpretation of the contract. The accused himself set the amount of the fee in relation to the work to be done. The fees, being for work that the accused never performed, were clearly excessive. (Emphasis added.)

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In each of the cases in which the accused set a specific fee for specific work and collected the fee for it, but failed to perform that work, the accused is guilty of violating 2-106(A) by “collecting” a clearly excessive fee.

Id. at 549, 857 P.2d 136, 138.

In the case at bar, respondent prepared the contract that provided representation through trial, sentencing, or other disposition, regardless of the time spent on the client’s behalf, in return for a \$15,000 flat fee. By withdrawing before plea or trial, respondent failed to perform pursuant to the terms of his own contract, thus, by keeping money he had not earned, respondent collected a clearly excessive fee.

In support of respondent’s erroneous proposition that relator failed to prove a clearly excessive fee, respondent relies upon the testimony of his “expert” witnesses, Messrs. Larry Riehl and Cort Gatterdam, neither of whom have any expertise in legal ethics. In his Objections, respondent asserts, “While the board did not find [respondent] credible, it ignored without any significant comment the unrebutted testimony of two (2) expenses [sic] that were based not on Summers’ testimony but on records reviewed by the experts.” The more plausible theory is that the board considered the “experts” testimony, but disregarded it.

Respondent's first "expert," Lawrence Riehl, was not called to opine on whether the fee was clearly excessive, as evidenced by respondent's question to Riehl:

Q: Mr. Riehl, do you have an opinion as to whether or not the hours charged for those particular individual items were reasonable?

A: Yes, I have an opinion... The opinion is that the hours charged for the listed entries were reasonable.

Id. at 304.

The board gave no weight to Riehl's testimony, as it was completely irrelevant. No one ever disputed that the hours charged for the entries were reasonable. The problem with Riehl's opinion was that it was based upon his erroneous assumption that the entries listed on respondent's final invoice were accurate. As the board found, that assumption was fatally flawed. "However, the inclusion of these questionable time entries, together with the inclusion of additional hours for the time period covered in the first bill, leads one to the inescapable conclusion that this final statement was 'padded' so that respondent could consume the retainer with these entries." Report, ¶49

Respondent's other "expert," Cort Gatterdam, acknowledged that he was not an expert.

Panel Chair: Do you consider yourself an expert in ethics?

Gatterdam: No, not in ethics.

Tr. V. I, p. 347

Gatterdam's admission proved true as he had a limited understanding of the Ohio Rules of Professional Conduct, as evidenced by the following exchange during cross-examination:

Relator: So your understanding of the disciplinary rules is that if a lawyer in a flat fee situation accumulates more hours than the flat fee is worth, then there is no duty to provide a refund, correct?

Gatterdam: No duty under the rules. That's my understanding and belief, yes.

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Relator: And what you're telling us is that the way you interpret Rule 1.5 with regard to flat fees is that if there's an early termination or a withdrawal from the representation, what you do in order to justify the entire flat fee is you multiply your hours worked times your hourly rate. If it's above the flat fee, you keep it?

Gatterdam: Yeah, I think that's what I said, right.

Id. at 331, 351

Gatterdam's testimony contradicted the express language of Rule 1.5(a), thus causing the panel to reject his testimony. "The panel agrees with relator that a simple mathematical calculation of time spent is not determinative to resolving the controversy." Id. at ¶45. Under Gatterdam's flawed theory, "clients would find themselves at the mercy of lawyers who are paid significant fees who later want to pull out of cases they have contracted to complete when the demands of the case become too onerous." [Report, ¶50]

Interestingly, Riehl testified that when faced with similar situations in which he has collected a fee, but the representation ended before completion, he has refunded the entire fee, regardless of the time spent. [Tr. V. I, p. 319] Riehl and Gatterdam testified that, unlike respondent, they would not have charged a client to withdraw from the client's case. Id. at 309, 343. When asked about respondent charging the Bells for drafting a complaint against respondent's investigator, Gatterdam testified, "I would not have made that charge." Id. at 344.

In *In re Complaint against Paulson*, 335 Or. 436, 71 P.3d 60, the Oregon Supreme Court publically reprimanded an attorney for attempting to charge his client \$67.50 for time spent responding to the client's bar complaint. Id. Despite the fact that the lawyer eventually deleted the charge, the Oregon Supreme Court found that the lawyer charged a clearly excessive fee.

The test for whether a fee is excessive is whether, “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.” DR 2-106(B). An accused lawyer who charges a client for work that the lawyer performed—but not for the benefit of that client—has charged a fee in excess of a reasonable fee, even if the excessive charges appear within a bill that contains other reasonable charges.

\* \* \*

We conclude that a fee charged for time spent exclusively in pursuit of a lawyer’s own interests violates DR 2-106(A). The accused acted exclusively in his own interests when he responded to [the client’s] complaint to the Bar. Consequently, the fee that the accused charged for his efforts was excessive and in violation of DR 2-106(A).

Id. at 440, 41, 71 P.3d 60, 62. Other jurisdictions specifically prohibit lawyers from charging their clients for the time the lawyer spends withdrawing from the client’s case. In Formal Ethics Op. 8 (2007), the North Carolina State Bar has concluded:

Rule 1.16(c) requires a lawyer “to comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.” Once a lawyer makes a formal appearance in a North Carolina court proceeding, the lawyer must obtain the tribunal’s permission to withdraw. *E.g., N.C. General Rules of Practice for the Superior and District Courts*, Rule 16. Thus, the act of withdrawal is a professional obligation of the lawyer, for the benefit of the lawyer, and, with the exceptions described in opinions #5 and #6 below, the cost of withdrawal cannot be shifted to the client.

Similarly, the State Bar of Michigan reached a similar conclusion, stating, “On the other hand, when it is the lawyer who has decided to withdraw, whether with cause or otherwise, the lawyer is not serving the interest of the client and therefore may not charge the client for expenses incurred in seeking the withdrawal. State Bar of Michigan, Advisory Op. RI-296 (1997).

Neither Prof. Cond. R. 1.5, nor its comments, state that a refund is calculated based upon the hours worked multiplied by the lawyer’s hourly rate. To the contrary, the rule states: “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.

Thus, the rule puts the onus on the lawyer by requiring the lawyer to consider all of the 1.5(a) factors before making a determination as to the reasonableness of the fee. In the case at bar, respondent undertook no such effort. Instead, respondent—and his “expert”—dispensed with the rule requirements and simply multiplied hours allegedly worked by respondent’s inflated hourly rates to ensure that respondent kept 100% of the nonrefundable fee.

Contrary to respondent’s assertions, time spent is but one factor to be considered in determining the reasonableness of a fee. Although Advisory Opinion 96-4 was drafted under the Code of Professional, the analysis remains sound.

A flat fee is a type of fixed fee. Flat fees are based upon factors independent of the actual number of hours involved in a representation. Flat fees provide certainty to clients with regard to costs of legal services while allowing attorneys to be paid a fair sum for their services. Flat fees are used for routine and standardized services, but are increasingly being

used in representations that present uncertainties about the amount of time the lawyer will expend.

Criminal matters do present uncertainty with regard to the amount of time that may be expended, since the matters may be resolved through dismissal, plea agreement, or trial. However, time is but one factor to consider when determining the reasonableness of a fee under DR 2-106(B).

BCGD, Adv. Op. 96-4.

As this Court has stated:

A trial court called upon to determine the reasonable value of a discharged contingent-fee attorney's services in *quantum meruit* should consider the totality of the circumstances involved in the situation. The number of hours worked by the attorney before the discharge is only one factor to be considered. Additional relevant considerations include the recovery sought, the skill demanded, the results obtained, and the attorney-client relationship itself. See *Rosenberg, supra*, 409 So.2d at 1022. Other factors to be considered will vary, depending on the facts of each case. As *Fox*, 44 Ohio St.3d at 71, 541 N.E.2d at 449-450, mentioned, the Code of Professional Responsibility, DR 2-106, FN3 gives guidelines for determining the reasonableness of attorney fees. Because the factors to be considered are based on the equities of the situation, those factors, as well as the ultimate amount of *quantum meruit* recovery by a discharged attorney, are matters to be resolved by the trial court within the exercise of its discretion. (Emphasis added.)

*Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.2d 570, 576, 629 N.E.2d 431, 436.

Although *Reid, Johnston* dealt with contingency fee agreements, the same rationale applies to flat fee agreements. Even respondent admitted that his fee should be computed on the basis of *quantum meruit*. [Ex. 40, p.2]

Similarly, In *Columbus Bar Assn. v. Klos* and *Columbus Bar Assn. v. Zingarelli*, 81 Ohio St.3d 486, 1998-Ohio-610, 692 N.E.2d 565, the Court found a clearly excessive fee based, in part, on the language in the respondents' fee agreements:

The contingent fee portion of the contract covering the litigation phase of the Clay case was also flawed. It provided that should the attorney be

discharged or withdraw prior to the settlement, they would be compensated at \$150 per hour. In *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St. 3d 69, 541 N.E.2d 448, and in *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 629 N.E.2d 431, we disapproved of similar agreements because a liquidated hourly fee arrangement upon termination of a contingent fee contract precluded the application of DR 2-106(B), which sets out the elements to be considered in the calculation of a reasonable fee. We disapprove also of this portion of the Clay contract.

*Klos*, supra, at 488, 692 N.E.2d 565, 568.

Again, the same rationale applies to flat fee contracts. Unilaterally determining the reasonableness of the flat fee by multiplying hours worked by the hourly rate precludes application of the other critical elements of 1.5(a) (formerly DR 2-106(B)) and defeats the purpose of the flat fee contract. “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.” Prof. Cond. R. 1.5(a) Comment 6[A] (Emphasis added.)

After reviewing all the factors, no attorney of ordinary prudence would conclude that \$17,726.01 was reasonable under the circumstances.

- (1) There was nothing complex about Bell’s criminal case, which involved a fight with an off-duty police officer at a baseball game. The police report indicates that the victim, Lt. Gaertner, was treated by medics and released at the scene of the incident. [Ex. 23]
- (2) Respondent’s acceptance of the case did not preclude him from accepting other employment.
- (3) Respondent’s own “expert” testified that in similar situations, he has refunded the entire fee. [Tr. V. I, p. 319]
- (4) This case involved \$19,500 in fees and expenses, yet at the time respondent withdrew, no results had been obtained. In fact, respondent admitted that he had not obtained a plea offer at the time of his withdrawal. [Tr. V. I, p. 83]

- (5) There were no time limitations imposed by the client. The docket reveals that the case remained active for 16 months.
- (6) Respondent had no previous relationship with his client and represented him for less than nine months. Further, the relationship between respondent and his client was anything but “professional.” [Tr. V. I, p. 186]. The Bells testified that respondent’s treatment of the Bells was “unprofessional and rude.” In an e-mail to Baker, the Bells wrote, “We are not stupid ‘folks’ and don’t appreciate being called as such. We are human beings with lives and feelings.” [Ex. 37, p.2]
- (7) Respondent has 40 years experience and is an accomplished criminal defense lawyer, yet his associate, who had been admitted to the bar for five months performed over 60% of the work on Bell’s case. [Report, ¶10, Ex. 11, 35]
- (8) The fixed flat fee committed respondent to represent Bell through trial, sentencing, or other disposition, regardless of the time spent on the client’s behalf. [Ex. 18]

In his Objections, respondent asserted:

Ohio law is clear that when dealing with a non-refundable or earned upon receipt flat, 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 used in order to determine whether the client is entitled to a refund, and further, the amount of the refund if appropriate.

Respondent’s characterization of Ohio law is simply incorrect. Aside from the fact that it directly contradicts the language of Prof. Cond. R. 1.5(a), there is no case law to support respondent’s baseless assertion. Respondent cannot pick and choose what factors apply in determining the reasonableness of a flat fee. Rather, he must evaluate all the relevant factors before making a determination as to the reasonableness of the fee. Taking into consideration the time respondent allegedly spent, along with the other factors, including the terms of the fee agreement, relator proved by clear and convincing evidence that the \$17,726.01 fee was clearly excessive.

In his Objections, respondent suggests that relator’s decision to refrain from presenting expert testimony somehow precluded relator from proving a clearly excessive fee. Respondent’s

proposition is absurd, especially in light of the fact that he relies upon the language in *Columbus Bar Assn. v. Farmer*, 111 Ohio St.3d 137, 2006-Ohio-137, 855 N.E.2d 462—a case in which this Court found a clearly excessive fee, despite, upon information and belief, the absence of any expert testimony.

**II. RELATOR PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED PROF. COND. R. 1.5(d)(3).**

Prof. Cond. R. 1.5(d)(3) unequivocally states:

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.

Prof. Cond. R. 1.5(d)(3).

On September 9, 2009, respondent and the Bells entered into a flat fee agreement, which stated, in relevant part, “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.” [Ex. 18] At the disciplinary hearing, respondent admitted that he failed to simultaneously advise the Bells in writing that if he did not complete the representation, the Bells could be entitled to a refund of all or part of the fee based upon the value of the representation. [Tr. V. I, pp. 60-61.] In light of respondent’s admission, it is incredible that respondent is now asserting that he “substantially complied” with the rule.

Respondent’s continued assertion that he accidentally used a template for a Kentucky fee agreement is a fabrication and underscores the lengths respondent is willing to go to avoid discipline. The board found respondent’s explanation to be “less than credible.” Report, ¶31. In

fact, the board found, “The panel concluded 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).” Id. at ¶32.

In further support of his “substantial compliance” argument, respondent asserts that providing his client with an itemized bill was consistent with a refundable retainer. Aside from the fact that the document itself characterized the retainer as non-refundable, the itemized statement was replete with questionable entries, thus leading the board to “the inescapable conclusion that this final statement was “padded” so that Respondent could consume the retainer with these entries.” Id. at ¶49.

The more plausible theory is that Exhibit 18 was respondent’s Ohio fee agreement and that it contained the non-refundable language because respondent intended the fee to be non-refundable.

### **III. RELATOR PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED PROF. COND. R. 8.4(h).**

The sole basis for respondent’s contention that relator failed to prove a violation of Prof. Cond. R. 8.4(h) [conduct adversely reflecting on a lawyer’s fitness to practice law], is that relator allegedly failed to prove that respondent collected a clearly excessive fee. Without repeating the argument, the evidence established by clear and convincing evidence that respondent collected a clearly excessive fee and failed to return the unearned portion. Consequently, respondent engaged in conduct that adversely reflected on his fitness to practice law in violation of Prof. Cond. R. 8.4(h).

#### **IV. THE BOARD'S RECOMMENDATION REGARDING RESTITUTION AND SANCTION WAS APPROPRIATE AND WARRANTED.**

##### **A. RESTITUTION**

Although the panel declined to recommend a figure for restitution, the board recommended that respondent refund \$15,000 “[b]ased upon the record surrounding the imposition of a non-refundable fee.” Report at p. 23. The board’s recommendation is appropriate and justified by the facts.

Respondent charged his client \$17,726.01 to represent him through trial or other disposition. From the outset of the attorney-client relationship, respondent understood that Bell was not interested in a plea and planned to take the case to trial. Report, ¶9. As the evidence clearly indicated, respondent performed little work on Bell’s behalf and quit well before resolution of the case. *Id.* at ¶47. In fact, despite respondent’s testimony that his work laid the groundwork for the eventual plea, the evidence established that at the time of respondent’s withdrawal, the prosecutor had not even responded to respondent’s form discovery motion or offered a plea. [*Id.*, Tr. V. I, p. 83] “As it happens, other than his misadventures in trying to get the surveillance video enhanced, attending a few pre-trials and filling a form motion for discovery, Bell gained very little benefit from respondent’s work.” Report, ¶47. The board continued, “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.” *Id.*

In addition to providing little benefit to Bell, respondent treated the Bell family with contempt throughout the representation. [Tr. V. I, pp. 174, 179]. “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.” Report, ¶19. Despite no wrongdoing by the Bells, respondent threatened to withdraw from the case unless the financially-strapped Bells came up with a \$15,000 nonrefundable payment. Four months later, respondent abandoned his client, despite little progress on the case. Between September 9, 2008—the date the Bells paid respondent \$15,000—and January 6, 2009—the date respondent informed the Bells that he was withdrawing from the case, respondent’s “copious” billing records indicate a minimal amount of work. [Ex. 35]. As the board noted, even the motion to withdraw was “fraught with chicanery.” Report, ¶38. Respondent demanded an oral hearing on the motion, which required his client to make another trip from Buffalo to Cleveland. Yet, upon arrival, respondent held an ex parte meeting with the presiding judge, thus denying the Bells the opportunity to present their side of the controversy. *Id.* To make matters worse, when the Bells requested a refund of any unearned fees, respondent “padded” his final invoice to ensure that he kept the full \$15,000, thus precluding the Bells from hiring counsel of their choice. Report, ¶49.

The Bells were unsophisticated, working class people. They borrowed the \$15,000 to pay respondent from Tony and Dwayne’s 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.

*Id.* at ¶53(d).

Contrary to respondent’s assertion that the board’s recommendation results in a finding that “Summers earned none of his fee,” the \$15,000 refund still allows respondent to retain the \$2,726.01 that he collected from the Bells. In light of the facts surrounding the nonrefundable fee, a \$15,000 refund is appropriate.

## **B. RESPONDENT'S MISCONDUCT WARRANTS A SIX-MONTH SUSPENSION FROM THE PRACTICE OF LAW**

In arriving at its recommendation of a six-month suspension from the practice of law, the board found several aggravating factors under BCGD Proc. Reg. §10(B)(1).

- Respondent acted with a dishonest and selfish motive;
- Respondent's testimony during the disciplinary hearing was laced with lies and evasiveness;
- Respondent has refused to acknowledge the wrongful nature of his misconduct;
- The victims in this case were vulnerable; and,
- Failure to make restitution

Report, ¶53.

Relator is not aware of—nor can respondent cite—any case in which an attorney received a stayed suspension despite the presence of the above-referenced aggravating factors. While each of the aggravating factors reflect poorly upon respondent, the depth of respondent's dishonesty warrants this Court's greatest concern. During the disciplinary hearing, respondent's testimony was "laced with lies and evasiveness," as evidenced by the board's findings:

- 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. Report, ¶28
- 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. Unfortunately this charge by Respondent is the weakest of all of his allegations for a number of reasons. *Id.* at ¶¶23, 24
- 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. *Id.* at ¶31
- The bill itself has many interesting and suspicious features. *Id.* at ¶36.

- As noted, the panel is not impressed with Respondent's protestations that his failure to include the language was an honest mistake. Id. at ¶41
- To make matters worse, Respondent has fabricated his reasons for discharging the Bells from the commencement of Relator's investigation through the disciplinary hearing. Id. at ¶48.
- 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. Id.
- However, the inclusion of these questionable time entries, together with the inclusion of additional hours for the time period covered in the first bill, leads one to the inescapable conclusion that this final statement was 'padded' so that respondent could consume the retainer with these entries. Id. at ¶49.

Respondent's false testimony during the disciplinary hearing illustrates his disrespect for the disciplinary process. A lawyer who cheats his client and lies under oath in a disciplinary proceeding is exactly the type of lawyer that the public needs to be protected from.

There is simply no place in the legal profession for those who are unwilling or unable to be honest with clients, courts, and their colleagues. Respondent's misrepresentation to the bankruptcy court, to his client, to relator during the disciplinary investigation, and to the panel during the hearing compel an actual suspension from the practice of law.

*Columbus Bar Assn. v. Cooke*, 11 Ohio St.3d 290, 2006-Ohio-5709, 855 N.E.2d 1226.

In arguing for dismissal, or in the alternative a public reprimand, respondent relies upon several disciplinary cases, all of which are easily distinguishable from the case at bar. First, respondent relies upon *Cuyahoga County Bar Assn. v. Levey*, 88 Ohio St. 3d 146, 2000-Ohio-283, 724 N.E.2d 395, a case in which a lawyer was found to have charged a clearly excessive fee by virtue a liquidated damages clause in his contingency fee contracts. Unlike respondent, the lawyer in *Levey* never enforced the provision, never collected on the fee, and changed the

language of the contract upon learning of its impropriety. *Id.* at 148, 2000-Ohio-283, 724 N.E.2d 397.

In the case at bar, respondent drafted an improper fee agreement and used it as a basis to bilk his client out of \$15,000. In addition, respondent has expressed no remorse for his conduct and remains adamant that he did not charge (or collect) a clearly excessive fee. Finally, unlike the lawyer in *Levey*, respondent testified falsely during the disciplinary hearing in an attempt to exculpate himself. Report, ¶47. As mentioned previously, the board found that respondent's "testimony during the hearing was laced with lies and evasiveness." Report, ¶53(b).

In *Cleveland Bar Assn. v. Cleary*, the Supreme Court of Ohio refused to grant a fully stayed suspension after finding that Judge Cleary testified falsely during her disciplinary hearing.

Accordingly, as in *Hoague*, we find a six-month suspension from the practice of law to be the appropriate sanction. Unlike in *Hoague*, however, we decline to stay any part of Cleary's suspension in light of the board's finding that Cleary made false and deceptive statements to the panel in an attempt to exculpate herself. [Emphasis added].

*Id.* at 207, 754 N.E.2d 205, 250.

Like Judge Cleary, respondent refused to acknowledge the wrongful nature of his misconduct, then compounded the situation by lying about what had occurred in an effort to conceal his misdeeds.

Respondent's reliance on *Columbus Bar Assn. v. Mills*, 109 Ohio St.3d 245, 2006-Ohio-2290, 846 N.E.2d 1253 is equally misplaced. In *Mills*, the Court imposed a one-year, stayed suspension after finding that the lawyer double-billed her client on one occasion, aggressively billed for secretarial, clerical, and other "administrative" expenses, and sought additional fees under the threat of non-attendance at a hearing. *Id.* at ¶6-8. Unlike respondent, the lawyer in

*Mills* admitted her misdeeds and offered to make restitution. On the contrary, respondent has never acknowledged the wrongful nature of his misconduct, has never offered to make restitution, and has lied in an attempt to avoid discipline. Respondent's dishonesty alone warrants an actual suspension from the practice of law.

Respondent characterizes *Dayton Bar Assn. v. Shram*, 98 Ohio St.3d 512, 2003-Ohio-2063, 787 N.E.2d 1184 as "most analogous" to the case at bar, yet, the misconduct in *Shram* pales in comparison to respondent's misconduct. Deborah Shram charged a client a \$3,300 non-refundable retainer to represent her in a domestic matter. *Id.* at ¶2. After Shram provided 2.5 hours of work, the client requested Shram stop working on her case, as it was the client's intention to reconcile with her husband. *Id.* Unbeknownst to Shram, the client had contacted Shram's secretary to request a final accounting; however, the secretary never informed Shram of the client's request or subsequent telephone inquiries. *Id.* at ¶4. In May 2011, Shram received a certified letter from the client requesting an accounting. Within a month, Shram had prepared the accounting; however, at the same time, Shram received a letter of inquiry from the bar association. Within three months, Shram reimbursed her client \$2,812.50. *Id.* at ¶5. In imposing a public reprimand, the Court found that Shram never intended to keep more funds than she had earned. *Id.* at ¶7.

In the case at bar, respondent not only intended to keep more than he earned, but he also padded his bill to ensure retention of the entire fee, lied under oath, and failed to make restitution.

In support of his argument for a lesser sanction, respondent relies upon *Akron Bar Assn. v. Watkins*, 120 Ohio St.3d 307, 2008-Ohio-6144, 898 N.E.2d 946, in which this Court imposed a six-month stayed suspension upon Attorney Thomas Watkins after finding that he overcharged

his elderly client while acting as her attorney-in-fact. In reaching its decision, the Court considered that respondent's misconduct resulted from his inexperience and desire to help a longtime family friend. Id. at ¶13. In addition, Watkins made complete restitution, acknowledged his misconduct, and expressed complete remorse. Id. at ¶14.

In the case at bar, the board found that respondent:

Has approached the entire proceeding with an attitude of righteous indignation and his testimony during the hearing was laced with lies and evasiveness. 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.

Report, ¶53(b), (c).

Based upon the misconduct, coupled with the abundance of aggravating factors, a six-month suspension is the appropriate sanction.

**CONCLUSION**

Respondent's refusal to accept responsibility for his misconduct, coupled with his willingness to lie before the board, warrants an actual suspension from the practice of law and a return of the \$15,000 fee.

Respectfully submitted,



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Disciplinary Counsel



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**CERTIFICATE OF SERVICE**

A copy of the foregoing Relator's Answer to Respondent's Objections to the Board of Commissioners' Report and Recommendations has been served upon Michael Close, Esq. and Dale D. Cook, Esq., Wiles Boyle Burkholder & Bringardner Co., 300 Spruce Street, Floor One, Columbus, Ohio, 43215-1173, and to Jon Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5<sup>th</sup> Floor, Columbus, Ohio, 43215, via regular U.S. mail, postage prepaid, this 7<sup>th</sup> day of June, 2011.



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Counsel of Record