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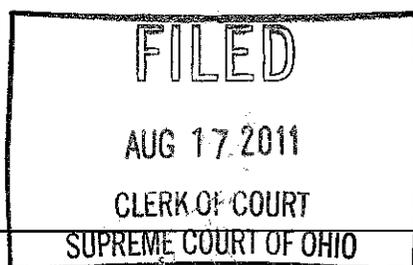
IN THE SUPREME COURT OF OHIO

Cleveland Metropolitan Bar Association :
Realtor :

CASE NO. 2011-1049

Robert J. Berk (0001031) :
Respondent :

**RESPONDENT'S AMENDED
OBJECTIONS TO FINDINGS
OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATIONS
OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE,
AND RESPONDENT'S BRIEF IN
SUPPORT OF OBJECTIONS**



**RESPONDENT'S AMENDED OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS OF
THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE,
AND RESPONDENT'S BRIEF IN SUPPORT OF OBJECTIONS**

COUNSEL FOR RELATOR:

Heather M. Zirke (0074994)
Cleveland Metropolitan Bar Association
1301 East Ninth Street, Second Level
Cleveland, Ohio 44114-1253
216-539-5971
216-696-2413 facsimile
hzirke@clemetrobar.org

COUNSEL FOR RESPONDENT:

Michael E. Murman (0029076)
14701 Detroit Avenue, Suite 555
Lakewood, Ohio 44107
216-228-6996
216-226-9011 facsimile
murmanlaw@aol.com

David O. Simon (0006050)
1370 Ontario Street
450 Standard Building
Cleveland, Ohio 44114
216-621-6201
216-575-1405 facsimile
dsimon@epiqtrustee.com

Edward G. Kagels (0025958)
14701 Detroit Avenue, Suite 555
Lakewood, Ohio 44107
216-228-6996
216-226-9011 facsimile
edkagels@yahoo.com

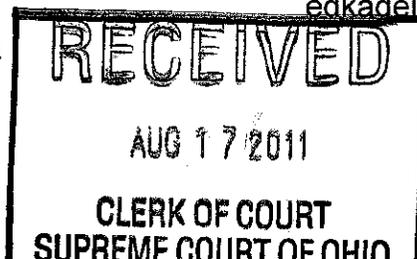


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Cleveland Metropolitan Bar Association:

1301 East Ninth Street, Second Level

Cleveland, Ohio 44114

Realtor

CASE NO. 2011-1049

**RESPONDENT'S AMENDED
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Robert J. Berk

Reg. No. 0001031

75 Public Square, Second Level

Cleveland, Ohio 44114

Respondent

**RESPONDENT'S AMENDED OBJECTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND RECOMMENDATIONS OF
THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE,
AND RESPONDENT'S BRIEF IN SUPPORT OF OBJECTIONS**

RESPONDENT'S AMENDED OBJECTIONS

Objection No. 1

**RESPONDENT OBJECTS TO THE BOARD'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW THAT RESPONDENT VIOLATED RULE 1.3, OHIO
RULES OF PROFESSIONAL CONDUCT, AS CHARGED IN THE COMPLAINT.**

Relator failed to prove by clear and convincing evidence that respondent's conduct constituted an actionable violation of Rule 1.3. The stipulated facts are that respondent neglected two bodily injury cases filed in common pleas court until the court dismissed

them. Thereafter, he took immediate remedial action at his own expense, and without any attempt to hide his negligence or exonerate himself. Tr. at 60:1; 64:1.¹

Respondent acknowledged that acceptance of the representation of the clients involved in the two count complaint ought not to have occurred because he was no longer regularly filing plaintiff injury cases in common pleas court. Tr. at 54:11; 55:1. Nevertheless, he accepted these cases because they were past and loyal clients and because he felt an obligation to serve them. Tr. at 58:7; 59:1.

The circumstances are material because they help explain how the incidents of neglect occurred. Respondent did not give the notices of the calendar events proper attention, so recording the court dates slipped through the administrative cracks of his office procedures; the appointments were not properly noted because they were aberrations, deviations from his current routine of bankruptcy and contract or debtor representation cases that make up most of his practice. Tr. at 54:21; 106:13

The board found a lack of diligence on the part of respondent constituting violations of Rules of Professional Conduct: Prof. Cond. Rule 1.3. They disregarded Comment [3] under Prof. Cond. Rule 1.3 which states in pertinent part: "... The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client."

It is important that the lack of diligence actionable in discipline be distinguished from the lack of diligence that is simply negligence if this rule is to perform as intended;

¹ All references to "Tr." are to the transcript of the disciplinary hearing. Page and line references are separated by a colon. The line cited is the first line of the relevant testimony.

that is, that simple negligence (not accompanied by dishonesty, deceit, or abandonment of clients) not be confused with professional misconduct. Negligence, while obviously not commendable, is not culpable wrongdoing. There are numerous remedies for negligence including malpractice damages.

Respondent was negligent. There was no abandonment of a single client, no cover up, and diligent attention in both cases to remedying his negligence without in any way attempting to exonerate himself or limit his liability.

No client, former client, or member of the public testified or offered a single item of evidence against the respondent. This is a case based on allegations of neglect of clients' cases advanced solely by the local bar association and prosecuted by an attorney colleague (Tr. at 65:23) who evidently is offended by respondent's failure to abide by local mores. Tr. at 116:19.

Objection No. 2

RESPONDENT OBJECTS TO THE RECOMMENDATION OF THE BOARD OVERRULING THE PANEL'S RECOMMENDATION THAT ALL TIME OFF BE SUSPENDED.

Actual time off will not serve to protect the public, is unnecessary to protect the legal system, and is excessive punishment for the conduct proven. A majority of the panel who heard the testimony and personally cross examined respondent concluded that based on the totality of the evidence, actual time off was not required to achieve the objectives of lawyer discipline.

Respondent's transgressions are administrative failures and arise from improper calendar attentiveness. They do not involve dishonesty, theft, deceit, or a conscious

disregard of the Rules of Professional Conduct.

In *Disciplinary Counsel v. Doellman*, 2010-Ohio-5990, Doellman was retained by a bank to do collection work from 1981 to 2001. During this period Doellman violated a number of legal and ethical rules that culminated in legal action by his client and disciplinary proceedings. Doellman's transgressions far exceed any conduct charged against respondent. The court held that Doellman committed eight distinct violations. The court found that, as respondent suggests in the instant case, the violations were anecdotal; they were "separate and independent violations, not a pattern as relator suggests." Thus, the *Doellman* case stands for the proposition that actual time off is not always appropriate simply because several offenses have been asserted and found.

The wrongdoing in the *Doellman* case was more severe than that in the instant case. Doellman was experiencing financial difficulties during the time period in question, and the charges in *Doellman* involved improper handling of client funds; another factor not present. The court found no need to impose an actual suspension.

The Court stated at page 17 of the opinion:

Relator is correct that dishonest or deceitful conduct generally mandates an actual suspension. However,... although respondent's conduct was wrong, it was not deceptive or dishonest. Accordingly, we are not constrained to impose an actual suspension.

The evidence demonstrates that respondent's prior discipline² accomplished its

² *Cleveland Bar Assn v. Berk*, 2007-Ohio-4264

intended modification of respondent's behavior, not the contrary as argued by the board. Respondent recognized and acknowledged his lapses and acted honorably without any attempt to limit his liability to his clients. Tr. at 60:1; 61:3; 62:1; 63:21; 64:1. Serious as they may be, the violations asserted here involve only alleged violations of Rule 1.3.

The board report relies upon three uncharged incidents³ first asserted on cross-examination at the hearing as aggravating factors. Respondent asserts that the three uncharged matters are ordinary events that may be considered commonplace in an active practice. They are not offenses, much less multiple offenses. Consequently, respondent asserts that it is inappropriate and unjust to contend that these matters constitute aggravating factors evidencing the need for harsh discipline.⁴

One case involved a simple miscommunication between respondent and the court about whether a document had been filed. Respondent established at court that it had been filed and the judge dismissed the matter. Tr. at 86:25; 87:1. In another, a client had trouble with a party asserting a claim against the client. The claim had been resolved by respondent some time prior. The client became irate when respondent did not produce the release as quickly as the client believed appropriate and filed a grievance. The document was in a dead file. Respondent produced it and the matter

³ Finding of Fact, Conclusions of Law at page 5

⁴ Respondent had no notice that the uncharged incidents were at issue. He was required to respond without an opportunity to prepare or present witnesses in explanation. Due process requires no less if they are to be used to enhance penalties.

was dismissed. Tr. at 67:18; 68:25; 69:1. The third involved a matter of professional judgment by respondent that it was unnecessary for him to appear at a hearing. The court initially disagreed and issued a show cause order. When respondent explained his reasoning to the judge (Tr. at 78:1 to 81:1), the court dismissed the show cause citation. Tr. at 81:3. Neither of the clients nor the judge filed a grievance or presented evidence against respondent. Bar counsel did not take the stand or submit to cross-examination. The entire line of questioning evidently caused at least one panel member discomfort about either the bar association's tactics or its motives. Tr. at 116:1.

The sole authority relied upon by the board in support of its recommendation is *Disciplinary Counsel v. Fowerbaugh*, 199-Ohio-261. Respondent submits that *Fowerbaugh* is not authority supporting actual time off for respondent from the practice of law. *Fowerbaugh* is the leading, precedent for the proposition that "dishonesty toward a client ... will require severe discipline". *Fowerbaugh* is the foundation precedent in a line of cases including *Disciplinary Counsel v. Rooney*, 2006-Ohio-4567 and *Disciplinary Counsel v. Beeler*, 2005-Ohio-1143 that establish that professional misconduct involving dishonesty will usually warrant actual suspension from the practice of law. *Cincinnati Bar Assn. v Hauck*, 2011-Ohio-3281. *Fowerbaugh*, and its progeny, including *Hauck*, are not material in this case.

Relator, in its trial brief, asserted precedents that were claimed to but do not stand for the proposition that time off has been a sanction in pure lack of diligence cases. There are many lack of diligence cases in which actual time off has not been imposed involving aggravating facts that are absent here.

In *Cleveland Bar Assn v. Norton*, 2007-Ohio-6038, Norton was found to have neglected two cases, failing to communicate his lack of malpractice insurance to his clients, and not cooperating in the professional misconduct investigation. Norton explained that, "... he had simply bitten off more than he could chew while trying to practice on his own for the first time." Norton was given a six month suspension, stayed.

In *Allen Cty Bar Assn v. Brown*, 2010-Ohio-580, Allen was charged with two counts of not acting with diligence and promptness, and being dilatory in reporting receipt of client funds. The hearing panel found a "disturbing pattern" of misconduct but recommended a one year stayed suspension that the court accepted.

The evidence at the hearing before the panel was that respondent's practice included many indigent client cases; serving well over 200 clients referred by the Cleveland Legal Aid Society (Tr. At 38:17), plus others referred by the Cleveland Consumer Protection Agency. Tr. at 54:1. Often the cases involved representing clients pro bono. Tr. at 38:7; 45:1. No referred clients ever complained about respondent neglecting their cases. Tr. at 39:9; 45:22. Although there was no evidence that any client was actually harmed by respondent's temporary neglect of their cases, there was live uncontroverted testimony that the removal of respondent from the practice of law will cause actual harm to the public, particularly the portion of the public underserved by the legal profession because they cannot pay market rates for legal services. Tr. at 41:18; 46:2; 49:1; 50:6.

When this matter was heard by the entire board, the dissenting panel member evidently persuaded a majority of the board to overrule the panel. The board report

adopted the dissenting panel member's conclusion that actual time off is appropriate, overruling the majority's calibrated balancing of the underserved public's interest in access to lawyers with the possibility that respondent might pose a risk in the future, without explanation.

A history of significant service to an underserved, economically deprived clientele is a mitigating factor. See: *Disciplinary Counsel v. Rohrer*, 2009-Ohio-5930; *Cincinnati Bar Assn. v. Lawson*, 2008-Ohio-3340; *Dayton Bar Association v. Corbin*, 2006-Ohio 2289. The testimony in this record constitutes substantial credible evidence that respondent's actual removal would also be contrary to the only logical rationale for overruling the panel's recommendation.

CONCLUSION

Disciplinary cases involving lawyer negligence and lack of diligence are legion but most include neglect plus other violations, or involve consistent failure to attend to clients, or conscious disregard of the Rules of Professional Conduct. The negligence involved when coupled with the mitigation present in this case should not warrant discipline.

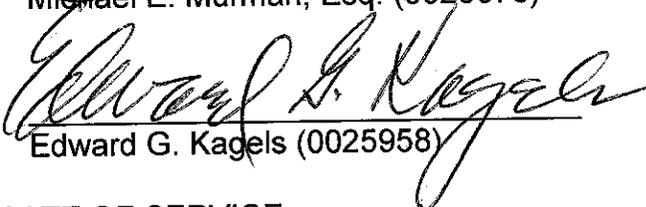
The record here is devoid of evidence of actual client harm. No client spoke a critical word against respondent, likely because respondent acted honorably throughout these matters. Respondent's conduct in recognizing, acknowledging, addressing and mitigating the harm from his admitted negligence establishes that actual suspension would be mere punishment.

Actual time off would be counterproductive to the goals of attorney discipline.

The uncontroverted evidence is that actual time off for this respondent will cause a real and substantial reduction in legal services for an economically deprived, and hence, underserved clientele.

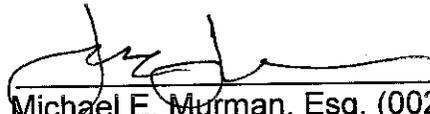
Accordingly respondent requests that this matter be dismissed. If the Court disagrees, then respondent submits that whatever sanction is deemed appropriate should not include any actual suspension from the practice of law.

Respectfully submitted,


Michael E. Murman, Esq. (0029076)

Edward G. Kagels (0025958)

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Amended Objections to Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline, and Respondent's Brief in Support of Objections was served upon Counsel for Relator, Heather Zirke, Esq., Cleveland Metropolitan Bar Association, 1301 East Ninth Street, Second Level, Cleveland, Ohio 44114 and David O. Simon, Esq., 1370 Ontario Street, 450 Standard Building, Cleveland, Ohio 44114 and Rick Dove, Esq., Secretary, The Board of Commissioners on Grievances and Discipline, The Supreme Court of Ohio, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431 this 16 day of August, 2011 by regular United States Mail, postage prepaid.


Michael E. Murman, Esq. (0029076)

Appendix A

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

11-1049

In Re:	:	
Complaint against	:	Case No. 10-090
Robert J. Berk	:	Findings of Fact,
Attorney Reg. No. 0001031	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Cleveland Metropolitan Bar Association	:	the Supreme Court of Ohio
	:	
Relator	:	

FILED
JUN 22 2011
CLERK OF COURT
SUPREME COURT OF OHIO

INTRODUCTION

This matter was heard on May 6, 2011 in Cleveland, Ohio, before a panel consisting of Walter Reynolds, Keith Sommer and Judge Arlene Singer, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Attorneys Michael E. Murman and Edward Kagels represented Respondent, and attorneys David O. Simon and Heather M. Zirke represented Relator, the Cleveland Metropolitan Bar Association.

Respondent was charged in a Complaint, filed October 11, 2010, with violating Prof. Cond. R. 1.3 that states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client" in each of the two counts.

Respondent was admitted to the practice of law in Ohio on November 8, 1969.

On August 29, 2007, Respondent's license to practice law was suspended for one year, stayed on conditions for violating five disciplinary rules. He was also placed on probation for

two years. Respondent had not applied for termination of his probation at the time this complaint was filed. See *Cleveland Bar Assn. v. Berk*, 114 Ohio St.3d 478, 2007-Ohio-4264.

FINDINGS OF FACT

Count One

Respondent filed suit on behalf of his clients Winston Lewis, Rachel Lewis and Irene Papadelis for damages resulting from an auto accident against the driver of the other automobile and her insurance company. The accident occurred on April 23, 2005. Suit was filed on April 10, 2007. The plaintiffs voluntarily dismissed the case, but re-filed it on August 21, 2008.

On March 23, 2009 a case management conference was scheduled in that matter and the court ordered Respondent to initiate the telephone conference. He did not. The matter was continued to April 20, 2009. The trial court stated that Respondent's failure to appear at that conference may result in dismissal. Respondent failed to appear, and the court dismissed the case without prejudice the following day.

Respondent filed a Civ. R. 60(B) motion on May 8, 2009, citing a scheduling oversight, which the court denied on May 13, 2009. New counsel, on behalf of the plaintiffs filed an appeal of this denial. The court of appeals affirmed the trial court's denial.

The plaintiffs in the underlying case filed a malpractice claim against Respondent in March 2010, which was voluntarily dismissed in February 2011, but the parties may still have been in settlement discussions.

Count Two

Respondent filed suit on behalf of his client Kenneth Render for damages resulting from an automobile accident. The accident occurred on August 23, 2005. Suit was filed on July 30, 2007.

A case management conference was scheduled for October 24, 2007, and Respondent was notified of the date, however, Respondent failed to appear. The court scheduled a settlement conference on February 29, 2008, and stated that the failure of Respondent to appear at future court dates may result in dismissal of the case. Respondent failed to appear at the settlement conference. The trial judge dismissed the case with prejudice, stating that Respondent failed "to appear at the case management conference and settlement conference," failed "to conduct or respond to discovery," and failed "to contact the court to explain his absence." With new counsel, plaintiff filed a Civ. R. 60(B) motion, which was denied. The denial was reversed on appeal. However, the appellate court reversed under Civ. R. 60(B)(5) – "interests of justice," not Civ. R.60(B)(1), stating that "Respondent's conduct went 'beyond mere mistake, inadvertence or excusable neglect.'"

Render settled the case with the tortfeasor's insurance company and dismissed the case in November 2010.

CONCLUSIONS OF LAW

The panel finds that Respondent violated Prof. Cond. R. 1.3 in each count.

Respondent argues that, while perhaps negligence or malpractice, his actions were insufficient to constitute a rule violation. He cites the last sentence in Comment [3] of Prof. Cond. R. 1.3, "The lawyer disciplinary process is particularly concerned with lawyers who *consistently* fail to carry out obligations to clients or consciously disregard a duty owed to a client" (emphasis added), to argue that these two cases are out of the many cases Respondent has handled, and thus no consistent neglect is shown.

The evidence belies this argument. The Supreme Court of Ohio has distinguished neglect from negligence when there is a "pattern of disregarding obligations or repeated omissions."

Disciplinary Counsel v. Fowerbaugh (1995), 74 Ohio St.3d 187, 190.

Here, Respondent neglected his duties in two different cases and twice in each case. He explains that somehow the notices from the court "did not make it into his calendar." Respondent claims that his yearly case load is about 400 to 450 files a year, most of which are in the area of bankruptcy or consumer debt, and these cases were personal injury cases – cases out of the ordinary for his current case load. However, Respondent's prior disciplinary case arose out of similar neglect.

Pursuant to the terms of his previous case, Respondent met with the monitoring attorney appointed for the one-year term of Respondent's probation. The first meeting was in October 2007 and the monitoring continued, at least through July 2009. It was during this period of time that Respondent committed the acts that are the subject of this complaint. The monitor's reports do not reference these cases at all. The first missed court date was in the Render case on October 24, 2007 just two months after the Supreme Court's decision in Respondent's prior disciplinary case on August 29, 2007.

MITIGATION AND AGGRAVATION

The panel finds the following aggravating factors pursuant to BCGD Proc. Reg. 10(B)(1):

- (a) a prior disciplinary offense;
- (c) pattern of misconduct; and
- (d) multiple offenses.

The panel finds the following mitigating factors pursuant to BCGD Proc. Reg. 10(B)(2):

- (b) absence of a dishonest or selfish motive;

- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure and a cooperative attitude; and
- (e) character and reputation.

Though not charged as a violation, the monitor did report an incident in November 2008 when Respondent failed to file a document in bankruptcy court and a show cause order was issued by the bankruptcy judge. Respondent promptly filed the document, but failed to attend the show cause hearing as he thought the matter was concluded. The monitor indicated in his quarterly report that the judge concluded the matter anyway as the document had been filed.

Another event in bankruptcy court during the pendency of this case was also explored during the hearing. Respondent represented a bankruptcy petitioner. Respondent failed to attend a hearing involving an issue between who he described as the "real party in interest" and the trustee. Respondent described his client as merely a "stakeholder." Respondent did not think it necessary for him to appear for the hearing, making a deliberate choice not to appear. The bankruptcy judge however had issued a show cause order for which Respondent appeared and explained his reasoning to the judge, who then dismissed the citation. He was, however, admonished because he did not inform the court prior to the court date that he would not appear.

The monitor reported a grievance against Respondent that had been filed in early 2009. Respondent could not promptly find the paperwork in his office to resolve the grievance until several months later. The grievance was then dismissed.

Though not considered as proof of violation of Prof. Cond. R. 1.3, these uncharged incidents are considered as an aggravating factor under BCGP Proc. Reg. 10 (B)(1)(c).

Respondent submitted four letters from individuals attesting to his reputation and good character. Judge Harry Hanna, Alita Struze and Solomon Harge testified in person. These last

three individuals are long time professional acquaintances of Respondent who testified to the many years Respondent has represented the interests of people, either pro bono or for minimal fees, who would have otherwise been unable to afford counsel. Mr. Berk received several awards for this service.

Respondent paid for appellate counsel for Lewis and Renders, insisted upon withdrawing a defense in a malpractice case to benefit his prior client, and insisted to appellate counsel that any blame be directed at him, not his clients, in fashioning arguments to reinstate his clients' cases. Respondent continues to carry malpractice insurance which he relies on to safeguard his clients' interests. In the Lewis case, his malpractice carrier is in settlement discussions with his former client. In Render, the case was settled by his former client and the tortfeasor's insurance company after the case was reinstated on appeal.

SANCTION

Relator requests a one-year suspension of Respondent's license with no more than six months stayed.

Respondent's previous discipline revolved around similar circumstances. Respondent had filed a personal injury suit on behalf of his clients in 2003. He failed to appear at two case management conferences and failed to file a motion for default judgment, resulting in dismissal of his clients' case. When he re-filed the case in 2004, he failed to produce documents and the case was dismissed again.

In addition to a violation of DR 6-101(A)(3) (neglecting an entrusted legal matter), Respondent was found to have violated DR 5-103(B) (providing financial assistance or advancing funds to a client for expenses other than litigation costs); DR 6-102(A) (attempting to exonerate himself or limit his liability to his client for personal malpractice); DR 7-101(A)(2)

(intentionally failing to carry out a contract of professional employment), and DR 7-101(A)(3) (conduct that intentionally prejudices or damages a client). He received a stayed sanction and was placed on probation with a monitor.¹

Respondent has completed the required additional six hours of CLE ordered in law office management. He took an additional CLE on law office management just prior to the hearing. His monitor reported that Respondent had taken steps to improve his calendar system and had organized his office better.

Respondent argues that if any actual suspension is imposed, the public will be harmed as he contributes many hours for minimal fees or pro bono representing people who might not otherwise have representation.

Respondent's large case load is of concern to the panel. Respondent has tried to limit his caseload to bankruptcy and consumer debt cases; both he and his secretary have tried with the help of his monitor to refine his calendar system and keep his office more organized. The panel feels that Respondent has his clients' best interests at heart, and his complained of actions were not deliberate, but that he may still pose harm to the public.

Respondent has apparently made progress with the help of his monitor, has adjusted his calendar system and his caseload. His caseload appears to still be substantial and the continued but uncharged incidents are troubling.

The panel is not unanimous in its recommendation for a sanction. The majority of the panel declines to recommend an actual suspension of Respondent's license. His dedication to his

¹ The Supreme Court's discussion of the sanction in Respondent's previous case referenced *Columbus Bar Assn. v. Micciulla*, 106 Ohio St.3d 19, 2005-Ohio-3470 (neglect of client matters, no prior disciplinary record, no dishonest or selfish motive, and cooperation); *Columbus Bar Assn. v. Halliburton-Cohen* (2002), 94 Ohio St.3d 217 (poor office management resulting in client fund violations); and *Toledo Bar Assn. v. Westmeyer* (1988), 35 Ohio St.3d 261 (neglect of client's legal matter and attempt to exonerate himself from malpractice liability.)

clients is obvious and he shows true remorse. What remains to be seen is if Respondent is capable of practicing law without missing deadlines and court appearances. A third panel member recommends an actual suspension be imposed, namely a one-year suspension, possibly with up to six months stayed.

Therefore, a majority of the panel recommends that Respondent's license be suspended for 18 months, all stayed. In addition, Respondent should be placed on two years' probation with a monitor, to be chosen by Relator. The panel suggests that the monitor be a lawyer who has had more than one successful experience as a monitor, and is familiar with the disciplinary system as well as law office management.

DISSENT

Member Keith Sommer respectfully dissents from the recommended sanction suspending Respondent's license for 18 months, all stayed, and recommends an 18-month suspension with 12 months stayed. I agree that Respondent be placed on two-year probation with a monitor to be chosen by Relator.

The findings of facts and conclusions of law are accurate and the following is submitted to support the dissenting recommended sanction.

On August 29, 2007, the Supreme Court disciplined Respondent for violating five disciplinary rules, including neglecting an entrusted legal matter; attempting to exonerate himself from liability for personal malpractice; and intentionally failing to carry out a contract of professional employment.

Respondent failed to attend a scheduled case management conference April 2003 and the rescheduled conference the following month. Respondent stated at the disciplinary hearing that his conduct was "not good lawyering" and was "not reasonable or appropriate."

The trial judge ordered Respondent to file a motion for default within ten days after June 25, 2003. Respondent failed to file a motion and trial court dismissed his client's case for want of prosecution.

Respondent refilled the case in January 2004 and defendant again failed to respond to the complaint. Respondent was ordered by the court to provide documents to allow the court to grant a default judgment. Respondent did not provide requested documents and the case was again dismissed.

In the Kenneth Render count of the instant case, Respondent failed to appear at a case management conference scheduled on October 24, 2007, which was two months after his initial Supreme Court suspension. On October 30, 2007, the court issued a journal entry stating failure to appear at future court dates may result in dismissal and set a settlement conference for February 29, 2008. Respondent failed to appear, and the judge dismissed the case with prejudice. The Eighth District Court of Appeals reversed the trial court's denial of a motion to vacate judgment filed by the new counsel, but stated that Respondent's conduct was "beyond mere mistake, inadvertence or excusable neglect."

In the Lewis/Papadelis case, a case management conference was scheduled on March 23, 2009, and the court ordered Respondent to initiate the telephone conference, which he did not do. The conference was continued to April 20, 2009, and the trial court stated that Respondent's failure to appear at that conference may result in dismissal. Respondent failed to appear, and the judge dismissed the case without prejudice. The Court of Appeals affirmed the dismissal, stating Respondent "did not assert any operative facts explaining to the trial court how his scheduling oversight amounted to 'excusable neglect' or 'extraordinary circumstances'."

It is also apparent that Respondent did not report the above incidents to his probation monitor.

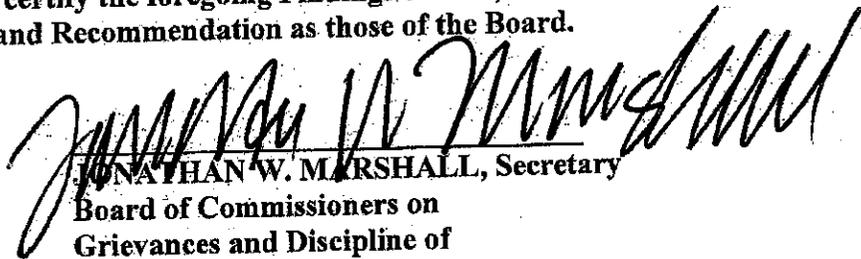
The panel report correctly reflects an incident in November 2008 when Respondent failed to file a document in bankruptcy court, and a show-cause order was issued by the bankruptcy judge. Respondent filed the required document but failed to attend the show-cause hearing as he thought the matter was concluded.

In that case, Respondent failed to attend a hearing and the bankruptcy judge issued a show-cause order against Respondent a few days before this panel hearing. Respondent explained that his client was merely a stakeholder, and he did not think it was necessary for him to appear at the hearing. Respondent testified that he explained this to the bankruptcy judge who then dismissed the citation. He was, however, admonished because he did not inform the court prior to the court date that he would not appear.

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 June 10, 2011. The Board adopted the Findings of Fact, and Conclusions of Law of the Panel. The Board adopted the dissent on sanction and recommends that Respondent, Robert J. Berk, be suspended from the practice of law for a period of eighteen months with twelve months stayed and that Respondent be placed on two-year probation with a monitor following his suspension. 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

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

FILED

MAY 04 2011

BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In Re:

Complaint Against

ROBERT J. BERK
Respondent

CLEVELAND METROPOLITAN
BAR ASSOCIATION
Relator

:

:

:

:

Bd. Case Number 10-090

AGREED STIPULATIONS

AGREED STIPULATIONS

Relator, the Cleveland Metropolitan Bar Association, and Respondent Robert J. Berk do hereby stipulate to the admission of the following facts and exhibits.

STIPULATED FACTS

1. Robert J. Berk, Ohio Supreme Court Registration Number 001031, was admitted to practice law in Ohio on November 18, 1969, and is subject to the Supreme Court Rules for the Government of the Bar of Ohio and the Ohio Rules of Professional Conduct.
2. On August 29, 2007, the Ohio Supreme Court disciplined Respondent for violating five disciplinary rules, including neglect of a legal matter to the prejudice of a client and attempting to limit his liability for legal malpractice. *Stip. Exhibit A.*
3. As a result of Respondent's five disciplinary rule violations, the Court suspended Respondent's license to practice law for a one-year term which was stayed on

conditions, and ordered two years of probation. Respondent has not applied for termination of his probation.

COUNT ONE

4. Respondent was hired by Winston Lewis, Rachel Lewis, and Irene Papadelis ("Plaintiffs") to file a lawsuit against Ashley Brzozowski and her insurance company because of an accident caused by Ms. Brzozowski on April 23, 2005.

5. Respondent filed a complaint on behalf of the Plaintiffs which was captioned *Winston Lewis, et al. v. Ashley Brzozowski* in the Cuyahoga County Court of Common Pleas on April 10, 2007. *Stip. Exhibit B.*

6. Plaintiffs voluntarily dismissed their case on October 26, 2007, and subsequently re-filed it on August 21, 2008.

7. The first case management conference was scheduled for December 11, 2008, but Plaintiffs were not able to effectuate service of process by that date.

8. The trial court rescheduled the case management conference for March 23, 2009, and ordered Respondent to initiate the conference by telephone.

9. Respondent did not initiate or otherwise participate in the March 23, 2009 case management conference.

10. On March 24, 2009, the trial court issued a judgment entry stating that Respondent failed to appear, and rescheduled the conference.

11. The trial court rescheduled the case management conference for April 20, 2009, and stated that Respondent's failure to appear may result in dismissal.

12. Respondent failed to attend the April 20, 2009 case management conference.

13. On April 21, 2009, the trial court issued a judgment entry stating that Respondent failed to appear, and dismissed the Plaintiffs' case without prejudice.

14. On May 8, 2009, Plaintiffs sought relief from judgment in the trial court by filing a Civ.R.60(B) motion, arguing that Respondent's failure to attend the case management conferences was due to mistake, inadvertence, or excusable neglect because of a scheduling oversight.

15. On May 13, 2009, the trial court denied Plaintiffs' Civ.R.60(B) motion.

16. Plaintiffs, through new counsel, appealed the trial court's denial of their Civ.R.60(B) motion to the Eighth District Court of Appeals. The Court of Appeals affirmed the trial court's ruling to dismiss the case, stating that Respondent "did not assert any operative facts explaining to the trial court how his scheduling oversight amounted to 'excusable neglect' or 'extraordinary circumstances.'" *Stip. Exhibit C.*

17. On March 12, 2010, Plaintiffs filed a legal malpractice action against Respondent. The case was voluntarily dismissed on February 18, 2011.

COUNT TWO

18. On or about August 23, 2005, Kenneth Render ("Mr. Render") was involved in a motor vehicle accident in Highland Heights, Ohio.

19. On July 30, 2007, Respondent, on behalf of Mr. Render, filed suit against the other driver, Sherri Belle, in the Cuyahoga County Court of Common Pleas, alleging damages resulting from the accident. *Stip. Exhibit D.*

20. On September 29, 2007, the trial court scheduled a case management conference for October 24, 2007, and notified Respondent of the date.

21. Respondent failed to appear for the October 24, 2007 case management conference.

22. On October 30, 2007, the court issued a journal entry stating that Respondent's failure to appear at future court dates may result in dismissal of the case. In the same entry, the court set a settlement conference for February 29, 2008.

23. Respondent failed to appear for the February 29, 2008 settlement conference.

24. On March 12, 2008, the trial court issued a journal entry stating that Respondent failed to appear, and Judge Shirley Strickland Saffold dismissed the case with prejudice.

25. On March 9, 2009, Mr. Render, through new counsel, filed a Motion to Vacate Judgment pursuant to Civ.R.60(B).

26. On March 30, 2009, the trial court denied Mr. Render's motion, citing Respondent's failure to appear at the case management conference and the settlement conference, his failure to conduct or respond to discovery, and his failure to contact the court to explain his absence.

27. On April 22, 2009, Mr. Render appealed the trial court's ruling to the Eighth District Court of Appeals.

28. The Eighth District reversed the trial court's decision denying Mr. Render's Motion to Vacate Judgment, holding that such denial was an abuse of the trial court's discretion. The Eighth District found that Mr. Render was not entitled to relief under Civ.R.60(B)(1) since Respondent's conduct went "beyond mere mistake,

inadvertence or excusable neglect," but granted relief based on Civ.R.60(B)(5) based on the "interests of justice." *Stip. Exhibit E.*

29. On November 23, 2010, Mr. Render's case was settled and dismissed.

AGGRAVATING FACTORS

30. Respondent admits that he has prior discipline. *Stip. Exhibit A.* (BCGD Proc. Reg. 10(B)(1)(a))

STIPULATED EXHIBITS

Exhibit A	Cleveland Bar Association v. Berk, 114 Ohio St.3d 478 (2007).
Exhibit B	Cuyahoga County Court of Common Pleas Docket for Winston T. Lewis, et al. v. Ashley Brzozowski, et al., Case No. CV-08-668431.
Exhibit C	Eighth District Court of Appeals Decision dated November 5, 2009, Case No. CA-09-93413.
Exhibit D	Cuyahoga County Court of Common Pleas Docket for Kenneth Render v. Sherri Bellet, et al., Case No. CV-07-631227.
Exhibit E	Eighth District Court of Appeals Decision dated May 27, 2010, Case No. CA-09-93181.

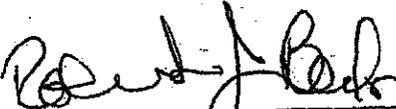
CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 3 day of May, 2011.


HEATHER M. ZIRKE (0074994)
Cleveland Metropolitan Bar Association
1301 East Ninth Street - Second Level
Cleveland, OH 44114-1253
(216) 539-5971 - Telephone
(216) 696-2413 - Facsimile
hzirke@clemetrobar.org
Counsel for Relator
Cleveland Metropolitan Bar Association

DAVID O. SIMON (0006050)
1370 Ontario Street
450 Standard Building
Cleveland, OH 44114
(216) 621-6201 - Telephone
(216) 575-1405 - Facsimile
dsimon@epiqtrustee.com


MICHAEL E. MURMAN (0029076)
14701 Detroit Avenue, Suite 555
Lakewood, OH 44107
(216) 228-6996 - Telephone
(216) 226-9011 - Facsimile
murmanlaw@aol.com

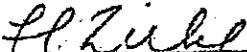

ROBERT J. BERK (0001031)
75 Public Square, Second Level
Cleveland, OH 44114
(216) 241-3880 - Telephone

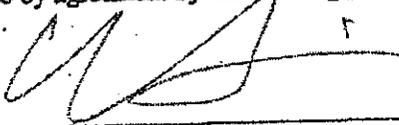
Counsel for Respondent
Robert J. Berk

Respondent

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 3 day of May, 2011.


HEATHER M. ZIRKE (0074994)
Cleveland Metropolitan Bar Association
1301 East Ninth Street - Second Level
Cleveland, OH 44114-1253
(216) 539-5971 - Telephone
(216) 696-2413 - Facsimile
hzirke@clemetrobar.org
Counsel for Relator
Cleveland Metropolitan Bar Association


DAVID O. SIMON (0006050)
1370 Ontario Street
450 Standard Building
Cleveland, OH 44114
(216) 621-6201 - Telephone
(216) 575-1405 - Facsimile
dsimon@epiqtrustee.com


MICHAEL E. MURMAN (0029076)
14701 Detroit Avenue, Suite 555
Lakewood, OH 44107
(216) 228-6996 - Telephone
(216) 226-9011 - Facsimile
murmanlaw@aol.com


ROBERT J. BERK (0001031)
75 Public Square, Second Level
Cleveland, OH 44114
(216) 241-3880 - Telephone

Counsel for Respondent
Robert J. Berk

Respondent

CERTIFICATE OF SERVICE

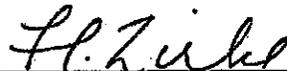
A copy of the foregoing has been served upon the following individuals via email this
3 day of May, 2011:

Hon. Arlene Singer
Sixth District Court of Appeals
One Constitution Avenue
Toledo, OH 43604

Keith Sommer
409 Walnut Street
P.O. Box 279
Martins Ferry, OH 43935

Walter Reynolds
One South Main Street, Suite 1600
Dayton, OH 45402

Michael E. Murman
14701 Detroit Avenue
Lakewood, OH 44107



HEATHER M. ZIRKE (0074994)
Cleveland Metropolitan Bar Assn.

Counsel for Relator
Cleveland Metropolitan Bar Assn.

Appendix B

RULE 1.3: DILIGENCE

A lawyer shall act with *reasonable* diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

[2] A lawyer must control the lawyer's work load so that each matter can be handled competently.

[3] Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

[4] A lawyer should carry through to conclusion all matters undertaken for a client, unless the client-lawyer relationship is terminated as provided in Rule 1.16. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about post-trial alternatives including the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to pursue those alternatives or prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rules 1.2(c) and 1.5(b).

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. *Cf.* Rule V, Section 8(F) of the Supreme Court Rules for the Government of the Bar of Ohio.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.3 replaces both DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him) and DR 7-101(A)(1) (with limited exceptions, a lawyer shall not fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules).

Neither Model Rule 1.3 nor any of the Model Rules on advocacy states a duty of “zealous representation.” The reference to acting “with zeal in advocacy” is deleted from Comment [1] because “zeal” is often invoked as an excuse for unprofessional behavior. Despite the title of Canon 7 of the Ohio Code of Professional Responsibility and the content of EC 7-1, no disciplinary rule requires “zealous” advocacy. Moreover, the disciplinary rules recognize that courtesy and punctuality are not inconsistent with diligent representation [DR 6-101(A)(3)], that a lawyer, where permissible, may exercise discretion to waive or fail to assert a right or position [DR 7-101(B)(1)], and that a lawyer may refuse to aid or participate in conduct the lawyer believes to be unlawful, even though there is some support for an argument that it is lawful [DR 7-101(B)(2)].

Comparison to ABA Model Rules of Professional Conduct

There is no change to the text of Model Rule 1.3.

The reference in Comment [1] to a lawyer’s use of “whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor” and the last three sentences of the comment have been stricken. The choice of means to accomplish the objectives of the representation are governed by the lawyer’s professional discretion, and the lawyer’s duty to communicate with the client, as specified in Rules 1.2(a) and 1.4(a)(2).

The reference to a lawyer’s duty to act “with zeal in advocacy upon the client’s behalf” also is deleted. Zealous advocacy is often invoked as an excuse for unprofessional behavior.

Comment [3] is revised to state more concisely the consequences of lawyer delay and neglect in handling a client matter and explain when charges of neglect are likely to be the subject of professional discipline.

The first sentence of Comment [4] is reworded and the balance of that sentence and the second sentence are deleted. The content of the deleted language is addressed in Rule 1.2.

Comment [5] is revised to refer to Gov. Bar R. V, Section 8(F). That rule authorizes Disciplinary Counsel or the chair of a certified grievance committee to appoint a lawyer to inventory client files and protect the interests of clients when a lawyer does not or cannot (because of suspension or death) attend to clients and no partner, executor, or other responsible party capable of conducting the lawyer’s practice is available and willing to assume responsibility.