

**IN THE
SUPREME COURT OF OHIO**

In re:

William M. Crosby
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Lakewood, OH 44107
Attorney Registration No. (0002451)

Respondent

CASE NO. 2011-1453

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

Relator

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

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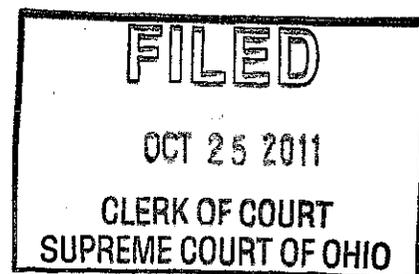


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**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
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Now comes relator, Disciplinary Counsel, and hereby submits this answer to Respondent William M. Crosby's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

On January 24, 2011, relator filed a five-count amended disciplinary complaint against respondent alleging that he failed to file Federal tax returns or pay his personal taxes for 6 years and intentionally used his IOLTA account to conceal his assets, resulting in a felony conviction for attempted tax evasion; engaged in an intentional and extended pattern of dishonesty with clients, counsel and a bankruptcy trustee; misled his client Jose Rivera about the status of his lawsuit, misappropriated nearly \$80,000 from Rivera and purposely advised Rivera to mislead a bankruptcy trustee; failed to notify five clients that he did not maintain malpractice insurance;

and made false and misleading statements during his testimony in the Rivera malpractice lawsuit and during relator's investigation of this matter.

Relator recommended that respondent be permanently disbarred. Respondent recommended a two year suspension to run concurrently with his present two year suspension. The Board found that respondent's "overall pattern of dishonesty in dealing with the IRS, the bankruptcy trustee, his clients, the court system and the disciplinary process warrants the harshest penalty" and recommended disbarment. [Report at 21] Relator now answers respondent's objections to the Board's recommendation that he be permanently disbarred.

STATEMENT OF FACTS

Count I

On June 30, 2010, respondent pled guilty to willfully attempting to evade and defeat the payment of Federal income tax by concealing the nature and extent of his income and assets, a felony offense. [Report at 3; Tr. at 33; Stip. 4, 5] In entering this plea, respondent admitted that he did not file personal income tax returns and did not make any income tax payments to the Internal Revenue Service (IRS) for the years 2001 through 2006. [Report at 4; Tr. at 34; Stip. 7] However, respondent's income during these same years ranged from \$109,089 to \$227,217. [Tr. at 35-36; Stip. Ex. 3]

As a part of his plea, respondent further admitted that he used his IOLTA account to conceal his assets from the IRS, prevent the IRS from seizing his assets, and disburse funds in a manner to conceal his income and disposition of his income from the IRS. [Report at 5; Stip. 8;

Tr. at 37] Respondent's admission that he used his IOLTA in this manner is in direct contradiction to his testimony under oath during his prior disciplinary case that he had not done so. [Tr. at 37-39]

Respondent was sentenced to five months of incarceration and two years of supervised release and ordered to pay \$314,637 in restitution to the IRS. [Report at 6; Stip. Ex. 4] On November 1, 2010, this Court suspended respondent for an interim period due to his felony conviction. [Report at 7; Stip. Ex. 5]

Respondent stipulated and the Board found that respondent's conduct in Count I violates the Code of Professional Responsibility: DR 1-102(A)(3) [a lawyer shall not engage in illegal conduct involving moral turpitude]; DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(5) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice]; and DR 1-102(A)(6) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law]. [Report at 16]

Count II

In or about June 2002, respondent undertook representation of Jose Rivera and Beningo Pacheco, who alleged that they had been sexually abused by a Catholic priest. [Report at 8; Tr. at 45, 46; Stip. 11] Respondent undertook this representation as a solo practitioner with Minnesota attorney Jeffrey Anderson as co-counsel. [Report at 10; Relator's Ex. 1; Tr. at 53] Respondent failed to advise Rivera and Pacheco that he did not maintain malpractice insurance,

failed to provide them with a written notice containing this information and did not obtain their signature on any such written notice. [Report at 11; Tr. at p. 47-48; Stip. Ex. 6]

On June 24, 2002, respondent filed a lawsuit on behalf of Rivera and Pacheco, and subsequently amended the complaint to add Marco Aponte, Hector Fonseca and Jose Garcia as plaintiffs, for a total of five plaintiffs. [Report at 12,13; Tr. at 56; Relator's Ex. 2, 3]

In January of 2003, Rivera filed for bankruptcy and was represented in his bankruptcy by Attorney James Kerner. [Report at 14; Stip. 16; Tr. at 149] Rivera's bankruptcy petition listed the lawsuit against the Catholic Church as an asset. [Stip. 16; Tr. at 58] On April 28, 2003, the bankruptcy court issued an order discharging Rivera's debts. [Report at 15; Relator's Ex. 5]

In June 2003, the Catholic Church and respondent's five clients settled their lawsuit. [Report at 16; Tr. at 59] Around this same time period, Attorney Anderson provided respondent with an accounting of \$15,579.21 in costs and expenses associated with the representation he provided to the five clients. [Report at 16; Stip. 17; Tr. at 65; Stip. Ex. 7] Because respondent and Anderson were involved in representing several parties against the Catholic Church, Anderson advised respondent that his costs and expenses should be pro-rated. [Report at 72; Relator's Ex. 20 at p. 9-12; Stip. 67]

On or about June 19, 2003, respondent met with Rivera and presented him with the settlement agreement. [Report at 17; Stip. 19; Tr. at 67; Stip. Ex. 8] Rivera signed the settlement agreement, but at respondent's urging, did not read the document. [Tr. at 151-152,

183-184] As such, Rivera was unaware his legal matter had actually been settled for \$175,000. [Report at 18; Tr. at 184-187] Respondent did not inform the trustee for Rivera's bankruptcy, Attorney Marvin Sicherman, about the Rivera settlement or seek bankruptcy court approval for the settlement agreement or the attorney fees. [Report at 19; Tr. at 60-62, 270; Stip. 18]

As a part of the settlement, respondent received a \$175,000 check in late June of 2003 payable to Rivera and his law firm. [Report at 20; Stip. Ex. 9; Stip. 20] On the back of the check, respondent signed "Jose Rivera (per POA)." [Report at 21; Stip. 21; Tr. at 69-70] However, Rivera never signed a power of attorney granting respondent permission to sign his name and respondent signed the check on behalf of Rivera without the advance knowledge or permission of Rivera. [Report at 21; Tr. at p. 152-153]

Shortly after receiving the settlement checks, respondent prepared settlement distribution sheets for Pacheco, Aponte, Fonseca and Garcia which indicated each was charged a 40 percent contingency fee and \$5,000 apiece for their individual pro rata share of expenses. [Report at 23; Tr. at 73-74; Stip. Ex. 11; Stip. 25] Respondent then promptly disbursed the full settlement owed to Pacheco, Aponte, Fonseca and Garcia and paid a co-counsel fee for all clients to Anderson. [Stip. 26; Relator's Ex. 7]

Respondent did not prepare a settlement distribution sheet for Rivera or obtain Rivera's signature on any such document. [Report at 22; Tr. at 71] However, a document created by respondent labeled "Jose Rivera Spreadsheet" indicates that Rivera was charged a 40 percent contingency fee [divided among respondent, Anderson and Attorney Carter Dodge] against his

\$175,000 settlement. [Report at 22; Stip. 22; Tr. at 72; Stip. Ex. 10] Rivera was also charged \$10,000 for "Expenses Reimbursement Jeff Anderson." [Report at 22; Stip. 23; Stip. Ex. 10; Tr. at 73] Despite holding at least \$95,000 in settlement funds owed to Rivera, respondent did not promptly disburse any of the funds to Rivera. [Report at 24; Tr. at 79]

On July 11, 2003, Bankruptcy Trustee Sicherman faxed a letter to respondent and co-counsel Anderson. [Report at 26; Tr. at 80; Stip. Ex. 12; Stip. 28] The letter asked respondent, in part, to "Please advise me of the status of the case, and if you wish to be engaged as special counsel to the trustee in bankruptcy to prosecute Mr. Rivera's claim. The claim cannot be settled without the consent and an order of the Bankruptcy Court." [Report at 26; Stip. 28; Stip. Ex. 12] Respondent did not reply to Sicherman's July 11, 2003 letter. [Report at 27; Stip. 29; Tr. at 81-82, 271]

On July 22, 2003, Rivera's bankruptcy attorney Kerner, sent a fax to Trustee Sicherman advising him that Rivera's "case against the diocese has apparently been settled for \$175,000." [Report at 28; Stip.30; Stip. Ex. 13; Tr. at 155] Kerner used the word "apparently" because Rivera did not know any specific details about his settlement and was relying on information he obtained from the other plaintiff's who had already been paid. [Tr. at 155-156, 234, 251] At this point in time, Rivera and Kerner were unclear whether the \$175,000 amount represented Rivera's settlement or the entire settlement for all five plaintiff's. [Tr. at 156, 234-235]

On July 24, 2003, Anderson provided Sicherman with a copy of the check he received from respondent for co-counsel attorney fees. [Report at 29; Tr. at 82-83; Stip. Ex. 14; Stip. 31]

On the same date, Anderson sent respondent a letter advising him that he had been contacted by Sicherman and advising him what he had told Sicherman. [Report at 29; Relator's Ex. 8]

In or about August of 2003, Rivera contacted respondent to get an update on the status of his lawsuit. [Report at 30] During this conversation, respondent advised Rivera that he was automatically entitled to "a \$5,000 personal injury exemption . . . under bankruptcy law," and on August 21, 2003, respondent disbursed \$5,000 to Rivera. [Report at 30; Tr. at 86, 156-157; Stip. Ex. 15] The memo on the check identifies this payment as a "net distribution exemption." [Report at 30; Stip. Ex. 15] Respondent did not inform Rivera's bankruptcy attorney or the bankruptcy trustee prior to disbursing these funds. [Tr. at 87]

In or about October of 2003, Rivera contacted respondent to get another update on the status of his lawsuit and advised respondent that he was also in need of funds due to a recent serious physical injury. [Report at 31; Tr. at 87, 158, 189; Stip. 33] During this conversation, respondent advised Rivera that he would "loan" Rivera some additional funds. [Tr. at 158, 189] On October 11, 2003, respondent disbursed \$10,000 to Rivera from the settlement funds that he was holding in his IOLTA account. [Report at 31; Tr. at 88; Stip. Ex. 16] Respondent did not inform Rivera's bankruptcy attorney or the bankruptcy trustee prior to disbursing these funds. [Tr. at 88]

On February 14, 2004, Trustee Sicherman sent respondent another letter seeking information about the Rivera settlement. [Report at 32; Tr. at 88; Stip. Ex. 17] In this letter, Sicherman stated "for many months my attempts to get an accounting of the funds distributed to

[Rivera] have been thwarted." [Report at 32; Stip. Ex. 17] Sicherman further advised Respondent that "if I can't get your cooperation and a report as to the amount and when it was paid to Mr. Rivera, I will have no choice but to get an Order issued by the Bankruptcy Court for your appearance with the necessary documents." [Report at 32; Stip. Ex. 17]

Respondent replied to Sicherman on February 23, 2004 and advised Sicherman that "nothing in the character of compensation paid to them was 'income' or 'windfall'" and characterized Rivera's settlement as "nominal compensation." [Report at 33; Stip. Ex. 18] Respondent further advised Sicherman that he would "seek permission from Jose Rivera to promptly disclose the amount paid to him" and that after respondent "saw the discharge in bankruptcy to Mr. Rivera and I presumed apparently incorrectly that this was a resolved matter." [Report at 34; Stip. Ex. 18]

On March 2, 2004, respondent sent a letter to Sicherman that stated "I spoke to Mr. Rivera who called me to ask if the fifteen thousand dollars that he received as his distribution ... was taxable. He agreed to permit me to disclose this information to you." [Report at 35; Stip. Ex. 19] Respondent's March 2, 2004 letter to Sicherman intentionally failed to disclose the full \$175,000 settlement amount and misleadingly suggested that the lawsuit was settled with Rivera receiving a total of \$15,000. [Report at 36; Tr. at 89-91, 273-274]

On March 23, 2004, respondent sent an e-mail to Rivera that, in part, advised Rivera to falsely inform Trustee Sicherman that Rivera had only received \$15,000 from the lawsuit. [Report at 37; Stip. Ex. 20; Tr. at 92, 161] On May 12, 2004, respondent sent an e-mail to

Rivera that, in part, asked Rivera "if we can reasonably be assured that the [bankruptcy trustee's] inquiries are at an end and I can safely pay you over the balance which I've held in escrow, and not subsequently be stuck with a huge bill." [Report at 38; Stip. Ex. 23; Tr. at 95-96] On June 8, 2004, respondent disbursed the remaining \$80,000 to Rivera. [Report at 39; Stip. Ex. 26] The memo on the check identifies this payment as the "final distribution." [Report at 39; Stip. Ex. 26]

On August 12, 2004, Trustee Sicherman filed a motion seeking the court to order Rivera to turnover \$15,000, premised on the trustee's mistaken belief that this was the total amount of Rivera's personal injury settlement. [Report at 40; Tr. at 96-97, 274-275; Relator's Ex. 9] At the time, Rivera and Kerner erroneously concluded that the \$15,000 amount sought by Sicherman was the figure agreed upon between respondent and Sicherman to be paid as full satisfaction. [Tr. at 197, 236, 253-254]

On August 17, 2004, Rivera sent respondent an e-mail advising respondent that his bankruptcy attorney James Kerner "said [respondent] was wrong. That the diocese claim was an asset and that I was not entitle [sic] to any of the money and that you should have turned it over to the trustee." [Report at 41; Tr. at 97; Stip. Ex. 29] Respondent replied to Rivera's e-mail the next day and advised Rivera, in part, "Don't be afraid. Kerner is an idiot" and directed Rivera to "Ask Kerner for your file." [Report at 42; Stip. Ex. 30]

On October 15, 2004, legal counsel for Trustee Sicherman sent a letter to respondent requesting him to provide documentation regarding the Rivera settlement and respondent did not

reply to this letter. [Report at 43; Stip. Ex. 36; Tr. at 100] On November 15, 2004, the bankruptcy court issued an order for respondent to appear on December 3, 2004, produce certain documents and provide testimony and respondent failed to appear as ordered by the bankruptcy court. [Report at 44; Stip. Ex. 37; Tr. at 276; Stip. 44]

On December 15, 2004, legal counsel for Trustee Sicherman sent respondent a letter advising him that unless he provided the documents pursuant to the bankruptcy court order, a contempt motion would be filed against him. [Report at 45; Stip. Ex. 38] On December 30, 2004, Trustee Sicherman filed a contempt motion against respondent for his failure to appear on December 3, 2004 and produce documents. [Report at 46; Relator's Ex. 11]

On January 27, 2005, Trustee Sicherman attempted to take respondent's deposition regarding his representation of Rivera. [Report at 47; Tr. 105] Respondent appeared for the deposition and produced several documents, but declined to answer any specific questions about his representation of Rivera. [Report at 47; Stip. 47; Tr. at 106] On February 21, 2005, Trustee Sicherman attempted to take respondent's deposition a second time regarding his representation of Rivera. [Report at 48; Stip. 48] Respondent appeared for the deposition, but declined to answer any specific questions about his representation of Rivera. [Report at 48; Tr. at 106; Stip. 48]

On March 14, 2005, Trustee Sicherman filed a complaint for monetary damages against respondent and Rivera. [Report at 49; Tr. at 106-107; Relator's Ex. 14] The complaint sought the remaining \$80,000 in settlement funds paid to Rivera and the \$17,500 in settlement funds

paid to respondent as attorney fees. [Report at 49; Relator's Ex. 14] On February 13, 2006, the bankruptcy court revoked Rivera's discharge of his debts due to his failure to provide Trustee Sicherman with his entire \$95,000 share of the \$175,000 settlement. [Report at 50; Stip. 50] As a result of the revocation, Rivera has suffered health problems, his paycheck has been garnished and his wife was forced to refinance the home they live in, to avoid a trustee-initiated foreclosure. [Tr. at 167-168, 293]

On March 14, 2007, Trustee Sicherman attempted to take respondent's deposition for a third time regarding his representation of Rivera. [Report at 51; Stip. 51] Respondent appeared for the deposition, but invoked the Fifth Amendment privilege and spousal privilege and declined to answer any specific questions about his representation of Rivera. [Report at 51; Stip. 51]

On March 10, 2009, the bankruptcy court granted Trustee Sicherman's summary judgment against respondent and Rivera based upon the complaint for monetary damages. [Report at 53; Stip. 52] The court granted a joint and several judgment against respondent and Rivera for \$35,257.16 and a judgment against respondent for the \$17,500 in settlement funds paid to respondent as attorney fees. [Report at 53, Stip. 52]

The Board found that respondent's conduct in Count II violates the Code of Professional Responsibility: DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(5) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice]; DR 1-102(A)(6) [a lawyer shall not engage in

conduct that adversely reflects on the lawyer's fitness to practice law]; DR 1-104 [a lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance]; DR 7-102(A)(3) [in his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal]; DR 7-102(A)(7) [in representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal fraudulent]; and DR 9-102(B)(3) [a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them]. [Report at 16]

Count III

On July 1, 2003, respondent deposited Rivera's \$175,000 settlement check into his IOLTA account. [Report at 56; Stip. Ex. 9; Tr. at 112; Stip. 53] After a 40 percent contingent fee and \$10,000 expense reimbursement were deducted from the settlement, Rivera was owed \$95,000. [Report at 57; Stip. 54] After respondent's August 21, 2003 disbursement of \$5,000 to Rivera from his settlement, respondent's IOLTA account should have held a balance of not less than \$90,000, reflecting the funds still owed to Rivera. [Report at 59; Stip. 56] On August 31, 2003, the balance in respondent's IOLTA account was \$82,959.84. [Report at 60; Stip. 57]

On October 11, 2003, respondent disbursed an additional \$10,000 in settlement funds to Rivera. [Report at 61; Stip. 58] Therefore, after this disbursement respondent's IOLTA account should have held a balance of not less than \$80,000, reflecting the funds still owed to Rivera.

[Report at 62; Stip. 59] On October 31, 2003, the balance in Respondent's IOLTA account was \$4,619.84. [Report at 63; Stip. Ex. 43; Stip.60]

On May 31, 2004, respondent's IOLTA balance was \$43.52. [Report at 64; Stip. Ex. 44; Stip. 61] On June 4, 2004, respondent deposited \$500,001 in unrelated settlement proceeds into his IOLTA account. [Report at 65; Stip. Ex. 45] Funds from this deposit were then used by respondent on June 8, 2004 to disburse the remaining \$80,000 owed to Rivera. [Report at 65; Stip. 61]

Respondent's IOLTA balance was below the amount of settlement funds owed to Rivera and being purportedly held by him in his IOLTA from August 31, 2003 through June 4, 2004. [Report at 66; Stip. 62] As such, respondent misappropriated nearly \$80,000 in funds belonging to Rivera. [Report at 66; Stip. 62; Tr. at 113]

The Board found that respondent's conduct in Count III violates the Code of Professional Responsibility: DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; and DR 1-102(A)(6) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law].¹ [Report at 17]

¹ The Board also found a violation of DR 9-102(B)(3) in error. A request by relator to dismiss his violation was granted by the hearing panel. [Tr. at p. 407]

Count IV

In June and July 2002, the respondent undertook representation of Jose Rivera, Beningo Pacheco, Hector Fonseca, Marco Aponte and Jose Garcia, who alleged that they had been sexually abused by a Catholic priest. [Report at 67; Tr. at 46, 115; Stip. 63] Respondent entered into a contingency fee agreements with these five plaintiff's and Minnesota attorney Jeffrey Anderson was respondent's co-counsel. [Report at 68; Stip. 64; Stip. Ex. 10, 11]

Respondent failed to advise Pacheco, Fonseca, Garcia and Aponte that he did not maintain malpractice insurance, failed to provide them with a written notice containing this information and did not obtain their signature on any such written notice. [Report at 69; Tr. at 47-48]

In June 2003, the Catholic Church and respondent's clients entered into a settlement of the lawsuit. [Report at 71; Stip. 66] During this same time period, Attorney Anderson provided respondent with an accounting of \$15,579.21 in costs and expenses associated with the representation he provided. [Report at 71; Stip. 66] Because respondent and Anderson were involved in representing several parties against the Catholic Church, Anderson advised respondent that his costs and expenses should be pro-rated. [Report at 72; Relator's Ex. 20 at p. 9-12; Stip. 67]

Respondent received the settlement checks in late June 2003. [Report at 73; Stip. 68] Respondent prepared a settlement distribution sheet for Pacheco, Fonseca, Garcia and Aponte

which indicated each was charged a 40 percent contingency fee and \$5,000 apiece for their individual pro rata share of case-related expenses. [Report at 74; Tr. at 116; Stip. Ex. 11] Respondent charged Rivera \$10,000 for "Expenses Reimbursement Jeff Anderson" and charged the remaining four clients \$5,000 apiece for their individual pro rata share of expenses. [Report at 75; Stip. Ex. 10, 11] Therefore, respondent charged his five clients a total of \$30,000 for expenses, but is unable to produce any documentation for expenses beyond the \$15,579.21 in expenses documented by Anderson or explain why Rivera was charged twice as much for expenses as the other four clients. [Report at 76; Tr. at 116-117; Stip. 72]

In June 2005, Garcia and Aponte filed a malpractice lawsuit against respondent. [Report at 77; Tr. at 117; Relator's Ex. 17] In their lawsuit, Garcia and Aponte alleged that respondent charged Garcia and Aponte \$5,000 apiece for improperly divided, invalid and/or nonexistent expenses. [Report at 78; Relator's Ex. 17] In May of 2006, respondent, Garcia and Aponte entered into a settlement agreement under which the respondent paid Garcia and Aponte \$5,000 apiece. [Report at 79; Relator's Ex. 18; Tr. at 118]

The Board found that respondent's conduct in Count IV violates the Code of Professional Responsibility: DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(5) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice]; DR 1-102(A)(6) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law]; DR 1-104 [a lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance]; DR 7-102(A)(3)

[in his representation of a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal]; DR 9-102(B)(3) [a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them]; and DR 9-102(B)(4) [a lawyer shall promptly pay or deliver to the client as requested by the client the funds, securities or other properties of in possession of the lawyer which the client is entitled to receive]. [Report at 18]

Count V

On August 14, 2009, respondent testified falsely two times when he was cross examined in a malpractice lawsuit filed against him by Rivera. [Report at 80; Relator's Ex. 19; Tr. at 121, 125] Respondent falsely asserted that Rivera "gave [respondent] a power of attorney and [the \$175,000 settlement check] was deposited pursuant to the power of attorney he gave" respondent. [Report at 80; Relator's Ex. 19 at p. 6] Respondent falsely testified that he kept \$80,000 of the settlement proceeds owed to Rivera in his IOLTA account for almost one year because "that's where [Rivera] directed [respondent] to maintain the funds." [Report at 80; Stip. 73; Relator's Ex. 19 at p. 15]

In January of 2005, Rivera and his legal counsel filed a grievance with relator alleging that respondent had engaged in ethical misconduct in his handling of the lawsuit for Rivera, and the other four clients. [Report at 81; Joint Ex. 46; Tr. 125-127] Respondent provided a response to the grievance containing three false statements. [Report at 82; Joint Ex. 46; Tr. 126-128] Respondent falsely asserted that he "did not advise [Rivera] to make misrepresentations to the

bankruptcy court." [Report at 82; Stip. Ex. 46; Tr. 126-127] Respondent falsely stated that "[All five clients] received every dollar due under their settlement agreements." [Report at 82; Stip. Ex. 46; Tr. 127-128] Finally, respondent falsely claimed that he "had no involvement with nor further notice of any events involving the Rivera bankruptcy" beyond the fact that he "understood that under bankruptcy law Rivera was entitled to the first \$5,000 of his proceeds, and probably additional proceeds once the question of his exemption under Ohio law was settled." [Report at 82; Stip. 75; Stip. Ex. 46; Tr. 128-129]

The Board found that respondent's conduct in Count V violates the Code of Professional Responsibility: DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(5) [a lawyer shall not engage in Conduct that is prejudicial to the administration of justice]; DR 1-102(A)(6) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law]; and Gov. Bar R. V, Section 4(G) [failure to cooperate with relator's investigation]. [Report at 18]

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS²

I.

RESPONDENT'S REPEATED, EXTENSIVE AND ALL-ENCOMPASSING DISHONEST MISCONDUCT REQUIRES PERMANENT DISBARMENT

² On page two and 10 of respondent's brief, he appears to cite his felony presentence investigation report as evidence. This report was not admitted into evidence. However, the panel permitted respondent to proffer the document under seal, to preserve respondent's right to object to the panel's decision not to admit the document. Respondent has not objected to the panel's decision and, as such, citation of this document in his objection brief is not proper. [Tr. at 408-417]

Respondent objects to the Board's recommended sanction of permanent disbarment and requests that this Court instead order a two year suspension. Because respondent does not specifically object to the Board's findings of facts, disciplinary rule violations and aggravating factors, this Court may conclude that respondent acknowledges these findings by the Board are correct.

A.

Respondent's Pervasive and Extensive Unethical and Illegal Actions and Harm to Multiple Clients and the Public Requires Permanent Disbarment

In the present matter, respondent has engaged in an alarming and extended pattern of repeated dishonest and unethical conduct spanning from 2002 until the present. With regard to Count I, it is undisputed that respondent failed to file tax returns or pay his personal taxes for six years, intentionally used his IOLTA account to conceal his assets from the IRS and was convicted of felony attempted tax evasion.

With regard to Counts II and IV of the disciplinary complaint, it is undisputed that respondent:

- Failed to advise five clients that he did not maintain malpractice insurance;
- Purposefully deceived Rivera about the status of his lawsuit;
- Settled Rivera's lawsuit without advising the bankruptcy trustee or obtaining bankruptcy court approval;
- Endorsed the Rivera settlement check with Rivera's name, falsely asserting that Rivera had given him power of attorney authority to do so, when Rivera had not

done so and was unaware that the settlement check had been received and deposited;

- Cheated his co-counsel Anderson, by paying him less than the full agreed upon 20 percent contingency fee owed to Anderson [Tr. at 76-78; Relator's Ex. 7, 20; Stip. Ex. 10, 11];
- Failed to present Rivera with a settlement disbursement sheet, which would have advised Rivera the amount and division of the settlement funds;
- Charged Rivera and the other four clients \$30,000 in costs, though respondent is unable to document or provide details regarding any actual costs incurred, beyond the \$15,579.21 in costs incurred by Anderson;
- Is unable to explain why he charged Rivera \$10,000 in costs and the other four plaintiff's only \$5,000 apiece or produce any documentation to substantiate such an uneven division of costs;
- Took a \$17,500 attorney fee and ultimately disbursed \$95,000 in settlement funds to Rivera without bankruptcy court knowledge or approval;
- Falsely advised the bankruptcy trustee that the Rivera's \$175,000 settlement was actually a \$15,000 settlement;
- Advised Rivera to misrepresent to the bankruptcy trustee that the Rivera's \$175,000 settlement was actually a \$15,000 settlement;
- Repeatedly refused to respond to letters and requests for information from the bankruptcy trustee and counsel for the bankruptcy trustee;
- Advised Rivera that his bankruptcy attorney was "an idiot" and requested that Rivera "get his file";

- Failed to appear for an examination as ordered by the bankruptcy court;
- Declined to testify about his representation of Rivera at three depositions held by the bankruptcy trustee; and
- Settled a malpractice lawsuit filed against him by Garcia and Aponte by reimbursing them \$5,000 apiece for the improper expenses respondent had previously charged them.

With regard to Count III of the disciplinary complaint, it is undisputed that respondent misappropriated nearly \$80,000 in Rivera's settlement funds, during a time period in which respondent falsely claimed he was holding the funds for Rivera.

With regard to Count V of the disciplinary complaint, it is undisputed that respondent falsely testified during Rivera's malpractice lawsuit against him asserting that Rivera had granted him a power of attorney and that he had held Rivera's settlement proceeds in his IOLTA for one year. Respondent further falsely advised relator in his response to the Rivera grievance that he did not tell Rivera to mislead the bankruptcy court, that all five clients received all of the settlement funds due to them and that he had no involvement in the Rivera bankruptcy.

Additionally, the Board found six aggravating factors present in this matter: a prior disciplinary sanction; a dishonest motive "in the handling of the funds from the Rivera settlement and the conduct which resulted in respondent's conviction;" a pattern of misconduct; false statements during the disciplinary process and failure to make "restitution to the IRS or satisf[y] the bankruptcy judgment." [Report at 19] The Board also found vulnerability and resulting

harm in that “the five clients respondent represented were not only apparently abused by a priest, but by the lawyer they trusted to right the wrongs that had been done to them as children” and respondent's conduct contributed to cause Rivera “to lose the bankruptcy protection he should have had.” [Report at 19]

Finally, this case is not respondent's first time engaging in repeated dishonest conduct. In respondent's prior disciplinary case, this Court found respondent to have “engaged in long-standing fraudulent trust account practices and deliberate deceptions,” made “representations [which] were not credible,” and “not fully cooperate[d] in the disciplinary process and lied about [his] reasons for the “unorthodox” manner in which he used his IOLTA.” [Stip. Ex. 1] In fact, in the present matter, respondent was forced to admit that he falsely testified during his prior disciplinary case, when he asserted that he had not used his IOLTA to hide income from the IRS.

B.

This Court's Case Law Supports Permanent Disbarment

Respondent argues that the proper sanction for his misconduct is a two year suspension. However, after considering the breadth and seriousness of his ethical violations, the many repeated acts of dishonesty between 2002 and the present, the aggravating factors found by the Board and this Court's prior case law, the totality of circumstances requires permanent disbarment.

First, this court has repeatedly held that the starting point for determining the appropriate sanction for attorney misappropriation of client funds is disbarment. “The continuing public

confidence in the judicial system and the bar requires that the strictest discipline be imposed in misappropriation cases.” *Cleveland Bar Assn. v. Belock*, 82 Ohio St.3d 98, 100, 1998-Ohio-261, 694 N.E.2d 897. Disbarment is the presumptive sanction for misappropriation. *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, 769 N.E.2d 816. See also *Cuyahoga County Bar Assn. v. Churilla* (1997), 78 Ohio St.3d 348, 678 N.E.2d 515.

In the present matter, respondent stipulated that he misappropriated nearly \$80,000 in Rivera’s funds and the Board found that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, when he charged his five clients for \$30,000 in expenses, when the evidence showed the costs to be around \$15,000. Further, it was established at the hearing that respondent cheated his co-counsel Anderson out of his full 20 percent contingency fee. As such, the appropriate starting point for determining respondent’s disciplinary sanction is disbarment.

This Court has also previously ordered a substantial disciplinary sanction for attorneys who are convicted for failure to file income tax returns and/or failure to pay income taxes. In *Dayton Bar Assn. v. Schram*, 122 Ohio St.3d 8, 2009-Ohio-1931, 907 N.E.2d 311, Schram failed to file income tax returns for 20 years, failed to pay federal withholding taxes for her employees and was convicted of felony tax crimes. Like respondent, Schram had prior discipline and had not made full and complete restitution. Schram was disbarred by this Court.

In *Dayton Bar Assn. v. Lewis*, 84 Ohio St.3d 517, 1999-Ohio-418, 705 N.E.2d 1217, Lewis failed to file or pay income taxes for five years, but did not have a felony conviction like

respondent. Lewis also acted dishonestly in a fee dispute with a client, violated trust account rules and made a misrepresentation to bankruptcy court in his personal bankruptcy proceeding. Lewis had been previously disciplined and received an indefinite suspension. In *Disciplinary Counsel v. Roetzel*, 70 Ohio St.3d 376, 1994-Ohio-254, 639 N.E.2d 50, Roetzel was convicted of attempted tax evasion, and in a default proceeding, this Court ordered an indefinite suspension. As such, an appropriate sanction solely for respondent's failure to file and pay income tax and resulting felony conviction is between disbarment and an indefinite suspension.

This Court has also ordered a substantial sanction for attorneys who engage in an extended pattern of dishonest, conduct including dishonesty in a bankruptcy proceeding and improper charges to a client. In *Disciplinary Counsel v. Schiller*, 123 Ohio St.3d 200, 2009-Ohio-4909, 915 N.E.2d 324, Schiller failed to turn over client funds to the bankruptcy court as ordered, misappropriated client funds, charged excessive fees, failed to advise clients that he did not maintain malpractice insurance and was also found to have engaged in multiple instances of client neglect. Unlike respondent, Schiller did not have prior discipline. As a result, this Court ordered an indefinite suspension.

In *Columbus Bar Assn. v. Cooke*, 111 Ohio St.3d 290, 2006-Ohio-5709, 855 N.E.2d 1226, Cooke engaged in fraudulent and deceitful conduct in a client's bankruptcy case when he failed to disclose a personal injury claim and settlement details to a bankruptcy court, made false statements to bankruptcy trustee regarding settlement terms, billed his client for improper fees, failed to disclose he did not maintain malpractice insurance to two clients, and deceptively distributed client settlement proceeds to his advantage. This Court held that "there is no place in

the legal profession for those who are unwilling or unable to be honest with clients, the courts and their colleagues.” Id. at ¶ 32. Unlike respondent, Cooke did not have prior discipline. This Court ordered an indefinite suspension with restitution.

Respondent makes four chief arguments against disbarment. First, respondent argues because each of the five individual counts of misconduct standing alone do not merit disbarment, it is not a proper sanction. However, in making this argument, respondent misses the point. It is the totality of respondent’s misconduct in all five counts which determines the sanction and requires his disbarment. None of the many cases cited by respondent include all of the misconduct engaged in by respondent. As such, none of the sanctions in each of these cases is solely controlling in the present matter. Further, respondent has prior discipline, the presence of six aggravating factors and what can only be described as a pervasive pattern of dishonesty that continued into the pending matter.

Respondent next argues that because most of the cases cited by relator resulted in an indefinite suspension, disbarment is not proper in his case. This argument fails for the same reason. Respondent’s total misconduct far exceeds that of any of the individual cases cited by relator. As the Board found, it is respondent’s “overall pattern of dishonesty in dealing with the IRS, the bankruptcy trustee, his clients, the court system and the disciplinary process [which] warrants the harshest penalty.” [Report at 21] It is the entirety of respondent’s misconduct in Counts I through V that requires disbarment.

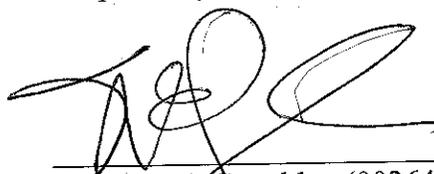
Thirdly, respondent argues for a lesser sanction by asserting that his conduct was “not for his own gain,” he “did not steal from his clients” and his “Rivera conduct was not for any personal gain.” [Respondent’s Brief at 5, 8 and 14] However, the evidence establishes that respondent failed to file or pay income tax for six years, despite ample income; overcharged five clients for nearly \$15,000 in nonexistent expenses; took a \$17,500 fee without bankruptcy court approval and misappropriated nearly \$80,000 of Rivera’s settlement proceeds for his own purposes. All of these actions were taken for respondent’s own gain.

Finally, respondent argues that this Court has found the absence of a dishonest motive to be a mitigating factor. [Respondent’s Brief at 11] However, the Board found that respondent did have a dishonest motive “in the handling of the funds from the Rivera settlement and the conduct which resulted in respondent's conviction.” [Report at 19] As such, the cases cited by respondent are inapplicable.

CONCLUSION

The Board found respondent's "overall pattern of dishonesty in dealing with the IRS, the bankruptcy trustee, his clients, the court system and the disciplinary process warrants the harshest penalty." As such, respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline should be overruled by this honorable Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Relator's Answer to Respondent's Objections to the Board of Commissioners Report and Recommendation has been served upon the Board of Commissioners on Grievances and Discipline, c/o Richard A. Dove, Secretary, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431, and Respondent's Counsel Patrick J. Perotti, Esq., Dworken & Bernstein Co., LPA, 60 South Park Place, Painesville, OH 44077, via regular U.S. mail, postage prepaid, this 25th day of October, 2011.



Robert R. Berger
Counsel for Relator