

12-0318

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

FILED
FEB 22 2012
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	Case No. 10-094
John Joseph Peden Attorney Reg. No. 0021233	:	Findings of Fact,
	:	Conclusions of Law, and
Respondent	:	Recommendation of the
	:	Board of Commissioners on
Columbus Bar Association	:	Grievances and Discipline of
	:	the Supreme Court of Ohio
Relator	:	
	:	

OVERVIEW

{¶ 1} Respondent has practiced law in Ohio since November, 1983. He is a solo practitioner in Columbus, focusing on juvenile, domestic relations, appellate, and some criminal matters, often through court appointments. He has been a solo practitioner since 2000. For ten years before that, he practiced in an office with other lawyers. Before entering private practice in 1990, he was lead attorney for the Franklin County Child Support Enforcement Agency. Respondent has been disciplined previously, initially receiving a six-month fully stayed suspension upon conditions. Based on Respondent's failure to comply with the conditions of his stayed suspension, the Supreme Court revoked the stay and Respondent served a three-month actual suspension from June until September 2009.

{¶ 2} This matter was heard on July 22, 2011, in Columbus, before a panel composed of William J. Novak, Keith A. Sommer, and Paul M. De Marco, panel chair. None of the panel members is from the appellate district in which the complaint arose or served on the probable

cause panel that certified the complaint to the Board. Lisa Pierce Reisz, Bruce Campbell, and Alysha Clous appeared on behalf of Relator, which has closely monitored Respondent for the past eight years. Alvin Mathews, Jr. appeared on behalf of Respondent.

{¶ 3} To appreciate the circumstances that have impelled the panel to recommend Respondent's indefinite suspension from the practice of law, it is helpful to understand his prior disciplinary matter, which essentially involved the same type of misconduct with which Respondent is charged here, except that now none of the same mitigating factors are present and there are now a number of aggravating factors.

PRIOR DISCIPLINARY PROCEEDING

{¶ 4} On May 15, 2008, the Supreme Court suspended Respondent for six months, all stayed on conditions, after finding that he had repeatedly overdrawn his IOLTA beginning in 2004; not maintained any trust account for a period of time; deposited client funds not yet earned as fees in his own account; been unable to make refunds of unearned fees; and failed to produce IOLTA records for Relator's investigation such that it was necessary to subpoena them.

Columbus Bar Assn. v. Peden, 118 Ohio St.3d 244, 2008-Ohio-2237, ¶¶3-4.

{¶ 5} In staying Respondent's six-month suspension, the Court adopted the Board's conclusion that "Respondent has a new understanding of how to properly account for client funds and will adhere to these practices in the future." *Id.* at ¶8.

{¶ 6} The Court also adopted a number of mitigating factors the panel and Board had found. The parties had stipulated that Respondent suffered from a mental disability (adjustment disorder with mixed emotional features) that had been diagnosed by a qualified professional, that this condition had contributed to his misconduct, that he had been successfully treated for a sustained period, and a qualified professional had determined that he would be able to return to

competent practice. *Id.* at ¶¶5-7. Other mitigating factors included Respondent had no prior disciplinary record, did not act out of dishonesty, had acknowledged and apologized for his misconduct, had made restitution, and had complied with his contract with the Ohio Lawyers Assistance Program (“OLAP”). *Id.* at ¶7.

{¶ 7} The conditions for staying Respondent’s suspension included one year of monitored probation “with the monitor paying specific attention to Respondent’s compliance with the requirements for client trust accounts,” that he periodically provide reports from his psychologist on his ability to practice law competently, and that he remain in compliance with his OLAP contract. *Id.* at ¶8.

{¶ 8} Relator appointed a monitor who, over the course of Respondent’s stayed suspension and his probation, attempted to assist him with his trust account issues. His monitor tried to instill in Respondent a basic understanding of how to deal with client funds in his trust account — that money “* * * shouldn’t be taken out until it was earned. You shouldn’t be writing checks for other people against it. * * *” Tr. 41. This has been a recurrent problem for Respondent, even though many of his cases were and are court-appointed. As his monitor stated in her testimony before this panel, “He has a pretty small practice and it worried me that with such a small practice he still wasn’t able to manage his trust account.” Tr. 48.

{¶ 9} On June 15, 2009, the Supreme Court found Respondent in contempt for violating its order to pay the costs of the prior disciplinary proceeding and imposed an actual suspension. On September 15, 2009, the Supreme Court reinstated Respondent to practice, subject to continuing monitored probation that the Court has never terminated.

{¶ 10} As a consequence of the Supreme Court’s orders, Respondent was subject to monitored probation from May 15, 2008 to May 15, 2009; was unmonitored from May 16 to

June 15, 2009, when he began his only actual suspension thus far; and has been on monitored probation again since the Court lifted his actual suspension and reinstated him on September 15, 2009. In essence, with the exception of one month following the end of his first probation year and three months of his actual suspension, Respondent has been continuously subject to monitored probation since May 15, 2008. The panel finds it significant that Respondent's misconduct in this most recent case occurred while he was subject to monitored probation.

{¶ 11} At the time of his actual suspension in June 2009, Respondent evidently was separated from his wife, who ultimately filed for divorce in October 2009. According to Respondent, "It got pretty contentious" and "I wasn't allowed back in the house." Tr. 180. During this time, Respondent states that he "was to some degree homeless. I had to find places to live, you know, weeks at a time, until I got on my feet to have my own place * * *. I mean it was a horrible part of my life. I never thought I would be in that position." Tr. 211-212.

{¶ 12} The behavior Respondent has exhibited since the Supreme Court imposed the stayed suspension on May 15, 2008 has been consistent with the behavior that led to that initial disciplinary proceeding. The common themes of Respondent's defense to the six counts against him¹ are that he constantly felt "overwhelmed" by his circumstances and had trouble making ends meet. See, e.g., Tr. 127, 201, 213. Evident in each of the six new instances of alleged misconduct, as well as in Respondent's erratic conduct in defending himself (with the help of multiple lawyers), is the definite sense that Respondent had lost control over his practice and his life, such that he did little work for the clients in these six cases, even while demanding more and more money from them over time, usually in cash.

¹ Relator elected not to proceed on Count Six, so it was dismissed. The panel heard Counts One, Two, Three, Four, Five, and Seven.

Count One—Willmore/Plaisted

{¶ 13} On April 1, 2009, Respondent agreed to represent Erin Willmore at the behest of her mother, Karen Plaisted, regarding custody of Ms. Willmore's infant daughter and to obtain a civil protective order due to domestic violence that had occurred in New York. The fee agreement required Ms. Plaisted to pay a \$2,000 retainer and an hourly rate of \$225.

{¶ 14} During April 2009, Ms. Plaisted made five payments totaling \$2,178 for attorney fees and court costs, of which \$175 was to be used to hire a process server in New York to serve a civil protective order on the putative father of Ms. Willmore's daughter. Respondent never used the \$175 to hire the process server, never deposited it in his trust account, and never refunded it.

{¶ 15} Respondent filed a petition for a civil protection order. The petition was scheduled to be heard on April 13, 2009. Respondent requested and received several continuances. Ultimately, he never obtained any civil protection order and never paid any money to a New York process server.

{¶ 16} Respondent issued a billing statement to Ms. Plaisted dated April 10, 2009, which purported to cover work up to and including April 13, 2009. The statement indicated he had spent 5.6 hours on the case for a total of \$1,260 in attorney fees earned. Despite several requests from Ms. Willmore and her mother, Respondent never sent a further accounting.

{¶ 17} Respondent failed to return repeated phone calls from Ms. Willmore and her mother and did not inform them of any work he may have done after April 13, 2009.

{¶ 18} When asked by Relator to produce billing records for time spent on the case after April 13, 2009, Respondent failed to do so, despite promising he would.

{¶19} When asked by Relator to produce evidence that the retainer had been placed in trust and remained there until earned, Respondent failed to do so, despite promising he would.

{¶20} Respondent did not deposit the retainer or cost advances in his IOLTA, and he did not otherwise maintain these funds in trust until earned as fees or paid out for expenses.

{¶21} When the Supreme Court suspended Respondent for contempt on June 15, 2009, it ordered him to notify all clients in writing of his suspension. Respondent did not notify Ms. Plaisted or Ms. Willmore of the suspension. They did not learn of it until Ms. Plaisted went to his office in August 2009 to discuss the case with him.

{¶22} According to Ms. Plaisted, when she asked Respondent for her money back, “[h]e asked me how much he owed me and I told him.” Tr. 239. Respondent promised he would refund \$1,018 to them, but he failed to do so. At that point, Ms. Plaisted contacted Relator and filed a complaint.

{¶23} Respondent agrees he still owes Ms. Plaisted \$1,018.

{¶24} After he was reinstated on September 15, 2009, Respondent made no attempt to contact Ms. Willmore to discuss her pending legal matter, to transfer the case to another lawyer, or to see that her legal interests or those of her infant daughter were being protected.

{¶25} After his reinstatement, Respondent did not notify Ms. Willmore or Ms. Plaisted in writing or orally that his malpractice insurance had lapsed and had not been reinstated.

{¶26} On November 3, 2009, Relator sent Respondent a copy of the grievance filed by Ms. Plaisted and requested a response. Having received no response, Relator sent a second letter by certified mail on December 2, 2009, for which Respondent signed a “green card” indicating receipt of that mailing. On January 14, 2010, Relator further notified Respondent that a subcommittee of Relator’s certified grievance committee had been appointed to investigate this

grievance. Respondent has never filed a response. Relator had to serve a subpoena on him for a deposition to inquire into this and other matters.

{¶ 27} In regard to Ms. Willmore and Ms. Plaisted, the panel finds that Relator has presented clear and convincing evidence establishing that Respondent violated the following provisions of the Rules of Professional Conduct: Prof. Cond. R.1.1 (competence), 1.3 (diligence), 1.4(a)(3) and (4) (failing to keep the client reasonably informed about the status of her case and to respond to her requests for information), 1.4(c) (failing to notify the client that his malpractice insurance had lapsed), 1.15(a) (failing to maintain client funds in an IOLTA properly identified as such and failing to keep appropriate records for the account), 1.5(d) and 1.16(e) (failing to deliver to the client promptly funds to which the client was entitled and by failing to render an accounting regarding the funds upon the request of the client), 1.6(d) (withdrawing from representation of this client without reasonable notice and without taking steps to protect the client's interest), 8.1(b) (knowingly failing to provide information in response to requests in connection with a disciplinary matter), and 8.4(h) (conduct adversely reflecting on his fitness to practice law).

Count Two—Culwell

{¶ 28} In November 2008, Respondent agreed to represent James C. Culwell in his divorce case at the rate of \$225 per hour.

{¶ 29} In January 2009, Respondent filed a complaint for divorce on behalf of Mr. Culwell. Although Mr. Culwell had paid Respondent \$221.50 specifically to cover filing fees, Respondent's check to the court for the filing fees was returned for insufficient funds. Respondent never informed Mr. Culwell that the check was dishonored or that the fees remained unpaid. Mr. Culwell later learned of this when the court contacted him. Mr. Culwell had to give

the court his own check to cover the filing fees. Respondent has never returned the money that Mr. Culwell entrusted to him for the filing fees.

{¶ 30} From November 2008 to June 2009, Respondent demanded and received from Mr. Culwell a total of \$4,925 for attorney fees and expenses. During this period, Respondent made no court appearances on Mr. Culwell's behalf. Respondent did not deposit the unearned portions of Mr. Culwell's payments in his IOLTA or otherwise maintain the funds in trust until earned as fees or paid out as expenses.

{¶ 31} When the Supreme Court suspended Respondent for contempt on June 15, 2009, it ordered him to notify all clients in writing of his suspension. Respondent did not send Mr. Culwell written notice of his suspension.

{¶ 32} The evening before a hearing scheduled for June 24, 2009 in Mr. Culwell's case, Respondent called and told him for the first time that he had been suspended from practice and could not attend the hearing the next morning. He also told Mr. Culwell that he had called the court and canceled the hearing.

{¶ 33} Despite Mr. Culwell's repeated demands for an accounting of all fees and costs, Respondent never provided any accounting and did not respond to Mr. Culwell's attempts to contact him.

{¶ 34} When his letters to Respondent went unanswered, Mr. Culwell filed a grievance with the Office of Disciplinary Counsel, which forwarded it to Relator. Mr. Culwell also filed a claim with the Clients' Security Fund. On March 16, 2010, Relator sent Respondent a copy of Mr. Culwell's grievance, along with a request for his response. Having received no response to the first letter, Relator sent a second letter by certified mail on April 1, 2010, and received back a signed "green card" indicating receipt of that mailing at Respondent's office address.

Respondent never filed a response. Relator had to serve a subpoena on Respondent for a deposition to inquire into this and other matters. Relator asked Respondent to produce his billing records, but Respondent failed to do so, despite promising he would.

{¶ 35} Despite promising to do so, Respondent has never returned to Mr. Culwell any portion of the \$3,026.25 difference between the money Mr. Culwell paid him (\$4,925) and the fees and costs for which he billed Mr. Culwell (\$1,898.75).

{¶ 36} After he was reinstated on September 15, 2009, Respondent made no attempt to contact Mr. Culwell to discuss his pending legal matter or to see that his legal interests were being protected. Respondent simply abandoned Mr. Culwell. Respondent did not withdraw from Mr. Culwell's case or otherwise notify the court in that case of his suspension, as ordered by the Supreme Court.

{¶ 37} After his reinstatement, Respondent also did not notify Mr. Culwell that his malpractice insurance had lapsed and had not been reinstated.

{¶ 38} Mr. Culwell had to secure other counsel to complete the case at an additional expense of approximately \$5,000. That counsel entered an appearance in the case in July 2009 and completed it by November 2009.

{¶ 39} In regard to Mr. Culwell, the panel finds that Relator has presented clear and convincing evidence establishing that Respondent violated the following rules: Prof. Cond. R. 1.1, 1.3, 1.4(a)(3) & (4), 1.4(c), 1.15(a), 1.5(d), 1.16(e), 1.6(d), 8.1(b), and 8.4(h).

Count Three—Trust Account Overdrafts

{¶ 40} On May 11, 2009, Respondent overdrew his IOLTA at Fifth Third Bank by the sum of \$200.

{¶ 41} Four days later, on May 15, 2009, Respondent again overdrew his IOLTA at Fifth Third Bank by the sum of \$133.

{¶ 42} On January 6, 2010, Respondent overdrew his IOLTA at Fifth Third Bank for a third time, by the sum of \$10.81.

{¶ 43} When Relator sent Respondent letters asking for a written explanation of these events regarding his IOLTA, respondent did not reply, and it became necessary for Relator to serve a subpoena on him for a deposition in order to question him about them. Respondent has not provided an adequate explanation regarding these overdrafts.

{¶ 44} Respondent has acknowledged that there was a period of eight or nine months when he did not have an IOLTA. He now has an IOLTA again, although on March 29, 2011, less than four months before the hearing in this matter, Respondent received notice that his new IOLTA was overdrawn by \$88.

{¶ 45} To this day, and despite his ongoing monitored probation “with the monitor paying specific attention to Respondent’s compliance with the requirements for client trust accounts,” [2008-Ohio-2237 at ¶8], Respondent has no records tracking what money has gone into and out of his trust account.

{¶ 46} In regard to these overdrafts, the panel finds that Relator has presented clear and convincing evidence establishing that Respondent violated the following provisions: Prof. Cond. R. 1.15(a), 8.1(b), and 8.4(h).

Count Four—Nessley

{¶ 47} In November 2009, Nick Nessley, the husband of Rose Nessley, consulted with Respondent about representation in proceedings to adopt his wife's daughter. Respondent agreed to assume responsibility for this legal matter. Respondent told the Nessleys he would charge a discounted rate if fees were paid in cash.

{¶ 48} Respondent told the Nessleys that he needed \$750 cash to begin the case and prepare the necessary papers and that he would endeavor to get the case filed prior to the holidays that year.

{¶ 49} The Nessleys paid the \$750 in cash as requested, and Respondent said he would have papers ready for them to sign within a week.

{¶ 50} Thereafter, Respondent did not contact the Nessleys or respond to their attempts to contact him. As Rose Nessley testified, "he was basically unreachable." Tr. 269

{¶ 51} On November 30, 2009, the Nessleys sent Respondent an e-mail asking him to report on the status of their legal matter, but he did not respond.

{¶ 52} Having received no word from Respondent for two full months after he was retained, the Nessleys sent another e-mail message to him on January 5, 2010.

{¶ 53} Two days later, Respondent answered that e-mail. In his message, he falsely claimed that he had tried to call back Mr. Nessley in November. He demanded another \$400 that he said was for court costs.

{¶ 54} On January 27, 2010, Mr. Nessley went to Respondent's office to sign the adoption papers to be filed in the Fairfield County Court of Common Pleas. During that visit, Mr. Nessley gave Respondent a check for the additional \$400 that Respondent had requested. Respondent did not deposit the retainer and cost advances pertaining to the Nessleys' case in an

IOLTA or otherwise maintain the funds in trust until earned as fees or paid out for a case expense. Instead, Respondent cashed Mr. Nessley's \$400 check the day he received it.

{¶ 55} Thereafter, Respondent did not contact the Nessleys for several months. Rose Nessley attempted in early March to find out from the trial court if the case had been filed, but, because adoption matters are confidential, the court could not give them that information, although a court official did tell her that they had not had any dealings with Respondent.

{¶ 56} On March 15, 2010, Respondent informed the Nessleys that the case would be heard by March 23, 2010. The Nessleys received no subsequent communication from Respondent concerning the hearing.

{¶ 57} On May 3, 2010, a court administrator called and informed Ms. Nessley that a \$400 check Respondent had given the court for costs had been returned for insufficient funds and that the court could not reach Respondent.

{¶ 58} On May 13, 2010, the Nessleys notified Respondent that they were dismissing him as their counsel and that they wanted a refund of all the money they had paid him (\$1,150).

{¶ 59} On May 20, 2010, Respondent wrote to the Nessleys, saying: "I am truly sorry about the handling of this case. You probably are not going to believe it, but I am a much better attorney than my performance has shown. I will refund \$800.00 to you. If that is acceptable let me know and I will send it to you on the 26th of this month. I will await your reply." Relator's Ex. OO. On May 21, 2010, the Nessleys agreed to accept the \$800 refund, but Respondent has not refunded any of it to them. Relator's Ex. QQ.

{¶ 60} Although Respondent's malpractice insurance lapsed during his suspension and was not renewed after he was readmitted in September 2009, he did not notify the Nessleys that he did not have professional liability insurance.

{¶ 61} Relator requested Respondent's response to the Nessleys' grievance by letters dated July 15, 2010 and July 29, 2010. Respondent did not respond to those letters.

{¶ 62} In regard to the Nessleys' case, the panel finds that Relator has presented clear and convincing evidence establishing that Respondent violated the following: Prof. Cond. R 1.1, 1.3, 1.4(a)(3) & (4), 1.4(c), 1.15(a), 1.16(e), 8.1(b), and 8.4(h).

Count Five—Petrovski

{¶ 63} In March 2009, Verka Petrovski hired Respondent to represent her in divorce proceedings.

{¶ 64} From March 2009 to November 2010, Ms. Petrovski paid Respondent installments totaling \$6,175 for costs and attorney fees.

{¶ 65} Respondent did not deposit the retainer and cost advances Ms. Petrovski paid in an IOLTA or otherwise maintain the funds in trust until earned as fees or paid out for a case expense.

{¶ 66} When the Supreme Court suspended Respondent for contempt on June 15, 2009, it ordered him to notify all clients in writing of his suspension. Respondent did not send Ms. Petrovski written notice of his suspension.

{¶ 67} Although Respondent's malpractice insurance lapsed during his suspension and was not renewed after he was readmitted in September 2009, he failed to notify Ms. Petrovski that he did not have malpractice insurance.

{¶ 68} Respondent did not keep Ms. Petrovski abreast of the status of her case but repeatedly demanded more and more money from her. "Every time there was a payday coming," Ms. Petrovski testified, "he would call me and tell me that he needed money for whether it's an investigation or an appraisal of the house. He would call me like about 2:00 in the afternoon and

want me to take the money to him in cash by 4:30 which I always did. * * * I borrowed some money from my dad once – a couple times and took it to him to the office.” Tr. 219. On one occasion when she did not have any cash, Ms. Petrovski gave Respondent a check for \$1,000. She received a call from her bank “an hour or so after that” indicating that respondent was attempting to cash it. Tr. 229.

{¶ 69} Respondent filed Ms. Petrovski’s divorce action on August 24, 2010, but otherwise did little work on her case.

{¶ 70} Ms. Petrovski subsequently secured other counsel, whom she had paid more than \$7,000 by the time of the panel’s hearing. She demanded a refund of the fees she had paid Respondent, but has not received any.

{¶ 71} After Ms. Petrovski filed a grievance against Respondent in December 2010, Relator twice requested Respondent’s response. Respondent did not respond to those requests.

{¶ 72} In regard to Ms. Petrovski’s case, the panel finds that Relator has presented clear and convincing evidence establishing that Respondent violated the following: Prof. Cond. R. 1.1, 1.3, 1.4(a)(3) & (4), 1.4(c), 1.15(a), 1.5(d), 1.16(e), 8.1(b), 8.4(c) (conduct involving dishonesty, deceit, or misrepresentation), and 8.4(h).

{¶ 73} The panel finds that Relator has not established by clear and convincing evidence that Respondent practiced law in reference to Ms. Petrovski’s case while he was suspended and, therefore, we find no violation of Prof. Cond. R. 5.5(a) (unauthorized practice) and 8.4(d) (conduct prejudicial to the administration of justice by acting as counsel for a litigant while suspended). Respondent testified without contradiction that he did not file Ms. Petrovski’s action in August 2009 during his actual suspension, as Relator had alleged, but rather during August, 2010. We can find no other indicia of Respondent’s having acted as a lawyer in Ms.

Petrovski's case during his three-month actual suspension. Unfortunately for Ms. Petrovski — and fortunately for Respondent — at the time he was suspended in June 2009, he apparently had been doing nothing on her case that could support Relator's allegation he violated the Supreme Court's order not to engage in "the practice of law in any form." The panel therefore recommends the dismissal of Relator's "practicing while suspended" allegations.²

Count Seven—King

{¶ 74} In June 2010, Respondent agreed to represent Theresa King in obtaining a dissolution of her marriage. According to her, it was a simple matter, "no children, no property, no financial issues," and her husband had no lawyer. Tr. 284. On June 23, 2010, Ms. King paid a retainer of \$1,000, which Respondent represented would cover the entire cost of the matter.

{¶ 75} Respondent did not deposit the retainer in an IOLTA or otherwise maintain the funds in trust until earned as fees or paid out for a case expense.

{¶ 76} Respondent never informed Ms. King that he did not carry malpractice insurance.

{¶ 77} On September 2, 2010, Respondent called and requested that Ms. King immediately pay him \$300 for filing fees. She recalls that "it was the first Ohio State game of the year and I was getting ready to go. I told him can he — could he wait until the next day and he said, well, he'd really appreciate it if I could write him a check that afternoon." Tr. 281. She complied. Instead of depositing her \$300 check in his trust account to cover his own check for the filing fees, respondent immediately cashed it. And, despite assuring Ms. King that her dissolution would be filed that week, he did not file it until approximately seven months after demanding her \$300 check for filing fees.

² Relator's only "practicing while suspended" allegation was in Count Five, as to Ms. Petrovski's case.

{¶ 78} Ms. King's attempts to contact Respondent by phone proved fruitless, so she went to his office. The receptionist gave her another phone number for Respondent. Her calls to that number went unanswered as well.

{¶ 79} On September 29, 2010, Ms. King sent Respondent a letter demanding the return of all of the money she had paid him (\$1,300). Relator's Ex. III.

{¶ 80} On February 7, 2011, Ms. King filed a grievance against Respondent. On February 15, 2011, Relator sent Respondent a copy of the grievance and requested his response within 10 days. He did not respond.

{¶ 81} Respondent ultimately completed Ms. King's dissolution on April 11, 2011. She no longer is seeking a refund.

{¶ 82} Based on his acts and failures to act in regard to Ms. King, the panel finds, by clear and convincing evidence, that Respondent violated the following: Prof. Cond. R. 1.4(a)(3) & (4), 1.4(c), 1.15(a), and 8.1(b).

{¶ 83} Based on Ms. King's testimony, the panel finds that the following alleged violations have not been established by clear and convincing evidence and recommends their dismissal: Prof. Cond. R. 1.1, 1.3, 1.5(d), 1.16(e), and 8.4(h).

Summary of Conclusions of Law

{¶ 84} In summary, the panel has found that, as to Counts One, Two, Four, and Five, Respondent committed violations of Prof. Cond. R. 1.1, 1.3, 1.4(a)(3) & (4), 1.4(c), 1.15(a), 1.5(d), 1.16(e), 1.6(d), 8.1(b), and 8.4(h); that, as to Count Five, he additionally committed a violation of Prof. Cond. R. 8.4(c); that, as to Count Three, he committed multiple violations of Prof. Cond. R. 1.15(a), 8.1(b), and 8.4(h); and that, as to Count Seven, he violated Prof. Cond. R. 1.4(a)(3) & (4), 1.4(c), 1.15(a), and 8.1(b). The panel also has found that, as to Count Five,

Relator failed to establish that Respondent violated Prof. Cond. R 5.5(a) and 8.4(d); and that, as to Count Seven, Relator failed to establish that Respondent violated Prof. Cond. R. 1.1, 1.3, 1.5(d), 1.16(e), and 8.4(h). Count Six was previously dismissed at Relator's request.

THE APPROPRIATE SANCTION

{¶ 85} Arriving at the appropriate sanction requires consideration of the attorney's misconduct, the duties violated, the injuries caused, the attorney's mental state, and the sanctions imposed in similar cases. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, ¶ 24. Before recommending a sanction, we also weigh the aggravating and mitigating factors in the case, including not only those set forth in BCGD Proc. Reg. 10, but all factors relevant to the case. *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, ¶40.

{¶ 86} Respondent's mental state looms large over this case and his future. He urges us to find, as the Supreme Court did in *Columbus Bar Assn. v. Peden*, 2008-Ohio-2237, at ¶¶5-7, that BCGD Proc. Reg. 10(B)(2)(g) applies as a mitigating factor. The evidence in the record before us, however, does not support such a finding in this case. Under BCGD Proc. Reg. 10(B)(2)(g), Respondent must establish: (i) that he has a mental disability diagnosed by a qualified health care professional; (ii) that it contributed to his misconduct; (iii) that he has undergone a sustained period of successful treatment; and (iv) that the qualified professional's prognosis is that Respondent will be able to return to the competent and ethical practice law under specified conditions. While we have no doubt of Respondent's mental difficulties, he failed to establish a sustained period of successful treatment. Respondent entered into an OLAP contract on March 7, 2007. He complied with it for about eight months, but by failing to call OLAP as required, he fell out of compliance. He was in contact with OLAP only sporadically

thereafter, until retaining his current counsel. With the help of his current counsel, Respondent entered into a second OLAP contract approximately one month before the July 22, 2011 hearing, but he since has fallen out of compliance with it as well.³ Therefore, we cannot find that BCGD Proc. Reg. 10(B)(2)(g) applies as a mitigating factor in this case.

{¶ 87} As previewed at the outset of this report, the record before us also does not support a finding that the other mitigating factors found in *Columbus Bar Assn. v. Peden*, 2008-Ohio-2237 — *i.e.*, no prior disciplinary record, lack of dishonesty, remorse for his misconduct, restitution, and OLAP compliance — apply in this instance.

{¶ 88} The panel finds the following aggravating factors apply in this case: (1) dishonest or selfish motive; (2) a pattern of misconduct; (3) multiple offenses; (4) lack of cooperation in the disciplinary process; (5) failure to make restitution; (6) prior disciplinary offenses, and (7) vulnerable victims (*e.g.*, Ms. Willmore, who, due to domestic violence, was forced to leave New York with her infant daughter and who needed Respondent’s help obtaining a civil protection order). The panel takes these seven aggravating factors into account in considering the remaining relevant factors — the duties Respondent violated, the injuries he caused, and the sanctions imposed in similar cases.

{¶ 89} Respondent repeatedly violated his duties to perform his clients’ work competently, keep them informed of the status of their cases, safeguard their funds until earned as fees or paid as expenses, and return unearned retainers or unused cost advances to them. It

³ After the hearing, relator moved to reopen the record for the purpose of filing an affidavit from Scott R. Mote, Executive Director of OLAP, dated September 8, 2011. The panel chair permitted Mr. Mote’s affidavit to be filed, along with an explanatory affidavit from respondent. The gist of Mr. Mote’s affidavit is that, after the hearing, respondent fell out of compliance with his OLAP contract by virtue of his failure to contact OLAP daily. In his affidavit, respondent admitted he had failed to contact OLAP daily “for a brief period of time in August of 2011,” in effect conceding he had fallen out of compliance with his contract. Respondent explained that his reporting lapse was due to having “experienced a short period of time where he ran into some financial hardship and became overwhelmed” and that he “reconnected with OLAP after this brief period and has been in total compliance ever since.”

would have been serious enough that Respondent failed to perform his clients' work competently and to keep them updated on their cases, but the picture that emerged was even worse — that of a cash-strapped attorney relying on those same clients as his virtual ATM during what was no doubt a mentally stressful time. For example, we know of four instances where Respondent urgently asked clients (Plaisted, Culwell, Nessley, and King) for money that he claimed to need for court costs or other case expenses, which he almost immediately converted it to his own use. And in two of those instances (Culwell and Nessley), when Respondent finally got around to making the originally intended cost payments, his checks bounced, forcing the clients to make good on them. Before, during, and after his actual suspension in 2009, Respondent's neglect of his duties to his clients left them to fend for themselves, a helpless condition exacerbated by his failure to inform them he lacked malpractice insurance. Respondent also repeatedly failed to disclose his actual suspension to his clients, in clear violation of the Supreme Court's suspension order, and repeatedly failed to cooperate in Relator's various investigations of his conduct.

{¶ 90} Relator argues that Respondent's violations of these duties warrant an indefinite suspension. As Relator points out, "A lawyer's neglect of legal matters and failure to cooperate in the ensuing disciplinary investigation generally warrant an indefinite suspension from the practice of law in Ohio." *Akron Bar Assn v. Goodlet*, 115 Ohio St.3d 7, 2007-Ohio-4271, ¶20; *see also Cleveland Metro Bar Assn. v. Kaplan*, 124 Ohio St.3d 278, 2010-Ohio-167, ¶15, and *Columbus Bar Assn. v. Troxell*, 129 Ohio St.3d 133, 2011-Ohio-3178, ¶16. In combination with Respondent's neglect of his clients' cases and failure to cooperate in Relator's investigations, his mishandling of client funds even while subject to close monitoring by Relator, his failure to inform clients of his suspension as ordered by the Supreme Court, and his failure to inform his clients he lacked malpractice insurance reinforce the need to remove Respondent from the

practice of law before he harms other clients. The Supreme Court repeatedly has prescribed indefinite suspensions for lawyers who engaged in comparable combinations of misconduct. *See Disciplinary Counsel v. Cantrell*, 125 Ohio St.3d 458, 2010-Ohio-2114 (citing cases); *Disciplinary Counsel v. Miller*, 126 Ohio St.3d 221, 2010-Ohio-3287 (citing cases); *Dayton Bar Assn. v. Wilson*, 127 Ohio St.3d 10, 2010-Ohio-4937 (citing cases).

{¶ 91} While there is evidence of misappropriation of client funds, misappropriation amounts to theft, and the presumptive sanction for it is disbarment, the panel attaches great weight to Relator's specific confirmation that it purposely is not seeking disbarment in this case. Respondent has practiced law for almost thirty years. For the past eight years, the Columbus Bar Association has devoted enormous time and resources monitoring Respondent's practice and trying to protect his clients. Although the panel sees few tangible signs of improvement, we are loathe to second-guess a bar association that, armed with far more knowledge of Respondent than we could possibly gather, has deliberately chosen not to recommend disbarment.

{¶ 92} Still, it is our duty to do everything necessary to protect the public, no more and no less. So even as we accede to Relator's recommendation of an indefinite suspension, the panel finds it necessary to recommend stringent conditions for any future reinstatement, given Respondent's failure to abide by the conditions of his previous stayed suspension. Because mishandling of client funds is one of the common threads running through Respondent's recurrent disciplinary problems, any conditions for reinstatement must ensure that the public would be protected from further violations of this type if he is reinstated. Unfortunately, we see no evidence that Relator's trust account monitor has been able to instill in Respondent a commitment to and understanding of the need to maintain the absolute integrity of client funds entrusted to Respondent. Unless and until Respondent demonstrates he understands the need for,

and is committed to, safeguarding client funds entrusted to him, none should be entrusted to him. If, as Respondent suggests, the bulk of his work currently comes through court appointments, this might not be as burdensome for Respondent as it might be for another attorney less reliant on court appointments, if Respondent were to be reinstated.

{¶ 93} And, of course, any conditions for reinstatement also would have to account for the other common thread running through Respondent's eight years of disciplinary problems — the undeniable fact he is prone to mental and emotional difficulties that tend to inhibit his work performance for prolonged periods. This history argues for mandating that Respondent establish his mental and emotional stability not only as a condition of reinstatement but also at regular intervals during the probationary period following any reinstatement.

RECOMMENDATION

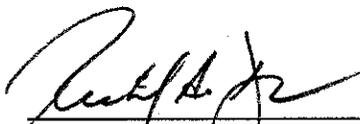
{¶ 94} The panel recommends that Respondent be suspended indefinitely from the practice of law. The panel also recommends that, prior to reinstatement, Respondent be required to demonstrate that he has fulfilled the following conditions: (1) he must provide proof of continuing and successful mental health counseling and proof that he is fully competent to return to the practice of law; (2) he must demonstrate that he has fully complied with all requirements imposed by OLAP during his suspension; (3) he must attend a rigorous and comprehensive course in law office management approved by Relator, with renewed emphasis on IOLTA management; (4) he must comply with any and all mandatory CLE requirements imposed by the Supreme Court; (5) he must pay the cost of this action as required by the Supreme Court; (6) he must make full restitution to Ms. Plaisted in the amount of \$1,018, to Mr. Cullwell in the amount of \$3,026.25, to the Nessleys in the amount of \$1,150, and to Ms. Petrovski in the amount of \$1,330, fulfillment of which must be certified by Relator; (7) he must not have violated his

suspension order in any way; and (8) upon reinstatement, he would be subject to a two-year probationary period, during which he must (a) continue to provide proof every six months that he remains mentally competent to practice of law, (b) be monitored by Relator, (c) delegate the management of his IOLTA to an independent professional trained to manage trust accounts, and (d) permit Relator to monitor that IOLTA.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 10, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the Panel and recommends that the Respondent, John Joseph Peden, be indefinitely suspended from the practice of law with reinstatement conditioned on the terms set forth in ¶94 this report. The Board further recommends that the cost of these proceedings be taxed to the 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 Recommendations as those of the Board.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**