ORIGINAL

IN THE SUPREME COURT OF OHIO

Cincinnati Bar Association,	:	**Case No. 2013-0223**
Relator,	:	
	:	**On Appeal from the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court**
v.	:	
Robert F. Alsfelder, Jr.	:	
Respondent.	:	**Board of Commissioners Case No. 10-076**

RESPONDENT ROBERT F. ALSFELDER, JR.'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

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I. INTRODUCTION

Respondent Robert Alsfelder, Jr. (hereinafter "Respondent") was admitted to the practice of law in November, 1981.[1] Respondent practices probate, commercial, and real estate law out of his home, assisted at times by his wife.[2] As this case makes abundantly clear, neither has he ever been a litigator nor been involved in protracted discovery disputes. While he can claim some involvement in the disciplinary process,[3] he certainly didn't learn how to protect himself procedurally from that experience, as he was represented by counsel in that matter.

The instant matter represents the Cincinnati Bar Associations' unsuccessful and unwarranted attempt at proving that Respondent essentially committed crimes in representing Joseph Witschger and his business (hereinafter collectively "Witschger"). As the following demonstrates, his representation of Witschger to a large extent was in his capacity as a business consultant, performing very little legal work and never charging for it. Instead, Respondent and his wife, also a lawyer, but performing in a business capacity, essentially ran the business for over four years. As the Board's report and recommendation reveals, none of the substantive allegations arising out of this representation survived scrutiny.

However, what did lead to Respondent's recommended indefinite suspension is his ineptitude in appropriately dealing with over-reaching discovery concerning his tax returns of him and his wife which he didn't possess concerning which he was provided an IRS waiver to obtain copies which he never signed.

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[1] Amended Complaint, para. 1
[2] *Cincinnati Bar Assn. v. Alsfelder*, 103 Ohio St.3d 375, para. 24, 2004-Ohio-5216, 516 N.E.2d 218
[3] *Alsfelder*, *supra* at fn. 3

Respondent has been serving a suspension arising from his failure to produce these tax returns since September 22, 2011. Instead of being given mitigation credit for this sanction, the Board recommended that it be an aggravating factor to increase the suspension he has already been serving for the very same conduct, his alleged failure to cooperate.

The following objections concern the Board's failure to find any mitigation factors at all, and its improper findings of certain aggravating factors, not the least of which being the indefinite suspension referred to above. For the reasons which follow, Respondent respectfully requests that this Honorable Court reject the recommended sanction of Relator and instead require Respondent's compliance with this Honorable Court's order holding him in contempt, order a two year suspension from the practice of law, and provide him credit for the time he has served this Honorable Court's previously issued suspension.

II. STATEMENT OF THE CASE

A. The Grievance

Grievant Joseph Witschger is the owner of Eastern Hills Dry Cleaners. (Tr. 115) In approximately 2002 and 2003 Witschger needed assistance with his business as he was behind in his taxes and was behind in paying Matrix, his accountant at the time. (Tr. 115-117) As a result, Witschger retained Respondent and his wife, a CPA (inactive) with a law degree, in November 2004, to work together to complete his bookwork, accounting, statements and tax obligations. (Tr. 117 and Rel. Ex. 7) Under the agreement Respondent billed for legal services at an hourly rate of $225 and his wife charged $65 per hour for business related services. (Rel. Ex. 7) Apparently,

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unbeknownst to Respondent, Witschger expected Respondent to do tax returns and to prepare profit and loss statements claiming that Respondent failed to do this. (Tr. 210-223 and Rel. Ex. 7) Witschger also claimed that Respondent failed to return records for his business upon request. (Tr. 214-216)

Witschger contended that from 2005 to 2008 Respondent or Respondent's wife wrote checks which he signed from the Eastern Hills Dry Cleaners account payable to Respondent totaling $140,000 with nothing recorded in the memo section or receipt indicating the purpose of the check. (Tr. 266 and 228-229) Witschger contends that when Respondent brought him checks for his signature they would be stacked one on top of another so that he could not see the payee lines. Witschger just simply signed his name when Respondent asked him to do so. (Tr. 121-122) Witschger claimed Respondent never provided him an itemized bill. (Tr. 118-119; 198-201)

Witschger also contended that his business, Eastern Hills Dry Cleaners, had a relationship with Colonial Cleaners since 2006 in which Eastern Hills would perform work for Colonial on a wholesale basis. (Tr. 125 and 183) In the last quarter of 2008, the owner of Colonial retired. (Tr. 185) Thereafter for a three month period in 2008, Respondent either owned or ran Colonial Cleaners. (Tr. 199) Witschger claimed that during the period that Respondent was involved with Colonial Cleaners, Eastern Hills was not paid for work that it had done for Colonial. (Tr. 197) Witschger, however, never billed Colonial for the services and never made a demand for payment at the time. (Tr. 189, 201-202 and 260)

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B. Pleadings of the Parties Before the Board

Cincinnati Bar Association (hereinafter "Relator") filed its Complaint against Respondent on August 15, 2010. Count One involved Eastern Hills Dry Cleaners and Count Two involved Colonial Cleaners.

Count One of the Complaint concerned an alleged attorney-client relationship which occurred in 2000 whereby Respondent assisted Witschger with legal issues and then he and his wife took care of the books for Witschger's business, Eastern Hills Dry Cleaners beginning in 2004. Allegedly, Respondent in taking over the daily operations of the business, routinely covered the payee line of checks Witschger was called upon to sign. Between 2005 and 2008, it was alleged that Respondent wrote 311 checks from the business account to himself totaling $152,000, repeatedly failing to account for his time and services despite requests to do so. Witschger also alleged Respondent failed to provide requested documents including Respondent's agreement to provide business services, monthly profit and loss statements for the business between 2004 and 2008, list of creditors of the business, bank statements, accounts receivable and payable for the business and an accounting in connection with a $7,500 check Witschger received from the estate of his mother which Respondent held in his trust account. Finally, it was alleged that Respondent failed to turn Witschger's files over to his new attorney.

As a result of these allegations, Respondent was charged with violating Prof.Cond.R. 1.15(a) (App. B) (failing to maintain records of a client's funds and property); R. 1.15(d) (App. B) (failing to promptly render a full accounting of a client's

funds and property) and R. 8.4(c) (App. C) (converting Witschger's funds for his own use and misleading Witschger as to the payees on checks).

Count Two alleged that Respondent purchased Colonial Dry Cleaners after attempting to recruit Witschger to buy the business and ultimately failed to pay Witschger for shirts obtained from Colonial Cleaners and cleaned by Witschger's business.

As a result of these allegations in Count Two, Respondent was charged with violating Prof.Cond.R. 1.8(a) (App. D) (entering into a business relationship with a client that was adverse to the client); R. 1.8(b) (using information relating to the representation of a client to the disadvantage of the client) and R. 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

On July 30, 2012, Relator filed its Amended Complaint. The Amended Complaint is essentially identical to the Complaint as to Counts One and Two. The Amended Complaint adds Count Three alleging Respondent committed tax evasion and Count Four alleges Respondent's failure to cooperate in Relator's investigation.

The essence of Count Three arises from Admissions to which Respondent failed to provide timely responses and which were deemed admitted. In connection with these Admissions, Respondent was charged with violating Prof.Cond.R. 8.4(b) (committing tax evasion) and R. 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation).

In addition, Count Four alleged Respondent's failure to cooperate in the disciplinary process recounting Respondent's untimely answer filed some four months late, an alleged failure to respond to a November 18, 2010 Subpoena for a deposition

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and production of documents, the alleged failure to produce documents in connection with a Board order of January 19, 2011 and the results of a proceeding before this Honorable Court in connection with Relator's efforts to cause Respondent to be held in contempt in connection with the aforementioned Subpoena for a deposition and production of documents.

In connection with the proceedings before this Honorable Court, Respondent was suspended from the practice of law on September 22, 2011 until such time as he presents proof that he has responded with the May 19, 2012 order and complied with the Subpoena *Duces Tecum*. He remains suspended to this day because of this order. Finally, on March 30, 2012 this Honorable Court found Respondent in contempt for failing to file an affidavit of compliance, ordering him to pay a $500 fine. Respondent complied with this order. This aforementioned conduct resulted in Respondent having been charged with violating Gov. Bar R. V(4)(G) (App. E).

Respondent filed answers to the Complaint and Amended Complaint essentially denying all allegation of misconduct and requesting that the Complaints be dismissed.

C. Discovery Disputes Underlying the Allegations of Failure to Cooperate

Prior to the filing of the Complaint, Respondent cooperated in Relator's investigation by submitting to his deposition. Respondent's deposition was started on May 24, 2010[4] and continued on June 3, 2010. (Tr. 68) Respondent's deposition resumed on June 23, 2011, but not concluded.[5] At the May deposition, Relator asked Respondent for several documents including (1) receipts for expenses advanced by

[4] Motion for Order to Compel Discovery and Hold Respondent in Contempt, (Ex. 2)
[5] *Id* at 74

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Respondent and reimbursed by Eastern Hills; (2) a copy, if one exists, of an account balance document; (3) a copy of what was provided to Witschger as to a check ledger, if it exists.[6] By email of July 12, 2010, Respondent's then counsel Charles Kettlewell provided the requested receipts to Relator's counsel.[7] Kettlewell then withdrew as Respondent's counsel.[8]

On November 17, 2010, Relator served Respondent with a Subpoena *Duces Tecum* commanding Respondent to again appear for deposition on December 1, 2010 and to produce certain documents.

On November 29, 2010, Respondent emailed Relator's counsel requesting a continuance of the deposition scheduled for December 1st as he had not had sufficient time from the date of service of the Subpoena November 17, 2010 to engage and meet with counsel and to assemble documents required to be produced.[9]

By correspondence of November 30, 2010, Relator's counsel requested that all documents requested in the Subpoena be produced on or before December 2, 2010 and indicated that thereafter Respondent would be re-subpoenaed for his deposition.[10] Relator's counsel indicated he felt additional time to supply the documents was unreasonable because they had been originally requested in June of 2010.[11]

By email of December 1, 2010, Respondent wrote to Relator's counsel confirming that his deposition would be rescheduled to give him additional time to retain

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[6] Motion for Order to Compel Discovery and Hold Respondent in Contempt, (Ex. 2)
[7] *Id* (Ex. 2)
[8] *Id* (Ex. 2)
[9] *Id* (Ex. 4)
[10] Respondent's Memorandum in Opposition to Relator's Motion for an Order to Compel Discovery and to Hold Respondent in Contempt, (Ex. 5)
[11] *Id* (Ex. 5)

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counsel. Respondent also pointed out that items A, C and D of the Subpoena **had never previously been requested** and that at the time of his deposition Relator's counsel made it clear that he only wanted handwritten papers or documents still in Respondent's possession. Respondent further indicated that he would turn over everything required in the format in his possession to his new counsel.[12]

On December 20, 2010, Relator served its Motion for Order to Compel Discovery and Hold Respondent in Contempt.

On January 3, 2011, Respondent served Respondent's Memorandum in Opposition to Relator's Motion for an Order to Compel and to Hold Respondent in Contempt.

On January 19, 2011, the Board ordered Respondent to produce the documents requested in Relator's November 18, 2010 Subpoena forthwith indicating any failure of Respondent to comply would provide the basis for a finding of contempt.[13]

On January 24, 2011, the Secretary of the Board of Commissioners entered an order appointing a hearing panel to hear the grievance.[14]

On February 9, 2011, Respondent emailed Relator's counsel providing dates for the scheduling of Respondent's deposition and requesting the deposition of Witschger for his deposition.[15]

On February 15, 2011, Relator's counsel emailed Respondent inquiring as to whether Respondent had retained counsel and indicating Relator's request for the documents previously ordered produced.[16]

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[12] *Id* (Ex. 6)
[13] Board Order January 19, 2011
[14] Board Order January 24, 2011
[15] Motion to Hold the Respondent Robert F. Alsfelder, Jr. in Contempt, (Ex.1)

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On March 14, 2011, Relator served its Motion to Hold the Respondent, Robert F. Alsfelder, Jr. in Contempt for failing to produce documents [requested in the November 2010 Subpoena] pursuant to the Board's January 19, 2011 order.[17]

On March 18, 2011 a conference call was conducted among the Panel Chair, Relator's counsel and Respondent, *pro sé*. At that time, Relator's Motion to Hold Respondent in Contempt was discussed and the Panel Chair ordered Respondent to produce documents which he indicated he had available. The Panel Chair's subsequent entry of March 22, 2011 stated that if Relator had not received the documents requested in the November 2010 Subpoena by March 25, 2011, then a recommendation for a finding of contempt would be forwarded to the Supreme Court.[18] The entry also acknowledged that Respondent did not have the check register (item B requested in the November 2010 Subpoena) as he had previously turned it over to Matrix, Witschger's accounting vendor.[19]

By correspondence of March 24, 2011 Respondent hand delivered to Relator's counsel monthly calendars from November 1, 2004 through January 31, 2009 (item C of the Subpoena *Duces Tecum*.) Respondent further indicated that shortly he would be forwarding to Relator time records and was attempting to print requested tax returns (item D of the Subpoena *Duces Tecum*) off an old computer.[20]

By correspondence of March 31, 2011 Respondent reiterated to Relator's counsel that he was not in possession of the check ledger (item B of the Subpoena

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[16] *Id* (Ex. 1)
[17] *Id*
[18] See Board Chair Journal Entry March 22, 2011.
[19] *Id* (at para. B)
[20] Respondent's Memorandum and Affidavit in Response to Entry dated April 26, 2011 and filed April 27, 2011 and related Motion for Contempt by Relator, (Affidavit, Ex.1)

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Duces Tecum.) Respondent again requested Relator to provide Witschger for deposition.[21]

By correspondence of April 4, 2011, Respondent provided to Relator's counsel copies of his time records for the years 2004 through 2006.[22]

On April 18, 2011, Relator filed with the Supreme Court, Relator's Motion to Hold Respondent in Contempt of this Court pursuant to Gov. Bar R. V(11)(C), Supreme Court Case No. 11-0625. The sole basis of Relator's Motion was the alleged failure of Respondent to produce the documents requested in the November 2010 Subpoena *Duces Tecum*. In its Brief Relator argued that Respondent failed to comply with the January 19, 2011 Board Chair's order and the March 22, 2011 order of the Panel Chair to produce documents by March 25, 2011. Relator in its Motion incorrectly stated in part that:

> As of April 15, 2011, Counsel for Relator has not received the documents requested in the November 18, 2010 Subpoena, which Respondent has been repeatedly ordered to produce.[23]

By entry filed April 27, 2011, the Panel Chair order that Respondent may respond to Relator's Motion pursuant to Gov. Bar R. V(11)(C) no later than May 6, 2011 and that the Panel Chair would rule on the Motion after May 6th.[24]

On May 6, 2011 Respondent served Respondent's Memorandum and Affidavit in Response to entry dated April 26, 2011 and Filed April 27, 2011 and Related Motion for

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[21] *Id* (Affidavit, Ex. 2)
[22] *Id* (Affidavit, Ex. 3)
[23] **Relator's statement was misleading and incorrect** in that it failed to indicate that the Panel Chair had previously acknowledged that Respondent had no documents responsive to Item B of the Subpoena *Duces Tecum* and that Respondent provided his monthly calendars from November 1, 2004 through January 31, 2009 on March 24, 2011 in compliance with Item C of the Subpoena *Duces Tecum*.
[24] See Panel Chair Entry filed April 27, 2011.

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Contempt by Relator. Respondent attached to his Memorandum his Affidavit identifying that which was produced through that time on March 24, 2011, March 31, 2011 and April 4, 2011 (with attached 2005 personal income tax return and reference to previously produced 2004 personal tax return – item D of the Subpoena *Duces Tecum*). Respondent's Affidavit stated that he was not in possession of paper copies of his tax returns for the years 2006 through 2009 but that he was attempting to retrieve the information and would provide it to Relator. Respondent's Affidavit further stated that he did not have in his possession any other information requested by Relator. Respondent did not file his Memorandum with the Supreme Court but rather he filed it with the Board of Commissioners complying with the Panel Chair's entry of April 27, 2011.[25]

In late April or early May, 2011, Relator made a Motion requesting the Board to withdraw its entry of April 27, 2011.[26]

On May 12, 2011, the Board of Commissioners withdrew its entry of April 27, 2011 allowing Respondent to respond to the Motion for Contempt by May 6, 2011, stating that the matter was before the Supreme Court in case No. 11-0625 and no longer within the jurisdiction of the Board.[27]

On May 13, 2011, Relator made a Motion to Extend Discovery and to Compel Respondent to attend his Deposition.[28]

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[25] See Respondent's Memorandum and Affidavit in Response to Entry Dated April 26, 2011 and Filed April 27, 2011 and Related Motion for Contempt by Relator, (Affidavit, para. 3-7)
[26] See Board Chair entry of May 12, 2011.
[27] *Id*
[28] See Panel Chair entry of May 31, 2011.

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On May 19, 2011, the Supreme Court granted Relator's Motion to Hold Respondent in Contempt, finding Respondent in contempt and ordered Respondent to comply with the [November 2010] Subpoena *Duces Tecum* and orders issued by the Board of Commissioners.[29] Because Respondent had filed his response with the Board of Commissioners, it appeared on the Supreme Court docket that Relator's April 18, 2011 Motion was unopposed by Respondent, **which it wasn't**.

In late May or early June 2011, Relator emailed Respondent requesting him to sign a standard IRS form allowing Relator to obtain Respondent's tax returns.[30]

On May 31, 2011, the Panel Chair entered an order that Respondent's deposition be scheduled again and that Respondent appear at the scheduled time.[31]

On June 3, 2011 a telephone conference was held among the Panel Chair and counsel for Relator and Respondent *pro sé*. Respondent was ordered to review the IRS form previously emailed to him by Relator and to "report any problem to the Panel Chair no later than Monday morning, June 6, 2011" and if there is no problem with the form, "then respondent will sign the form and return it to Relator by mail on Monday, June 6, 2011." In addition, various dates were set for depositions and a prehearing telephone conference on July 1, 2011. The entry was filed on June 7, 2011[32]

On June 15, 2011 Relator filed Relator's Motion for Respondent to be Held in Contempt for failing to comply with the Panel Chair's order of June 7, 2011 to sign the standard IRS form allowing Relator to obtain Respondent's tax returns.

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[29] See Supreme Court Order of May 19, 2011.
[30] See Panel Chair entry of June 7, 2011.
[31] See Panel Chair entry of May 31, 2011
[32] See Board Chair order of June 7, 2011

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On June 17, 2011, the Panel Chair entered an order finding that respondent failed to respond to the Chair's June 7, 2011 order to provide the IRS form. Respondent was ordered to provide the signed form to Relator no later than June 27, 2011 or to file a response explaining why he should not be held in contempt by no later than June 27, 2011.[33]

On June 23, 2011, Respondent attended the conclusion of his deposition. (Tr. 74)

On June 27, 2011, Respondent was finally permitted to depose Witschger.[34]

Also, on June 27, 2011, Respondent served his Responsive Memorandum Regarding Entry Dated June 17, 2011 Re: Motion to Hold Respondent in Contempt/Motion for a Protective Order. Respondent argued that the tax returns were not relevant and contained personal and confidential information of Respondent and Respondent's wife, a non-party who had not consented to the release. Respondent also requested a protective order that he not be required to produce any additional tax returns (having previously provided his 2004 and 2005 returns) and that Respondent not be held in contempt for noncompliance with the June 17, 2011 entry of the Board of Commissioners.[35]

On June 30, 2011, Relator served its Reply Memoranda in Support of the Relator's Motion to Hold Respondent in Contempt for Failure to Comply with the Board of Commissioner's Journal Entry Dated June 7, 2011, regarding the requested IRS form waiver. Relator argued that the tax returns were relevant stating that the tax returns

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[33] See Board Chair entry of June 17, 2011
[34] See Responsive Memorandum Regarding Entry Dated June17, 2011 Re: Motion to Hold Respondent in Contempt/Motion for Protective Order, filed July 7, 2011, p. 2
[35] *Id*

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were needed to confirm that Respondent performed legal and business services for Witschger. Relator further argued that Respondent's tax returns were relevant stating that an examination of the tax returns would shed light on Colonial's revenue stream as well.[36]

On June 30, 2011, Respondent served his Supplemental Memorandum Regarding Entry Dated June 17, 2011 Re: Motion to Hold Respondent in Contempt, disputing Relator's claims that Respondent's tax returns were relevant. Respondent argued that none of the information Relator sought would be gleaned from Respondent's tax returns, that Schedule C of his returns would only indicate gross income and only as one lump sum, and that Respondent's income paid by Witschger's business would not be reflected separate and apart from other earned income in Schedule C of Respondent's tax returns.

Regarding any alleged relevance of Respondent's tax returns to the revenue stream of Colonial Cleaners, Respondent cited Witschger's own deposition testimony that Witschger's company admittedly never once billed Colonial Cleaners. (Witschger's same testimony at the formal hearing was instrumental in the Panel's dismissal of Count Two of the Amended Complaint after Relator's case-in-chief.) Respondent requested a protective order that his tax returns need not be produced.

Respondent also objected to a mischaracterization by Relator that Respondent paid himself as Witschger had admitted to signing all checks received by Respondent

[36] Reply Memorandum in Support of the Relator's Motion to Hold Respondent in Contempt for Failure to Comply with the Board of Commissioner's Journal Entry Dated June 7, 2011, at p. 2.

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and that the Rules of Professional Conduct did not require Respondent to have provided itemized billing to Witscher under these circumstances.[37]

On July 1, 2011 a telephone conference was held between the Panel Chair, counsel for Relator and Respondent. At that time, Relator indicated that it would seek a sanction for Respondent's contempt (failure to provide the tax form waiver) from the Supreme Court.[38]

By Entry of July 8, 2011, the Panel Chair overruled Respondent's Motion for a Protective Order regarding the IRS form waiver essentially finding it untimely. The Panel Chair also indicated that no further hearings would be scheduled in the matter until after the Supreme Court had an opportunity to address Respondent's contempt.[39]

On July 15, 2011, Relator filed with the Supreme Court Relator's Motion for the Imposition of Sanctions on Respondent and Memorandum in Support. Relator's grounds again included the alleged failure of Respondent to comply with the November 2010 Subpoena *Duces Tecum* pursuant to the January 19, 2011 order of the Board, the March 22, 2011 entry of the Panel Chair and the May 19, 2011 order of the Supreme Court and Respondent's failure to comply with the Chairs entries of June 7, 2011 and June 17, 2011 to provide the IRS waiver and the Panel Chair's July 8, 2011 entry recommending Respondent be found in contempt for not complying with the previous order of the Panel (regarding the IRS waiver.)[40]

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[37] Supplemental Memorandum Regarding Entry Dated June 17, 2011 Re: Motion to Hold Respondent in Contempt.
[38] Panel Chair entry of July 8, 2011.
[39] *Id*
[40] It is apparent from the record and troubling that at the time Relator filed its July 15, 2011 Motion with the Supreme Court, Relator knew that Respondent had previously produced all documents in his possession responsive to items A and C of the November

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On July 28, 2011 Respondent filed with the Supreme Court Respondent's Motion to Strike Relator's Motion for the Imposition of Sanctions. Respondent argued that Relator's service of the Motion upon Respondent was not proper and that Respondent intended to oppose Relator's Motion on the merits upon receiving Witschger's deposition transcript. Respondent further argued that his income tax information was not relevant to the disciplinary proceedings.

On September 22, 2011, the Supreme Court granted Relator's Motion for the Imposition of Sanctions and suspended Respondent from the practice of law until proof is filed with the Court that Respondent has obeyed the May 19, 2011 court order and complied with the Subpoena *Duces Tecum* issued by the Board of Commissioners. The Court also denied Respondent's Motion to Strike.

On November 9, 2011, the Supreme Court ordered Respondent to show cause on or before November 29th why Respondent should not be found in contempt for failure to fully comply with the Court's order of September 22, 2011 and to immediately file an Affidavit of Compliance.

On November 17th, 2011, Relator served upon Respondent Relator's Request for Admissions requesting Respondent to admit that he filed Federal and State of Ohio income tax returns in 2004 through 2008, that he received checks from Witschger made payable to himself for legal and business services and that some checks were made

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Subpoena, that Respondent was not in possession of documents requested in item B of the Subpoena and that Respondent had previously produced his 2004 and 2005 tax returns and did not have any other returns responsive to item D. Relator presumably also knew that Respondent's prior Memorandum demonstrating his compliance with the November 2010 Subpoena *Duces Tecum* had never been filed with the Supreme Court but rather was filed with the Board of Commissioners.

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payable to Respondent which were cashed but the money was not reported as gross income either on his Ohio or Federal tax returns for the years 2004 through 2009.

On November 29, 2011, the Affidavit of Compliance of Robert F. Alsfelder, Jr. and in response to Motion to Show Cause was filed. Attached to Respondent's Affidavit were copies of Respondent's notices of disqualification and withdrawal filed in four different proceedings in which Respondent was counsel and/or co-counsel and in one proceeding in which he was a *pro-sé* party and not representing anyone. Respondent's Affidavit stated that he was not holding any client property, papers and/or unearned monies.

On December 29, 2011, Respondent filed Respondent's Motion for Protective Order Regarding Requests for Admissions and Memorandum in Support, arguing that Relator's Request for Admissions was untimely, unnecessary, annoying, embarrassing and oppressive.

On January 9, 2012, Relator filed Relator's Response to Respondent's Motion for Protective Order, arguing that the Request for Admissions sought the admission of information related to Respondent's income tax returns which had been previously sought through a Subpoena *Duces Tecum* (November 2010) and therefore was not new discovery and would not be annoying, embarrassing or oppressive.

By order of January 19, 2012, the Supreme Court denied Respondent's Motion for a Protective Order.

On February 22, 2012, Relator filed Relator's Motion to Hold Respondent in Contempt of this Court pursuant to Gov. Bar. R. V(11)(C), requesting the Court to impose sanctions on Respondent for his continued failure to comply with the November

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2011 Subpoena *Duces Tecum* as ordered by the Supreme Court on May 19, 2011 and orders issued by the Board.[41] Relator further alleged Respondent's Affidavit of Compliance was false and that Respondent's Notices of Disqualifications in *Lay v. Lay*, Case No. 05 DR 29723 in the Warren County Court of Common Pleas and in *In re McCollum*, Case No. F09-2588 in the Hamilton County Juvenile Court were not reflected on the respective Court dockets. Relator requested an additional sanction that Respondent be arrested and detained until he could be presented in person to the Supreme Court.[42]

On March 5, 2012 Respondent filed Respondent's Memorandum in Opposition to Relator's Motion to Hold Respondent in Contempt, with Respondent's attached Affidavit demonstrating that in the case of *In re McCollum* his Notice of Disqualification and Withdrawal had been previously filed with the Clerk's office on December 5, 2011 and had been refiled on March 2, 2012.[43] A file stamped copy of the Notice was also attached.[44] The docket in the *McCollum* case further demonstrated that new counsel appeared on behalf of Respondent's former clients on August 12, 2011.[45] With regard to the *Lay v. Lay* matter, Respondent's Affidavit demonstrated that he had previously mailed his Notice of Disqualification and Withdrawal to the Warren County Clerk of

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[41] Again, it was abundantly clear on the record that Respondent had produced all documents in his possession responsive to the Subpoena *Duces Tecum* and that the only outstanding order upon Respondent was to provide the IRS waiver.
[42] Relator's Motion to Hold Respondent in Contempt of This Court Pursuant to Gov. Bar R. (11)(c), p. 3.
[43] Respondent's Memorandum in Opposition to Relator's Motion to Hold Respondent in Contempt, (Ex. A)
[44] *Id* (Ex. A1)
[45] Relator's Motion to Hold Respondent in Contempt of this Court Pursuant to Gov. Bar R. V(11)(c), (Ex. E)

Courts prior to November 17, 2011 and refiled the Notice on March 2, 2012.[46] A time stamped copy of the Notice was attached. In further support Respondent provided an Affidavit establishing that the Clerk's office had been experiencing numerous incidents where documents and pleadings had been misfiled including documents pertaining to the *Lay* matter,[47] as well as an Affidavit establishing that Court personnel acknowledged receipt of Respondent's Notice of Disqualification.[48] The docket in the *Lay* matter also clearly reflected a misfiled document on November 3, 2012 titled "Answer of Defendant ABF Freight Systems, Inc." an entity that was not involved in the case.[49] Respondent further indicated that he had attempted to fully comply with the Court's order and in good faith believed that he had.

By order of March 30, 2012, the Supreme Court granted Relator's Motion, found Respondent in contempt and ordered Respondent to pay a fine of $500 within 30 days. The order does not state any specific facts supporting the finding of contempt.

D. <u>The Hearing</u>

The formal hearing before the Panel was held October 29 and October 30, 2012. Relator called four witnesses in its case, Respondent Robert Alsfelder, the Grievant Joseph Witschger, Kent Marcun, a retired United States Treasury Agent who made a summary of cancelled checks drawn on the account of Eastern Hills Dry Cleaning made payable to Respondent over a four year period from January of 2005 through January of 2009 and Barbara Witschger, the Grievant's ex-wife who was never involved in the

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[46] Respondent's Memorandum in Opposition to Relator's Motion to Hold Respondent in Contempt, (Ex. A, para. 3)
[47] *Id* (Ex. B)
[48] *Id* (Ex. C)
[49] Relator's Motion to Hold Respondent in Contempt of This Court Pursuant to Gov. Bar R. (11)(c), p. 3, Entry of 1/13/12

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business of Eastern Hills Dry Cleaners and who admitted that her only knowledge of the business was what her former husband had told her. (Tr. 302 and 330)

At the close of Relator's case Respondent was unanimously granted a dismissal of Count Two of the Amended Complaint regarding Colonial Cleaners.

Respondent then called himself in Respondent's case.

E. <u>The Board's Findings of Fact and Conclusions of Law</u>

On February 4, 2013, the Board of Commissioners issued its Findings of Fact and Conclusions of Law. (App. A)

With regard to Count One the Panel did not find by clear and convincing evidence that Respondent violated Prof.Cond.R. 1.15(a) (by failing to maintain records of a client's funds and property), R. 1.15(d) (by failing to promptly return a full accounting of a client's funds and property) or R. 8.4(c) (converting client funds and misleading the client as to the payees of checks.)

With regard to Count Two, the Panel unanimously found the allegations had not been proven by clear and convincing evidence and at the conclusion of Relator's case the Panel unanimously dismissed Count Two in its entirety.

With regard to Count Three, the Panel did not find by clear and convincing evidence that Respondent violated Prof.Cond.R. 8.4(b) or R. 8.4(c) (tax evasion and conduct involving dishonesty and fraud.)

With regard to Count Four, failure to cooperate, the Panel found that Respondent failed to respond to the November 2010 Subpoena for a deposition and production of documents; failed to respond to the Board's order of January 19, 2011 to produce the documents in compliance with the Subpoena and on May 19, 2011 the Supreme Court

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found Respondent in contempt and order him to comply with the Subpoena. The Panel further found Respondent failed to comply with the Court's May 19, 2011 order and was suspended from the practice of law on September 22, 2011 until proof was filed that he obeyed the May 19, 2011 order and complied with the Subpoena *Duces Tecum*.

The Panel also noted that on July 8, 2011, it had recommended Respondent be found in contempt for not complying with the order of the Panel to review and sign an IRS waver to allow Relator to obtain Respondent's tax returns and on March 30, 2012 the Supreme Court found respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of $500. The Panel found by clear and convincing evidence that Respondent failed to cooperate in Relator's investigation and in the disciplinary proceedings in violation of Gov. Bar R. V(4)(G).

With regard to aggravating and mitigating factors, the Panel found that there were no mitigating factors. As to the Panel found Respondent had a prior disciplinary offense and was suspended for one year stayed on the condition that he pay restitution, that Respondent has been disciplined by the Court for being in contempt in these proceedings, that Respondent's failure to comply with the Panel orders pertaining to the November 2011 Subpoena and IRS waiver was a pattern of misconduct and that Respondent failed to attend his deposition. The Panel also found a lack of cooperation in the disciplinary process again based on Respondent's failure to provide tax returns. The Panel finally found that at the hearing Respondent was very guarded in his testimony and has not been forthcoming thereby establishing the aggravating factor of submission of false evidence, false statements or other deceptive practices during the disciplinary process under BCGD Pro. Reg. 10(B)(1)(f) (App. F). Consequently, the

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Board recommended that Respondent be indefinitely suspended from the practice of law.

III. STATEMENT OF THE FACTS

A. The Underlying Grievance

Respondent testified at the hearing that he entered into an agreement with Witschger in November 2004 to provide business services to Witschger's business. (Tr. 103-104 and 415) Respondent and his wife were running the business of Eastern Hills so that Witschger could devote his time to production, quality control, sales and managing his employees. (Tr. 65 and 85) Respondent and his wife acted as the office managers of Eastern Hills Cleaners. (Tr. 70) Their duties included making deposits, writing checks, and maintaining cash flow. (Tr. 70-71) Respondent also dealt with creditors and assisted the business with employee issues and business property issues. (Tr. 481and 830) Later in the relationship Respondent also became responsible for handling customer complaints regarding quality issues, (Tr. 433) legal services performed by Respondent for Eastern Hills included the formation of LLCs, the transfer of property to one LLC, preparing deeds and handling lawsuits. (Tr. 468)

Typically Respondent meet with Witschger an hour per day 6 or 7 days per week in the morning to discuss the day, what had to be done, and determine which suppliers and creditors had to be paid. (Tr. 480-481) Respondent returned later in the day or the next day to deliver items to Witschger including checks for his signature. (Tr. 481-482) Witschger independently also wrote checks. (Tr. 78)

Respondent testified that Witschger received and opened all of the mail of Eastern Hills Dry Cleaners and thereafter provided the mail to Respondent. (Tr. 409)

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Respondent or his wife, as part of the services rendered to Eastern Hills, then prepared checks. Witschger was provided the prepared checks on a regular basis for his review, approval and signature. Witschger was provided all of the payment stubs and checks and envelopes and it was Witschger that sealed the envelopes and mailed them. (Tr. 409-410) Witschger always knew what was going on in his business and had ultimate control over it. (Tr. 410)

Checks were provided to Witschger for his signature, by Respondent, his wife or at times were left for Witschger or Witschger would pick them up from Respondent. (Tr. 167-168) Respondent never intentionally covered any payee lines of any check provided to Witschger for his review, approval or signature and there was no reason for him to do so because Witschger was the one who stuffed and sealed the envelopes at which time he saw all of the checks. (Tr. 410-411) Further, Witschger received the cancelled checks each month from the bank. Witschger had complete control of his bank account, established his own passwords and accessed his account online in real time. (Tr. 409-412)

All mail, business records and bank statements which were provided to Respondent by Eastern Hills for the purposes of providing business services were returned after use. (Tr. 413) Respondent did not have the capacity to store the records and had no use for them after providing his services. (Tr. 413) A check ledger that Respondent and/or his wife kept on a pad of paper, was returned to Witschger in January of 2009. (Tr. 485-487) Respondent has no record of receiving a fax from Witschger requesting the return of records and returned all Phone calls even after the relationship was over. (Tr. 420)

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Respondent had no involvement with the accounts receivables or in-house charge accounts of Eastern Hills Dry Cleaners. (Tr. 83 and 413) Respondent played no role in payroll, tax returns or tax deposits. (Tr. 413) All of Eastern Hill's Tax returns were prepared by Matrix or its subsidiary Pay Master. (Tr. 414) Respondent could not create profit and loss statements because he was not involved in payroll and did not have the information. (Tr. 83 and 413) These functions were never part of Respondent's responsibilities. (Tr. 414)

Respondent was never requested by Witschger to do tax returns for Eastern Hills Dry Cleaners. (Tr. 415) Sometime after Respondent's representation of Eastern Hills Dry Cleaners began in November of 2004, Matrix completed tax returns for Eastern Hills for the years 2002 and 2003. Eastern Hills, at that time, was attempting to get caught up on its tax returns. (Tr. 415) Matrix had provided services to Eastern Hills in the 1990s and had ceased providing services due to nonpayment from the late 1990s through 2004. (Tr. 416 and 133) As part of business services provided by Respondent to Eastern Hills Dry Cleaners, Respondent re-engaged Matrix, negotiated an installment plan for past due monies owed from Eastern Hills and obtained its agreement to agree to prepare tax returns for Eastern Hills as part of the catch up process. (Tr. 417) Matrix did, during the period of Respondent's relationship with Witschger, prepare tax returns for past due taxes. (Tr. 415 and 428 and Resp. Exs. D and E)

Although Respondent was requested by Witschger to prepare his 2008 personal tax return, Respondent could not accept the employment. Because the return was to be a joint return of Witschger and his wife and Witschger had instructed Respondent not to

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have any dialogue with Witschger's wife, Respondent felt there was a conflict in completing the return. (Tr. 414-415)

After 2004, Respondent never submitted any billing to Eastern Hills. (Tr. 471) Because the number of hours per week that Respondent was working on Eastern Hill's matters became predictable and agreed upon, no bills for services rendered were submitted to Witschger. (Tr. 471 and 475) It was agreed that Respondent and his wife would spend approximately 23 hours per week on the Eastern Hills account. (Tr. 79, 475 and 477) Respondent spent on average approximately two hours a day working on matters for Witschger but capped his charged time at 1 hour per day. (Tr. 472 and 479-480) Respondent was paid $65 per hour for 23 hours per week worked by both him and his wife. (Tr. 478 and 483) This agreement was based upon a conversation between Respondent and Witschger early on in their relationship but it was never reduced to writing. (Tr. 477) Respondent was only paid when cash flow would permit it. (Tr. 478) At no time was Eastern Hills current with its payment to Respondent. (Tr. 478) Respondent and his wife worked in excess or 23 hours a week in providing business services to Eastern Hills. (Tr. 79) Respondent kept track of the hours worked at the time but no longer has the records. (Tr. 482-483) Respondent and his wife were never paid at the $65 per hour rate agreed upon because cash flow never permitted it. (Tr. 485)

Respondent never billed Witschger or his business for legal serves and was never paid for them. (Tr. 475) Legal services were never part of the $140,000 in checks paid to Respondent over the four years from 2004 to 2008. (Tr. 476) Respondent

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estimates that he was not paid for approximately $200,000 of services rendered to Witschger and his business. (Tr. 88)

Respondent's wife owned Colonial Cleaners and Respondent assisted in the operation for a period of time. (Tr. 94) Witschger/Eastern Hills did contract work for Colonial Cleaners. (Tr. 95)

As a result of unanswered Requests for Admissions it was deemed admitted that Respondent filed Federal and Ohio income tax returns for the years 2004 through 2008, that Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to himself for legal and business services and that checks made payable to Respondent were cashed but the money was not reported as gross income on either Respondent's Ohio and/or Federal income tax from the years 2004 through 2009.

Respondent received many checks from Witschger/Eastern Hills Dry Cleaners for the reimbursement of expenses and on one occasion for damaged slacks. (Tr. 442-443, 436-438 and 478 and Resp. Ex. A) Checks received from Eastern Hills Dry Cleaners for reimbursement are not income to Respondent. (Tr. 444) These records were all provided to Eastern Hill at the time as they were deductible expenses for Eastern Hills. (Tr. 442) Respondent provided copies of receipts for expenses advanced and paid by Eastern Hills to Relator in July of 2010.[50]

B. <u>Findings of the Board</u>

On Count One of the Amended Complaint, the Board found that in 2000 Respondent had performed legal work for Witschger who owned Eastern Hills Dry

[50] See fn 6, *supra*.

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Cleaners. By 2004, Witschger's business was struggling and he needed help managing it. In November of 2004 Respondent and Witschger entered into an agreement for Respondent and his wife to "take over the business aspect of the cleaners." The agreement called for Respondent to bill for legal services at an hourly rate of $225 and for his wife to charge $65 per hour for business related services. The Board found that Respondent visited Witschger at his business early each morning to discuss business problems. Respondent obtained the mail that Witschger had received and would take documents to his wife who would organize them and prepare checks to pay bills. Later that afternoon or the next day, Respondent returned to the business to have Witschger sign checks and make payments. Respondent also returned documents for Witschger to maintain. Witschger was responsible for signing the checks and, in addition, received the mail and had access to cancelled checks and bank account records. The Board found that Respondent did not keep property belonging to Witschger.

The Board further found that from 2005 through 2008 Respondent or his wife wrote a total of 311 checks totaling over $152,000 on the Eastern Hills Dry Cleaners' account payable to Respondent, that 272 of the checks totaling over $141,000 contained no notation on the memo line and no description as to the reason for the check. Most of the checks were cashed by Respondent and not deposited into a bank. Respondent did not keep a record of his billings for service to Witschger or keep any record of any payments received. Witschger at no time requested Respondent to give him an accounting for Respondent's time, billing or work performed. None of the written communication on behalf of Witschger to Respondent requested an accounting. The Board found that Relator never requested an accounting of the funds. The Board

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further found that Respondent did not keep property belong to Witschger but rather returned the property to Witschger soon after he and/or his wife had made use of it and Witschger was responsible for maintaining his own records.

Although Witschger claimed that Respondent stacked checks at the time they were presented for Witschger's signature so that he could not see who the payee was, the Panel did not find Witschger's testimony to be credible. Witschger received the mail and had access to the cancelled checks and bank account records. There was no evidence that Respondent ever held any funds belonging to Witschger.

The Board found that Relator failed to establish by clear and convincing evidence the disciplinary rules allegedly violated in Count One of the Amended Complaint, Prof. Cond. R. 1.15(a), R. 1.15(d) and R. 8.4(c).

In respect to Count Two of the Amended Complaint, the Board found that the owners of Colonial Dry Cleaners were looking to sell the business. Ultimately, Respondent became the owner of Colonial Dry Cleaners. The Board found that the Relator failed to prove the allegations of Count Two of the Amended Complaint that charged Respondent with violations of Prof. Cond. R. 1.8(a), R. 1.8(b) and R. 8.4(c).

In regard to Count Three the Board found Respondent did not respond to Request for Admissions and that therefore it was deemed admitted and conclusively established that: Respondent filed Federal and State of Ohio income tax returns in 2004 through 2008; that Respondent received checks from Witschger and/or Eastern Hills Dry Cleaners made payable to Respondent for legal and business services and that checks were cashed but the money was not reported as gross income on either Respondent's Ohio and/or Federal income tax returns. The Board found there was no

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other evidence submitted regarding Count Three beyond the Admissions. The Board found that Respondent identified at least one check that was cashed but was not payment for legal or business services. The Board found that the Admissions did not establish that the checks received for legal and business services were the same checks that were cashed and not reported as gross income, that Respondent identified at least one check that was cashed but was not for payment for legal or business services that would not be included as gross income and that the Admissions do not prove tax evasion.

Thus, the Board found that Relator did not prove by clear and convincing evidence the allegations in Count Three of the Amended Complaint that Respondent violated Prof. Cond. R. 8.4(b) and R. 8.4(c).

As to Count Four of the Amended Complaint (failure to cooperate), the Board found Respondent failed to respond to a November 18, 2010 Subpoena for a deposition and production of documents and the activities in respect there to chronicled, *infra*,[51] all in violation of Gov. Bar R. V(4)(G).

As to aggravation and mitigation, the Panel found aggravating factors of prior disciplinary offense, pattern of misconduct, lack of cooperation in the disciplinary process and submission of false evidence, false statements or other deceptive practices during the disciplinary process.

On mitigation, the Panel found none of the factors to be considered in favor of mitigation had been shown and rejected Respondent's argument that his failure to

[51] Secton III(C), *infra*.

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cooperate has already been dealt with by the Supreme Court in the contempt proceedings.

The Panel recommended that Respondent be indefinitely suspended from the practice of law and that no reinstatement be considered unless proof is filed that Respondent has obeyed the May 19, 2011 order of the Court and has complied with the Subpoena *Duces Tecum* issued by the Board. The Board adopted the Panel's Findings of Fact, Conclusions of Law and Recommendations.[52]

C. FACTS OF THE DISCOVERY DISPUTE

On November 17, 2010, Relator served Respondent with a Subpoena *Duces Tecum* requesting the production of documents in four catagories:

A Account balance document showing a running account of charges for services rendered to Mr. Witschger and monies paid by Mr. Witschger;

B a "check ledger: document provided to Matrix;

C Respondent's business and personal calendars for the years 2004 through 2009; and

D Copies of Respondent's Federal tax returns for the years 2004 through 2009.

With regard to item A Respondent never had such a document. Hence, the record reflects he so advised the Board and Relator no later than May 6, 2011.[53] [54]

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[52] *Id* pp. 5-12

[53] Respondent's Memorandum and Affidavit in Response to Entry April 26, 2011 and Filed April 27, 2011 and Related Motion for Contempt by Relator, Alsfelder Affidavit at para. 6.

[54] Because Respondent filed his Memorandum with the Board pursuant to the Board's entry of April 26th, this Court was unaware when it ruled upon the contempt motion that Respondent had produced all documents in his possession in compliance with requests A-D of the Subpoena *Duces Tecum*.

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With regard to item B of the Subpoena for the "check ledger" provided to Matrix, Respondent indicated to Relator as well as the Panel Chair as early as March 18, 2011 that he did not have the document in his possession but rather it had been previously turned over to Matrix as part of Mr. Witschger's tax information.[55] By correspondence of March 31, 2011 Respondent again advised Relator's counsel that he did not have the check ledger, item B requested in the Subpoena.[56]

With regard to item C of the Subpoena, Respondent's personal and business calendars for the years 2004 through 2009, Respondent provided all responsive documents on March 24, 2011.[57] [58]

Regarding item D of the Subpoena *Duces Tecum*, for Respondent's Federal tax returns for the years 2004 through 2009, the record again demonstrates that Respondent did not have his returns for 2006 through 2009 but did produce his 2004 and 2005 tax returns.[59]

Regarding Respondent's deposition scheduled for December 1, 2010, in the November Subpoena *Duces Tecum*, the record reflects that on November 29, 2010 Respondent requested Relator to continue the deposition.[60] By correspondence of

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[55] See Panel Chair's entry of March 22, 2011, item B.
[56] Respondent's Memorandum and Affidavit in Response to Entry Dated April 26, 2011 and Filed April 27, 2011 and Related Memorandum for Contempt by Relator, Alsfelder Affidavit and correspondence of March 31, 2011.
[57] *Id* Correspondence of March 24, 2011.
[58] Again, due to the Board's order of April 26, 2011 Respondent's Memorandum was filed with the Board of Commissioners and not with this Court and therefore it appears on this Court's docket that Relator's Motion was unopposed.
[59] *Id* Correspondence of March 24, 2011 and Alsfelder Affidavit at para. 7-8 and attached 2005 Individual Income Tax Return
[60] Motion for Order to Compel Discovery and Hold Respondent in Contempt. (Ex. 4)

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November 30th Relator agreed stating "we will re-subpoena you for deposition."[61] In correspondence of December 1st, Respondent confirmed that his deposition would be rescheduled stating his desire to retain counsel.[62]

Respondent had initially appeared for his deposition on May 24, 2010[63] and it continued on June 3, 2010 and was resumed on June 23, 2011. (Tr. 68 and 74)

As it relates to the IRS waiver, the record reflects that Respondent was initially requested to provide the waiver shortly before June 3, 2011.[64] Respondent was given until June 6, 2011 by the Panel Chair to "review the form and report any problems to the Panel Chair no later than Monday morning, June 6, 2011"[65]

Respondent did not make any formal objection to providing the IRS tax form waiver until his Responsive Memorandum with the Board on July 7, 2011 objecting for the first time on the grounds that his tax returns were irrelevant and contained personal and confidential information of Respondent and his wife, a nonparty to the litigation.[66]

In Respondent's Supplemental Memorandum, Respondent further objected to production of his tax returns arguing that none of the information sought by Relator would be revealed through the return because Schedule C of the return would only indicate gross income and only as one lump sum. Respondent's income paid by Witschger's business would not be reflected separate and apart from other earned

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[61] Respondent's Memorandum in Opposition to Relator's Motion for an Order to Compel Discovery and to Hold Respondent in Contempt. (Ex. 5)
[62] Motion to Hold the Respondent, Robert F. Alsfelder, Jr. in Contempt, (Ex. 1 December 1, 2010 email)
[63] Motion for an Order to Compel Discovery and to Hold Respondent in Contempt, (Ex. 2, July 6, 2010 correspondence)
[64] Panel Chair entry of June 7, 2011
[65] *Id*
[66] Responsive Memorandum Regarding Entry Dated June 17, 2011 Re: Motion to Hold Respondent in Contempt/Motion for Protective Order at p. 2.

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income in Schedule C of Respondent's tax return. That Respondent's income tax return would also be irrelevant to the revenue stream of Colonial Cleaners (which, in fact, was a loss) and that Witschger had testified at his deposition that he never billed Colonial Cleaners.[67]

By entry of July 8, 2011, the Panel Chair ruled that Respondent "never mentioned an objection as to relevancy or any other reason" with the IRS form as ordered on June 3, 2011.[68] The Panel Chair overruled Respondent's Motion for a Protective Order and recommended Respondent be held in contempt for not complying with the previous order of the Panel.[69]

Pursuant to the June 7, 2011 order the Board Chair, Respondent appeared for the resumption of his deposition on June 23, 2011.[70]

Interestingly, Relator has unclean hands as it relates to discovery in this matter. While Respondent issued Interrogatories and Requests for Production to Relator on May 16, 2011, instead of responding, Relator filed a Motion for Protective Order which was overruled by the Panel Chair on July 8, 2011. Thereafter, by way of correspondence, Respondent requested full and complete answers and responses to his discovery. As of three days before the formal hearing in this matter, Respondent

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[67] Supplemental Memorandum Regarding Entry June 17, 2011 Re: Motion to Hold Respondent in Contempt

[68] In this regard, apparently Respondent failed to understand that the Panel Chair's order of June 7, 2011 requiring Respondent to "report any problem with the form to the Panel Chair or to sign the form and return it to Relator by mail on Monday, June 6, 2011" required Respondent to make any objections as to relevance and confidentiality by that time.

[69] Panel Chair Entry July 8, 2011

[70] Panel Chair Order June 7, 2011 and Tr. 74

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brought to the attention of the panel the total lack of answers and responses to his previously issued discovery to the Relator.[71]

Importantly, Relator failed to timely identify its expert witness pursuant to a prehearing Order and to Respondent's Interrogatory directed to such witness.[72] While the Court felt that Respondent was not prejudiced, it is clear that Relator failed in its obligation to treat Respondent fairly under Prof.Cond.R. 3.4 (App. G). Unfortunately for Respondent, his lack of litigation experience resulted in his not preserving these errors by filing appropriate discovery motions to compel Relator's cooperation.[73]

IV. Objections to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners

Objection No.1: The Panel Failed to Acknowledge as a Mitigating Factor, Respondent's Prior Sanction of an Indefinite Suspension.

Under BCGD Proc. Reg. 10(B)(2)(f) the Board may consider in favor of recommending a less severe sanction, the imposition of other penalties or sanctions. Despite the Board's awareness of the Supreme Court's order of September 22, 2011 suspending Respondent from the practice of law for failure to comply with the Subpoena *Duces Tecum* [production of the tax returns, all other documents accounted for], the Court suspended Respondent from the practice of law and he remains suspended to this day. In short, Respondent has already been sanctioned for the very conduct alleged in Count Four of the Amended Complaint which was the sole Count found by the Board to have any merit.

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[71] Motion *in Limine* served October 26, 2012, attached Affidavit of Robert F. Alsfelder, Jr., paras. 2-6.
[72] Tr. 27-30.
[73] Tr. 36-37.

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The imposition of other penalties or sanctions has been found as a mitigation factor where there has been an interim suspension. *Disciplinary Counsel v. Pace*, 103 Ohio St.3d 445, 2004-Ohio-5465, 816 N.E.2d 1046; *Cleveland Bar Assn. v. Glassman*, 104 Ohio St.3d 484, 2004-Ohio-6771, 820 N.E.2d 350. Penalties and sanction have also been found as mitigating factors under BCGD Proc. Reg. 10(B)(2)(f) in the following situations: the removal from an employment position with the Elections Commission, *Disciplinary Counsel v. Conese*, 102 Ohio St.3d 439, 2004-Ohio-3888, 812 N.E.2d 944; the denial of court appointments, *Toledo Bar Assn. v. Stahlbush*, 126 Ohio St.3d 366, 2010-Ohio-3823, 933 N.E.2d 1091; and criminal penalties arising from the same conduct, *Disciplinary Counsel v. Chambers*, 125 Ohio St.3d 414, 2010-Ohio-1809, 928 N.E.2d 1061; *Disciplinary Counsel v. Smith*, 128 Ohio St.3d 390, 2011-Ohio-957, 944 N.E.2d 1166.

Inasmuch as Respondent has been suspended from the practice of law since September 22, 2011 and continues under suspension to this day as a result of the same conduct which is the subject of these disciplinary proceedings such suspension should have been considered under BCGD Proc. Reg. 10(B)(2)(f) by the Board as a mitigating factor.

<u>Objection No. 2</u>: The Panel Failed to Find as Mitigating Factors that Respondent had not Violated any Disciplinary Rules, no Harm was Caused to the Grievant in his Representation of the Grievant, that there was an Absence of Selfish or Dishonest Motive and Respondent Performed *Pro Bono* Work.

Because each disciplinary case is unique, the court is not limited to the aggravating and mitigating factors listed in BCGD Proc. Reg. 10(B) in determining an appropriate sanction. *Disciplinary Counsel v. Forbes*, 122 Ohio St.3d 171, 2009-Ohio-

2623, 909 N.E.2d 629; *Butler Cty. Bar Assn. v. Portman*, 121 Ohio St.3d 518, 2009-Ohio-1705, 905 N.E.2d 1203.

In the case at bar, the Board did not find by clear and convincing evidence that Respondent had violated any professional conduct rules in his representation of Witschger or Witschger's business or that any harm had been caused to Witschger. (Counts One and Two of the Complaint.) Further, the Board did not find by clear and convincing evidence that Respondent violated professional conduct rules regarding alleged tax evasion (Count Three.) In fact, the only violation the Board found was under Gov. Bar. R. V(4)(G) as a result of Respondent's failure to cooperate in the discipline process which boiled down to a failure to provide the IRS waiver. It is therefore respectfully submitted the Board erred in failing to consider as a mitigating factor that there were no findings that Respondent committed misconduct in his representation of Witschger.

Additionally, a Respondent's *pro bono* work has been considered as a positive fact when determining the appropriate sanction for a lawyer's misconduct. *Cleveland Bar Assn. v. Smith*, 102 Ohio St.3d 10, 2004-Ohio-1582, 806 N.E.2d 495; *Disciplinary Counsel v. Rohrer*, 124 Ohio St.3d 65, 2009-Ohio-5930, 919 N.E.2d 180. The hearing transcript reflects that the Respondent did *pro bono* work[74] which the Board failed to find as a mitigating factor.

Finally, an absence of a dishonest or selfish motive exists in this matter, another mitigating factor.

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[74] (Tr. 474) Admittedly, Respondent did not develop this by way of explanation to any extent.

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Objection No. 3: The Panel Erroneously Found as an Aggravating Factor a Pattern of Misconduct.

Under BCGD Proc. Reg. 10(B)(1)(c) (App. F) the Panel found Respondent had engaged in a pattern of misconduct. Specifically, the Board stated:

> Respondent has failed to comply with the court's order to turn over certain documents pursuant to a subpoena *duces tecum*. Respondent has failed to comply with the panel's order to sign a standard IRS waiver form. Respondent failed to attend a deposition.

Initially, it should be pointed out that the record reflects that Respondent did not fail to attend his deposition but rather did attend his deposition in May and July of 2010 (before the discipline case was filed) and its resumption on June 23, 2011. Insofar as the Panel is referring to the December 1, 2010 deposition pursuant to the November Subpoena *Duces Tecum*, the record reflects that Respondent requested that this round be continued and that Relator's counsel voluntarily agreed.[75] Although the resumption of Respondent's deposition was not immediately rescheduled, due to Respondent's unsuccessful attempt to retain counsel there is no evidence that Respondent failed to appear at an agreed upon or ordered date.[76] As memorialized in the Board Chair's order of June 7, 2011, Respondent's deposition was scheduled for June 23, 2011 at which time Respondent did appear and his deposition was resumed. (Tr. 75) There is simply no evidence of record that demonstrates that Respondent failed to attend a deposition as found by the Board.

As it relates to Respondent's alleged failure to turn over documents pursuant to the Subpoena *Duces Tecum* and failure to comply with the Panel's order to sign an IRS

[75] See fn 60 and 61, *supra*.
[76] See Supplemental Memorandum Re: Entry Dated June 17, 2011 Re: Motion to Hold Respondent in Contempt, p. 4.

waiver, this failure is one and the same. Respondent produced all records requested in the Subpoena *Duces Tecum* which were available to him including his tax returns for 2004 and 2005. Respondent simply was not able to obtain from his own existing records his tax returns other than for the years 2004 and 2005. This resulted in Relator's request for Respondent to sign the IRS waiver. Therefore, all of the conduct cited by the Panel amounts to but one act, failing to provide a signed waiver so that Relator could obtain Respondent's income tax returns apart from the 2004 and 2005 returns that were provided. Such single act does not amount to a pattern of misconduct under BCGD Proc. Reg. 10(B)(1)(c).

Numerous courts have interpreted what constitutes a pattern of misconduct as an aggravating factor in attorney disciplinary proceedings. In *In the Matter of Levine*, 174 Az. 146, 847 P.2d 193 (1993), the Supreme Court of Arizona, in interpreting 9.22(c) (a pattern of misconduct), stated that:

> Although respondent's conduct constitutes "multiple offenses," in that he brought several frivolous claims against multiple defendants over the years, we do not believe his misconduct constitutes a "pattern" as contemplated by the standard. Such a "pattern" has been found in the past under circumstances in which a respondent either faces us with a prior disciplinary record involving the same or similar wrongdoing, or when a respondent's misconduct involves multiple clients. (Citations omitted.)

In *In re Redden*, 342 Or. 393, 153 P.3d 113 (2007), the Supreme Court of Oregon cited numerous factors in concluding that the respondent did not engage in a pattern of misconduct, including no prior disciplinary history or similar misconduct in the past, the misconduct occurred during the representation of one client in one legal matter, and respondent was not accused of multiple rule violations. See also *Cuyahoga County Bar Association v. Jurczenko*, 106 Ohio St.3d 123, 2005-Ohio-4101, 832 N.E.2d

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720; *Disciplinary Counsel v. Gittinger*, 125 Ohio St.3d 467, 2010-Ohio-1830, 929 N.E.2d 410; *Disciplinary Counsel v. Taft*, 112 Ohio St.3d 155, 2006-Ohio-6525, 858 N.E.2d 414, (false financial disclosure documents filed between 1998-2004); *Cleveland Bar Association v. Demore-Ford*, 92 Ohio St.3d 417, 755 N.E.2d 855 (2001).

The Court properly has found a pattern of misconduct where the conduct involves multiple matters, similar misconduct occurring over an extended period of time and involving multiple rule violations. See *Disciplinary Counsel v. Squire*, 116 Ohio St.3d 110, 2007-Ohio-5588, 876 N.E.2d 933 (where respondent's misconduct occurred in five different matters from 2003 to 2006 involved similar misconduct, and 40 violations of the Judicial Code and 12 violations of the Code of Professional Conduct); *Mahoning County Bar Association v. Sinclair*, 105 Ohio St.3d 65, 2004-Ohio-7014, 822 N.E.2d 360 (where respondent, administrative assistant to a congressman, paid kickbacks of his salary for more than one year, drafted deeds of conveyance to further the congressman's attempt to hide assets from creditors, violated multiple Rules of Professional Conduct and had a prior disciplinary violation.)

In the case at bar, Respondent was not found to have violated any professional rules of conduct in his representation of Witschger. All of Respondent's alleged conduct boils down to his failure to sign the IRS waiver for five years of his tax returns having previously produced his returns for the years 2004 and 2005, the only one which he possessed. While Respondent does have a prior disciplinary violation, regarding his representation of a client over ten years ago, it is not similar to the alleged failure to cooperate in the within matter but rather as a result of advising a client concerning non-legal issues and accepting compensation for that advice. See *Alsfelder*, *supra*.

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There simply is no pattern of misconduct applicable to Respondent. Respondent firmly believed and does to this day that his tax returns are not relevant to any of the issues in these proceedings and would result in the disclosure of confidential information of Respondent and his wife, a nonparty to these proceedings. Had Respondent interpreted the Panel Chair's order of June 3, 2011, entered June 7, 2011, to review the IRS form and "report any problem to the Panel Chair no later than Monday morning, June 6, 2011" to have required Respondent to have made his objections regarding relevancy and confidentiality at that time, the Panel Chair may well have accepted Respondent's argument. The July 7, 2011 ruling by the Panel Chair, however, makes it clear that despite the ambiguous language of his June 3rd order, Respondent was required to raise his objection prior to June 6, 2011 and Respondent's objections made thereafter would not be entertained. The Panel Chair's entry of July 8, 2011 reiterated this rationale. Had Respondent been more adept at litigation he would have appropriately addressed his concerns of relevancy and confidentiality by requesting an in-camera review by the Panel Chair. If his tax returns were deemed relevant, a protective order under Super. R. 45 to eliminate Respondent's concerns for confidentiality could have been entertained.

Objection No. 4: The Panel Erroneously Found as an Aggravating Factor Submission of False Evidence, False Statements or Other Deceptive Practices.

As an aggravating factor, the Board also found that Respondent violated BCDG Proc. Reg. 10(B)(1)(f), submission or false evidence, false statements or other deceptive practices during the disciplinary process. The Board's report at p. 11 states in pertinent part that: "At the hearing, Respondent was very guarded in his testimony.

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Respondent has not been forthcoming." Inasmuch as the Panel did not make a finding of any specific hearing testimony that it found "very guarded" or in which the Respondent was not "forthcoming" Respondent can only guess as to the offending testimony.

In this regard, the Board may be referring to Respondent's failures to acknowledge his prior deposition testimony at the time of the hearing beyond agreeing to what the transcript said. The record demonstrates that Respondent's testimony was in no way false or deceptive but likely due to Respondent's unfamiliarity with the litigation process, the Ohio Civil Rules pertaining to the reading and signing of his deposition and his understanding of a prior agreement between Respondent's prior counsel, Kettlewell and Relator regarding Respondent's deposition and that he would be afforded an opportunity to review it after it was closed. Relater never closed it.. (Tr. 450-452) Respondent testified at the hearing that he was not notified that he would be called at the hearing by Relator until one week before the hearing. As a result, Respondent had not reviewed his deposition transcript or documents for the hearing. (Tr. 97 and 111) Respondent did not have the transcript and had never seen the transcript prior to the hearing. He was never afforded an opportunity to review the transcript and make corrections. (Tr. 64-65, 74-75 and 88-89) Further, it was Respondent's belief that the deposition had never been "closed" and that there was an agreement between his former counsel Kettlewell and Relator that he would have a full opportunity to review the transcript and make corrections once it was completed. (Tr. 67, 450-452)

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Further, at times Relator's proposed impeachment by reading Respondent's deposition testimony demonstrated the inaccuracies of the Relator's original question and certainly explains why Respondent was apprehensive about committing to testimony he had not reviewed. In this regard, Relator cross-examined Respondent:

Q. You were able to at least get paid for business services **at least once a week, maybe even twice a week**; is that accurate?

A. I don't recall.

Q. Look at . . .

* * * * *

Q. "Based on the checks that we have received and our spreadsheet, it appears that you were able to pay yourself for services **every month**." Answer, "I would say that is probably correct." Question, "And sometimes **twice a month**?" Answer, "And sometime **twice a month**." Do you see that?

A. I do. (Tr. 89-90)

Similarly, Relator cross-examined Respondent:

Q. Okay. Colonial Hills was actually owned by your wife, wasn't it?

A. I don't believe so.

Q. Turn to page 183 of your deposition. Line 14. Question, "So Debbie owned Colonial?" Answer, "I believe that - - yes, that to be the case." Line 16. Question, "Debbie Alsfelder?" Answer, "That's correct." Question, "How long did she own Colonial?" "For the length of time that Joe kept it open, which was, I would say, the middle of November until the end of January." Question, "Of what years?" "'08, "09." Do you agree that is accurate?

A. I agree that that's what it says.

Q. All right. But you have no knowledge of your wife owning Colonial Hills Dry Cleaners?

A. I have never heard of Colonial Hills Dry Cleaners.

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Q. You've never heard of Colonial Hills Dry Cleaner?

A. Never.

Q. Even though your deposition clearly acknowledges that you had a great deal of information about Colonial Hills Dry Cleaners, correct?

A. I have never - - I'm being as clear with you. I have never heard of Colonial Hills Dry Cleaners.

> JUDGE STREET: Mr. Foley, I don't know what you keep referring to as "Colonial Hills." The deposition you are reading from just calls it "Colonial Cleaners." I don't know if there is a semantical difference or not.
>
> MR. FOLEY: I wouldn't think there would be, but thank you.

Q. Have you heard of Colonial Dry Cleaners?

A. Colonial Dry Cleaners?

Q. Yes.

A. I have heard of Colonial Cleaners. (Tr. 92-93)

The record reflects Respondent's continued attempts to be painstakingly accurate in his testimony at the time of the hearing in spite of Respondent never having reviewed or signed his deposition and Relator's questions at the hearing which, in fact, mischaracterized Respondent's deposition testimony which was then used as attempted impeachment. While the Panel may have felt Respondent was "very guarded" or not "forthcoming" the record demonstrates that Respondent was simply trying to be accurate.

Similarly, Respondent's hearing testimony regarding documents demonstrates his continued attempt to be accurate. When asked about Relator's Ex. 7. the November 1, 2004 engagement letter and contract for legal services applicable to Respondent's services at issue in the Grievance, Respondent was unable to unequivocally attest to

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the exhibit until he had an opportunity to review his file, which he did, and then confirmed the exhibit the following day. (Tr. 103-104)

Thereafter, the next day on October 30, 2012, Respondent was able to affirmatively identify Relator's Exhibit 7:

> JUDGE STREET: Is there an agreement that reflects that, a corporate agreement?
>
> MR. ALSFELDER: I think the agreement that we had given to Mr. Witschger by way of letter in 2004.
>
> JUDGE STREET: Do you have a copy of that?
>
> MR. FOLEY: Your Honor, it was admitted - -
>
> JUDGE STREET: No. Just let me ask the question. Do you have a copy of that letter that you are talking about?
>
> MR. ALSFELDER: I would hope that I - - that I do, yes.
>
> JUDGE STREET: Can you show it to me?
>
> MR. ALSFELDER: Well, this is the one dated November 1st, 2004, that was given to me yesterday that I believe is the letter that memorialized our relationship on November 1st, 2004, that you are referring to.
>
> JUDGE STREET: Well, my memory is yesterday you disavowed knowledge of that document.
>
> MR. ALSFELDER: That's correct.
>
> JUDGE STREET: Are you avowing knowledge of it today, or are you just - -
>
> MR. ALSFELDER: I went back last night and took a look in my records and would indicate to you that that accurately reflects - -
>
> JUDGE STREET: So that was the agreement you had with Mr. Witschger for Eastern Hills?
>
> MR. ALSFELDER: Correct. (Tr. 466-468)

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Again, although the Panel may have felt that Respondent was being guarded or was not being forthcoming, the transcript demonstrates that he was simply attempting to be accurate and carefully review his own file document before authenticating it. Further, despite the Panel's characterization of Respondent's testimony, the Panel found with regard to the disputed issue of whether or not Respondent kept Witschger's property, that Respondent's testimony was credible. In this regard, the Report states:

> Although Witschger claimed that Respondent kept property belonging to Witschger, the Panel is not convinced that Respondent did. The Panel finds Respondent's testimony more believable than Witschger's on this point. Respondent testified that he returned the property to Witschger soon after he and/or his wife had recorded or made use of it, and that Witschger was responsible for maintaining it. There was no testimony that Respondent had ever held any funds belonging to Witschger.[77]

The record is simply devoid of any conduct on the part of the Respondent which would constitute false evidence, false statement or other deceptive practices during the disciplinary process.

Further, a review of Ohio cases interpreting BCGD Proc. Reg. 10(B)(1)(f) demonstrates conduct far different (usually intentionally false and deceptive) than anything that occurred in these proceedings. See *Akron Bar Assn. v. DeLoach*, 130 Ohio St.3d 153, 2011-Ohio-4201, 956 N.E.2d 811 (recreating letters to respondent's client); *Toledo Bar Assn. v. Scott*, 129 Ohio St.3d 479, 2011-Ohio-4185, 953 N.E.2d 831 (fabricating hourly bills and claiming that they were delivered to the client periodically during the representation); *Cleveland Metropolitan Bar Assn. v. Zaffiro*, 127 Ohio St.3d 5, 2010-Ohio-4830, 935 N.E.2d 836 (falsely leading relator to believe that respondent maintained professional-liability insurance when in fact he did not); *Cleveland*

[77] Panel Report at p. 6.

Metropolitan Bar Assn. v. Kaplan, 124 Ohio St.3d 278, 2010-Ohio-167, 921 N.E.2d 645 (failing to refund a retainer for eight months after representing under oath it would be refunded shortly); *Disciplinary Counsel v. Rohrer, supra.* (upholding the board's decision to decline a 10(B)(1)(f) finding where respondent down played his misstatements to a juvenile court in a letter to relator); *Cincinnati Bar Assn. v. Schmalz*, 123 Ohio St.3d 130, 2009-Ohio-4159, 914 N.E.2d 1024 (where respondent told investigators she developed a friendship with a client which was in fact sexual); *Butler Cty. Bar Assn. v. Williamson*, 117 Ohio St.3d 399, 2008-Ohio-1196, 884 N.E.2d 55 (misleading relator by reporting that his client was actually represented by independent counsel and changing the date on a letter terminating the relationship with the client.)

In the case at bar, Respondent Alsfelder's conduct does not compare with conduct that has been found to establish a BCGD Proc. Reg. 10(B)(1)(f) aggravating factor in prior decisions. It is respectfully submitted that none of the Respondent's conduct in the proceeding were remotely akin to the submission of false evidence, false statements or other deceptive practices and the Panel cites none. Further, any of Respondent's testimony that might possibly be characterized as guarded or not forthcoming has been affirmatively demonstrated to be as a result of Respondent's desire to be scrupulously accurate at times under the circumstance of Relator's mischaracterization of his prior deposition testimony.

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Objection No. 5: The Panel's Recommended Sanction of an Indefinite Suspension is Inappropriate Under the Circumstance of This Case.

As this Court routinely states when determining appropriate sanctions to impose for attorney misconduct, "we consider the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases." *Disciplinary Counsel v. Goldblatt*, 118 Ohio St.3d 310, 2008-Ohio-2458, 888 N.E.2d 1091 para. 10. See also *Columbus Bar Association v. Linnen*, 111 Ohio St.3d 507, 2006-Ohio-5480, 857 N.E.2d 539, para. 25.

Here, the only violation was under Gov. Bar R. V(4)(G), a failure to cooperate which essentially boiled down to Respondent's failure to sign the IRS waiver. Respondent was found not to have violated any rules in his representation of Witschger. The record reflects that Respondent's failure to sign the IRS waiver was as a result of his overriding concern for confidentiality and his belief that his tax returns were irrelevant. Respondent failed to utilize procedures which may well have resulted in alleviating his concern, such as requesting an *in camera* review by the Panel Chair or a timely requested protective order pursuant to Sup.R. 45 (App. H). In fact, the record demonstrates that Respondent's conduct resulting in the Board's finding of a failure to cooperate was as the result of Respondent having unintentionally waived his argument of relevancy and confidentiality, both by failing to assert them properly and timely, and the result of Respondent's inept litigation and discovery practice skills, rather than a desire to impede the proceedings.

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Additionally, the record herein reflects that Relator's Motion to Hold Respondent in Contempt of this Court Pursuant to Gov. Bar R. V(11)(C) filed April 18, 2011, the sole factual basis of which was Respondent's alleged failure to have complied to the November 2010 Subpoena was not opposed in the Supreme Court but rather Respondent's Brief with his Affidavit demonstrating that he had produced all documents responsive to the Subpoena that were in his possession **was filed with the Board of Commissioners and therefore went unopposed in the Supreme Court**. This error by Respondent was certainly a result of the Board's order of April 27th which stated in part that "Respondent may respond to the motion no later than May 6, 2011. The Panel Chair will rule on the Motion after May 6th."

Clearly, Respondent failed to understand the significance of the Panel Chair's later entry of May 12, 2011 withdrawing the entry of April 27, 2011 due to lack of jurisdiction. Certainly this Court would not have ordered Respondent to comply with the Subpoena *Duces Tecum* had Respondent's Brief and Affidavit demonstrating compliance been evident. This was never acknowledged by Relator. The resulting order of May 19, 2011 by the Supreme Court finding Respondent in contempt was due to Respondent's failure to understand the litigation procedure before the Board of Commissioners and Ohio Supreme Court.

The panel's recommended sanction of an indefinite suspension is not consistent with sanctions imposed in similar cases involving a failure to cooperate where there was no other finding of misconduct. In *Mahoning Bar Association v. Jones,* 127 Ohio St.3d 424, 2010-Ohio-6024, 940 N.E.2d 940, Respondent was found to have violated Gov. Bar R. V(4)(G) as a result of a substantial lack of cooperation, including failure to timely

provide contact information or to verify interrogatories, repeated delays in responding to discovery, failure to attend a deposition and failure to produce his client's file. There was no rule violation and Respondent had a prior disciplinary offense. He received a six-month suspension, all stayed. In *Disciplinary Counsel v. Lape,* 130 Ohio St.3d 273, 2011-Ohio-5757, 957 N.E.2d 772, there was a 4(G) violation, numerous stipulated rule violations and a prior disciplinary offense. He was given a six-month suspension, all stayed.

Sanctions imposed in Gov. Bar R. V(4)(G) cases involving far more egregious conduct than that of the Respondent herein are also germane. See *Dayton Bar Association v. Matlock*, 134 Ohio St.3d 276, 2012-Ohio-5638, 981 N.E.2d 861 (multiple rule violations, including mishandling client funds, prior disciplinary offenses and a pattern of misconduct resulted in a one-year suspension, stayed, upon conditions. *Disciplinary Counsel v. Seabrook,* 133 Ohio St.3d 97, 2012-Ohio-3933, 975 N.E.2d 1013 (multiple rule violations, including continuing to practice while under suspension and prior disciplinary violations resulted in a two-year suspension, with the second year stayed, upon conditions and one year monitored probation upon resuming practice); *Trumbull County Bar Association v. Large*, 134 Ohio St.3d 172, 2012-Ohio-5482, 980 N.E.2d 1021 (multiple rule violations, prior suspension, a pattern of misconduct, submitting false evidence and making false statements during the disciplinary process resulted in a two-year suspension, with the final six months stayed, upon conditions.)

V. CONCLUSION

In the case at bar, Respondent has already been suspended for 18 months, a far greater sanction than those rendered in similar cases and much more akin to sanctions

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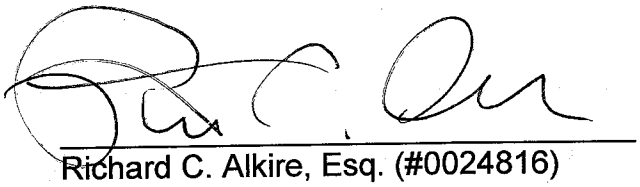
that have been imposed for more egregious conduct. It is therefore respectfully submitted that given the sanctions imposed in similar cases, Respondent has already served a far greater suspension and after receiving credit for his interim suspension to date, he should not be further sanctioned, or should at most receive a two year suspension with credit for the suspension already served.

Respectfully submitted,



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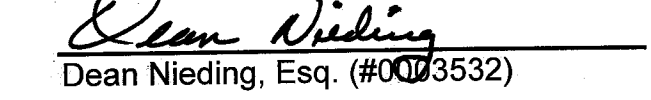

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APPENDIX

A. Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio

B. Prof.Cond.R. 1.15

C. Prof.Cond.R. 8.4

D. Prof.Cond.R. 1.8

E. Gov. Bar R. V(4)(G)

F. BCDG Pro.Reg. 10(B)(1)

G. Prof.Cond.R. 3.4

H. Sup.R. 45

APP. A

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

In re:	:	
Complaint against	:	**Case No. 10-076**
Robert F. Alsfelder, Jr. **Attorney Reg. No. 0014829**	:	**Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Cincinnati Bar Association	:	
Relator	:	

OVERVIEW

{¶1} Relator accused Respondent of two counts of misconduct related to his representation of the owner of a dry cleaning business, one count related to filing his federal tax return, and one count for failing to cooperate. The evidence presented at the hearing did not establish by clear and convincing evidence that Respondent had violated the specific rules of professional conduct alleged in the complaint, except for the allegations in Count Four concerning his failure to cooperate in Relator's investigation. Because of his failure to cooperate, the panel recommends that Respondent be indefinitely suspended from the practice of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prehearing Proceedings

{¶2} On August 16, 2010, a probable cause panel found probable cause for the filing of a complaint against Respondent, and the original complaint was accepted for filing. The original

complaint contained two counts against Respondent. The first count concerned Eastern Hills Dry Cleaners, and the second count concerned Colonial Dry Cleaners. Both counts were based on Respondent's representation of Joseph Witschger, the owner of Eastern Hills Dry Cleaner.

{¶3} Notice was sent to Respondent of the filing of the complaint on August 16, 2010.

{¶4} The Board was not able to secure service of the complaint on Respondent, and on October 6, 2010, filed the complaint with the Clerk of Court of the Supreme Court of Ohio pursuant to Gov. Bar R. V, Section 11(B). On October 19, 2010, the Board advised Relator that Respondent was in default for not filing an answer.

{¶5} In the meantime, Relator was attempting to take the deposition of Respondent. Respondent attended two depositions, but failed to attend a third scheduled on December 1, 2010. Respondent also failed to produce certain documents at that deposition pursuant to a subpoena duces tecum.

{¶6} On December 21, 2010, Relator filed a motion to compel discovery and hold Respondent in contempt for not attending the deposition and for not producing documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents forthwith.

{¶7} On January 19, 2011, Respondent filed an answer to the complaint, and on January 24, 2011, a hearing panel was assigned.

{¶8} On March 15, 2011, Relator filed a motion to hold Respondent in contempt for failing to produce the documents requested in the earlier subpoena duces tecum. On March 22, 2011, the panel ordered Respondent to provide the requested documents.

{¶9} On April 18, 2011, based on Respondent's failure to comply with the discovery orders, Relator filed a motion to hold Respondent in contempt in the Supreme Court of Ohio. Supreme Court Case No. 2011-0625. This contempt proceeding was handled by the Court

outside of the proceedings before the Board. On May 19, 2011, the Court found Respondent in contempt and ordered him to comply with the subpoena duces tecum. On September 22, 2011, the Court suspended Respondent from the practice of law for not complying with its order. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of $500.

{¶10} In the disciplinary case before the Board, at a telephone conference on June 3, 2011, and memorialized by journal entry dated June 7, 2011, Respondent was ordered to review, sign, and return a standard IRS waiver form to Relator. The waiver form would allow Relator to obtain copies of Respondent's tax returns. Respondent did not complete the form and, on June 16, 2011, Relator filed a motion for Respondent to be held in contempt. By entry dated June 17, 2011, Respondent was given until June 27, 2011 to complete and return the form.

{¶11} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with the previous order of the panel.

{¶12} While the contempt matter was pending before the Court, Relator filed a request for admissions in the Court case. Respondent failed to respond to the request for admissions. Consequently, in the disciplinary case, Relator filed a motion to deem the admissions to be admitted. On July 24, 2012, the panel ordered that the request for admissions would be deemed admitted.

{¶13} On July 30, 2012, Relator filed an amended complaint that included the two original counts and two additional counts. The two additional counts alleged misconduct on the part of Respondent for tax evasion and for noncooperation in the disciplinary proceeding.

{¶14} Respondent filed an answer to the amended complaint on August 28, 2012.

{¶15} The matter was heard on October 29 and 30, 2012 in Cincinnati before a panel consisting of Sharon Harwood, Alvin Bell, and Judge John Street, chair. None of the panel members is from the district in which the complaint arose, and none was a member of the probable cause panel that certified the matter to the Board. Michael P. Foley and Stephen M. Nechemias appeared as counsel for Relator. Respondent was present for the hearing and represented himself.

Count One—Witschger Matter

{¶16} In 2000, Respondent had performed legal work for Joseph Witschger. Witschger owned Eastern Hills Dry Cleaners. During and after his representation in 2000, Respondent became a regular customer of the dry cleaning business. By 2004, Witschger's business was struggling, and he needed help in managing it. On or about November 1, 2004, Respondent and Witschger entered into an agreement for Respondent and his wife, an attorney and certified public accountant, to "take over the business aspect of the cleaners." Exhibit 7. The agreement called for Respondent to bill for legal services at the hourly rate of $225 and for his wife to charge $65 per hour for her business related services.

{¶17} Typically each day, Respondent would visit Witschger at his business early in the morning to discuss business problems. Respondent would obtain the mail that Witschger had received and would take documents to his wife who would organize them and prepare checks to pay bills. Later that afternoon or the next day, Respondent would return to the business to have Witschger sign the checks and make payments. Respondent would also return the documents for Witschger to keep.

{¶18} Witschger was responsible for signing the checks.

{¶19} From 2005 to 2008, Respondent or his wife wrote a total of 311 checks on the Eastern Hills Dry Cleaners account to himself. These checks totaled over $152,000. Two hundred and seventy-two of the checks, totaling over $141,000, contained no notation on the memo line and no description as to the reason for the check. Most of these checks were cashed by Respondent, not deposited, at various banking institutions in Cincinnati.

{¶20} Respondent did not keep a record of his billings for services to Witschger nor did he keep any record of payments received. Respondent testified that the 311 checks were for services rendered and for reimbursement of costs and expenses, and that they were fully explained to Witschger. Witschger testified that Respondent brought him the checks stacked one on top of the other so that he could not see the payee line. He would then simply sign his name when Respondent asked him to do so. Respondent testified that he spent a minimum of six or seven hours a week working on Witschger's business and that his wife performed a minimum of 17 to 18 hours per week working on the business. Respondent claimed that he was not nearly paid in full for the time he spent working on the business.

{¶21} Witschger testified that he asked Respondent to return records for the business, but that Respondent has not returned them. Respondent testified that he did not keep the business records. Instead his practice was to take documents home, give them to his wife, and then return them as soon as she was through with them. In addition, Witschger testified that he expected Respondent to prepare profit and loss statements, do the tax returns, and other items. Respondent testified that he had never prepared those documents and was not retained to do so. In fact, there was another entity that had prepared some tax returns and another entity that did the payroll accounting for the business.

{¶22} Witschger at no time asked Respondent to give him an accounting for the time or money performed by or paid to Respondent.

{¶23} As a result of his representation, in Count One of the amended complaint, Relator accused Respondent of violating the following: Prof. Cond. R. 1.15(a) by failing to maintain records of a client's funds and property; Prof. Cond. R. 1.15(b) for failing to promptly render a full accounting of a client's funds and property; and Prof. Cond. R. 8.4(c) for converting Witschger's funds for his own use and for misleading Witschger as to the payees of the checks.

{¶24} The panel does not find by clear and convincing evidence that Respondent has violated Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(d), or Prof. Cond. R. 8.4(c).

{¶25} Prof. Cond. R. 1.15(a) states in part:

> A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

{¶26} Although Witschger claimed that Respondent kept property belonging to Witschger, the panel is not convinced that Respondent did. The panel finds Respondent's testimony more believable than Witschger's on this point. Respondent testified that he returned the property to Witschger soon after he and/or his wife had recorded or made use of it, and that Witschger was responsible for maintaining it. There was no testimony that Respondent had ever held any funds belonging to Witschger.

{¶27} Prof. Cond. R. 1.15(d) states:

> Upon receiving funds or other property in which a client or a third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third's person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, confirmed in writing, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

{¶28} Although the panel is troubled by the large number of checks written to Respondent and the lack of accounting for them, it does not appear that Respondent was ever asked to account for them. At the hearing, Witschger was asked if he had ever asked for an accounting or a billing by Respondent, and Witschger said he had not. None of the written communication on behalf of Witschger to Respondent requested an accounting. Relator never requested an accounting of the funds. The panel, therefore, cannot find that Respondent violated Prof. Cond. R. 1.15(d).

{¶29} Prof. Cond. R. 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Although Witschger claimed that Respondent stacked the checks so that he could not see who the payee was when he signed the checks, the panel does not find his testimony to be credible. Respondent testified that he explained everything to Witschger and that Witschger signed the checks. Witschger received the mail and had access to the cancelled checks and bank account records. The panel is not convinced there has been sufficient evidence to prove a violation of Prof. Cond. R. 8.4(c).

{¶30} Therefore, the panel recommends that the allegations in Count One of the complaint be dismissed.

Count Two—Colonial Dry Cleaners

{¶31} The allegations in Count Two concerned a second dry cleaning business, the Colonial Dry Cleaners. The owners of Colonial Dry Cleaners were looking to sell the business. Ultimately, Respondent became the owner of Colonial Dry Cleaners. Relator alleged that Respondent had taken advantage of Witschger in order to purchase the Colonial Dry Cleaners and charged Respondent with violations of Prof. Cond. R. 1.8(a), 1.8(b), and 8.4(c). The panel found that these allegations had not been proven by clear and convincing evidence. At the conclusion of Relator's case, the panel dismissed Count Two in its entirety.

Count Three—Income Tax Returns

{¶32} The allegations in Count Three revolved around the request for admissions filed in the contempt action before the Supreme Court of Ohio. Respondent did not respond to the request, and the following facts were deemed admitted and conclusively established:

- Respondent filed federal and State of Ohio income tax returns in 2004;
- Respondent filed federal and State of Ohio income tax returns in 2005;
- Respondent filed federal and State of Ohio income tax returns in 2006;
- Respondent filed federal and State of Ohio income tax returns in 2007;
- Respondent filed federal and State of Ohio income tax returns in 2008;
- Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfelder and/or Robert Alsfelder for legal and business services; and
- Checks were made payable to Robert Alsfelder from Eastern Hills Dry Cleaners and/or Joseph Witschger which were cashed but the money was not reported as gross income either on Respondent's Ohio and/or federal income tax returns from the years 2004 through 2009.

{¶33} At the hearing, Relator offered no additional evidence beyond these admissions. Respondent identified at least one check that was written to him that was a reimbursement from the dry cleaning business for damage to his clothing.

{¶34} Relator alleged that Respondent had violated the following: Prof. Cond. R. 8.4(b) by committing tax evasion, an illegal act that reflects adversely on Respondent's honesty or

trustworthiness; and Prof. Cond. R. 8.4(c) by engaging in conduct involving dishonesty and fraud.

{¶35} The allegations contained in Count Three concern the matters deemed to be admitted by Respondent as a result of his not responding to the request for admissions.

{¶36} The deemed admissions, by themselves, are not sufficient to establish by clear and convincing evidence of a violation of either Prof. Cond. R. 8.4(b) or Prof. Cond. R. 8.4(c).

{¶37} Prof. Cond. R. 8.4(b) prohibits an attorney from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness. Relator argues that Respondent has committed tax evasion based on the admissions. The admissions, however, do not prove tax evasion. Through the admissions, Relator established that Respondent received checks for legal and business services and that Respondent received checks that were cashed but not reported as gross income. The admissions do not establish that the checks received for legal and business services were the same checks that were cashed and not reported as gross income. In fact, Respondent identified at least one check that was cashed but that was not payment for legal or business services and that would not necessarily be included in gross income.

{¶38} Prof. Cond. R. 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The deemed admissions do not prove, by clear and convincing evidence, that Respondent violated this rule.

{¶39} The panel, therefore, recommends that the allegations in Count Three be dismissed.

Count Four—Failure to Cooperate

{¶40} Respondent failed to respond to a November 18, 2010, subpoena for a deposition and production of documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents in compliance with the subpoena. Respondent failed to do so.

{¶41} On May 19, 2011, the Court found the Respondent in contempt and ordered him to comply with the subpoena duces tecum.

{¶42} Respondent failed to comply with the Court's May 19, 2011 order and on September 22, 2011 the Court suspended Respondent from the practice of law until proof was filed that he had obeyed the May 19, 2011 order and had complied with the subpoena duces tecum.

{¶43} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with an order of the panel to review and sign a standard IRS waiver to allow Relator to obtain Respondent's tax returns. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of $500.

{¶44} Relator alleged Respondent had violated Gov. Bar R. V, Section 4(G) by failing to cooperate in the disciplinary process.

{¶45} The panel finds, by clear and convincing evidence, that Respondent has failed to cooperate in Relator's investigation and in the disciplinary proceedings.

AGGRAVATION, MITIGATION, AND SANCTION

{¶46} The panel finds that the following aggravating factors are present:

- *Prior disciplinary offense.* Respondent was previously suspended for one year, stayed on the condition that he pay restitution in the amount of $30,000. See *Cincinnati Bar Assn. v. Alsfelder*, 103 Ohio St.3d 375, 2004-Ohio-5216. The

defendant has also been suspended by the Court for being in contempt of the Court's order to comply with a subpoena duces tecum in this case.

- *Pattern of misconduct.* Respondent has failed to comply with the Court's order to turn over certain documents pursuant to a subpoena duces tecum. Respondent has failed to comply with the panel's order to sign a standard IRS waiver form. Respondent failed to attend a deposition.
- *Lack of cooperation in the disciplinary process.* Respondent refused and still refuses to provide his tax returns. On occasions, Respondent agreed to provide tax returns and other documents, but never did so.
- *Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.* At the hearing, Respondent was very guarded in his testimony. Respondent has not been forthcoming.

{¶47} None of the factors to be considered in favor of mitigation has been shown.

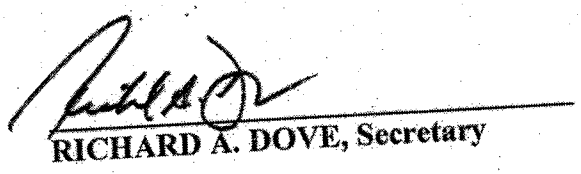
{¶48} Relator recommends that Respondent be permanently disbarred. Respondent asks that there be no finding of misconduct and that the matter be dismissed. Respondent argues that the failure to cooperate has already been dealt with by the Court in the contempt proceeding.

{¶49} The panel recommends that Respondent be indefinitely suspended from the practice of law. The panel further recommends that no reinstatement be considered unless proof is filed that Respondent has obeyed the May 19, 2011 order of the Court and that he has complied with the subpoena duces tecum issued by the Board.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 1, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Robert F. Alsfelder, Jr., be indefinitely suspended from the practice of law in Ohio with reinstatement subject to the conditions set forth in ¶49 of this report. The Board further recommends that the costs 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.



RICHARD A. DOVE, Secretary

APP. B

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

(1) maintain a copy of any fee agreement with each client;

(2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:

(i) the name of the client;

(ii) the date, amount, and source of all funds received on behalf of such client;

(iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;

(iv) the current balance for such client.

(3) maintain a record for each bank account that sets forth all of the following:

(i) the name of such account;

(ii) the date, amount, and client affected by each credit and debit;

(iii) the balance in the account.

(4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;

(5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

(f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.

(g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm* purchasing the law practice at the time client files are transferred.

(h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a business that provides a law-related service shall:

(1) maintain funds of clients or third persons that cannot earn any net income for the clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

APP. C

RULE 8.4: MISCONDUCT

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

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) *knowingly* assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

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

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

APP. D

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or *knowingly* acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless all of the following apply:

(1) the transaction and terms on which the lawyer acquires the interest are fair and *reasonable* to the client and are fully disclosed to the client in *writing* in a manner that can be *reasonably* understood by the client;

(2) the client is advised in *writing* of the desirability of seeking and is given a *reasonable* opportunity to seek the advice of independent legal counsel on the transaction;

(3) the client gives *informed consent*, in a *writing* signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent.

(c) A lawyer shall not solicit any *substantial* gift from a client. A lawyer shall not prepare on behalf of a client an instrument giving the lawyer, the lawyer's *partner*, associate, paralegal, law clerk, or other employee of the lawyer's *firm*, a lawyer acting "of counsel" in the lawyer's *firm*, or a person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to the client. For purposes of division (c) of this rule:

(1) "person related to the lawyer" includes a spouse, child, grandchild, parent, grandparent, sibling, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship;

(2) "gift" includes a testamentary gift.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in *substantial* part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may do either of the following:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

APP. E

SECTION 4. Investigation and Filing of Complaints.

(A) **Referral by Board.** The Board may refer to a Certified Grievance Committee or the Disciplinary Counsel any matter filed with it for investigation as provided in this section.

(B) **Referral by Certified Grievance Committee.** If a certified grievance committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the chair of the certified grievance committee may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all matters contained in the request and report the results of the investigation to the committee that requested it.

(C) **Power and Duty to Investigate; Dismissal without Investigation.**

(1) The investigation of grievances involving alleged misconduct by justices, judges, and attorneys and grievances with regard to mental illness shall be conducted by the Disciplinary Counsel or a certified grievance committee. The Disciplinary Counsel and a certified grievance committee shall review and may investigate any matter filed with it or that comes to its attention and may file a complaint pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.

(2) A grievance may be dismissed without investigation if the grievance and any supporting material do not contain an allegation of misconduct or mental illness on the part of a justice, judge, or attorney. A certified grievance committee shall not dismiss a grievance without investigation unless bar counsel has reviewed the grievance.

(D) **Time for Investigation.** The investigation of grievances by Disciplinary Counsel or a certified grievance committee shall be concluded within sixty days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

(1) **Extensions of Time.** Extensions of time for completion of the investigation may be granted by the Secretary of the Board upon written request and for good cause shown. Investigations for which an extension is granted shall be completed within one hundred fifty days from the date of receipt of the grievance. Time may be extended when all parties voluntarily enter into an alternative dispute resolution method for resolving fee disputes sponsored by the Ohio State Bar Association or a local bar association.

(2) **Extension Limits.** The chair or Secretary of the Board may extend time limits beyond one hundred fifty days from the date of filing in the event of pending litigation, appeals, unusually complex investigations, including the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses, or for other good cause shown. If an investigation is not completed within one hundred fifty days from the date of filing the grievance or a good cause extension of that time, the Secretary may refer the matter either to a geographically appropriate certified grievance committee or the Disciplinary Counsel. The investigation shall be completed within sixty days after referral. No investigation shall be extended beyond one year from the date of the filing of the grievance.

(3) **Time Limits not Jurisdictional.** Time limits set forth in this rule are not jurisdictional. No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

(E) **Retaining Outside Experts.** A particular investigation may benefit from the services of an independent investigator, auditor, examiner, assessor, or other expert. A certified grievance committee may retain the services of an expert in accordance with the Board regulations.

(F) **Cooperation with Clients' Security Fund.** Upon the receipt of any grievance presenting facts that may be the basis for an award from the Clients' Security Fund under Gov. Bar R. VIII, the Disciplinary Counsel or a certified grievance committee shall notify the grievant of the potential right to an award from the Fund and provide the grievant with the forms necessary to initiate a claim with the Clients' Security Fund. The Disciplinary Counsel, a certified grievance committee, and the Board shall provide the Board of Commissioners of the Clients' Security Fund with findings from investigations, grievances, or any other records it requests in connection with an investigation under Gov. Bar R. VIII. The transmittal of confidential information may be delayed pending the termination of the disciplinary investigation or proceedings.

(G) **Duty to Cooperate.** The Board, the Disciplinary Counsel, and president, secretary, or chair of a certified grievance committee may call upon any justice, judge, or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and alternative dispute resolution procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No attorney, and no justice or judge, except as provided in Rule 3.3 of the Code of Judicial Conduct, shall neglect or refuse to assist or testify in an investigation or hearing.

(H) **Referral of Procedural Questions to Board.** In the course of an investigation, the chair of a certified grievance committee, the president of a bar association, or the Disciplinary Counsel may direct a written inquiry regarding a procedural question to the chair of the Board of Commissioners. The written inquiry shall be filed with the Secretary of the Board. Upon receipt of a written inquiry, the chair of the Board and the Secretary shall consult and direct a response.

(I) **Requirements for Filing a Complaint.**

(1) **Definition.** "Complaint" means a formal written allegation of misconduct or mental illness of a person designated as the respondent.

APP. F

The master shall prepare a written report upon the matters submitted to or considered by the master after consultation with the parties and the panel chair. The master shall serve a copy of the report on each party and file the report with the Secretary of the Board. The report shall become the order of the Board unless a party files a written objection to the report within ten days of the filing with the Board. All objections shall be decided by the chair of the hearing panel as set forth in Gov. Bar R. V, Section (6)(D)(3).

History: Effective 11-1-95.

Section 9. Time Guidelines for Pending Cases **NOTE:** BCGD Proc. Reg., Section 9 (E) was repealed, effective August 1, 2012.

Section 10. Guidelines for Imposing Lawyer Sanctions

(A) Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

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

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

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

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

(a) absence of a prior disciplinary record;
(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 to disciplinary Board or cooperative attitude toward proceedings;
(e) character or reputation;
(f) imposition of other penalties or sanctions;
(g) chemical dependency or mental disability when there has been all of the following:

(i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;

(ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;

(iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;

(iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(h) other interim rehabilitation.

History: Effective 6-1-00; amended, eff. 2-1-03.

Section 11. Consent to Discipline

(A) As used in this section:

(1) "Misconduct" has the same meaning as used in Gov. Bar R. V, Section 6(A)(1);

(2) "Sanction" means any of the sanctions listed in Gov. Bar R. V, Section 6(B)(3), (4), or (5).

(B) Pursuant to Gov. Bar R. V, Section 11(A)(3)(c), the relator and respondent may enter into a written agreement wherein the respondent admits to alleged misconduct and the relator and respondent agree upon a sanction to be imposed for that misconduct. The written agreement may be entered into after a complaint is certified by the Board, but no later than sixty days after appointment of a hearing panel. For good cause shown, the chair of the hearing panel or the Board chair may extend the time for the parties to file a written agreement by an additional thirty days. The written agreement shall be signed by the respondent, respondent's counsel, if the respondent is represented by counsel, and relator, and shall include all of the following:

(1) An admission by the respondent, conditioned upon acceptance of the agreement by the Board, that the respondent committed the misconduct listed in the agreement;

(2) The sanction agreed upon by the relator and respondent for the misconduct admitted by the respondent;

(3) Any aggravating and mitigating factors, including but not limited to those listed in Section 10, that are applicable to the misconduct and agreed sanction;

APP. G

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed, or if the testimony of a person with knowledge is unavailable, incomplete, or false. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying

APP. H

dockets, and indices, subject to the exclusions in division (C)(2) of this rule.

(2) The term "case document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document to which public access has been restricted pursuant to division (E) of Sup.R. 45;

(d) Except as relevant to the juvenile's prosecution later as an adult, a juvenile's previous disposition in abuse, neglect, and dependency cases, juvenile civil commitment files, post-adjudicatory residential treatment facility reports, and post-adjudicatory releases of a juvenile's social history;

(e) Notes, drafts, recommendations, advice, and research of judicial officers and court staff;

(f) Forms containing personal identifiers, as defined in division (H) of this rule, submitted or filed pursuant to division (D)(2) of Sup.R. 45;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access.

(D) "Case file" means the compendium of case documents in a judicial action or proceeding.

(E) "File" means to deposit a document with a clerk of court, upon the occurrence of which the clerk time or date stamps and dockets the document.

(F) "Submit" means to deliver a document to the custody of a court for consideration by the court.

(G)(1) "Administrative document" means a document and information in a document created, received, or maintained by a court that serves to record the administrative, fiscal, personnel, or management functions, policies, decisions, procedures, operations, organization, or other activities of the court, subject to the exclusions in division (G)(2) of this rule.

(2) The term "administrative document" does not include the following:

(a) A document or information in a document exempt from disclosure under state, federal, or the common law, or as set forth in the Rules for the Government of the Bar;

(b) Personal identifiers, as defined in division (H) of this rule;

(c) A document or information in a document describing the type or level of security in a court facility, including a court security plan and a court security review conducted by a local court, the local court's designee, or the Supreme Court;

(d) An administrative or technical security record-keeping document or information;

(e) Test questions, scoring keys, and licensing, certification, or court-employment examination documents before the examination is administered or if the same examination is to be administered again;

(f) Computer programs, computer codes, computer filing systems, and other software owned by a court or entrusted to it;

(g) Information on or obtained from the Ohio Courts Network, except that the information shall be available at the originating source if not otherwise exempt from public access;

(h) Data feeds by and between courts when using the Ohio Courts Network.

(H) "Personal identifiers" means social security numbers, except for the last four digits; financial account numbers, including but not limited to debit card, charge card, and credit card numbers; employer and employee identification numbers; and a juvenile's name in an abuse, neglect, or dependency case, except for the juvenile's initials or a generic abbreviation such as "CV" for "child victim."

(I) "Public access" means both direct access and remote access.

(J) "Direct access" means the ability of any person to inspect and obtain a copy of a court record at all reasonable times during regular business hours at the place where the record is made available.

(K) "Remote access" means the ability of any person to electronically search, inspect, and copy a court record at a location other than the place where the record is made available.

(L) "Bulk distribution" means the distribution of a compilation of information from more than one court record.

(M)(1) "New compilation" means a collection of information obtained through the selection, aggregation, or reformulation of information from more than one court record.

(2) The term "new compilation" does not include a collection of information produced by a computer system that is already programmed to provide the requested output.

History: Effective 7-1-09.

RULE 45. Court Records - Public Access

(A) **Presumption of public access** Court records are presumed open to public access.

(B) **Direct access**

(1) A court or clerk of court shall make a court record available by direct access, promptly acknowledge any person's request for direct access, and respond to the request within a reasonable amount of time.

(2) Except for a request for bulk distribution pursuant to Sup.R. 46, a court or clerk of court shall permit a requestor to have a court record duplicated upon paper, upon the same medium upon which the court or clerk keeps it, or upon any other medium the court or clerk determines it can be reasonably duplicated as an integral part of its normal operations.

(3) A court or clerk of court shall mail, transmit, or deliver copies of a requested court record to the requestor within a reasonable time from the request, provided the court or clerk may adopt a policy allowing it to limit the number of court records it will mail, transmit, or deliver per month, unless the requestor certifies in writing that the requestor does not intend to use or forward the records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include news reporting, the gathering of information to assist citizens in the understanding of court activities, or nonprofit educational research.

(4) A court or clerk of court may charge its actual costs incurred in responding to a request for direct access to a court record. The court or clerk may require a deposit of the estimated actual costs.

(C) **Remote access**

(1) A court or clerk of court may offer remote access to a court record. If a court or clerk offers remote access to a court record and the record is also available by direct access, the version of the record available through remote access shall be identical to the version of the record available by direct access, provided the court or clerk may exclude an exhibit or attachment that is part of the record if the court or clerk includes notice that the exhibit or attachment exists and is available by direct access.

(2) Nothing in division (C)(1) of this rule shall be interpreted as requiring a court or clerk of court offering remote access to a case document in a case file to offer remote access to other case documents in that case file.

(3) Nothing in division (C)(1) of this rule shall be interpreted as prohibiting a court or clerk of court from making available on a website any court record that exists only in electronic form, including an on-line journal or register of actions.

(D) **Omission of personal identifiers prior to submission or filing**

(1) When submitting a case document to a court or filing a case document with a clerk of court, a party to a judicial action or proceeding shall omit personal identifiers from the document.

(2) When personal identifiers are omitted from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule, the party shall submit or file that information on a separate form. The court or clerk may provide a standard form for parties to use. Redacted or omitted personal identifiers shall be provided to the court or clerk upon request or a party to the judicial action or proceeding upon motion.

(3) The responsibility for omitting personal identifiers from a case document submitted to a court or filed with a clerk of court pursuant to division (D)(1) of this rule shall rest solely with the party. The court or clerk is not required to review the case document to confirm that the party has omitted personal identifiers, and shall not refuse to accept or file the document on that basis.

(E) **Restricting public access to a case document**

(1) Any party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document. Additionally, the court may restrict public access to the information in the case document or, if necessary, the entire document upon its own order. The court shall give notice of the motion or order to all parties in the case. The court may schedule a hearing on the motion.

(2) A court shall restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering each of the following:

(a) Whether public policy is served by restricting public access;

(b) Whether any state, federal, or common law exempts the document or information from public access;

(c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

(3) When restricting public access to a case document or information in a case document pursuant to this division, the court shall use the least restrictive means available, including but not limited to the following:

(a) Redacting the information rather than limiting public access to the entire document;

(b) Restricting remote access to either the document or the information while maintaining its direct access;

(c) Restricting public access to either the document or the information for a specific period of time;

(d) Using a generic title or description for the document or the information in a case management system or register of actions;

(e) Using initials or other identifier for the parties' proper names.

(4) If a court orders the redaction of information in a case document pursuant to this division, a redacted version of the document shall be filed in the case file along with a copy of the court's order. If a court orders that the entire case document be restricted from public access, a copy of the court's order shall be filed in the case file. A journal entry shall reflect the court's order. Case documents ordered restricted from public access or information in documents ordered redacted shall not be available for public access and shall be maintained separately in the case file.

(F) **Obtaining access to a case document that has been granted restricted public access**

(1) Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion.

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PROOF OF SERVICE

The foregoing **RESPONDENT ROBERT F. ALSFELDER, JR.'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO** was mailed by ordinary U.S. mail this 26th day of March, 2013 to:

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