

IN THE SUPREME COURT OF OHIO

Cleveland Metropolitan Bar Association,  
Relator

v.

Charles Walter Fonda,  
Respondent.

: Case No. 2013-0571  
:  
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:  
: On Certified Report From the Board of  
: Commissioners on Grievances and  
: Discipline of the Supreme Court of Ohio  
: Case No. 12-030  
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**Respondent Charles W. Fonda's Objections  
to the Certified Report of the Board of Commissioners  
on Grievances and Discipline of the Supreme Court of Ohio**

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## Table of Contents

	Page
Table of Authorities .....	ii
Statement of the Case .....	1
Statement of the Facts .....	2
Discussion .....	8
Objection No. 1: Fonda acted with reasonable diligence and promptness per the Agreement, the matter for which he was retained, and was not obligated to render further service in absence of a signed litigation agreement and the advancement of court costs, thus Fonda did not violate Rule 1.3 .....	8
Objection No. 2: Under the factual circumstances of this case, there was nothing for Fonda to inform Walton, thus Fonda could not have violated Rule 1.4(a)(3) .....	11
Objection No. 3: In the context of this case, there was no information to be provided by Fonda to Walton, thus Fonda could not have violated Rule 1.4(a)(4) .....	13
Objection No. 4: Where Walton deposited no papers or property with Fonda and there were no other items reasonably necessary for Walton's representation, there was nothing for Fonda to have promptly returned to Walton, thus there cannot be a violation of Rule 1.16(d) .....	14
Objection No. 5: A public reprimand sufficiently serves the primary purpose of the disciplinary process .....	16
Conclusion .....	21
Certificate of Service .....	21
Appendix .....	Appx. 1
Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio	

**Table of Authorities**

**Page**

**Cases**

*Akron Bar Assn. v. Freedman*, 128 Ohio St.3d 497, 2011 Ohio 1959, 946 N.E.2d 753 ..... 18

*Cleveland Metro. Bar Ass'n v. Gusley*, 133 Ohio St.3d 534, 2012-Ohio-5012 ..... 18

*Columbus Bar Ass'n v. Bhatt*, 133 Ohio St.3d 131, 2012-Ohio-4230 ..... 18

*Cuyahoga County Bar Ass'n v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596 ..... 10, 11

*Dayton Bar Ass'n v. Greenberg*, Slip Opinion 2013-Ohio-1723 ..... 17

*Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510 ..... 17

*Disciplinary Counsel v. Dundon*, 129 Ohio St.3d 571, 2011-Ohio-4199, 954 N.E.2d 1186 ... 18

*Disciplinary Counsel v. Talikka*, Slip Opinion 2013-Ohio-1012 ..... 17

*In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538 ..... 12

*Lorain County Bar Ass'n v. Stuart*, 135 Ohio St. 3d 117, 2012-Ohio-5687 ..... 18

*Toledo Bar Ass'n v. Pheils*, 129 Ohio St.3d 279, 2011-Ohio-2906 ..... 9

*Trumbull County Bar Ass'n v. Rucker*, 134 Ohio St.3d 282, 2012 Ohio 5642 ..... 18

**Administrative Regulations**

Code of Professional Responsibility

DR 6-101(A)(3) ..... 10, 11

Rules and Regulations Governing Procedure on Complaints and Hearings Before  
the Board of Commissioners on Grievances and Discipline of the Supreme Court

BDGD Proc.Reg. 10(B) ..... 17

BCGD Proc.Reg. 10(B)(2)(a) ..... 17, 18

BCGD Proc.Reg. 10(B)(2)(b) .....	17, 18
BCGD Proc.Reg. 10(B)(2)(c) .....	18
BCGD Proc.Reg. 10(B)(2)(d) .....	17, 18
BCGD Proc.Reg. 10(B)(2)(e) .....	18
BCGD Proc.Reg. 10(B)(2)(g) .....	20
BCGD Proc.Reg. 11 .....	11

**Rules of Professional Conduct**

Prof.Cond.R. 1.0(i) .....	8
Prof.Cond.R. 1.2 .....	10
Prof.Cond.R. 1.2(c) .....	9
Prof.Cond.R. 1.3 .....	1, 2, 7, 8, 9, 10, 11, 18, 21
Prof.Cond.R. 1.4(a)(3) .....	1, 2, 7, 12, 13, 18, 21
Prof.Cond.R. 1.4(a)(4) .....	1, 2, 7, 13, 14, 21
Prof.Cond.R. 1.5(a) .....	1, 2
Prof.Cond.R. 1.5(b) .....	1, 2
Prof.Cond.R. 1.5(c)(1) .....	18
Prof.Cond.R. 1.16(d) .....	1, 2, 7, 8, 14, 15, 16, 21
Prof.Cond.R. 8.4(d) .....	1, 2

**Miscellaneous**

Board of Commissioners' Opinion 2010-2 .....	15, 16
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## Statement of the Case

Respondent Charles W. Fonda ("Fonda"), Sup. Ct. No. 0022753, was admitted to the practice of law on November 6, 1981. He is a solo practitioner whose practice generally involves representation of persons seeking relief in bankruptcy and with probate court matters, e.g., decedent's estates. Hearing Transcript ("Tr.") at 139-140. Fonda has no history of any disciplinary action. Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. ("Report") at ¶40.

Relator's Amended Complaint involved Fonda's representation of two separate client matters – the administration of a decedent's estate ("Schub matter") and an issue arising from the purchase of a motor vehicle and its repossession ("Walton matter"). The substance of the Amended Complaint claimed Fonda violated Prof.Cond.R. ("Rule") 1.3 (failure to act with reasonable diligence in both matters), Rule 1.4(a)(3) (failure to keep client informed in both matters), Rule 1.4(a)(4) (failure to comply with reasonable request for information in both matters), Rule 1.5(a) (clearly excessive fee, applicable only to the Schub matter), Rule 1.5(b) (communicate scope of representation and basis for fee, applicable only to the Schub matter), Rule 1.16(d) (prompt return of client papers in both matters), and Rule 8.4(d) (conduct prejudicial to the administration of justice in both matters).

The parties entered into numerous written stipulations of fact and to the admission of numerous exhibits. Following a hearing, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ("Board") certified to this Court its Findings of Fact, Conclusions of Law, and Recommendations. In both matters, the Board concluded clear and

convincing evidence existed to sustain Fonda having violated Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d). Report at ¶4, 7. The Board further concluded that in the Schub matter there was not clear and convincing evidence that Fonda violated Rules 1.5(a) and 1.5(b). Report at 5. Lastly, the Board concluded that in both matters there was not clear and convincing evidence that Fonda violated Rule 8.4(d). Report at ¶5, 7.

The Board recommended that Fonda be suspended from the practice of law for twelve months, with the suspension stayed on conditions. Report at 9.

Charles W. Fonda submits for this Court's review his Objections to the Board's Report focusing on the Walton matter and the Board's factual findings leading to its conclusions that Fonda violated Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d). Fonda further submits that a public reprimand is the appropriate sanction.

#### **Statement of the Facts**

Damon Walton was referred to Fonda's office concerning a truck Walton purchased. Walton Deposition ("Walton Depo.") at 11-12.<sup>1</sup> Walton purchased a used vehicle having been told by the dealer that he (Walton) had been pre-approved for credit. Walton Depo. at 15-16. At the time of purchase Walton was without funds for the down payment and agreed to make installment payments to the dealership. Walton Depo. at 17-18. Walton missed a payment and discovered that the dealership immediately repossessed the vehicle. Walton Depo. at 24-25, 28-29. Walton then provided the necessary funding for the down payment and retrieved the vehicle

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<sup>1</sup> Prior to the hearing, Fonda conducted a deposition of Walton, who was subject to examination by Relator. When Walton indicated that he would not appear at the hearing Relator sought to introduce portions of Walton's deposition testimony at which time it was agreed that the entire transcript would be admitted into evidence. Tr. at 115.

from the dealership. Walton Depo. at 25, 29.

Subsequently Walton received a call from the dealership stating that due to his (Walton's) driver's license suspension, the credit application Walton previously submitted was rejected, Walton Depo. at 32-33, whereupon the dealership again repossessed the truck. Walton Depo. at 33.

Walton engaged the owner of the dealership in a very "heated" "confrontation," with raised voices, expressions of anger, and other emotional demonstrations. Walton Depo. at 34-36, 63.

In May 2009 Walton conferred with Fonda at Fonda's office seeking a remedy such as the return of the vehicle to Walton or the return of his down payment. Walton Depo. at 44. Walton had none of the paperwork relating to the purchase of the vehicle claiming that such was inside the truck when repossessed. Walton Depo. at 39.

Walton told Fonda that his (Walton's) grandfather thereafter purchased a vehicle from the same dealership. Walton Depo. at 37. Fonda requested that Walton provide the paperwork from his grandfather's vehicle as the form of that purchase agreement would most likely be similar to Walton's missing paperwork. Despite repeated requests, Walton never presented Fonda with the grandfather's purchase documents. Tr. at 212. At no time had Walton provided Fonda with any documents. Walton Depo. at 85.

Walton signed a representation agreement ("Agreement") with Fonda. Walton Depo. at 42, Relator's Exhibit 24. The pertinent provision of the Agreement is very short, is written in regular, not reduced, print; and is in clear, easy to understand, mostly one and two-syllable words,

1. The CLIENT has retained and hereby does retain the ATTORNEY to prepare a demand letter on his behalf to Auto[-]Rite (salesman/finance manager Von) for the return of his vehicle and/or funds deposited with Auto-Rite relating to a vehicle transaction with Auto-Rite, which transpired at the end of March, 2009. **The attorney is specifically retained to prepare such demand letter, and to proceed with follow-up negotiations, if any. Should a lawsuit be required, the parties hereto will proceed under a separate agreement.** (Uppercase and parenthesis *sic*, boldface added.)

Walton, a former police officer, Walton Depo. at 7-8, acknowledged to having previously retained attorneys, to having signed written agreements for the legal services, to having read those agreements, and to having understood those documents. Walton Depo. at 76.

Notwithstanding the explicit terms of the Agreement<sup>2</sup> and ignoring for the moment Fonda's testimony to the contrary, Tr. at 145, Walton steadfastly denied that Fonda ever mentioned his representation of Walton was limited, *i.e.*, that Fonda would seek to resolve the matter without court involvement, but if unsuccessful, then a second, separate litigation agreement and the pre-payment of court costs would be required before proceeding in court. Walton Depo. at 41 ("Q. [Mr. Fonda n]ever told you that? A. No."), 46.

Fonda wrote two letters to the dealership, Relator's Exhibits 25 and 26, copies of which Fonda mailed to Walton. Tr. at 146-147. When Fonda received no response, having waited a reasonable period, Fonda advised Walton that if he (Walton) wanted to proceed to litigation that both (Fonda and Walton) must sign a separate, litigation, agreement. Tr. at 147. Fonda also reminded Walton that he (Walton) was to advance the necessary court costs. Tr. at 147-148.

Walton recalled these events differently, first expressing frustration with Fonda's failure

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<sup>2</sup> "It was clearly spelled out in the original representation agreement that should a lawsuit be required the parties would have to enter into an additional representation agreement." Report at ¶29.

to undertake any work on his behalf. When asked if Fonda undertook any activity, Walton stated "I have no idea," Walton Depo. at 47, correcting this statement to reflect having received from the Better Business Bureau a copy of a letter Fonda sent to Auto-Rite, *id.*, which evolved into the acknowledgment that upon visiting Fonda's office, Walton was given a copy of a letter Mr. Fonda sent to Auto-Rite. Walton Depo. at 48, 52.

Walton was prolific, from 3-4 times a week to 30-40 times a month, in his calls to Fonda's office, home, and cell phone, wherever he (Walton) thought Fonda could be reached. Walton Depo. at 49-50. Walton became verbally abusive to the point of intimidation of Charlotte Cohen, Fonda's assistant. Report at ¶27.

I couldn't deal with him (Walton) anymore. He was always yelling. He was always screaming. He was what I considered to be verbally abusive, and he would accuse me of not giving Mr. Fonda his messages, which wasn't true, and he would just go off on tangents. And I got tired of being yelled at.

Testimony of Charlotte Cohen, Tr. at 128.

Walton's behavior was not unlike his verbal confrontation with the owner of Auto-Rite – raised voices, expressions of anger or some other emotional demonstration. Walton Depo. at 34, 36, 63.

Although Walton had no difficulty in calling Fonda at his office, on his cell phone, or at home to complain, Walton failed to communicate with Fonda to notify him (Fonda) that he (Walton) would not appear for the meeting Walton scheduled to discuss the case. Walton Depo. at 70. The reason for not attending the meeting was understandable,<sup>3</sup> the failure to notify Fonda

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<sup>3</sup> Shortly before the scheduled meeting Walton sustained an injury, hospitalizing him. Although Walton had access to a phone, he chose not to call Fonda to cancel the meeting. Walton Depo. at 69-70. Fonda did appear for the scheduled meeting, waiting over an hour for  
(continued...)

was inexcusable.

Walton acknowledged that between September 2010 and March 2011 he and Fonda “played telephone tag.” Walton Depo. at 72-73. Then in March 2011 Walton appeared in Fonda’s office with a \$100 check issued by his (Walton’s) mother representing the filing fee for pursuing the court action. Walton Depo. at 73, Relator’s Exhibit 29. Walton claimed Fonda never mentioned the need to sign the second, litigation, agreement and that he (Walton) “had no knowledge of any such fee agreement” even through the date of his deposition on October 2, 2012. Walton Depo. 58, 74.

Following the delivery of the \$100 check, Walton claimed not to have had any further conversation or direct contact with Fonda. Walton Depo. at 60.

Fonda never negotiated the \$100 check believing that such would commit him to undertake litigation on Walton’s behalf without having a signed separate litigation agreement. No “stop payment” order issued of the \$100 check at any time following its delivery to Fonda. Walton Depo. at 77.

In January 2012 Walton terminated Fonda’s services and demanded return of his papers and documents, Relators’ Exhibit 23, contemporaneously filing his grievance with Relator. As previously indicted, at no time had Walton produced and presented to Fonda any documents or papers. Fonda had already provided Walton with copies of the two letters written to the car dealership, thus, there was nothing to return to Mr. Walton.

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<sup>3</sup>(...continued)  
that which would not take place. Tr. at 152-153.

By letter dated July 25, 2012, the undersigned, on Fonda's behalf, sent to Relator's counsel copies of Fonda's file on Walton comprising of six items: (1) Fonda's handwritten note with "Auto Rite" written at the top, Relator's Exhibit 30; (2) Fonda's "Client Information Sheet," Relator's Exhibit 31; (3) Gloria Walton's check no 1362, a copy of which was admitted as Relator's Exhibit 30; (4) the Agreement between Fonda and Walton, Relator's Exhibit 24; (5) Fonda's July 23, 2009, letter to Auto Rite, Relator's Exhibit 25; and (6) Fonda's September 2, 2009, letter to Auto Rite, Relator's Exhibit 26.

Given the number of Walton's calls, Fonda did not dispute that he did not return each and every call or voicemail, especially not having anything new to report each day. Further, given Walton's demeanor and behavior, Fonda's paralegal Charlotte justifiably refused to further speak with Walton.

Although Walton claimed that he intended to retain other counsel to pursue his claim against the car dealership, he did not do so. Walton Depo. at 82, 83.

Upon the totality of the circumstances, Fonda acted in a reasonable manner, with reasonable diligence and promptness in his activities on Walton's behalf consistent with the Agreement between Walton and Fonda, and consistent with Fonda's ethical obligations under the Rules of Professional Conduct. Any delay in proceeding with the Walton, following the two letters to the car dealership were as a result of Walton's failure to have retained Fonda by providing Fonda with the court costs and a signed litigation agreement. Further, as Fonda had no "client papers or property" belonging to Walton, there was nothing for Fonda to return. Fonda takes issue with the Board's findings and conclusions that Fonda violated Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d) and that such was part of the consideration for the imposition of the

sanction to be imposed with regard to the Schub matter.<sup>4</sup>

### Discussion

**Objection No. 1: Fonda acted with reasonable diligence and promptness per the Agreement, the matter for which he was retained, and was not obligated to render further service in absence of a signed litigation agreement and the advancement of court costs, thus Fonda did not violate Rule 1.3.**

Rule 1.3 provides that “[a] lawyer shall act with *reasonable* diligence and promptness in representing a client.” (Italics *sic.*) The key word, as emphasized, is “reasonable,” defined at Rule 1.0(i) as “the conduct of a reasonably prudent and competent lawyer.”

The timeline as presented by the evidence demonstrated that following the initial meeting and signing of the Agreement, Fonda waited for Walton to provide documentation of the purchase of the repossessed vehicle, and absent that, of the vehicle purchased by Walton’s grandfather. When Walton failed to deliver the requested documents, Fonda wrote to the dealership, a copy sent to Walton. After a reasonable period, and having received no response, Fonda again wrote to the car dealership, with a copy again sent to Walton. With no response, Fonda advised Walton that to proceed further, he and Walton would have to sign a second, litigation agreement and Walton would have to advance the court costs.

Upon writing the two letters to the car dealership attempting to negotiate a resolution on Walton’s behalf, Fonda completed all services per the Agreement. At that time, Fonda could have chosen not to proceed further, and there was nothing obligating Fonda to do so. As of that

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<sup>4</sup> Pertaining the Schub matter, Fonda acknowledged that he did not maintain reasonable communications with the client, but he challenged the allegations that he violated Rule 1.3 (failure to act with reasonable diligence) and Rule 1.16(d) (prompt return of client papers), presenting evidence in support thereof. Regardless, Fonda accepts responsibility for his conduct in Schub.

time, Fonda could not have violated Rule 1.3; to the contrary, Fonda had acted “with reasonable diligence and promptness in representing” Walton per the Agreement.

When Walton first visited Fonda, it was as a prospective (new) client. The Agreement Walton signed complied, to the letter, with Rule 1.2(c). Rule 1.2(c) specifically allows an attorney to “limit the scope of a **new** or existing **representation** if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.” (Italics *sic*, boldface added.) Fonda did exactly which Rule 1.2(c) authorized and in the manner in which the Rule prescribed – the Agreement expressly limited the scope of representation, indicating the terms by which Fonda and Walton agreed to both the present and future services to be provided.

There can be no question that the limitations imposed per the Agreement – *i.e.*, a second, signed litigation agreement, and the advancement of court costs – were reasonable, that such was communicated to Walton, and that such was in writing.

As the evidence, without question, demonstrated that Walton failed complied with both conditions, the limitation on Agreement for **the initial representation** precluded the creation of the attorney-client relationship for litigation purposes, and Fonda could not have violated Rule 1.3.

Fonda never expressed to Walton that he (Fonda) would not continue to represent him (Walton). The Agreement stipulated conditions for Fonda to undertake further representation, Walton would have to sign a second, litigation agreement and advance the filing fee. Walton never did the former and waited one and one-half years to have his mother do the latter. Without a signed the litigation agreement, the \$100 check was of no consequence.

In *Toledo Bar Ass’n v. Pheils*, 129 Ohio St.3d 279, 2011-Ohio-2906, ¶24, this Court

affirmed that Rule 1.2 permits a lawyer to limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing. This Court found a violation because the respondent therein still represented the client in the very matter that he agreed to undertake. Here, Walton hired Fonda under a limited legal services agreement to attempt a negotiated resolution with the car dealership. Fonda completed the services under the Agreement which, unfortunately, did not resolve the issues between Walton and the car dealership.

Fonda never deposited the \$100 check into his IOLTA. That Fonda never negotiated the check is consistent with Fonda's requirement that two conditions be met before Fonda would be retained to initiate litigation against the car dealership. Unless and until such occurred, Fonda did not represent Walton and absent the attorney-client relationship pertaining to the litigation against the car dealership, Fonda could not have violated any duty per Rule 1.3.

Finally, this case is readily distinguishable from *Cuyahoga County Bar Ass'n v. Hardiman*, 100 Ohio St.3d 260, 2003-Ohio-5596, wherein this Court found the existence of an attorney-client relationship and that the attorney thus violated DR 6-101(A)(3) (a lawyer shall not neglect a legal matter entrusted to him), predecessor to and replaced by Rule 1.3.

In *Hardiman*, the question presented was whether an attorney can violate DR 6-101(A)(3) absent an express attorney-client relationship. *Id.* at 262. This Court held that an attorney-client relationship need not be formed by an express written contract or by the full payment of a retainer, but may be created by implication based upon the conduct of the parties and the reasonable expectations of the person seeking representation. *Id.* "The determination of whether an attorney-client relationship was created turns largely on the reasonable belief of the

prospective client.” *Id.*

*Hardiman* found that the attorney’s conduct gave rise to the reasonable belief creating the attorney-client relationship. Of import was this Court’s advice and counsel to members of the bar:

To avoid violating the Disciplinary Rules, an attorney who is declining representation of a client until the full retainer is received should clarify that fact with the client. Clearly, the use of a written fee agreement is the preferred method of detailing the conditions of an attorney’s representation. Had respondent memorialized the fee arrangement in a written instrument setting forth the obligations of the parties, including a statement that no work would be undertaken until Moore had paid a specific dollar amount, respondent might not be in the position that he finds himself in today and may have been able to exonerate himself from disciplinary action. Instead, under the facts presented, we are obliged to find that respondent violated DR 6-101(A)(3).

To avoid violating Rule 1.3, by declining representation of a client until satisfaction of the financial and other obligations, Fonda followed this Court’s admonition to the letter:

1. Both Fonda and Walton signed the Agreement detailing the limited conditions of Fonda’s representation, and,
2. The Agreement included a statement that no litigation would be undertaken until Walton signed a subsequent litigation agreement and advanced the payment of the court filing fee.

Whereas *Hardiman* failed to perform such preventative measures leading to the disciplinary violation, Fonda, by complying with this Court’s directive, is “able to exonerate himself from disciplinary action.” The Board’s factual determination that Fonda violated Rule 1.3 is not supported by clear and convincing evidence, and the Board’s conclusion that Fonda violated Rule 1.3 is contrary to law.

**Objection No. 2: Under the factual circumstances of this case,**

**there was nothing for Fonda to inform Walton, thus Fonda  
could not have violated Rule 1.4(a)(3)**

Context is everything. *In re M.W.*, 133 Ohio St.3d 309, 2012-Ohio-4538, caption preceding ¶36 (O'Connor, C.J., dissenting).

Fonda incorporates, as if fully rewritten herein, his argument in support of Objection No. 1 in that no attorney-client relationship existed obligating Fonda to initiate litigation on Walton's behalf. If no representation agreement existed obligating Fonda to pursue litigation on Walton's behalf, then Fonda could not have violated Rule 1.4(a)(3) as there was nothing about which to inform non-client Walton, let alone keep him informed. It was Walton who failed to meet the conditions that would have imposed the duties of Rule 1.4(a)(3) upon Fonda.

Not addressed by the Board were what information did Walton lack and what knowledge did he not have which rendered him uninformed? The answer to both is "nothing."

Rule 1.4(a)(3) does not dictate the frequency in which an attorney must notify a client, whether daily, weekly, or monthly, or some other time schedule. The Rule uses "reasonable" that is, "the conduct of a reasonably prudent and competent lawyer." Put into context, if a "client" possesses all the information that exists in a matter, that the attorney does not communicate to the client to say "nothing new," cannot constitute a breach of Rule 1.4(a)(3).

From a public relations perspective, it may serve the attorney well to periodically send a message to a client to inform of "nothing new." However, the failure to do so cannot rise to the level of a disciplinary violation, especially where not only was there nothing new for 18 months, but the only manner by which things could change would have been for Walton to have complied with the two conditions to establish the new attorney-client relationship for litigation. Until

Walton complied with these two reasonable conditions, no matter how frequently Walton called, no matter the tone taken by Walton, no matter who he tried to intimidate, the scenario never changed and there was nothing about which Fonda could inform Walton.

The Board's factual determination that Fonda violated Rule 1.4(a)(3) is not supported by clear and convincing evidence, and the Board's conclusion that Fonda violated Rule 1.4(a)(3) is contrary to law.

**Objection No. 3: In the context of this case, there was no information to be provided by Fonda to Walton, thus Fonda could not have violated Rule 1.4(a)(4)**

Fonda incorporates, as if fully rewritten herein, his arguments in support of Objection Nos. 1 and 2. The Board concluded that Fonda violated Rule 1.4(a)(4), in that Fonda failed to comply, as soon as practicable, with *reasonable* requests for information from the client.

As with Objection No. 2, the Report does not indicate what is "reasonable" or what information Fonda could have provided of which Walton was unaware, assuming, *arguendo*, that Fonda had any duty to do so as no attorney-client relationship existed with Walton beyond the initial Agreement. The Report does not indicate the information that Fonda could have provided Walton. In this instance, silence is neither damning nor golden.

For purposes of Rule 1.4(a)(4), there was no attorney-client relationship for litigation, and as Walton was aware of the non-responsiveness of the car dealership, Walton had two choices *vis-a-vis* Fonda – either sign the litigation agreement and advance the costs for litigation, thus having retained an attorney to represent him, or do nothing and not have an attorney representing him. Walton, by his inaction, chose the latter.

The Board's factual determination that Fonda violated Rule 1.4(a)(4) is not supported by

clear and convincing evidence, and the Board's conclusion that Fonda violated Rule 1.4(a)(4) is contrary to law.

**Objection No. 4: Where Walton deposited no papers or property with Fonda and there were no other items reasonably necessary for Walton's representation, there was nothing for Fonda to have promptly returned to Walton, thus there cannot be a violation of Rule 1.16(d).**

Walton testified that he provided Fonda with no documents. Walton received copies of the two letters Fonda sent to the auto dealership. Walton requested the return of his file from Fonda. Although Walton provided Fonda with no "papers or property," the Board found that "Respondent's counsel sent **copies of Walton's documents**" to Relator's counsel. Report at ¶32. The Board concluded that Fonda's "failure to promptly return Walton's file constituted a violation of Rule 1.16(d). Report at ¶37. The finding by the Board is clearly erroneous and its conclusion is contrary to law.

Rule 1.16(d) mandates the attorney's prompt return to a client of the client's "papers and property." The Rule does not require, nor did the Board cite any authority for an attorney to turn over his file to the client.

Rule 1.16(d) speaks of the return to the client of "papers and property" belonging to the client along with other documents and items "*reasonably necessary to the client's representation.*" (Italics *sic.*) Despite Fonda's requests, Walton submitted nothing to Fonda. As Walton provided no "papers and property" to Fonda, there was nothing for Fonda to return. Upon Fonda's retaining the undersigned as counsel, a copy of the few papers comprising Fonda's office file, including Fonda's notes, was sent to Relator's counsel.

At no time had any of Relator's counsel indicated that Walton suffered any prejudice or

that any portion of Fonda's file was "reasonably necessary to [Walton's] representation," notwithstanding Walton's not having secured subsequent counsel or having further pursued his claim against the car dealership.

Fonda's personal notes are not *per se* Rule 1.16(d) "papers and property" to be delivered to the client. Rule 1.16(d) explains that client "'papers and property' **may include** correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation." (Boldface added.) Omitted from this list are attorney notes.

This omission is considered significant. The drafters of Ohio rules could have easily included a lawyer's notes in the list, but did not. Yet, the list does include a category "items reasonably necessary to the client's representation" and this is the category where a lawyer's notes may or may not fall depending upon the nature and content of the notes.

Board of Commissioners' Opinion 2010-2 ("Op. 2010-2") at 12.

As a matter of first impression before the Board, Opinion 2010-2 reviewed a client's claimed right to his attorney's notes, noting that this issue had not been the subject of any disciplinary case before this Court. Op. 2010-2 at 7.

Part of the difficulty in addressing "lawyer's notes" is that the category is broad and not precisely defined. A lawyer's notes might comprise a range of information from thoughts, ideas, impression, or questions of an attorney, to internal office management memoranda such as personnel assignments or conflicts of interest checks, to facts about a case.

*Id.* at 8.

When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression, or questions will

probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation and if so should be turned over to the client.

*Id.* at 12.

Nothing contained in Fonda's file gave rise to any conclusion that such were "reasonably necessary to [Walton's] representation." The burden should not be on Fonda to prove the negative, that such information is not reasonably necessary to Walton's representation, but upon Relator to affirmatively demonstrate, by clear and convincing evidence, what information in Fonda's notes was so essential that its absence prejudiced or may have prejudiced Walton.

The record before the Board is devoid of any evidence that Fonda's notes of the initial meeting with Walton or anything else contained in Fonda's file contained information *reasonably* necessary to Walton's representation especially where Walton failed to secure other counsel or to further pursue his cause .

Fonda did not fail to return client papers and property and Fonda's file did not contain information or documentation reasonably necessary to Walton's representation. The Board's factual determination that Fonda violated Rule 1.16(d) is not supported by clear and convincing evidence, and the Board's conclusion that Fonda violated Rule 1.16(d) is contrary to law.

**Objection No. 5: A public reprimand sufficiently serves the primary purpose of the disciplinary process.**

Two principles serve as guideposts for this Court when considering the imposition of a disciplinary sanction:

We have long recognized that the primary purpose of the disciplinary process is

not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship.

*Disciplinary Counsel v. Talikka*, Slip Opinion 2013-Ohio-1012, ¶19, and,

Each disciplinary case involves unique facts and circumstances; thus we are not limited to the factors specified in BGD Proc.Reg. 10(B) and may take into account all relevant factors in determining which sanction to impose.

*Dayton Bar Ass'n v. Greenberg*, Slip Opinion 2013-Ohio-1723, ¶6.

Taking into consideration all facts and circumstances in this matter, Charles Fonda has not shown himself “unworthy of the trust and confidence essential to the attorney-client relationship” and a public reprimand satisfies the purpose and preserves the integrity of the attorney disciplinary process.

The criteria considered by this Court as expressed when having imposed a public reprimand, support and justify the issuance of a public reprimand herein.

Weighing the mitigating factors against the conduct at issue, we reject the board’s recommendation that a one-year stayed suspension be imposed, and instead, based on the fact that Agopian has no prior disciplinary record, has fully complied with the disciplinary process, and has accepted responsibility for his conduct, and further considering the character letters attesting to his reputation, integrity, and professionalism, we issue a public reprimand for the conduct in this case.

*Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510, ¶15.

(1) Stuart has no prior discipline, see BGD Proc.Reg. 10(B)(2)(a); (2) Stuart promptly and fully cooperated in the disciplinary process, accepted responsibility for his misconduct, and acknowledged his violations of the Code of Professional Conduct, see BGD Proc.Reg. 10(B)(2)(d); and (3) Stuart did not act with a selfish or self-serving motive, nor did his violations of the Code of Professional Conduct involve fraud or dishonesty, see BGD Proc.Reg. 10(B)(2)(b). Additionally, Stuart presented five letters attesting to his character and diligence in the usual course of his legal practice. We concur in the board’s evaluation of the mitigating factors.

The board adopted the stipulated sanction of public reprimand, finding that that

sanction was consistent with our precedent. Indeed, several prior cases similarly involve isolated instances of neglect or incompetence, sometimes with the failure to notify the client of a lack of professional-liability insurance. Those cases culminated in a public reprimand. (Citations omitted.) We agree with the board and adopt the sanction of public reprimand. We believe that sanction is sufficient to protect the public.

*Lorain County Bar Ass'n v. Stuart*, 135 Ohio St. 3d 117, 2012-Ohio-5687, ¶15-16.

[M]itigating factors include the absence of a prior disciplinary record, absence of a dishonest or selfish motive, a timely good-faith effort to make restitution, full and free disclosure and a cooperative attitude toward the disciplinary proceedings, and reputation of good character in the community. See BCGD Proc.Reg. 10(B)(2)(a), (b), (c), (d) and (e).

*Trumbull County Bar Ass'n v. Rucker*, 134 Ohio St.3d 282, 283, 2012 Ohio 5642, ¶4.

And as especially relevant and applicable to this matter are *Cleveland Metro. Bar Ass'n v. Gusley*, 133 Ohio St.3d 534, 2012-Ohio-5012, ¶4-5,

[M]itigating factors include the absence of a prior disciplinary record, absence of a selfish motive, a timely good-faith effort to rectify the consequences of the misconduct by registering with the United States District Court for the Northern District of Ohio, and full and free disclosure and a cooperative attitude toward the disciplinary proceedings. The parties do not stipulate to any aggravating factors. See BCGD Proc.Reg. 10(B)(2)(a), (b), (c), and (d). Based upon these substantial mitigating factors, the parties stipulate that a public reprimand is the appropriate sanction for Gusley's misconduct.

The panel and board found that the consent-to-discipline agreement conforms to BCGD Proc.Reg. 11 and recommend that we adopt the agreement in its entirety. We agree that Gusley violated Prof.Cond.R. 1.3, 1.4(a)(3), and 1.5(c)(1).

and, *Columbus Bar Ass'n v. Bhatt*, 133 Ohio St.3d 131, 2012-Ohio-4230, ¶18,

We have previously imposed public reprimands for attorneys who have engaged in conduct comparable to that of Bhatt. See, e.g., *Akron Bar Assn. v. Freedman*, 128 Ohio St. 3d 497, 2011 Ohio 1959, 946 N.E.2d 753 (publicly reprimanding an attorney who failed to communicate with clients in a timely manner, failed to keep them reasonably informed of the status of their case, and failed to notify the clients that he did not maintain malpractice insurance or that they could be entitled to a refund of any unearned portion of a nonrefundable fee); *Disciplinary*

*Counsel v. Dundon*, 129 Ohio St.3d 571, 2011 Ohio 4199, 954 N.E.2d 1186 (publicly reprimanding an attorney who neglected a client matter, failed to regularly communicate with the client, and failed to timely respond to requests for a refund of the client's attorney fees).

Fonda has not contested the findings in the Schub matter and from the outset fully cooperated with Relator in accounting for his actions and inactions, which included Fonda's payment of \$990.93 representing what Fonda thought was the outstanding Ohio Estate Tax and accrued interest. Report at 9, fn 1.

The Board concluded as aggravating factors multiple offenses (based on two clients), pattern of misconduct (based on two clients), vulnerable clients, and harm to clients resulting from misconduct. Report at ¶39. The Board noted the parties' stipulation of mitigating factors of no prior disciplinary history and no selfish or dishonest motive, Report at ¶40, and of Fonda's contract with Ohio Lawyer's Assistance Program, Respondent's Exhibit J, and of his on-going mental health treatment with James Medling, Ph.D, Respondent's Exhibit A. Report at ¶41-43. The Board did not mention any other mitigating factors such as full and free disclosure to disciplinary Board or cooperative attitude toward proceedings and letters attesting the Fonda's good character or reputation. Respondent's Exhibits C-I.

Fonda presented testimonial letters demonstrating 31 years of competency, dignity, civility, and respect when discharging his duties on behalf of his clients and in his relationship with colleagues. Following conversation with Relator's counsel, Fonda began introspection resulting in his undergoing psychological treatment with James Medling, Ph.D., and entering into a contract with the Ohio Lawyers Assistance Program.

Dr. Medling's report, admitted by stipulation, revealed very personal matters of Mr.

Fonda in a most open and candid manner along with a discussion of the measures to successfully confront and resolve these issues. Dr. Medling's report met the four elements supporting BDGD Proc.Reg. 10(B)(2)(g) mitigation.

Fonda disputed at the hearing any restitution to Schub (1) given his payment of \$990.93 on behalf of the estate, (2) as any interest resulting from the reporting of the newly discovered assets did not result from any act or failure to by Fonda and would have accrued even had an estate tax return been timely filed and the tax timely paid, and (3) as Fonda made clear that he did not prepare or involve himself in federal tax matters, offering Schub the option of securing her own accountant of having Fonda refer to Schub an accountant, thus any taxes and interest arising from the delay in preparing, filing, and paying federal taxes did not result from any act or failure to act by Fonda.

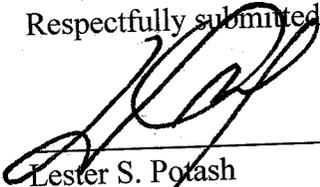
Although Fonda did not present objections to the Board's conclusions involving Schub, as this Court conducts an independent review of this matter, Fonda submits, for mitigation purposes, the foregoing comments about the Schub matter as reflecting positively when considering the "unique facts and circumstances" that this case presents.

### Conclusion

**WHEREFORE**, Respondent Charles W. Fonda respectfully prays that this Court, upon review, sustain Fonda's objections (1) determining that with regard to the Walton matter, he committed no violation of Rules 1.3, 1.4(a)(3), 1.4(a)(4), and 1.16(d), and (2) that a public reprimand is the appropriate sanction for Fonda's conduct in connection with the Schub matter.

Respectfully submitted,

/s/Stanley E. Stein (by consent)  
Counsel for Respondent

  
\_\_\_\_\_  
Lester S. Potash  
Counsel of Record for Respondent

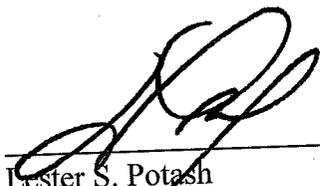
### Certificate of Service

A true copy of the foregoing Respondent's Objections has been served electronically this 20<sup>th</sup> day of May, 2013, upon the following counsel for Relator:

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\_\_\_\_\_  
Lester S. Potash  
Counsel of Record for Respondent

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

<b>In re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 12-030</b>
<b>Charles Walter Fonda</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0022753</b>	:	<b>Conclusions of Law, and</b>
	:	<b>Recommendation of the</b>
<b>Respondent</b>	:	<b>Board of Commissioners on</b>
	:	<b>Grievances and Discipline of</b>
<b>Cleveland Metropolitan Bar Association</b>	:	<b>the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	
	:	

**OVERVIEW**

{¶1} This matter was heard December 10, 2012, in Columbus before a panel consisting of Teresa Sherald, Charles Coulson, and Judge Otho Eyster, chair. None of the panel members is from the appellate district in which the complaint arose, and none served on the probable cause panel that certified the matter to the Board.

{¶2} Relator was represented by Joseph E. Huigens and Robert S. Faxon. Respondent was present, represented by Lester S. Potash.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶3} The parties have entered into 61 written stipulations of fact and 48 exhibits were admitted into evidence at the hearing. The parties did not stipulate rule violations or aggravating factors, but did stipulate two mitigating factors. In making its findings of fact, conclusions of law, and its recommendation, the panel also considered the testimony of Respondent and of the

other witnesses offered at the hearing, both live and by deposition. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶4} Respondent, Charles W. Fonda, was admitted to the practice of law in Ohio on November 6, 1981, and is thus subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶5} Respondent is a solo practitioner. Respondent employs a parttime assistant who works approximately four hours per week; coming to the office only after 4:00 p.m. Respondent is the only point of contact for his clients other than the hours worked by his assistant.

#### **Count One – Janice Schub**

{¶6} On June 29, 2007, Ms. Schub, a California resident, hired Respondent and entered into a representation agreement with him whereby Respondent agreed to “prepare and file the Initial Application to Administer Estate and to Probate Will, Appointment of Appraiser form, all documents necessary to transfer real estate and other documents, and the filing of accounts and closing the estate” on behalf of Schub in handling the probate of the estate of Leslie E. Hevland. Relator’s Ex. 1, ¶2. Hevland was Schub’s brother.

{¶7} Schub’s understanding was that Respondent was to handle all phases of closing the estate including the filing of Ohio estate tax returns and any federal returns. Schub “entrusted him to do it all for her.” Hearing Tr. 65.

{¶8} Respondent filed the Ohio estate tax return 20 months late and never requested an extension of time to file the return. The estate ultimately paid \$1,080.66 in accrued interest because of the late filing.

{¶9} Respondent filed the 2007 federal income tax return for Hevland 39 months late. Due to the late filing, penalties and interest were assessed, however, the penalty was eventually waived and the interest was reduced to \$180.65.

{¶10} Respondent filed the federal estate tax return 42 months late. As a result, the estate paid \$436.95 in penalties and interest.

{¶11} The penalties and interest waived were done so as a direct result of Schub's efforts with no help from Respondent.

{¶12} By March 2010, Respondent had stopped returning Schub's calls to his office and cell phone. After attempting to contact Respondent by letters and email with little success, she resorted to sending letters via certified mail. Relator's Ex. 8 & 9.

{¶13} Respondent entered into evidence a report of his psychologist, Dr. Medling. As it relates to Schub, the report states:

He stated that his work with Ms. Schub covered four years over several different periods of time. She was the friend of his paralegal who was assisting him with bankruptcies and state filings. Difficulties began around the two year mark with communication difficulties that lead [sic] to problems filing necessary forms, around May 2010. That is also when some of the avoidance on his part began to arise. He would rationalize, "I can do that later." He denied disliking her but there was frustration that surfaced. His position was that he would call her if there was something new to report. He grew weary of her repeated calls asking "Are we there yet?" He also noted miscommunication between him and his paralegal about what to say to her. He was aware that he was not as direct and straightforward with his paralegal as he could have been and that he was avoiding Ms. Schub's calls.

Respondent's Ex. A, p. 5

{¶14} In January 2012, approximately four and one-half years after Respondent was retained, Schub terminated Respondent's services and requested her file. Respondent did not return Schub's file until after the complaint was filed in this matter in July 2012.

{¶15} The representation agreement entered into by the parties set attorney fees at \$125 per hour. The amount paid to Respondent was approximately \$12,000.

{¶16} Relator alleges the actions and omissions of Respondent's representation of Schub as contained in Count One violate the following: Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4(a)(3) [a lawyer shall keep the client informed about the status of the matter]; Prof. Cond. R. 1.4(a)(4) [a lawyer shall comply as soon as practicable with reasonable requests for information from the client]; Prof. Cond. R. 1.5(a) [a lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee]; Prof. Cond. R. 1.5(b) [a lawyer shall communicate to the client the nature and scope of representation and the basis or rate of the fee and expenses]; Prof. Cond. R. 1.16(d) [a lawyer shall take steps to protect a client's interest as part of termination or representation]; and Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice.]

{¶17} The panel concludes by clear and convincing evidence that Respondent's conduct in his dealings with Schub violated Prof. Cond. R.1.3, Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), and Prof. Cond. R. 1.16(d).

{¶18} By filing estate and income tax returns 20, 39, and 42 months late, and not closing Hevland's estate after four and one-half years, Respondent did not act with reasonable diligence and promptness in representing Schub.

{¶19} Respondent has admitted avoiding Schub's calls and putting off her work, failing to keep her reasonably informed about the status of her case, and not promptly complying with her reasonable request for information in violation of Prof. Cond. R. 1.4(a)(3) and Prof. Cond. R. 1.4(a)(4).

{¶20} Relator offered no evidence that Respondent charged an illegal or clearly excessive fee other than the fact that Respondent has been paid approximately \$12,000 by Schub. The panel finds Relator has not proven by clear and convincing evidence that Respondent charged a clearly excessive fee or that he did not communicate to Schub what fees and expenses he was charging and recommends dismissal of the alleged violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.5(b).

{¶21} By not promptly returning Schub's files when requested, Respondent violated Prof. Cond. R. 1.6(d).

{¶22} The panel finds Relator failed to prove by clear and convincing evidence that the course of conduct followed by Respondent as it relates to Ms. Schub constitutes conduct prejudicial to the administration of justice and recommends dismissal of the alleged violation of Rule 8.4(d).

#### **Count Two – Damon Walton**

{¶23} Mr. Walton purchased a truck from an Auto Rite dealership in February 2009. After paying the down payment in installments, he was told the financing bank required additional money down. When Walton refused to pay additional money, the truck was repossessed with paperwork and personal items in the truck.

{¶24} On May 13, 2009, Walton retained and entered into a representation agreement with Respondent. The agreement called for Respondent to prepare a demand letter to Auto Rite and pursue follow-up negotiations. Walton paid Respondent \$250. Relator's Ex. 24.

{¶25} Following their second meeting on May 15, 2009, Walton could not get Respondent to take or return his calls.

{¶26} In late July or early August 2009, Walton went to Respondent's office, without an appointment, and had a discussion about his case. At this meeting, Respondent provided a copy of a demand letter dated July 23, 2009 that he had sent to Auto Rite. Relator's Ex. 25.

{¶27} From the date of the third meeting, Walton called Respondent quite frequently with his calls often unanswered or unreturned. When Walton would get Respondent's assistant on the phone, he often became verbally abusive to the point where she refused to take his calls.

{¶28} In July 2010, Walton made contact with Respondent and they scheduled a meeting for July 27, 2010. Before the meeting could take place, Walton was assaulted and severely injured and as a result missed the scheduled meeting.

{¶29} Between October 2010 and March 2011, Walton made numerous attempts to contact Respondent. In early March 2011, Respondent communicated with Walton that if he wanted him to file suit he would need an additional \$100. It was clearly spelled out in the original representation agreement that should a lawsuit be required the parties would have to enter into an additional representation agreement.

{¶30} On March 7, 2011, Walton met with Respondent and gave him a check for \$100 drawn on this mother's account. The check was not negotiated, no lawsuit was filed, and Respondent did not communicate with Walton after this date.

{¶31} Walton filed a grievance against Respondent on November 23, 2011. On January 11, 2012, Walton terminated Respondent's representation and requested the return of his file (by certified mail). Relator's Ex. 27. Respondent did not respond to Walton's request.

{¶32} On July 25, 2012, Respondent's counsel sent copies of Walton's documents and the original check for \$100 to Relator's counsel who subsequently returned them to Walton.

{¶33} Relator alleges the actions and omissions of Respondent's representation of Walton as contained in Count Two violate the following: Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), Prof. Cond. R. 1.16(d), and Prof. Cond. R. 8.4(d).

{¶34} The panel concludes by clear and convincing evidence that Respondent's conduct in his dealings with Walton violates Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), and Prof. Cond. R. 1.16(d).

{¶35} Respondent represented Walton for more than two and one-half years without getting any of his legal issues resolved, constituting a violation of Prof. Cond. R. 1.3.

{¶36} Respondent's failure to return phone calls or to attempt any other means of communicating with Walton for months at a time constitutes violations of Prof. Cond. R. 1.4(a)(3) and Prof. Cond. R. 1.4(a)(4).

{¶37} Walton's request for his file on January 11, 2012, was ignored by Respondent. The file was returned to Walton on July 25, 2012, by Respondent's counsel. Respondent's failure to promptly return Walton's file constitutes a violation of Prof. Cond. R. 1.16(d).

{¶38} The panel finds Relator failed to prove by clear and convincing evidence that the course of conduct followed by Respondent as it relates to Walton constitutes conduct prejudicial to the administration of justice and recommends the alleged violation of Prof. Cond. R. 8.4(d) be dismissed.

#### **MITIGATION AND AGGRAVATION, AND SANCTION**

{¶39} The panel finds several aggravating factors, specifically; (1) multiple offenses (only two clients); (2) pattern of misconduct (only two clients); (3) vulnerable clients; and (4) harm to his clients as a result of misconduct.

{¶40} The parties stipulated to the following mitigating factors: (1) no history of disciplinary actions; and (2) absence of a selfish or dishonest motive.

{¶41} The original complaint in this matter was filed April 16, 2012. A hearing was scheduled for August 27, 2012. On August 13, Respondent requested a 60-day continuance of the hearing to allow Respondent to submit to a mental health examination ordered by the OLAP contract entered into on August 1, 2012. Respondent's Ex. J.

{¶42} On August 29, 2012, Respondent was evaluated by James M. Medling, PhD, Clinical Psychologist, separate from his OLAP contract. The report of Dr. Medling admitted into evidence diagnosed Respondent with Generalized Anxiety Disorder and Dysthymic Disorder contributing to cause Respondent's "deficiencies" in dealing with Schub and Walton. Dr. Medling opines "currently and with continued psychological treatment, Mr. Fonda is able to provide competent, ethical, professional service to his clients." Respondent's Ex. A.

{¶43} Respondent testified he is still counseling with Dr. Medling and is compliant with the terms of his OLAP contract.

{¶44} Relator recommends Respondent be suspended from the practice of law for a minimum of one year, with no more than six months stayed on conditions.

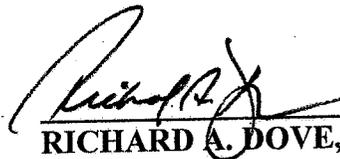
{¶45} Respondent denies violations of any of the cited rules, but should the panel disagree, he contends the evidence warrants a sanction of not more than a public reprimand.

{¶46} The panel, having considered the case law cited, the rule violations, and the aggravating factors versus the mitigating factors, recommends a sanction of a one-year suspension from the practice of law, all stayed on the condition Respondent pay Schub \$707.33 as restitution<sup>1</sup> and comply with the terms of the OLAP contract entered into August 1, 2012.

### **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 April 4, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Charles Walter Fonda, be suspended from the practice of law for one year, with the suspension stayed in its entirety upon the conditions set forth in ¶46 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**

<sup>1</sup> By way of explanation, Hevland's estate was assessed a late-filing penalty in the amount of \$6980.25 on March 8, 2012 because the Ohio estate tax return was then 18 months overdue. Stipulation 15. The Ohio Department of Taxation eventually waived the penalty, but not the interest. Stipulation 33. Due to the 39-month late filing of the federal income tax return, the estate incurred \$479.02 in penalties and \$216.53 in interest, but the penalty was ultimately waived and interest reduced by \$35.88, leaving a \$180.65 balance. Stipulation 37. Due to the 42-month late filing of the federal estate tax return, the estate incurred \$314.40 in penalties and \$122.55 in interest, totaling \$436.95, none of which was waived or reduced. Stipulation 40. On November 30, 2011, Schub paid the accrued Ohio interest, totaling \$1,080.66, using estate funds. Stipulation 42. Schub also paid the \$436.95 owed on the federal estate tax return and the \$180.65 owed on the federal income tax return, using estate funds. Stipulations 37, 40. Therefore, Schub paid a total of \$1,698.26 in combined state and federal interest and penalties, using estate funds. Stipulation 45. After accounting for Respondent's duplicate payment of the accrued Ohio interest on December 30, 2011 in the amount of \$990.93, Hevland's estate incurred a net uncompensated loss of \$707.33 as a result of Respondent's misconduct.