

ORIGINAL

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

| | | |
|--|---|---|
| In re: | : | 13-0924 |
| Complaint against | : | Case No. 12-003 |
| Joy Lenore Marshall Attorney Reg. No. 0073585 | : | Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio |
| Respondent | : | |
| Disciplinary Counsel | : | |
| Relator | : | |

FILED
 JUN 07 2013
 CLERK OF COURT
 SUPREME COURT OF OHIO

OVERVIEW

{¶1} This matter was heard in Columbus, Ohio on September 26, 27, and 28, 2012, before a panel consisting of Judge Beth Whitmore, Teresa Sherald, and David E. Tschantz, chair, all of whom are duly qualified members of the Board. None of the panel members resides in the appellate district from which the complaint originated or served as a member of the probable cause panel that reviewed this matter. Respondent, Joy L. Marshall, appeared at the hearing *pro se*. Relator, Disciplinary Counsel, also appeared by and through its counsel, Robert Berger.

{¶2} Respondent was charged in the complaint with the following violations: DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation]; DR 1-102(A)(5) and Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]; DR 1-102(A)(6) and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]; DR 2-106(A) [illegal or clearly excessive fee]; DR 5-101(A)(1) [a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or

reasonably may be affected by the lawyer's financial, business, property, or personal interests]; and Prof. Cond. R. 8.2(a) [false or with reckless statement concerning the qualifications or integrity of a judicial officer].

{¶3} The panel concludes that Relator proved the alleged violations of DR 1-102(A)(4), DR 1-102(A)(5), DR 1-102(A)(6), Prof. Cond. R. 8.2(a), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h). The panel also finds that Respondent did not violate DR 2-106(A) and DR 5-101(A)(1) and recommends their dismissal.

{¶4} Based on its findings of fact, conclusions of law, the evidence adduced at the hearing concerning matters in mitigation and aggravation, case precedent established by the Supreme Court of Ohio, and the recommendations of the parties, the panel recommends the imposition of a two-year suspension, with one year stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent is an attorney who was first admitted to the practice of law in Wisconsin in 2001. Respondent was admitted to the practice of law in the State of Ohio on November 18, 2002. Respondent is subject to the Rules of Professional Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar in Ohio. Since admission, Respondent has served as a law clerk for the University of Wisconsin, a law clerk for the Honorable Paul B. Higgenbotham (judge of the Wisconsin Court of Appeals, District IV), and practiced law with the firm of Porter, Wright, Morris & Arthur; served as a legal specialist for Nationwide Mutual Insurance Company and, for the past nine years, has engaged in the private practice of law in the Columbus area. Hearing Tr. 30.

{¶6} The complaint arose out of Respondent's representation, beginning on February 18, 2006, of a woman named Bessie Tyus. Ms. Tyus had been a resident of the Grande Point

Health Community in Richmond Heights, Ohio, a suburb of Cleveland, and had brought an action against the corporation owning and operating that facility for personal injury she alleged she had suffered while a resident there.

{¶7} The personal injury action was first filed in August 2005 in the Cuyahoga County Common Pleas Court, Case No. CV-05-571328, by the client's first attorney William P. Campbell, who is a partner in the Cleveland firm of Dickson & Campbell. The case was assigned to Judge Nancy M. Russo. The actual client, Bessie Tyus, did not directly participate in the conduct of the lawsuit. Instead, she delegated her authority in the matter to her daughter Kimberly Tyus through a power-of-attorney. Two other children, Bessie's son Andre Tyus and another daughter, Daphne Tyus, also were involved in the case and sometimes attended meetings and provided input. However, Kimberly Tyus exercised the authority of the client in all matters pertaining to the lawsuit out of which arose the circumstances that are the subject of the instant disciplinary matter.

{¶8} Attorney Campbell and Attorney M. David Smith of the firm of Friedman, Domiano & Smith, LPA, [hereinafter both attorneys and their firms will be referred to collectively as "Former Counsel"] had represented Ms. Tyus in her case against the nursing home since 2004 and had been retained under a contingent fee agreement that stated that Former Counsel was entitled to be paid 40 percent of any recovery if a complaint were filed. Relator's Ex. 2.

{¶9} Respondent's representation of the client began when she was contacted by Kimberly Tyus, who indicated that the family was not satisfied with the quality of the representation that Bessie Tyus was receiving from Former Counsel and, therefore, wished to retain her services.

{¶10} Respondent advised the Tyus family at that time that Ms. Tyus should remain with Former Counsel because the case was in litigation, but affirmed that she would represent Ms. Tyus if the client was determined to get another attorney. A few days later, a member of the family called and advised her that if she did not take the case then they would go elsewhere, as Ms. Tyus had made the decision to get another attorney. Based on that representation, Respondent agreed to accept the case. Also at that time the client sent a letter to Attorney Campbell informing him that Former Counsel had been terminated. Relator's Ex. 5, p. 7.

{¶11} Respondent then met with the client and advised her of the doctrine of quantum meruit, and explained that this meant that Former Counsel could claim payment for the reasonable value of the services they had provided from 2004 through their discharge in 2006. The client was also advised to contact Mr. Campbell and obtain a statement from him setting forth what he believed was owed to Former Counsel for costs advanced and for fees on a quantum meruit basis should there be a recovery.

{¶12} The client thereafter faxed a document to her office which was entitled settlement memorandum. Respondent's Ex. 1. The client advised that this document was what was provided by Mr. Campbell's office in response to the client's inquiry concerning what was owed for the previous services. The memorandum shows the amount of \$2,943.70 advanced as costs, but does not show any other amounts due from the client. The client and her family further advised Respondent that they believed that Former Counsel was not owed any additional fees. Respondent did not undertake to contact Former Counsel herself.

{¶13} Respondent then executed a contingent fee agreement of her own with the client on February 18, 2006, providing for payment to Respondent of one-third of any recovery, plus costs. *Id.*

{¶14} Attorney Campbell, upon receipt of his client's decision to terminate his services, sent a letter on February 20, 2006, to his now former client confirming the termination and advising that Former Counsel would assert an attorney's lien based on the contingent fee agreement or on quantum meruit. The letter did not specify any amount sought beyond the amount of \$2,943.70 advanced as costs. Relator's Ex. 4.

{¶15} Attorney Campbell also filed a motion to withdraw as plaintiff's counsel with the court on February 21, 2006. Relator's Ex. 5. In support of that motion, Attorney Campbell attached a memorandum in which he informed the court that Former Counsel were asserting an attorney's lien for "fees and costs advanced," but which likewise enumerated only the amount of \$2,943.70 advanced as costs.

{¶16} Respondent relied on the amount specified in the settlement memorandum and Attorney Campbell's letter to her client in concluding that her client was correct that Former Counsel were owed nothing beyond reimbursement for the \$2,943.70 advanced as costs. Respondent was never served with Attorney Campbell's motion to withdraw.

{¶17} Respondent then received a letter directly from Attorney Campbell on March 6, 2006, in which he advised that Former Counsel was asserting an attorney lien for reimbursement of the \$2,943.70 of advanced expenses and for fees based on quantum meruit, and asked her to contact him at the conclusion of the case to discuss what he should be paid. Relator's Ex. 6. Respondent found this suggestion to be "improper" because she saw Former Counsel's claim for fees as a demand being made upon her client, not upon her fee and she did not believe she had an obligation to negotiate with Former Counsel on behalf of her client. Hearing Tr. 259.

{¶18} Respondent was able to settle the case on March 19, 2006 and a release of the defendant in the suit was executed to that effect. Relator's Ex. 7. The amount of the settlement was \$150,000.

{¶19} The next day, one of defendant's attorneys informed the court that the case had been settled, and the court filed a journal entry to that effect the same day. Relator's Ex. 8. The entry also advised that the court "retains jurisdiction over all post-judgment motions." For some reason unknown to the panel, Judge Russo appears to have executed the entry on March 17, 2006, which would have been two days before the case was actually settled and three days before the court was informed that the case had been settled.

{¶20} Respondent did not call Attorney Campbell to discuss their respective fees, as he had requested, nor did she advise her client to seek the opinion of other counsel.

{¶21} On March 27, 2006, a week after the court put on its settlement entry, Former Counsel filed a notice of charging lien with the court in which they advised that they had performed 95 percent of the work on the case and asked the court to award them a fee of \$47,500 in addition to reimbursement of the \$2,953.70 in costs advanced by them on behalf of the client. Relator's Ex. 9. This was Respondent's first notice of the actual amount claimed by Former Counsel. The record of the trial court also indicates that Former Counsel filed a motion to declare and enforce charging lien on the same date, but this motion is not before the panel.

{¶22} On March 29, 2006, Respondent filed a memorandum contra Former Counsel's motion to declare and enforce charging lien. This memorandum was likewise not provided to the panel.

{¶23} The next day, because of the fee dispute, the defendants' insurance carrier sent the \$150,000 settlement proceeds to the court in the form of a check. Relator's Ex. 10. Judge Russo

did not cash the check, but deposited it in a presumably-empty fishbowl on her desk. Relator's Ex. 11, p. 5.

{¶24} On April 18, 2006, Judge Russo set the date of April 28, 2006 for a hearing on Former Counsel's motion.

{¶25} On April 26, 2006, Respondent filed an application for writ of prohibition in the Cuyahoga County Court of Appeals, seeking an order to the trial court prohibiting Judge Russo from ruling on Former Counsel's motion. Relator's Ex. 14. The next day, Respondent filed a motion for an alternative writ with the court of appeals. Respondent also filed an application for a writ of prohibition with the trial court, which was stricken by the court on May 2, 2006 as being improperly filed.

{¶26} On April 28, 2006, the trial court held its hearing on Former Counsel's motion. Respondent was assisted at this hearing by Attorney Edward Parks of Columbus and she was late for this hearing. Judge Russo explained to Respondent, once she arrived, that she had filed improper applications for a writ with the court of appeals and her court, so the trial court retained jurisdiction on the fee issue. At the hearing, Attorney Campbell advised the court that, to make things easier, Former Counsel would accept the application of a one-third percentage to the recovery rather than the 40 percent their agreement with the client entitled them to recover. This modified their agreement to be in line with Respondent's percentage, and allowed the court to focus on the division of one-third of the recovery between the attorneys, rather than attempting to apply two different percentages. Attorney Campbell put on evidence at this hearing that Former Counsel was entitled to 95 percent of one-third of the recovery, and should also be reimbursed for the \$2,953.70 in costs advanced, and was therefore entitled to a total of \$50,453.70 out of the

recovery. Attorney Campbell was then cross-examined about his services and fees by Attorney Parks. Relator's Ex. 11.

{¶27} However, before Attorney Parks' cross-examination of Attorney Campbell was concluded, and without giving Respondent an opportunity to present any evidence of her own, Judge Russo advised the parties off the record that the hearing would be continued due to other pressing matters of court, gave the \$150,000 settlement check to Respondent and instructed her not to disburse more than \$85,000 of the proceeds to her client pending resolution of the attorney fee issue. No record was made of that part of the hearing. Respondent deposited the check in an IOLTA on May 1, 2006. Relator's Ex. 12.

{¶28} On May 5, 2006, the trial court set the date of June 22, 2006 as the date on which the attorney fee hearing would reconvene. On the same date, Respondent wrote herself a check for \$1,127.66 in reimbursement of her costs advanced, which are detailed in a statement admitted into evidence, and also distributed \$63,352.34 to her client. Relator's Ex. 13. The account earned \$241.15 in interest, which Respondent transferred to another account, and there was a bank fee of \$20, so after all these transactions a balance of \$85,500 remained in the IOLTA account. Relator's Ex. 12. At some point on or around that same date, the client sent a cashier's check to Respondent in the amount of \$25,000 as a "gift" out of the client's share of the distributed proceeds. There is conflicting evidence before the panel on whether Respondent applied this money toward her fees or returned the \$25,000 to the client, but the panel believes that Respondent received this money, applied it toward her fee, and did not return it.

{¶29} On May 9, 2006, the court of appeals denied Respondent's application for a writ of prohibition on the grounds that it was improperly filed and that it failed on the merits. Relator's Ex. 14.

{¶30} On May 11, 2006, Respondent filed a second application for writ of prohibition in the court of appeals, again seeking an order to the trial court prohibiting Judge Russo from ruling on Former Counsel's motion. Relator's Ex. 15.

{¶31} On May 22, 2006, Respondent filed a motion with the trial court to dismiss Former Counsel's motion. Relator's Ex. 16. This motion to dismiss was denied by Judge Russo on June 13, 2006. Respondent also voluntarily dismissed, on this same date, the second application for writ of prohibition she had filed with the court of appeals.

{¶32} On May 31, 2006, Respondent filed a complaint in prohibition with the Supreme Court of Ohio also seeking an order to the trial court prohibiting Judge Russo from ruling on Former Counsel's motion. Relator's Ex. 17. The actual complaint filed with the Supreme Court was not provided to the panel; rather, Relator provided a certified copy of the docket entries in the case. Relator's Ex. 17. Respondent applied for dismissal of the case on June 26, 2006 and the court granted the application and dismissed the case on June 29, 2006.

{¶33} On June 12, 2006, the trial court journalized its verbal order of April 28, 2006 confirming that Respondent was prohibited from distributing more than \$85,000 from the settlement proceeds. Relator's Ex. 18. At the time the entry was filed by the court, the balance in Respondent's IOLTA account was \$85,500.

{¶34} On June 22, 2006, Former Counsel withdrew their motion to declare and enforce charging lien and the trial court filed a journal entry noting that the motion was withdrawn, but also noting that Former Counsel had advised the court that they would file an appropriate post-judgment motion to intervene for the purposes of enforcing the charging lien. This entry was signed by Judge Russo on June 21, 2006. Relator's Ex. 19.

{¶35} On June 23, 2006, Respondent sent her client a second check out of the funds in the IOLTA account in the amount of \$60,006.50 and paid herself the amount of \$25,493.50 in fees and costs. On the same date, the client executed a settlement agreement, in which the client agreed in writing that she had received \$98,561.92, that Respondent had received a fee of \$50,000, and that the client had reimbursed Respondent for \$1,438.08 in costs advanced. Relator's Ex. 20. The settlement agreement also provided, significantly, that the client agreed to be responsible for all outstanding liens against the settlement proceeds, including the claims "found to be valid and owing any previous attorney." Further, the settlement agreement recited the following: "As of this date there are no known valid and existing liens."

{¶36} Respondent did not counsel her client to seek the advice of another attorney before this document was executed.

{¶37} After interest was credited to Respondent's IOLTA in the amount of \$167.48 on June 26, 2006, she transferred the interest to another account and closed the account on June 30, 2006. Relator's Ex. 12. The transfer of this interest brought the total paid to Respondent, or transferred by Respondent to a party other than the client, out of the settlement funds to \$52,029.74. At this point, the client had received \$98,358.84 but had agreed to be responsible for the payment of Former Counsel's fees and costs, and any other liens that might arise. Former Counsel's demand was for a total of \$50,453.70; thus at this point over half of what the client had received was still subject to, at the very least, the claims of Former Counsel.

{¶38} Respondent advised the client and her family what their potential liability to Former Counsel could be and testified that they "were okay with assuming the liability for that quantum meruit claim and Mr. Campbell's expenses." Hearing Tr. 382.

{¶39} On June 26, 2006, Former Counsel filed their motion to intervene. The motion was unopposed and granted on July 6, 2006, and the court appears to have set the matter for hearing on the fee issue on July 19, 2006.

{¶40} On July 7, 2006, Respondent filed a motion for reconsideration, a memorandum contra the motion to intervene, and a motion for continuance, and on July 10, 2006 the motion for reconsideration was granted and the motion for continuance was denied.

{¶41} On July 14, 2006, the court re-granted Former Counsel's motion to intervene and reminded counsel for all parties that the hearing would go forward on July 26, 2006.

{¶42} On July 12, 2006, Respondent filed an affidavit of disqualification regarding Judge Russo with the Supreme Court of Ohio. Respondent's Ex. E. Chief Justice Moyer denied Respondent's affidavit on July 19, 2006. Relator's Ex. 21. Respondent filed a motion for reconsideration with the Supreme Court of Ohio in July 2006 and it was likewise denied by Chief Justice Moyer on July 28, 2006. Respondent filed a second motion for reconsideration on September 18, 2006 and it was likewise denied by the Chief Justice on September 20, 2006. Respondent's Ex. F. In all his rulings, the Chief Justice found no evidence of bias or prejudice on the part of Judge Russo.

{¶43} The record does not state specifically, but it appears that the July 26, 2006 hearing was cancelled because of the filing of these affidavits.

{¶44} On August 1, 2006, Respondent filed a second complaint in prohibition with the Supreme Court of Ohio seeking yet another order prohibiting Judge Russo from ruling on Former Counsel's motion to declare and enforce charging lien. Relator's Ex. 22. Again, the actual complaint filed with the Court was not provided to the panel. Judge Russo moved for dismissal of the case on August 10, 2006 and on August 17, 2006 Judge Russo moved for

sanctions based on an allegation of frivolous actions. On August 21, 2006, Respondent filed two additional motions with the Court, one for issuance of an alternative writ and one for injunctive relief. On September 19, 2006, Respondent filed a motion for leave to file an amended complaint and on September 20, 2006 Respondent filed a motion for issuance of an emergency peremptory writ. All of these motions were opposed by Judge Russo.

{¶45} On October 4, 2006, the Court denied all of Respondent's motions and granted Judge Russo's motions for dismissal and for sanctions. Eventually, the Court awarded expenses to Judge Russo in the amount of \$327.42.

{¶46} Meanwhile, back in Cuyahoga County, on August 1, 2006 Attorney Cassandra Collier-Williams filed her appearance as additional counsel for Respondent's client and on August 15, 2006 Respondent filed a motion to withdraw from representation citing a conflict of interest between herself and her client. Relator's Ex. 23. The same day, Respondent also filed a counterclaim against Former Counsel on behalf of her client alleging legal malpractice.

{¶47} Also on the same day, the trial court finally reconvened its hearing on the fee dispute. The judge was advised that Respondent had withdrawn from the case and when Respondent stood up to place her withdrawal upon the record, took the unusual step of ordering Respondent from the courtroom while the hearing proceeded. Respondent complied with this order. Respondent's Ex. A, at p. 3. The judge then advised Attorney Collier-Williams that she should finish Attorney Parks' cross-examination of Attorney Campbell so that the court could make a determination of how to award fees, but Attorney Collier-Williams, who now represented the client, indicated that she had no intention of doing so. Attorney Collier-Williams further indicated that she was there to protect her client from paying any further fees out of their share of

the recovery, not argue with Former Counsel over how much of the fees they were entitled to receive. *Id.* at pp. 4-6.

{¶48} Judge Russo then stated, on the record, that Respondent's absence was indicative to the court that Former Counsel's motion to declare and enforce the charging lien was unopposed. The court then discussed the best method of administering the distribution of the remaining funds with Attorneys Campbell and Collier-Williams and thereafter ordered that Respondent retain \$4,557 and transfer the remaining funds on or before August 18, 2006 to Attorney Collier-Williams, who was ordered to then distribute \$10,000 to the client and \$50,443 to Former Counsel. Relator's Ex. 24. The judge, after reaching this decision, sent Attorney Campbell out into the hallway to find Respondent, but he was unable to do so. Respondent later reentered the courtroom, but by the time she returned the hearing had concluded.

{¶49} Respondent subsequently received a copy of the court's order.

{¶50} On August 16, 2006, Respondent's motion to withdraw was granted by the court, and on August 20, 2006 the counterclaim was stricken as having been filed by Respondent without the consent of the client or her new counsel and for being filed improperly in a post-dispositive enforcement of lien action.

{¶51} On or about August 21, 2006, the court was advised by Attorney Collier-Williams that no funds had been received from Respondent for distribution pursuant to the court's order of August 15, 2006. The court ordered the same day that Respondent show cause why she should not be held in contempt for failure to comply with the court's order, and further that she produce for the court's inspection copies of her IOLTA records. The hearing was set for 8:30 a.m. on August 23, 2006 and the order clearly indicated that if Respondent did not appear on that date and at that time a bench warrant would be issued for her arrest. Relator's Ex. 25.

{¶52} Respondent received a copy of this order.

{¶53} On August 23, 2006, Respondent was seventy minutes late for the hearing. Respondent testified at the hearing in this matter that her reason for being late was that she simply did not leave Columbus early enough. Hearing Tr. 133. The court issued a bench warrant at 8:30 a.m. when Respondent failed to appear, so when she did finally arrive at the courthouse she was arrested. The court set her bond at \$5,000 and scheduled another show cause hearing for August 28, 2006 at 8:30 a.m. at which time she was expected to explain why she had not complied with court's order to transmit the remaining funds to Attorney Collier-Williams and why she had shown up late, and that she was expected to produce her IOLTA records. The order also clearly specified that a bench warrant would be issued if she did not appear at the court on that date at that time. Relator's Ex. 26. Subsequently, the court continued this second show cause hearing to September 21, 2006.

{¶54} On September 18, 2006, Respondent appealed Judge Russo's order for respondent to transmit the funds held in her IOLTA. This appeal was subsequently dismissed for failure to timely file the appeal. Relator's Ex. 31. In addition, the matter was appealed to the Supreme Court of Ohio, but the Court declined to hear the case. Relator's Ex. 32.

{¶55} At the second show cause hearing on September 21, 2006, Respondent was represented by counsel. At this hearing, Respondent's counsel attempted to argue that she had not been given an opportunity at the August 15, 2006 hearing to defend her interest in the fees due under her contingent fee agreement, but the court rejected Respondent's argument and characterized her actions at that hearing as a voluntary withdrawal as counsel for the plaintiff (which the record shows is what happened) followed by a voluntary departure from the courtroom (which the record shows was definitely not voluntary). Respondent's counsel, near

the beginning of the hearing, advised the court that all the settlement funds had been distributed. Respondent's counsel then attempted to elicit testimony from her regarding her fees, but this was cut short by Judge Russo, who ordered counsel to focus only on the contempt charge and matters relevant to it. The judge then questioned Respondent directly on what had happened to the money, but Respondent would not answer the judge's questions, so the court held her in contempt and ordered her jailed a second time until the money was disbursed pursuant to the court's previous order. Relator's Ex. 27 and 28.

{¶56} Although the trial court initially denied bond, Respondent was later released on bond and the next day filed a notice of appeal of the court's holding of contempt. In December 2007, the appeals court upheld Judge Russo's finding of contempt and remanded the case to the trial court for a determination of the status of the funds. Relator's Ex. 34. In its holding, and significant to this case, the appeals court held that Respondent's disbursement of the funds she had been ordered to hold in trust by the trial court, even though done in the period between Former Counsel's filing of their motion to enforce charging lien and the withdrawal of that motion, was a violation of the trial court's order. The court of appeals, in light of this finding, held that a finding of contempt was "clearly within the court's discretion." *Id.* at p. 8.

{¶57} Upon receipt of the remand, Judge Russo immediately ordered that the show cause hearing be resumed and set its resumption for January 9, 2008. Relator's Ex. 35. In her order, the judge specifically instructed Respondent to bring all relevant financial records to the hearing and produce them to Former Counsel, and also to produce all relevant records of time and activity on the Tyus case. Respondent received this order.

{¶58} In the meantime, on June 19, 2006 Former Counsel filed a civil suit against Respondent alleging fraud, conversion/theft, embezzlement, and tortious interference with

business and seeking compensatory and punitive damages, in the Cuyahoga Common Pleas Court and the case was assigned to Judge Timothy J. McGinty. Respondent counterclaimed for fraud, interference with contractual relations, libel per se, abuse of process, and intentional and negligent infliction of emotional distress. The court granted plaintiff Former Counsel's motion for summary judgment and denied Respondent's motion for summary judgment on December 31, 2007 and awarded a judgment to Former Counsel, and against Respondent, in the amount of \$50,443 plus statutory interest. Relator's Ex. 36. However, Respondent appealed and the Cuyahoga County Court of Appeals dismissed the appeal after determining that the trial court has not ruled on all the claims before it and, therefore, has never made a final determination in the case. The case remains pending with the trial court.

{¶59} When the show cause hearing resumed on January 9, 2008, Respondent informed the court that she had been unable to locate her IOLTA records. Respondent also testified at the hearing in this case, that she did not attempt to reconstruct those records because she believed that she had already provided them to the court. As a substitute for the production of those records in compliance with the order of the court, she represented to the court that the contents of those records had been read into the record at the September 21(sic), 2006 hearing. The court promptly found her in violation of yet another order of the court. Later in the hearing, after giving her another opportunity to advise the court regarding what had happened to the money and not receiving a straight-forward answer to the question, Judge Russo again found her in contempt, remanded her to the county jail and scheduled a resumption of the hearing for January 15, 2008. Relator's Ex. 38 and 39.

{¶60} On January 14, 2008, Judge Russo decided to recuse herself from the case, citing a referral to outside investigative authority regarding the location of the missing funds and the

possibility that she might be called as a witness, and also cancelled the scheduled resumption of the show cause hearing. Relator's Ex. 41. At the time of the hearing in this matter, the court has yet to set a date for resumption of this show cause hearing.

{¶61} On January 17, 2008, Respondent filed a second affidavit with the Supreme Court of Ohio seeking the disqualification of Judge Russo, but as the judge had already recused herself from the case, Chief Justice Moyer dismissed the request as moot. Relator's Ex. 42.

{¶62} On February 11, 2008, Respondent appealed the second contempt finding. Relator's Ex. 40. The court of appeals, on May 5, 2008 dismissed the appeal for failure to timely file a brief. Relator's Ex. 46.

{¶63} Although Respondent did not timely file a brief, she did file one on May 1, 2008. In it, Respondent alleged that Judge Russo allowed Respondent's race and gender to affect her partiality. Relator's Ex. 45, p. 14. Respondent admitted in later testimony at the hearing that she conducted no research to determine the racial makeup of Attorney Campbell's law firm although Respondent alleged preferential treatment of them by Judge Russo because of their gender and race. Likewise, Respondent was unable to cite any specific actions by the trial judge such as improper racial or gender-based remarks that indicated an overt bias. Respondent admitted that the sole basis for her allegation was that the judge had ruled against her on the fee division issue and had had her jailed for contempt. Hearing Tr. 167-171, 329, 330, 338.

{¶64} On April 22, 2008, Respondent filed a petition for relief under Chapter 13 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of Ohio, which was converted eleven months later into a Chapter 7 proceeding. Respondent gave somewhat conflicting testimony concerning this bankruptcy filing at the hearing in this matter. Respondent testified that, although she filed her petition under Chapter 13 initially, her goal was to discharge,

among other debts, the judgment awarded against her in Judge McGinty's court. Hearing Tr. 101, 165. Respondent also testified that her initial intent was to pay at least a portion of Former Counsel's judgment. Hearing Tr. 345. But Respondent also testified that she did not file the bankruptcy petition with the objective of discharging Former Counsel's judgment, but only as a means to stay execution of that judgment while the case was on appeal. Hearing Tr. 292. On October 15, 2008, Former Counsel filed an adversary action in the bankruptcy court contesting the discharge of the judgment. Relator's Ex. 47.

{¶65} On March 31, 2010, the bankruptcy court denied Respondent's request to discharge Former Counsel's judgment, citing evidence that Respondent had "committed a wrongful act by disbursing the escrowed funds in contravention of the State Court order" and further stating that "The Defendant's theory that the Plaintiff no longer had an interest in the Escrowed Funds is simply disingenuous." Relator's Ex. 48, pp. 9-11.

{¶66} On June 11, 2010, Respondent appealed the bankruptcy court's decision to the U.S. District Court and on January 26, 2011 Judge Algenon L. Marbley affirmed the bankruptcy court's decision. Relator's Ex. 50.

Alleged Violations of DR 1-102(A)(4)

{¶67} Relator argues that Respondent violated DR 1-102(A)(4) in several ways. First, it asserts that Respondent purposefully and knowingly took and kept a \$50,000 fee and disbursed \$700 in expenses to herself in direct violation of several of the court's orders. Second, Relator points to the finding of the bankruptcy court, affirmed by the U.S. District Court, that Respondent committed a wrongful act and inflicted willful and malicious injury upon Former Counsel. Third, Relator cites Respondent's incomplete and misleading statements made to the court on September 21, 2006 with regard to the status of the settlement funds as evidence of

misrepresentation. Finally, Relator argues that the fact that Respondent, despite having a judgment taken against her and being ordered to make payment to Former Counsel by Judge Russo, has yet to pay Former Counsel anything is evidence of dishonesty and fraud.

{¶68} The panel, after carefully examining all the evidence before it, finds by clear and convincing evidence that Respondent did violate DR 1-102(A)(4). The panel concurs with Relator that Respondent made incomplete and misleading statements to the court at the hearing on September 21, 2006. An examination of the transcript of that hearing discloses several instances of Respondent's failure to answer, or providing incomplete answers to, direct questions put to her by Judge Russo on the status of the funds entrusted to her by the court. Relator's Ex. 27, pp. 24-26. In the opinion of the panel, incomplete answers and refusals to answer are misrepresentations. The panel also finds that Respondent misrepresented to the court that she had not taken a fee from the Tyus settlement proceeds when in fact she had done exactly that on June 23, 2006.

{¶69} The panel also finds that a violation of DR 1-102(A)(4) occurred when Respondent distributed the Tyus settlement funds. The panel concurs with the U.S. Bankruptcy Court that Respondent committed a wrongful act and inflicted willful injury to Former Counsel when she did so, in the panel's opinion Respondent did what she did with malice toward Former Counsel and as a deliberate action to misappropriate said funds. Respondent should have known that the distribution was a violation of the orders of the court, so the panel finds that this violation of the court's orders was done out of dishonesty or in perpetration of a fraud such that it rises to the level of a violation of DR 1-102(A)(4).

{¶70} The panel is of the opinion that Respondent is correct that Judge Russo's order of August 15, 2006 is superseded by the order of the Cuyahoga County Court of Appeals of

December 24, 2007 remanding the contempt case to the trial court and ordering it to hold a hearing to determine which parties are owed money and what amounts, if any, the respondent is retaining that do not belong to her. Relator's Ex. 34, p. 9. While the case was before the court of appeals on appeal of the contempt charge, the panel notes that the court had the entire record before it and chose not to order Respondent to comply with Judge Russo's order of August 15, 2006. Instead, it ordered another determination hearing. This hearing, although commenced, has never been completed by the trial court and the determination ordered by the court of appeals has never been made. In light of these circumstances, the panel declines to find that Respondent's continued failure to pay Former Counsel is a violation of DR 1-102(A)(4).

{¶71} Likewise, the panel finds that Respondent's failure to pay the judgment awarded against her by the Cuyahoga County Common Pleas Court in the civil action filed by Former Counsel does not rise to a violation of DR 1-102(A)(4) because said judgment has also not been finalized due to the finding of the Cuyahoga County Court of Appeals that the trial court has not finalized its determination of the case.

Alleged Violations of DR-102(A)(5), DR 1-102(A)(6), Corresponding Rules of Professional Conduct, and Prof. Cond. R. 8.2(a)

{¶72} Relator next alleges that Respondent is in violation of DR 1-102(A)(5) and its counterpart, Prof. Cond. R. 8.4(d), DR 1-102(A)(6) and its counterpart Prof. Cond. R. 8.4(h), and Prof. Cond. R. 8.2(a), due to Respondent's violation of court orders, Respondent's behavior that resulted in two findings of contempt, and Respondent's public, written, accusation of racial and gender bias on the part of the trial judge.

{¶73} First, the panel is convinced that Respondent believed she was entitled to take her fee out of the Tyus settlement funds, but Respondent also admitted at the hearing that she was aware that she was under a court order not to do so until such time as the court ruled in the

disposition of the remaining funds. However, Respondent read the court's entry of June 22, 2006 as creating a "legal window" that permitted her to disburse the funds without the court's resolution of the fee dispute. The panel disagrees with her interpretation of the wording of the court's entry. It is the opinion of the panel that the entry makes clear that, although Former Counsel had withdrawn their motion to enforce charging lien, they intended to file another post-judgment motion. Since the court made no mention of any release of the funds being held by Respondent, her determination that this entry permitted her to disburse the funds, and pay herself a fee in the process, was irresponsible, reckless, and a violation of the court's order of June 12, 2006. As it was a violation of the court's order, the panel finds, by clear and convincing evidence, that it is a violation of DR 1-102(A)(5) and DR 1-102(A)(6).

{¶74} Second, Respondent violated the court's order to appear for the August 23, 2006 show cause hearing when she arrived seventy minutes late for that hearing. The panel is mindful that the late arrival of an attorney for a hearing is not normally a violation of any Rule of Professional Conduct. However, in this case Respondent had been ordered to appear by the judge in the courtroom at a definite time on a definite date under a clearly communicated threat of a contempt charge, and Respondent failed to do so, not by a few minutes, but by well over an hour and then failed to give a reasonable excuse for her late arrival. Respondent's only excuse was that she was unable to leave Columbus any earlier than she did. The panel finds, by clear and convincing evidence, that this is also a violation of DR 1-102(A)(5) and DR 1-102(A)(6).

{¶75} Third, Respondent violated the court's order to produce her IOLTA records at the January 9, 2008 continuation of the show cause hearing. Here again, Respondent had received a specific order from Judge Russo to produce her IOLTA and financial records in the courtroom at a definite time on a definite date, and Respondent failed to do so. Again, Respondent had no

reasonable explanation for why she had failed to comply with the court's order. When the judge asked Respondent where her records were, her only response was that the contents of those records had been read into the record of the September 23, 2006 hearing. Respondent attempted at the hearing in this matter to justify her behavior by explaining that she thought the judge would allow her to pull the records from the file. However, this explanation rings hollow, because Respondent admitted under questioning that she did nothing to prepare for the hearing and wasn't even sure that she had produced the proper records in the previous hearing. Hearing Tr. 405-411. Respondent did not obtain a transcript, she did not obtain copies of any of the exhibits from the previous hearing, and she did not call her bank and try to obtain copies of bank statements. The panel finds, by clear and convincing evidence, that this lack of any attempt to comply with the specific order of the court is also a violation of Prof. Cond. R. 8.4(d) and Prof. Cond. R. 8.4(h).

{¶76} Fourth and most troubling is Respondent's accusation, found in the merit brief she filed with the Cuyahoga County Court of Appeals concerning her second contempt charge, that Judge Russo denied her a hearing and reduced her attorney fees because of racial and gender bias. The panel understands Respondent's frustration with Judge Russo. It is difficult for the panel to understand why the judge prevented Respondent's attorney, Edward Parks, from completing his examination of Respondent for the purpose of putting evidence on the record detailing her services to the Tyus family at the April 28, 2006 hearing or why the judge ordered Respondent from the courtroom during the August 15, 2006 hearing without giving her an opportunity to present the same evidence.

{¶77} But the panel notes that Respondent filed two affidavits of disqualification with the Supreme Court of Ohio alleging bias on the part of Judge Russo and both were found to be

without merit by Chief Justice Moyer. Respondent's Ex. F and G. The panel is also mindful that the Supreme Court of Ohio has set forth an objective standard with regard to attorney misconduct in this area in *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416, 2003-Ohio-4048. The Court stated in that case that, to be able to survive scrutiny in a disciplinary case, statements an attorney makes about the integrity of a judicial officer must be supported by a reasonable factual basis. In the opinion of the panel, Respondent was within her rights and obligations as an attorney when she made her charges of bias in seeking the judge's disqualification, even though both requests were later found to be meritless.

{¶78} However, Respondent's later charge of racial and gender bias against the judge does not, in the opinion of the panel, survive the reasonable factual basis test set forth in *Gardner*. Respondent, who is a black female, alleged that she had been treated disparately from what she believed were the white, male members of Former Counsel's law firms as the basis for her allegation of racial and gender bias. Chief Justice Moyer wrote about the effect of unfounded racial bias claims made against judges in *In Re Disqualification of Cunningham*, 100 Ohio St.3d 1216, 2002-Ohio-7470:

Allegations of racial bias are among the most serious and damaging claims that can be directed at a judge, since such allegations, if true, would not only constitute a violation of the judge's oath of office and the Code of Judicial Conduct, but also would strike at the very heart of the integrity of the judiciary. In order to warrant a judge's disqualification, these claims must be demonstrated by clear evidence that establishes the existence of bias. *Id.* at ¶2.

{¶79} Respondent admitted during the hearing in this matter that she conducted no research with regard to the racial makeup of Former Counsel's firms, Respondent could point to no specific actions or racial- or gender-based remarks made by Judge Russo that indicated bias, and Respondent could cite no instances of anyone else who advised her that they had had a similar experience with Judge Russo. Also, Respondent's charge of gender bias has a difficult

time surviving the reasonableness test in light of the fact that both the judge and Respondent are females. Given this complete lack of substantiation of both allegations, the panel finds, by clear and convincing evidence, that they were unreasonable and therefore finds violations of Prof. Cond. R. 8.4(d), Prof. Cond. R. 8.4(h), and Prof. Cond. R. 8.2(a).

Alleged Violations of DR 2-106(A)

{¶80} Relator also alleges that Respondent is in violation of DR 2-106(A). Relator's argument is that Respondent billed her client in the Tyus case over \$700 for expenses that were incurred after the lawsuit was settled and were specifically incurred as the result of the respondent attempting to defend her fee in Judge Russo's courtroom and on appeal, and therefore should not have been billed to the client at all. Respondent's counter-argument is that she incurred these expenses in defense of her client's interests and therefore no violation occurred.

{¶81} The panel notes that DR 2-106(A) reads as follows: "a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." A review of the items listed in Relator's Ex. 13 discloses that Respondent did not charge her clients an illegal or clearly excessive fee in that document. Rather, Respondent charged them for expenses, and the rule cited by Relator does not appear, on its face, to apply to expenses. In order to find a violation of DR 2-106(A), the panel would have to assume that the Court, in adopting this rule, intended to insert a word into the rule that was not there when the rule was adopted. Since the Court did not insert the words "costs" or "expenses" into the rule, the panel declines to do so as well. The panel also notes that the current equivalent to DR 2-106(A), Prof. Cond. R. 1.5, likewise does not contain either of the words "costs" or "expenses."¹ Therefore, since the rule on its face does not prohibit an attorney from charging his or her clients excessive costs, the panel recommends that this charge be dismissed.

¹ Cf. Model Rule of Professional Conduct 1.5(a).

Alleged Violations of DR 5-101(A)(1)

{¶82} Relator next alleges that Respondent is in violation of DR 5-101(A)(1). Relator's argument concerning this issue is that Respondent violated this disciplinary rule when she sought and obtained her client's signature on the settlement agreement in which her client agreed to be responsible for Former Counsel's fees and expenses advanced, and then continued to represent her for a period of seven weeks thereafter. Respondent believes that her client's interests and those of her own were in alignment, and that no conflict was present, because her client was responsible for Former Counsel's fees and their expenses advanced and this had nothing to do with her fees and the expenses she had advanced.

{¶83} As held by the Supreme Court in *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, a client remains responsible to pay the fees due to and costs incurred by a prior attorney. In the opinion of the panel, the settlement agreement executed by Respondent and her client does nothing more than remind the parties of that fact in writing. Therefore, the panel finds that the allegation of a violation of DR 5-101(A)(1) was not proven by clear and convincing evidence and recommends that said allegation be dismissed.

{¶84} In summary of all of the foregoing conclusions of law, the panel finds, by clear and convincing evidence, that Respondent has violated DR 1-102(A)(4), DR 1-102(A)(5), DR 1-102(A)(6), Prof. Cond. R. 8.2(a), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h). The panel finds that Respondent did not violate DR 2-106(A) and DR 5-101(A)(1) and recommends that those allegations be dismissed.

MITIGATION, AGGRAVATION AND SANCTION

{¶85} With regard to the factors in aggravation that may be considered in favor of a more severe sanction for professional misconduct listed in BCGD Proc. Reg. 10(B)(1), Relator

argued that Respondent (a) engaged in a pattern of misconduct, (b) committed multiple offenses, (c) has refused to acknowledge the wrongful nature of her conduct, (d) acted with a dishonest and selfish motive, (e) failed to make restitution, and (f) caused harm to Judge Russo through her unreasonable accusation of racial and gender bias, the courts by filing a plethora of litigation, Former Counsel by not paying their claim for fees, and her client by creating an impermissible conflict of interest and charging improperly for expenses.

{¶86} The panel finds, by clear and convincing evidence, that Respondent did engage in a pattern of misconduct and committed multiple offenses. Respondent violated a number of court orders and was held in contempt twice as a result.

{¶87} The panel disagrees that Respondent has refused to acknowledge the wrongful nature of her conduct. While some of Respondent's conduct was based on her interpretation of the law, some of her conduct was clearly wrong, and she acknowledged that it was wrong at the hearing in this matter.

{¶88} In regard to the allegation that Respondent acted with a dishonest and selfish motive, the panel agrees that Respondent did so when she distributed the remaining settlement funds in violation of the court's order.

{¶89} In regard to the allegation that Respondent has failed to make restitution, the panel does not find this to be an aggravating factor, given the status of the contempt and civil cases before the trial courts and the panel's finding in ¶70 above that the order of the trial court that Respondent pay Former Counsel is not currently in effect and the panel's note in ¶71 above of the finding of the Eighth District Court of Appeals that the trial court has not finalized its determination of the civil action filed against Respondent by Former Counsel.

{¶90} Relator alleged in its closing argument that Respondent caused harm to Judge Russo through her unreasonable accusation of racial and gender bias, the courts by filing a plethora of litigation, Former Counsel by not paying their claim for fees, and her client by creating an impermissible conflict of interest and charging improperly for expenses. The panel agrees that Respondent caused harm to Judge Russo and the courts and finds this is an aggravating factor, but in light of its finding in ¶¶81 and 83 above, the panel finds that no harm was caused to Respondent's client.

{¶91} With regard to the factors in mitigation that may be considered in favor of less severe sanctions for professional misconduct listed in BCGD Proc. Reg. 10(B)(2), the panel unanimously finds, by clear and convincing evidence, that Respondent (a) has no prior disciplinary violations, (b) made full and free disclosure to Relator, (c) has good character and reputation, and (d) has had other sanctions imposed upon her for her misconduct in the form of actual jail time as the result of the court's findings of contempt.

{¶92} In its prehearing brief, Relator recommended that Respondent receive between a two-year suspension and an indefinite suspension, but at the hearing advocated only an indefinite suspension. Respondent, in her prehearing brief, argued in one part that she should receive no more than a public reprimand, and in another part that the matter should be dismissed. Relator presented authority to the panel in support of its recommendation. Respondent presented no authority in support of her recommendation.

{¶93} The panel reviewed both parties' recommendations in light of the findings of fact, conclusions of law, factors in mitigation and aggravation, and precedent established by the Supreme Court of Ohio.

{¶94} The panel believes that guidance on the appropriate sanction is found in the case of *Disciplinary Counsel v. Simon-Seymour*, 131 Ohio St.3d 161, 2012-Ohio-114. In that case, the respondent was found to have violated several professional conduct rules, among them DR 1-102(A)(4) and Prof. Cond. R. 8.4(c). The respondent in that case was hired to probate an estate but took funds from the estate without court approval, eventually causing an overdraft on her trust account. To cover this, the respondent falsely reported to the probate court that she had made disbursements to pay estate obligations. The respondent later repaid the estate more than she owed it, but never provided a full accounting to the estate's administrator. The Court adopted the parties' consent-to-discipline agreement, as recommended by the Board, of a two-year suspension, with six months stayed, with the condition that the respondent complete five hours of CLE in trust account management as a condition of the stay.

{¶95} Also instructive is the case of *Disciplinary Counsel v. Stafford*, 131 Ohio St.3d 385, 2012-Ohio-909. In that case, the respondent, in divorce proceedings, abused the discovery process and made several inaccurate statements or omissions to the tribunal and opposing counsel. The respondent also misled the court in a motion in order to insert a new charge into a pleading. The respondent engaged in dishonesty, fraud, deceit, or misrepresentation, and failed to inform a tribunal of all relevant facts. In another matter, the respondent in that case instructed a subordinate attorney to prepare a motion that maligned a judge and made statements and misrepresentations in a motion that further maligned the judge, which adversely reflected on the respondent's fitness to practice law. The Court ordered in that case that the respondent be suspended for one year.

{¶96} The panel also finds instructive the case of *Disciplinary Counsel v. Frost*, 122 Ohio St.3d 219, 2009-Ohio-2870. In that case, the respondent repeatedly leveled unfounded

accusations of racial bias and other impropriety against a federal judge. The Court imposed an indefinite suspension in that case, although the sanction was due in significant part to other rule violations.

{¶97} Based on the foregoing, the panel recommends that Respondent receive a two-year suspension from the practice of law, with one year stayed on the conditions that Respondent commit no further misconduct and as set forth below.

{¶98} Both parties argued the issue of restitution at the hearing in this matter and in post-hearing briefs filed at the request of the panel. The panel notes Relator's argument that Respondent, in her post-hearing brief, stated that she advised her client that she placed the value of Former Counsel's services in the Tyus case at \$8,232, and also notes that she has never contested Former Counsel's claims for reimbursement of expenses in the amount of \$2,943.70. The panel also considered the recommendation of Relator that payment of the total of \$50,443 in fees and costs by Respondent to Former Counsel, as ordered by the trial court in the Tyus case, be made a condition of a stay of any sanction. The panel is unwilling to comply with Relator's request as it is of the opinion, after having sifted through all the hearings and motions filed in the various cases involving this matter, that Respondent has never been afforded the opportunity to present evidence of the work she performed for her client in that case to the court or to finish her cross-examination of Former Counsel on their claims for fees and reimbursement for costs advanced. In the opinion of the panel, the trial court should complete its work in the contempt case against Respondent as ordered by the court of appeals and then enter the order it deems appropriate before restitution should attach.

{¶99} Therefore, the panel recommends that the stay set forth in ¶97 above and Respondent's return to the practice of law also be conditioned upon the payment, or an

arrangement satisfactory to Relator to make payment, of any additional amounts that may be ordered paid by Respondent to Former Counsel by the Cuyahoga County Common Pleas Court, after it holds the hearing ordered by the Cuyahoga County Court of Appeals in Appeal No. 88780.

{¶100} As a final matter, the panel recommends that restitution not be ordered with regard to the civil case filed against Respondent, as also recommended by Relator.

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 and June 6, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Joy Lenore Marshall, be suspended from the practice of law in Ohio for two years, with one year stayed subject to the condition contained in ¶99 of this report and that she engage in no further misconduct. 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