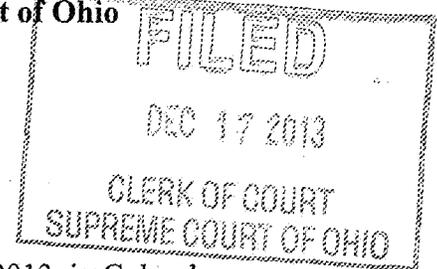


BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	:	
Complaint against	:	Case No. 12-013
John Joseph Scaccia Attorney Reg. No. 0022217	:	Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Dayton Bar Association	:	
Relator	:	

13-1982



OVERVIEW

{¶1} This matter was heard on October 22, 2012 and July 30, 2013, in Columbus before a panel consisting of Alvin Bell, Sharon Harwood, and John Polito, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Brian Weaver and Christopher Cowan appeared on behalf of Relator. David Williamson appeared on behalf of Respondent.

{¶3} While the original complaint was pending, new allegations of misconduct were filed against Respondent. Respondent eventually was charged with additional ethical violations in a second complaint filed by Relator.

{¶4} Respondent requested that disposition be withheld pending investigation of the additional charges and if appropriate a consolidation of the cases for purposes of judicial economy. No objection was raised by Relator who acquiesced to the request.

{¶5} The first complaint filed under Case No. 2012-013 alleged violations of the following: DR 6-101 [competence]; DR 7-101 [representing a client zealously]; DR 9-102 [preserving identity of funds and property of a client]; and Prof. Cond. R. 1.15 [safekeeping client funds].

{¶6} The second complaint filed under Case No. 2013-012 alleged violations of the following: Prof. Cond. R. 1.1 [a lawyer shall provide competent representation to a client]; Prof. Cond. R. 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client]; Prof. Cond. 1.5(a) [charging an illegal or excessive fee]; Prof. Cond. R. 1.5(d)(3) [a lawyer shall not enter into an arrangement for or charge, or collect a fee denominated as “earned upon receipt”, “nonrefundable” or in any similar terms, unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation]; Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients or third persons that is in a lawyer’s possession separate from the lawyer’s own property]; Prof. Cond. R. 1.15(c) [a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred]; and Prof. Cond. R. 1.15(d) [upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property].

{¶7} Respondent filed a motion to consolidate both cases. The motion was not opposed by Relator and the cases were consolidated under Case No. 2012-013. The consolidated case was assigned to the same panel that conducted a subsequent hearing on July 30, 2013.

{¶8} With regard to the 2012 complaint, the panel concludes that Relator has proven by clear and convincing evidence the following violations regarding the Mound clients: DR6-101;

DR 9-102(B)(3); Prof. Cond. R. 1.15(a)(2); Prof. Cond. R. 1.15(a)(3); and Prof. Cond. R. 1.15(a)(4).

{¶9} Relator has failed to prove by clear and convincing evidence the following violations alleged in the 2012 complaint: DR 7-101; DR 9-102(A)(1); and DR 9-102(A)(2). The panel recommends dismissal of these alleged violations.

{¶10} With regard to the 2013 complaint, the panel concludes that Relator has proven by clear and convincing evidence the following violations in the second complaint: Prof. Cond. R. 1.5(d)(3); Prof. Cond. R. 1.15(a); and Prof. Cond. R. 1.15(c) in Count One; Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(c) in Count Two.

{¶11} Relator has failed to prove by clear and convincing evidence the following violations alleged in the 2013 complaint: Prof. Cond. R. 1.15(d) in Count One; Prof. Cond. R. 1.1; Prof. Cond. R. 1.3; Prof. Cond. R. 1.5(a); Prof. Cond. R. 1.5(d); Prof. Cond. R. 1.5(d)(3) in Count Two. The panel recommends dismissal of these alleged violations.

{¶12} As a sanction, the panel recommends a suspension of one year, with six months stayed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

2012 Complaint—Mound Clients

{¶13} At the October 22, 2012 hearing, the parties submitted 38 joint stipulations of facts, which the panel accepts as follows:

{¶14} Respondent, John J. Scaccia, was admitted to the practice of law in the state of Ohio on November 11, 1983. Respondent is subject to the Code of Professional Responsibility, Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio.

{¶15} Respondent, at all times pertinent herein, was admitted to practice before the United States District Courts, Northern and Southern Districts of Ohio, the United States Sixth Circuit Court of Appeals, and the United States Supreme Court.

{¶16} Respondent was from early 2000 to approximately March 1, 2004 associated in the practice of law with the Brannon Law Offices of Dayton, Ohio, headed by Attorney Dwight D. Brannon.

{¶17} The Mound Laboratory (Mound), located in Miamisburg, Ohio is a former United States Atomic Energy Commission site, operated over the years by a variety of private companies.

{¶18} Commencing around August 2, 2001, Respondent, Brannon, and the Brannon Law Office began representing a group of former employees (Mound clients) of the Mound.

{¶19} The Mound clients had all worked for a private company, which was then operating the Mound. All of the Mound clients had been terminated from employment prior to the representation by Respondent, Brannon, and Brannon Law Offices. All complained of wrongful termination based on various grounds.

{¶20} The Mound clients comprised 19 couples, which one person of each couple being a terminated employee, and nine solo persons, for a total of 47 Mound clients.

{¶21} On May 22, 2003, Respondent, Brannon, and Brannon Law Offices filed a complaint in U.S. District Court, Southern District of Ohio, Cincinnati (Mound case) on behalf of the Mound clients. The complaint was 127 pages in length and contained 1,128 numbered paragraphs.

{¶22} On June 22, 2003, an amended complaint was filed prior to any pleading in opposition to the original complaint. The amended complaint was 132 pages in length and contained 1,157 numbered paragraphs. The amended complaint did add parties to the case.

{¶23} Both the complaint and the amended complaint contained signature lines for Respondent and Brannon to execute their signatures. Respondent did sign both pleadings, however, Brannon did not sign either pleading.

{¶24} Brannon signed no pleadings in the case, other than his motion to withdraw filed and approved in February 2004.

{¶25} Respondent left the Brannon Law Office on or about March 1, 2004, and has practiced law as a solo practitioner since.

{¶26} The Mound case was transferred on the court's own motion from the Cincinnati base of the Western Division to Dayton, Ohio of the same division in August 2004.

{¶27} Responding to motions to dismiss filed by certain defendants, the district court at Dayton issued an entry and order filed October 5, 2004, dismissing four corporate defendants and three individual defendants.

{¶28} The district court directed Respondent to file an appropriate amended complaint as to the remaining defendants within thirty days of the entry and order of October 5, 2004.

{¶29} Respondent filed a motion for extension of time to file the amended complaint, which the court granted on November 4, 2004.

{¶30} Respondent's motion for extension of time had requested until November 25, 2004 to file the amended complaint. November 25, 2004 was Thanksgiving Day. The court's order granted Respondent until November 24, 2004 to file the amended complaint.

{¶31} Respondent filed the amended complaint on Friday, November 26, 2004, the day after Thanksgiving. On Monday, November 29, 2004, the district court issued an order striking the amended complaint as having been filed out of time and without leave of court.

{¶32} On January 5, 2005, Respondent filed a motion to file the amended complaint out of time.

{¶33} On August 3, 2005, the court issued an entry and order overruling Respondent's motion to file the amended complaint out of time and terminated the case.

{¶34} Respondent perfected an appeal to the Sixth Circuit Court of Appeals, which the court unanimously sustained the district court's termination of the Mound case.

{¶35} Respondent filed an appeal to the United States Supreme Court, which the court declined to hear on May 29, 2007.

{¶36} Respondent, during his tenure at the Brannon Law Offices, from 2000 to 2004, was able to use the IOLTA trust account of that firm.

{¶37} Respondent opened an IOLTA trust account in his own name on August 14, 2001, at National City Bank being account number ending in 961. When PNC Financial purchased National City Bank in the fall of 2008, the account number changed to account number ending in 479.

{¶38} Respondent opened an additional IOLTA trust account on March 10, 2006, at National City Bank, being account number ending in 420. The subsequent PNC account number ended in 691.

{¶39} Respondent and many of the Mound clients signed fee agreements at the beginning of the attorney/client relationship. The form used for the fee agreements was provided by the Brannon Law Office.

{¶40} Included within the fee agreements at paragraph three were provisions that costs and expenses of suit were to be borne by the client, and that each Mound client (or couple, as the case may be) would pay a retainer for expenses. All Mound clients paid Respondent some amount of money toward such expenses, except for six Mound clients, including two couples, of the named plaintiffs on the amended complaint.

{¶41} The total expense fund of the Mound clients provided to Respondent amounted to \$22,000. All said funds were initially placed in the trust account of the Brannon Law Office.

{¶42} Upon Respondent's leaving the Brannon Law Office, Respondent received from said office the total sum of \$21,875 by way of two separate checks as the expense money for the Mound clients, which sum Respondent deposited in his trust account #961.

{¶43} On behalf of the Mound clients, Respondent wrote four checks out of trust account #961 totaling \$1,035.54, wherein the Mound case or the Mound clients were referenced on the memo line of each check.

{¶44} Respondent paid by personal credit card the sum of \$3,681.32 for the printing of the brief for the United States Supreme Court.

{¶45} At the present time, Respondent is unable to produce any additional records other than those mentioned in ¶¶43-44 supporting any other expense payments made on behalf of the Mound clients.

{¶46} Respondent spent the entire \$21,875 expense fund, which had been provided to Respondent by the Mound clients.

{¶47} Respondent maintained funds in his trust accounts that belonged to him, but which he had not yet withdrawn and labeled as "surplus."

{¶48} In July 2006, Respondent wrote three checks out from trust account #961 totaling \$660 for personal expenses: namely, two checks for his children's summer camp, and one check payable to his wife. In September 2006, Respondent wrote two checks out of trust account #420 totaling \$ 300 to the Dayton Bar Association, one for a CLE seminar, and the other for his annual dues. At the present time, neither party is able to produce any additional checks written out of Respondent's trust accounts attributable to personal expenses.

{¶49} In July 2008, Respondent deposited personal funds into trust account #420.

{¶50} Respondent then executed checks from that account to 11 Mound clients, each in the amount of \$300.

{¶51} In May 2010, Respondent deposited personal funds into trust account #420. Respondent then executed a check from that account to George and Betty Nafziger who were Mound clients in the amount of \$1,500.

{¶52} The initial complaint alleged that between the years 2003-2007 Respondent violated DR 6-101; DR 7-101; and DR 9-102 while representing 47 plaintiffs in litigation in the Federal District Court for the Southern District of Ohio. Additional violations of Prof. Cond. R. 1.15 were alleged for years 2007-2010 for failure to comply with IOLTA requirements.

{¶53} A substantial portion of Relator's case refers to orders issued by Judge Thomas Rose of the Federal District Court. Judge Rose's order of October 4, 2004, ruling on various pending motions, states in part:

Plaintiffs have already filed three Memoranda in response to Defendants...
Motion to Dismiss totaling seventy-eight (78) pages without leave of Court.

* * *

While Plaintiffs have not shown good cause for exceeding the twenty page limit, to deny their Motion at this time would only serve to further frustrate an

already tortured process. * * * However, any future disregard for the Local Rules and required approvals by this Court will not be tolerated.

October 22, 2012 Hearing, Ex. 12e, at p. 4-5.

{¶54} Judge Rose's order contains several other references to frustration with Plaintiffs Counsel (Respondent) and mentions several times that future disregard of the Rules by Respondent would not be tolerated. Judge Rose indicated:

Thus far Plaintiffs have filed several documents out of time, they have filed at least two documents without proper signature, they have filed several documents in duplicate but with different captions and they filed several documents without the necessary approval of the Court. All of these actions are offensive to the dignity and power of the Court. * * * Future occurrences will not be tolerated.

Id. at p. 8.

{¶55} In dismissing the complaint, the judge's order granted Respondent an additional 30 days to file an amended complaint which complied with the Rules. Respondent failed to amend the complaint within the time allowed by the court and the case was terminated by the court in its order of August 3, 2005. In this order Judge Rose stated in part:

In a prior order, this Court admonished the Plaintiffs for several times disregarding the Local Rules.* * *and the required approvals of the Court. The Court repeatedly recognized that Plaintiffs' Counsel's conduct created a 'tortured process' that is offensive to the dignity and power of this Court and its rules of procedure. Finally, the Court warned Plaintiffs at least six times in the prior Order that future occurrences would not be tolerated. Yet, Plaintiffs' Counsel has now once again disregarded the orders of this Court by failing to file an Amended Complaint by the deadline established by the Court. Plaintiffs' Counsel then filed the Amended Complaint out of time without leave to file out of time. Then, to even further insult the Court's dignity, when the Amended Complaint was struck, Counsel waited for thirty seven days to seek leave of Court to file the Amended Complaint out of time.

October 22, 2012 Hearing, Ex. 12h at pp.8-9.

{¶56} Respondent testified that initially when he accepted the Mounds case he did so relying upon Brannon's experience in handling complex cases, but subsequently gained the experience to adequately represent the plaintiffs while working on the case at the Brannon firm

from the years 2000-2004. Respondent further testified that he disagreed with Judge Rose's conclusions and believes he would have prevailed on the merits of the case if it had not been dismissed on procedural grounds. Respondent further contends that he represented 47 plaintiffs and only one, George Nafziger, complained. Mr. Nafziger sued Respondent for malpractice and that case was settled.

{¶57} The panel concludes that Relator has proven by clear and convincing evidence that Respondent violated DR 6-101 by failing to act competently and neglecting a legal matter entrusted to him.

{¶58} While it cannot be denied that the Mound clients were damaged or prejudiced by Respondent's actions, no evidence of intent was proven as required by the rule. Therefore, the panel recommends dismissal of the DR 7-101 charge.

{¶59} The fee agreements with the Mound clients indicate that each client would advance funds for costs and expenses of litigation. A total of \$22,000 was collected from the clients (varying amounts were paid by clients) and the money was deposited into the Brannon Law Firm trust account.

{¶60} Approximately four years later, Respondent left the Brannon law firm and was given the remaining balance of \$21,875. Respondent deposited these funds into his own trust account. Over the next few years, Respondent spent the remaining \$21,875 and was unable to provide a complete accounting of the funds and claimed he had no records to reconstruct an accounting.

{¶61} Respondent was able to produce four checks totaling \$1,035.34 relating to payment of expenses on the case and a credit card charge for \$3,681.32 for printing the brief for the United States Supreme Court. Stipulation 31 & 32.

{¶62} In July 2008, Respondent deposited personal funds into his trust account and wrote checks of \$300 each as reimbursement to eleven Mound clients and an additional \$1,500 to George Nafziger in 2010. Stipulation 37 & 38. It should be noted that these payments were made after the Supreme Court denied certiorari and after Nafziger had filed a legal malpractice case against Respondent.

{¶63} Respondent testified that he reimbursed himself for mileage, photocopying charges, and rental of an office conference room to keep all of the Mound case files. Respondent did not have any records to substantiate the charges, but testified that the photocopy charges would have been for thousands of pages of documents.

{¶64} The parties stipulated that Respondent wrote three checks in 2006 totaling \$660 from his trust account for personal expenses including his children's summer camp, \$300 for bar dues and a CLE seminar. Stipulation 36.

{¶65} The panel concludes that clear and convincing evidence was presented that Respondent violated DR 9-102(B)(3) by failing to maintain complete records of all funds of clients and to render appropriate accounts to the clients.

{¶66} The panel concludes that Relator has proven by clear and convincing evidence the following violations in the first complaint regarding the Mound clients: DR 6-101; DR 9-102(B)(3); Prof. Cond. R. 1.15(a)(2); Prof. Cond. R. 1.15(a)(3); and Prof. Cond. R. 1.15(a)(4).

{¶67} The panel concludes that clear and convincing evidence of violations of DR 9-102(A)(1) and DR 9-102(A)(2) was not presented and recommends that these charges be dismissed. Prof. Cond. R. 9-102(A) specifically excludes advances for costs and expenses.

{¶68} The panel concludes that clear and convincing evidence was presented to show that Respondent violated Prof. Cond. R. 1.15(a)(2); Prof. Cond. R. 1.15(a)(3); and Prof. Cond. R. 1.15(a)(4) by failing to maintain client and bank records for the years 2007-2010.

2013 Complaint

Count I—Grider Matter

{¶69} Respondent entered into an attorney/client relationship with Kimberly Grider on July 27, 2010, regarding an employment matter.

{¶70} The fee agreement did not contain language that the client may be entitled to a refund if the legal representation was not completed for any reason.

{¶71} The written fee agreement provided that Grider would pay a “flat non-refundable fee” of \$2,000 which was paid to Respondent.

{¶72} Respondent did not place the \$2,000 fee into a trust account, but instead deposited it into his law firm operating account.

{¶73} Respondent filed suit on Grider’s behalf and represented her until March 20, 2012, when Grider discharged him as counsel.

{¶74} Respondent did not provide Grider with an accounting of the funds she had paid despite her request for such an accounting.

{¶75} Relator alleges that Respondent violated Prof. Cond. R 1.5(d)(3) by accepting a flat nonrefundable fee of \$2,000 from Grider and further violations of Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(c) for failure to deposit the fee into a trust account.

{¶76} Exhibit A admitted into evidence is a copy of the fee agreement between Respondent and Kimberly Grider. The agreement is dated July 27, 2010, and describes the

scope of the legal services to be provided. Paragraph 4 of the agreement reads in part (emphasis added):

*** Attorney will be compensated on a hybrid contingent rate through the administrative process with the OCRC or EEOC and any negotiations with the employer outside the EEOC/OCRC process. The hybrid arrangement will consist of a flat non refundable fee of \$2000.00 but if the case is successful, attorney will be paid on a contingent fee less \$2,000.00 or the \$2,000.00 whichever is greater. However if attorney fees are awarded the attorney will be compensated as follows:

A. Accepting the award of attorney fees or

B. Accepting the contingency fee less the award of attorney fees and returning the attorney fees client has paid. (the contingent fee is described in the agreement as 33 1/3 of all money collected if obtained prior to or after filing suit and 40% if an appeal is filed)

C. The hourly rate [of \$250.00 an hour for Respondent].***

{¶77} Grider paid Respondent \$2,000 by credit card on July 27, 2010, as per Exhibit B.

Respondent placed these funds into his operating account and not into a trust account.

{¶78} On March 6, 2012, Grider paid Respondent \$110 by check which contained the memo of "legal services" although Respondent testified the money was for expenses. These funds were also deposited into Respondent's operating account. On March 20, 2012, Grider sent Respondent a letter by facsimile terminating his services and requesting a complete accounting of services rendered.

{¶79} Respondent acknowledged that he deposited the funds paid by Grider into his operating account and further that he did not provide Grider an accounting as she had requested. July 30, 2013 Hearing Tr. 19-20; 22. Respondent testified that the fee contract with Grider was not a "non-refundable fee" but a "flat fee" of \$2,000 for representation at the administrative level and "non-refundable" was inserted in error. July 30, 2013 Hearing Tr. 80-81.

{¶80} The panel does not accept Respondent's position that the word "non-refundable" was inserted as an error in the fee agreement. The agreement refers to and sets forth a non-refundable fee and therefore must advise the client of a possible refund as required by the rule.

{¶81} The panel concludes that Relator has proven by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.5(d)(3).

{¶82} By failing to deposit client funds in a trust account as required, the panel concludes that Respondent violated Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(c). Clear and convincing testimony was presented by Respondent's own testimony as cited in the transcript references above.

{¶83} A review of the rule indicates that it governs those situations in which a lawyer receives funds on behalf of a client in which a third party may have an interest by virtue of a lien, judgment or written agreement guaranteeing payment from specific funds. The rule is clearly intended to provide guidance in those situations where a dispute may arise over protecting third parties' interests in funds which would otherwise belong to the client.

{¶84} Comment [4] to Prof. Cond. R. 1.15 is instructive and provides in part:

Divisions (d) and (c) address situations in which third persons may claim a lawful interest in specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect third-person interests of which the lawyer has actual knowledge against wrongful interference by the client. * * *

{¶85} The first sentence of Prof. Cond. R. 1.15(d) begins with the words "[u]pon receiving funds * * *." The remainder of the rule describes the attorney's responsibilities where third parties may have claims to the funds. It would be unreasonable to interpret "upon receiving funds" to include the receipt of a retainer for legal services thereby requiring the lawyer to promptly notify the client that he received the retainer and there are no known parties with a

claim to those funds. In the case at bar, the only funds in issue are those paid in advance toward a legal fee.

{¶86} If there is a fee dispute between the lawyer and client Prof. Cond. R. 1.5(f) applies (referral to bar association) or in the case of an attorney withdrawing from representation Prof. Cond. R. 1.16(e) could apply (lawyer shall promptly refund any part of a fee paid in advance that is not earned).

{¶87} The accounting required under Prof. Cond. R. 1.15(d) applies to those cases involving disputes with third parties.

{¶88} The panel concludes that Relator has not proven by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(d) and therefore recommends dismissal of that charge.

Count II—Willis Matter

{¶89} Respondent entered into an attorney-client relationship on April 15, 2011, with Jason Willis.

{¶90} There was no written fee agreement between Respondent and Willis and Willis paid Respondent \$2,500.

{¶91} Respondent was retained to seek judicial release for Willis who was incarcerated at that time.

{¶92} Respondent did not deposit the \$2,500 fee into a trust account, but instead deposited the entire amount into his law firm operating account.

{¶93} On Willis' behalf, Respondent filed a motion for judicial release on January 20, 2012.

{¶94} Respondent did not request a hearing on the motion for judicial release.

{¶95} On March 21, 2012, the motion for judicial release was denied by the trial judge without a hearing.

{¶96} Two prior motions for judicial release were filed on Willis' behalf by previous counsel and each motion was denied without a hearing.

{¶97} Relator alleges that in representing Jason Willis Respondent violated the following: Prof. Cond. R. 1.1; Prof. Cond. R. 1.3; Prof. Cond. R. 1.5(a); Prof. Cond. R. 1.5(d)(3); Prof. Cond. R. 1.15(a); Prof. Cond. R. 1.15(c); and Prof. Cond. R. 1.15(d).¹

{¶98} Willis was sentenced to prison for a term of four years on August 27, 2009, after pleading guilty to felonious assault. Two prior motions for judicial release were filed on Willis' behalf by other counsel and each motion was denied without a hearing.

{¶99} Relator alleges that Respondent violated the Prof. Cond. R. 1.1 and Prof. Cond. R. 1.3 by waiting nine months to file the motion and failing to request a hearing on the motion.

{¶100} Respondent testified that he waited to file the motion because Willis had been involved in recent infractions for gambling and contraband while in prison. July 30, 2013 Hearing Tr. 34. Additionally, Respondent was seeking the assistance of Willis' family to secure employment and housing for Willis so that the judge would look favorably upon the motion. *Id.* at 35-36.

{¶101} Respondent's strategy was to let time pass for Willis to "clean up his act" prior to the judge reviewing another motion for judicial release. Respondent did not request a hearing because the law provides that if such a motion is denied after a hearing the court shall not

¹ In Count Two of the 2013 complaint, Relator alleges violations of Prof. Cond. R. 1.5(a) and (c) based on Respondent's failure to deposit the \$2,500 received from Willis in his IOLTA, which relates to Prof. Cond. R. 1.15. The parties proceeded as though the complaint charged violations of Prof. Cond. R. 1.15(a) and (c), thus the Board concludes the error was immaterial.

consider a subsequent motion for that offender. The statute further provides that the court shall hold only one hearing for an eligible offender.

{¶102} The judge's order denying Respondent's motion refers to the seriousness of the offense, the likelihood of recidivism and defendant's failure to follow institutional rules as factors in the decision. July 30, 2013 Hearing, Ex. 6. It is difficult to believe the judge's decision would have been any different if the motion was filed earlier or if a hearing was requested. Respondent's explanation of letting time lapse between the prison infractions and allowing Willis "to clean up his act" has some merit. The strategy to refrain from requesting a hearing may have acted to Willis' benefit so that another similar motion could be filed at a later time. A subsequent motion for judicial release was filed on Willis' behalf by another attorney and that motion was denied on October 30, 2012.

{¶103} The panel concludes that Relator failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.1 and Prof. Cond. R. 1.3 and recommends that those charges be dismissed.

{¶104} Relator alleges that the fee charged by Respondent was clearly excessive in part because no fee agreement was entered into describing the nature of the fees and the services provided by Respondent were inadequate.

{¶105} Respondent testified that there was oral fee agreement for a "flat fee" not a "non-refundable" fee. July 30, 2013 Hearing Tr. 77. Although Respondent did not keep time records to justify the fee, he identified the services provided to include: visiting Willis in jail; contacting the prison system to obtain medical reports and incident reports; meeting with the family to attempt to arrange housing and employment for Willis; filing the motion for judicial release; and

compiling exhibits which were not attached to the motion, but forwarded to the judge for consideration.

{¶106} The panel concludes that \$2,500 for these services is not clearly excessive when considering the factors set forth in Prof. Cond. R. 1.5. Therefore, the panel recommends that the alleged violation of Prof. Cond. R. 1.5(a) be dismissed.

{¶107} The only evidence in the record regarding the allegation of nonrefundable fee charged to Willis is the testimony of Respondent that a flat fee was charged. Relator failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.5(d)(3) and therefore, the panel recommends dismissal of that charge.

{¶108} Respondent admitted to placing the \$2,500 fee from Willis into his office operating account and not a trust account as required by Prof. Cond. R. 1.15(a). July 30, 2013 Hearing Tr. 27-30. The panel does not accept Respondent's explanation that at the time Willis paid \$2,500 the fee had already been earned. Therefore, the panel concludes that Relator proved by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(c) by not depositing the fee deposit into a trust account.

{¶109} Relator failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(d) by failing to provide an accounting. Relator acknowledged this fact in closing argument. *Id.* at 110. Therefore, the panel recommends dismissal of this charge.

AGGRAVATION, MITIGATION, AND SANCTION

{¶110} When imposing sanctions for attorney misconduct, the Court considers relevant factors including the duties violated by the lawyer and sanctions imposed in similar cases: *Stark*

Cty. Bar Assn. v. Buttacavoli, 96 Ohio St.3d 424, 2002-Ohio-4743. The Court also weighs evidence of the aggravating and mitigating factors listed in BCGD Proc. Reg. 10. *Lake Cty. Bar Assn. v. Troy*, 121 Ohio St.3d 51, 2009-Ohio-502.

{¶111} The panel finds the following aggravating factors: (1) a pattern of misconduct; (2) multiple offenses; and (3) refusal to acknowledge the wrongful nature of his conduct.

{¶112} The panel finds the following mitigating factors: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; and (3) evidence of character and reputation.

{¶113} Sanctions for similar violations have ranged from public reprimands to indefinite suspensions depending on the severity of the conduct and the aggravating factors.

{¶114} Public reprimands were issued in *Trumbull Cty. Bar Assn. v. Rucker*, 134 Ohio St.3d 282, 2012-Ohio- 5642 and *Cincinnati Bar Assn. v. Seibel*, 132 Ohio St.3d 411, 2012-Ohio-3234.

{¶115} In the *Rucker* case, Respondent failed to act with reasonable diligence, charged an improper nonrefundable fee, and failed to maintain client funds separately in a trust account.

{¶116} Respondent Seibel also charged a nonrefundable fee and failed to hold client funds in an interest bearing account. He was charged in only one case and was found to violate Prof. Cond. R. 1.5(c); Prof. Cond. R. 1.15(d); and Prof. Cond. R. 1.5(d)(3).

{¶117} The *Rucker* and *Seibel* cases were consent to discipline agreements and the Court noted no aggravating factors and cooperation in the disciplinary process in each case.

{¶118} In the case of *Toledo Bar Assn. v. Gregory*, 132 Ohio St.3d 110, 2012-Ohio-2365, Respondent mishandled retainers received from two clients, failed to deposit fee retainers into a trust account and failed to maintain adequate records. She was found to have violated Prof.

Cond. R. 1.15(a); Prof. Cond. R. 1.15(a)(2); Prof. Cond. R. 1.15(4); and Prof. Cond. R. 1.15(c).

The aggravating factors included a pattern of misconduct involving multiple offenses. The Court found that Gregory acknowledged the wrongful nature of her conduct and had wound down her practice during the pendency of the disciplinary matter to protect potential clients from harm. The sanction imposed by the Court was a stayed six-month suspension.

{¶119} In *Columbus Bar Assn. v. Watson*, 132 Ohio St.3d 496, 2012-Ohio-3830,

Respondent committed multiple violations involving three clients including depositing client funds into his operating account instead of a trust account, comingled personal and client funds, and paid personal expenses from his trust account in violation of Prof. Cond. R. 1.15(a) and Prof. Cond. R. 1.15(d). The Board found one aggravating factor of multiple offenses and recommended a six-month stayed suspension. The Court ordered a one-year stayed suspension with conditions.

{¶120} In *Toledo Bar Assn. v. Royer*, 133 Ohio St.3d 545, 2012-Ohio-5147, Respondent neglected a legal matter and did not deposit client funds into a trust account, did not maintain complete records of client property and was found to have violated DR 9-102A; DR 9-102(B)(3); Prof. Cond. R. 1.5(a); Prof. Cond. R. 1.5(c); Prof. Cond. R. 1.15(a)(3); and Prof. Cond. R. 1.15(a)(4).

{¶121} The Court noted Respondent's 46 years of practice with no disciplinary actions and his full cooperation in the disciplinary process as mitigating factors. The Court further noted that Respondent's problems were due to bad time management and record keeping. He was given a one-year stayed suspension with conditions.

{¶122} Other cases with similar violations have resulted in more severe sanctions including *Disciplinary Counsel v. Johnson*, 131 Ohio St.3d 372, 2012-Ohio-1284 (two-year

suspension with 18 months stayed), *Medina Cty. Bar Assn. v. Malynn*, 131 Ohio St.3d 377, 2012 Ohio 1293 (two-year suspension with six months stayed), and *Columbus Bar Assn. v. Boggs*, 129 Ohio St.3d 190, 2011-Ohio-2637. All of the above cited cases involved dishonesty, deceit, fraud, or misrepresentation, none of which were proven in this case.

{¶123} Relator recommends that Respondent be suspended for two years while Respondent argued that the sanction should be the appointment of a monitor to assist Respondent in maintaining proper trust accounting records.

{¶124} When considering the nature of the offenses, the aggravating and mitigating factors, in addition to prior decisions of the Court, the panel recommends that Respondent be suspended for one year with six months stayed.

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 December 12, 2013. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, John Joseph Scaccia, be suspended from the practice of law for one year with six months stayed. 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