





Before the hearing, relators and respondent submitted a comprehensive set of stipulations. The few remaining issues were litigated at the hearing on April 22, 2014.

One of the issues in dispute was whether respondent had violated Prof. Cond. R. 1.5(a) (prohibiting a lawyer from making an agreement for, charging, or collecting a clearly excessive fee) and Prof. Cond. R. 1.15(d) (requiring a lawyer to promptly deliver to the client or third party any funds to which the client or third party are entitled) with respect to the third count of Disciplinary Counsel's complaint, and consequently, whether respondent owed any restitution. *See Relator's Hearing Brief, attached hereto as Appendix A.*

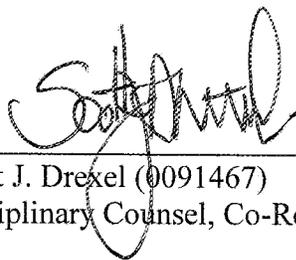
After taking into consideration the stipulations and the testimony at the hearing, the board determined:

- On June 2, 2011, Floyd Evans retained respondent to represent him in a personal injury matter for a 30% contingency fee;
- Floyd Evans had been previously represented by Attorney Michael Gertner in the same matter also at a 30% contingency fee;
- After Gertner learned that Evans had retained respondent, Gertner contacted respondent and advised her that he had a lien for \$11,133.49 on Evans' settlement proceeds for services previously rendered to Evans;
- Respondent disputed Gertner's services, but ultimately agreed to pay Gertner \$9,333.49 for services rendered to Evans;
- Evans' personal injury case settled for \$145,000;
- Of the \$145,000, \$9,333.49 was paid directly to Gertner, and \$135,666.51 was paid to respondent;
- Respondent received \$43,500 in fees, which was her full 30% contingency fee;
- In disbursing settlement funds, respondent deducted the \$9,333.49 that had been paid directly to Gertner from Evans' share of the settlement proceeds; and
- In total, Evans paid over \$52,833.49 in attorney fees.

The board correctly concluded that respondent's decision to keep the entire 30% contingency fee and not deduct Gertner's \$9,333.49 fee from her fee was clearly excessive in violation of Prof. Cond. R. 1.5(a). In fact, respondent's actions resulted in Evans paying over 36% in legal fees even though he had contracted for a 30% contingency fee with both attorneys who represented him. Furthermore, the board concluded that respondent's failure to deliver funds to her client and or a third party violated Prof. Cond. R. 1.15(d).<sup>1</sup>

Despite the board's findings, it did not address the issue of restitution. Accordingly, relator requests this matter be remanded to the board for the sole purpose of addressing its position on restitution. Depending on the board's position, relator and/or respondent may determine that objections to the board report are warranted; however, that decision cannot be made at this time due the board's failure to address the issue of restitution.

Respectfully submitted,

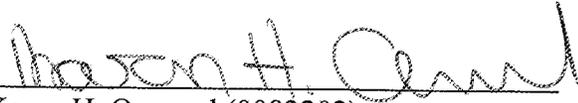


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Scott J. Drexel (0091467)  
Disciplinary Counsel, Co-Relator

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<sup>1</sup> As noted in relator's hearing brief (Appendix A) and the board report, respondent disbursed \$2,505 more to Evans than she believed he was entitled to receive due to a miscalculation on her settlement disbursement sheet. This miscalculation, however, caused respondent to pay Grant Medical Center (Grant) \$2,505 less than the amount of its medical lien. Instead of trying to address the issue herself, respondent simply advised both Grant and Evans that they had to work with each other regarding collection of the remaining \$2,505. Grant has subsequently written off the \$2,505 and closed its file on Evans' matter. However, relator submits that respondent took \$9,333.49 more in attorney fees than she was entitled to receive because she paid herself a full thirty percent (30%) contingency fee in addition to the \$9,333.49 fee that was paid to Gertner. Respondent should have deducted the fees paid to Gertner from her own contingency fee. As a result, relator submits that, on remand, the board should recommend that respondent be ordered to make restitution to Grant in the amount of \$2,505, i.e. the remaining amount made for medical services, and that she should be ordered to make restitution to Evans in the amount of \$6,828.49. If, for some reason, either Grant or Evans will not accept restitution, then the board should recommend that the respective amount(s) should be paid to the Client Security Fund of Ohio.



Karen H. Osmond (0082202)  
Assistant Disciplinary Counsel  
250 Civic Center Drive, Suite 325  
Columbus, Ohio 43215-7411  
Telephone (614) 461-0256  
Facsimile (614) 461-7205  
Karen.osmond@sc.ohio.gov  
Counsel for Co-Relator

**Certificate of Service**

I hereby certify that the foregoing *Co-Relator's Motion for Remand to the Board of Commissioners on Grievances and Discipline* was served via U.S. Mail, postage prepaid, this 25<sup>th</sup> day of August, 2014, upon respondent's counsel, Alvin E. Mathews, Esq., at 115 W. Main St., 4<sup>th</sup> Floor, Columbus, Ohio 43215, upon the Columbus Bar Association at 175 S. Third St., Suite 1100, Columbus, Ohio 43215, and upon Richard A. Dove, Esq., Secretary of the Board of Commissioners of Grievances and Discipline, at 65 South Front St., 5<sup>th</sup> Floor, Columbus, Ohio 43215.



Karen H. Osmond (0082202)  
Counsel for Co-Relator, Disciplinary Counsel

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

FILED

APR 15 2014

BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

In re:

**Beverly J. Corner, Esq.**  
Attorney Reg. No. 0042725  
5918 Sharon Woods Blvd., Suite 100  
Columbus, OH 43229

**Respondent,**

**Case No. 13-059**

**Disciplinary Counsel**  
250 Civic Center Drive, Suite 325  
Columbus, Ohio 43215-7411

**CO-RELATOR, DISCIPLINARY  
COUNSEL'S, HEARING BRIEF**

**Columbus Bar Association**  
175 South Third St. Suite 1100  
Columbus, Ohio 43215

**Co-Relators.**

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**CO-RELATOR, DISCIPLINARY COUNSEL'S, HEARING BRIEF**

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Now comes relator, Disciplinary Counsel, and submits this hearing brief to the Board of Commissioners on Grievances and Discipline. On November 14, 2013, relator filed a three-count complaint against respondent, Beverly J. Corner, alleging that she engaged in a pattern of misconduct including the misappropriation of client funds and charging an excessive fee.<sup>1</sup>

**APPENDIX  
A**

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<sup>1</sup> The Columbus Bar Association also filed a complaint against respondent regarding a bankruptcy matter that respondent handled. Conduct alleged in that complaint is not covered in this hearing brief, but is relevant to the panel's determination of aggravating factors, mitigating factors, and appropriate sanction.

## FACTS AND VIOLATIONS

### *Count One – Failure to Keep IOLTA Records*

On July 13, 2012 and again on July 17, 2012, respondent overdrew her IOLTA at PNC Bank. As a result of these overdrafts, relator initiated an investigation of respondent's conduct and asked her to provide several documents regarding the transactions that caused the overdrafts, as well as documents regarding her IOLTA in general, i.e. client ledgers, general ledgers, and proof that a monthly reconciliation had been completed.

Based on the information that respondent provided, including information that she provided in response to subsequent inquiries from relator and her deposition testimony on July 23, 2013, it was clear that between January 2012 and May 2013, respondent had failed to maintain records of client funds in her possession as required by Prof. Cond. R. 1.15 and had failed to perform monthly reconciliations of her IOLTA. In addition, it was clear that respondent had withdrawn fees/funds from her IOLTA on an as-needed basis rather than as earned and that she had used funds from her IOLTA to pay expenses on behalf of clients without first receiving and/or depositing supporting funds from her clients into her IOLTA.

For instance, on June 6, 2012, respondent received a \$100 check from Teri Driver, the administrator for the Estate of Wanda Driver. This check was for fees associated with the estate. Respondent immediately cashed the check from Teri Driver rather than depositing it into her IOLTA. Nevertheless, on June 7, 2012, respondent used her IOLTA to write a \$75 check to the probate court for fees in the *Driver* Estate. At her deposition, respondent was unable to account for the remaining \$25 that she had received from Teri Driver.

Similarly, on December 11, 2012, Jason Connors paid respondent \$350 for an expungement matter. \$50 of the \$350 was for Connors' filing fee; however, respondent failed to

deposit any portion of Connors' payment into her IOLTA. Nevertheless, on December 20, 2012, respondent used her IOLTA to write a \$50 check to the Montgomery County Clerk of Courts on behalf of Connors.

As evidence that respondent was withdrawing funds/fees from her IOLTA on an as needed basis rather than as earned, relator respectfully refers the panel to the allegations contained in Count Two of Disciplinary Counsel's complaint, specifically the allegations regarding Antonio Sledge. In the *Sledge* matter, respondent withdrew fees/funds from her IOLTA on an as needed basis, including funds that she should have been holding in trust to pay several medical bills on behalf of Sledge.

While respondent's conduct alone is troubling, it is even worse when one takes into account that on November 29, 2011 – just eight months before the overdrafts that initiated this matter occurred – relator terminated a seven-month investigation of respondent's IOLTA. During this prior investigation, respondent represented to relator that she had not previously understood her professional obligations under Prof. Cond. R. 1.15, but that she would exercise due diligence in determining what her obligations were and would thereafter comply with those obligations.

During the prior investigation, relator spent several hours on the phone with respondent reviewing, discussing, and correcting records that respondent submitted in response to relator's inquiries. In addition, relator sent several letters to respondent advising her of her Prof. Cond. R. 1.15 obligations and providing respondent with a copy of a book entitled "Lawyer's Trust Accounts," which explained in detail how to properly manage an IOLTA. As a result of the prior investigation, respondent also attended a Continuing Legal Education (CLE) seminar at the Columbus Bar Association on November 30, 2011 regarding the "nuts and bolts" of trust account

management. After seven months of working with respondent, relator believed that respondent had learned how to properly manage her IOLTA or, at the very minimum, had the tools to know how to do so; therefore, relator terminated its investigation of respondent. Soon thereafter and despite her knowledge of Prof. Cond. R. 1.15, respondent returned to her “old ways” and continued to engage in conduct as she had done prior to relator’s investigation, i.e. not reconciling her IOLTA, not maintaining appropriate records of client funds in her possession, and using her IOLTA to advance fees for clients without first receiving and/or depositing supporting funds from clients into her IOLTA.<sup>2</sup>

Clearly, respondent’s conduct violates Prof. Cond. R. 1.15(a) (requiring a lawyer to keep client funds in an interest bearing trust account separate from the lawyer’s own property); Prof. Cond. R. 1.15(a)(2) (requiring a lawyer to maintain a record for each client that sets forth the name of the client; the date, amount, and source of all funds received on behalf of the client; the date, amount, payee, and purpose of each disbursement made on behalf of the client; and the current balance for each client); Prof. Cond. R. 1.15(a)(3) (requiring a lawyer to maintain a record for each bank account that sets forth the name of the account; the date, amount, and client affected by each credit and debit; and the balance in the account); and Prof. Cond. R. 1.15(a)(5) (requiring a lawyer to perform a monthly reconciliation of the lawyer’s IOLTA).

### ***Count Two – Misappropriation of Client Funds***

In Count Two, relator charged respondent with misappropriating funds belonging to or associated with the following individuals’ cases: William and Allene McCoy, Shannon Smoot,

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<sup>2</sup> It is also important to note that during relator’s prior investigation, which lasted from March 2011 to November 2011, respondent was, without relator’s knowledge, actively misappropriating client funds from Donna Denney, Meredith Rogan, and Marvin Dennis.

Donna Denney, Meredith Rogan, Demetra Canon, Marvin Dennis, Alida Powell, and Marvin Dennis. The details of each case can be found in the complaint filed by Disciplinary Counsel; however, for the panel's convenience, each case is also summarized below.

William and Allene McCoy

In November 2008, respondent agreed to represent William and Allene McCoy in a personal injury matter for a 1/3 contingency fee; however, respondent specifically agreed to base her fees on the McCoy's net settlement rather than the gross settlement.

In April 2010, the McCoy's settled their personal injury matter for \$12,000. In turn, respondent received a \$12,000 settlement check from the tortfeasor's insurance company, which she improperly deposited into her *business* account. In May 2010, respondent incorrectly determined that the McCoy's were due \$4,796 from their settlement, which is \$1,241.34 less than the McCoy's were actually owed.<sup>3</sup> In part, the discrepancy was due to the fact that respondent based her attorney fees on the gross settlement, rather than the net settlement as she had previously agreed.

Despite the fact that in May 2010 respondent had calculated that the McCoy's were due \$4,796, respondent did not disburse any settlement proceeds to the McCoy's. Instead, respondent used the McCoy's settlement proceeds to pay personal/business expenses and/or obligations on behalf of other clients. By June 30, 2010 – a little over two months after respondent deposited the McCoy's settlement proceeds into her business account – the balance in respondent's business account was only \$49.84.

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<sup>3</sup> By relator's calculation, the McCoy's should have received \$6,037.34 from their settlement. The gross settlement was \$12,000. From this amount, \$2,719 should be subtracted for a medical lien and \$225 for filing fees. This leaves a net settlement of \$9,056. 1/3 of \$9,056 is \$3,018.66, which constitutes respondent's attorney fees. \$9,056 minus \$3,018.66 equals \$6,037.34.

Respondent did not begin disbursing settlement proceeds to the McCoys until January 2011 – more than eight months after she had received the settlement check. Even then, respondent disbursed the McCoys' settlement proceeds – the \$4,796 that she had previously calculated – in installments. Respondent was unable to disburse the McCoys' settlement proceeds all at one time because she had already spent the proceeds and not have the necessary funds to do so.

Sometime between April 2011 and July 2011, and most likely at the McCoys' insistence, it was determined that the McCoys were owed additional funds from their settlement. On July 14, 2011, respondent entered into an agreement with the McCoys whereby she agreed that the amount that the McCoys were actually entitled to was \$5,695. She also agreed to pay them 15% interest in the amount of \$854.25 for a total of \$6,549.25. On July 14, 2011 – the day the agreement was entered into – respondent paid the McCoys an additional \$1,100 and she agreed to pay them the remaining \$653.25 in \$200 monthly installments starting September 15, 2011. To the best of relator's knowledge, respondent has now paid the McCoys in full; however, this does not change the fact that respondent violated Prof. Cond. R. 1.15(d) by failing to promptly deliver settlement proceeds to the McCoys and Prof. Cond. R. 8.4(d) by misappropriating the McCoys' funds prior to disbursement.<sup>4</sup>

Shannon Smoot

In March 2010, respondent agreed to represent Shannon Smoot in a personal injury matter for a 1/3 contingency fee. Thereafter, respondent retained Attorney Kristin J. Bryant to

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<sup>4</sup> At the hearing on April 22, 2014, relator intends to recommend dismissal of Prof. Cond. R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law) in light of the Supreme Court of Ohio's decision in *Disciplinary Counsel v. Bricker*, 137 Ohio St. 3d 35, 2013-Ohio-3998, 997 N.E.2d 500.

help her with Smoot's case, and she agreed to pay Bryant 1/3 of the fee that she received from the *Smoot* case. Neither respondent, nor Bryant, obtained Smoot's written consent to share attorney fees pursuant to Prof. Cond. R. 1.5(e).

In or about November 2010, Smoot agreed to settle his personal injury matter for \$3,250. In turn, respondent received a check for \$3,250 from the tortfeasor's insurance company, which she deposited into her IOLTA. At the time of settlement, Smoot had outstanding medical bills to the Ohio State University in the amount of \$1,231 and to OSU Physicians in the amount of \$294.

On December 21, 2010, respondent issued a check to Smoot for \$875.66, which is the amount that respondent had calculated, albeit incorrectly, that Smoot was owed from his settlement. Respondent kept the remainder of Smoot's settlement proceeds to pay Attorney Bryant for her services, to pay Smoot's medical bills, and to cover her attorney fees.

Despite having received funds to do so, respondent did not pay Smoot's OSU Physicians bill until April 27, 2011 – over four months after having received funds to do so. Similarly, respondent did not pay Smoot's OSU Hospital bill until June 27, 2012 – over eighteen months after having received funds to do so. Moreover, respondent only paid Smoot's OSU Hospital Bill after the Ohio Attorney General (on behalf of the Ohio State University) filed a lawsuit against Smoot for non-payment of his medical bill.<sup>5</sup> Rather than paying Smoot's medical bills in a timely manner as she should have done, respondent used the funds set aside for Smoot's medical bills to pay personal or business expenses and/or to satisfy obligations on behalf of other clients. By February 18, 2011 – two months after respondent had deposited Smoot's settlement

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<sup>5</sup> In the answer that respondent filed on behalf of Shannon Smoot, respondent falsely denied that Smoot owed money to OSU or that the amount of the debt was \$1,231 despite the fact that she had acknowledged as much on her distribution sheet for Smoot's case.

proceeds into her IOLTA and two months before she paid any medical bills on behalf of Smoot – the balance in respondent’s IOLTA was only \$14.

Cleary, respondent violated Prof. Cond. R. 1.5(e) by failing to obtain Smoot’s written permission to share fees with Attorney Bryant, Prof. Cond. R. 1.15(d) by failing to promptly pay Smoot’s medical bills, and Prof. Cond. R. 8.4(c) by misappropriating funds earmarked for payment of Smoot’s medical bills.

Donna Denney

Respondent is currently representing Donna Denney in a personal injury matter for a 25% contingency fee. Between March 2011 and June 2011 (during the time that relator’s previous investigation of respondent was occurring), respondent received four checks totaling \$5,826.53 from Geico Insurance on behalf of Denney. These funds were for the sole purpose of paying or negotiating Denney’s outstanding medical bills with EMPI, Inc. and NovaCare.

All of these funds should have been held in trust for Denney’s benefit; however, respondent deposited \$500 of the \$5,826.53 into her business account and used it almost immediately. As to the remaining \$5,326.53, respondent deposited these funds into her IOLTA; however, she depleted them within four months of deposit and well before she had paid any medical bills on behalf of Denney. Specifically, respondent deposited the \$5,326.53 into her IOLTA on March 16, 2011, but by June 30, 2011, the balance in respondent’s IOLTA was only \$94.24. Respondent did not pay Denney’s EMPI, Inc. invoice until August 14, 2013, and she did not pay the NovaCare invoice until September 13, 2013.

Based on the above, it is clear that respondent violated Prof. Cond. R. 8.4(c) by misappropriating Denney’s funds for her own personal or business purposes.

Meredith Rogan

In May 2011 (also while relator's prior investigation of respondent was occurring), respondent received and deposited a check for \$2,986.47 into her IOLTA on behalf of Meredith Rogan. This check represented the proceeds of a property damage settlement that respondent had obtained for Rogan. Of the \$2,986.47, Rogan was entitled to \$2,780.93. The remaining \$205.54 was owed to respondent for attorney fees and expenses.

Shortly after depositing the \$2,986.47 into her IOLTA, respondent began drawing down the funds in her IOLTA by withdrawing cash and or writing checks, including a \$1,600 check to herself on May 27, 2011. By May 31, 2011, the balance in respondent's IOLTA was only \$1,776.34. During June 2011, respondent continued to draw down the balance in her IOLTA by withdrawing funds or writing checks, including a \$700 check to herself on June 11, 2011. By June 13, 2011, the balance in respondent's IOLTA was only \$164.24.

On June 6, 2011, Rogan contacted respondent regarding her property damage claim. On June 15, 2011, respondent wrote a letter to Rogan regarding the matter. Respondent falsely stated in her letter that since June 6, 2011, she had "been unable to write checks on the account due to the account being compromised." Respondent further falsely stated that the bank had informed her that all funds would be available after June 30, 2011 and that a check would be issued "once the bank matter has been reconciled." Near the end of her letter, respondent apologized for the "inconvenience regarding [her] bank institution." As shown by respondent's use of her trust account in the months preceding her letter to Rogan, there was nothing "compromised" about respondent's account, nor had the bank prohibited respondent from writing checks on the account. Respondent's letter was nothing more than an attempt to delay

payment to Rogan while she tried to gather the necessary funds with which to pay Rogan. On July 14, 2011, respondent issued a \$2,780.93 check to Rogan from her *business* account.

Based on the above, it is clear that respondent violated Prof. Cond. R. 8.4(c) by not only misappropriating Rogan's funds, but by also lying to Rogan in her June 15, 2011 letter.

Marvin Dennis

On May 13, 2011 (and while relator's prior investigation of respondent was occurring), respondent deposited a check for \$2,439.27 into her IOLTA. This check represented the proceeds of a personal injury settlement that respondent had obtained on behalf of her client, Marvin Dennis. Of the \$2,439.27, Dennis was entitled to \$1,519.27. Due to purported health problems, Dennis was unable to sign the settlement disbursement sheet until February 2, 2012.

Although respondent should have held Dennis's funds in trust until she disbursed them, by June 2, 2011 – three weeks after she had deposited Dennis's funds into her IOLTA – the balance in respondent's IOLTA was below the \$1,519.27 that respondent should have been holding in trust for Dennis, and it remained that way for at least the next eight months. In fact, on February 2, 2012, the day that Dennis signed his settlement disbursement sheet, the balance in respondent's IOLTA was only \$14.24. Accordingly, respondent was unable to distribute Dennis's settlement proceeds to him at that time. Respondent did not disburse Dennis's settlement proceeds to him until June 27, 2012, and even then, she used earned fees that she had left in her IOLTA from another client's (Antonio Sledge's) personal injury settlement to pay Dennis. There is no doubt that respondent's conduct violates Prof. Cond. R. 1.15(d) and Prof. Cond. R. 8.4(c).

Demetra Canon

Sometime during the late spring or early summer of 2011, respondent began providing legal services to Demetra Canon regarding a custody matter. On November 8, 2011, respondent formally opened a file on Canon's legal matter and began charging Canon for her services at the rate of \$85 per hour.

On January 31, 2012 (only two months after relator's prior investigation of respondent had concluded), respondent formalized her attorney/client relationship with Canon by entering into a fee agreement with Canon. Per the fee agreement, Canon paid respondent a \$750 retainer, which respondent deposited into her *business* account the same day even though respondent had only earned \$269.15 of Canon's retainer at the time. The following day, February 1, 2012, respondent withdrew \$820 from her business account (none of which was transferred into her IOLTA) leaving a balance of only \$91.62 in the account. Based on these facts, it is clear that respondent violated Prof. Cond. R. 8.4(c) by misappropriating funds belonging to Canon before they were earned.

Alida Powell

On or about March 2, 2012 (only three months after relator's prior investigation of respondent had concluded), respondent began representing Alida Powell in a custody matter. On March 5, 2012, Karen Taylor paid respondent \$750 on behalf of Powell, which according to respondent's fee agreement, was to be billed against at the rate of \$200 per hour.<sup>6</sup>

On March 6, 2012, respondent deposited the entire \$750 from Taylor into her business account even though she had only performed \$43.75 worth of services on behalf of Powell as of

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<sup>6</sup> Respondent actually charged Powell \$175 per hour.

that date. After depositing the \$750 into her operating account, respondent proceeded to use the \$750 to pay various business and personal expenses. As of March 19, 2012, the balance in respondent's operating account was a negative \$4.73. As of this same date, respondent had still only performed \$43.75 of services on behalf of Powell. Based on these facts, it is clear that respondent violated Prof. Cond. R. 8.4(c) by misappropriating funds belonging to Powell before they were earned.

Antonio Sledge

On June 22, 2012 (seven months after relator's prior investigation of respondent had concluded), respondent deposited a check for \$57,511.15 into her IOLTA. This check represented the proceeds of a personal injury settlement that respondent had obtained on behalf of Antonio Sledge minus \$1,488.85 that had been paid directly to the Ohio Department of Job and Family Services.<sup>7</sup>

Per respondent's distribution sheet, respondent retained \$19,666.67 of Sledge's settlement for attorney fees and \$907.87 to pay costs and expenses on behalf of Sledge. The cost and expenses included, but were not limited to, three Healthport Invoices for medical records and a \$350 medical bill from Dr. James C. Latshaw.

With regard to respondent's attorney fees, she did not withdraw them from her IOLTA all at one time, nor did she withdraw the exact amount of her attorney fees. Between June 26, 2012 and July 31, 2012, respondent withdrew \$17,985 from her IOLTA for what appear to be attorney fees related to the *Sledge* case. She used the remainder of her earned fees to pay financial obligations on behalf of other clients, such as Marvin Dennis, from her IOLTA. By July 31,

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<sup>7</sup> The actual settlement amount was \$59,000.

2012, the balance in respondent's IOLTA was only \$29.59. Notably, in this period of time, respondent did not pay the three Healthport Invoices for Sledge or the \$350 invoice from Dr. Latshaw.<sup>8</sup> Respondent did not pay two of the Healthport invoices until January 2013, and only after those invoices had been referred for collection. She did not pay the third Healthport invoice until July 2013, and again, only after the invoice had been referred for collection. With respect to Dr. Latshaw, respondent did not pay his \$350 invoice until February 27, 2013.

Clearly, respondent has violated Prof. Cond. R. 1.15(d) by failing to pay Sledge's medical bills on time and Prof. Cond. R. 8.4(c) by using funds earmarked for Sledge's medical bills to pay personal and/or business expenses.

### *Count Three – Floyd Evans*

On June 2, 2011, Floyd Evans retained respondent to represent him in a personal injury matter for a 30% contingency fee. This particular matter arose out of an automobile accident that occurred while Evans, who was employed as a driving instructor, was teaching a student how to drive. As such, Evans made claims against both his employer and the tortfeasor – an individual who was texting at the time he hit Evans and the student. Evans was previously represented by Michael Gertner, who had also agreed to represent him at a 30% contingency fee.

After being retained by Evans, respondent sent a letter to Gertner requesting a copy of Evans' file. In addition, respondent advised Gertner that she intended to "compensate" him for "reasonable legal services rendered" on the case prior to her involvement. Thereafter, Gertner informed respondent that he was claiming a lien of \$11,133.49 for services provided to Evans.

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<sup>8</sup>Respondent issued a check to Dr. Latshaw for \$350; however, the check was returned for insufficient funds. This transaction is one of the transactions that caused relator to initiate a second investigation of respondent's IOLTA.

Respondent disputed this amount, but ultimately agreed to pay Gertner \$9,333.49 for services rendered to Evans.

In total, Evans' personal injury matter settled for \$145,000 – \$65,000 from Evans' employer and \$80,000 from the tortfeasor. On December 26, 2011, respondent deposited a check for \$65,000 into her IOLTA. This check represented the portion of Evans' settlement from Evans' employer. On the same day, respondent distributed 70% of the settlement (\$45,500) to Evans and his wife. Respondent also wrote a check to herself for \$19,000 in attorney fees; however, respondent's attorney fees should have been \$19,500. Respondent left the remaining \$500 in her IOLTA thus commingling personal funds with client funds.

On February 1, 2013, respondent deposited a check for \$70,666.51 from Nationwide Insurance into her IOLTA. This check represented the portion of the settlement from the tortfeasor's insurance company minus \$9,333.49 that was paid directly to Gertner for attorney fees. The \$70,666.51 should have been distributed as follows:

- a. \$14,766.51 to respondent for attorney fees and expenses;
- b. \$20,884.95 to Grant Medical Center;
- c. \$2,505 to Grandview Family Practice;
- d. \$6,701 to Clinic Medical Services;
- e. \$4,585 to Roy M. Gottlieb, D.D.S.;
- f. \$180 to Ortho Neuro; and
- g. \$21,044.05 to Evans.

Respondent actually distributed the \$70,666.51 as follows:

- a. \$24,000 to herself for attorney fees;
- b. \$100 to herself for expenses;

- c. \$18,379.95 to Grant Medical Center;
- d. \$2,505 to Grandview Family Practice;
- e. \$6,701 to Clinic Medical Services;
- f. \$4,585 to Roy M. Gottlieb, D.D.S.;
- g. \$180 to Ortho Neuro; and
- h. \$14,215.56 to Evans.

What respondent essentially did was treat Gertner's attorney fees the same as any other lien, thereby deducting it from Evans' portion of the settlement. In doing so, respondent ensured that she received her full 30% contingency fee, while at the same time making Evans pay out 36% of his settlement in attorney fees even though he had contracted with both Gertner and respondent for a 30% contingency fee.

In addition, respondent failed to include a \$2,505 payment that she had made to Grandview Family Practice on her disbursement sheet for Evans, which resulted in respondent giving Evans \$2,505 more than she believed he was entitled to, but \$6,828.49 less than he was actually entitled to (\$9,333.49 in excessive attorney fees minus \$2,505 that should have been reflected on the disbursement sheet).

As a result of giving Evans \$2,505 more than she believed he was entitled to, respondent had insufficient funds to pay all of Evans' medical bills. Rather trying to recoup the money from Evans or pay the money herself since it was her fault that Evans had received "too much," respondent merely decided to short Grant Medical Center \$2,505 and advise them that they would have to collect that money from Evans directly.

Relator respectfully submits that respondent violated Prof. Cond. R. 1.5(a) (prohibiting a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee)

by failing to deduct Gertner's fees from her own fee and Prof. Cond. R. 1.15(d) (requiring a lawyer to promptly deliver to the client or third party any funds to which the client or third party are entitled to) by failing to provide Grant Medical Center with the full amount that it was owed.<sup>9</sup>

In support of these charges, relator respectfully directs the panel's attention to *Goldauskas v. Elyria Foundry Company, Inc.*, 145 Ohio App.3d 490, 763 N.E.2d 645 (9<sup>th</sup> Dist., 2013), which cited the Indiana Supreme Court case of *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind., 1999). In *Galanis*, the Indiana Supreme Court held

Only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed, and that fee should in turn be allocated among the various attorneys involved in handling the claim in question.

*Id.* The Indiana Supreme Court further noted that it was possible for a second attorney to receive "a windfall" if he/she is permitted to receive a full contingency fee when the first attorney "contributed significantly" to the case as Gertner did in the instant matter. *Id.* at 861.

Additionally, the Indiana Supreme Court stated that

[I]t is incumbent upon the lawyer who enters a contingent fee agreement with knowledge of a previous lawyer's work to explain fully any obligation of the client to pay a previous attorney and explicitly contract away liability for those fees. If this is not done the successor assumes the obligation to pay the first lawyer's fee out of his or her contingent fee.

*Id.* at 863. See also *In re J.F.*, 162 Ohio App.3d 716, 834 N.E.2d 876 (9<sup>th</sup> Dist., 2005), which appears to stand for the proposition that one contingency fee should be split among two attorneys

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<sup>9</sup> At the hearing in this matter on April 22, 2014, relator intends to recommend dismissal of Prof. Cond. R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law) in light of the Supreme Court of Ohio's decision in *Disciplinary Counsel v. Bricker*, 137 Ohio St. 3d 35, 2013-Ohio-3998, 997 N.E.2d 500.

involved in a case, the division of which should be based on the factors contained in Prof. Cond. R. 1.5.

To date, respondent has not returned any portion of the \$9,333.49 that she overcharged Evans. If fact, she insists that her conduct was appropriate in the matter. In light of the above, the panel should find that respondent violated Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d) and order respondent to make restitution in the amount of \$9,333.49 as follows – \$6,828.49 to Evans and \$2,505 to Grant Medical Center. If for some reason, Evans or Grant Medical Center will not accept restitution, the panel should order respondent to pay the respective amount to the Client Security Fund to avoid any unjust enrichment or benefit to respondent.

#### **AGGRAVATING AND MITIGATING FACTORS**

When imposing sanctions for attorney misconduct, the Court considers all relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818.

As explained above, respondent failed to keep appropriate records of client funds in her possession despite a previous investigation by relator into the exact same conduct; she misappropriated funds from at least eight clients (some during relator's prior investigation of her conduct and some shortly after the conclusion of the prior investigation); she lied to at least one client about the delay in transmitting the client's share of the settlement proceeds; and she charged an excessive fee in the *Evans* matter. In addition, respondent engaged in the misconduct alleged in the Columbus Bar Association's complaint, which will most likely be addressed in a separate hearing brief.

In each disciplinary case, the Court also considers the relevant aggravating and mitigating factors. With respect to Disciplinary Counsel's complaint alone, respondent has engaged in a

pattern of misconduct and multiple offenses. In addition, she was actively misappropriating client funds while being investigated by relator, and she has failed to make restitution to Floyd Evans and/or Grant Medical Center.

As to mitigating factors, respondent has practiced law for 25 years with no prior discipline. In addition, for the most part, she has cooperated with relator's investigation. Finally, relator is aware that respondent has been diagnosed with Depression NOS (not otherwise specified) and that she has signed a four-year mental health contract with the Ohio Lawyer's Assistance Program, with which she is in compliance. That being said, respondent has provided relator with very little information concerning her treatment (if she is continuing to engage in treatment) and/or any information that provides a causal connection between her misconduct and her diagnosis. Accordingly, relator is unaware of whether respondent's mental illness will qualify as a mitigating factor under BCGD Proc. Reg. 10(B)(2).

### **RECOMMENDED SANCTION**

Relator respectfully submits that the appropriate sanction in this matter is, at a minimum, a two-year suspension with no portion of the suspension stayed.<sup>10</sup> Relator further submits that reinstatement in this matter should be conditioned on the following:

- 1) Respondent's completion of at least 12 hours of CLE in law office or IOLTA management during her period of suspension;
- 2) Respondent's completion of restitution to Floyd Evans and/or Grant Medical Center in the amount of \$9,333.49; and
- 3) Respondent's compliance with all treatment recommendations by OLAP and/or her therapist.

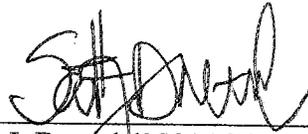
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<sup>10</sup> Relator has been in communication with the Columbus Bar Association, and it is in agreement with this proposed sanction.

## CONCLUSION

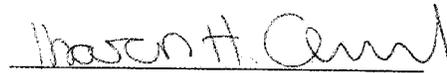
For the foregoing reasons, relator submits that there is clear and convincing evidence that respondent has engaged in ethical misconduct and requests that the panel find respondent in violation of the Rules of Professional Conduct charged in the complaint filed by Disciplinary Counsel with the exception of Prof. Cond. R. 8.4(h). Relator further requests that the panel recommend that respondent be suspended from the practice of law for at least two years and that her reinstatement be conditioned at a minimum on the factors listed above.

Respectfully submitted,



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Scott J. Drexel (0091467)  
Disciplinary Counsel, Co-Relator



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Karen H. Osmond (0082202)  
Assistant Disciplinary Counsel  
250 Civic Center Drive, Suite 325  
Columbus, Ohio 43215-7411  
614.461.0256 - phone  
614.461.7205 - fax  
Karen.osmond@sc.ohio.gov  
Counsel for Co-Relator, Disciplinary Counsel

**Certificate of Service**

I hereby certify that the foregoing "Co-Relator, Disciplinary Counsel's, Hearing Brief" was served via U.S. Mail, postage prepaid, this 15th day of April 2014 upon respondent's counsel, Alvin E. Mathews, at 115 W. Main St., 4<sup>th</sup> Floor, Columbus, Ohio 43215 and upon the Columbus Bar Association at 175 S. Third St., Suite 1100, Columbus, Ohio 43215.



Karen H. Osmond (0082202)  
Counsel for Co-Relator, Disciplinary Counsel