Supreme Court of Ohio Clerk of Court - Filed January 09, 2015 - Case No. 2014-1404

IN THE SUPREME COURT OF OHIO

In re:	:	
	:	**Case No. 2014-1404**
Disciplinary Counsel	:	
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Co-Relator,	:	
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Beverly J. Corner (0042725)	:	**CO-RELATOR'S OBJECTIONS TO THE FINAL AND SUPPLEMENTAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**
Respondent.	:	
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CO-RELATOR'S OBJECTIONS TO THE FINAL AND SUPPLMENTAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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IN THE SUPREME COURT OF OHIO

Disciplinary Counsel Co-Relator, **Beverly J. Corner (0042725)** Respondent.	: : : : : : : : : : : :	**Case No.: 2014-1404** **CO-RELATOR'S OBJECTIONS TO THE FINAL AND SUPPLEMENTAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

CO-RELATOR'S OBJECTIONS TO THE FINAL AND SUPPLEMENTAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

BACKGROUND AND PROCEDURAL HISTORY

On October 14, 2013, the Board of Commissioners on Grievances and Discipline (board) certified a three-count formal complaint against respondent that was filed by co-relator, Disciplinary Counsel (hereinafter referred to as "Disciplinary Counsel" or "relator"). On March 3, 2014, the board certified a second one-count formal complaint against respondent that was filed by the Columbus Bar Association. Both of these matters were consolidated and proceeded to a hearing on April 22, 2014.

Prior to the hearing, the parties entered into comprehensive stipulations in which respondent stipulated to many of the facts alleged in the complaints filed by Disciplinary Counsel and the Columbus Bar Association, as well as many of the violations alleged in the respective complaints. With respect to Disciplinary Counsel's complaint, respondent stipulated to violating the following professional conduct rules: 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 records of client funds in his/her possession); Prof. Cond. R. 1.15(a)(3) (requiring a lawyer to maintain records of the bank account in which the lawyer maintains client funds); Prof. Cond. R. 1.15(a)(5) (requiring a lawyer to perform a monthly reconciliation of his/her IOLTA); Prof. Cond. R. 1.5(e) (requiring a lawyer to obtain written consent from a client to share fees with a lawyer not in the same firm); 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 is entitled); and Prof. Cond. R. 8.4(c) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

With respect to the Columbus Bar Association's complaint, respondent stipulated to violating Prof. Cond. R. 1.1 (requiring a lawyer to provide competent representation); Prof. Cond. R. 1.3 (prohibiting a lawyer from failing to act with reasonable diligence in representing a client); Prof. Cond. R. 1.15(a)(c)(d) (requiring a lawyer to promptly return property to a client that the client is entitled to receive); and Prof. Cond. R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice).

In the stipulations, Disciplinary Counsel agreed to recommend dismissal of the Prof. Cond. R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law) violations in Counts Two and Three of its complaint in light of this Court's decision in *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998, 997 N.E.2d 500. For the same reason, the Columbus Bar Association agreed to recommend dismissal of the Prof. Cond. R. 8.4(h) violation charged in its complaint. The Columbus Bar Association also agreed to recommend dismissal of a Prof. Cond. R. 8.4(c) violation charged in its complaint.

Accordingly, the only issues in dispute at the hearing on April 22, 2014 were (a) certain facts pertaining to Count Three (Floyd Evans) of Disciplinary Counsel's complaint; (b) the Prof. Cond. R. 1.5(a) (prohibiting a lawyer from charging an illegal or clearly excessive fee) and Prof. Cond. R. 1.15(d) (requiring a lawyer to promptly deliver to a client or third person any funds or other property that the client or third person is entitled to receive) violations alleged in Count Three of Disciplinary Counsel's complaint; (c) the Prof. Cond. R. 1.5(a) and Prof. Cond. R. 3.3(a)(1) (prohibiting a lawyer from making a false statement of fact or law to a tribunal) violations alleged in the Columbus Bar Association's complaint; and (d) the appropriate sanction in the matter.

Following the hearing, on August 11, 2014, the hearing panel unanimously dismissed the Prof. Cond. R. 8.4(h) violation charged in Counts Two and Three of Disciplinary Counsel's complaint, as well as the Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(h) violation charged in the Columbus Bar Association's Complaint. As noted above, all of these violations had been recommended for dismissal in the Agreed Stipulations that were filed on April 18, 2014.

On August 12, 2014, the board issued its Findings of Fact, Conclusions of Law, and Recommendation (board report) and filed it with this Court. (Appendix A.) As to the violations in dispute, the board found that Disciplinary Counsel had proven, by clear and convincing evidence, violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d) with respect to Count Three (Floyd Evans) of its complaint, but that the Columbus Bar Association had not proven violations of Prof. Cond. R. 1.5(a) or Prof. Cond. R. 3.3(a)(1) with respect to its complaint. In light of its conclusions, the board recommended that respondent be suspended from the practice of law for two years, with one year stayed.

Despite its finding that Disciplinary Counsel had proven the alleged violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d), the board did not order respondent to make restitution. Because of this inherently inconsistent finding, relator filed a Motion for Remand on August 25, 2014 requesting that this matter be remanded to the board solely to consider restitution. By order filed September 15, 2014, this Court granted relator's motion so that the board could "address the issue of restitution."

On September 30, 2014, a conference call was held amongst the parties and the panel chair. During this call, the panel chair expressed confusion over the purpose of the remand and stated that it was his belief that the panel had only found violations of the Professional Conduct Rules stipulated to in the Agreed Stipulations, and nothing else. Counsel for relator informed the panel chair that the board report clearly stated that relator had proven violations of Prof. Cond. R. 1.5(a) and 1.15(d) and that the purpose of the remand was solely to address the issue of restitution. The panel chair then suggested that the parties file briefs in the matter. Relator's counsel inquired about whether the briefs should address restitution only or restitution and the validity of the Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d) violations. In response, the panel chair stated that he was not going to order briefs at the moment, that he was going to check into a few issues with the Secretary of the Board, and that he would then contact the parties within the next week or two regarding how this matter was to proceed.

On December 15, 2014, and without any further communication from the panel chair and without providing the parties with an opportunity to brief potential issues in the case, the board issued a Supplemental Panel Report (panel report) that dismissed the violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d), but affirmed the remainder of the August 12, 2014 board report. (Appendix B.) Relator, Disciplinary Counsel, now files objections to the dismissal of the

Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d) violations, as well as the recommendation of a two-year suspension with one year stayed.

STATEMENT OF FACTS

Disciplinary Counsel's complaint against respondent contained three counts. The first count pertained to respondent's mismanagement of her IOLTA. The second count pertained to respondent's misappropriation of several different clients' funds, and the third count was specific to one of respondent's clients, Floyd Evans. Respondent fully stipulated to the facts and violations contained in Counts One and Two (with the exception of those that relator agreed to dismiss); however, respondent only partially stipulated to the facts in Count Three, and did not stipulate to any violations.

The board adopted the parties' stipulations in its August 12, 2014 board report, and it reaffirmed its findings in the December 15, 2014 panel report. Other than their relevance to the appropriate sanction in this matter, relator has no objection to the board's findings in Counts One or Two. Relator's objections focus on the board's findings with respect to Count Three. Nonetheless, all three counts have been summarized below so that they may be considered when determining the appropriate sanction in this matter.

Count One – Failure to Keep IOLTA Records

On July 13, 2012 and again on July 17, 2012, respondent overdrew her IOLTA at PNC Bank. (Stipulations, ¶ 12.) As a result of these overdrafts, relator initiated an investigation of respondent's conduct and asked her to provide several documents regarding the transactions causing the overdrafts, as well as documents regarding her IOLTA in general, i.e. client ledgers, general ledgers, and proof that she had been completing a monthly reconciliation of her IOLTA.

Based on the information that respondent provided, it was clear that between January 2012 and May 2013, respondent failed to maintain records of client funds in her possession as required by Prof. Cond. R. 1.15 and that she failed to perform monthly reconciliations of her IOLTA. (Stipulations, ¶ 14; Stip. Ex. 66, Pg. 37.) 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. *Id.*

For instance, on June 6, 2012, respondent received a $100 check from Teri Driver, the administrator of the estate of Wanda Driver. (Stip. Ex. 66, Pgs. 79-84.) This check was for fees associated with the estate. Respondent immediately cashed the check from Driver rather than depositing it into her IOLTA; however, on June 7, 2012, respondent used funds from her IOLTA to write a $75 check to the probate court for fees associated with the *Driver* Estate. At her deposition on July 23, 2013, respondent was unable to account for the remaining $25 that she had received from Driver. *Id.*

Similarly, on December 11, 2012, respondent received $350 from Jason Connors for an expungement matter. (Stip. Ex. 66, Pgs. 96-100.) $50 of the $350 was for Connors' filing fee; however, respondent failed to deposit any portion of Connors' payment into her IOLTA. *Id* Nevertheless, on December 20, 2012, respondent used her IOLTA to write a $50 check to the Montgomery County Clerk of Courts for Connors' filing fee. *Id.*

As evidence that respondent was withdrawing funds/fees from her IOLTA on an as-needed basis rather than as earned, relator respectfully refers this Court to the allegations regarding Antonio Sledge, which are contained in Count Two of Disciplinary Counsel's complaint and which will be discussed further below. (Stipulations, ¶ 83-93.)

While respondent's conduct alone is troubling, it is even more troubling when one considers 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. (Stip. Ex. 12.) 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. (Stipulations, ¶ 8; *See* Stip. Ex. 9.)

During the prior investigation, relator spent several hours on the telephone with respondent reviewing, discussing, and correcting records that respondent submitted in response to relator's inquiries. (Stipulations, ¶ 7; Stip. Ex. 12.) In addition, relator sent several letters to respondent advising her of her Prof. Cond. R. 1.15 obligations and provided respondent with a copy of a book entitled "Lawyers' Trust Accounts," which explained in detail how to properly manage an IOLTA. (Stip. Exs. 4, 5, 6, & 10.) 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. (Stip. Ex. 66, Pg. 35.) This CLE program was taught by the former Disciplinary Counsel, Jonathan E. Coughlan, and a paralegal from the Office of Disciplinary Counsel. (Stipulations, ¶ 11.) After seven months of working with respondent, relator believed that respondent had learned how to properly manage her IOLTA or, at the very minimum, possessed the tools to do so; therefore, relator terminated its investigation. (Stip. Ex. 12.)

Shortly after the investigation was terminated, however, respondent returned to her "old ways," 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. (Stip. Ex. 66.) In sum, respondent knowingly ignored her professional obligations under Prof. Cond. R. 1.15.

Count Two – Misappropriation of Client Funds

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 attorney fees on the McCoys' net settlement rather than their gross settlement. (Stip. Ex. 15.)

In April 2010, the McCoys settled their personal injury matter for $12,000. (Stip. Ex. 17.) In turn, respondent received a $12,000 settlement check from the tortfeasor's insurance company, which she improperly deposited into her *business* account. (*See* Stipulations, ¶ 3; Stip. Exs. 17 & 19.) In May 2010, respondent incorrectly determined that the McCoys were due $4,796 from their settlement, which was $1,241.34 less than the McCoys were actually owed.[1] (Stipulations, ¶ 20; Stip. Ex. 18.) 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. *Id.*

Despite the fact that respondent had calculated that the McCoys were due $4,796, respondent did not disburse any settlement proceeds to the McCoys. Instead, respondent used the McCoys' settlement proceeds to pay personal/business expenses and/or obligations on behalf of other clients. (Stip. Ex. 67, Pg. 24.) By June 30, 2010 – a little over two months after respondent deposited the McCoys' settlement proceeds into her business account – the balance in respondent's business account was only $49.84. *Id.*

[1] Respondent stipulated that the McCoys should have received $6,037.34 from their settlement. (Stipulations, ¶ 20.)

Respondent did not begin disbursing the McCoys' settlement proceeds to them until January 2011 – more than eight months after receiving the settlement check. (Stip. Ex. 19.) Even then, respondent disbursed the McCoys' settlement proceeds – the $4,796 that she had previously calculated – in installments. (Stipulations, ¶ 27.) She was unable to disburse the entire settlement at one time because she had already spent the McCoys' settlement proceeds and did not have the funds to do so. *Id.*

Sometime between April 2011 and July 2011, it was determined that the McCoys were owed additional funds from their settlement. (Stipulations, ¶ 29.) On July 14, 2011, respondent entered into an agreement with the McCoys whereby she agreed to pay them an additional $899, which was the difference between what the agreement stated the McCoys were entitled to ($5,695) and what respondent had actually disbursed to the McCoys ($4,796). (Stip. Ex. 19.) She also agreed to pay the McCoys' 15% interest in the amount of $854.25 for a total of $1,753.25. *Id.* On July 14, 2011 – the day the agreement was entered into – respondent paid the McCoys $1,100 and agreed to pay the remaining $653.25 in $200 monthly installments starting September 15, 2011. *Id.* To the best of relator's knowledge, respondent has paid the McCoys in full.

<u>Shannon Smoot</u>

In March 2010, respondent agreed to represent Shannon Smoot in a personal injury matter for a 1/3 contingency fee. (Stipulations, ¶ 33; Stip. Ex. 20.) Thereafter, respondent retained Attorney Kristin J. Bryant to help her with Smoot's case, and she orally agreed to pay Bryant 1/3 of the fee that she received from the *Smoot* case. (Stipulations, ¶ 34.) Neither respondent, nor Bryant, obtained Smoot's written consent to share attorney fees under Prof. Cond. R. 1.5(e). (Stipulations, ¶ 35.)

In or around November 2010, respondent settled Smoot's personal injury matter for $3,250. (Stipulations, ¶ 36.) In turn, respondent received a check for $3,250 from the tortfeasor's insurance company, which she deposited into her IOLTA. *Id.* 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. *Id.*

On December 21, 2010, respondent issued a check to Smoot for $875.66, which was the amount that respondent had calculated, albeit incorrectly, that Smoot was owed from his settlement. (Stipulations, ¶ 39-42.) Respondent kept the remainder of Smoot's settlement to pay Attorney Bryant for her services, to pay Smoot's medical bills, and to cover her attorney fees. (Stipulations, ¶ 44.)

Despite having received funds to do so, respondent did not pay Smoot's OSU Physicians bill until April 27, 2011 – over four months later. (Stipulations, ¶ 45.) Similarly, respondent did not pay Smoot's OSU Hospital bill until June 27, 2012 – over eighteen months later. *Id.* 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.[2] (Stip. Exs. 27-28.) 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 her own personal or business expenses or to satisfy obligations on behalf of other clients. (Stipulations, ¶ 46.) By February 18, 2011 – two months after respondent had deposited Smoot's settlement 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. (Stipulations, ¶ 47.)

[2] 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. (Stip. Ex. 37.)

Donna Denney

At all times relevant to this portion of Count Two, respondent was representing Donna Denney in a personal injury matter for a 25% contingency fee. (Stipulations, ¶ 48.) 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. (Stipulations, ¶ 49.) These funds were for the sole purpose of paying or negotiating Denney's medical bills with EMPI, Inc. and NovaCare. (Stipulations, ¶ 50.)

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 immediately misappropriated the funds. (Stip. Ex. 32, Pgs. 2, 16, & 17.) As to the remaining $5,326.53, respondent deposited these funds into her IOLTA; however, she depleted them within four months of deposit and years before paying any medical bills on behalf of Denney. (Stip. Ex. 3; Pgs. 53, 79-82, & 123; Stipulations, ¶ 55.) 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. *Id.* 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. (Stip. Exs. 33-35; Stipulations, ¶ 53.)

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. (Stipulations, ¶ 57.) This check represented the proceeds of a property damage settlement that respondent had obtained for Rogan. *Id.* Rogan was entitled to $2,780.93 of the

$2,986.47. (Stipulations, ¶ 58.) The remaining $205.54 was owed to respondent for attorney fees and expenses. (Stip. Ex. 36.)

Shortly after depositing the $2,986.47 check into her IOLTA, respondent began misappropriating the funds in her IOLTA by withdrawing cash or writing checks, including a $1,600 check to herself on May 27, 2011. (Stipulations, ¶ 59; Stip. Ex. 3, Pgs. 108-122.) By May 31, 2011, the balance in respondent's IOLTA was only $1,776.34. *Id.* During June 2011, respondent continued to misappropriate Rogan's funds by withdrawing funds or writing checks, including a $700 check to herself on June 11, 2011. (Stipulations, ¶ 60; Stip. Ex. 3, Pgs. 123-128.) By June 13, 2011, the balance in respondent's IOLTA was only $164.24. *Id.*

On June 6, 2011, Rogan contacted respondent regarding her property damage claim. (Stipulations, ¶ 61.) On June 15, 2011, respondent wrote a letter to Rogan in which she falsely stated that since June 6, 2011, she had "been unable to write checks on the account due to the account being compromised." (Stipulations, ¶ 62; Stip. Ex. 37.) 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." *Id.* Near the end of her letter, respondent apologized for the "inconvenience regarding [her] bank institution." *Id.* As shown by respondent's use of her trust account in the months preceding her letter to Rogan, respondent's account had not been "compromised," 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 check to Rogan for $2,780.93 from her *business* account. (Stipulations, ¶ 63.)

Marvin Dennis

On May 13, 2011 (and while relator's prior investigation of respondent was ongoing), respondent deposited a check for $2,439.27 into her IOLTA. (Stipulations, ¶ 64.) This check represented the proceeds of a personal injury settlement that respondent had obtained on behalf of her client, Marvin Dennis. *Id.* Of the $2,439.27, Dennis was entitled to $1,519.27. (Stipulations, ¶ 65; Stip. Ex.40.) Due to purported health problems, Dennis was unable to sign the settlement disbursement sheet until February 2, 2012. (Stipulations, ¶ 66.)

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 settlement check 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. (Stipulations, ¶ 68.) 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. *Id.* Accordingly, respondent was unable to distribute Dennis's settlement proceeds to him at that time. (Stipulations, ¶ 67.) 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. (Stipulations, ¶ 69.)

Demetra Canon

Sometime during the late spring or early summer of 2011, respondent began providing legal services to Demetra Canon regarding a custody matter. (Stipulations, ¶ 70.) However, respondent did not begin charging Canon for her services until November 8, 2011, at which time she opened a file on Canon's legal matter. (Stipulations, ¶ 71; Stip. Ex. 41.)

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 agreeing in writing to provide legal services Canon at the rate of $85/hour. (Stipulations, ¶ 74; Stip. Ex. 42.) On the same day, Canon paid respondent a $750 retainer. Respondent immediately deposited Canon's entire $750 into her *business* account even though she had only earned $120.42 of Canon's retainer at the time. (Stipulations, ¶ 74; Stip. Ex. 43, Pgs. 2, 13, & 14.) 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. (Stipulations, ¶ 75.) As of February 1, 2012, respondent had only earned $269.15 of Canon's retainer. *Id.* By February 6, 2012, the balance in respondent's business account was a negative $10.95; however, respondent had still only earned $269.15 of Canon's funds. (Stip. Ex. 41; Stip. Ex. 43, Pg. 22)

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. (Stipulations, ¶ 77; Stip. Ex. 45.) 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.[3] (Stipulations, ¶ 78; Stip. Ex. 46.)

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 that date. (Stipulations, ¶ 80; Stip. Ex. 43, Pgs. 46, 58, & 59; Stip. Ex. 44.) After depositing the

[3] Respondent actually charged Powell $175 per hour. (Stip. Ex. 44.)

$750 into her operating account, respondent proceeded to use the $750 to pay various business and personal expenses. (Stipulations, ¶ 81; Stip. Ex. 43, Pgs. 45-48.) As of March 19, 2012, the balance in respondent's operating account was a negative $4.73. (Stipulations, ¶ 82; Stip. Ex. 43, Pg. 46.) As of this same date, respondent had still only performed $43.75 of services on behalf of Powell. (Stip. Ex. 44.)

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. (Stipulations, ¶ 85.) This check represented the proceeds of a $59,000 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. (Stip. Ex. 46.)

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. *Id.* 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. *Id.*

With regard to respondent's attorney fees, she did not withdraw them from her IOLTA 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 appears to be attorney fees related to the *Sledge* case. (Stipulations, ¶ 88.) She used the remainder of her earned fees to pay financial obligations on behalf of other clients, such as Marvin Dennis. (Stipulations, ¶ 88; Ex. 1 to Stip. Ex. 66, Pgs. 1-23 to 1-37.) By July 31, 2012, the balance in respondent's IOLTA was only $29.59. (Stipulations, ¶ 88; Ex. 1 to Stip. Ex. 66, Pg. 1-32.) Notably, in this period of time, respondent did not pay the three Healthport invoices for Sledge

or the $350 invoice from Dr. Latshaw.[4] Respondent did not pay two of the Healthport invoices until January 2013, and only after those invoices had been referred for collection. (Stipulations, ¶ 90-93; Stip. Exs. 48-52.) She did not pay the third Healthport invoice until July 2013, and again, only after the invoice had been referred for collection. *Id.* With respect to Dr. Latshaw, respondent did not pay his $350 invoice until February 27, 2013. *Id.*

Count Three – Floyd Evans

On July 2, 2010, Floyd Evans retained Attorney Michael Gertner to represent him in a personal injury matter for a 30% contingency fee. (Stipulations, ¶ 96; Stip. Ex. 53.) 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. (Stip. Exs. 94-95.) Accordingly, Evans was seeking recovery from both his employer and the tortfeasor. After Gertner had worked on Evans' case for approximately one year, Evans terminated Gertner's services. (Stipulations, ¶ 96; Stip. Ex. 54.) On June 2, 2011, Evans retained respondent to represent him in that matter for a 30% contingency fee. *Id.*

After being retained by Evans, respondent sent a letter to Gertner requesting a copy of Evans' file. (Stip. Ex. 55.) In addition, respondent advised Gertner that she intended to "compensate" him for "reasonable legal services rendered" on the case prior to her involvement. *Id.* Thereafter, Gertner informed respondent that he was claiming a lien of $11,133.49 for the services he had provided to Evans. (Stipulations, ¶ 97; Stip. Ex. 56.) Respondent disputed this amount and sent Gertner a letter in this regard. (*See* Stip. Ex. 57.) Despite his belief that his

[4] Respondent issued a check to Dr. Latshaw for $350 during this period of time; 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.

charging lien was appropriate, Gertner agreed to reduce his lien to $9,333.49, which respondent agreed to pay. (Hearing Transcript, Pg. 32; Stip. Ex. 56; *See* Stipulated Ex. 60.)

In total, Evans' personal injury matter settled for $145,000 – $65,000 from Evans' employer and $80,000 from the tortfeasor. (Stipulations, ¶ 99; Hearing Transcript, Pgs.32-33.) On December 26, 2012, respondent deposited a check for $65,000 into her IOLTA. (Stipulations, ¶ 100.) This check represented the portion of the settlement from Evans' employer. *Id.* On the same day, respondent distributed 70% of the settlement ($45,500) to Evans and his wife. (Stipulations, ¶ 101.) Respondent also wrote a check to herself for $19,000 in attorney fees; however, respondent's attorney fees were $19,500. (65,000 x 30%) *Id.* Respondent left the remaining $500 in her IOLTA thus commingling personal funds with client funds. *Id.*

On February 1, 2013, respondent deposited a check for $70,666.51 from Nationwide Insurance into her IOLTA. (Stipulations, ¶ 102.) This check represented the portion of the settlement from the tortfeasor's insurance company minus $9,333.49 that was paid directly to Gertner in satisfaction of his lien. *Id.*

After depositing the $70,666.51 into her IOLTA, respondent proceeded to write the following checks from her IOLTA:

a. $24,100 to herself – $24,000 in attorney fees and $100 in expenses;
b. $2,505 to Grandview Family Practice as payment for services rendered to Evans;
a. $6,701 to Clinic Medical Services for services rendered to Evans;
b. $4,585 to Roy M. Gottlieb, D.D.S. for services rendered to Evans;
c. $180 to Ortho Neuro for services rendered to Evans;
d. $20,884.95 to Grant Medical Center for services rendered to Evans; and
e. $14,215.56 to Evans.

(Hearing Transcript, Pgs. 33-35; Ex. 1 to Stip. Ex. 66, Pgs. 1-72, 1-79 to 1-84.) In total, respondent disbursed $73,171.51 from her IOLTA even though she had only received

$70,666.51 from Nationwide Insurance. The excess disbursement occurred because respondent failed to include the $2,505 payment to Grandview Family Practice on Evans' disbursement sheet. (Stipulations, ¶ 107; Stip. Ex. 63.) In order to rectify this shortage of funds, respondent stopped payment on the $20,884.95 check to Grant Medical Center, and issued a new check to Grant Medical Center in the amount of $18,379.95 – $2,505 less than what they were owed and what respondent had initially paid them. (Hearing Transcript, Pg. 35.) She then simultaneously wrote letters to Grant Medical Center and Evans -- the letter to Grant Medical Center stated that it would have to resolve the matter directly with Evans and the letter to Evans stated that he had to pay Grant Medical Center $2,505 out of the settlement proceeds he had already received. (Stip. Exs. 64-65.) Grant Medical Center has since written off the $2,505 that it was owed and accepted $18,379.95 as payment in full. (Hearing Transcript, Pg. 37.)

RELATOR'S OBJECTIONS

1. The board exceeded the scope of this Court's remand order when it recommended dismissal of the Prof. Cond. R. 1.15(d) and Prof. Cond. R. 1.5(a) violations in its December 15, 2014 supplemental panel report.

Gov. Bar R. V(6)(I) requires a hearing panel to file a certified report of its proceedings, including its findings of fact and recommendations, with the Secretary of the board. Under Gov. Bar R. V(6)(J), the certified report of the panel is then reviewed by the entire board, at which point, the board can refer the matter to the panel for further hearing or proceed on the certified report of the prior proceedings that occurred before the hearing panel. After a final review, the full board may dismiss a disciplinary complaint or find the respondent guilty of misconduct.

With respect to the instant matter, page 22 of the board's August 12, 2014 report states, "The panel finds that through stipulation *and testimony* Relator – Disciplinary Counsel…has established by clear and convincing evidence that Respondent violated the following

rules...ODC Complaint, Count Three: Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d)." (Emphasis added.) Presumably, this finding was contained in the panel's certified report, which was presented to the board on August 8, 2014. Board report at 22. On August 12, 2014, and after considering the certified report of the panel, including the panel's recommendation as to sanction, the full board "adopted the findings of fact, conclusions of law, and recommendation of the panel...." *Id.* The board then filed its final report with this Court, and on August 28, 2014, this Court issued an Order to Show Cause as to "why the recommendation of the board should not be confirmed by the court and the disciplinary order so entered." August 28, 2014 Order to Show Cause.

After reviewing the final report of the board, relator was satisfied with the board's findings regarding the applicable professional conduct rules in this matter, but was concerned by the fact that the board did not order respondent to pay restitution despite finding that she had charged a clearly excessive fee under Prof. Cond. R. 1.5(a). Given that the board report did not address restitution in any way, relator believed that the board's failure to address restitution was an inadvertent oversight. Accordingly, relator filed a Motion for Remand solely so that the board could address its position on restitution.

Relator believed that a Motion for Remand was the most efficient way to have its concerns addressed.[5] In its Motion for Remand, relator specifically stated that the board had "correctly concluded" that respondent violated Prof. Cond. R. 1.5(a), and that the sole purpose of

[5] As an alternative to filing a Motion for Remand, relator could have simply filed Objections to the board's August 12, 2014 report. Relator believed, however, that the filing of objections over a relatively straightforward issue, such as restitution, would be an inefficient use of time and resources.

the remand was for the board to address its position on restitution.[6] Relator further stated that depending on the board's position on restitution, objections may or may not be warranted. On September 15, 2014, this Court granted relator's motion and remanded this proceeding to the board "to address the issue of restitution."

On remand, however, the board overstepped its authority and dismissed the previously found violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d). The scope of the remand was specifically limited to "the issue of restitution." It was not an opportunity for the board to reconsider its previously made findings – let alone to reconsider its findings without giving the parties an opportunity to brief or otherwise formally address the issue.[7] Moreover, the board stated in its supplemental panel report that the reason for the dismissal was due to the "evidence presented to the hearing panel." The board failed to note, however, that the evidence presented to the panel had already been reviewed by the entire board and that the entire board had concluded that respondent had violated Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d).

This Court has previously held that "absent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *Nolan v. Nolan*, 11 Ohio St.3d 1, 462 N.E.2d 410, 11 O.B.R. 1 (1984). The *Nolan* decision has consistently been followed by

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[6] Relator also believed that the board had correctly concluded that respondent violated Prof. Cond. R. 1.15(d); however, since the purpose of the remand was to address restitution, relator's position concerning Prof. Cond. R. 1.15(d) was not specifically stated in the Motion for Remand.

[7] It is important to note that the board has never filed a motion to supplement or correct the record in this proceeding. Accordingly, had relator chosen to file objections to the board's August 12, 2014 report instead of a motion for remand, the board would have never had the opportunity to reconsider or change its previous findings.

Ohio courts since it was rendered in 1984. *State v. Letts*, 1999 WL 42011 (Ohio App. 2nd Dist., 1999).

In *Nolan*, a domestic relations case, the final divorce decree ordered the parties to share occupancy of the marital home. *Nolan*, 11 Ohio St.3d at 1. Both parties appealed this finding, along with several other items in the final divorce decree. On appeal, the appellate court overruled all assignments of error except for the issue regarding joint occupancy of the marital home. The appellate court noted that "there was little chance that the parties can get along if they are allowed to have joint occupancy of the home," and it remanded the case to the lower court for "further proceedings in accordance with the law." *Id.* at 2.

On remand, however, the lower court did not address the joint occupancy issue, but rather, it restructured the real estate settlement. On further appeal, the appellate court affirmed the decision of the lower court, including the restructured real estate settlement. On appeal to this Court, the appellant argued that a lower court is "bound to execute the mandate of a reviewing court without variation," and the appellee argued that it is sufficient for the lower court to "remain within the general intent of the remand." *Id.* at 3.

Upon consideration of both arguments, this Court determined that the doctrine of the "law of the case" provides that the decision of the reviewing court in a case remains the law of the case for all subsequent proceedings. *Id.* This Court further determined that "where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.... Moreover, the trial court is without authority to extend or vary the mandate given." *Id.* at 3-4. Finally, this Court stated that "to permit the trial court to so markedly deviate from the basis of the remand would defeat the aforementioned purposes of the

doctrine of law of the case, particularly that of consistency of result." *Id.* at 5. Ultimately, this Court reversed the findings of the appellate court and remanded the *Nolan* matter back to the trial court for further proceedings.

While not a disciplinary case, *Nolan* is instructive in this matter in that the board is operating as a lower/trial court and this Court is the reviewing court. Accordingly, the board had no authority "to extend or vary" the authority granted to it by this Court, which was limited solely to addressing the "issue of restitution." Accordingly, this Court should find the board's December 15, 2014 panel report void and proceed as if the board's August 12, 2014 report was the only report of the board. In the alternative, this Court should determine that the board's findings in the December 15, 2014 panel report are in error and that respondent violated Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d) for the reasons set forth below.

2. Respondent violated Prof. Cond. R. 1.5(a) when she failed to deduct Attorney Michael Gertner's fee from her own attorney fee.

Attorney Michael Gertner represented Floyd Evans in a personal injury matter from July 2010 to approximately June 2011. Respondent then represented Evans from June 2011 until the conclusion of the case in late 2012/early 2013. Both Gertner and respondent agreed to represent Evans for a 30% contingency fee.

Following his termination, Gertner contacted respondent and notified her that he was claiming a $11,133.49 lien on Evan's settlement proceeds as payment for legal services he had rendered prior to respondent's involvement in the case. (Stip. Ex. 56.) After some negotiation with respondent, Gertner agreed to accept $9,333.49 for his services, which respondent agreed to pay. (Stip. Ex. 57.) However, when it came time to disburse Evans' settlement, respondent took her full 30% contingency fee. She then deducted the $9,333.49 that had been paid directly to

Gertner from Evans' share of the settlement. As a result, Evans paid $52,833.49 in attorney fees or 36% of his settlement even though he had contracted with both respondent and Gertner to be represented for a 30% fee.[8] Relator recognizes that a 36% contingency fee in and of itself is not "clearly excessive;" however, in this case, it is clearly excessive in that it is nearly $10,000 more than what Evans contracted to pay.[9]

With respect to the board's conclusions in this matter, the December 15, 2014 panel report incorrectly states that "relator has conceded that it has no case law to support the proposition that Respondent's failure to deduct prior counsel's fees from her fee constituted an illegal or excessive fee." Panel report at 2. What relator actually stated during the telephone conference that was conducted after the remand was that there was no *disciplinary* case law that supported its position, but that there was civil case law that was directly on point. This same case law was also cited in relator's hearing brief that was filed before the hearing. Specifically, in *Goldauskas v. Elyria Foundry Company, Inc.*, 145 Ohio App.3d 490, 763 N.E.2d 645 (9th Dist., 2013), the 9th District Court of Appeals adopted the Indiana Supreme Court's position on

[8] The $52,833.49 is calculated as follows: Evans paid $19,500 in attorney fees from his first settlement installment of $65,000 and $33,333.49 from his second settlement installment of $80,000 – $24,000 to respondent and $9,333.49 to Gertner.

[9] The December 15, 2014 panel report states that "relator's position would have resulted in Evans paying fees totaling 23% of the settlement…." At no point has relator ever suggested that Evans should have paid less than 30% of his settlement in attorney fees. To the contrary, relator's position has consistently been that Evans should have paid 30% of his $145,000 settlement in attorney fees or $43,500. $9,333.49 of the $43,500 should have gone to Gertner in accordance with his negotiated settlement with respondent and the remaining $34,166.51 should have gone to respondent. Had this occurred, respondent would have received approximately 23% of Evans' total settlement, which relator respectfully submits is not unreasonable given that she only represented Evans for approximately six months longer than Gertner and especially since the case was "stagnated" during the period of respondent's representation of Evans. (Hearing Transcript, Pgs. 128-129.)

contingency fees that was laid out in *Galanis v. Lyons & Truitt*, 715 N.E.2d 858 (Ind., 1999). In *Galanis*, the Indiana Supreme Court held that:

> 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 pursuit of the matter as did Gertner in the instant matter. *Id.* at 861. The 9th District Court of Appeals also issued a decision in *In re J.F.*, 162 Ohio App.3d 716, 834 N.E.2d 876 (9th Dist., 2005) that stands for the proposition that one contingency fee should be split among two attorneys involved in a case, the division of which should be based on the factors contained in Prof. Cond. R. 1.5.

Moreover, relator has recently found an attorney discipline case from California that contains facts similar to the instant case. In *In the Matter of VanSickle*, 4 Cal. State Bar Ct. Rptr. 980 (2006), David VanSickle assumed the representation of Ivy Hei in a personal injury matter after Hei had previously been represented by Attorney John Nagel. *VanSickle*, 4 Cal. State Bar Ct. Rptr. at 984. Although VanSickle's fee agreement made no mention of Nagel's prior representation, VanSickle claimed that Hei had agreed to pay Nagel's attorney fees in addition to his own 35% contingency fee. *Id.* Hei testified to the contrary and stated that VanSickle never told her that she had to pay both VanSickle's <u>and</u> Nagel's fees. *Id.* When it came time to disburse Hei's personal injury settlement, VanSickle disbursed 35% of the settlement to himself and he deducted Nagel's fees out of Hei's portion of the settlement. *Id.* at 985-987. In total, Hei paid "far in excess of what she believed she had agreed to pay." *Id.* at 988.

Ultimately, the California State Bar Court Review Department (CSB) concluded that VanSickle charged an "unconscionable" fee, which is similar to Ohio's "clearly excessive fee" standard. The CSB's finding was based on the fact that VanSickle had not clearly advised Hei of her obligation to pay his 35% contingency fee in addition to Nagel's fee. The CSB's finding is also similar to the Indiana Supreme Court's findings in *Galanis*, in which the Indiana Supreme Court concluded 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.

Galanis, 715 N.E.2d 858 at 863.

Like VanSickle's fee agreement, respondent's fee agreement made no mention of Gertner's prior representation. Moreover, there is nothing in the record that suggests respondent unequivocally told Evans that he had to pay Gertner's fee in addition to her own fees. At the hearing, respondent merely testified that she told Evans that he had to pay Gertner's fee, but not necessarily in addition to respondent's fees. Finally, while the CSB had the testimony of Hei to rely on, this Court has even stronger evidence to rely on. Respondent admitted that at the conclusion of Evans' case, Evans wrote her two letters in which he was clearly upset and believed that he should have received more money from his settlement. (Hearing Transcript, Pgs. 141-142.)

As the attorney in the matter, respondent was in the best position to clearly identify Evans' obligations regarding attorney fees. Absent undeniable proof, such as a written fee agreement or other contract, Evans should only be required to pay one contingency fee – the amount to be determined by the highest ethical contingency to which he contractually agreed,

which in this case is 30%. That one fee should then be divided between respondent and Gertner pursuant to the factors contained in Prof. Cond. R. 1.5 or independent negotiations amongst themselves. From a policy standpoint, such principles encourage the free selection of attorneys. Otherwise, clients may be hesitant to retain counsel of their choosing if they are required to pay a full contingency fee to the final attorney involved in a case, as well as attorney fees to any or all other attorneys who may have been involved in the case. Moreover, such principles prevent "windfalls," as noted in *Galanis,* to attorneys who may become involved in a case after a significant amount of work has already been completed on the case.

For all the above reasons, this Court should find that respondent collected a clearly excessive fee in violation of Prof. Cond. R. 1.5(a) and order her to make restitution in the amount of $9,333.49.[10][11]

3. Respondent violated Prof. Cond. R. 1.15(d) when she failed to pay Grant Medical Center the $2,505 that it was owed.

The Prof. Cond. R. 1.15(d) violation is based on respondent's failure to promptly pay Grant Medical Center the $2,505 that it was owed. As noted above, on February 1, 2013, respondent deposited a check for $70,666.51 into her IOLTA. (Stipulations, ¶ 102.) After depositing this check, respondent proceeded to write the following checks from her IOLTA on behalf of Floyd Evans:

a. $24,100 to herself – $24,000 in attorney fees and $100 in expenses;
b. $2,505 to Grandview Family Practice for services rendered to Evans;
c. $6,701 to Clinic Medical Services for services rendered to Evans;

[10] In relator's hearing brief, relator recommended restitution in the amount of $9,333.49, but stated that $6,828.49 of the amount should go to Evans and $2,505 should go to Grant Medical Center. At the time, relator was not aware that Grant Medical Center had written off the $2,505 it was owed. Accordingly, the full $9,333.49 should be paid to Evans.

[11] If for some reason, Evans will not accept restitution, then the money should be paid to the Lawyers' Fund for Client Protection to avoid any unjust enrichment or benefit to respondent.

d. $4,585 to Roy M. Gottlieb, D.D.S. for services rendered to Evans;[12]
e. $180 to Ortho Neuro for services rendered to Evans;
f. $20,884.95 to Grant Medical Center for services rendered to Evans; and
g. $14,215.56 to Evans.

(Hearing Transcript, Pgs. 33-35.) When these disbursements are totaled, it is clear that respondent issued a total of $73,171.51 on behalf of Evans – $2,505 more than the settlement check that she deposited into her IOLTA. This occurred because respondent failed to list the payment to Grandview Family Practice (GFP) on Evans' disbursement sheet. Accordingly, when she totaled the numbers on her disbursement sheet, she distributed $2,505 more to Evans than she believed he was entitled to.

Upon realizing her error, respondent stopped payment on the $20,884.95 check to Grant Medical Center and reissued a check to them for $18,379.95 – $2,505 less than they were owed. (Hearing Transcript, Pg. 35.) She then simultaneously wrote letters to Grant Medical Center and Evans. The letter to Grant Medical Center stated that it would have to resolve the matter directly with Evans and the letter to Evans stated that he had to pay Grant Medical Center $2,505 out of the settlement proceeds he had already received. (Stip. Exs. 64 and 65.) Despite the fact that respondent had just received $24,000 in attorney fees from Evans' settlement and the fact that it was her miscalculation that caused the shortage of funds in her IOLTA, respondent decided to short Grant Medical Center $2,505 rather than cover the deficiency herself until she could obtain the "overpayment" from Evans. The mere fact that Grant Medical Center has since written off

[12] On April 21, 2012, Dr. Gottlieb contacted respondent regarding payment of his medical bill. (Stip. Ex. 62.) On April 22, 2012, respondent informed Dr. Gottlieb that no settlement had been reached and that he would receive payment when the matter "officially settles." *Id.* Despite informing Dr. Gottlieb of this, she failed to disburse payment to him upon receipt of the first $65,000 installment of Evans' settlement. Instead, she disbursed 70% to Evans and 30% to herself (with the exception of the $500 that she improperly kept in her IOLTA).

the $2,505 does not change the fact that respondent failed to promptly pay Grant Medical Center amounts that it was owed in accordance with Prof. Cond. R. 1.15(d).

At the disciplinary hearing, respondent testified that the $18,379.95 payment to Grant Medical Center was a negotiated settlement; however, respondent's own actions belie that possibility. Respondent's April 16, 2013 letter to Evans specifically stated that "the additional amount of $2,505 needs to be paid to Grant Medical Center" and that Evans should contact Cindy Thompson "about how to settle the balance owed to Grant Medical Center." (Stip. Ex. 64.) Respondent's April 16, 2013 letter to Cindy Thompson stated that she had made a "calculation mistake" that resulted in $2,505 going to Evans rather than Grant Medical Center. (Stip. Ex. 65.) There would have been no need for respondent to write the above-mentioned letters had the $18,379.95 payment been a negotiated settlement. Thus, respondent was not truthful in her testimony before the panel.

As to the board's finding with respect to the Prof. Cond. R. 1.15(d) violation, it is simply erroneous. It is clear that the panel/board did not understand the facts underlying the Prof. Cond. R. 1.15(d) allegation. In fact, it appears that the panel/board was under the impression that the Prof. Cond. R. 1.15(d) violation had something to do with Grandview Family Practice (GFP) and whether they received payment for their services. In fact, the board even stated in its December 15, 2014 panel report that "the question is whether Respondent had actual knowledge of Evans' debt to GFP and whether GFP's interest was a lien, judgment, or the subject of a written agreement between Respondent and Evans." Panel report at 2. Not only is that <u>not</u> the issue, there is no doubt that respondent knew of Evans's debt to GFP. She <u>paid</u> Evans' debt to GFP and testified to the payment at the disciplinary hearing on April 22, 2014.

> **Question:** You then sent another check to - - for $2,505 to Grandview Family Practice?

Answer: Correct.

(Hearing Transcript, Pg. 34.) GFP's only relevance to the Prof. Cond. R. 1.15(d) violation is the fact that it was not included on respondent's disbursement sheet, which resulted in a $2,505 "overpayment" to Evans, which in turn led respondent to pay Grant Medical Center $2,505 less than it was entitled to receive.

The board also erroneously concluded that there was no evidence that GFP or Grant had a lien or judgment and that there was no evidence that respondent and Evans contracted for payment of various services. Contrary to the board's findings, there is clear and convincing evidence that respondent agreed to pay Evans medical bills from his settlement proceeds. At the hearing, in response to questioning from Commissioner Sommer, respondent stated "Yes, sir, I do the guarantee – irrevocable guarantee letters for insurance or different things like – or for medicals and things like that that need to be paid." (Hearing Transcript, Pg. 162.) Moreover, respondent's April 16, 2013 letter to Cindy Thompson states that she was distributing Evans settlement "per the guarantees he signed, including but not limited to yours [Grant Medical Center]." Furthermore, the board overlooked the fact that respondent actually paid GFP and Grant Medical Center the amounts that they were owed. It was only when she discovered her calculation error that she decided to stop payment on the check that she had issued to Grant Medical Center. She then reissued a check to them for $2,505 less than they were owed.

Finally, the board recommended dismissal of the Prof. Cond. R. 1.15(d) violation since "Grant/GFP" has written off the $2,505 debt owed by Evans. Not only are Grant Medical Center and GFP <u>not</u> the same entity, GFP did not write off any debts owed to it. In fact, GFP was paid

what it was owed or what it agreed to accept for its services.[13] It was Grant Medical Center that wrote off a $2,505 debt; however, as noted above, it was not a negotiated settlement. The mere fact that Grant Medical Center wrote off an amount due does not change the fact that respondent violated Prof. Cond. R. 1.15(d) by failing to pay the funds to Grant Medical Center in the first place.

4. At the very minimum, respondent's conduct warrants a two-year suspension with no portion of the suspension stayed.

The panel recommended that respondent be suspended from the practice of law for two years with one year stayed. Board report at 24. This recommendation was adopted by the full board on August 8, 2014. *Id.* In support of its recommendation, the board cited *Disciplinary Counsel v. Talikka*, 135 Ohio St.3d 323, 2013-Ohio-1012, 986 N.E.2d 954 (2013) and *Disciplinary Counsel v. Folwell*, 129 Ohio St.3d 297, 2011-Ohio-3181, 951 N.E.2d 775, both of which are easily distinguishable.

With respect to the *Talikka* case, the board correctly stated that Leo Johnny Talikka engaged in a pattern of misconduct involving neglect of three different client matters, failure to inform two clients that their cases had been dismissed, and misappropriation of client funds. For his conduct, Talikka received a two-year suspension with one year stayed. Talikka, however, had practiced law for more than 40 years without incident. In this case, however, respondent was actively misappropriating client funds *while* she was being investigated by relator for mismanagement of her IOLTA. In fact, over the course of three years, respondent

[13] It is possible that the $2,505 payment to GFP was a negotiated settlement; however, after this figure was reached, GFP did not write off any portion of the $2,505.

misappropriated approximately $19,000 in client funds, albeit at different times; however, misappropriated $11,000 while under investigation by relator.

Moreover, relator respectfully submits that 4-3 decision in *Talikka* was a deviation from sanctions that this Court typically issues for similar conduct. In fact, the board believed that Talikka should be indefinitely suspended, and to this effect, Chief Justice O'Connor authored a 19-page dissent in support of the board's recommendation. It appears that the primary reason Talikka received a lesser sanction was because relator stipulated to a two-year suspension with one year stayed and joined Talikka in his objections to the board's recommendation of an indefinite suspension. Neither factor is present here.

With respect to the *Folwell* case, Norman L. Folwell also engaged in several instances of misconduct; however, only one of them involved the misappropriation of client funds. The remainder of Folwell's conduct revolved around his neglect of client cases or his failure to return unearned fees. Moreover, there is no indication that Folwell engaged in misconduct while being investigated by relator on similar matters. Finally, as it did in *Talikka*, relator stipulated to the sanction in *Folwell*.

In contrast to the above cases is *Disciplinary Counsel v. Leksan*, 136 Ohio St.3d 85, 2013-Ohio-2415, 990 N.E.2d 591 (2013), which relator cited in its closing argument. Thomas Leksan engaged in pattern of misconduct that was very similar to respondent's, i.e. misappropriation of client funds and failure to maintain an IOLTA in a manner consistent with Prof. Cond. R. 1.15. Although, the amount of money that Leksan misappropriated was much greater than the amount misappropriated by respondent, Leksan's mitigation was also much more persuasive. In fact, relator recommended a two-year suspension in the *Leksan* matter because of Leksan's mitigation; however, upon review of the evidence, the board and this Court

determined that an indefinite suspension was more appropriate. The only reason that relator did not recommend a similar sanction in this matter is because the amount of money that respondent misappropriated was much less than what Leksan misappropriated; however, relator recognizes that the presumptive sanction for misappropriation is disbarment and that "it is immaterial whether the amount at stake is large or small, to be paid to the client, or applied to pay a client's debt." *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110, 812 N.E.2d 1280.

There is a common theme amongst all of respondent's misconduct – respondent places her interests first! Take for instance, Count One. Between March 2011 and November 2011, respondent exchanged several letters and phone calls with relator regarding the proper management of her IOLTA, i.e. what funds belonged in her IOLTA, what funds did not, and how to keep track of the funds that were in her IOLTA. Despite the information provided by relator, which included a book entitled "Lawyers' Trust Accounts," and her attendance at a CLE taught by the former Disciplinary Counsel, respondent blatantly ignored her professional obligations under Prof. Cond. R. 1.15. Why? Because it "frustrated" her. (Stip. Ex. 66, Pgs. 37-38.) It is simply inconceivable that anyone who was serious about complying with the Rules of Professional Conduct would engage in such conduct.

With respect to Counts Two and Three, it is easy to see that respondent always received what she was owed. It is her clients or third parties that take the back seat while her personal obligations are satisfied. Even at the disciplinary hearing, respondent testified that she engaged in her conduct because she was "trying to run my business and take care of my family." (Hearing Transcript, Pg. 124.)

For instance, respondent used a portion of the McCoy settlement proceeds to pay her office rent (Stip. Ex. 17, Pg. 49); to pay for her personal tax preparation (Stip. Ex. 17, pg. 52); to

pay for office supplies (Stip. Ex. 17, Pg. 54); to pay for parking (Stip. Ex. 17, pg. 59); and to pay her assistant (Stip. Ex. 17, Pgs. 20 & 60). She also withdrew $1,300 in cash from her IOLTA presumably to pay personal or business expenses. (Stip. Ex. 17, Pg. 49).

Similarly, with regard to the *Smoot* matter, respondent deposited Smoot's settlement proceeds into her IOLTA on December 3, 2010. (Stip. Ex. 3, Pgs. 12 & 21.) Prior to this deposit, the balance in respondent's IOLTA was only $50.66 (Stip. Ex. 3, Pg. 12.) Despite the fact that respondent had only calculated her fees from the *Smoot* matter to be $1,173.34, within days of depositing the *Smoot* settlement proceeds into her IOLTA, respondent wrote herself four checks totaling $3,070 for "compensation" and "cash." (Stipulations, ¶ 40, Stip. Ex. 3, Pgs. 14, 15, 18, & 19.) Moreover, in the *Smoot* Matter, OSU Hospital had to wait over 18 months for payment, and even then, relator respectfully submits that it only received payment because it pursued a lawsuit against Smoot.

The two most telling instances of respondent placing herself before her clients are the *Rogan* matter in Count Two and the *Evans* matter in Count Three. With respect to the *Rogan* incident, within six weeks of depositing the $2,986.47 property damage settlement proceeds into her IOLTA, of which Rogan was entitled to $2,780.93, respondent had nearly depleted the funds in her IOLTA – most of which went to herself. (Stipulations, ¶ 59-60.) However, when Rogan contacted respondent regarding her property damage settlement, respondent falsely asserted that her bank was to blame. Specifically, she falsely informed Rogan that her bank account had been "compromised" and that the funds in her IOLTA would not be available for approximately two more weeks. (Stipulations, ¶ 62; Stip. Ex. 37.) Respondent's attempts to explain her conduct show her ability to acknowledge her wrongdoing. (Stip. Ex. 67, Pgs. 54-57.)

With respect to the *Evans* case, respondent distributed an additional $2,505 from Evans' settlement proceeds due to her failure to include her payment to one of Evans' medical providers on the disbursement sheet. Despite the fact that it was her error that had caused the shortage and the fact that she had just received $24,000 in attorney fees from the settlement, respondent decided to short a different medical provider $2,505. At no point did respondent ever consider paying the $2,505 from her own inflated share of the proceeds.

It is also important to note that while these objections focus on the allegations contained in Disciplinary Counsel's complaint, the Columbus Bar Association independently concluded that formal discipline was warranted against respondent for respondent's incompetent representation of a bankruptcy client and her failure to disgorge attorney fees pursuant to a court order for over two years.

Finally, relator wishes to briefly address the mitigating and aggravating factors in this matter. The parties have stipulated that respondent has not been previously disciplined and that she cooperated with relators' (Disciplinary Counsel and Columbus Bar Association) investigations. Both of these factors, however, have limited value in that respondent was committing misconduct while being investigated in a prior matter and that she is obligated to cooperate in investigations by Disciplinary Counsel or a Certified Grievance Committee. Gov. Bar R. V(4)(G) and Prof. Cond. R. 8.1(b). The board also gave respondent mitigating credit for her depression diagnosis despite finding that respondent did start therapy until July 2013 – well after relator's second investigation had started. Moreover, the board specifically noted that respondent's therapist was not a "particularly credible witness." Board report at 23.

In contrast, the aggravating factors in this matter are overwhelming. Not only has respondent stipulated to engaging in a pattern of misconduct and multiple offenses, relator

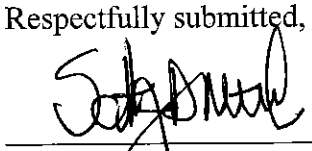
respectfully submits that respondent's actions are indicative of a selfish or dishonest motive. Moreover, while feigning ignorance of Prof. Cond. R. 1.15 and promising relator that she would perform her due diligence to learn and comply with her professional obligations in a prior investigation, respondent was actively engaged in misappropriating client funds. Certainly this provides aggravating evidence in accordance with BCGD Proc. Reg. 10(b)(1). Finally, respondent has failed to make restitution to Evans and to this day, insists that her conduct in that matter was appropriate. For all of the above reasons, respondent should be suspended from the practice of law for a minimum of two years with no portion of the suspension stayed.

CONCLUSION

Respondent engaged in an extensive pattern of misconduct, including but not limited to deceitful actions and misappropriation of client funds – part of which occurred during a prior investigation of respondent. In addition, respondent also charged a clearly excessive fee and failed to promptly deliver funds to several clients and third parties.

Respondent's conduct simply cannot be tolerated in a profession grounded on integrity and trust. Accordingly, for the protection of the public, respondent must be suspended from the practice of law for a minimum of two years with no portion of the suspension stayed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Co-Relator's Objections to the Final and Supplemental Report of the Board of Commissioners on Grievances and Discipline* was served via U.S. mail, postage prepaid, on this 9th day of January 2015, upon Richard A. Dove, Esq., Director of the Board of Professional Conduct, 65 South Front Street, 5th Floor, Columbus, Ohio 43215 and upon respondent's counsel, Alvin E. Mathews, at James E. Arnold & Associates, 115 W. Main St., 4th Floor, Columbus, Ohio 43215.

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

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Disciplinary Counsel
Supreme Court of Ohio

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

In re:	:	
Complaint against	:	**Case No. 2013-059**
Beverly J. Corner **Attorney Reg. No. 0042725**	:	**Findings of Fact,** **Conclusions of Law, and**
Respondent	:	**Recommendation of the** **Board of Commissioners on**
Disciplinary Counsel and **Columbus Bar Association**	:	**Grievances and Discipline of** **the Supreme Court of Ohio**
Co-Relators	:	

OVERVIEW

{¶1} This matter was heard on April 22, 2014, in Columbus before a panel consisting of Keith Sommer, Robert Gresham, and Lawrence A. Sutter, chair. Commissioner Gresham did not attend the hearing, but reviewed the transcript post hearing. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Respondent was present and represented by Alvin Matthews, Jr. Karen H. Osmond appeared on behalf of Disciplinary Counsel. Robert Morje appeared on behalf of Columbus Bar Association.

{¶3} This matter commenced as a three-count complaint filed by Relator-Disciplinary Counsel in November 2014. Approximately six weeks prior to the scheduled hearing, the Board received a new complaint filed by Relator-Columbus Bar Association that alleged additional rule violations arising from Respondent's representation of Tonya Packer. BCGD Case No. 2014-

APPENDIX
A

022. Upon motion of co-Relators and with the consent of Respondent, the Board chair consolidated the two cases for hearing under BCGD Case No. 2013-059.

{¶4} Based upon the parties' stipulations and other evidence at the hearing, the panel concludes that Relator has established multiple violations by clear and convincing evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to practice law in the state of Ohio on November 6, 1989 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

ODC Complaint, Count One—Failure to Keep Required IOLTA Records

{¶6} Prior to November 15, 2010, Respondent maintained client funds in a nontrust account at PNC Bank, account no. XXXXXX4488. Respondent was under the mistaken impression that this account was an IOLTA; however, Respondent did not treat this account as an IOLTA, *i.e.* she deposited earned fees into the account, paid personal and business expenses from the account, and commingled personal and client funds in the account.

{¶7} On November 15, 2010, Respondent opened an IOLTA at PNC Bank, account no. XXXXXX5822.

{¶8} On or about March 7, 2011, Respondent overdrew her IOLTA at PNC Bank.

{¶9} As a result of this overdraft, Relator-Disciplinary Counsel initiated an investigation of Respondent's IOLTA. During the investigation, it became clear that Respondent was not managing her IOLTA in a manner consistent with Prof. Cond. R. 1.15, *i.e.* she was depositing earned fees in her IOLTA, she was failing to maintain proper records of client funds in her possession, she was paying client expenses from the account without having first received

and/or deposited supporting funds from her clients, and she was withdrawing earned fees from the account on an "as needed" rather than "as earned" basis.

{¶10} Over the course of a seven-month investigation, which involved the exchange of several letters and phone calls with Respondent, Relator-Disciplinary Counsel advised Respondent of proper IOLTA management techniques, including but not limited to the following:

- Client Ledgers and General Ledgers, i.e. what information each ledger had to contain and how each ledger worked with each other;
- Respondent's obligation to perform a monthly reconciliation of her IOLTA;
- Respondent's obligation to withdraw attorney fees from her IOLTA as earned rather than as needed;
- Respondent's obligation to ensure that she has received *and* deposited supporting funds from a client into her IOLTA prior to paying any expenses on behalf of that client from her IOLTA; and
- Respondent's obligation to use her business/operating account to advance client expenses for which she has not received supporting funds.

{¶11} By the end of Relator-Disciplinary Counsel's investigation in November 2011, Respondent assured Relator-Disciplinary Counsel that she understood her Prof. Cond. R. 1.15 obligations and would maintain her IOLTA in a manner consistent with those obligations, including but not limited to, maintaining client and general ledgers, not advancing fees from her IOLTA, and not withdrawing fees before they were earned.

{¶12} In addition, Respondent assured Relator-Disciplinary Counsel that both she and her bookkeeper would be attending a continuing legal education (CLE) seminar at the Columbus Bar Association on November 30, 2011 regarding the "nuts and bolts" of IOLTA management.

{¶13} As a result of Respondent's assurances, i.e. that she knew how to properly manage her IOLTA and that she would be attending an IOLTA CLE, Relator-Disciplinary Counsel terminated its investigation of Respondent on November 29, 2011.

{¶14} On November 30, 2011, Respondent and her bookkeeper attended an IOLTA seminar at the Columbus Bar Association, which was taught in part by former Disciplinary Counsel Jonathan E. Coughlan and a paralegal from the Office of Disciplinary Counsel, Heath A. Rambo. The following topics were covered at the seminar:

- Trust account requirements;
- Funds belonging in a trust account;
- Reconciliation requirements and how to reconcile your account;
- Common errors and violations;
- Delegation of trust account responsibilities;
- How to set up client ledgers; and
- How to set up a general ledger.

{¶15} On July 13, 2012 and July 17, 2012, Respondent overdrew her IOLTA at PNC bank.

{¶16} As a result of these overdrafts, Relator-Disciplinary Counsel initiated a second investigation of Respondent's IOLTA. During the investigation, it was determined that despite the previous investigation and her attendance at an IOLTA CLE, Respondent was still mishandling client funds and still not managing her IOLTA in a manner consistent with Prof. Cond. R. 1.15.

{¶17} Specifically, between January 2012 and May 2013:

- Respondent failed to maintain client ledgers or a general ledger of client funds in her possession that were consistent with Prof. Cond. R. 1.15;
- Respondent withdrew funds from her IOLTA on an "as-needed" basis rather than on an "as-earned" basis oftentimes leaving earned fees in her IOLTA or causing a shortage of client funds in her IOLTA;
- Respondent used funds from her IOLTA to pay expenses on behalf of clients without first receiving funds from her clients and/or without first depositing funds that she had received from clients into her IOLTA; and
- Respondent failed to reconcile her IOLTA on a monthly basis.

{¶18} Respondent stipulates that her conduct in Count One of the complaint filed by Relator-Disciplinary Counsel violates the following:

- Prof. Cond. R. 1.15(a) [a lawyer shall keep client funds in an interest-bearing trust account separate from the lawyer's own property];
- Prof. Cond. R. 1.15(a)(2) [a lawyer shall 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) [a lawyer shall 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) [a lawyer shall perform a monthly reconciliation of the lawyer's IOLTA and related documents].

ODC Complaint, Count Two –Misappropriation of Client Funds

{¶19} Respondent has misappropriated funds belonging to clients or third parties on at least eight occasions as described below.

William and Allene McCoy

{¶20} On November 25, 2008, William and Allene McCoy retained Respondent to represent them in a personal injury matter.

{¶21} Respondent agreed to represent the McCoys on a 1/3 contingency fee basis; however, Respondent's fee was to be based on the McCoys' net settlement, *i.e.* gross settlement minus filing fees, medical bills, etc.

{¶22} On April 14, 2010, the McCoys agreed to settle their personal injury matter for $12,000.

{¶23} On or about April 27, 2010, Respondent deposited a $12,000 settlement check from Auto Owners Insurance, which represented the settlement proceeds for the McCoys, into her business account (XXXXXX4488).

{¶24} Pursuant to Respondent's fee agreement with the McCoys, the $12,000 should have been disbursed as follows:

Gross Settlement	$12,000
Expenses/Liens	- $2,944
Axis Chiropractic ($2,719)	
Filing Fees ($225)	
Net Settlement	$9,056
Minus (-) Attorney Fees (1/3)	$3,018.66
McCoy Disbursement	$6,037.34

{¶25} Respondent did not disburse the McCoy settlement pursuant to the above table.

{¶26} Instead, Respondent based her 1/3 contingency fee on the McCoy's gross settlement rather than the net settlement.

{¶27} Accordingly, in or about May 2010, Respondent determined that the McCoys were due $4,796 of the $12,000 settlement.

{¶28} Although Respondent had determined in May 2010 that the McCoys were due $4,796, she did not disburse any funds to the McCoys at that time.

{¶29} Instead, Respondent used the McCoys' settlement funds to pay personal or business expenses and/or to pay the obligations of other clients. By May 28, 2010, the balance in Respondent's business account was only $1,385.39. By June 30, 2010, the balance in Respondent's business account was only $49.84.

{¶30} As noted above, on November 15, 2010, Respondent opened an IOLTA at PNC Bank. By this time, Respondent had already misappropriated funds belonging to the McCoys. Accordingly, she did not transfer any funds belonging to the McCoys into her IOLTA.

{¶31} Respondent did not begin disbursing settlement funds to the McCoys until January 2011 because she did not have the necessary funds until that time. Even then,

Respondent disbursed the McCoys' settlement funds in parts because she did not have enough funds to distribute the entire settlement amount due to the McCoys at one time.

{¶32} Pursuant to her calculations, Respondent disbursed $4,796 to the McCoys as follows: $1,400 in January 2011, $1,300 in March 2011, and $2,096 in April 2011.

{¶33} Sometime after April 2011 and before July 14, 2011, it was determined that the McCoys were owed additional funds from their settlement.

{¶34} On July 14, 2011, Respondent entered into an agreement with the McCoys whereby she agreed to pay them a total of $5,695 from their settlement plus 15 percent interest in the amount of $854.25 for a total of $6,549.25.

{¶35} 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.

{¶36} To the best of Relator-Disciplinary Counsel's knowledge, Respondent has paid the McCoys in full.

Shannon Smoot

{¶37} On or about March 1, 2010, Shannon Smoot retained Respondent to represent him in a personal injury matter. Respondent agreed to represent Smoot on a 33 percent contingency fee basis.

{¶38} Respondent retained Attorney Kristin J. Bryant to assist her with Smoot's case. Respondent orally agreed to pay Bryant 1/3 of her fee in the *Smoot* case.

{¶39} Although Smoot was aware that both Respondent and Bryant were working on his case, Respondent did not obtain Smoot's written consent to share fees with Bryant pursuant to Prof. Cond. R. 1.5(e).

{¶40} In or about November 2010, Smoot agreed to settle his personal injury matter for $3,250. At the time, Smoot owed $1,231 to the Ohio State University Hospital and $294 to OSU Physicians for medical services performed in connection with his personal injury matter.

{¶41} On or about November 26, 2010, Progressive Insurance sent Respondent a check for $3,250, which represented the proceeds of Smoot's personal injury matter.

{¶42} Respondent deposited this check into her IOLTA on December 3, 2010.

{¶43} On Respondent's settlement disbursement sheet, Respondent incorrectly noted that Smoot's settlement was $3,520, not $3,250.

{¶44} Using this incorrect figure, Respondent calculated her attorney fees to be $1,173.34 and Bryant's share of her fees to be $391.11.

{¶45} On Respondent's disbursement sheet, Respondent also incorrectly noted that Smoot owed OSU Physicians $240 instead of the $294 that Smoot actually owed.

{¶46} Using the incorrect figures on her disbursement sheet, Respondent calculated Smoot's share of the settlement to be $875.66, which she disbursed to Smoot on or about December 21, 2010.

{¶47} On or about December 21, 2010, Respondent also disbursed $391.11 to Bryant for her services in the *Smoot* case.

{¶48} Respondent kept the remainder of Smoot's settlement for her attorney fees and to pay Smoot's Ohio State University Hospital and OSU Physicians medical bills.

{¶49} Despite having received funds to do so, Respondent did not pay Smoot's OSU Physicians bill until April 27, 2011. Respondent did not pay Smoot's OSU Hospital bill until on or about June 27, 2012, and only then after the Ohio Attorney General (on behalf of the Ohio State University) had filed a lawsuit against Smoot for nonpayment of his medical bill.

{¶50} Instead, Respondent used funds set aside for Smoot's medical bills to pay personal or business expenses and/or to satisfy obligations on behalf of other clients.

{¶51} Between December 3, 2010 and June 27, 2012, Respondent should have had at least $1,231 in trust at all times, but she did not. By December 31, 2010, less than one month after she had deposited Smoot's settlement proceeds into her IOLTA, the balance in Respondent's IOLTA was only $317.53. By January 21, 2011, the balance in Respondent's IOLTA was only $130.69, and by February 18, 2011, the balance in Respondent's IOLTA was only $14.

Donna Denney

{¶52} Respondent is currently representing Donna Denney in a personal injury matter for a 25 percent contingency fee.

{¶53} Between March 2011 and June 2011, Respondent received a total of $5,826.53 on behalf of Denney. Specifically, on or about March 16, 2011, Respondent received three checks from Geico Casualty Insurance Company totaling $5,326.53 and on or about July 18, 2011 she received an additional $500 check from Geico on behalf of Denney.

{¶54} The funds that Respondent received from Geico on behalf of Denney were for the purpose of paying or negotiating Denney's outstanding medical bills with EMPI, Inc. and NovaCare and should have been held in trust pending payment of Denney's medical bills.

{¶55} Respondent deposited the three checks totaling $5,326.53 into her IOLTA on March 16, 2011; however, she deposited the $500 check into her business account on July 18, 2011.

{¶56} Over the course of her representation, Respondent was able to successfully negotiate Denney's EMPI, Inc. invoice from $1,811.48 to $1,126.53. Similarly, she was able to

negotiate Denney's NovaCare invoice from $7,815 to $4,700. The negotiated total of these two bills was $5,826.53, which is the exact amount that Respondent received from Geico on behalf of Denney.

{¶57} Respondent did not pay EMPI, Inc. until on or about August 14, 2013 and she did not pay NovaCare until on or about September 13, 2013.

{¶58} Between the time that Respondent received funds from Geico on behalf of Denney (March and June 2011) and the time that she paid Denney's medical bills (August and September 2013), Respondent should had Denney's funds in trust, but she did not.

{¶59} With regard to the $5,326.53 that Respondent deposited into her IOLTA in March 2011, a majority of these funds had been expended by June 30, 2011 as a result of Respondent's withdrawal of funds from her IOLTA to pay personal or business expenses and/or Respondent's use of funds in her IOLTA to pay obligations on behalf of other clients, including, but not limited to, the second $1,300 installment payment to William and Allene McCoy. By March 31, 2011, the balance in Respondent's IOLTA was only $3,159.78. By April 29, 2011, the balance in Respondent's IOLTA was only $1,040.09 and by June 30, 2011 the balance in Respondent's IOLTA was only $94.24.

{¶60} With regard to the $500 that Respondent deposited into her business account on July 18, 2011, all of these funds had been used by July 29, 2011. Specifically, after depositing the $500 check from Geico into her business account, Respondent began using the funds in her business account to pay personal and business expenses. By July 29, 2011, the balance in Respondent's business account was a negative $650.66.

Meredith Rogan

{¶61} On May 11, 2011, Respondent 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.

{¶62} Of the $2,986.47, Rogan was entitled to $2,780.93.

{¶63} Shortly after depositing the $2,986.47 into her IOLTA, Respondent began withdrawing funds from her IOLTA, including a $2,200 withdrawal on May 13, 2011 and 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.

{¶64} During June 2011, Respondent continued to withdraw funds from her IOLTA, including but not limited to, a $700 withdrawal on June 1, 2011, a $200 check to herself on June 2, 2011, and a $700 check to herself on June 11, 2011. By June 13, 2011, the balance in Respondent's IOLTA was only $164.24.

{¶65} On or about June 6, 2011, Rogan contacted Respondent regarding her property damage claim.

{¶66} On June 15, 2011, Respondent wrote a letter to Rogan and informed her that she had received a check on behalf of Rogan on May 9, 2011 and she implied that the check had been deposited into her IOLTA. Respondent falsely stated, however, that since June 6, 2011 she had "been unable to write checks on the account due to the account being compromised." She further falsely stated that the bank had informed her that all funds will be available after June 30, 2011 and that a check will be issued to Rogan "once the bank matter has been reconciled." Near the end of her letter, Respondent apologized for the "inconvenience regarding [her] bank institution."

{¶67} On or about July 14, 2011, Respondent issued a $2,780.93 check to Rogan from her business operating account.

Marvin Dennis

{¶68} On May 13, 2011, 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.

{¶69} Of the $2,439.27, Dennis was entitled to $1,519.27.

{¶70} Due to purported health problems, Dennis did not sign the settlement distribution sheet until February 2, 2012.

{¶71} At the time that Dennis signed the settlement distribution sheet, Respondent was unable to provide Dennis with his share of the settlement proceeds because she had already misappropriated Dennis's funds.

{¶72} As of February 2, 2012, the balance in Respondent's IOLTA was only $14.24. Moreover, the balance in Respondent's IOLTA had been less than the $1,519.27 that she should have been holding in trust for Dennis since June 2, 2011, approximately three weeks after she deposited Dennis's settlement proceeds into her trust account.

{¶73} Respondent did not disburse Dennis's settlement proceeds to him until June 27, 2012. When she disbursed the settlement proceeds, Respondent did so using earned fees that she had left in her IOLTA from another client's personal injury settlement.

Demetra Canon

{¶74} Sometime during the late spring or summer 2011, Respondent began providing legal services to Demetra Canon regarding a custody matter.

{¶75} 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.

{¶76} On January 31, 2012, Respondent formalized her attorney/client relationship with Canon by entering into a fee agreement with Canon.

{¶77} Per the fee agreement, Canon was to pay a $750 retainer, which she paid that same day.

{¶78} On January 31, 2012, Respondent deposited the entire $750 from Canon into her business operating account even though she had only performed $120.42 worth of services on behalf of Canon at the time she received the $750 from Canon.

{¶79} On February 1, 2012, Respondent withdrew $820 from her business operating account, including the $750 from Canon, leaving only $91.62 in her operating account. Respondent did not transfer any portion of this withdrawal to her IOLTA.

{¶80} As of February 6, 2012, the balance in Respondent's operating account was a negative $10.95. As of this same date, Respondent had only performed $269.15 worth of services on behalf of Canon.

Alida Powell

{¶81} On or about March 2, 2012, Respondent began representing Alida Powell in a custody matter.

{¶82} Respondent required Powell to pay $750 up front, which according to Respondent's fee agreement was to be billed against at the rate of $200 per hour. Respondent actually charged Powell $175 per hour.

{¶83} On or about March 5, 2012, Karen Taylor paid Respondent $750 on behalf of Powell.

{¶84} Rather than holding the funds from Taylor in trust for Powell, on March 6, 2012 Respondent deposited the entire $750 check into her business operating account even though she had only performed $43.75 worth of services on behalf of Powell at the time she received the check from Taylor.

{¶85} After depositing the $750 into her operating account, Respondent proceeded to use Powell's funds for various business and personal expenses.

{¶86} 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.

Antonio Sledge

{¶87} Respondent represented Antonio Sledge in a personal injury matter.

{¶88} In or about June 2012, Sledge agreed to settle his personal injury matter for $59,000.

{¶89} On June 22, 2012, Respondent deposited a check for $57,511.15 into her IOLTA. This check represented the proceeds of Sledge's personal injury settlement minus $1,488.85 that had been paid directly to the Ohio Department of Job and Family Services.

{¶90} Per Respondent's distribution sheet, the $57,511.15 was to be disbursed as follows:

- $36,936.61 to Sledge;
- $19,666.67 to Respondent for attorney fees; and
- $907.87 to Respondent for expenses that Respondent had purportedly advanced on behalf of Sledge and/or agreed to pay on his behalf with settlement funds.

{¶91} On or about June 27, 2012, Respondent issued a check to Sledge for $36,936.61. She also began withdrawing earned attorney fees and expenses from her IOLTA; however, she

did not withdraw all her earned fees and expenses at one time, nor did she withdraw the exact amount of her earned fees and expenses.

{¶92} Between June 26, 2012 and July 31, 2012, Respondent withdrew $17,985 from her IOLTA for what appears to be attorney fees and expenses related to the *Sledge* case. She used the remainder of her earned fees and expenses to pay financial obligations on behalf of other clients. By July 31, 2012, the balance in Respondent's IOLTA was only $29.59.

{¶93} Among other things, the $907.87 that Respondent received to pay Sledge's expenses included three Healthport invoices for medical records for $28.89, $110.62, and $26.04.

{¶94} Although Respondent received funds to pay these invoices, she did not pay the Healthport invoices for $26.04 and $110.62 until January 2013 and only then after the invoices had been referred for collection. Respondent did not pay the invoice for $28.89 until July 2013 and only then after the invoice had been referred for collection.

{¶95} The $907.87 also included an invoice from Dr. James C. Latshaw for $350. On or about June 27, 2012, Respondent wrote a check from her IOLTA to Dr. Latshaw for $350; however, when Dr. Latshaw and/or his staff attempted to negotiate the check on July 17, 2012 the check was returned for insufficient funds.

{¶96} Between June 27, 2012 and July 17, 2012, Respondent should have had at least $350 in her trust account; however, due to her failure to keep appropriate records of funds in her IOLTA, Respondent did not have these funds in trust.

{¶97} Respondent did not pay Dr. Latshaw for his services until February 27, 2013.

{¶98} Respondent stipulates that her conduct in Count Two of the complaint filed by Relator-Disciplinary Counsel violates the following:

- Prof. Cond. R. 1.5(e) [a lawyer shall obtain written consent from a client to share fees with a lawyer not in the same firm];
- Prof. Cond. R. 1.15(d) [a lawyer shall promptly deliver to the client or third party any funds to which the client or third party are entitled to]; and
- Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation].

{¶99} Relator has agreed to recommend dismissal of Prof. Cond. R. 8.4(h).

ODC Complaint, Count Three—Floyd Evans Matter

{¶100} Floyd Evans was employed as a driving instructor by the Columbus Driving Academy.

{¶101} On July 1, 2010, Evans was teaching a student how to drive when another vehicle stuck his car killing the student and injuring Evans.

{¶102} On July 2, 2010, Evans retained Attorney Michael Gertner to represent him for a 30 percent contingency fee. After Gertner had worked on the case, Evans terminated Gertner's representation and retained Respondent to represent him also for a 30 percent contingency fee. Evans retained Respondent on June 2, 2011.

{¶103} After learning that Evans had retained Respondent, Gertner contacted Respondent and advised Respondent that he had a lien for $11,133.49 on Evans' settlement proceeds for services that he had previously provided to Evans.

{¶104} Respondent disputed Gertner's services, but ultimately agreed to pay him $9,333.49 for services rendered to Evans.

{¶105} In total, Evans' personal injury matter settled for $145,000 – $65,000 from Evans' employer and $80,000 from the tortfeasor.

{¶106} On December 26, 2011, Respondent deposited a check for $65,000 from Erie Insurance into her IOLTA. This check represented the portion of Evans' settlement from Evans' employer.

{¶107} On the same day, Respondent distributed $45,500 to Evans and his wife. Respondent also wrote a check to herself for $19,000 for her attorney fees; however, her fees should have been $19,500. Respondent left the remaining $500 of her earned fees in her IOLTA thus commingling personal funds and client funds.

{¶108} 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 his attorney fees.

{¶109} The $9,333.49 was paid directly to Gertner with the prior consent of Respondent.

{¶110} At the time that Respondent received the $70,666.51 settlement, Evans also owed the following to various medical providers:

- $20,884.95 to Grant Medical Center;
- $2,505 to Grandview Family Practice;
- $6,701 to Clinic Medical Services;
- $4,585 to Roy M. Gottlieb, D.D.S.; and
- $180 to Ortho Neuro.

{¶111} From the $70,666.51 settlement, Respondent received $24,000 in attorney fees and $100 in expenses. When disbursing the proceeds of the $70,666.51 to Evans, Respondent did not deduct the $9,333.49 that had been paid to Gertner from her 30 percent contingency fee. Instead, she took her full 30 percent fee and treated Gertner's attorney fees like any other expense and deducted it from Evans' share of the settlement proceeds.

{¶112} In total, Evans paid $52,833.49 of his $145,000 settlement in attorney fees to Respondent and Gertner.

{¶113} Respondent also paid Evans $14,215.56, which was $2,505 more than what she believed he was owed due to her failure to include the $2,505 payment to Grandview Family Practice on her settlement disbursement sheet.

{¶114} With respect to Count Three, the following violations are in dispute:

- Prof. Cond. R. 1.5(a) [prohibiting a lawyer from making an agreement for, charging, or collecting an illegal or clearly excessive fee]; and
- Prof. Cond. R. 1.15(d).

{¶115} Relator has agreed to recommend dismissal of Prof. Cond. R. 8.4(h).

Columbus Bar Association Complaint—Tonya Packer Matter

{¶116} On March 31, 2011, Respondent filed a Chapter 13 bankruptcy on behalf of her client, Tonya Packer, which was assigned to Bankruptcy Judge Charles Caldwell, case number 11-53436.

{¶117} On May 19, 2011, an objection to plan confirmation was filed by the Chapter 13 trustee, outlining numerous deficiencies in the case, including an incorrect social security number.

{¶118} On June 15, 2011, Respondent filed documents to correct the social security number.

{¶119} On June 16, 2011, the court entered the order directing service of notice of amended statement of social security number.

{¶120} On June 29, 2011, the court scheduled a hearing for July 12, 2011 to determine the status of the social security number correction.

{¶121} On June 30, 2011, the Chapter 13 trustee filed an amended objection, reflecting the unaddressed deficiencies in the bankruptcy.

{¶122} On July 12, 2011, the court denied confirmation of the Chapter 13 plan and dismissed the bankruptcy.

{¶123} On July 22, 2011, Respondent filed a motion for reconsideration regarding the court's July 12, 2011 dismissal.

{¶124} On July 25, 2011, Judge Caldwell denied Respondent's motion and ordered Respondent to disgorge all fees paid in the bankruptcy to Packer.

{¶125} On August 8, 2011, Respondent filed a second motion for reconsideration addressing the dismissal of the bankruptcy and the disgorgement of fees.

{¶126} The second motion for reconsideration was denied the same day it was filed.

{¶127} On August 17, 2011, Respondent filed a second Chapter 13 bankruptcy for Packer and was given case number 11-58528.

{¶128} On August 18, 2011, Respondent filed a motion to impose automatic stay, thus protecting Packer from her creditors.

{¶129} On September 9, 2011, the court held a hearing and extended the stay until September 21, 2011.

{¶130} The court further ordered Respondent to prepare and tender an order extending the stay to September 21, 2011.

{¶131} Respondent did not file an order extending the stay in the bankruptcy to the date directed by the court.

{¶132} When confronted, Respondent, among other things, advised Judge Caldwell that she "forgot."

{¶133} Due to Respondent's failure to follow the court's order, the stay expired, and in the opinion of the court, the bankruptcy was rendered "pointless."

{¶134} On October 17, 2011, a new attorney entered his appearance to represent Packer in her Chapter 13 bankruptcy proceedings. With the assistance of new counsel, Packer filed a third Chapter 13 bankruptcy and confirmed her plan in that case.

{¶135} On October 21, 2011, the court filed another order requiring Respondent to disgorge fees to Packer.

{¶136} Respondent proceeded to file numerous responses to the October 21, 2011 order. Because Respondent was no longer attorney of record for the matter, each was deemed erroneous by the court case administrator.

{¶137} On November 1, 2011, Respondent filed a first amended disclosure of compensation showing Respondent had received no prior payments from Packer.

{¶138} However, in an invoice dated January 28, 2011 three payments to Respondent from Packer are summarized showing $500 was paid on February 12, 2010, $625 was paid on January 4, 2011, and $675 was paid on January 28, 2011.

{¶139} On October 24, 2013, the court ordered a show cause hearing.

{¶140} In the aftermath of the hearing, the court issued two orders in the second Chapter 13 bankruptcy case.

{¶141} The first was a judgment order awarding disgorgement of fees to debtor pursuant to amended order to show cause, awarding $1,806.65 to Packer.

{¶142} In its order, the court found that Respondent "...failed to adequately represent debtor..." and "...Ms. Corner does not have sufficient skills to adequately represent debtors. Ms. Corner's defense of lack of formal notice of the October 24, 2011, disgorgement order is reprehensible..."

{¶143} In its second order, the court suspended Respondent's electronic filing privileges until "proof of payment of the judgment is filed . . .," and "...until further order of the Court."

{¶144} On November 15, 2013, Respondent filed a notice of appeal with respect to the November 1, 2013 order. That appeal was dismissed by the bankruptcy appellate panel.

IOLTA Issues

{¶145} On January 3, 2011, Respondent deposited a check from Packer for $625 into the "B J Corner LPA IOLTA Client Trust Fund."

{¶146} On January 4, 2011, the balance of the IOLTA was $612.34.

{¶147} Between January 19, 2011 and January 27, 2011, the IOLTA balance varied between $139.89 and $530.69. On January 31, 2011, Respondent deposited a check from Packer for $675 into the "B J Corner LPA IOLTA Client Trust Fund."

{¶148} On February 18, 2011, despite holding funds for Packer in her account, Respondent's IOLTA total fell to $14, and during the entire month of February, rarely rose above $570.

{¶149} Respondent failed to maintain Packer's retainer in her IOLTA.

{¶150} Respondent agrees that the amount ordered in the disgorgement decision is due and payable to Packer and agrees to pay the ordered amount to Packer.

{¶151} Although denied in her answer to the formal complaint, Respondent now stipulates that her conduct in the complaint filed by Relator-Columbus Bar Association violates the following:

- Prof. Cond. R. 1.1 [failing to provide competent representation];
- Prof. Cond. R. 1.3 [failing to act with reasonable diligence in representing a client];
- Prof. Cond. R. 1.15(a)(c)(d) [failing to promptly return property in the possession of the lawyer that the client is entitled to receive]; and

- Prof. Cond. R. 8.4(d)[conduct that is prejudicial to the administration of justice].

{¶152} Relator has agreed to recommend dismissal of Prof. Cond. R. 8.4(c) and Prof. Cond. R. 8.4(h).

{¶153} The panel finds that through stipulation and testimony Relator-Disciplinary Counsel and Relator-Columbus Bar Association has established by clear and convincing evidence that Respondent violated the following rules:

- **ODC Complaint, Count One:** Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), Prof. Cond. R. 1.15(a)(3), and Prof. Cond. R. 1.15(a)(5);
- **ODC Complaint Count Two:** Prof. Cond. R. 1.5(e), Prof. Cond. R. 1.15(d), and Prof. Cond. R. 8.4(c);
- **ODC Complaint, Count Three:** Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.15(d);
- **CBA Complaint:** Prof. Cond. R. 1.1, Prof. Cond. R. 1.3, Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(c), Prof. Cond. R. 1.15(d), and Prof. Cond. R. 8.4(d).

{¶154} Based on the stipulations of the parties and evidence presented at the hearing, the panel dismisses Prof. Cond. R. 1.5(a) [CBA Complaint], Prof. Cond. R. 3.3(a)(1) [CBA Complaint], Prof. Cond. R. 8.4(c) [CBA Complaint], and Prof. Cond. R. 8.4(h) [ODC Complaint, Counts Two and Three and CBA Complaint].

AGGRAVATION, MITIGATION, AND SANCTION

{¶155} Respondent hereby agrees and stipulates to the presence of the following aggravating factors as listed under BCGD Proc. Reg. 10(B)(1):

- Respondent engaged in a pattern of misconduct; and
- Respondent engaged in multiple offenses.

{¶156} Respondent hereby agrees and stipulates to the presence of the following mitigating factors listed under BCGD Proc. Reg. 10(B)(2):

- Respondent has not been previously disciplined; and
- Respondent cooperated with the investigations.

{¶157} Respondent offered the testimony of Jason Coale, a licensed Ohio clinical social worker. Coale testified that he began treating Respondent in July 2013 and at that time she was diagnosed with a depressive disorder. As his treatment continued, he discovered that Respondent's depression reached deep into her past and that her depression contributed to her ethical issues. Coale is not a medical doctor and did not prescribe any medication, only therapy sessions.

{¶158} Coale opined that if Respondent stays current with her professional treatment and has systems in place such as CLE's to keep her up-to-date with the legal profession she should be competent to practice law. The panel did not find Coale a particularly credible witness, but considered Respondent's condition as a mitigating factor under BCGD Proc. Reg. 10(B)(2)(g).

{¶159} In considering the factual situation as outlined in the stipulations and testimony, this matter is very similar to the *Disciplinary Counsel v. Talikka*, 135 Ohio St.3d 323, 2013-Ohio-1012. In *Talikka*, the attorney committed numerous violations of the rules including failing to act with reasonable diligence in representing clients in three separate cases; failing to inform two clients their cases were dismissed; failing to refund unearned portions of retainers of clients'; and he violated Prof. Cond. R. 1.4(a)(4) by failing to respond to reasonable requests for information from a client. Talikka also failed to put $10,000 belonging to a client into his client trust account; failed to maintain records of funds he should have been holding in his trust account for five separate clients; and failed to properly administer those funds. Additionally, he failed to have his clients sign closing statements in three different personal injury contingency fee matters and failed to promptly distribute all of the funds his clients were entitled to receive. Finally, the attorney's conduct in five of the client matters involved dishonesty, fraud, deceit, or misrepresentation. The sanction in *Talikka* was a two-year suspension, with one year stayed on

conditions, including payment of restitution along with statutory interest on the amounts owed and a one-year period of monitored probation.

{¶160} Similarly, in *Disciplinary Counsel v. Folwell*, 129 Ohio St.3d 297, 2011-Ohio-3181, the Court issued a two-year suspension, with second year stayed on the condition that the respondent submitted to a one-year period of monitored probation. Folwell had engaged in pattern of misconduct involving seven separate client matters, failed to provide competent representation, failed to act with reasonable diligence by settling case for minor client without probate court approval, failed to maintain separate ledgers for client trust account, failed to perform monthly reconciliations of trust account, and improperly used client funds.

{¶161} After consideration of all of the relevant facts, admissions and stipulations, as well as the aggravating and mitigating factors, the panel recommends that Respondent be suspended from the practice of law for two years, with one year stayed. Further, the panel recommends that reinstatement be conditioned on her continued treatment for depression with a certified health care professional under an OLAP contract, and that she be required to produce a letter from an OLAP or other medical professional indicating that she is competent to return to the practice of law.

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 August 8, 2014. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Beverly J. Corner, be suspended from the practice of law in Ohio for two years, with one year stayed on conditions contained in ¶161. 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

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

In re:	:	
Complaint against:	:	**Board Case No. 2013-059**
Beverly J. Corner	:	**SCO Case No. 2014-1404**
Respondent	:	
Disciplinary Counsel and Columbus Bar Association	:	
Co-Relators	:	

SUPPLEMENTAL PANEL REPORT AND RECOMMENDATION ON REMAND FROM THE SUPREME COURT OF OHIO

{¶1} This matter comes before the panel on remand from the Supreme Court of Ohio. *Disciplinary Counsel, et al. v. Corner*, 2014-Ohio-3959. The question presented to is whether Respondent is to make restitution to a former client, Floyd Evans, due to Respondent's charging of an excessive fee. In the original recommendations, the panel and Board found violations of Prof. Cond. R. 1.5(a) [excessive or illegal fee] and Prof. Cond. R. 1.15(d) [safekeeping of client and/or third party funds] relating to Count Three of the complaint (the Evans matter). That recommendation was made in error as these two violations should have been dismissed based on the evidence presented to the hearing panel.

{¶2} The Evans matter involved a client who had entered into a contingency fee agreement with prior counsel. Evans then retained Respondent on a separate agreement. When the disbursement of settlement funds occurred, Respondent took her contracted fee and then

APPENDIX B

deducted the prior attorney's lien from Evan's portion of the settlement. The allegation was that this scenario resulted in an excessive fee.

{¶3} Relator has conceded that it has no case law to support the proposition that Respondent's failure to deduct prior counsel's fees from her fee constituted an illegal or excessive fee. Relator's position would have resulted in Evans paying fees totaling approximately 23% of the total settlement, whereas Respondent's action resulted in the client paying legal fees totaling approximately 36.4%. Although this is more than the total fee for which the client contracted with prior counsel and Respondent, and may constitute a breach of the fee agreements, the question for the panel and Board is whether this constitutes an illegal or excessive fee and thus a violation of Prof. Cond. R. 1.5(a). There was no clear and convincing evidence submitted to justify such a finding. The Prof. Cond. R. 1.5(a) violation should be dismissed.

{¶4} With regard to the Prof. Cond. R. 1.15(d) violation, Respondent stipulated that she failed to account for $2,505 owed to Grandview Family Practice (GFP) in her disbursement. The question is then whether Respondent had actual knowledge of Evans' debt to GFP and whether GFP's interest was a lien, judgment, or the subject of a written agreement between Respondent and Evans. Evans did not testify at the hearing, and Grant/GFP has since written-off the $2,505 debt owed by Evans. There is no evidence in the record that either GFP or Grant had a lien or judgment for the amounts. Nor is there evidence that Respondent and Evans contracted for the payment of the various expenses. Therefore, there is not clear and convincing evidence of a Prof. Cond. R. 1.15(d) violation. This violation should also be dismissed.

{¶5} The panel recommends adoption of this supplemental panel report and the filing of the same with the Supreme Court.

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, 2014. The Board adopts the supplemental report and recommendation of the hearing panel to dismiss the alleged violations of Prof. Cond. R. 1.5(a) and 1.15(d) in the Evans matter for lack of clear and convincing evidence and reaffirms the balance of the recommendations set forth in the Board report filed with the Supreme Court on August 12, 2014.

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