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LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	**Case No. 2014-2155**
	:	
Relator,	:	
	:	**On Appeal from the Board of**
v.	:	**Commissioners on Grievances**
	:	**and Discipline of the**
Thomas John Simon,	:	**Ohio Supreme Court**
	:	
Respondent.	:	

RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Richard C. Alkire (0024816)
Dean Nieding (0003532)

Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Boulevard
Cleveland, Ohio 44131-2335
Telephone: 216-674-00550
Facsimile: 216-674-0104
rick@alkirelawyer.com
dean@alkirelawyer.com

Counsel for Respondent

Stacy Solochek-Beckman (0063306)
Assistant Disciplinary Counsel

Office of Disciplinary Counsel
250 Civic Center Drive
Suite 325
Columbus, Ohio 43215-7411
Telephone 614-461-0256
Facsimile: 614-461-7205
Stacy.beckman@sc.ohio.gov

Counsel for Relator

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

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250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

I. INTRODUCTION

Respondent, Thomas John Simon (hereinafter "Respondent" or "Mr. Simon"), hereby submits his objections to the Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio[1] (hereinafter "Opinion")(App. B) which recommends the imposition of a two-year suspension from the practice of law, with eighteen months stayed. The Panel[2], after hearing the testimony of the grievants, Danny Hubbard (hereinafter "Hubbard") and Louis Grippi (hereinafter "Grippi"); the Respondent both in Relator's case-in-chief and in Respondent's case-in-chief; Bradley Thomas Wight (Respondent's IT consultant) and nine character witnesses including, The Honorable Robert S. Wynn, The Honorable Albert S. Camplese, The Honorable Charles Graham Hague, Philip J. Varckette, Douglas Edward Warren, Sr., David Clemons, Thomas Patrick Clemons, Sr., Thomas P. Clemons, Jr., and Thomas Perry, and after receiving exhibits both admitted during the hearing and which had previously been stipulated to by the parties concerning the Professional Conduct Rule violations alleged (Hubbard: Prof. Cond. R. 1.4(a), 1.4(a)(3), 1.4(c)(App. C), 8.1(a)(App. D) and 8.4(d) (App. E); Grippi Prof. Cond. R. 1.3 (App. F), 1.4(a)(1)(App. C), 1.4(a)(3)(App. C) and 8.4(d)(App. E) and acknowledging certain aggravating and mitigating factors, recommended that Respondent be suspended from the practice of law for a period of two-years, with eighteen months stayed on the condition that Respondent commit no further misconduct. The Board of Commissioners on Grievances and

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[1] After this Report was issued, and as of January 2015, this board is now referred to as The Board of Professional Conduct.

[2] Hereinafter, "the Panel" refers to the three members of the Board who heard this matter on the merits on July 25 and August 20, 2014.

Discipline of the Supreme Court of Ohio (hereinafter "The Board") adopted the Findings of Fact and Conclusions of Law of the Panel in all respects.

Because the Panel failed to take into account all of the evidence in connection with the testimony of both Hubbard and Grippi and the testimony of the Respondent, it erroneously concluded that Respondent failed to keep his clients reasonably informed of decisions he made on their behalf, the factual dispute the Panel perceived was at the heart of the proceedings. (Opinion, para. 3) (App. B)

In the Hubbard matter, the Panel's decision concerning correspondence from Mr. Simon it found had not been fabricated by him is internally inconsistent with its conclusion that Respondent had not adequately communicated with his client, especially in light of the contradictory testimony offered by Hubbard in his deposition which occurred a week before his hearing testimony. Although acknowledging the "intense cross-examination" of Hubbard related to Respondent's letters (largely because Hubbard at the hearing deviated in numerous material respects from the testimony he gave one week before in deposition), the Panel nevertheless concluded that Relator met its burden of proof by clear and convincing evidence on the issue of communication which most certainly turned on both the correspondence and other contradictory and unclear testimony offered by Hubbard.

In the same vein, in the Grippi matter, the Panel ignored all of the legal research performed by Respondent in concluding that he neglected the Grippi case as well as failing to take into account Grippi's acknowledgment of communications during the course of the representation, about which Grippi also attempted to deviate from his prior deposition testimony.

As it relates to mitigation, the Panel failed to acknowledge as a mitigation factor that no harm or prejudice came to either of the grievants in connection with this matter. Additionally,

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

the Panel did not address one way or another, Respondent's cooperation in the disciplinary process and with Relator. The Panel also failed to properly acknowledge as a mitigation factor the lack of any dishonestly whatsoever on the part of Respondent, all of which if properly considered should have resulted in a fully stayed suspension at the very least, if not a public reprimand.

II. STATEMENT OF THE CASE

The instant discipline matter was commenced when Relator filed his Complaint on February 23, 2014. Prior to that time, as it relates to the Danny Hubbard representation which is the subject of Count I of the Complaint, the Ashtabula County Bar Association considered Hubbard's grievance and dismissed it[3]. (Tr. 47)

In the Complaint, as it relates to the Hubbard representation, Respondent was charged with violating Prof. Cond. R. 1.4(a)(1) [a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required]; Rule 1.4(a)(3) [a lawyer shall keep the client reasonably informed of the status of the matter]; Rule 1.4(c) [a lawyer shall inform the client if the lawyer does not maintain professional liability insurance] (App. C); Rule 8.1(a) [in connection with the disciplinary matter, a lawyer shall not knowingly make a false statement of material fact] (App. D); and Rule 8.4(d) [it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.] (App. E) The Panel unanimously dismissed the Prof. Cond. R. 8.1(a) and 8.4(d) alleged violations in its entry of December 15, 2014 subsequent to the formal hearing. (App. A) Importantly, three of the letters giving rise to the Prof. Cond. R. 8.1(a) allegation which was dismissed (Complaint, para. 16; App. A) were forms of communication which the Panel erroneously found Hubbard had

[3] Hereinafter references to the formal hearing which took place on July 25 and August 20, 2014 shall be cited as "Tr. ."

LAW OFFICE OF
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(216) 674-0550 • Fax: (216) 674-0104

never received even though the testimony presented by Hubbard himself was contradictory in that regard and certainly not clear and convincing.

As it relates to Count II of the original Complaint, the Grippi representation, Respondent was originally charged with violating Prof. Cond. R. 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client] (App. F); Rule 1.4(a)(1) [a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required] (App. C); Rule 1.4(a)(3) [a lawyer shall keep the client reasonably informed of the status of the matter] (App. C); Rule 8.4(c) [a lawyer shall not engage in conduct involving dishonestly, fraud, deceit, or misrepresentation] (App. E) and Rule 8.4(d) [it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.] (App. E) The Panel unanimously dismissed the Prof. Cond. R. 8.4(d) violation in its entry of December 15, 2014 as well. (App. A)

Respondent answered these allegations on March 17, 2014 admitting many of the factual allegations and denying that he had committed any professional misconduct.

On or about July 18, 2014, after Mr. Simon had been deposed by Relator on July 10, 2014, Relator withdrew the Prof. Cond. R. 8.4(c) alleged misconduct as it related to the inaccurate allegation made in Paragraph 30 of the Complaint concerning alleged dishonest representation. On July 24, 2014, Respondent filed his Answer to the Amended Complaint denying the allegations of misconduct, again admitting many of the factual allegations of the Amended Complaint and asserting, as an affirmative defense, that the aggravating factors existing in the case were far outweighed by mitigating factors including the mitigating factors of the absence of a selfish motive, full and free disclosure to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio and to Relator, a cooperative attitude

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

towards the proceedings, and good character and reputation. Respondent reserved the right to assert other defenses as they became known during the pendency of the Amended Complaint.

Ultimately, the Panel found that in connection with the representation of both Hubbard and Grippi, the Respondent had not committed conduct which was prejudicial to the administration of justice and in connection with Hubbard, had not made false statements in connection with this discipline matter, specifically involving falsifying the letters that were sent to Hubbard. (App. A)

It is also important to note, based upon the allegations of the Amended Complaint, that Respondent was not charged with neglecting Hubbard's case and as it relates to Mr. Grippi's case, the only dishonesty charge that was made was withdrawn by Relator when he filed the Amended Complaint.

III. STATEMENT OF THE FACTS

Respondent, Thomas J. Simon, is a life-time resident of Ashtabula, Ohio. He was born on October 2, 1950 and has been married since 1971. He has three children and seven grandchildren. (Tr. 232)

He went to grade school in Ashtabula and went on to graduate from Ashtabula High School. Thereafter, he was drafted into the Army and served two years overseas receiving an honorable discharge in 1971. He had the rank of Sergeant after having served eighteen months. (Tr. 233, Ex. 50) His rank on discharge was E5 with a security clearance as a Specialist. He was assigned to an aviation helicopter company. He started out serving in Fort Campbell, Kentucky, Fort Polk, Louisiana and then was assigned at various locations throughout Europe. (Tr. 234)

He graduated from Kent State University in 1977 with a Bachelors degree in general studies, with concentrations in political science and history. (Tr. 234-35)

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

He went on to graduate from Cleveland Marshall College of Law in 1981, passed the Bar that year in Ohio and passed the Bar in Florida in 1982. (Tr. 235) He became the Assistant City Solicitor in Ashtabula after graduating from law school until 1984 when he went into his own private practice and was employed as an Assistant County Prosecutor from 1984 to 1985. (Tr. 236)

He was elected Ashtabula City Solicitor in 1985 and he was continuously re-elected to that office through November 2007. As of November 2007, he was no longer City Solicitor whereupon he went back into private practice. (Tr. 236) From 2007 to the present he has continuously been in private practice.

He did run for City Solicitor in 2011 and was defeated. (Tr. 236) Since he resumed private practice in 2007, Respondent has principally concentrated on domestic relations and criminal defense. Although involved in employment law while City Solicitor, the only private clients he has represented in that regard are the grievants herein, Hubbard and Grippi. (Tr. 239)

A. <u>The Hubbard Representation</u>

Mr. Hubbard's grievance arose from his termination of employment with the Village of Jefferson as a truck driver operator in 2009. (Tr. 22-23) He confronted the driver of "his truck on a Saturday in Golden Dawn parking lot," when he saw that a younger employee was driving a truck to which he had been regularly assigned. (Tr. 23) The supervisor had informed the younger employee to drive the truck that day. A "heated conversation" took place, in Hubbard's words. (Tr. 23) Hubbard believed that he should have been called in to drive the truck that day for seniority reasons. (Tr. 23) He was called into the office on the following Monday and he was informed that disciplinary action would be sought because he was angry and made a scene in

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public. (Tr. 24) Both the City Council and Mayor terminated him from his employment on February 19, 2009. (Tr. 24)

At the formal hearing in the case at bar, Mr. Hubbard would have had the Panel believe that he first contacted Mr. Simon in February **2010** and indicated that he had a letter from Mr. Simon dated February 22, **2010**. (Tr. 24, 26) In fact, as is set forth in detail *supra,* the first contact he had with Mr. Simon was in July 2010 with a meeting in February **2011** and two letters being written by Mr. Simon to him in February **2011**, one dated February 14, 2011 and one dated February 22, 2011, transmitting a copy of the Complaint and receipt for the filing fee advanced by Mr. Simon. (Stipulated Exs. 16, 17)[4]

When Mr. Simon first met with Hubbard, Mr. Simon's immediate concern was that this was a Class 1 offense that should result in an immediate discharge if the offense as described by the Village was true. (Tr. 290) After Mr. Simon met with Hubbard in July, 2010 he did not agree to represent him but instead provided him a letter setting forth the required retainer and hourly rate. (Stipulated Ex. 15) It wasn't until February 2011, just before the expiration of the two year statute of limitations, that Mr. Hubbard met with Mr. Simon again, followed-up by Mr. Simon with a letter dated February 14, 2011 reminding Mr. Hubbard about the necessary retainer (Stipulated Ex. 16). Then, Mr. Simon filed the Complaint to protect the statute of limitations on February 22, 2011, even though the retainer was not provided, a copy of which was provided to Mr. Hubbard with Mr. Simon's cover letter of February 22, 2011 (Relator's Ex. A, Stipulated Ex. 17)

[4] Hereinafter, reference to stipulated exhibits will be cited as "Stipulated Ex. ", references to Relator's exhibits shall be cited as "Relator's Ex. ," and references to Respondent's exhibits shall be cited as "Respondent's Ex. ."

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
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As it relates to communication by Mr. Simon with Hubbard, the first documented communication between Respondent and Hubbard is a letter dated July 16, 2010. (Stipulated Ex. 15) This letter memorialized an in-person conference which took place in July, 2010. This letter also bears the image of a copy stamp which Mr. Simon regularly used on the copy of the correspondence he would retain in his file. (Tr. 291-92)

Hubbard denies receiving any correspondence and asserted at the hearing that he first contacted Tom Simon in February 2010 near the middle of the month. (Tr. 24) He brought to the hearing a letter from Mr. Simon dated February 22, **2011** (Relator's Ex. A) to substantiate this incorrect assertion. Later, on cross-examination, he admitted that the first meeting was probably on July 15, 2010 and that the second meeting was the one he testified to on direct examination, but in February **2011**. (Tr. 61) Indeed, Stipulated Ex. 16[5] is admittedly consistent with the occurrence of the second meeting. (Tr. 62)

It is significant to note in assessing whether clear and convincing evidence was presented by Relator, that none of the letters Hubbard ultimately admitted to receiving were brought by him to the deposition occurring a week before the formal hearing. (Tr. 70) He only found one of the three or four letters he received from Mr. Simon between the time of the deposition and the hearing and brought that one. (Tr. 70)

It is noteworthy that the letter Hubbard did find and bring to the formal hearing was a letter dated February 22, 2011 which enclosed a receipt showing that Mr. Simon advanced the filing fee and a copy of the Complaint. However, the original letter which was allegedly uncovered by Hubbard between the time of his deposition on July 18 and the time of the formal

[5] Another letter Hubbard denied ever receiving.

hearing on July 25 only had the receipt attachment with it (Tr. 63) while Hubbard claimed on direct that he did not receive a copy of the Complaint with that letter. (Tr. 31-32)

Again, on cross-examination Hubbard was forced to admit that the copy of the Complaint that was in the original files that he brought with him to his deposition a week before had Mr. Simon's copy stamp on it. (Tr. 63) This Complaint with the copy stamp on it was within the files which purportedly were the original files retrieved by Hubbard from a subsequent lawyer who had received the files from Mr. Simon. (Tr. 63-64)

The original files Hubbard brought with him to the deposition were marked Deposition Exhibits A-E inclusive and were admittedly not in the very same condition that they were when they were obtained from Mr. Talicka, the lawyer to whom Mr. Simon gave the original Hubbard file after the case had been dismissed. (Tr. 63-64) Many of those files were in the possession of another individual, Hubbard's friend, Mr. Downing, until they had been brought by Hubbard to his deposition. (Tr. 64) Some of the documents had water stains on them. (Tr. 64) When he brought those files to his deposition, they did not contain the February 22 letter marked Relator's Ex. A (Tr. 64-65) and produced by Hubbard at the formal hearing.

Notwithstanding Relator's inability to show that Hubbard maintained a complete copy of the files turned over to Mr. Talicka by Mr. Simon, documents that were within those files were used by Respondent during Hubbard's deposition to reconstruct the communications that occurred between him and Mr. Simon.

For instance, a memorandum from the Village Administrator, Mr. Finger, contained within Deposition Ex. A, had a fax mast dated July 15, 2010 at 10:13 a.m. with Mr. Simon's fax number on it. (Tr. 55-56) This is of course why Hubbard could not deny that he probably met with Mr. Simon on that day. (Tr. 61) Yet, he persisted in his denial that he ever received the

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

follow-up letter, Stipulated Ex. 15, which was consistent with Mr. Simon being faxed the very memo found within Hubbard's file and having a first conference with Mr. Simon at or about that time[6].

While on direct, Hubbard would have had the Panel believe that he received the hearing notice for a Pretrial Conference on July 18, 2011 directly from Judge Yost, (Tr. 35) it was clear that he received it from Mr. Simon in connection with Mr. Simon's letter of April 11, 2011. (Stipulated Ex. 18) First, Judge Yost notes on the bottom of the Order who the Clerk is to send it to. (Stipulated Ex. 4) Specifically, it went to the Joint Court Mediation Office, Thomas J. Simon, Esq., and Neil D. Schor, Esq., with no mention of Hubbard. (Stipulated Ex. 4) On the other hand, the July 21, 2011 Order of Judge Yost was sent directly by him to Hubbard along with Thomas J. Simon, Esq. and Neil D. Schor, Esq. (Stipulated Ex. 5, Bates No. 001595) Also see, Judgment Entry dated September 28, 2011, (Stipulated Ex. 7), only directed to Thomas J. Simon, Esq., Neil D. Schor, Esq. and Joint Court Mediation Project. Second, both Hubbard and his friend Mr. Downing appeared for the Pretrial, obviously aware of it have been scheduled. (Tr. 35)

Incredibly, when shown Stipulated Ex. 7 by Relator's counsel, that would contradict Hubbard's testimony about from whom he received the Order when compared to Stipulated Exs. 4 and 5, he volunteered that he didn't believe Mr. Simon showed up for that hearing either. (Tr.

[6] The only significant thing that occurred in connection with Mr. Hubbard between the time of his deposition and the time of his formal hearing testimony as it relates to his memory was that he had a telephone conference with Assistant Disciplinary Counsel Ms. Beckman the night before the hearing when he wrote dates on an envelope that included 7/15/10, 2/22/11, 3/10/11, 7/18/11, 7/30/11 and 11/17/11. (Tr. 60) Perhaps this horse-shedding the night before the hearing accounts for the wildly divergent testimony on direct which required the cross-examination based upon the previous deposition. Indeed, as a result of the tedious cross-examination requiring constant reference to the previous sworn testimony, The Panel admitted as evidence at the hearing the deposition transcripts of Hubbard and Grippi. Counsel for Relator specifically did not object to considering these depositions as evidence in the case. (Tr. 454)

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
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38) Tellingly, the face of the Order showed that Mr. Simon did appear at that hearing. (Stipulated Ex. 7) After forwarding the April 8, 2011 letter to Hubbard with the Hearing Notice (Stipulated Ex. 18) Mr. Simon sent Mr. Hubbard a letter dated November 23, 2011 (Stipulated Ex. 19) Not only does Hubbard deny receiving this letter, he denies, as the letter indicates, that the Civ. R. 41(A)(1)(a) Notice of Dismissal (App. G) was discussed prior to its having been filed.

Each of the letters which Hubbard denied receiving discussed the need for him to provide a $3,750.00 retainer. In the very first letter of July 16, 2010, the retainer was explained as well as Mr. Simon's hourly rate of $250.00. Mr. Simon clearly indicated that he would not accept this case on a contingency basis. Hubbard was reminded of this in the letters of February 14, 2011, April 11, 2011 (at which time Mr. Simon suggested that the Complaint might have to be dismissed without prejudice as it ultimately was) and November 23, 2011.

The only evidence about communications between Mr. Simon and Hubbard came from those two individuals. Hubbard's testimony was anything but clear and convincing in that regard, as distinct from Mr. Simon's.

In this connection, while asserting at the formal hearing that he only received one letter from Mr. Simon (Tr. 50) he did not even bring that one to the deposition the week before. (Tr. 51) Hubbard claims that he found that letter on his computer desk under other papers, other bills. (Tr. 51)

He then changed his testimony from his deposition at the formal hearing and asserted that he only got one letter from Mr. Simon and a bunch of letters from the Court system. (Tr. 51) However, he was forced to acknowledge that that was not his story the week before. (Tr. 51)

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In fact, when asked the question the week before "how many letters did you get from Mr. Simon", he responded "probably three or four." (Tr. 53, Hubbard deposition, p. 44, ll. 8-13)[7] Again, significantly, Hubbard was forced to acknowledge that "when [he] got letters from Mr. Simon . . . 'he put' them on the table." (Tr. 54) At no time during his deposition did he say he was talking about getting letters only from the Court. He knew the questioning involved letters from Mr. Simon. (Tr. 54) He also acknowledged that he had been directed by counsel for Relator prior to his deposition to bring all the files that he got back from Mr. Talicka to his deposition. (Tr. 54) Those files were marked with stickers during the deposition. (Tr. 55)

When questioned about the fax received by Mr. Simon from the Village Administrator, Mr. Finger, at or about the time of the first meeting between Hubbard and Simon, at the hearing Mr. Hubbard vacillated that this was a memo faxed to Mr. Simon's office at the time of the very first meeting. (Tr. 56) He acknowledged that he had responded at the deposition that this fax had probably been received at or about the time of the first meeting he had with Mr. Simon. (Tr. 56) Had it not been for that fax, the series of admissions (Tr. 57) would probably not have occurred which included Mr. Hubbard's acknowledgment that the correspondence marked Stipulated Ex. 15 was consistent with the first meeting between him and Mr. Simon having occurred at or about the time of the July 15, 2010 faxed memo.

The letter marked Relator's Exhibit A, which Mr. Hubbard allegedly found after the deposition on July 18, 2014 and before the hearing on July 25, 2014, he brought in an envelope which had notes on the back of it. It was this envelope where he wrote down dates that he

[7] Both of the depositions of the grievants, Danny Hubbard and Louis Grippi, were accepted as evidence in the hearing. References to Hubbard's deposition shall be cited as "Depo of Hubbard, p. ___ ll. ___," while references to the deposition of Louis Grippi shall be cited as "Grippi Depo, p. ___, ll. ___."

discussed with counsel for Relator on the phone the night before the formal hearing. (Tr. 58-60, see fn 6, *supra*)

Even after admitting that the first meeting with Mr. Simon was probably in July 2010, Mr. Hubbard again attempted to assert that the first meeting he had with Mr. Simon was within the first two weeks of February 2011. (Tr. 60-61) Ultimately he said that the first meeting was probably in July, 2010. (Tr. 61)

Again, while discussing the attachments referenced in newly discovered Relator's Ex. A, Hubbard again attempted to deviate from the facts by claiming that he didn't receive the complaint with that letter although the letter clearly indicates the Complaint had been provided. (Tr. 63)

True to form at the hearing, again Hubbard refused to acknowledge he received the April 2011 Court Order with Mr. Simon's letter of April 11, 2011. (Stipulated Ex. 18) Ultimately, confronted with his deposition testimony, he had to admit that he knew about the hearing referenced in that Order because he got the Order with a letter he had been sent by Mr. Simon. (Tr. 67-68) Not to mention, the face of the Order itself indicated that it had been sent to Mr. Simon, not Mr. Hubbard, unlike at least one other Order the Court had sent. (Stipulated Ex. 5)

Moving onto the circumstances surrounding the November 23, 2011 letter (Stipulated Ex. 19), while denying he received that letter at the formal hearing, in his deposition he clearly indicated it "could have been. . . one of the letters [Simon] he sent you that you remember getting three or four of them, true?" to which question he answered "True." (Tr. 69, Depo of Hubbard p. 100, ll. 8-25)

Indeed, he ultimately admitted the Dismissal Entry was with the letter. (Tr. 69, Depo of Hubbard, p. 101, l. 3)

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

Significantly, none of the three or four letters he admitted to getting from Mr. Simon and putting on the table at his residence of 66 West Ashtabula St. after he got them were among the documents he brought to the deposition. (Tr. 69-70, Depo of Hubbard, p. 61, ll. 13-15) He admitted finding one of those letters since the deposition but not finding the others. (Tr. 70)

The most reasonable explanation for Hubbard's inability to find any of the letters is that each of them involved reminding Hubbard that he would have to pay a retainer and be billed hourly for representation. However, he had no money to pay Mr. Simon in 2010 (Tr. 70) nor did he have any money in 2011 to pay him. (Tr. 70) He wanted someone to represent him with a requirement of no retainer and on a contingency basis. (Tr. 70-71)

Besides the various letters documenting communication, Hubbard did admit to meeting with Mr. Simon not only in July 2010 and in the first two weeks of February, 2011, but also after Mr. Simon had inadvertently missed the Pretrial set for July 18, 2011. (Tr. 36) He met a final time with Mr. Simon after the case was dismissed. (Tr. 40-41)

Each and every time Hubbard met with Mr. Simon he was accompanied by his friend Mr. Downing. (Tr. 27) Yet, this friend was not called to testify at the hearing in order to corroborate or clarify anything.

It was during the meeting in July, 2011, after Mr. Simon had inadvertently missed the Pretrial having been in Judge Yost's courtroom earlier that day (Tr. 302) that Mr. Simon mentioned that a Show Cause hearing was set, which is indicated in the Order directly sent by the Court to Hubbard. (Stipulated Ex. 5) Mr. Simon discussed this with Hubbard thereafter and indicated that he would take care of it, which he did. (Tr. 72) Hubbard never had to pay any money as a penalty for Mr. Simon's inadvertent missing of the July Pretrial. (Tr. 73) Indeed,

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

Mr. Hubbard acknowledged that Mr. Simon may have told him that Mr. Simon had been in the Court earlier that day when he missed the hearing. (Tr. 73)

The bottom line is that Hubbard brought this grievance because he wanted cash (Tr. 74) and he ultimately admitted that he did not pay a lot of attention to from whom the items of correspondence came, whether from the Court or Mr. Simon. (Tr. 76) In fact, in October and November 2011 he acknowledged he was having trouble receiving mail at the address to which the letters were addressed, 66 West Ashtabula Street. (Tr. 77)

During Mr. Simon's testimony he thoroughly and clearly explained all of his communication with Hubbard. (Tr. 287-311) This communication unequivocally involved a discussion with Mr. Hubbard about dismissing the action since the Affidavit filed by the Defendant in connection with its Motion for Summary Judgment could not be contradicted by Mr. Hubbard. (Tr. 307) Mr. Simon explained that the matter would be dismissed with prejudice by the Court unless evidence was obtained to oppose the sworn testimony and Affidavit or voluntarily without prejudice under Rule 41. (App. G) Hubbard accepted the recommendation of Mr. Simon to dismiss the matter under Rule 41. (Tr. 308) As a result, the voluntary dismissal was filed and the Entry was transmitted to Mr. Hubbard with the November 23, 2011 cover letter of Mr. Simon reiterating the discussion which transpired prior to the Dismissal Entry having been filed on November 17, 2011. (Stipulated Ex. 19)

When the Ashtabula County Bar Association investigated Hubbard's complaint, they likewise notified him before the expiration of the one year time limit within which to refile the matter, that he had the right to do so. (Tr. 71) In Mr. Simon's initial response to the Letter of Inquiry of the Ashtabula Bar Association, Mr. Simon explained the Hubbard matter in great detail without forwarding any portion of the file. (Stipulated Ex. 13) Thereafter, upon further

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

inquiry by the Bar Association and in particular Virginia K. Miller, Mr. Simon provided her the four letters with attachments that Relator alleged were fabricated by him. (Stipulated Ex. 14, Tr. 312-13)

B. The Grippi Representation

The Grippi representation actually began when Grippi first began coming to Mr. Simon's office in late 2009 on a weekly or bi-weekly basis. (Tr. 241) This occurred during the preliminary administrative process involved in Grippi's grievance against his employer, The City of Ashtabula, being handled by his Union. The grievance concerned Grippi's termination from his employment. Ultimately, the Administrative procedure ended and he was no longer being represented by the Union. (Tr. 242) At that point, Mr. Grippi asked Mr. Simon to formally represent him, which was in 2010.

In April 2010, Mr. Simon sent a letter to the American Federation of State, County and Municipal Employees expressing his concern that the Union should reconsider its position regarding continuing with Grippi's case. (Tr. 242-43) The Union declined to proceed to Arbitration on Grippi's behalf. (Tr. 243)

Because Grippi was unemployed at the time and on unemployment compensation with no other income, Mr. Simon did not seek compensation to represent Grippi. Grippi had been a friend of his for thirty years. (Tr. 243-44)

Accordingly, Mr. Simon assisted Grippi with the administrative process associated with the State Employees Relations Board ("SERB") without charge. (Tr. 243-44) Grippi did offer to reimburse Mr. Simon for any costs. (Tr. 244)

On November 5, 2010, Mr. Simon filed a civil complaint arising from Grippi's discharge and after the SERB appeal was dismissed. (Tr. 244)

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

Between April 28, 2010 and November 15, 2010 Mr. Simon had significant interaction with the State Employees Relations Board. It conducted its investigation based on the concerns of Grippi and Mr. Simon. A concern was whether Grippi had been treated arbitrarily and was discriminated against or was treated with bad faith. A mistake would not be sufficient in order to prevail in an unfair labor practice charge. (Tr. 245) (Stipulated Ex. 21, cover letter to SERB with the unfair labor practice charge)

Contrary to Grippi's assertion that Mr. Simon did nothing on his behalf, Mr. Simon did significant legal research beginning in 2010. Relator's Exhibit B is comprised of various case law, treatises and court rules excerpts. The research involved not only the issues before SERB but also an anticipated action to be filed in Court. (Respondent's Ex. B) Legal research took place in May and June of 2010 as evidenced by the research recounted in Respondent's Exs. C and D. Research was also conducted in August 2010 in advance of filing the Complaint. (Respondent's Ex. E) (Tr. 247-52)

While this research was being conducted, Grippi was in Mr. Simon's office on a weekly or bi-weekly basis. Grippi often brought M&Ms with him when he visited Mr. Simon in his office. (Tr. 249) This practice was verified by Mr. Grippi. (Tr. 129)

Reluctantly, at the hearing, Grippi acknowledged that he might have seen Mr. Simon a handful of times (in his office or on the phone) before the case was dismissed in 2011. He brought M&Ms to Mr. Simon's office a handful of times. (Tr. 129) He did acknowledge that when he came to Mr. Simon's office, Grippi would learn about his case, what Mr. Simon was going to do and what was going to be done in connection with the matter. (Tr. 132) Mr. Grippi limited the number of times he saw Mr. Simon to five or six, he wasn't sure. (Tr. 132)

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Richard C. Alkire Co., L.P.A.
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(216) 674-0550 • Fax: (216) 674-0104

After the SERB matter was dismissed, the Common Pleas action was filed on November 15, 2010. (Tr. 252) Mr. Simon constantly advised Grippi that he didn't think it was a good idea to be in State Court and that this was more a matter to be brought in Federal Court, a forum in which Mr. Simon did not practice. (Tr. 253) Between the time the complaint was filed in November 2010 and an Order issued by Judge Mackey on February 9, 2011 (Stipulated Ex. 25) the two defendants, The City of Ashtabula and the Union Local 1197, had filed respectively a Motion to Dismiss and a Motion for Judgment on the Pleadings. Mr. Simon advised Grippi of this and talked about it with him. (Tr. 254-55) Mr. Simon indicated that there probably wasn't a good defense to these motions. Grippi on the other hand wanted Mr. Simon to take depositions. (Tr. 255)

Mr. Simon indicated that it was not time to take depositions because the motions were more of a procedural or jurisdictional matter. (Tr. 255) It was during this time period that Mr. Simon explained to Grippi that he ought to dismiss the case under Rule 41, get a lawyer specializing in Federal litigation and have a second set of eyes look at the matter. It was Mr. Simon's impression that Grippi was not in a financial position to do that. (Tr. 256) Essentially, Mr. Simon did nothing to advance the cause thereafter other than take leaves to respond. (Stipulated Exs. 25, 26, 27 and 28) Mr. Simon was concerned that if the matter was not dismissed under Rule 41, without prejudice, when the Court ruled on the pending motions it might end the matter adversely to him. Mr. Simon incorrectly felt that if the Judge dismissed the matter on his own that would be without prejudice and not inure to the prejudice of Mr. Grippi. (Tr. 259) In fact, Mr. Simon did some research on the issue of the Judge's dismissal without a response forthcoming from the party opposing the motions. (Tr. 259) Mr. Simon discovered a line of cases indicating that such dismissal would be without prejudice. (Tr. 259)

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Richard C. Alkire Co., L.P.A.
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(216) 674-0550 • Fax: (216) 674-0104

Grippi was opposed to dismissing the matter under Rule 41 and Mr. Simon felt there was a possibility that if the Judge ruled without any opposition the dismissal would be without prejudice. He expressed this opinion to Grippi. (Tr. 260-61)

Indeed, in March 2011 and June 2011 Mr. Simon continued to perform legal research pertinent to the matter and discussed the same with Grippi. (Respondent's Exs. F, G, Tr. 262-63)

The reason Mr. Simon did not file the Rule 41(A) motion on his own was that Grippi did not give him permission to do so. This was different than in the Hubbard case where he did obtain that permission. (Tr. 263-64)

Ultimately, on August 10, 2011, Judge Mackey dismissed the case. (Stipulated Ex. 28, Tr. 264-65) Both Grippi and Mr. Simon learned about this dismissal from the newspaper, which apparently obtained the Entry before it was provided to counsel. (Tr. 265) Immediately upon learning of the dismissal, Mr. Simon conducted additional legal research beginning on August 19, 2011. (Respondent's Ex. H, Tr. 266) After this adverse ruling of the trial court, Mr. Simon discussed with Grippi the filing of the Notice of Appeal or perhaps a Motion for Reconsideration. The decision was made to file a Notice of Appeal since Motoins for Reconsideration generally deal with interim Orders, not final dispositive ones. (Tr. 268) Mr. Simon timely filed the Notice of Appeal. (Tr. 268)

During the course of the pending appeal, Mr. Simon took three extensions of time because he was trying to avoid doing something which would be prejudicial to Mr. Grippi's chances if he got a lawyer to bring this matter in Federal Court. (Tr. 268-69) In fact, during this period of time there was some negotiation. However, Grippi wanted to be taken back as an employee with the City of Ashtabula. That was not to be but instead a mention of a "nominal" settlement was made in correspondence between counsel. (Stipulated Ex. 44. Tr. 269) No

amount of money was ever discussed. (Tr. 270) Indeed, one of the reasons to extend the time during the appellate process was the fact that negotiation was ongoing. (Stipulated Ex. 37, Tr. 271)

By the time the motion to extend the time to file the brief was filed on January 10, 2012 (Stipulated Ex. 37) Mr. Simon knew that Grippi had been consulting another attorney. Once Mr. Simon learned Grippi retained the attorney, Mr. Hume, Mr. Simon contacted Mr. Hume to discuss the matter. (Tr. 273)

It was at this point that Mr. Simon indicated to Grippi that Mr. Hume ought to handle the entire matter including the appeal but Grippi wanted Mr. Simon to continue. This is why a contingent fee agreement was executed at that time. (Stipulated Ex. 46)

The contingent fee agreement was executed on January 18, 2012 by both Grippi and Mr. Simon. Mr. Grippi also executed another document that day (Stipulated Ex. 45) which permitted Mr. Simon to enter an appearance in the Federal action. The contingent fee agreement made it clear that Mr. Simon was to be co-counsel with Mr. Hume in the Federal case. (Tr. 274-75)

At this point, as it relates to the Appellate matter in State Court, Mr. Simon felt that he was going to defer to Mr. Hume on that, concerned with the application of *res judicata.* (Tr. 275) The same facts which underlied the State Court case also underlied the Federal Court case. (Tr. 275-76)

At the time of the instant formal hearing in 2014, the claims of age discrimination and handicapped discrimination had survived in the Federal case after motions were filed to dispose of the entire case. The remedies which have survived include reinstatement, back pay, attorneys' fees and punitive damages. (Tr. 276) In fact, the remedies which have survived are greater than

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
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those which had been sought in State Court case. (Tr. 276) Grippi is in a better position today than he was before the Federal case had been filed. (Tr. 277)

While the Appellate case continued to pend, additional legal research was performed by Mr. Simon on February 5, February 8 and February 15, 2012. Mr. Simon was sharing this research with Mr. Hume during this period of time. (Respondent's Ex. I, Tr. 277-78)

Finally, Mr. Hume entered an appearance in the Appellate case on February 16, and filed the Brief on the Merits on March 5, 2012. (Stipulated Exs. 39, 40 and 41; Tr. 281) The Appellate Court affirmed the ruling of the Trial Court granting Defendants' motions. (Stipulated Ex. 42, Tr. 281) In the Appellate Court Opinion, the split of authority which Mr. Simon had previously discovered was mentioned. (Tr. 282)

Sometime after January 18, 2012 Grippi came to Mr. Simon's office extremely upset and indicated that Mr. Simon's services were no longer needed. (Tr. 279-80)

Despite this clear presentation of communications between Mr. Simon and Grippi between 2009 and 2012 corroborated by documentation and legal research bearing date stamps, Grippi was adamant at the hearing that he only met with Mr. Simon one time in 2011. (the period between the time the Complaint had been filed in November, 2010 and when the Complaint was dismissed in August, 2011) (Tr. 127) He also took this position in his deposition. (Depo of Grippi, p. 39)

In the instant matter, it is respectfully submitted that clear and convincing evidence does not exist to support the Panel's findings of fact in connection with Mr. Simon's alleged lack of communication with his clients Hubbard and Grippi and Mr. Simon's alleged neglect of the Grippi matter.

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

C. Aggravation and Mitigation Evidence

The aggravating factors found by the Panel are far outweighed by the mitigating factors about which evidence was presented and received.

Respondent stipulated to a prior disciplinary offense. He had intermingled personal funds with those of his clients in and IOLTA account and failed to fully cooperate with the disciplinary process. (Tr. 317) For that he was suspended from the practice for one-year with the entire suspension stayed on February 16, 2011. Unrepresented in that action, Mr. Simon entered into a Consent-to-Discipline Agreement stipulating to the misconduct. The misconduct involved using his IOLTA Trust Account as a personal bank account and law-office operating account, but did not involve in any way dishonesty. The failure to respond to Relator's request for information involved requests for 2005 – 2008 Income Tax Returns which he failed to provide in a timely fashion. (Tr. 318-19) Relator acknowledged that there is no evidence which suggested that the Respondent used his client trust account in an effort to shield funds from creditors or the Internal Revenue Service. (Stipulated Ex. 1) Ultimately the tax returns were provided prior to the execution of the Consent-to-Discipline Agreement.

The multiple offenses allegedly found in the case-at-bar, involve the various allegations of a failure to communicate which have been addressed. See Sections II (A) and (B) infra.

Mr. Simon has been found to have refused to acknowledge the wrongful nature of his conduct. Of course, his testimony supports his refusal to so acknowledge, since he did not neglect the Grippi case as demonstrated, infra, and did consult his clients about the dismissal of their cases, among other aspect of the cases.

As it relates to mitigation evidence, the Panel found that there was an absence of a dishonest or selfish motive. (Tr. 319-20) However, the evidence also demonstrated that neither

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

of the clients were harmed by Mr. Simon's conduct. The Panel in its rendition of aggravating factors indicated that these clients were "arguably not harmed by his inaction in their cases." (Opinion, 2, para. 38) As such, this fact of no harm should be considered as a mitigating factor in the balancing analysis of an appropriate sanction.

In addition, Mr. Simon did fully and completely cooperate in the disciplinary process, as explained by Mr. Simon in his testimony. (Tr. 320, 451) Mr. Simon completely cooperated with Virginia Miller of the Ashtabula County Bar Association in connection with the Hubbard grievance (Tr. 311-12 Stipulated Exs. 13, 14) He also responded to Assistant Disciplinary Counsel's inquiries. (Tr. 314-15) Indeed, Relator did not argue that there was a lack of cooperation on Mr. Simon's part. (Tr. 426-33, Closing argument of Relator)

As it relates to the "plentiful" evidence of character or reputation as acknowledged by the Panel (Opinion, para. 39) it is significant that judges, lawyers and law enforcement officials testified on his behalf live at the hearing as well as some in letter form. (Respondent's Exs. A, J, K, L) Judges Michael A. Cicconetti, (Respondent's Ex. A) Judge of the Painesville Municipal Court, Robert Scott Wynn, Judge of the Eastern County Court in Jefferson, Ohio (Tr. 165-73); Albert S. Camplese, Judge of the Ashtabula Municipal Court in Ashtabula, Ohio (Tr. 174-83) and Charles Graham Hague, Judge of the Probate and Juvenile Division of the Common Pleas Court in Ashtabula County, Ohio (Tr. 183-92) provided testimony and/or a letter to the Panel. Philip J. Varckette, Former City of Ashtabula Policeman and Detective, Acting City Manager for the City of Ashtabula (Tr. 192-199); Douglas E. Warren, Sr., Bailiff of the Ashtabula Municipal Court and retired State Trooper (Tr. 200-206); David Clemens, retired Police Officer (Tr. 206-211); Thomas Patrick Clemens, Sr., retired Policeman and Bailiff for the Municipal Court for the City of Ashtabula (Tr. 212-215); Thomas P. Clemens, Jr., Ashtabula City Police Officer (Tr.

215-219); Thomas Perry, Police Officer with the City of Ashtabula Police Department (Tr. 220-224); William P. Bobulsky, Attorney (Respondent's Ex. J); Harold E. Specht, Jr., Attorney (Respondent's Ex. K) and Margaret A. Draper, Attorney (Respondent's Ex. L) also provided testimony and/or letters.

The testimony and letters of these witnesses attest to Respondent's good character, attention to the interest of his clients, good works in the community and reputation for honesty and trustworthiness.

IV. LAW AND ARGUMENT

Proposition of Law No. I: Clear and convincing evidence is necessary to sustain Relator's burden to prove professional misconduct involving a Respondent's duty to keep his clients reasonably informed of decisions made on their behalf and neglect.

In order to issue recommendations concerning a sanction in connection with the misconduct of an attorney, a hearing panel must determine, by clear and convincing evidence, that the Respondent is guilty of misconduct. See Gov. Bar. R. V, Section 6(I)[8]. (App. H)

Clear and convincing evidence has been defined as:

> That measure or degree of proof which is more than a mere 'preponderance of evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as the facts sought to be established.

Lansdowne v. Beacon Journal Pub. Co., 32 Ohio St.3d 176, 180, 512 N.E.2d 979 (1987)

This Court has acknowledged that it is not bound by the findings of fact of the Board and Panel although it gives some deference to them in light of the reality that the Panel observed the witnesses first hand. See Cleveland Bar Ass'n v. Cleary, 93 Ohio St.3d 191, 198, 754 N.E.2d

[8] Throughout this brief, references to Gov. Bar R. V is the version of that Rule in effect on December 15, 2014 when the Report by the Board was issued and after which the formal proceedings had concluded.

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

235, 243-44 (2001) (this Court refused to reverse the Panel and Board's recommendation that Judge Cleary be suspended from the practice of law for six months based on the presumption that clear and convincing evidence was not presented in support of the alleged misconduct) Even so, this Court will disregard the Panel's findings when the record weighs heavily against them. Id. While Cleary was not such a case, the instant one is.

Further,

> [although] the Board of Commissioners on Grievances and Discipline Makes recommendations to this Court in disciplinary proceedings, this Court renders the final determination of facts and conclusions of law. Ohio State Bar Ass'n v. Reid (1999), 85 Ohio St.3d 327, 708 N.E.2d 193, at Para. 1 of the Syllabus.

Columbus Bar Ass'n v. Plymale, 91 Ohio St.3d 367, 369, 745 N.E.2d 413, 416 (2000) (although the Panel and Board found that an agreement had been entered into to share legal fees with a non-lawyer and that such violated DR 3-102(A) (App. I), the Supreme Court construed the evidence in its entirety and found that Respondent and the individual did not enter into an agreement to share legal fees, dismissing the case rather then accepting the recommendation of discipline.)

Unlike this Court, the Board never sees the transcript. In addition, what is especially significant in the instant matter is that the Panel received as evidence not only the testimony at the hearing but the testimony that was received by way of deposition one week before the hearing, as it relates to both grievants. See fn 6 infra. As such, not only is the use of the deposition in connection with the cross-examination of each of the grievants at the formal hearing important on the issue of credibility, but also as it relates to substantive evidence.

As the Statement of Facts in connection the Hubbard and Grippi representations demonstrate infra (Sections III, A and B) not only did both Hubbard and Grippi acknowledge

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

substantial communication between them and Mr. Simon, but documents admitted into evidence substantiated the same. This also applies to the neglect finding in the Grippi matter.

In this regard, as it relates to the Hubbard representation, the four letters which Relator argued had been fabricated by Respondent were not found to have been fabricated at all by the Panel. (App. 2, para. 24) The Panel's analysis of the evidence in para. 23 ignores the very documents that were brought to the hearing by Hubbard which he did retain and the consistency between the documents and the letters written by Respondent.

For example, the memo of Mr. Finger concerning Hubbard's incident with a fax mast dated in July 2010 before Respondent wrote his July 16, 2010 letter certainly supports that such letter had been sent and a meeting occurred. Hubbard admitted in his deposition that this meeting lasted forty-five minutes. (Depo. of Hubbard, p. 24) Similar facts have been set forth above concerning documents in Hubbard's file brought with him to his deposition which rendered the letters Mr. Simon asserts he sent consistent with such assertion. Indeed, the Panel acknowledged that Hubbard "admitted to receiving three or four letters from Respondent, but could not recall the contents of those letters." (Opinion, para. 21) (App. B) No letters at all were contained within the files brought by Hubbard to the hearing other than one that he allegedly found within the one week period of time between when he gave his deposition testimony and the time of the hearing. (Opinion, para. 21) (App. B)

It is simply inconceivable that comparing Hubbard's deposition testimony to his testimony at trial, recognizing the sworn testimony of Mr. Simon and taking into account the stipulated exhibits, one could conclude that clear and convincing evidence was offered by Relator that Hubbard did not receive sufficient communication from Mr. Simon. Indeed,

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Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

nowhere in the Panel's Opinion did it indicate it had a "firm belief or conviction in this regard," the legal standard for clear and convincing evidence.

It is also significant that Mr. Downing, who was present at the few meetings acknowledged by Hubbard and who read to Hubbard all of the letters received by Hubbard from Mr. Simon, (Opinion, para. 21, Tr. 72) (App. B) was never called by Relator to testify. Similarly, in Disciplinary Counsel v. Oldfield, 140 Ohio St.3d 123, 2014-Ohio-2963, this Court noted the Panel's acknowledgement that a corroborating witness available on a pertinent issue was not called to testify thereby supporting the Panel's finding that it had a lack of a "firm conviction" concerning evidence presented by Relator. While the Panel in the instant matter did not seem troubled by that lack of corroborating evidence, even though Hubbard provided wildly contradictory statements both at the hearing and during deposition, this Court may certainly find a lack of clear and convincing evidence was presented, including drawing an appropriate inference from the failure of Relator to present Mr. Downing's testimony.

As it relates to the Grippi representation, Grippi's own testimony belies the conclusion of the Panel that "Respondent failed to keep Grippi informed of the status of his case and allowed the case to be dismissed with prejudice without notifying Grippi of the pending motion." First, there were pending motions and second, Grippi admitted he thought he had brief conversations about the motions and didn't know either way if Mr. Simon was going to respond to the motions. (Tr. 111) As to the dismissal, while he asserted at one point that he had not discussed dismissing the case with Mr. Simon (Tr. 113), he did admit upon further examination that Mr. Simon did bring up Rule 41. (Tr. 136) This testimony flies in the face of the Panel's conclusion in connection with Grippi and Mr. Simon's communication with him. (Opinion, para. 36) (App. B)

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
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As to neglect, as the detailed presentation of the testimony infra indicates, Mr. Simon performed substantial work in connection with this representation of Grippi including substantial research on multiple occasions throughout the entire representation. (Stipulated Exs. B-I)

Proposition of Law No. II: An actual suspension from the practice of law is not warranted when Relator fails to prove by clear and convincing evidence violations in two separate matters under Prof. Cond. R. 1.4 and the only stipulated violation is a Prof. Cond. R. 1.4(c) violation, even when the Respondent has received prior discipline.

The Panel determined, based upon the evidence presented, that there were aggravating factors which included the stipulated prior disciplinary offense, multiple offenses related to respondent's alleged failure to communicate with the two grievants throughout his handling of their cases and Respondent's refusal to acknowledge the wrongful nature of his conduct. Indeed, as the Panel noted, Respondent would not acknowledge that he neglected Grippi's case or that he dismissed or let be dismissed cases without consulting his clients. Of course, he refused to acknowledge these facts because they were not true.

As is set forth infra, Mr. Simon did consult with Hubbard about dismissing his case before he did so and followed-up the dismissal with a letter reiterating that conversation. (Stipulated Ex. 17) Indeed, Mr. Simon forecasted in his letter to Hubbard of April 11, 2011 (Stipulated Ex. 18), that dismissing the complaint would be appropriate if Hubbard could not pay the required retainer and fee.

Thus, should this Honorable Court agree that the evidence in this case which was clear and convincing demonstrated that Respondent did communicate with Hubbard a reasonable and appropriate amount of time throughout the handling of his case, then neither of those aggravating circumstances apply.

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

Likewise, should this Panel determine, contrary to the Panel's finding, that Mr. Simon indeed communicated appropriately throughout his representation of Grippi and certainly did not neglect Grippi's case, then neither of those two aggravating factors apply either, based upon Grippi's own admissions. As such, the only applicable aggravating factor in this matter is a prior disciplinary offense.

As it relates to mitigating factors, the Panel failed to acknowledge the lack of harm to the clients, although finding the same in their report (Opinion, para. 38) (App. B) as an aggravating factor. Further, the Panel failed to mention, at all, Respondent's cooperation throughout the disciplinary process and in connection with the proceedings before the Board or that he made full and free disclosure in connection with this matter. Although pled in his Amended Answer as a mitigating factor and argued at the hearing, the Panel failed to make a finding one way or the other on such mitigating factor. Further, Relator did not argue that such mitigating factor had not been demonstrated by the evidence. Under the BCGD Proc. Reg., Section 10 (App. J), full and free disclosure to the Disciplinary Board and a cooperative attitude towards the proceedings constitutes a factor to take into account as mitigation in determining the appropriate sanction.

Further, the evidence presented by Respondent through the character witnesses was not only significant because of the stature of the witnesses who testified but also related to Mr. Simon's reputation for honesty which should have caused the Panel to give his testimony more credence than the conflicting, confusing and unclear testimony of each of the grievants.

Further, in other cases considered by this Court, the fact that there was an aggravating factor of a prior discipline action had not prevented a sanction of a fully stayed suspension.

In this connection, in Cleveland Metro Bar Ass'n v. Berk, 132 Ohio St.3d 82, 2012-Ohio-2167 , 969 N.E.2d 256, this Court suspended Mr. Berk from the practice of law for eighteen

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

months staying the entire suspension in a situation involving the neglect of two client matters resulting in the dismissal of the clients' actions. This was so even though the conduct in that matter was comparable to the conduct that led to his first disciplinary sanction when Berk previously received, a one year suspension entirely stayed. See also, Disciplinary Counsel v. Turner, 140 Ohio St.3d 109, 2014-Ohio-3158 (mentioned by the Panel in its Report, this case involved a two-year suspension all stayed although this attorney had previously been suspended for failing to comply with continuing legal education requirements and had received a conditionally stayed six-month suspension for neglecting three separate probate matters); Disciplinary Counsel v. Siewert, 130 Ohio St.3d 402, 2011-Ohio-5935, 958 N.E.2d 946 (the Court ratified a Consent to Discipline Agreement for a six-month fully stayed suspension where the attorney had previously been suspended for twenty four months with eighteen months stayed having neglected a legal matter entrusted to him, having failed to seek his client's lawful objectives, having failed to carry out a contract of employment, having caused prejudice or damage to his client and having failed to assist in an investigation of professional misconduct. The second Siewert discipline matter involved allegations of sexual misconduct with a client.)

Before making a final determination in respect to a sanction, this Honorable Court has weighed the evidence of aggravating and mitigating factors listed in Section 10 of the Rules and Regulations Governing Procedure on Complaints and Hearings before the Board of Commissioners on Grievances and Discipline. (App. J) See Disciplinary Counsel v. Broeren, 115 Ohio St.3d 473, 2007-Ohio-5251, 875 N.E.2d 935, para. 21.

As has been pointed out numerous times by this Court, when imposing sanctions for attorney misconduct, all relevant factors, including the duties the lawyer violated, the lawyer's mental state and sanctions imposed in similar cases are considered. Stark Cty. Bar Ass'n. v.

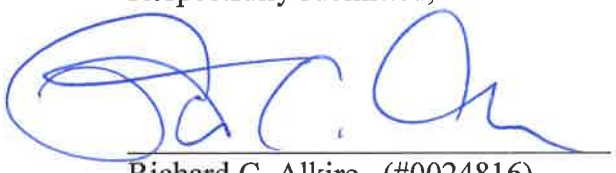
Buttacavoli, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, para. 16. Indeed, because each disciplinary case is unique, this Court is not limited to the factors specified in the aforementioned rule but may take into account all relevant factors. See Disciplinary Counsel v. Kimmins, 123 Ohio St.3d 207, 2009-Ohio-4943, 915 N.E.2d 330 para. 17.

As such, taking into account all of the evidence in this matter including the mitigating factors not addressed by the Panel, the recommended two-year suspension with eighteen months stayed is excessive. Further, two of the three aggravating factors found, it is respectfully submitted, are based upon findings of fact which were not proven by clear and convincing evidence leading to not only the finding of professional conduct rule violations, but also aggravating factors premised on those violations.

V. CONCLUSION

Accordingly, for the foregoing reasons, Respondent respectfully objects to the Recommendation of the Board to this Honorable Court that Respondent be suspended from the practice to law and respectfully requests that this Honorable Court either fully stay any actual suspension it deems appropriate or, find a public reprimand as the appropriate sanction for the sole and only professional conduct rule violation under Prof. Cond. R. 1.4(c).

Respectfully submitted,



Richard C. Alkire (#0024816)

RICHARD C. ALKIRE CO., L.P.A.
250 Spectrum Office Building
6060 Rockside Woods Blvd.
Independence, Ohio 44131-2335
216-674-0550 / Fax 216-674-0104

Attorney for Respondent

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,	:	**Case No. 2014-2155**
	:	
Relator,	:	
	:	**On Appeal from the Board of**
v.	:	**Commissioners on Grievances**
	:	**and Discipline of the**
Thomas John Simon,	:	**Ohio Supreme Court**
	:	
Respondent.	:	

APPENDIX TO
RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO
THE FINAL REPORT OF THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE

App. A

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

FILED
DEC 15 2014
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In re:	:	
Complaint against	:	**Case No. 2014-013**
Thomas John Simon	:	
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

ENTRY

The hearing panel unanimously dismisses the following alleged violations by Relator in its formal complaint. The secretary shall provide notice of dismissal to the parties and entities listed in Gov. Bar R. V, Section 6(G).

Count I-Prof. Cond. R. 8.1(a) and Prod. Cond. R. 8.4(d)

Count II-Prof. Cond. R. 8.4(d)

Sanford E. Watson, Panel Chair

Teresa Sherald

Hon. Matthew W. McFarland

App. B

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

In Re:	:	**Case No. 2014-013**
Complaint against	:	
Thomas John Simon **Attorney Reg. No. 0009725**	:	**Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Disciplinary Counsel	:	
Relator		

OVERVIEW

{¶1} This matter was heard on July 25 and August 20, 2014, in Columbus before a panel consisting of Judge Matthew W. McFarland, Teresa Sherald, and Sanford E. Watson, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Respondent was present and represented by Richard C. Alkire. Stacy Solochek Beckman appeared on behalf of Relator.

{¶3} The alleged misconduct in this proceeding involved Respondent's failure to keep two separate clients reasonably informed in their respective wrongful discharge cases. In both cases, Respondent neglected the matters, and the clients were surprised to learn that their cases were dismissed. The underlying facts regarding Respondent's conduct in court is not in dispute. Rather the factual disputes in this case revolve around whether Respondent kept his clients reasonably informed of decisions he made on their behalf.

{¶4} Based upon the evidence presented at the hearing of this matter and for the reasons set forth below, the panel recommends the Board find violations of Count I and II and recommend a two-year suspension, with eighteen months stayed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to practice law in the state of Ohio on May 11, 1981 and subject to the Ohio Rules of Professional Conduct and the Government of the Bar of Ohio.

{¶6} On February 16, 2011, the Supreme Court of Ohio suspended Respondent from the practice of law for one year, with the entire suspension stayed. *Disciplinary Counsel v. Simon,* 128 Ohio St.3d 359, 2011-Ohio-627. Respondent's previous disciplinary case arose out of his commingling funds and failure to cooperate with Relator.

{¶7} On July 22, 2014, the parties entered into stipulations of fact, stipulated to Respondent's violation of Prof. Cond. R. 1.4(c), and agreed upon stipulated exhibits. The panel accepted the stipulations of fact and stipulated violation, and convened a hearing to consider the facts and violations that remained in dispute. The parties' factual stipulations are set forth below, interspersed with the testimony and evidence from the hearing that provide further context for the panel's recommendation.

Count I-Danny Hubbard

{¶8} In Count I of the amended complaint, Respondent is charged with the following violations:

- Prof. Cond. R. 1.4(a)(1) [a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the rules];
- Prof. Cond. R. 1.4(a)(3) [a lawyer shall keep the client reasonably informed about the status of the matter];
- Prof. Cond. R. 1.4(c) [a lawyer shall inform a client at the time of the client's engagement of the lawyer if the lawyer does not maintain professional liability insurance];

- Prof. Cond. R. 8.1(a) [knowingly make a false statement of material fact in connection with a disciplinary matter]; and
- Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice].

{¶9} Respondent admits to a violation of Prof. Cond. R. 1.4(c), but denies all other alleged violations in Count I of the amended complaint.

{¶10} The factual disputes in this count involve whether Respondent kept his client reasonably informed and three letters addressed from Respondent that Danny Hubbard claims were never sent to him. The first disputed letter, dated July 16, 2010 in pertinent part, indicates that Respondent will require a $3,750 retainer to represent him. Stipulated Ex. 15. Hubbard denies receiving the letter from Respondent. Hubbard testified that he did not see the letter until his deposition was taken in connection with this disciplinary proceeding.

{¶11} On or about February 11, 2011, Hubbard retained Respondent in connection with a wrongful termination claim against his former employer, the Village of Jefferson, Ohio. Hubbard's employment was terminated in 2009. At the time Respondent was hired, the two-year statute of limitations was about to run on Hubbard's claim.

{¶12} The second disputed letter from Respondent to Hubbard was dated February 14, 2011. Stipulated Ex. 16. In this letter, Hubbard indicates that he cannot continue to represent Hubbard beyond the filing of the complaint unless he pays him a retainer of $3,750. The letter further indicates that if he cannot pay the retainer, the case could be voluntarily dismissed, which would extend the statute of limitations for an additional year. Hubbard denies receiving the letter or ever being informed by Respondent that he required a retainer.

{¶13} To meet the two-year deadline, Respondent filed a complaint on Hubbard's behalf with the Ashtabula County Court of Common Pleas, Civil Division on February 22, 2011. Hubbard did not pay a retainer in connection with the case.

{¶14} On April 6, 2011, the court scheduled a pretrial for July 18, 2011 and notified Respondent. Hubbard also received notice of the pretrial from the court. Hubbard showed and waited in the hallway outside the courtroom, but Respondent failed to appear. As a result of Respondent's failure to appear, the court issued an entry granting defendant reasonable attorney fees in the amount of $150 from Hubbard, and scheduled a show cause hearing for September 26, 2011, and directed Hubbard to show cause as to why his complaint should not be dismissed. Hubbard received a copy of the entry from the court and contacted Respondent. Respondent's only explanation was that he forgot to appear. Respondent did appear at the show cause hearing and the court determined that the matter would not be dismissed, noted that mediation was scheduled to proceed on December 14, 2011 and scheduled a jury trial for February 15, 2012.

{¶15} On or about July 1, 2011, the defendants served their first set of interrogatories and request for production of documents upon Respondent. Respondent failed to reply to the discovery requests. On September 28, 2011, counsel for the defendants renewed its discovery requests to no avail. On October 13, 2011, the defendants filed a motion to compel discovery. Respondent did not file an opposition brief, and the court granted the motion. Hubbard testified that Respondent never discussed any of the discovery requests with him.

{¶16} On November 15, 2011, the defendants filed a motion for summary judgment in the matter and served Respondent with a copy of the motion. Rather than oppose the motion, Respondent filed a notice of dismissal on Hubbard's behalf. Hubbard testified that Respondent never discussed with him the motion for summary judgment or the notice of dismissal in advance of filing.

{¶17} The third disputed letter from Respondent to Hubbard was dated November 23, 2011. Stipulated Ex. 19. Hubbard denies receiving the letter from Respondent. Hubbard

testifies that he learned that his case had been dismissed by going to the courthouse and inquiring about the status from the judge's secretary.

{¶18} After learning of the dismissal, Hubbard sought new counsel but was unsuccessful in finding anyone willing to take the case. Consequently, Hubbard did not refile his case within a year following the dismissal.

{¶19} During the representation, Respondent did not advise Hubbard that he did not have professional liability insurance.

{¶20} On July 25, 2012, Hubbard filed a grievance against Respondent with the Ashtabula County Bar Association Certified Grievance Committee. The grievance was dismissed. Hubbard subsequently brought his complaint to Relator.

{¶21} Overall, Hubbard admitted to receiving three or four letters from Respondent, but could not recall the contents of those letters. During the hearing, it was also revealed that Hubbard is dyslexic and would have a friend, Richard Downing, read correspondence to him so that he would fully comprehend it. Under intense cross-examination, Hubbard maintained that he did not receive Respondent's letters dated July 16, 2010, February 14, 2011, and November 23, 2011, nor was he ever informed that unless Respondent received a retainer, the case would be voluntarily dismissed.

{¶22} Respondent testified that he kept Hubbard informed through the letters as well as through telephone conversations. During Relator's investigation, Respondent was asked to produce telephone records and his computer hard drive. Respondent indicated that he did not keep records of local telephone calls and he only used his computer as a word processor and so there were no records to produce. Respondent also offered the testimony of Bradley Thomas Wight who provided computer maintenance services to Respondent. Wight testified that

Respondent's computer from which any metadata would have been retrieved had been replaced because it had crashed.

{¶23} In reconciling the conflicting testimony and weighing the credibility of the witnesses, the panel believes that Respondent failed to inform Hubbard that he would require a retainer or else the case would be voluntarily dismissed. Even if Respondent sent the disputed letters, it is not clear whether Hubbard received them. Furthermore, Respondent failed to inform Hubbard regarding discovery requirements, the motion for summary judgment, or seek Hubbard's consent before filing the notice of dismissal. For these reasons, the panel finds clear and convincing evidence that Respondent violated Prof. Cond. R. 1.4(a)(1) and Prof. Cond. R. 1.4(a)(3).

{¶24} Relator takes the failure to inform argument a step further and alleges that Respondent created July 16, 2010, February 14, 2011, and November 23, 2011 letters after the fact and by doing so, knowingly made false statements in connection with a disciplinary matter. In considering this argument, it should first be noted that the fact that Hubbard did not receive the letters does not mean that they were fabricated. Secondly, the absence of computer files or metadata does not prove the allegation. To do so, would shift the burden to Respondent to prove that the letters were not fabrications. For these reasons, we find Relator failed to produce clear and convincing evidence that Respondent produced false evidence in violation of Prof, Cond. R. 8.1(a) and we recommend dismissal of the violation. For the same reasons, we also find Relator failed to prove by clear and convincing evidence that Respondent engaged in conduct that is prejudicial to the administration of justice and accordingly, recommend dismissal of the alleged violation of Prof. Cond. R. 8.4(d).

{¶25} Finally, Respondent has stipulated that he failed to ever inform Hubbard that he lacked professional liability insurance and therefore, we find a violation of Prof. Cond. R. 1.4(c).

Count II-Louis Grippi

{¶26} In Count II of the amended complaint, Respondent was charged with the following violations:

- Prof. Cond. R. 1.3 [diligence];
- Prof. Cond. R. 1.4(a)(1);
- Prof. Cond. R. 1.4(a)(3); and
- Prof. Cond. R. 8.4(d).

{¶27} Respondent denies all of the alleged violations in Count II of the amended complaint.

{¶28} On or about April 2010, Louis Grippi retained Respondent in connection with a wrongful termination claim involving the City of Ashtabula, Ohio and his union, American Federation of State, County and Municipal Employees (AFSCME) Local 1197.

{¶29} On April 28, 2010, Respondent submitted a letter to AFSCME challenging the union's determination that it would not pursue arbitration on Grippi's behalf against the City of Ashtabula. When Respondent did not receive a satisfactory response to his letter, he initiated an unfair labor practice charge with the State Employment Relations Board (SERB) on Grippi's behalf. SERB dismissed this charge on July 22, 2010.

{¶30} On November 15, 2010, Respondent filed a complaint on Grippi's behalf with the Ashtabula County Court of Common Pleas, Civil Division, against Anthony Cantagallo, city manager of the City of Ashtabula, and John A. Lyell, president of AFSCME Local 1197.

{¶31} On December 15, 2010, Cantagallo filed a motion for judgment on the pleadings and an answer; AFSCME Local 1197 filed a motion to dismiss on December 14, 2010. Notwithstanding being given ample time, through April 15, 2011 Respondent did oppose not

either motion. As a result, on August 10, 2011 Judge Mackey dismissed the case with prejudice, stating that "[n]o response has been filed to the Motions by the Plaintiff."

{¶32} On August 10, 2011, Grippi sent Respondent a letter by certified mail requesting an update on his case. Grippi testified that after Respondent filed the complaint, Respondent did not keep him informed of the status of his case and that is why he sent the letter. Respondent received the letter, but did not respond. In the hearing, Respondent testified that Grippi frequently stopped by the office and during those visits he updated him on the matter.

{¶33} On August 18, 2011, Grippi learned that his case had been dismissed with prejudice when he was reading the local newspaper. Grippi contacted Respondent about the dismissal and Respondent agreed to appeal the dismissal. Respondent timely filed a notice of appeal and informed Grippi of the same.

{¶34} On February 16, 2012, Grippi retained Attorney Martin S. Hume to handle the appeal. The appeal ended with the Eleventh District Court of Appeals affirming the decision of the trial court.

{¶35} Grippi subsequently pursued his unfair labor practice claims in federal court with other counsel.

{¶36} As in Count I, Count II comes down to a question of credibility. Whether Respondent kept Grippi informed required the panel to reconcile the conflicting testimony and weigh the credibility of the witnesses. The panel believes that Respondent failed to keep Grippi informed of the status of his case and allowed the case to be dismissed with prejudice without notifying Grippi of the pending motion. For these reasons, the panel finds clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(1), and Prof. Cond. R. 1.4(a)(3).

{¶37} Notwithstanding Respondent's neglect of Grippi's case, we find Relator failed to prove by clear and convincing evidence that Respondent engaged in conduct that is prejudicial to the administration of justice. Accordingly, we recommend dismissal of the alleged violation of Prof. Cond. R. 8.4(d).

AGGRAVATION, MITIGATION, AND SANCTION

{¶38} Based upon all of the evidence presented, the panel finds the following aggravating factors:

- Respondent stipulated to his prior disciplinary offense;
- Respondent had multiple offenses to the extent he failed to communicate with his clients numerous times in two cases; and
- Respondent refused to acknowledge the wrongful nature of his conduct. While his clients were arguably not harmed by his inaction in their cases, he never acknowledged that it was wrong to neglect a case, then dismiss the case, or let the case be dismissed without consulting the client.

{¶39} Based upon all of the evidence presented, the panel also finds the following mitigating factors:

- The absence of a dishonest or selfish motive; and
- The evidence of character or reputation was plentiful; Respondent offered 13 character witnesses including testimony from three judges, six current or former law enforcement officers, and four letters of reference, one from a judge.

{¶40} Relator recommends a sanction of an indefinite suspension largely premised upon the belief that Respondent provided false evidence to Relator in the form of letters to Hubbard. Because we believe Relator failed to prove by clear and convincing evidence that the letters in question were fabricated, Relator's recommendation should be rejected.

{¶41} Respondent recommends dismissal or at least a reprimand. To dismiss the matter in its entirety would be to ignore Respondent's stipulation to a violation of Prof. Cond. R. 1.4(c). It also would be inconsistent with this panel's findings that Respondent violated Prof. Cond. R.

1.3, Prof. Cond. R. 1.4(a)(1), and Prof. Cond. R. 1.4 (a)(3). Therefore, Respondent's recommendation should be rejected as well.

{¶42} The panel reviews sanctions in light of the findings of fact, conclusions of law, factors in aggravation and mitigation, and precedent established by the Supreme Court of Ohio. In taking all of these factors, the panel found one case where the facts where strikingly similar, except for the presence of prior discipline. *Lorain Cty. Bar Assn. v. Godles,* 128 Ohio St.3d 279, 2010-Ohio-6274. In *Godles*, the respondent filed a personal injury suit and failed to respond to discovery, failed to respond to a motion to compel, but instead voluntarily dismissed the case. *Id.* at ¶6. The respondent claims to have called the client and sent him a letter explaining the voluntary dismissal, but the client testified that this conversation never occurred and that he never received the letter. *Id.* at ¶7. The panel found neither side credible but concluded that the respondent did very little work in the case and failed to communicate fully with the client. *Id.* at ¶12. Ultimately, the Court "considering respondent's long career with no previous disciplinary action" decided to publicly reprimand the respondent. *Id.* at ¶18. Thus, the major difference in Respondent's case is that he does have a prior disciplinary record.

{¶43} The panel also considered three cases offered by Respondent for the proposition that cases where prior discipline is an aggravating factor do not require an actual term of suspension. See *Disciplinary Counsel v. Siewert,* 130 Ohio St.3d 402, 2011-Ohio-5935 (six-month suspension, all stayed where the respondent with prior discipline engaged in a romantic relationship with his domestic relations client); *Cleveland Metro. Bar Assn. v. Berk,* 132 Ohio St.3d 82, 2012-Ohio-2167 (18-month suspension, all stayed where the respondent with prior discipline neglected client matters); *Disciplinary Counsel v. Turner,* 140 Ohio St.3d 109, 2014-

Ohio-3158 (two-year suspension, all stayed where the respondent with prior discipline placed personal funds in client trust account and failed to cooperate with disciplinary process).

{¶44} Respondent's conduct is most consistent with the factors considered in *Turner* in that the Court in *Turner* imposed a longer stayed suspension because of the aggravating factor of prior discipline and the respondent's initial failure to cooperate. See *Turner* at ¶¶17-18. There is some irony in the fact that the case distinguished by the Court in *Turner* was the matter involving Respondent's prior discipline. *Id.*, citing *Disciplinary Counsel v. Simon,* 128 Ohio St.3d 359, 2011-Ohio-627. In considering Respondent's current matter, the panel must consider Respondent's failure to acknowledge the wrongful nature of his conduct as well as the prior discipline. Credibility considerations aside, neglecting a client's case, allowing it to be dismissed, and not notifying a client of the dismissal is wrong.

{¶45} There are cases involving the neglect of clients' matters that have resulted in an actual suspension, but those cases involved dishonest conduct that has not been proven here. *Medina Cty. Bar Assn. v. Malynn,* 131 Ohio St.3d 377, 2012-Ohio-1293 (two-year suspension, with six month stayed where misconduct included neglecting client matters and engaging in conduct involving dishonesty); and *Toledo Bar Assn. v. Harvey,* Slip Opinion No. 2014-Ohio-3675 (two-year suspension, with six months stayed where misconduct included failing to provide competent representation, failing to consult with client, and engaging in conduct prejudicial to the administration of justice).

{¶46} Having considered the findings of fact and conclusions of law, weighed the aggravating and mitigating factors, and reviewed Supreme Court of Ohio precedent, the panel respectfully recommends a sanction of a two-year suspension, with eighteen months stayed on the condition that Respondent commit no further misconduct.

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 adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Thomas John Simon, be suspended from the practice of law for two years, with eighteen months stayed on condition that Respondent commit no further misconduct. The Board further recommends that the costs of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.

RICHARD A. DOVE, Secretary

App. C

Ohio Prof. Cond. Rule 1.4

Rules current through rule amendments received through December 10, 2014

Ohio Court Rules > *Ohio Rules of Professional Conduct* > *I. Client-lawyer relationship*

Rule 1.4. Communication

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) ***reasonably*** consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

CLIENT ACKNOWLEDGEMENT

App. D

Rule 8.1. Bar admission and disciplinary matters

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) ***knowingly*** make a false statement of material fact;

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or *knowingly* fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

App. E

Rules current through rule amendments received through December 10, 2014

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, *knowingly* assist or induce another to do so, or do so through the acts of another;

(b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) ***knowingly*** assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

App. F

Ohio Prof. Cond. Rule 1.3

Rules current through rule amendments received through December 10, 2014

Ohio Court Rules > *Ohio Rules of Professional Conduct* > *I. Client-lawyer relationship*

Rule 1.3. Diligence

A lawyer shall act with *reasonable* diligence and promptness in representing a client.

App. G

Rule 41. Dismissal of actions

(A) Voluntary dismissal; Effect thereof.

(1) By plaintiff; By stipulation. Subject to the provisions of Civ.R. 23(E), Civ.R. 23.1, and Civ.R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

(2) By order of court. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

(B) Involuntary dismissal; Effect thereof.

(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

(2) Dismissal; Non-jury action. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ.R. 52 if requested to do so by any party.

(3) Adjudication on the merits; Exception. A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) Failure other than on the merits. A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

(a) lack of jurisdiction over the person or the subject matter;

(b) failure to join a party under Civ.R. 19 or Civ.R. 19.1.

(C) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

(D) Costs of previously dismissed action. If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

History

Amended, eff 7-1-71; 7-1-72; 7-1-01.

App. H

(F) **Hearing.** Upon reasonable notice and at a time and location set by the panel chair pursuant to the hearing procedures and guidelines of the Board, the panel shall hold a formal hearing on the complaint. Requests for continuances may be granted by the panel chair for good cause shown. All hearings shall be recorded by a court reporter provided by the Board and a transcript filed with the Secretary.

(G) **Authority of hearing panel; Dismissal.** If, at the end of the evidence presented by the relator or of all evidence, a unanimous hearing panel finds that the evidence is insufficient to support a charge or count of misconduct, the panel may order that the complaint or count be dismissed. The panel chair shall give written notice of the action taken to the Board, the respondent, all counsel of record, the Disciplinary Counsel, the Certified Grievance Committee for and the local bar association of the county or counties in which the respondent resides and maintains his or her office and the county from which the complaint arose, and the Ohio State Bar Association.

(H) **Referral by panel.** In the alternative, if the hearing panel determines that findings of fact and recommendations for dismissal should be referred to the Board for review and action by the full Board, the panel may submit its findings of fact to the Board and may recommend dismissal in the same manner as provided in this rule with respect to public reprimand, probation, suspension, or disbarment.

(I) **Public reprimand, probation, suspension, or disbarment; duty of hearing panel.** If the hearing panel determines, by clear and convincing evidence, that respondent is guilty of misconduct and that public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the hearing panel shall file its certified report of the proceedings, its finding of facts and recommendations, including any recommendations as to probation and the conditions of probation, with the Secretary. The report shall include the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with the proceedings.

(J) **Review by entire board.** After review, the Board may refer the matter to the hearing panel for further hearing, order a further hearing before the Board, or proceed on the certified report of the prior proceedings before the hearing panel. After the final review, the Board may dismiss the complaint or find that the respondent is guilty of misconduct. If the complaint is dismissed, the dismissal shall be reported to the Secretary of the Board, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the hearing panel.

(K) **Public reprimand; Probation, suspension, or disbarment; duty of board after review.** If the Board determines that a public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the Board shall file a final certified report of its proceedings, including its findings of fact and recommendations, with the Clerk of the Supreme Court. The report shall include the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with the proceedings. The Board forthwith shall notify the respondent and all counsel of record of the action, enclosing with the notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

App. I

DR 3-102. DIVIDING LEGAL FEES WITH A NON-LAWYER.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with his or her firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons.

(2) An agreement to purchase the practice of a deceased, disabled, or disappeared lawyer in accordance with DR 2-111 may provide for the payment of money, over a reasonable period of time, to a nonlawyer.

(3) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer a proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(4) A lawyer or law firm may include nonlawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(5) A lawyer participating in a lawyer referral service that satisfies the requirements of DR 2-103(C) may pay to the service a fee calculated as a percentage of legal fees earned by the lawyer in his or her capacity as a lawyer to whom the service has referred a matter. This percentage fee is in addition to any reasonable membership or registration fee established by the service.

[Effective: October 5, 1970; amended effective: July 1, 1996; February 1, 2003.]

App. J

party and file the report with the Secretary of the Board. The report shall become the order of the Board unless a party files a written objection to the report within ten days of the filing with the Board. All objections shall be decided by the chair of the hearing panel as set forth in Gov. Bar R. V, Section (6)(D)(3).

History: Effective 11-1-95.

Section 9. Time guidelines for pending cases. **NOTE:** BCGD Proc. Reg., Section 9 (E) was repealed, effective August 1, 2012.

Section 10. Guidelines for imposing lawyer sanctions.

(A) Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, consideration will be given to specific professional misconduct and to the existence of aggravating or mitigating factors.

(B) In determining the appropriate sanction, the Board shall consider all relevant factors; precedent established by the Supreme Court of Ohio; and the following:

(1) Aggravation. The following shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) lack of cooperation in the disciplinary process;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge wrongful nature of conduct;

(h) vulnerability of and resulting harm to victims of the misconduct;

(i) failure to make restitution.

(2) Mitigation. The following shall not control the Board's discretion, but may be considered in favor of recommending a less severe sanction:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) timely good faith effort to make restitution or to rectify consequences of misconduct;

(d) full and free disclosure to disciplinary Board or cooperative attitude toward proceedings;

(e) character or reputation;

(f) imposition of other penalties or sanctions;

(g) chemical dependency or mental disability when there has been all of the following:

(i) A diagnosis of a chemical dependency or mental disability by a qualified health care professional or alcohol/substance abuse counselor;

(ii) A determination that the chemical dependency or mental disability contributed to cause the misconduct;

(iii) In the event of chemical dependency, a certification of successful completion of an approved treatment program or in the event of mental disability, a sustained period of successful treatment;

(iv) A prognosis from a qualified health care professional or alcohol/substance abuse counselor that the attorney will be able to return to competent, ethical professional practice under specified conditions.

(h) other interim rehabilitation.

History: Effective 6-1-00; amended, eff. 2-1-03.

LAW OFFICE OF
Richard C. Alkire Co., L.P.A.
250 Spectrum Office Building • 6060 Rockside Woods Boulevard • Independence, Ohio 44131-2335
(216) 674-0550 • Fax: (216) 674-0104

PROOF OF SERVICE

The foregoing **RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE** was e-filed with the Supreme Court of Ohio and emailed this 28th day of January, 2015 to:

Stacy Solochek-Beckman
Assistant Disciplinary Counsel

Office of Disciplinary Counsel
250 Civic Center Drive
Suite 325
Columbus, Ohio 43215-7411
Stacy.beckman@sc.ohio.gov

Attorney for Relator
Disciplinary Counsel

Richard C. Alkire

Attorney for Respondent