

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT  
OF THE SUPREME COURT OF OHIO**

**In re:**

**Case No. 2014-080**

**Complaint against**

**Dennis Armand DiMartino  
Attorney Reg. No. 0039270**

**Findings of Fact,  
Conclusions of Law, and  
Recommendation of the  
Board of Professional Conduct  
of the Supreme Court of Ohio**

**Respondent**

**Mahoning County Bar Association**

**Relator**

**OVERVIEW**

{¶1} This matter was heard on May 14, 2015 in Medina before a panel consisting of David E. Tschantz, John R. Carle, and William J. Novak, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11(A).

{¶2} Respondent was present at the hearing, represented by Mark Hanni. David C. Comstock, Jr. and Ronald E. Slipski appeared on behalf of Relator.

{¶3} Respondent's conduct involved multiple acts of failing to promptly inform clients of decisions, failing to comply with requests for information, failing to apprise clients of the status of their cases, failing to appropriately address fees and distributions of settlements, failing to appropriately address subrogation claim upon settlement and finally, failing to cooperate with the investigatory process.

{¶4} Based upon Respondent's admissions in his answer and the evidence presented at the hearing, the panel finds by clear and convincing evidence that Respondent engaged in professional misconduct, as outlined below.

{¶5} Upon consideration of the applicable aggravating and mitigating factors and case precedents, the panel recommends that Respondent be indefinitely suspended from the practice of law and that upon any application for reinstatement Respondent undergo a mental health assessment with recommendation and the completion of a continuing education program specifically as it relates to IOLTA accounts and law office management. In addition, Respondent shall make restitution in the amount of \$4,600 to Ember Herrington and Rita Chegar.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶6} Respondent was admitted to the practice of law in the state of Ohio on November 16, 1987 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

#### **Respondent's Disciplinary History**

{¶7} On December 7, 1994, Respondent was suspended from the practice of law for six months, stayed on the condition that no disciplinary complaints against Respondent were certified to the Board by a probable cause panel during that time. The stayed suspension was imposed based on Respondent's violation of DR-102(A)(6) for failing to timely respond to his clients' inquiries, failing to provide his client with a settlement statement, and failing to promptly forward his clients' portion of settlement proceedings. See *Mahoning Cty. Bar Assn. v. DiMartino*, 71 Ohio St.3d 95, 1994-Ohio-281.

{¶8} On July 18, 2007, Respondent was suspended from the practice of law in Ohio for one year stayed on the conditions that Respondent commit no further misconduct and that he serve a one-year probation pursuant to Gov. Bar R. V, Section 9. Respondent was found to have violated and DR-7-101(A)(2) for neglecting a entrusted legal matter and failing to carry out a contract of

professional employment. See *Mahoning Cty. Bar Assn. v. DiMartino*, 114 Ohio St.3d 174, 2007-Ohio-3605.

{¶9} On February 3, 2010, Respondent was suspended for six months based on a violation of Prof. Cond. R. 8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation. Because this violation occurred during the one-year stayed suspension ordered in the 2007 case and thus violated the terms of that stay, the Court lifted the stay and reinstated the one-year suspension. The Court further ordered that the six-month suspension was to run concurrently with the one-year reinstated suspension. *Mahoning Cty. Bar Assn. v. DiMartino*, 124 Ohio St.3d 360, 2010-Ohio-247. Respondent was reinstated to the practice of law on July 5, 2011.

#### **Procedural History of this Case**

{¶10} While it is relatively unusual to address the procedural history, in this case it is important because it demonstrates the continued lack of appreciation by Respondent of the disciplinary process.

{¶11} On October 29, 2014, the complaint was filed against Respondent arising out of his representation of Ember Herrington and Rita Chegar.

{¶12} Respondent failed to file a timely answer to the complaint and, on November 26, 2014, was notified that he was in default. On December 29, 2014, Respondent's default was certified to the Supreme Court.

{¶13} On January 14, 2015, the Court ordered Respondent to show cause why an interim default suspension should not be issued. On January 13, 2015, Respondent filed his answer, pro se, to the complaint without motion for leave to file.

{¶14} On February 12, 2015, the Court remanded the case to the Board for further proceedings under Gov. Bar R. V, Section 12.

{¶15} On February 12, 2015, the Board appointed a three-member panel to hear the case with a hearing scheduled on May 14, 2015 by entry dated February 24, 2015.

{¶16} On March 5, 2015, Relator filed a motion for leave to file an amended complaint including additional rule violations arising out of Respondent's representation of Paul Melia, Jr. and Kathy Melia as well as a violation relating to the overdraft of Respondent's IOLTA account. The motion for leave was granted on March 9, 2015. Respondent did not file a timely answer to the amended complaint.

{¶17} On more than one occasion throughout the prehearing process, Respondent failed to appear by phone and despite the panel chair's voice mails. Respondent did not make an effort to return the panel chair's calls or to address his failure to appear for telephone conferences.

{¶18} On May 13, 2015, Respondent requested a continuance of the hearing scheduled for the next day because he retained counsel, Mark Hanni, to represent him and also asked for leave to file an answer instanter. The chair overruled the motion for the continuance, but permitted Respondent to file an answer to the amended complaint instanter.

{¶19} The hearing was held on May 14, 2015. Respondent did not present evidence of any mental health assessment nor did he offer character letters.

{¶20} At the conclusion of the hearing, Respondent requested and obtained 14 days within which to obtain a mental health evaluation with appropriate documentation, 21 days to provide documentation of checks in support of his defense as well as character letters, and 30 days within which to file a post-hearing brief. None of these documents was filed with the Board.

{¶21} Respondent requested additional time within which to provide character letters. The request was denied.

{¶22} At the hearing on this case, testimony was submitted by way of deposition and live testimony from the following witnesses:

- a. Kathy McNabb Welsh (records custodian by way of deposition);
- b. Mary Lou Nogay (records custodian by way of deposition);
- c. Thomas Infante, Esq.;
- d. Douglas Toot, Esq.;
- e. Kent Marcum;
- f. Rita Chegar;
- g. Ember Herrington Knapp;
- h. Kathy Melia; and
- i. Dennis DiMartino.

#### **Count I—Ember Herrington and Rita Chegar**

{¶23} Ember Herrington was involved in a motor vehicle accident on May 17, 2003.

{¶24} At the hearing, Respondent testified that there was a signed contingency fee agreement with Herrington but it was not available and could not be located.

{¶25} The tortfeasor had insurance coverage of \$12,500 for liability and approximately \$6,500 for property damage.

{¶26} The liability claim against the tortfeasor was settled. Herrington received approximately \$6,500 for property damage.

{¶27} On March 4, 2005, a deposit was made to Respondent's IOLTA account in the amount of \$12,500.

{¶28} On March 15, 2005, check number 2014 was issued in the amount of \$4,344.93 from the settlement funds.

{¶29} On March 17, 2005, check number 2013 in the amount of \$8,155.07 was paid from the settlement funds with responding claims that the client received after litigation expenses had been deducted.

{¶30} A lawsuit was filed in Mahoning County Court of Common Pleas for an underinsured motorist claim against American Family Insurance Company, the carrier for Rita Chegar, Ember Herrington's mother (Case No. 2008-CV-1786).

{¶31} The underinsured motorist case was settled on or about January 6, 2010 for \$15,000. Respondent's IOLTA account reflects that \$15,000 was deposited and that the check was issued to Respondent for attorney's fees in the amount of \$5,000 and Herrington was to receive \$5,400.

{¶32} Respondent's IOLTA account does not reflect what happened to the balance remaining of \$4,600. In fact, Respondent had no explanation as to what happened to the \$4,600 as part of the settlement.

{¶33} As a result of the motor vehicle accident, Medical Mutual of Ohio asserted a subrogation claim against Chegar in the amount of \$11,018.

{¶34} Respondent negotiated the subrogated lien and agreed to pay the lien reduction from the settlement proceeds to Medical Mutual of Ohio. Respondent claimed that he prepared a check for \$4,600 and mailed it to ACS Recovery Services, the collection company for Medical Mutual. Notwithstanding, on March 14, 2013 ACS Recovery Services mailed a notice to Chegar that the lien monies was still owed.

{¶35} The next day Chegar called Respondent and asked him why the subrogation lien had not been paid.

{¶36} Respondent told Chegar that he mailed a check to Medical Mutual of Ohio to satisfy the subrogation lien from the IOLTA account. Respondent stated that the check was not cashed or returned.

{¶37} Respondent told Chegar he would correct the problem.

{¶38} A few weeks later, Chegar encountered Respondent in the Mahoning County Courthouse at which time Respondent indicated that the check from his IOLTA account payable to Medical Mutual of Ohio with regard to the subrogation lien had not been negotiated.

{¶39} Chegar placed approximately four telephone calls to Respondent, who failed to return her calls.

{¶40} The ACS Recovery Services claim remains pending and unresolved.

{¶41} On June 20, 2013, Chegar filed a grievance against Respondent with Relator.

{¶42} Respondent failed to reply to repeated inquiries by Relator and as of the date of filing, Respondent failed to reply to inquiries related to the investigation of the Chegar grievance.

{¶43} Further, Respondent failed to respond to Relator's inquiries relating to Respondent's IOLTA account.

{¶44} The evidence adduced at hearing, as well as the admissions of Respondent, resulted in violations of the following based upon clear and convincing evidence:

- Prof. Cond. R. 1.3 [diligence];
- Prof. Cond. R. 1.4(a)(1) [failing to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required];
- Prof. Cond. R. 1.4(a)(3) [failing to keep the client reasonably informed about the status of the matter];
- Prof. Cond. R. 1.4(a)(4) [failing to comply as soon as practical with reasonable requests for information from the client];

- Prof. Cond. R. 1.5(b) [the nature and scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, within a reasonable time after commencing the representation];
- Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation];
- Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with the representation separate from the lawyer's own property]; and
- Gov. Bar R. V, Section 4(G) [failure to cooperate].

{¶45} At the hearing, Relator dismissed alleged violations of the following:

- Prof. Cond. R. 1.4(a)(2) [failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished]; and
- Prof. Cond. R. 1.5(a) [a lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee].

## **Count II—Paul and Kathy Melia**

{¶46} On or about April 22, 2011, Paul Melia and Kathy Melia, husband and wife, filed an action by and through their attorney (“Attorney 1”) against Youngstown Orthopedic Associates, Ltd. and David Weimer, M.D. The case was known as Mahoning County Common Pleas Court Case No. 11-CV-269.

{¶47} During the course of his representation, the Melias provided Attorney 1 approximately \$2,000 to secure an affidavit of an expert medical witness.

{¶48} On or about September 9, 2011, a judgment entry was filed granting the Melias an extension of time to file their “affidavit of merit” on or before September 29, 2011.

{¶49} On or about October 6, 2011, the Melias, by and through Attorney 1, filed a notice of filing of expert affidavit pursuant to Rule 10(D) of the Ohio Rules of Civil Procedure along with the affidavit of Paul J. Cangemi, M.D.

{¶50} On or about October 19, 2011, by and through Attorney 1, the Melias dismissed the above matter pursuant to Civil Rule 41(A).

{¶51} Between October 19, 2011 and October 18, 2012, the Melias met with another attorney (“Attorney 2”) who assisted them in preparing another complaint against Youngstown Orthopedic Associates, Ltd. and David Weimer, M.D. as a refiling of Case No. 11-CV-269.

{¶52} The Melias provided Attorney 2 with the filing fee.

{¶53} On October 18, 2012, the Melias filed an action (the refiling of the above action) pro se against Youngstown Orthopedic Associates, Ltd. and David Weimer, M.D. in the Court of Common Pleas, Mahoning County, Ohio known as Case No. 12-CV-3261.

{¶54} The Melias then hired Respondent to represent them with regard to the above matter but at no time did Respondent have a contingency fee agreement with the Melias.

{¶55} Respondent does not have an executed fee agreement; however, he stated in his answer that a fee agreement was provided to the Melias and that he believed they signed it.

{¶56} The case was set for a hearing on status on February 25, 2013 at 10:00 a.m. before Magistrate Gene Fehr.

{¶57} Respondent told the Melias they did not need to attend the hearing. The Melias did not attend the hearing. Respondent also did not attend.

{¶58} On February 26, 2013, Magistrate Fehr filed an order indicating that the Melias had failed to appear, that a new hearing was set for March 20, 2013 at 11:30 a.m. before Magistrate Fehr to determine whether or not the case should be dismissed for failure to prosecute, and indicating that the Melias failure to appear would likely result in a dismissal of the action.

{¶59} On March 20, 2013, Respondent filed an entry of appearance as counsel on behalf of the Melias.

{¶60} On March 20, 2013, Magistrate Fehr filed an order which provided, inter alia, that the Melias had to provide the name and address of expert witnesses, along with a report of their testimony, to defendants on or before August 1, 2013.

{¶61} On or about July 2, 2013, the Melias were scheduled to be deposed. Respondent cancelled the depositions. The depositions were never rescheduled.

{¶62} On July 31, 2013, Magistrate Fehr filed an order requiring the Melias to respond to defendants' November 4, 2012 discovery request by August 8, 2013 indicating that the Melias continued failure to respond by that date would likely result in sanctions.

{¶63} On August 6, 2013, defendants filed a motion for summary judgment arguing, inter alia, that the Melias had failed to produce any expert report by August 1, 2013 pursuant to Magistrate Fehr's order filed March 20, 2013.

{¶64} On August 22, 2013, the court set defendants' motion for a non-oral hearing on Friday, September 13, 2013 and indicated that the Melias' response was due by September 6, 2013. On September 9, 2013, Respondent filed a motion on behalf of the Melias to extend the time for the Melias to respond to the motion for summary judgment.

{¶65} On September 12, 2013, defendants filed a brief in opposition to the motion to extend the time to respond to the motion for summary judgment.

{¶66} On September 17, 2013, defendants filed a supplemental motion for summary judgment.

{¶67} Mediation was scheduled for September 23, 2013 at 10:30 a.m.

{¶68} On September 23, 2013, the Melias appeared at the Mahoning County Courthouse for the mediation. Respondent did not appear.

{¶69} After waiting one hour, Magistrate Fehr informed the Melias that the mediation had been cancelled approximately one week prior. The Melias were never informed that the mediation had been cancelled.

{¶70} On September 26, 2013, Magistrate Fehr granted the Melias leave to serve defendants with an expert report until November 4, 2013. The Melias were also given leave to respond to the motion for summary judgment until November 4, 2013.

{¶71} Respondent never provided an expert medical report to defendants and never responded to defendants' motion for summary judgment.

{¶72} On November 19, 2013, Magistrate Fehr filed his decision granting defendants' motion for summary judgment for the reason that the Melias did not provide any expert reports.

{¶73} Respondent did not file any objection to the magistrate's decision.

{¶74} Respondent never informed the Melias of the magistrate's decision.

{¶75} On February 6, 2014, Judge James C. Evans filed a judgment entry adopting the Magistrate Fehr's decision granting the defendants' motion for summary judgment for the reason that the Melias did not provide any expert report and did not respond to the defendants' motion for summary judgment.

{¶76} Copies of the entry were mailed to Respondent on February 11, 2014.

{¶77} Subsequently, Respondent met with the Melias. At that meeting, Respondent told the Melias that he was going to contact an expert and submit an expert report to the court.

{¶78} When Respondent told the Melias he was going to submit an expert report, he knew their case had been dismissed. Respondent did not tell the Melias that judgment had been entered against them.

{¶79} The Melias did not receive any further communication from Respondent.

{¶80} In May 2014, the Melias contacted the court and were informed that their case had been dismissed in February 2014.

{¶81} Respondent was aware of the dismissal; *i.e.* the granting of defendants' motion for summary judgment, when he met with the Melias after February 11, 2014. He did not tell the Melias that judgment had been entered against them.

{¶82} On or about June 3, 2014, Paul Melia filed a grievance with Relator.

{¶83} Respondent was asked to respond to the complaint on or before June 16, 2014.

{¶84} Respondent did not provide a response.

{¶85} On June 27, 2014, Relator wrote a certified letter to Respondent requesting a response within ten days. Relator explained that a failure to respond would result in the assumption that the allegations were true. Relator also explained that the failure to respond would be considered a failure to cooperate which was potentially a separate ethical violation.

{¶86} To date, Respondent has never provided a response to the grievance and/or the inquiries made by Relator.

{¶87} The evidence adduced at the hearing, based upon the testimony and admissions by Respondent, resulted in violations of the following based upon clear and convincing evidence:

- Prof. Cond. R. 1.3;
- Prof. Cond. R. 1.4(a)(1);
- Prof. Cond. R. 1.4(a)(3);
- Prof. Cond. R. 1.4(a)(4);
- Prof. Cond. R. 1.5(b);
- Prof. Cond. R. 1.5(c) [not providing a written contingent fee agreement and/or a closing statement (R.C. 4705.15(B) and (C))];
- Prof. Cond. R. 8.4(c);

- Prof. Cond. R. 1.15(a); and
- Gov. Bar R. V, Section 4(G).

{¶88} At the hearing, Relator dismissed alleged violations of the following:

- Prof. Cond. R. 1.4(a)(2); and
- Prof. Cond. R. 1.5(a).

### **Count III—IOLTA Overdraft**

{¶89} First National Bank of PA issued a notice, pursuant to R.C. 4705.10, indicating that Respondent's IOLTA account number XXXX6819 was overdrawn on at least one occasion.

{¶90} That notice indicated that account number XXXX6819 had a dishonored item in the amount of \$5,000 returned on May 30, 2014.

{¶91} Disciplinary Counsel of the Supreme Court of Ohio made an initial inquiry and mailed a follow-up letter to Respondent with regard to this dishonored item.

{¶92} Disciplinary Counsel received no response.

{¶93} Disciplinary Counsel then became aware of the fact that the above matter relating to Herrington and Chegar was already proceeding. Accordingly, Disciplinary Counsel referred the overdraft notice to Relater.

{¶94} On September 12, 2014, Relater wrote to Respondent requesting an explanation.

{¶95} Respondent failed to reply.

{¶96} On September 26, 2014, Relater again wrote to Respondent, enclosed the letter of September 12, 2014, and indicated that if the Herrington and Chegar matter was certified, Relator would most likely amend the complaint to include this overdraft.

{¶97} Respondent failed to respond prior to the hearing on May 14, 2015.

{¶98} The evidence adduced at the hearing, as well as Respondent's admissions, resulted in the following violations based upon clear and convincing evidence:

- Prof. Cond. R. 1.15(a);
- Gov. Bar R. V, Section 4(G).

#### **AGGRAVATION, MITIGATION, AND SANCTION**

{¶99} Based upon the admissions, exhibits, and testimony adduced at the hearing, the panel finds the following aggravating factors:

- Prior disciplinary offenses;
- Dishonest or selfish motive;
- A pattern of misconduct;
- Multiple offenses;
- Lack of cooperation in disciplinary process prior to May 2015;
- Failure to make restitution (as of the date of this report).

{¶100} Based upon the admissions, exhibits, and testimony adduced at the hearing, the panel finds that there were no mitigating factors.

{¶101} There is no question that Respondent neglected legal matters, acted with dishonesty, permitted an overdraft of his IOLTA account, failed to account for settlement funds, failed to keep clients informed, failed to provide a written fee agreement, and failed to act in a competent and professional manner. Respondent also had a practice of flagrantly disregarding the disciplinary process. In determining whether or not a sanction is appropriate for Respondent's misconduct, all relevant factors must be considered including the duties of Respondent, the violations incurred, and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743.

{¶102} Attention is directed to the case of *Trumbull Cty. Bar Assn. v. Braun*, 133 Ohio St.3d 541, 2012-Ohio-5136. Respondent Braun neglected client matters and retained a fee without performing work. In addition, he failed to cooperate in the ensuing disciplinary investigation. He

also had a prior disciplinary record for similar misconduct where he did not cooperate with the disciplinary process. The Court indefinitely suspended Respondent Braun. Respondent in this case engaged in similar misconduct.

{¶103} In *Disciplinary Counsel v. Scacchetti*, 131 Ohio St.3d 165, 2012-Ohio-223. Respondent Scacchetti commingled personal funds and failed to respond to a disciplinary investigation. He also failed to deliver funds or property that a third person was entitled to receive. In this case, Respondent over-drafted his IOLTA account and failed to appropriately address a subrogation claim resulting in a failure to account for \$4,600.

{¶104} Given that Respondent had three prior disciplinary matters, no mitigating factors, and continues to disregard the process, the panel has determined that Respondent should be indefinitely suspended from the practice of law and that restitution be made in the amount of \$4,600 within sixty days of the filing of this report to the Herrington and Chegar clients. In addition, if Respondent chooses to seek reinstatement, such reinstatement shall be conditioned upon a mental health evaluation and a plan of treatment as well as appropriate CLE courses in law office management specifically in the area of IOLTA accounts.

#### **BOARD RECOMMENDATION**

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on August 7, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Dennis Armand DiMartino, be indefinitely suspended from the practice of law, ordered to make restitution in the amount of \$4,600 to the Herrington and Chegar clients within sixty days of date of the Supreme Court's disciplinary order, and ordered to pay the costs of these

proceedings. The Board further recommends that Respondent's reinstatement to the practice of law be subject to the conditions set forth the ¶104 of this report.

**Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**



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**RICHARD A. DOVE, Director**