

IN THE SUPREME COURT OF OHIO

<b>Disciplinary Counsel,</b>	:	<b>CASE NO. 2015-1315</b>
	:	
Relator,	:	
	:	
vs.	:	<b>RELATOR'S ANSWER TO</b>
	:	<b>RESPONDENT'S OBJECTIONS</b>
	:	<b>TO THE BOARD OF PROFESSIONAL</b>
<b>Raymond Leland Eichenberger, Esq.</b>	:	<b>CONDUCT'S REPORT AND</b>
	:	<b>RECOMMENDATIONS</b>
Respondent.	:	
	:	

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**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS TO THE BOARD OF  
PROFESSIONAL CONDUCT'S REPORT AND RECOMMENDATIONS**

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**RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS TO THE BOARD OF  
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Now comes relator, Disciplinary Counsel, and hereby submits the following answer to the objections of respondent, Raymond L. Eichenberger, to the report and recommendations of the Board of Professional Conduct (“Report”).

**INTRODUCTION**

On May 23, 2014, relator, Disciplinary Counsel, filed a one-count complaint alleging that respondent had committed acts of professional misconduct. The Board of Professional Conduct (“Board”) certified relator’s complaint on June 9, 2014. Respondent filed an answer to the allegations on August 5, 2014. The formal complaint arose out of an overdraft of respondent’s IOLTA. A three-person panel of the board held a hearing on this matter on June 23, 2015. On

August 10, 2015, the board issued its report, recommending that respondent be suspended from the practice of law for two years, with conditions.

### **STATEMENT OF FACTS**

On May 9, 2013, relator received an overdraft notice from PNC Bank reporting that respondent had overdrawn his IOLTA on May 2, 2013. The overdraft notice from PNC Bank described the transaction causing the overdraft as "PAYDAYADV CASHNETUSA in the amount of \$1,275.68, item returned, no charge". Stip. Ex. 2.

On June 12, 2013, relator sent a Letter of Inquiry (LOI) to respondent regarding the overdraft. Stip. Ex. 3. On June 27, 2013, relator received respondent's written response to the LOI. Stip. Ex. 4. Despite relator's specific requests in its LOI, respondent failed to provide client ledgers or his IOLTA bank statements. Transcript of Hearing ("Tr."), p. 53. Rather, respondent falsely stated that the transaction that caused the overdraft "was an unauthorized attempt to make a withdrawal from an account that was not even being used by me as a trust account." Stip. Ex. 4. Respondent failed to provide any additional details about the transaction that caused the overdraft. According to respondent, his IOLTA account numbers xx-xxxx-3339 and xx-xxxx-6377 were the *same* account but had two account numbers due to the bank's transition from National City Bank to PNC. *Id.*

Respondent further stated in his response to the LOI that he had already discontinued using his IOLTA account no. xx-xxxx-6377 due to an alleged security breach in March 2013 when he was made aware of an attempt to make an unauthorized transfer from the account by unknown third persons; however, respondent did not close the account until May 2013. *Id.* In a clear contradiction to his June 27, 2013 response to relator's LOI, respondent testified at the disciplinary hearing that he closed the former account because the Payday Loan that he

authorized to be automatically withdrawn from his IOLTA account continued to be withdrawn, despite his verbal request of the Payday loan company to cease withdrawals. Tr., p. 58.

Respondent opened a new IOLTA account at PNC in March 2013 under account number xx-xxxx-1362. Respondent provided to relator only *page 1 of 3* of the March bank statement reflecting the new account number. Stip. Ex. 4.

On July 15, 2013, relator sent another letter to respondent requesting the information that he failed to provide in his initial response. Specifically, relator requested copies of respondent's monthly bank statements on account number xx-xxxx-6377 for the month of the overdraft, the month before the overdraft, and the month after the overdraft, (i.e., April, May and June 2013). Stip. Ex. 5. On July 23, 2013, respondent replied to relator's inquiry, stating, in part,

I would once again emphasize to you, and state that you are missing the point, because, 1) this was a fraudulent and unauthorized transaction on an old account that was not even being used at the time, and 2) virtually all of the funds in my trust account at any given time are retainers being earned by me and not client funds.

Stip. Ex. 6.

Respondent enclosed a copy of a letter that he had written to PNC Bank dated March 13, 2013, which was some time before the overdraft in his IOLTA, reporting alleged fraudulent and unauthorized activity on his IOLTA account. *Id.*

Respondent provided only partial copies of his IOLTA bank statements for April and May 2013 and he altered page two of the April statement to conceal the improper Automated Clearing House (ACH) deductions that he had authorized to be withdrawn from his IOLTA. *Id.*, see also Report, at ¶¶ 32-34.

On August 21, 2013, relator sent a third letter to respondent specifically requesting an explanation of the transaction that caused the overdraft in May 2013. Stip. Ex. 7. According to

respondent, he began using his new IOLTA account number xx-xxxx-1362 exclusively in early April 2013. Stip. Ex. 4. However, according to bank record activity for his previous IOLTA (account no. xx-xxxx-6377), there were deposits totaling \$2,134.48, checks totaling \$2,282.89, and ACH deductions totaling \$1,191.54, for the month of April 2013. Tr., pp. 63-64. Therefore, relator requested that respondent provide the redacted information from the April 2013 bank statement and client ledgers related to the activity on account number xx-xxxx-6377 for April 2013. Relator also requested bank statements and client ledgers for respondent's new IOLTA (account number xx-xxxx-1362), which respondent opened in March 2013. Stip. Ex. 7.

On September 5, 2013, respondent replied to relator's inquiry regarding the electronic transfer that caused the overdraft in May 2013. Respondent stated,

As this transaction was not initiated by me, in the way of writing a check or personally initiating a withdrawal, it is very unfair to attempt to blame the situation on me, or to attempt to state that I caused a deficiency in the bank account balance. I did nothing of the sort. In fact, since the electronic transfer was declined, it never occurred. \* \* \* The fact that the account was, for all practical purposes closed and dormant at the time of this occurrence, also makes your inquiry more than a little silly.

Stip. Ex. 8, see also, Tr., p. 65.

Respondent further said that, in response to relator's requests for client ledgers and redacted information from the April 2013 bank statement, "all amounts in the old Trust Account after April 1, 2013 were in fact EARNED fees, and there were not even any funds that were unearned retainers in the account." He further stated, "the electronic transfers that you speak of were transfers of these already earned attorney's fee amounts to other accounts that were owned by me." Respondent refused to cooperate with relator's inquiry, stating, "the places where I own accounts and where I made electronic transfers are not relevant to your inquiry". Stip. Ex. 8.

Respondent also stated,

I will decline to send you the monthly statements from the new Trust Account, as there are no allegations pending of any problems with the account \* \* \* I find your threats to subpoena my bank records to be totally out of line and offensive. The authority of your office in this simple and easily explained matter surely cannot extend to such overly broad and invasive limits.

*Id.*

Despite multiple requests from relator for information in furtherance of its investigation, respondent failed to provide any bank records or client ledgers for IOLTA number xx-xxxx-1362 and did not provide any client ledgers or the *un-altered* bank statements for IOLTA account number xx-xxxx-6377. *Id.*, see also Tr. p. 64.

Due to the lack of information provided by respondent during the course of relator's investigation, relator obtained respondent's PNC IOLTA bank records under subpoena. Respondent's bank records demonstrated that, from at least September 1, 2012 through October 8, 2013, respondent used both of his PNC IOLTAs as his personal and operating bank accounts. Stip. Exs. 9-10, see also Tr., p. 14.

From at least September 1, 2012 through October 8, 2013, respondent used his PNC IOLTA accounts in the following manner; including, but not limited to:

- On at least 25 occasions, respondent wrote checks payable to Columbia Gas, WOW cable, and American Electric Power, totaling \$1,681.58.
- On at least 39 occasions, respondent issued preauthorized electronic checks or wrote checks payable to Target, totaling \$1,043.84.
- On 12 occasions, respondent wrote checks payable to DEB Group for monthly rent of respondent's law office, totaling \$7,200.
- On 12 occasions, respondent wrote checks payable to Spare Room Storage for storage units, totaling \$1,057.68.
- On at least 87 occasions, respondent wrote checks payable to himself, totaling \$7,265.

- On August 22, 2012, respondent wrote a check payable to Tobacco Road Golf and Travel for \$486.
- On April 19, 2013, respondent wrote a check payable to Legacy Golf Packages for \$640.
- On May 8, 2013, respondent wrote a check payable to the Memorial Tournament for two tournament badges in the amount of \$315.
- On April 15, 2013, respondent wrote a check payable to the U.S. Treasury for \$66.67, noting on the memo line "Irvin/Eichenberger 2012 Form 1040," and respondent wrote a check payable to Ohio Treasurer of State for \$10.00, noting in the memo line "Irvin/Eichenberger 1040."
- On November 21, 2012, respondent wrote a check payable to the Columbus Symphony for two tickets in the amount of \$85.75.
- Monthly payments of \$56.72 were issued to Protective Life Insurance via ACH deductions and checks written by respondent.
- On August 16, 2013, respondent wrote a check for \$128.25 to Squared Insurance Agency for partial payment on his malpractice insurance premium.
- On ten occasions, from July 31, 2013 through October 8, 2013, respondent wrote and personally endorsed checks to Red Foot Racing Stables, LLC, totaling \$3,990.
- On numerous occasions, respondent wrote checks to Kroger, Hallmark, Kohl's, Walgreens, Anthony Thomas, Strader's, Darby Creek Nursery, JC Penney, Bath & Body Works, and Toys R Us.

Stip. Exs. 12-25.

On April 1, 2014, relator sent a letter to respondent requesting an explanation regarding the use of his IOLTA for personal transactions. Stip. Ex. 26. On April 16, 2014, relator received respondent's response, wherein he identified Red Foot Racing Stables as an Ohio LLC, which he owned as its sole member. He further stated that "transfers to Red Food once again involve the shifting of my personal income by the way of earned fees." Respondent stated,

I repeat that the funds in my trust account are uniformly almost always retainers that have been or will be earned quickly, and that the funds belong to me personally. The funds are never withdrawn from the account until they are due and payable to me. Therefore,

the transactions you mention in your letter are draws of my earned fees, and involve my personal income to use as I see fit.

Stip. Ex. 27.

Respondent's IOLTA records also evidenced client funds being deposited monthly into the account. Stip. Exs. 9-11, Tr., pp. 30-31. However, since respondent refused to provide client records or ledgers, relator was unable to determine if the fees had been earned. In fact, respondent testified that he did not maintain client ledgers. Tr., pp. 20, 47. He further testified that he knew the funds that he frequently removed from his IOLTA were earned fees because he looked at his time records and "some of it was in my head." Tr., pp. 21-25.

In his July 23, 2013 response, respondent described the transaction that caused the overdraft as "fraudulent and unauthorized." Stip. Ex. 6. After review of respondent's bank records, relator determined that the transaction was neither fraudulent nor unauthorized. Respondent's bank records reflect monthly ACH transactions from PAYDAYADV CASHNETUSA with the *same* identifying account number but with varying monthly amounts from September 2012 through May 2013. Stip. Exs. 6, 9. Despite his previous false characterization of the transaction that caused the overdraft, respondent testified at the hearing that the transaction was in fact a recurring transaction from his IOLTA that respondent authorized to repay his Payday Loan. Tr., pp. 47-49.

## **RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS**

### **I. THE PANEL CORRECTLY OVERRULED RESPONDENT'S MOTION TO DISMISS**

Respondent asserts that the board's issuance of a subpoena for respondent's bank records without notice to respondent and without giving him the opportunity to move to quash the subpoena, violated his Constitutional and due process rights. But respondent's claims are

without merit. Respondent's argument that relator ignored written rules governing the issuance of the subpoenas during the investigative stage is entirely false. To the contrary, it is the respondent who has failed to recognize and continues to ignore the Rules and Regulations set forth by this Court.

BPC Proc. Reg. 6(A) unequivocally states, in relevant part, "a notice of subpoena is NOT required to be issued to the respondent unless probable cause has been found." At the hearing, the panel rejected this same argument. Invoking BCGD Proc. Reg. 6(A), the panel stated, "in fact, Rule 6(A) specifically allows for a subpoena during the investigatory process without notice to respondent." Tr. pp. 99-100.<sup>1</sup>

Relator was not required, during its confidential disciplinary investigation of this matter, to serve respondent with a copy of its subpoenas for respondent's IOLTA records or to otherwise provide him with notice of the subpoenas. The subpoenas for respondent's IOLTA records were properly signed and issued by the Director of the Board of Professional Conduct of the Supreme Court (formerly the Board of Commissioners on Grievances and Discipline) on October 7, 2013 and May 1, 2014, over one month before the board certified the complaint. Consequently, respondent was not entitled to notice and the panel appropriately denied respondent's motion to dismiss.

Furthermore, respondent's argument that he was denied due process resulting from a lack of notice rings hollow when in fact, respondent conceded in his letter to relator that he was well aware that relator would subpoena his bank records in furtherance of its investigation, stating, "I find your threats to subpoena my bank records to be totally out of line and offensive." Stip. Exs. 7, 8.

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<sup>1</sup> On January 1, 2015, the Board of Commissioners on Grievances and Discipline became the Board of Professional Conduct; consequently, BCGD Proc. Reg. 7(A) became BPC Proc. Reg. 6(A).

## **II. THE PANEL AND BOARD CORRECTLY FOUND THAT RELATOR PROVED BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED THE RULES OF PROFESSIONAL CONDUCT**

### **A. Relator proved by clear and convincing evidence that respondent violated Prof. Cond. R. 1.15(a)**

Respondent's argument that relator failed to meet its burden of clear and convincing evidence in regard to the commingling of funds in his IOLTA is absurd, particularly given the board's findings that:

- Respondent improperly used his IOLTA account for personal and non-client related business;
- It is uncontroverted that respondent failed to properly manage his IOLTA account for most of his 35 years of practicing law; and,
- There are over 200 instances of improper transactions made through respondent's IOLTA account in the 24 months prior to the hearing.

Report, at ¶25-27.

Respondent overdrew his IOLTA on May 2, 2013. Stip. Ex. 2. The improper transaction that caused the overdraft was an authorized withdrawal by respondent from his IOLTA for repayment of a personal Payday loan. Tr., p. 55. Furthermore, it is undisputed that, between September 1, 2012 through October 8, 2013, respondent wrote checks and authorized withdrawals from his IOLTA to pay his personal and office expenses.

- On at least 25 occasions, respondent wrote checks payable to Columbia Gas, WOW cable, and American Electric Power, totaling \$1,681.58.
- On at least 39 occasions, respondent issued preauthorized electronic checks or wrote checks payable to Target, totaling \$1,043.84.
- On 12 occasions, respondent wrote checks payable to DEB Group for monthly rent of respondent's law office, totaling \$7,200.
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- On numerous occasions, respondent wrote checks to Kroger, Hallmark, Kohl’s, Walgreens, Anthony Thomas, Strader’s, Darby Creek Nursery, JC Penney, Bath & Body Works, and Toys R Us.

Report, at ¶20; see also Stip. Exs. 12-25.

Respondent has maintained that he only withdrew earned fees from his IOLTA; however, respondent was unable to produce one shred of evidence to support his self-serving testimony. On the contrary, relator proved, and the board agreed, that respondent blatantly and repeatedly violated Prof. Cond. R. 1.15(a)(2), Prof. Cond. R. 1.15(a)(3), and Prof. Cond. R. 1.15(a)(4). The board found that no records were ever produced in this matter indicating even an attempt at compliance with the requirements set forth in the rule. Furthermore, respondent’s disdain for the

investigatory process, fraudulent conduct, and lack of cooperation only exacerbated the problem. Report, at ¶42.

The record is replete with evidence that respondent deposited both personal funds and client funds, at various times, into his IOLTA. Respondent failed to maintain rule compliant ledgers, and failed to conduct a monthly reconciliation of his IOLTA. Tr. pp. 20, 47. At times, the only bank account that respondent used for personal, business, and client-related activity was his IOLTA. Tr. pp. 15, 79, 80. At the hearing, respondent testified that he carried blank checks from his IOLTA account in his pocket at all times to cover frequent personal and business expenses. Tr. p. 28. Respondent withdrew funds from his IOLTA in a sporadic and haphazard manner, relying solely on his recollection of what was in his time records and “what was in his head.” Tr. pp. 23, 25. By his own admission, respondent was sloppy and careless. Tr. p. 92.

Yet, in his objections respondent attempts to minimize the improper use of his IOLTA to pay personal and business expenses by citing the board’s report that there was no evidence presented that any client funds were lost as a result of his misconduct. Respondent’s rationale for his comprehensive mismanagement and grave misuse of his IOLTA is seriously misguided. The Court, in *Disciplinary Counsel v. Wise*, 108 Ohio St.3d 381, 2006-Ohio-1194, at ¶15, 843 N.E.2d 1198, quoting, *Miles*, 76 Ohio St.3d 574 at ¶577, 1996-Ohio-359, 669 N.E.2d 831, noted that it is “of the utmost importance that attorneys maintain their personal and office accounts separate from their clients’ accounts” and that any violation of that rule “warrants a substantial sanction whether or not the client has been harmed.” The board was correct in finding by clear and convincing evidence that respondent’s conduct violated Prof. Cond. R. 1.15(a). Report, at ¶39.

**B. Relator proved by clear and convincing evidence that respondent violated Prof. Cond. R. 8.4(c)**

In response to relator's inquiry of his IOLTA overdraft, respondent provided relator a copy of an altered bank statement wherein he intentionally concealed improper electronic debit transactions from his IOLTA. The PNC IOLTA bank statement that respondent provided was different from the monthly bank statement provided by PNC Bank, as it clearly had been altered by respondent. Respondent intentionally concealed the automatic debit to Payday Loans, which was the transaction that caused the overdraft, as well as multiple credit card payments and life insurance premium deductions. Tr., pp. 59-62; see also Stip. Exs. 6, page 6; Stip. Ex. 9, page 341.

Despite relator's request during the investigation that respondent provide the concealed information, he failed to comply. Rather, he provided an evasive and misleading written response, stating,

As this transaction was not initiated by me, in the way of writing a check or personally initiating a withdrawal, it is very unfair to attempt to blame the situation on me, or to attempt to state that I caused a deficiency in the bank account balance \* \* \* the fact that the account was, for all practical purposes closed and dormant at the time of this occurrence, also makes your inquiry more than a little silly.

Stip. Ex. 8.

Respondent refused to cooperate with relator's inquiry, stating "the places where I own accounts and where I made electronic transfers are not relevant to your inquiry." Tr., pp. 65-66; see also Stip. Ex. 8.

Respondent's testimony that the concealed information resulted from a "copy error" is beyond the pale. The board found that the information that respondent concealed was in the middle of the page and only included information damaging to respondent's claims. Tr., p. 59-

62, see also Report, at ¶34. Despite respondent's testimony, the board properly concluded that respondent intentionally and deceptively altered bank records before production in an effort to conceal transactions he knew were inappropriate. Report, at ¶32. Furthermore, the board found that respondent's intentional concealment of the information was a willful act of deception, dishonesty, and fraud. *Id.*

In addition to respondent's false testimony at the hearing, the board found that respondent repeatedly made material misrepresentations in correspondence with relator in a deceptive and willful effort to conceal irregularities in his IOLTA account. Report, at ¶37; see also Stip. Exs. 4, 6, 29.

Relator established by clear and convincing evidence that respondent's conduct violated Prof. Cond. R. 8.4(c). Report, at ¶39.

**C. Relator proved by clear and convincing evidence that respondent violated Prof. Cond. R. 8.4(d), 8.1(b), and Gov. Bar R. V(4)(G)**

The board found that respondent repeatedly and consistently refused to provide copies of his IOLTA bank records during both the investigation and litigation phase of the proceedings. Report, at ¶29. The responses that respondent did provide to relator were evasive and misleading. Stip. Exs. 4, 6, 8, 27. As already discussed, respondent refused to cooperate with relator's inquiries, claiming relator's inquiries were "more than a little silly" and that "where he owns accounts and made electronic transfers from are not relevant to relator's inquiry." Tr., pp. 65-66; see also Stip. Ex. 8. Furthermore, at the hearing, respondent confirmed his lack of cooperation when in response to relator's question, he stated, "I did not provide what you asked for, you're correct." Tr., p. 64.

Respondent testified at the hearing that a respondent's cooperation under Prof. Cond. R. 8.1 was subject to interpretation and a "gray area." Tr., p. 73. Notwithstanding his repeated

evasive and incomplete responses to relator's inquiries, respondent testified that he provided what *he* felt was sufficient to relator's inquiries. Tr., pp. 73-74. Respondent's testimony was another example of respondent's disdain for the Court's disciplinary process. Respondent's repeated failure to cooperate with relator's requests seriously impeded the investigation, thus prejudicing the administration of justice. Report, at ¶38.

Respondent's arrogance and disdain for the disciplinary process throughout the investigation phase continued during the litigation phase. The board found that even after respondent was ordered by the panel chair to produce documents, respondent refused. Report, at ¶¶30. Based on respondent's non-compliance, the panel was forced to issue an extraordinary order recommending that respondent be found in contempt. Report, at ¶¶31.

Furthermore, respondent's claim that, after the complaint was filed, he ultimately provided to relator all of the available documents and records relator had requested is far from the truth and without merit. Because respondent failed to maintain client ledgers, what respondent ultimately provided amounted to nothing more than his IOLTA checkbook register and some client time records. Two months before the hearing and in response to his deposition, respondent provided what appeared to be two client ledgers along with his IOLTA bank statements from January through March 2015. Although respondent told the panel - at the time of the hearing - he was keeping client ledgers and had been for at least one year prior, he failed to provide any evidence to support his testimony. Report, at ¶42; see also Tr., pp. 85-87.

To this day, respondent continues to make excuses and blame others for his misconduct. In fact, in his objections, respondent blames the panel chair for his failure to cooperate, asserting the panel chair unreasonably failed to take into account his travel schedule and ignored his explanations. He further argues that he was zealously representing himself in an adversarial

proceeding and that he didn't understand what was being asked of him. But respondent's actions speak louder than his words. Respondent knew exactly what was being asked of him and rather than reply in an honest and forthright manner, he chose to submit evasive, misleading, and non-responsive replies to relator's inquiries. To this day, respondent has refused to acknowledge any wrongdoing. Report, at ¶¶13, 17, 18, 24.

The board was correct in finding by clear and convincing evidence that respondent violated Prof. Cond. R. 8.4(d), 8.1(b), and Gov. Bar R. V(4)(G); consequently, this Court should overrule respondent's second objection.

### **III. RESPONDENT'S MISCONDUCT WARRANTS A TWO-YEAR SUSPENSION**

In his objections, respondent asserts that a public reprimand is the appropriate sanction. But respondent can cite no relevant authority for his flawed position. In fact, despite arguing that any sanction other than a public reprimand would be an "outrage" and "fundamentally unfair", respondent cites to cases that are easily distinguishable and none of them exhibit the level of non-cooperation that respondent exhibited.

For example, in *Cleveland Bar Assn. v. Cox*, 98 Ohio St.3d 420, 2003-Ohio-1553, 786 N.E.2d 454, this Court imposed a public reprimand upon a lawyer who engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by lying to relator. However, unlike respondent, *Cox* involved an isolated incident of misconduct. Furthermore, the Court found no aggravating factors but found mitigating factors that Cox had no prior discipline and no selfish motive. *Id.* at ¶6.

Unlike respondent, the lawyers in *Cincinnati Bar Assn. v. Mezher and Espohl*, 134 Ohio St.3d 319, 2012-Ohio-5527, 982 N.E.2d 657, charged their client with a fee for an advertised "free" consultation and failed to communicate the basis for the fee to their client. They were

found to have significant mitigation, i.e., no prior discipline, no dishonest or selfish motive, displayed a cooperative attitude, demonstrated good character and Mezher took steps to rectify the problems associated with her website and fee agreements. Additionally, the only aggravating factor present was failure to make timely restitution. *Id.* at ¶23.

In *Cincinnati Bar Assn. v. Hackett*, 129 Ohio St.3d 186, 2011-Ohio-3096, 950 N.E.2d 969, the lawyer entered into a consent to discipline agreement and the Court found that the lawyer violated Prof. Cond. R. 1.5 and 5.6. The Court found significant mitigating factors, i.e., no prior discipline, cooperation in the disciplinary proceeding, and evidence of good character. Furthermore, the Court found just one aggravating factor – respondent’s use of the unethical employment agreement with more than one associate. *Id.* at ¶10.

Finally, in *Disciplinary Counsel v. Roberts*, 117 Ohio St.3d 99, 2008-Ohio-505, 881 N.E.2d 1236, this Court found significant mitigating factors and a single aggravating factor. Mitigating factors that were found included no prior discipline, no selfish motive, and the presence of good character and reputation. Furthermore, unlike respondent, the lawyer in *Roberts* cooperated in the disciplinary process and exhibited a willingness to accept responsibility for his mistakes. *Id.* at ¶18.

The cases upon which respondent relies in support of a public reprimand are factually distinguishable and each contain significant mitigating factors, including cooperation in the disciplinary process. In the case at bar, the board found that respondent has no prior disciplinary record, but also found significant aggravating factors, including that respondent acted with a dishonest or selfish motive; demonstrated a pattern of misconduct; committed multiple offenses; showed a lack of cooperation in the disciplinary process; submitted false evidence; submitted

false statements; and engaged in other deceptive practices during the disciplinary process.

Report, at ¶¶40,41.

The panel recommended a two-year suspension with one year stayed. Report, at ¶4. The panel further recommended that respondent be assigned a mentor to provide oversight of his IOLTA account and attend a continuing legal education course on law firm management. Report, at ¶47. The board adopted the report, but recommended that respondent be suspended from the practice of law in Ohio for two years, with reinstatement subject to the same conditions. Report, at p. 10. The board predicated its recommendation on the following:

- (1) respondent's failure for nearly 35 years to adhere to the requirements for maintaining separation between his personal funds and client funds;
- (2) the deceptive and deceitful action of altering bank records provided to relator in an attempt to conceal inappropriate transactions;
- (3) positions taken by respondent during the disciplinary proceedings are without merit and contrary to the requirements of the Rules of Professional Conduct;
- (4) respondent's failure to appreciate the wrongfulness of his misconduct; and,
- (5) respondent's repeated and flagrant disregard for his duty to cooperate in the disciplinary proceedings.

Report, at pp. 10-11.

The board found no mitigating factors other than a lack of previous discipline. Report, at ¶40. Despite respondent's less than genuine claims of additional mitigation set forth in his brief, respondent offered no evidence at the hearing to support the factors listed under Gov. Bar R. V(13)(C).

In his objections, respondent asserts that the board erroneously found that he failed to show remorse for his actions. The so-called "remorse" that respondent describes, i.e., humiliation, embarrassment, health, and personal problems, is not remorse, but rather

*consequences* of respondent's misconduct. The board was correct in finding that, at no time before, or during the hearing, did respondent show any remorse for intentionally and willfully altering his records. Report, at ¶36.

In making its recommendation, the panel relied on two cases that, in its opinion, were most closely aligned to the case at bar. First, the panel cited *Disciplinary Counsel v. Riek*, 125 Ohio St.3d 46, 2010-Ohio-1556, 925 N.E.2d 980. In *Riek*, the Court held that an 18-month suspension, with 12 months conditionally stayed, was appropriate for an attorney who used his trust account to pay personal expenses and subsequently provided a check to a client without sufficient funds to honor the check. He then misled his client as to the source of the problem. *Id.* at ¶7. Second, the panel cited *Disciplinary Counsel v. Dockry*, 133 Ohio St.3d 527, 2012-Ohio-5014, 979 N.E.2d 313. In *Dockry*, the Court issued a one-year suspension, all stayed, on conditions. The respondent in *Dockry* deposited and maintained personal funds in his client trust account, used that account to pay personal expenses, borrowed client funds from the account for his personal use, failed to maintain the appropriate ledgers, and failed to reconcile his account. The Court did not impose an actual suspension because Dockry took corrective action and had significant mitigating factors. *Id.* As the panel properly pointed out, that is not the case in this matter. Report, at ¶45.

The actual misconduct in both *Riek* and *Dockry* are similar to respondent's; however, the respondent's misconduct is aggravated by his dishonesty, deception, and lack of cooperation as evidenced throughout the disciplinary process, thus warranting an upward departure from the sanctions imposed in *Riek* and *Dockry*. As the panel properly determined, this matter is not limited to the inappropriate use of the IOLTA account; it also includes the deliberate and systematic attempts to deceive relator through non-cooperation, deception, and fraud. Report, at

¶46. “Generally, misconduct involving dishonesty, fraud, deceit, or misrepresentation warrants an actual suspension from the practice of law”. *Disciplinary Counsel v. Karris*, 129 Ohio St.3d 499, 2011-Ohio-4243, ¶ 16, 954 N.E.2d 118, citing *Disciplinary Counsel v. Kraemer*, 126 Ohio St.3d 163, 2010-Ohio-3300, ¶ 13; 931 N.E.2d 571; and *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 1995-Ohio-261, 658 N.E.2d 237, syllabus. *Id.* In the case at bar, respondent’s dishonesty coupled with his blatant disregard for the disciplinary process, warrants a two-year suspension.

In support of its recommendation of a two-year suspension, relator relies on *Disciplinary Counsel v. Crosby*, 124 Ohio St.3d 226, 2009-Ohio-6763, 921 N.E.2d 225. In *Crosby*, this Court imposed a two-year suspension upon William Crosby after finding that he used his IOLTA as his personal and operating account for an extended period of time and failed to reconcile his account, testifying instead that he kept a running total of the amount owed to him in his head. Crosby had no previous discipline, nor was there any evidence that client funds were missing; however, Crosby engaged in a pattern of misconduct, committed multiple offenses, failed to fully cooperate in the investigation, and lied about the unorthodox manner in which he managed his IOLTA. *Id.* at ¶17.

In the case at bar, respondent managed his IOLTA accounts in a similar fashion—even testifying that he kept the figures “in his head.” Tr., p. 23. And like the lawyer in *Crosby*, respondent’s misconduct spanned many years, he committed multiple offenses, failed to cooperate in the disciplinary process, and deliberately engaged in deceptive conduct aimed at concealing his misdeeds. Report, at ¶¶26, 32, 41. In light of *Crosby*, respondent’s misconduct warrants a two-year suspension from the practice of law.

Respondent's level of noncooperation cannot be overstated. Respondent's disdain for the process resulted in the panel chair recommending that respondent be found in contempt. Report, at ¶ 31. In *Cincinnati Bar Assn. v. Alsfelder*, 138 Ohio St.3d 333, 2014-Ohio-870, 6 N.E.3d 1162, this Court indefinitely suspended a lawyer for his failure to cooperate in the disciplinary process after the Court had twice found him in contempt, despite the fact that the underlying misconduct had been dismissed. In imposing its sanction, the Court stated,

Here, Alsfelder's misconduct goes far beyond the typical failure to cooperate in a disciplinary investigation. It encompasses a complete and contumacious disregard of this court's orders over a period of years. Alsfelder's recalcitrance flies in the face of his oath of office, his duties to this court, and his duties to the legal profession as a whole. If he is unable or unwilling to conduct himself with dignity, civility, and respect in the conduct of his own legal affairs, we cannot expect him to competently, ethically, or professionally represent the clients who entrust him with their most important affairs.

*Id.* at ¶38.

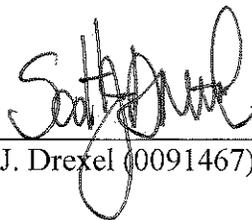
In the case at bar, respondent's misconduct, coupled with the failure to cooperate, warrants a two-year suspension from the practice of law.

### **CONCLUSION**

Relator established - and the board found - by clear and convincing evidence that respondent violated the disciplinary rules as charged. After considering the evidence presented in this matter, the significant aggravating factors, the lack of mitigating factors, and the Court's decisions in similar cases, relator requests that this Court overrule respondent's objections and adopt the board's recommendation and suspend respondent from the practice of law for two years, with reinstatement subject to the condition that respondent complete a continuing legal education course on law firm financial management and upon reinstatement, that respondent be

required to work with a mentor assigned by relator to provide oversight of respondent's compliance with the IOLTA requirements.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, Raymond Leland Eichenberger, Esq., 7544 Slate Ridge Boulevard, Reynoldsburg, OH 43068, and upon Richard A. Dove, Director, Board of Professional Conduct, 65 S. Front Street, 5<sup>th</sup> Floor, Columbus, Ohio 43215 this 26<sup>th</sup> day of October, 2015.



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