

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

In re:

Case No. 2015-030

Complaint against

**Virginia Mary Barborak
Attorney Reg. No. 0068601**

Respondent

Columbiana County Bar Association

Relator

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

OVERVIEW

{¶1} This matter was heard on December 3, 2015 in Columbus before a panel consisting of Dr. John Carle, Lisa Eliason, and Patricia A. Wise, 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.

{¶2} Respondent was present at the hearing, represented by John B. Juhasz. Timothy A. Barry appeared on behalf of Relator.

{¶3} The case arose out of a four-count complaint. All of the counts involved allegations of Respondent's failure of proper safekeeping and record-keeping of client funds, her knowingly making false statements in the investigation of those allegations, and related allegations of dishonesty, fraud, deceit, or misrepresentation, conduct prejudicial to the administration of justice, and conduct that adversely reflects on the lawyer's fitness to practice law.

{¶4} Based upon its findings of fact, conclusions of law, and the evidence presented at the hearing, the panel finds, by clear and convincing evidence, that Respondent engaged in

professional misconduct as outlined below. Upon consideration of the applicable aggravating and mitigating factors and case precedent, the panel recommends that Respondent be suspended indefinitely from the practice of law, with certain conditions that she must satisfy before being reinstated to the practice of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} The parties entered into stipulations of fact. Exhibits were admitted into evidence at the hearing. Respondent was the sole witness. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶6} Respondent was admitted to the practice of law in the state of Ohio on November 10, 1997 and is subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶7} Respondent has no prior disciplinary history.

Count One—Patsey Estate, Trumbull County Probate Court

{¶8} Respondent prepared James R. Patsey’s will that was executed on September 12, 2011. The will provided that after payment of debts, funeral expenses, and administration expenses the “first fifty thousand (\$50,000.00) dollars of my estate shall go to maintain and fund the J.J. Patsey Scholarship Fund, in memory of my son J.J. Patsey who died in 1989.” The scholarship fund was administered by the Lisbon Alumni Association. Patsey’s will provided that the remainder of his estate go to Sean M. Patsey, his only son and the executor of the estate.

{¶9} James Patsey died on February 4, 2013. On March 7, 2013, Sean M. Patsey wrote a \$51,000 check payable to the Barborak Law Offices and delivered it to Respondent who on March 8, 2013 deposited it into the Barborak Law Trust Account at 1st National Community Bank, Account Number 1 (“trust account”). The trust account is an IOLTA/IOTA.

{¶10} The trust account balance on March 1, 2013 was \$268.68 and on March 8, 2013 after the \$51,000 check was deposited the amount balance was \$51,268.68. Respondent then signed a number of checks that were not related to the Patsey Estate.

{¶11} Respondent signed Check No. 1646 dated March 8, 2013 for \$5,000 payable to Barborak Law Offices which was deducted from the trust account on March 11, 2013.

{¶12} Respondent signed Check No. 1647 dated March 8, 2013 for \$500 payable to a client that was deducted from the trust account on March 11, 2013.

{¶13} Respondent signed Check No. 1652 dated March 14, 2013 for \$22,000 payable to cash that was deducted from the trust account on March 18, 2013. The memo line of the check lists "Jennifer Angle" who is employed by Respondent and is Respondent's sister.

{¶14} Respondent signed Check No. 1653 dated March 11, 2013 payable to a client for \$4,729.85 that was deducted from the trust account on March 20, 2013.

{¶15} Respondent signed Check No. 1654 dated March 11, 2013 payable to a client for \$3,999.76 that was deducted from the trust account on March 25, 2013.

{¶16} Respondent signed Check No. 1656 dated March 20, 2013 payable to herself for \$1,500 that was deducted from the trust account on March 21, 2013.

{¶17} On March 28, 2013, Respondent directed, by her signature on a debit transaction slip, that \$10,000 be withdrawn from the trust account and the withdrawn funds were deposited in Account Number 2 at 1st National Community Bank. A \$10,000 cashier's check was then prepared with the remitter being Virginia Barborak and the cashier's check was payable to another client.

{¶18} There were only two other deposits made into the trust account in March 2013, one for \$150 and one for \$900 and one other check was written, being Check No. 1655 dated March 18, 2013 payable to Client 5 for \$150.

{¶19} The balance in the trust account on March 31, 2013 was \$4,439.07.

{¶20} On May 13, 2013, Respondent filed with the Trumbull County Probate Court, an Application to Probate Will and an Application for Authority to Administer Estate as counsel for the Fiduciary and on May 20, 2013 an entry appointing Sean M. Patsey as fiduciary (“executor”) was signed by Probate Court Judge Swift.

{¶21} The final account in the Patsey Estate was due to be filed on November 18, 2013, which was not filed. On February 6, 2014, Judge Swift issued a Citation for Delinquent Final Account or Application to Extend Administration and Notice of Hearing ordering the appearance of Respondent and the executor before the court on March 12, 2014 to show cause why the executor should not be removed for the failure to file the final account.

{¶22} On February 18, 2014, Respondent filed an Application to Extend Administration which was granted by Judge Swift.

{¶23} On March 31, 2014, Respondent filed a Fiduciary’s Account and Final Receipt and Disbursements.

{¶24} The final receipts and disbursements filed on March 31, 2014 stated that the \$50,000 had been distributed to the Lisbon Alumni Association, which was false as the funds had not been distributed yet.

{¶25} In June 2014 and July 2014, Respondent issued three checks totaling \$50,000 to the Lisbon Alumni Association. On June 12, 2014, Respondent issued Check No. 1132 for \$25,000 from a separate IOLTA in the name of Virginia M. Barborak, Account Number 3 at 1st National Community Bank. On June 23, 2014, Respondent issued Check No. 1138 for \$17,000 from her IOLTA Account Number 3. And on July 2, 2014, Respondent issued Check No. 1146 for \$8,000 from her IOLTA Account Number 3.

{¶26} On June 5, 2014, Respondent filed a Motion for Instructions for Final Distribution. An Amended Fiduciary's Account and Amended Receipts and Disbursements were attached to the Motion for Final Distribution.

{¶27} The amended receipts and disbursements listed a \$25,000 distribution to Lisbon Alumni Association for the J.J. Patsey Scholarship Fund, which is false as the funds had not been distributed yet.

{¶28} The probate court set the Motion for Instructions and Amended Final Account for a hearing on July 2, 2014, at which hearing Respondent was discharged by the executor as counsel for the James R. Patsey Estate.

{¶29} On August 16, 2014, Respondent filed an Application to Approve Attorney Fees seeking payment of \$6,567.82, and on January 20, 2015 the probate court set Respondent's Application to Approve Attorney Fees for hearing on February 25, 2015. The hearing was conducted by Judge Clunk, sitting by assignment, at which Respondent and her paralegal Jennifer Angle testified.

{¶30} On March 4, 2015, Judge Clunk filed an order stating *inter alia* as follows:

- Specifically, the filings by opposing counsel on February 24 and February 25, 2015 are in conflict and require further proceedings to ascertain whether at any time between March 8, 2013 and June 12, 2014, the trust account of Attorney Barborak contained less than \$50,000.00.
- Therefore, the Court orders that the matters discussed in this Order shall be considered at a further hearing to be held on March 25, 2015 at 9:00 a.m. It is the further Order of this Court that Attorney Virginia Barborak shall present her trust account records for the period between March 8, 2013 and June 12, 2014 for an in camera examination by the Court at the above scheduled hearing.

{¶31} On March 10, 2015, William M. Flevares, Respondent's personal attorney, and counsel for the Patsey Estate met in chambers with Judge Clunk for an *in camera* review of

Respondent's trust account records. None of Respondent's trust account records were left with Judge Clunk initially.

{¶32} The balance in the trust account on March 1, 2013 according to the March 2013 statement submitted to the probate court by Respondent was \$103,268.68. The actual March 1, 2013 balance in the trust account was \$268.68.

{¶33} The ending balance in the trust account on March 31, 2013 according to the March 2013 statement submitted to the probate court by Respondent was \$107,439.07. The actual March 31, 2013 balance in the trust account was \$4,439.07.

{¶34} The March 2013 trust account statement submitted by Respondent to the probate court and filed with the probate court was a forgery designed to mislead and misinform the probate court.

{¶35} Upon request of Judge Clunk, the trust account bank statement for March 2013 was delivered to Judge Clunk by Respondent's counsel and filed with the probate court on March 10, 2015.

{¶36} The forged bank statements submitted to Judge Clunk on March 10, 2015 for his review and subsequently filed with the court per order of Judge Clunk on April 6, 2015 included the March, April, May, June, and July 2013 statements of account for the trust account.

{¶37} Each statement of account given to Judge Clunk had been altered by Respondent by adding \$103,000 to the actual balance in the account to make it appear that the balance and each entry on each statement of account was \$103,000 higher than the actual balance or entry.

{¶38} The March, April, May, June, and July 2013 trust account statements submitted to Judge Clunk and subsequently filed with the probate court were forgeries designed to mislead and misinform the probate court.

{¶39} Further, the altered bank statements submitted to Judge Clunk on March 10, 2015 for his review and subsequently filed with the court per order of Judge Clunk included the August, September, October, November, and December 2013 and January, February, March, April, May, June, July, and August 2014 statements of account for Account 3.

{¶40} Each statement of account for Account 3 had been altered by Respondent by adding \$82,000 to the actual balances on the account to make it appear that the balance and each entry on each statement of account was \$82,000 higher than the actual balance or entry.

Count Two—David Rose Educational Fund Trust, Columbiana County Probate Court

{¶41} Marion Francis Blood died testate on March 1, 1990. A probate case was opened in the Columbiana County Probate Court being Case No. 1990 EST 0129.

{¶42} Item VIII of Blood's will left one half of her residuary estate to "Dale Rose as Trustee for the David Rose Educational Fund." The Education Fund was to be used for the educational expenses of any youth who could prove descent from Ohio pioneer David Rose.

{¶43} On March 31, 2006, an Application for Appointment of Testamentary Trustee was filed by relatives of Blood and Respondent was appointed as trustee of the David Rose Educational Fund ("Education Fund") and Letters of Authority were issued to her on June 18, 2009.

{¶44} On October 23, 2009, Respondent withdrew \$25,000 from the Education Fund and deposited it in Respondent's trust account.

{¶45} Based on the first partial account Respondent filed on March 14, 2011, no disbursements were made from the trust account of Education Fund moneys until December 2010, thus the balance in the trust account should never be less than \$25,000 between October 23, 2009 and December 2010.

{¶46} The trust account's ending balance as of the last day of each month from October 2009 to November 2010 shows that in only one month were there sufficient funds to cover the \$25,000 in Education Funds that were supposed to be deposited in the trust account.

<u>Date</u>	<u>IOLTA ACCOUNT 1 – Balance</u>
November 30, 2009	\$13,246.11
December 30, 2009	\$ 5,923.86
January 31, 2010	\$25,993.86
February 28, 2010	\$ 414.86
March 31, 2010	\$ 5,934.86
April 30, 2010	\$ 5,934.86
May 30, 2010	\$ 7,868.32
June 30, 2010	\$ 1,626.32
July 31, 2010	\$16,235.64
August 31, 2010	\$ 4,320.85
September 30, 2010	\$ 1,933.49
October 31, 2010	\$ 2,624.21
November 30, 2010	\$ 2,364.21

{¶47} Between August 23, 2009 and November 30, 2010, Education Fund moneys in the trust account were misappropriated and used by Respondent for purposes other than to assist descendants of David Rose with their education expenses.

{¶48} As of December 31, 2010, Respondent's trust account should have contained Education Fund moneys totaling \$28,153.14. The actual balance in the trust account on December 31, 2010 was \$32,221.37.

{¶49} As of January 31, 2011, Respondent's trust account should have contained Education Fund moneys totaling \$28,153.14, but the ending balance was \$6,623.97. Since no distributions of Education Funds had occurred, a deficiency of \$21,529.17 of Education Funds existed.

{¶50} The balance in the trust account on February 28, 2011 was down to \$586.47. No distribution of Education Funds occurred in February 2011, therefore a deficiency of \$27,566.67 of Education Funds existed.

{¶51} On March 14, 2011, Respondent filed the first partial account with the probate court. The account stated that there was \$25,152.22 “cash on hand” which was according to a hand written note on the first partial account was being “held in BLO trust account.” Respondent initialed the handwritten note.

{¶52} The actual balance in the trust account as of March 14, 2011 was \$1,086.47.

{¶53} Respondent’s first partial account is false and misleading and designed to purposely misinform the probate court and Columbiana County Probate Court Judge Baronzzi.

{¶54} The balance in the trust account on March 31, 2011 was \$1,086.47, and the deficiency from the first partial account assertion that there was \$25,153.14 in the trust account was \$24,065.75. In fact, based on the trust account bank records, the Education Fund moneys in the trust account should have been \$28,153.14, therefore the deficiency of Education Funds in the trust account was \$27,066.67.

{¶55} Throughout 2011 and 2012, the trust account was depleted by Respondent and it lacked sufficient funds to satisfy the Education Fund obligations and other trust account obligations of clients whose funds were deposited in the trust account.

{¶56} On June 19, 2012, the second partial account was due and the probate court gave Respondent notice on July 19, 2012 to file the delinquent account within fifteen days. Respondent requested and received an extension of time to file the account to September 30, 2012. On October 24, 2012, Judge Baronzzi ordered Respondent to open a separate checking account and all funds of the Marion Frances Blood Trust be deposited in that checking account.

{¶57} On December 11, 2012, Judge Baronzzi, having not received verification of the opening of a checking account and that the funds held by Respondent in her trust account had been transferred to the checking account, ordered a status conference be held on January 3, 2013.

{¶58} As of December 31, 2012, Respondent had \$11,709.26 in her trust account. There had been funds deposited in the trust account from various probate estates over the previous year which should have been available for withdrawal in the trust account as follows:

David Rose Education Funds	\$ 28,153.14
Viola Shipman Estate Funds	\$ 72,686.02
James Conn Estate Funds	\$ 70,642.60
Total funds that should have been in the trust account on December 31, 2012	<u>\$171,481.76</u>

{¶59} On January 1, 2013, the balance in the trust account was \$11,709.26. Based on the David Rose Education Funds, Viola Shipman Funds, and James Conn Funds that had been deposited and not distributed, Respondent had a deficiency in her trust account of \$159,772.50.

{¶60} On January 2, 2013, Respondent's brother, Nicholas Barborak, delivered to Respondent Official Check No. 5932284046 for \$69,500 payable to Respondent that was deposited in the trust account.

{¶61} On January 2, 2013, Respondent signed Check No. 1622 for \$25,152.22 payable to cash and opened a checking account at Home Savings & Loan for the Marion Francis Blood Trust, designated herein as Account Number 4.

{¶62} On September 17, 2014, Respondent filed a third partial account which showed that from January 3, 2013, the date of the filing of the second partial account, to September 17, 2014 that total withdrawals from Account Number 4 were \$405.35.

{¶63} In the 19-month period from January 2013 to September 2014, Respondent stated in the third partial account that there were only two withdrawals from Account Number 4.

{¶64} Yet on July 9, 2013, Respondent directed, by her signature on a debit transaction, that \$20,000 be withdrawn from Account Number 4 and with which Respondent obtained an official check for \$20,000 payable to Attorney Nicolas Amato. The name of the remitter on Official Check No. 5932284215 payable to Amato was Virginia Barborak.

{¶65} Respondent signed Check No. 220 dated July 25, 2013 payable to cash for \$600 that was deducted from Account Number 4 on July 25, 2013.

{¶66} On August 28, 2013, \$20,600 was deposited in Account Number 4 via a Consumers Bank check from the Barborak Law Office.

{¶67} On September 10, 2013, Respondent directed by her signature on a debit transaction that \$14,229.59 be withdrawn from Account Number 4 and Respondent obtained a Home Savings and Loan Official Check No. 5932284264 payable to a client. The name of the remitter on the official check payable to the client was Attorney Virginia Barborak. Respondent used Education Funds to pay the client the disbursement she was entitled to receive as a beneficiary of the Viola Shipman Estate.

{¶68} Respondent wrote a number of unauthorized checks from Account Number 4. On October 21, 2013, Respondent signed Check No. 100 dated October 21, 2013 for \$1,000 payable to cash. The memo line stated "reimbursement." On October 25, 2013, Respondent signed Check No. 218 dated October 25, 2013 for \$500 payable to cash. And on October 24, 2013, Respondent signed Check No. 219 dated October 24, 2013 for \$1,500 payable to Respondent.

{¶69} The balance in Account Number 4 on October 29, 2013 was \$7,463.08, which based on an initial deposit of \$25,152.22 minus reported checks and bank service fees totaling \$433.60, leaves a deficiency of \$17,255.54.

{¶70} Respondent signed Check No. 217 dated November 1, 2013 for \$4,000 payable to cash.

{¶71} The balance in Account Number 4 on November 29, 2013 was \$3,460.59.

{¶72} Respondent signed Check No. 130 dated December 3, 2013 for \$2,500 payable to cash and she signed Check No. 216 dated December 6, 2013 for \$350 payable to cash.

{¶73} These unauthorized, unreported, and improper withdrawals and checks reduced the account balance in Account Number 4 to \$608.08, and as of December 28, 2013 a deficiency of \$24,104.82.

{¶74} On August 5, 2014, the probate court gave notice to Respondent to file an account in 15 days, which deadline was continued on Respondent's motion to September 15, 2014.

{¶75} The problem Respondent faced was that though she was ordered to file an account, she only had \$588.08 in Account Number 4 when there should have been \$24,718.62 in Account Number 4.

{¶76} Respondent's third partial account was false and misleading and designed to purposely misinform the probate court and the Columbiana County Probate Judge Baronzzi.

Count Three—Viola G. Shipman Estate, Columbiana County Probate Court

{¶77} On February 2, 2012 Respondent filed an Application for Authority to Administer Estate of Viola G. Shipman with the Columbiana County Probate Court, designed as Case No. 2102 ES 00023.

{¶78} On February 6, 2012, an Entry Appointing Fiduciary Letters of Authority appointing Respondent as executor of the estate was issued by the probate court.

{¶79} On February 8, 2012, Respondent, as executor and fiduciary of the estate of Viola G. Shipman, deposited a \$72,686.02 check payable to the Estate of Viola G. Shipman in Respondent's trust account.

{¶80} On February 8, 2012, the balance in the trust account, prior to the deposit of the Shipman check, was \$333.93 and after the check was deposited the balance was \$73,019.95.

{¶81} Despite the fact that the probate court inventory with a schedule of assets was not filed in the Shipman Estate until May 22, 2012, Respondent wrote unauthorized and unreported checks in February 2012 in excess of \$34,000 from the trust account. Respondent signed checks to herself, Barborak Law Offices, and cash totaling \$6,278.76 and disbursements to the beneficiaries of the Estate of Gary Paulin totaling \$28,269.38.

{¶82} The checks signed by Respondent included: (1) Check No. 1280 dated February 8, 2012 for \$4,320 payable to Barborak Law Offices for legal fees; (2) Check No. 1281 dated February 8, 2012 for \$1,200 payable to Lisbon Montessori Preschool; (3) Check No. 1282 dated February 8, 2012 for \$1,000 payable to Virginia Barborak; (4) Check No. 1283 dated February 14, 2012 for \$5,460 payable to Client 9 on which the memo line states "Estate of Gary Paulin Re: Payment for Loan;" (5) Check No. 1284 dated February 14, 2012 for \$4,551.79 payable to Client 9 on which the memo line states "Estate of Gary Paulin Disbursement;" (6) Check No. 1285 dated February 14, 2012 for \$4,551.79 payable to Client 10 on which the memo line states "Estate of Gary Paulin Disbursement;" (7) Check No. 1286 dated February 14, 2012 for \$4,551.79 payable to Client 11 on which the memo line states "Estate of Gary Paulin Disbursement;" (8) Check No. 1287 dated February 14, 2012 for \$4,551.79 payable to Client 12 on which the memo line states "Estate of

Gary Paulin Disbursement;” (9) Check No. 1288 dated February 14, 2012 for \$4,551.79 payable to Client 13 on which the memo line states “Estate of Gary Paulin Disbursement;” (10) Check No. 1289 dated February 14, 2012 for \$50.45 payable to Columbiana County Probate Court on which the memo line states “Paulin;” (11) Check No. 1290 dated February 15, 2012 for \$250 payable to Client 14 on which the memo line states “Conn Estate;” (12) Check No. 1291 dated February 15, 2012 for \$175 payable to Columbiana County Probate Court on which the memo line states “Kettewell;” (13) Check No. 1292 dated February 15, 2012 for \$155 payable to Columbiana County Probate Court on which the memo line states “Joy Estate;” (14) Check No. 1293 dated February 21, 2012 for \$20.00 payable to Client 15 on which the memo line states “Martha Adkins;” (15) Check No. 1295 dated February 22, 2012 for \$725 payable to cash; (16) Check No. 1296 dated February 23, 2012 for \$1,699 payable to Charley Kidder on which the memo line states “Bankruptcy Fees;” (17) Check No. 1297 dated February 24, 2012 for \$233.76 payable to Barborak Law Office on which the memo line states “Legal Fees Milliken;” and (18) Check No. 1299 dated February 24, 2012 for \$695.29 payable to Client 16 on which the memo line states “Mary Phillips.”

{¶83} Checks 1280 through 1299 written on Respondent’s trust account were not reported on the final account of the Shipman Estate and were the unauthorized use of Shipman Estate funds.

{¶84} On February 29, 2012, the balance remaining in the trust account was \$42,359.37, a \$34,558.14 depletion of Shipman Estate funds.

{¶85} Respondent was given notice on August 15, 2012 to file the Shipman Estate final account by August 30, 2012, which date was continued on Respondent’s motion to May 29, 2013.

{¶86} The problem faced by Respondent was that as of March 31, 2013 there was \$4,439.07 in the trust account. But there had been funds deposited and not distributed and should still have been in the trust account as follows: (1) James Patsey Estate Funds of \$51,000 and (2)

Viola Shipman Funds of \$72,686.02 for a total at minimum that should be in the trust account of \$123,686.02.

{¶87} Respondent filed a fiduciary's account in the Shipman Estate on May 29, 2013.

{¶88} The disbursements listed and reported in the Shipman Fiduciary's Account were not made on or by May 29, 2013 because Respondent did not have the funds in the trust account to make the disbursements.

{¶89} On June 24, 2013, Nicholas Barborak as remitter paid to Virginia Barborak \$52,000 via Home Savings Official Check 5932284197 which Respondent deposited in the trust account on June 24, 2013 bringing the trust account's balance to \$53,696.53.

{¶90} After the \$52,000 was deposited in the trust account, Respondent signed a number of checks as follows: (1) Check No. 1701 dated June 20, 2013 for \$28 payable to the Recorder's Office; (2) Check No. 1702 dated June 21, 2013 for \$1,500 payable to Virginia Barborak; (3) Check No. 1703 dated June 25, 2013 for \$5,000 payable to Barborak Law Office; (4) Check No. 1705 dated May 29, 2013 for \$1,784.93 payable to Client 19 and deducted from Account Number 1 on July 1, 2013 on which the memo line stated "Reimbursement Estate of Shipman." Check Number 1705 was backdated to May 29, 2013 to match the date of the filing of the fiduciary account; (5) Check No. 1706 dated May 29, 2013 for \$30,839.20 payable to Client 18 and deducted from the trust account on July 1, 2013 on which the memo line stated "Disbursement Estate of Shipman." Check 1706 was backdated to May 29, 2013 to match the date of the filing of the fiduciary account; (6) Check No. 1707 dated June 27, 2013 for \$28 payable to probate court; (7) Check No. 1708 dated July 3, 2013 for \$500 payable to Respondent; (8) Check No. 1709 dated May 29, 2013 for \$19,229.59 payable to Client 17 which was deducted from the trust account on July 10, 2013 on

which the memo line stated “Estate Shipman Disbursement.” Check 1709 was backdated to May 29, 2013 to match the date of the filing of the fiduciary account.

{¶91} Respondent’s fiduciary account is false and misleading and designed to purposely misinform the probate court and Columbiana County Probate Court Judge Baronzzi.

Count Four—James Conn Estate, Columbiana County Probate Court

{¶92} On August 16, 2010, Respondent filed an Application for Authority to Administer Estate of James Conn with the Columbiana County Probate Court designated as Case No. 2010 ES 00219 and on August 16, 2010 an Entry Appointing Fiduciary Letters of Authority was entered on the docket. Respondent was counsel for the estate.

{¶93} On August 7, 2012, Respondent deposited a check which was the proceeds from the sale of the James Conn Estate real estate totaling \$70,642.60 in her trust account.

{¶94} On August 31, 2012, the balance of funds in the trust account was \$105,115.38.

{¶95} On August 31, 2012, the trust account should have had a balance, at a minimum, to cover the previously deposited and undistributed funds as follows: (1) David Rose Educational Fund moneys totaling \$28,153.14; (2) Shipman Estate Funds of \$72,686.02; (3) Conn Estate Funds of \$70,642.60; and (4) \$38,000 for Client 20 for a total balance of \$212,481.76.

{¶96} As of August 31, 2012, the trust account had an approximate deficiency of \$107,366.38.

{¶97} As of December 31, 2012, the balance in the trust account was \$11,709.26. The Shipman Estate, Conn Estate, and Dave Rose Educational Funds totaling \$177,481.76 were still supposed to be in the trust account, but it had a deficiency of \$165,772.50.

{¶98} The Conn final distributive account was not timely filed. On December 11, 2012, the probate court issued a judgment entry that stated:

This estate was before the Court on December 5, 2012 for show cause hearing why estate should not be closed and fees denied for failure to file the final and distributive account. Appearing before the Court were Attorneys Virginia Barborak, on behalf of the estate, and Attorney Neil Maxwell, on behalf of the surviving spouse.

The Court admonished Attorney Barborak for inexcusable delays in the processing of the estate. Attorney Barborak admitted her inexcusable delinquency and apologized for the same. The Court finds that part of the claimed delay in this estate arises out of the Fiduciary's living outside of the jurisdiction of the Court. The Court advised counsel that the Court is inclined to deny all fees in this estate unless the co-fiduciaries consent to the Court's appointment of Attorney Barborak as substitute fiduciary for the purpose of immediately liquidating the remaining bonds and making distributions and final account within thirty (30) days. Attorney Maxwell further requested distribution of available funds to his client be made forthwith. Attorney Barborak agreed to make the partial distribution without delay.

{¶99} Respondent pursuant to the judge's December 11, 2012 judgment entry was appointed the administratrix of the Conn Estate despite the fact that Respondent knew she did not have the funds in her trust account to make the disbursements necessary to close the Conn Estate.

{¶100} The problem faced by Respondent was that on December 31, 2012 there was only \$11,709.26 in her trust account. But there had been deposited and should have been available for withdrawal in the trust account on that date the following:

Marion Blood Trust Funds	\$ 28,153.14
Viola Shipman Estate Funds	\$ 72,686.02
James Conn Estate	\$ 70,642.60
Total Funds Deposited in the Trust Account	<u>\$171,481.76</u>

{¶101} On December 31, 2012, with a balance in the trust account of \$11,709.26 Respondent had a deficiency of \$159,772.50.

{¶102} As of January 31, 2013, the David Rose Education Fund moneys and the Conn Estate disbursements had been made after the deposit of \$69,500 received from Respondent's

brother. However, the Shipman Estate deposit of \$72,686.02 at minimum should still be in the trust account.

{¶103} As of January 31, 2013, there was a minimum deficiency in the trust account of \$70,300.07.

{¶104} On January 9, 2013, Respondent filed the fiduciary's account in the James Conn Estate listing all of the disbursements.

{¶105} The fiduciary account stated that a beneficiary disbursement of \$1,459.76 had been made to Client 3 and that \$2,540 was due to Client 3 as fiduciary fees pending court approval. Neither sum of money had been distributed to Client 3.

{¶106} The probate court approved the fiduciary fees for Client 3 on February 14, 2013. However, no immediate distribution was made to Client 3 because Respondent's trust account only had a balance of \$1,664.30.

{¶107} Respondent signed Check No. 1654 dated March 11, 2013 for \$3,999.76 payable to Client 3 which was deducted from the trust account on March 25, 2013. Respondent utilized funds received from Sean Patsey for the Patsey Estate to pay this Conn Estate disbursement and fee.

{¶108} The fiduciary account filed on January 9, 2013 stated that a beneficiary disbursement of \$2,189.85 had been made to Client 2 and that \$2,540 was due to Client 2 as fiduciary fees pending court approval. Neither sum of money had been distributed to Client 2.

{¶109} The probate court approved the fiduciary fees for Client 2 on February 14, 2013. However, no immediate distribution was made to Client 2 because Respondent's trust account only had a balance of \$1,664.30.

{¶110} Respondent signed Check No. 1653 dated March 11, 2013 for \$4,729.85 payable to Client 2 which was deducted from the trust account on March 20, 2013. Respondent utilized the funds received from Sean Patsey for the Patsey Estate to pay this Conn Estate disbursement and fee.

{¶111} The fiduciary account filed on January 9, 2013 in the Conn Estate and signed by Respondent as fiduciary and counsel for the estate was false and misleading and designed to purposely misinform the probate court and Columbiana County Probate Court Judge Baronzzi.

Stipulations as to Restitution

{¶112} On May 13, 2016, the parties supplemented the record with stipulations as to restitution. The stipulations state:

- The James R. Patsey Estate in Trumbull County has been closed and there is no additional restitution due that estate from Respondent.
- The Viola G. Shipman Estate in Columbiana County was closed in 2013 and there is no additional restitution due that estate from Respondent.
- The James Conn Estate in Columbiana County was closed in 2013 and there is no additional restitution due that estate from Respondent.
- The Respondent has withdrawn from the Marion Frances Blood Estate & David Rose Educational Fund Trust and has made full restitution thereto.

{¶113} In light of the parties' stipulations regarding restitution, the panel does not find that Respondent owes restitution to any of the estates or the trust referenced in Relator's complaint.

{¶114} The panel concludes, by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following rules as to each count of Relator's complaint:

- Prof. Cond. R. 1.15(a) [a lawyer shall safe keep a client's funds, keep a record for each client on whose behalf funds are held, keep a record for each bank account and perform a monthly reconciliation];
- Prof. Cond. R. 3.3(a)(1) and 3.3(a)(3) [a lawyer shall not knowingly make a false statement of fact or law to a tribunal and offer evidence that the lawyer knows to be false];

- Prof. Cond. R. 8.4(a) [a lawyer shall not 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];
- Prof Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and
- Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice].

{¶115} The panel further concludes that the scope and extent of Respondent's misappropriations and her multiple misstatements to tribunals, both of which constitute a troubling pattern of dishonesty by a lawyer, establish conduct so egregious as to warrant a finding of a violation of Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law], in accordance with the standards of *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998.

MITIGATION, AGGRAVATION, AND SANCTION

{¶116} The parties stipulated to and the panel finds the following mitigating factors: (1) Respondent has no prior disciplinary record; and (2) Respondent has a reputation for significant involvement in the community.

{¶117} Respondent provided evidence of a disorder for which she has sought counseling since 2012 and submitted a three-year OLAP contract entered into on March 26, 2015. Hearing Tr. 19-23; Respondent's Ex. O-Q. Although there is proof that Respondent has undergone counseling for a depressive disorder, Respondent presented no evidence to prove that this disorder contributed to her misconduct and no prognosis that she will be able to resume the competent, ethical professional practice of law. See Gov. Bar R. V, Section 13(C)(7). Thus, the panel does not find this to be a mitigating factor. However, the existence of this does form the basis for a condition the panel recommends be placed on her reinstatement to the practice.

{¶118} The parties stipulated to and the panel finds the following aggravating factors: (1) Respondent acted with a dishonest or selfish motive; (2) Respondent has engaged in a pattern of misconduct; and (3) Respondent has committed multiple offenses.

{¶119} In a further discrepancy, the panel finds that Respondent testified that “I have a few cases that I’m winding up, but I am – I have removed myself from the practice of law due to stress and so forth,” and that “I have voluntarily removed myself from the practice of law.” Hearing Tr. 13, 25. And yet, Respondent’s counsel confirmed in a post-hearing phone conference on May 3, 2016 that Respondent continues to practice, and Respondent has not registered as inactive. This discrepancy is in keeping with a pattern of dishonesty as evidenced by the stipulations to the facts of this matter.

{¶120} The panel reviewed the parties’ recommendation for the sanction of a two-year suspension in light of the findings of fact, conclusions of law, mitigating and aggravating factors, and precedent established by the Supreme Court of Ohio. Although disbarment is the presumptive sanction for misappropriation, this sanction may be tempered with sufficient evidence of mitigating or extenuating circumstances. See, e.g., *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110, ¶14, citing *Disciplinary Counsel v. France*, 97 Ohio St.3d 240, 2002-Ohio-5945, ¶11 (presumptive disciplinary measure for acts of misappropriation is disbarment); *Disciplinary Counsel v. Smith*, 101 Ohio St.3d 27, 2003-Ohio-6623, ¶9 (lesser sanction of indefinite suspension based on the mitigating evidence that the respondent had been licensed to practice for approximately 45 years without any previous ethical infraction).

{¶121} With regard to precedent, the panel considered and relied upon the following cases: *Cleveland Metro. Bar Assn. v. McElroy*, 140 Ohio St.3d 391, 2014-Ohio-3774 (numerous falsifications and misrepresentation of facts creating a pattern of dishonesty, accompanied by

forgery and tampering with evidence; stipulated mitigating factors included a self-imposed five-year break from the practice of law, no pattern of ongoing harm and no personal gain; no stipulated aggravating factors.); *Disciplinary Counsel v. Leksan*, 136 Ohio St.3d 85, 2013-Ohio-2415 (the parties stipulated to two-year suspension, but the Court approved the Board's recommendation of indefinite suspension for charge of 22 rule violations including misappropriation of client funds; mitigating factors included mental health, substance impairments); *Lake County Bar Assn. v. Rozanc*, 132 Ohio St.3d 114, 2012-Ohio-2408 (fraud committed upon the probate court and assets concealed; restitution paid was the only mitigating factor); *Akron Bar Assn. v. Smithern*, 125 Ohio St.3d 72, 2010-Ohio-652 (the respondent misappropriated client retainers; pled guilty to fourth degree felony; mitigating factors included no prior discipline, impairment and restitution); *Disciplinary Counsel v. Bandman*, 125 Ohio St.3d 503, 2010-Ohio-2115 (misappropriation and concealment of trust assets for the respondent's own benefit; multiple offenses but no prior discipline).

{¶122} Considering the particular facts of this case, an indefinite suspension also appeared justified. In addition to other rule violations in the case, Respondent admits to submitting false, misleading, altered and/or forged documents to tribunals on five separate occasions, specifically designed to mislead and/or misinform the court. These numerous falsifications and misrepresentations of fact create a pattern of dishonesty. Viewed individually, each is significant, but as a pattern, over the course of 2009–2015, this conduct is most disturbing. The Court has said “the practice of law demands from every attorney, at a minimum, absolute candor before any Court or disciplinary authority.” *Cleveland Metro. Bar Assn. v. McElroy*, 140 Ohio St.3d 391, 2014-Ohio-3774, ¶19. And as noted above, there is at best an inconsistency regarding Respondent's representations concerning her continued practice of law during the pending of this matter.

{¶123} And finally, but most importantly, the panel is unable to determine whether any other clients or beneficiaries have been harmed by Respondent’s conduct. It is impossible to make this determination because of Respondent’s lack of proper recordkeeping. Respondent failed to maintain detailed records of the money held and disbursed on behalf of her clients, failed to maintain or produce documentation to support the purpose of expenditures, engaged in conduct involving dishonesty, deceit, or misrepresentation, and knowingly submitted false, misleading, altered and/or forged documents to the courts on five occasions. After Respondent’s counsel reviewed her files back to 2009, which he represented was the “best he could do,” he could say only that he did “not see evidence that any estate has been ‘shorted.’” And even after Relator’s audit by a third party, that accountant could not determine a “true balance” for each client. Respondent’s failure to maintain adequate records may have concealed any harm to Respondent’s clients and she should not be permitted the benefit of the doubt from her unacceptable recordkeeping.

{¶124} Accordingly, the panel recommends that Respondent be indefinitely suspended from the practice of law in Ohio. In addition to the requirements of Gov. Bar R. V, Section 25(D), any future reinstatement to the practice of law shall be conditioned upon Respondent’s proof of all of the following:

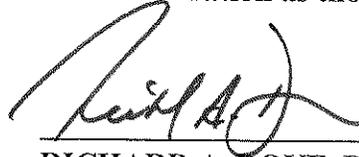
- A full accounting and reconciliation of Respondent’s current and former IOLTA accounts, and payment of full restitution to any clients found to be owed restitution as a result of such accounting and reconciliation;
- Proof that she has established an office accounting system to accurately track receipts and disbursements of client funds, fees, loans, and expenses; and
- Certification by a qualified health care professional of Respondent’s fitness to resume the competent, ethical, and professional practice of law.

{¶125} Upon reinstatement, Respondent shall be required to work and cooperate with a monitoring attorney assigned by Relator for a duration and subject to conditions deemed appropriate as a result of the reinstatement proceeding.

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 June 3, 2016. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Virginia Mary Barborak, be indefinitely suspended from the practice of law in Ohio, with reinstatement subject to the conditions set forth in ¶¶124 and 125 of this report, and that Respondent be ordered to pay costs of these proceedings.

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.



RICHARD A. DOVE, Director