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

In re:

Complaint against

Kinsley Frampton Nyce
Attorney Reg. No. 0003547

Respondent

Columbus Bar Association

Relator

Case No. 2016-007

Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct

OVERVIEW

{¶ 1} This matter was heard on February 3 and March 6, 2017 before a panel composed of David Dingwell, Judge C. Ashley Pike, and Paul De Marco, panel chair.[1] 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} Lori Brown, Steven Nolder, and Terry Sherman appeared on behalf of Relator. Respondent was present at the hearing and appeared *pro se*.

{¶ 3} The operative complaint consists of four counts. The first two counts grow out of the fact that Respondent, by his own admission, has never personally carried professional liability insurance coverage. Count One alleges that Respondent failed to notify business clients in a particular case that he did not maintain professional liability insurance, failed to maintain the required record of such notification, failed to obtain court permission to withdraw from the representation, failed to respond to his successor counsel's request for information about his malpractice coverage, and improperly made contact with the principal for his former clients

[1] Judge Pike was not present for the second day of the hearing but has reviewed the transcript, exhibits, and post-hearing briefs.

knowing that he had been terminated, knowing that they had hired successor counsel, and knowing that the former clients instructed him not to communicate directly with them.

{¶ 4} Count Two alleges that, in his representation of other clients, Respondent likewise failed to notify them of the fact that he did not maintain professional liability insurance and also failed to maintain the required documentation of those notices. Count Two also alleges that Respondent failed to produce to Relator, upon request, the notice related to the clients involved in Count One, his client list for a three-year period, or valid notices signed by his clients during that period acknowledging his lack of malpractice coverage, and that he gave false, misleading or evasive answers on this subject at an August 2015 deposition.

{¶ 5} The two remaining counts in the amended complaint relate to Respondent's IOLTA. Count Three alleges that Respondent failed to maintain the required IOLTA-related records and failed to produce them when requested by Relator. Count Four alleges that Respondent used his IOLTA to launder hundreds of thousands of dollars withdrawn from his elderly mother's bank accounts in Vermont before she died—money that otherwise would have been available to defray the costs of her continued nursing home care as she neared the end of her life.

{¶ 6} Although the panel does not credit all of Relator's evidence, we nevertheless find that Relator has established, by clear and convincing evidence, that Respondent committed violations alleged in each of the four counts. Were that the extent of our findings, the panel doubtless would not be recommending the severe sanction we adopt in this report. But that is not the extent of our findings. Beyond the fact that we largely sustain Relator's allegations of misconduct, we also find that Respondent actively sought to conceal evidence of his misconduct, repeatedly gave false and evasive testimony in depositions and at the hearing, and used a multitude of means in a dishonest effort to subvert, derail, and undermine the disciplinary process. It would

be difficult to imagine an accused attorney demonstrating less respect for the disciplinary process or less remorse for his misconduct. The panel takes seriously the Board's duty to protect the public from unscrupulous lawyers. The Board cannot fulfill this duty if lawyers accused of wrongdoing are able to frustrate and degrade the disciplinary system by concealing evidence, giving false testimony, and refusing to cooperate honestly in the truth-seeking process. Because we believe that a lawyer who acts in this manner, in addition to committing the serious underlying misconduct with which he is charged, has no business continuing to practice law, we recommend disbarment as the appropriate sanction for Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 7} Respondent was admitted to the practice of law in Ohio on May 10, 1982 and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

Requirements of Prof. Cond. R. 1.4(c) and Former DR 1-104

{¶ 8} The Ohio Rules of Professional Conduct took effect on February 1, 2007, replacing the Ohio Code of Professional Responsibility. In relevant part, the language of Prof. Cond. 1.4(c) mirrors that of former DR 1-104 in that each requires an attorney, such as Respondent, who lacks a specified level of malpractice coverage—at least $100,000 per occurrence and $300,000 in the aggregate—to spell out that fact in a notice signed by both the attorney and the client. Each rule specifies the exact form of the notice to be used.

{¶ 9} For many years, these two consecutively extant rules—current Prof. Cond. R. 1.4(c) and former DR 1-104—have served to protect the public by mandating that lawyers who do not carry malpractice insurance take four concrete steps to protect clients whose interests are thus placed at risk: (1) the lawyer must present the client with a notice that clearly discloses both the

lack of malpractice coverage and the rule upon which the lawyer is required to make this disclosure; (2) the lawyer must sign the notice; (3) the lawyer must have the client sign and date the form acknowledging the lawyer's disclosure; and (4) the lawyer must maintain a copy of the signed and dated form for five full years after the representation ends.

{¶ 10} The form notices mandated by each rule, unsurprisingly, differ to this extent: the one prescribed by Prof. Cond. R. 1.4(c) starts out, "Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct," and makes reference to the same rule in the "Client Acknowledgement," while the one formerly prescribed by DR 1-104 started out, "Pursuant to DR 1-104 of the Ohio Code of Professional Responsibility," and made reference to that rule in the "Client Acknowledgement."

Count One—Arthur Goldner & Associates and NC Plaza, LLC

{¶ 11} Respondent represented two entities, Arthur Goldner & Associates and NC Plaza, LLC, in litigation in Franklin County common pleas court against Whitt Sturtevant, LLP. Hearing Tr. 48. The lawsuit brought by WS involved a tenant build-out dispute on commercial rental property that NC owned and AG managed in Columbus. Hearing Tr. 47, 208. Arthur Goldner is AG's principal, president, and CEO and ultimate decision maker. Hearing Tr. 46. At the time of the litigation, Rick Aronhalt was AG's on-site manager at the Columbus property. Hearing Tr. 47. Goldner made the decision to hire Respondent and was the only person who had the authority to do so on behalf of AG. Hearing Tr. 49, 50-51. Respondent never notified Goldner that he did not carry professional liability insurance. Hearing Tr. 50.

{¶ 12} After a bench trial and a ruling in favor of WS and against AG and NC, Goldner hired Stephen Jones in place of Respondent to handle an appeal, instructing Jones to admonish Respondent not to contact Goldner directly again. Hearing Tr. 51. Jones did so. Hearing Tr. 234.

Thereafter, despite Jones's admonition, Respondent sent communications directly to Goldner. Hearing Tr. 52-53, 234-235; Relator's Ex. 1-E & 1-H.

{¶ 13} Respondent failed to file a notice of withdrawal from his representation of AG and NC, as required by Local Rule 18.01 of the Franklin County Common Pleas Court. Hearing Tr. 212-214.

{¶ 14} Shortly after his retention, Jones discovered that AG carried property liability insurance that would have covered three claims brought by WS—conversion, wrongful eviction, and defamation—but that Respondent had failed to advise AG to submit a claim to Zurich, its insurer. Hearing Tr. 215-220. On Jones' advice, AG belatedly submitted a claim, and Zurich confirmed that its policy would have indemnified and covered defense costs for the three claims. Zurich denied coverage for lack of prompt notice by AG. Hearing Tr. 216-220, 223; Relator's Ex. 1-A. Jones informed AG that Respondent's failure to advise AG to submit a claim to Zurich could be a basis for a legal malpractice claim against Respondent, whereupon Jones sent a letter to Respondent asking for information regarding his professional liability insurance coverage. Hearing Tr. 224-227; Ex. 1-B. Respondent ignored the letter, so Jones sent a second one, in which he conveyed the clients' report that Respondent never apprised them of any lack of malpractice coverage, leaving Jones to assume he had it. Hearing Tr. 229-231; Relator's Ex. 1-C. When Respondent ignored that letter as well, Jones sent a third letter, which Respondent likewise ignored. Hearing Tr. 232-233; Relator's Ex. 1-D.

{¶ 15} By now, Jones had become concerned, based on Respondent's silence, that Respondent had no malpractice coverage. Hearing Tr. 232. Instead of responding to Jones alone, Respondent sent an email to Jones *and* Goldner decrying Jones's "threats." Hearing Tr. 235; Relator's Ex. 1-E. Jones responded by email, reminding Respondent he should not be contacting

Goldner or the clients anymore, and adding: "Kinsley, do us all a favor, cut to the chase, and just tell us if you had insurance or not." Hearing Tr. 236-238; Relator's Ex. 1-F.

{¶ 16} When he heard nothing from Respondent, Jones followed up with another email, giving Respondent "the third notice" not to contact Goldner directly, and asking "for the fifth time" if Respondent "had insurance. No drama please, just tell us, we need to know as soon as possible." Hearing Tr. 238-239; Relator's Ex. 1-G. Instead of responding to Jones, Respondent sent yet another letter directly to Goldner, in which he still did not address whether he carried malpractice insurance. Rather, he threatened that, if AG sued him for malpractice, he would no longer "stay silent" about matters allegedly communicated to him by his clients during the WS litigation. Relator's Ex. 1-H.

{¶ 17} Respondent admitted at the hearing that he has never personally carried malpractice insurance. Hearing Tr. 412-413. He never advised Goldner of that fact or presented Goldner with a notice to sign acknowledging his lack of malpractice coverage. Relator's Ex. 11 at 47; Hearing Tr. 438.

{¶ 18} The panel finds that Relator has established, by clear and convincing evidence, that Respondent: (1) failed to notify AG and NC during the time he represented them in the WS representation that he did not maintain professional liability insurance; (2) failed to maintain the required record of such notification; (3) failed to obtain court permission to withdraw from the representation; (4) repeatedly failed to respond to his successor counsel's legitimate requests for information about his malpractice coverage; and (5) repeatedly made improper contact with the principal for AG (Goldner) knowing that the company had hired successor counsel.

{¶ 19} Based on these findings of fact, the panel concludes that Respondent violated Prof. Cond. R. 1.4(c) and (c)(1) [failing to advise client of lack of malpractice insurance and keep a

signed copy of the notice for five years]; Prof. Cond. R. 1.16(c) [failing to obtain court permission to withdraw when required by court rule]; and Prof. Cond. R. 4.2 [communicating directly with his former client after successor counsel instructed him not to do so].

{¶ 20} The panel rejects Respondent's argument that Prof. Cond. R. 1.4(c) did not require him to apprise Goldner of his lack of malpractice coverage. This argument appears to be based on Respondent's contention that Aronhalt, AG's on-site property manager, was his "client contact," (Hearing Tr. 439), and that Aronhalt already knew, from a prior representation by Respondent, that he did not carry such insurance. Goldner, not Aronhalt, was AG's principal. Goldner, not Aronhalt, made the decision to hire Respondent to handle the WS lawsuit. This was a significant piece of litigation for AG. We feel safe in assuming Goldner would not have hired Respondent to defend this important lawsuit for Goldner's company if he had known Respondent did not carry malpractice insurance. It was imperative that Respondent apprise Goldner of that fact, rather than rely on the off-chance that Goldner's employee, Aronhalt, might remember that during a prior representation of Aronhalt personally, Respondent had no such coverage.

{¶ 21} It is not even clear to us, parenthetically, that Respondent had apprised Aronhalt of his lack of malpractice insurance when he previously represented Aronhalt. Respondent produced to Relator two forms by which he claims to have informed Aronhalt he had no such coverage. Relator's Ex. 8; see also Relator's Ex. 89 at 107-108. Given that both forms are undated and refer to former DR 1-104 of the Ohio Code of Professional Responsibility, there is no telling when they came into existence relative to the WS lawsuit (that commenced in 2012) or if they are even authentic. See discussion of Count Two, *infra.*

{¶ 22} The panel further concludes that Relator has established by clear and convincing evidence that, by deliberately ignoring and evading his successor counsel's repeated and legitimate

requests that he provide information about his malpractice coverage and cease contacting Goldner directly, Respondent acted deceitfully and dishonestly, in violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, and misrepresentation].

{¶ 23} The panel also concludes that Relator has established by clear and convincing evidence that, regarding the allegations in Count 1, Respondent violated Prof. Cond. R. 8.4(h) [conduct adversely reflecting on his fitness to practice law]. Respondent's extraordinarily strained and protracted efforts to conceal from his clients (AG and NC) and his successor counsel his lack of malpractice coverage—which, we can assume, would have prompted the clients not to hire him in the first place, had they known of it—constitute egregious misconduct adversely reflecting on his fitness to practice law, warranting a finding that he also violated Rule 8.4(h). See *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998, ¶21; see also *Cincinnati Bar Assn. v. Ball*, 146 Ohio St.3d 382, 2016-Ohio-785, ¶9 (concealing wrongful conduct in part justifies egregiousness finding).

Count Two—Notice of Lack of Malpractice Insurance

{¶ 24} In 2015, during Relator's investigation of Respondent's representation of AG, Relator requested and later subpoenaed Respondent's client list for a three-year period and copies of signed notices to clients under Prof. Cond. R. 1.4(c) going back to January 2012. Relator further requested that Respondent give a "direct answer" to Jones's questions about the Prof. Cond. R. 1.4(c) notice in connection with Respondent's representation of AG and NC in the WS litigation. Relator also explored these subjects at an August 2015 deposition of Respondent.

{¶ 25} In substance, Count Two of the operative complaint challenges the accuracy and completeness of the information that Respondent provided to Relator in response. Relator alleges in Count Two (1) that Respondent did not supply a compliant Prof. Cond. R. 1.4(c) notice for the

AG/NC representation, (2) that Respondent did not and could not supply the requested notices for 30 enumerated clients in a form compliant with Prof. Cond. R. 1.4(c)—*i.e.*, signed by himself and by his clients acknowledging his lack of malpractice insurance and maintained for five years after the representation, and (3) that Respondent was deceptive, evasive, and uncooperative in responding to Relator on these topics.

{¶ 26} Respondent acknowledged representing at least 30 clients between January 2012 and August 2015, the time of his initial deposition by Relator. Given Respondent's admission that he has never personally carried malpractice coverage, he should have been in possession of, and been able to produce to Relator, compliant Prof. Cond. R. 1.4(c) notices for at least those clients.

{¶ 27} In June 2015, through his attorney at the time, Respondent produced two forms purportedly related to the WS litigation, neither of which complies with Prof. Cond. R. 1.4(c). Relator's Ex. 8. The forms are not signed by Respondent or by Goldner, are undated, and refer to DR 1-104, a rule that has not been effective for more than 10 years. One of the undated forms contains what Respondent's lawyer oxymoronically referred to as "Mr. Aronhalt's typewritten signature" (Relator's Ex. 8 at 1 and 4), not a handwritten signature as required by Prof. Cond. R. 1.4(c). The other undated form contains what appears to be the signature of "Rick A. Aronhalt," but neither Aronhalt nor Respondent testified convincingly that it is genuine or that it was affixed to the form in connection with Respondent's representation of AG and NC in the WS litigation. Relator's Ex. 8, at 3. These were the only notices Respondent produced to Relator in 2015. Relator's Ex. 8; see also Relator's Ex. 89 at 107-108.

{¶ 28} Respondent makes much of the fact that the trial court in the WS litigation found that Aronhalt had altered a document, that AG knew a document it used was "forged," and that AG "blithely published a document that contained false statements about [WS]." Respondent's

Ex. R-11 at 25. We have no doubt that AG and Aronhalt were found to be bad actors in the WS lawsuit, as evidenced by the fact that the trial court awarded WS punitive damages. *Id.* But their conduct before and during that litigation does not detract from Respondent's inability to produce a copy of a notice signed by himself and signed and dated by Goldner in compliance with Prof. Cond. R. 1.4(c). Nor does it render the two deficient "Aronhalt" forms sufficient to satisfy that rule.

{¶ 29} In March 2016, Respondent produced to Relator what he claimed were additional compliant notices provided to and signed by his clients during the period beginning in 2012. Far from the number of clients he conceded representing during that period, *i.e.*, 30, there were only 10 additional notices in the batch Respondent produced in 2016. None of them, moreover, fully complies with Prof. Cond. R. 1.4(c)—either because they refer to former DR 1-104, are undated, do not bear Respondent's signature, or do not appear to bear authentic client signatures. See Relator's Ex. 15-25; see also, Relator's Ex. 89 at 105, 107-108, 111-112, 116-117, 119, 123-126. Some of the ten additional notices have more than one of these flaws; none is a flawless example of what Prof. Cond. R. 1.4(c) requires.

{¶ 30} One of the clients whose signed Prof. Cond. R. 1.4(c) notice should have been in Respondent's possession was Ellen Shaffer, who retained Respondent in June 2012 to represent her in a dog bite case and who testified at the hearing. Hearing Tr. 294-296, 298. No notice bearing her signature was among those that Respondent produced to Relator in 2015 and 2016. Shaffer testified that Respondent never mentioned to her that he did not carry malpractice coverage, nor did he present her with any written notice of that fact. Hearing Tr. 297-298. Had he done so, she testified, it would have been significant to her: "It would have made me very uneasy about a legal professional not looking after a client's best interest." Hearing Tr. 298.

{¶ 31} Rather than challenge Shaffer on the issue of his failure to notify her of his lack of malpractice coverage, Respondent embarked on a rambling mix of cross-examination and diatribe emblematic of his approach to the entire hearing, in the course of which he attempted to confuse and hoodwink Shaffer with a totally different document that he had not previously disclosed to Relator (Respondent's Ex. R-26), feigned acting with "integrity" when Relator challenged his belated production, and accused the panel chair of mischaracterizing what had happened during supervised discovery. Hearing Tr. 307-312.

{¶ 32} When Respondent testified regarding Shaffer at his August 25, 2015 deposition and December 22, 2016 deposition, he stated that she was aware he did not maintain malpractice insurance. Relator's Ex. 11 at 125; December 22, 2016 Deposition, pp. 133-134.[2] When pressed for a copy of a compliant Prof. Cond. R. 1.4(c) notice signed by Shaffer, Respondent claimed he could not produce it because it was lost, ostensibly with the notices of other clients, in a flood at his office. *Id.* at 134; see also, Hearing Tr. 471-473, 476-486, 498. Nevertheless, at the hearing, Respondent insisted Shaffer "absolutely" had signed it. Hearing Tr. 501. This testimony cannot be squared, however, with Respondent's other sworn testimony. For example, at his deposition on August 25, 2015, Respondent never mentioned anything about a flood destroying any of his Prof. Cond. R 1.4(c) records. Hearing Tr. 488-494. And, during his deposition on December 22, 2016, far from claiming that Shaffer "absolutely" signed the Prof. Cond. R. 1.4(c) notice, Respondent testified that she had refused to return the packet containing the Prof. Cond. R. 1.4(c) form he had provided to her. December 22, 2016 Deposition, p. 134; Hearing Tr. 505-506.

[2] The panel chair monitored this deposition by telephone. See ¶40, *infra*.

{¶ 33} The panel does not find Respondent's testimony regarding Shaffer, the allegedly ruinous flood, or the notices of other clients listed in Count 2 to be credible.[3] The panel concludes that Relator has established, by clear and convincing evidence, that Respondent committed the following violations alleged in Count Two: Prof. Cond. R. 1.4(c) and (c)(1) [failing to advise clients of lack of malpractice insurance and keep a signed copy of the notice for five years]; Prof. Cond. R. 8.1(a) [knowingly making a false statement of material fact in connection with a disciplinary matter]; Prof. Cond. R. 8.1(b) [failing to disclose a material fact or knowingly failing to respond to a disciplinary authority's demand for information in connection with a disciplinary matter]; and Gov. Bar R. V, Section 9(G) [neglecting or refusing to assist in a disciplinary investigation or hearing].

{¶ 34} The panel further concludes that Relator has established, by clear and convincing evidence, that Respondent, in the course of discovery and the hearing, acted deceitfully and dishonestly toward Relator, the panel chair, and the panel, and made misrepresentations to them with respect to Count Two, in violation of Prof. Cond. R. 8.4(c).

{¶ 35} The panel also concludes that Relator has established, by clear and convincing evidence, that, regarding the allegations in Count Two, Respondent likewise violated Prof. Cond. R. 8.4(h). Respondent's extreme, unjustified, and unnecessary efforts to conceal from Relator evidence relevant to Count Two constitute egregious misconduct adversely reflecting on his fitness to practice law, warranting a finding that he also violated Prof. Cond. R. 8.4(h). See *Bricker* and *Ball, supra.*

[3] Relator presented the testimony of Larry Garrett and Woody Fox and exhibits related thereto in an effort to show that Respondent failed to notify Garrett of his lack of malpractice insurance at the time Respondent represented him. The panel does not find the evidence regarding the Garrett representation sufficient to satisfy the clear and convincing standard.

Count Three—IOLTA Records

{¶ 36} Respondent maintains an IOLTA ending in 7804. On March 24, 2016, Relator issued a request to Respondent to provide certain records regarding this account no later than April 4, 2016.

{¶ 37} The request stated that, for the period from January 1, 2012 through February 29, 2016, Respondent should provide: (1) copies of fee agreements for all clients from whom Respondent collected funds or fees and deposited them in account 7804; (2) copies of records maintained for each such client, including name, the date, amount and source of all deposits into account 7804, the date, amount, payee, and purpose of each disbursement made on behalf of such clients, and each client's running balance; (3) copies of records showing the date, amount, and client affected by every credit and debit to account 7804 and the running balance therein; and (4) copies of the required monthly reconciliations for account 7804. Relator also requested copies of all bank-generated statements, deposit slips, and canceled checks for account 7804 for the period from September 1, 2015 through February 29, 2016. And, to the extent Respondent "received funds or other property in which a client or third party claimed a lawful interest," Relator also requested copies of Respondent's "notification(s) of his receipt of such funds or property to the client or third person." The records requested align with those lawyers are required to retain under Prof. Cond. R. 1.15(a)(1)-(5).

{¶ 38} After amending its complaint, Relator made repeated requests for the records related to account 7804.

{¶ 39} Respondent never produced anything close to the full set of IOLTA-related records that Relator requested beginning on March 24, 2016.

{¶ 40} Because this case has been contentious, the panel chair closely monitored discovery, making himself available to the parties to resolve disputes. To keep discovery moving, the panel chair conducted multiple teleconferences with the parties. The panel chair also telephonically monitored Respondent's deposition on December 22, 2016, after a previous attempt to take Respondent's deposition earlier that month, outside the panel chair's presence, quickly descended into chaos. Closely supervising discovery gave the panel chair an opportunity to gauge Respondent's openness and responsiveness.

{¶ 41} Throughout discovery and continuing into the first day of the hearing, Respondent could hardly have been less forthcoming, open, and candid in responding to discovery, particularly with respect to producing his IOLTA-related records.

{¶ 42} More than seven months after Relator first requested these records, Respondent began asserting that he already had produced them. It is worth noting that Respondent did *not* make this claim in his expansive April 15, 2016 letter to Relator (Relator's Ex. 31), *or* in his otherwise prolix and self-serving motion to dismiss and motion to quash filed on May 18, 2016, *or* in his June 17, 2016 answer to the amended complaint.

{¶ 43} Even when Relator stated in its June 22, 2016 response to Respondent's motion to quash that it did not have the IOLTA-related records, Respondent still did not make the claim that he already had produced them.

{¶ 44} Respondent did not offer that belated excuse for nonproduction until his November 30, 2016 response to Relator's initial discovery requests—more than seven months after Relator had propounded them.

{¶ 45} In that same November 30 filing, Respondent claimed, also for the first time, that his IOLTA-related records consisted of only "nine pages." So as of November 30, 2016,

Respondent had belatedly staked out the position that he did not have to provide the IOLTA-related records requested by Relator because he had long since given Relator those "nine pages."

{¶ 46} Even after Relator filed a motion to compel in December 2016, Respondent stuck to his position during his December 22, 2016 deposition that he had produced the "nine pages." December 22, 2016 Deposition, pp. 104, 312. Rather than do the simple thing and provide Relator another copy of what he supposedly had produced, Respondent instead treated this as an opportunity for gamesmanship and obfuscation. See *Disciplinary Counsel v. Stafford*, 128 Ohio St. 3d 446, 2011-Ohio-1484, ¶56. Although the alleged production was supposed to have consisted only of "nine pages," Respondent conveniently never had a copy of them close at hand that he could simply show Relator—not during his deposition, and not even during the first day of the hearing. When, on the first day of the hearing, Respondent again claimed to have already produced the "nine pages," the panel chair ordered him to produce a copy to Relator by the end of the day. The next day, Respondent produced six, not nine, pages of IOLTA records to Relator, offering no explanation for the discrepancy. Relator's Ex. 91, Hearing Tr. 545-561. These six pages contain some of the requested IOLTA-related information, but nothing close to the records that Relator originally requested and that Respondent was required to maintain for account 7804 under Prof. Cond. R. 1.15(a). Respondent later produced another page at the panel chair's instruction, which was not responsive to Relator's original request due to falling outside the timeframe specified; but he never produced the other two pages that he claimed to have given to Relator previously. Hearing Tr. 553-554, 557-559.

{¶ 47} The panel finds that, for the period from January 1, 2012 through February 29, 2016, Respondent failed to provide Relator: (1) copies of fee agreements for all clients from whom Respondent collected funds or fees and deposited them in account 7804; (2) copies of all records

maintained for each such client, including name, the date, amount and source of all deposits into account 7804, the date, amount, payee, and purpose of each disbursement made on behalf of such clients, and each client's running balance; (3) copies of records showing the date, amount, and client affected by every credit and debit to account 7804 and the running balance therein; and (4) copies of the required monthly reconciliations for account 7804. The panel further finds that Respondent also failed to provide Relator copies of all bank-generated statements, deposit slips, and canceled checks for account 7804 for the period from September 1, 2015 through February 29, 2016. It is evident to the panel that Respondent did not produce these records because he never maintained them, as required by Prof. Cond. R. 1.15(a)(1)-(5).

{¶ 48} The panel concludes Relator has established, by clear and convincing evidence, that Respondent violated each of the subdivisions of Prof. Cond. R. 1.15(a) requiring lawyers to maintain complete IOLTA-related records, *i.e.*, Prof. Cond. R. 1.1.5(a)(1), (2), (3), (4), and (5). The panel further concludes that, by failing to produce such records to Relator in a complete and timely fashion, Respondent knowingly breached his duties to disclose material information when requested and to cooperate and assist in Relator's investigation, in violation of Prof. Cond. R. 8.1(b) and Gov. Bar. R. V, Section 9(G).

Count Four—Barbara Nyce Funds

{¶ 49} In 2006, Respondent's mother Barbara Nyce executed a durable power of attorney naming Respondent and his brother Roger as her attorneys-in-fact.

{¶ 50} At various times in 2013 and early 2014, Barbara resided at a nursing facility in Burlington, Vermont known as Burlington Health & Rehabilitation Center.

{¶ 51} From March 18, 2014 until her death on May 25, 2015, Barbara resided at a care and rehabilitation facility known as Kindred Transitional Care and Rehabilitation-Birchwood Terrace.

{¶ 52} At the time she initially became a patient at Burlington Health in 2013, Barbara had assets in excess of $700,000, including sizable accounts in two Vermont banks on which her sons were also listed, and a home in Shelburne, Vermont.

{¶ 53} By the time of her final discharge from Burlington Health, Barbara owed the facility more than $67,000.

{¶ 54} By the time of her death, she owed Birchwood more than $137,000.

{¶ 55} Between the two facilities, Barbara owed more than $205,000 at the time she died.

{¶ 56} By then, Barbara had no assets from which to pay these debts. The reason for this is that Respondent and his brother Roger systematically withdrew the funds from the two bank accounts, and the brothers executed a quit claim deed transferring the Shelburne property from Barbara to themselves for only $10.

{¶ 57} On one day alone, June 19, 2013, Respondent and his brother caused $584,619.23 to be transferred out of the Vermont bank accounts and caused seven cashier's checks totaling that amount to made payable to themselves. Hearing Tr. 704-705, 708-709; Relator's Ex. 83, 85, 86, and 87. This money was deposited two days later into account 7804, Respondent's IOLTA. Hearing Tr. 646, 657-658, 709; Relator's Ex. 60 at 11 and Relator's Ex. 61 at 3-5. Over the ensuing two weeks, the money was transferred out of account 7804 in three batches: (1) $200,000 went into an account for an estate of which Respondent was executor, (Hearing Tr. 664), though well after the estate was closed, (Hearing Tr. 669); (2) $177,171.87 went to pay for a condominium in

the name of Respondent's wife; and (3) $200,000 went into a certificate of deposit in Respondent's name. Relator's Ex. 50; Hearing Tr. 800.

{¶ 58} Respondent testified that the $200,000 in the CD was "moved to investments for" nine individuals whom he characterized as his "clients," (Hearing Tr. 797), and that this was done at his mother's "direction," (Hearing Tr. 802), even though he testified elsewhere that his mother suffered from dementia and was "brain damaged." Hearing Tr. 705, 730-732. He further explained: "It is now titled in the name of a trust for the nine clients," of which his son, a nonlawyer, is the trustee. Hearing Tr. 798-799. Respondent refused to identify the nine individuals and would only say that his mother had some sort of connection to them, though he himself did not "always know what her connection was." Hearing Tr. 801. He also testified that three "third parties" have a potential future interest in the investments—three unidentified individuals who are "[n]ot clients, but third parties that the nine clients have to embrace. They're mutually symbiotic." *Id.* Respondent refused to divulge the names of the third parties, stating: "I can't disclose the names of the third parties, but the third parties only have a future interest if things happen at this point in time. So when we negotiated and got everybody on board, they don't have any way to do anything to harm the nine until possibly a much later date and time." Hearing Tr. 801-802. Respondent also refused to identify the nine individuals. All he would say is that they are "desperate" and that "[m]y mother had them deal with me over the years." Hearing Tr. 805.

{¶ 59} None of the nine individuals is identified in what Respondent claimed was his "complete" IOLTA client ledger for 2013. Relator's Ex. 91; Hearing Tr. 569. When Relator's counsel inquired where the Prof. Cond. R. 1.4(c) forms for the nine "clients" are, Respondent replied, "Those are with me." Hearing Tr. 806. When Relator's counsel pressed him on why he had not surrendered them in response to Relator's repeated requests for all such forms for his

clients, he replied: "Because they're private clients, and I'm not doing legal services for them. I'm running their accounts and running their homes. So I did not see that they're legal clients. None of them are suing anybody or getting benefits. When I say they're clients, they start out that way because of my mother; but they don't transition. They're people that eat, have a home, stay warm, survive because of what my mother and I do. That's not a legal client. It's a client." *Id.* At that point, the panel chair asked, "If they're not legal clients, then why can't we know who they are?" Respondent replied, "They don't want to be known" and "It's not anybody in here's business." Hearing Tr. 806-808.

{¶ 60} It is clear to the panel that Respondent used his IOLTA to try and launder the money withdrawn from his mother's bank accounts in Vermont, that he used the dormant estate's bank account for the same purpose, and that his story about the "nine clients" is a complete sham concocted by Respondent in a vain effort to sanitize and legitimize his improper use of his IOLTA account. The panel thus concludes Relator has established, by clear and convincing evidence, that Respondent violated Prof. Cond. R. 1.15(a) and (b) [restricting the use of a lawyer's trust account].

{¶ 61} We are given to understand that the transfers of Barbara's assets figure in ongoing legal proceedings in federal court in Vermont, although the current status of those proceedings and Respondent's potential liability, if any, are unclear on this record. For our purposes, though, it is sufficiently clear that Respondent knew when he transferred the money back out of his IOLTA that at least one third-party would claim an interest in his mother's funds. Ex. 1 to Relator's Ex. 66, p. 10. Thus, the panel concludes Relator has established by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(d) [failure to notify third person claiming an interest in funds deposited into lawyer's trust account].

{¶ 62} As with Counts One and Two, Relator alleged a violation of Prof. Cond. R. 8.4(h) in Count Four. It is up to Relator to demonstrate the requisite level of "egregiousness" sufficient to justify a finding that Respondent violated Prof. Cond. R. 8.4(h). See *Bricker*, *supra*. Although Relator's post-hearing brief mentions this rule in passing in its discussion of Count Four, Relator does not explain why it believes the misconduct that is violative of the other rules charged in Count Four should be considered egregious under *Bricker*. Because it is not up to the panel to search for reasons that Relator should supply, we decline to find that Relator has met its burden of proof with respect to the Prof. Cond. R. 8.4(h) violation alleged in Count Four and unanimously dismiss that alleged violation. The extreme, self-serving, and unacceptable nature of Respondent's conduct with respect to Count Four is, nevertheless, properly part of our consideration of the appropriate sanction.

AGGRAVATION, MITIGATION, AND SANCTION

{¶ 63} Relator recommends that Respondent be permanently disbarred from the practice of law. Respondent makes no mention of any sanction in his post-hearing brief, nor did he present any mitigating evidence at the hearing. His post-hearing brief mentions his lack of any disciplinary history and seeks dismissal of the entire complaint against him. For the reasons set forth below, the panel agrees with Relator that disbarment is warranted.

{¶ 64} Arriving at the appropriate sanction requires consideration of the duties violated, the injuries caused, the attorney's mental state, and the sanctions imposed in similar cases. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, ¶24. Before recommending a sanction, we also weigh the aggravating and mitigating factors in the case, including not only those set forth in Gov. Bar. R. V, Section 13, but all factors relevant to the case. *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, ¶40.

Duties Violated and the Injuries Caused

{¶ 65} In connection with Counts One and Two, the panel has found that Respondent violated important duties of disclosure to clients, the salutary effects of which are to notify clients that their lawyers are placing their interests at risk by not carrying any or sufficient professional liability insurance. Respondent not only violated these duties, he made conscious efforts to conceal evidence of his violations, including needlessly hiding his lack of malpractice coverage before, during, and after his representation of AG and NC—an ethical lapse made all the more harmful by the fact that these clients actually had a plausible malpractice claim to bring against Respondent, and that when they made that known to him through their successor counsel, he threatened to damage them further if they brought it.

{¶ 66} In connection with Counts Three and Four, the panel has found that Respondent violated important duties related to the use of IOLTA and to the disciplinary process. Once again, Respondent not only violated these duties, he sought to conceal evidence of his violations, both from Relator and from this panel, conjuring up a brand new class of "clients" whose identities he did not have to disclose to anyone—not even the panel—even while he was using his lawyer trust account to launder their supposed funds.

{¶ 67} By breaching these various duties, Respondent did harm to clients, third-parties, and the disciplinary system.

Respondent's Mental State

{¶ 68} Respondent offered no reliable evidence that he suffered from any mental disability or chemical dependency at the time of the violations. Thus, there is a presumption that he was healthy and unhindered at that time he committed them. See *Disciplinary Counsel v. McCord*, 121 Ohio St.3d 497, 2009-Ohio-1517, ¶45.

Aggravating and Mitigating Factors

{¶ 69} The panel finds as the sole mitigating factor that Respondent had no prior disciplinary record.

{¶ 70} As aggravating factors, the panel finds that Respondent: (1) acted with a dishonest and selfish motive; (2) committed multiple offenses; (3) engaged in a pattern of misconduct; (4) refused to acknowledge the wrongful nature of his conduct; (5) failed to cooperate in the disciplinary process; and (6) submitted false evidence, made false statements, and used deceptive practices during the disciplinary process. The last two of these factors warrant elaboration.

{¶ 71} From the beginning, Respondent displayed open and undisguised hostility toward the disciplinary system, the attorneys representing Relator, and the panel. It would be difficult to imagine an accused attorney demonstrating less respect for the disciplinary process or less remorse for his misconduct. Throughout the proceedings, from the initial complaint through the end of the hearing, Respondent actively sought to conceal evidence of his misconduct, gave false and evasive testimony, and used a multitude of means in a dishonest effort to subvert, derail, and undermine the disciplinary process. In his answer to the amended complaint, for example, he denied the allegation "Respondent is not licensed to practice law in Vermont" due to "lack of specificity." Relator's Ex. 35 at 2. He asserted "counterclaims" against Relator and its individual lawyers for a variety of constitutional violations and for violations of federal and state racketeering laws. Relator's Ex. 34 at 3-5. During discovery, he had subpoenas issued to take depositions of particular witnesses, often requiring the panel chair to issue special entries, then he failed to show up for the depositions, inconveniencing the witnesses, Relator's counsel, and Board staff. At his own aborted deposition in early December 2016, Respondent objected to the court reporting

service employed by Relator as biased. During the hearing in February and March 2017, Respondent quibbled endlessly over trivial matters such as:

- How to phrase the number of clients he had in a specified time period (Hearing Tr. 414-419: spending five minutes debating whether he said he had 30 clients, at least 30 clients, or approximately 30 clients at a given point in time);

- Identifying copies of filings such as the amended complaint (Hearing Tr. 417: "I recognize that this is what it says on the front page. I don't know even upon looking I will be able to identify for certain, but that is what it says here.");

- The manner in which Relator's counsel framed questions (Hearing Tr. 414: "Q. Let's focus for a minute on the period of time from 2012 through August of 2015. Are you with me? A. I don't know if I am with you, but if there is a question, I don't know it yet.");

- Identifying a letter addressed to himself (Hearing Tr. 428: "Q. Do you recognize Exhibit 7 as a, first of all, do you agree that is a letter addressed to you dated May 22nd, 2015? A. Well, it is certainly not addressed to me in any way that is who I am, but I understand it is my last name and first name, but it is not me, but, I got the letter, I received this letter.").

{¶ 72} At times, Respondent's quibbling spanned a period of months. At his December 22, 2016 deposition, Respondent refused to identify Roger Nyce as his brother based on his Fifth Amendment privilege. December 22, 2016 Deposition, p. 341. Then, on February 3, 2017, the first day of the hearing, Respondent filed a memorandum in which he repeatedly identified Roger as his "brother." Respondent [sic] Filing of Memorandum of Law, p. 4. During his testimony the very same day, though, he turned evasive again, taking several minutes to answer whether Roger was his brother—and in the end refusing to say one way or the other. Hearing Tr. 608-610. By March 6, 2017, the second day of the hearing, Respondent was back to routinely calling Roger his "brother," as if he had never cast any doubt on the matter. Hearing Tr. 718 ("Roger, my brother * * *."); see also Hearing Tr. 707, 708, 718, 719, 723, 804. Similarly, at his December 22, 2016 deposition, Respondent refused to discuss any matters related to Vermont, his mother, or his brother, invoking his Fifth Amendment privilege—although he refused to be pinned down to what

part of that Amendment he was invoking. December 22, 2016 Deposition, pp. 342-345 (regarding Respondent's blanket assertion of the privilege), and p. 337 ("I'm invoking under the Fifth Amendment in broader clauses"). During the hearing, he discussed these matters at length—indeed, that is how he began his case—as if he never had done or suggested otherwise. ("I'd like to begin where the bar association ended by starting with Vermont * * *"). Hearing Tr. 702

{¶ 73} Respondent also repeatedly refused to answer perfectly proper "yes" or "no" questions posed by Relator's counsel, even when the panel chair instructed him to do so. Hearing Tr. 459-461, 462-465. He falsely testified about providing signed Prof. Cond. R. 1.4(c) notices to Relator. Hearing Tr. 462-463, 467-468. And, he fabricated elaborate stories to cover his tracks, such as: the flood that supposedly "wiped out" most of his clients' Prof. Cond. R. 1.4(c) notices (Hearing Tr. 471-473, 476-486, 498, and Respondent's Post-Hearing Brief, p. 5), this despite never mentioning the flood during his first deposition or in his motions attacking the complaint (Hearing Tr. 488-494, 494-497); and the equally tall tales of the "nine pages" of IOLTA-related records that he supposedly had given to Relator (Count Three), which turned out to be six pages never before disclosed, and of the "nine clients" (Count Four), who turned out not to be "legal clients" at all, but "private clients," whatever that might mean. See discussions of Counts Three and Four, *supra.*

{¶ 74} "The duty to cooperate in disciplinary proceedings is rooted in the self-governing nature of the legal profession. It requires each lawyer to ensure that the profession is properly regulated, even when he himself is the subject of the process. * * * So when an attorney disregards or fails to cooperate in the disciplinary process, not only does he disserve the public and this court's mission to protect it, he also compromises the profession and himself as a member of it." *Disciplinary Counsel v. Watson*, 98 Ohio St.3d 181, 2002-Ohio-7088, ¶14.

{¶ 75} The panel takes seriously the duty of the Board and the Court to protect the public from unscrupulous lawyers. Neither the Board nor the Court can fulfill this duty if lawyers accused of wrongdoing are able to frustrate and degrade the disciplinary system by concealing evidence, giving false testimony, and refusing to cooperate honestly in the truth-seeking process. A lawyer who acts in this manner, as Respondent has throughout this proceeding, on top of committing the serious underlying misconduct with which he is charged, has no business continuing to practice law.

Sanctions Imposed in Similar Cases

{¶ 76} The Supreme Court consistently has reminded us "that the primary purpose of the disciplinary process is not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship." *Cleveland Metro. Bar Assn. v. Lockshin,* 125 Ohio St.3d 529, 2010-Ohio-2207, ¶42.

{¶ 77} The panel agrees with Relator's characterization that Respondent "is dangerously unable to distinguish right from wrong." Relator's Post-Hearing Brief, p. 23. We do not reach this conclusion lightly, but only after observing Respondent throughout this lengthy disciplinary proceeding. The disciplinary process often serves as a fail-safe, shining a bright light on accused lawyers and distinguishing the corrigible from the incorrigible. It is a process designed in part to allow the Board and the Court to determine when lawyers who have neglected their ethical duties can nevertheless return to the ethical practice of law without posing harm to the public, and when they cannot. Even lawyers who have committed serious ethical lapses, when they cooperate in the truth-seeking process, demonstrate genuine remorse, and show that they could yet practice ethically without danger to the public, have been able to avoid the harshest sanction of disbarment and received second, and sometimes more, chances. But the disciplinary process has a way of

exposing those who are no longer worthy of the trust that lawyers must simultaneously carry, project, and live up to. Tell-tale signs of this include accused lawyers giving false testimony during the disciplinary process, attempting to impede, obstruct, or protract the disciplinary process, or persistently refusing to accept responsibility for any of their misconduct. When exposed, these signs, *all of which Respondent has exhibited*, can tip the balance from a term or indefinite suspension to disbarment. See, *e.g.*, *Toledo Bar Assn. v. Harvey*, Slip Opinion No. 2017-Ohio-4022, ¶19 ("Harvey has shown very little respect for our attorney-discipline process."); *Trumbull Cty. Bar Assn. v. Roland*, 147 Ohio St.3d 274, 2016-Ohio-5579, ¶¶18-19; *Columbiana Cty. Bar Assn. v. Barborak*, 149 Ohio St.3d 143, 2016-Ohio-8167, ¶16; *Cincinnati Bar Assn. v. Hoskins*, Slip Opinion No. 2017-Ohio-2924, ¶24; *Disciplinary Counsel v. Little*, Slip Opinion No. 2017-Ohio-6871, ¶13; *Cleveland Metropolitan Bar Assn. v. Frenden*, 149 Ohio St.3d 548, 2016-Ohio-7198, ¶ 33; *Lake County Bar Assn. v. Davies*, 144 Ohio St.3d 558, 2015-Ohio-4904, ¶¶19, 27; *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, ¶¶27-28; *Trumbull Cty. Bar Assn. v. Kafantaris,* 121 Ohio St.3d 387, 2009-Ohio-1389, ¶15.

{¶ 78} After considering all of the factors and the case law mentioned above, the panel concludes that respondent no longer is fit to practice a profession grounded on trust, integrity, and candor. To assure the protection of the public, the only appropriate sanction is permanent disbarment.

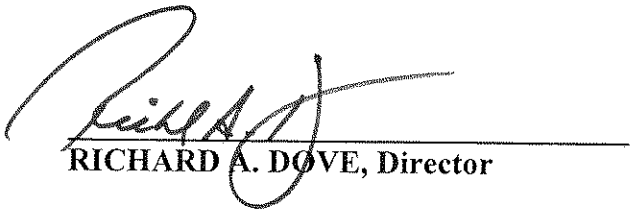
{¶ 79} In light of respondent's misconduct, the duties violated and the harm caused, the presence of multiple aggravating factors, the sole mitigating factor of no prior discipline, and the sanctions imposed in similar cases, the panel recommends that Respondent be disbarred.[4]

[4] In its post-hearing brief, Relator notes that it is "unable to recommend a restitution amount due to the pending litigation in Vermont." Relator's Post-Hearing Brief, p. 23. Because, as noted, we do not know the status of that litigation or of Respondent's potential liability, the panel also is unable to recommend any restitution amount at this stage.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on August 4, 2017. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Kinsley Frampton Nyce, be permanently disbarred from the practice of law in Ohio and ordered to pay the costs of these proceedings.

Pursuant to the order of the Ohio Board of Professional Conduct, I hereby certify the foregoing findings of fact, conclusions of law, and recommendation as those of the Board.



RICHARD A. DOVE, Director