IN THE SUPREME COURT OF OHIO

Disciplinary Counsel Relator, v. Jason Allan Sarver, Esq. Respondent.	Case No. 2020-0229 On Certified Report by the Board of Professional Conduct

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Relator's Answer to Respondent's Objections

Joseph M. Caligiuri, Esq. (0074786)
Disciplinary Counsel
Relator

Jason Allan Sarver, Esq. (0082073)
Respondent

Karen H. Osmond, Esq. (0082202)
*Counsel of Record
Assistant Disciplinary Counsel
Donald M. Scheetz, Esq. (0082422)
Chief Assistant Disciplinary Counsel
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215
Telephone: (614) 461-0256
Facsimile: (614) 461-7205
Karen.Osmond@sc.ohio.gov
Donald.Scheetz@sc.ohio.gov
Co-Counsel for Relator

Philip A. King, Esq. (0071895)
Law Office of Philip A. King, LLC
2529 Oakstone Drive
Columbus, Ohio 43231
Telephone: (614) 610-4545
Facsimile: (614) 340-7191
pking@pkesq.com
Counsel for Respondent

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INTRODUCTION AND PROCEDURAL HISTORY

On June 3, 2019, relator filed a formal complaint against respondent alleging violations of Prof.Cond.R. 1.4(a)(1), 1.16(d), 3.4(c), 5.5(a), 8.1(a), 8.4(c), and 8.4(d) arising from respondent's representation of Juanita Mustin and the Estate of Jessica Mustin. *Cuyahoga County Probate Court Case No. 2018 EST 238239.*

On November 26, 2019, respondent entered into several factual stipulations, as well as stipulations to all rule violations except for Prof.Cond.R. 1.4(a). However, at the disciplinary hearing on December 3, 2019, respondent acknowledged that he violated all charged violations *including* Prof.Cond.R. 1.4(a). (Hrg. Tr., Pg. 180:3.) But then in his post-hearing brief, respondent inexplicably reversed his position again and claimed that he did not violate Prof.Cond.R. 1.4(a) or, for the first time, Prof.Cond.R.3.4(c). Respondent's vacillating positions on his misconduct shows that he does not appreciate the gravity of his misconduct, nor the harm that he caused Juanita Mustin or the Estate of Jessica Mustin.

In its post-hearing brief, relator recommended that respondent be indefinitely suspended from the practice of law and that any reinstatement be conditioned on 1) respondent's completion of restitution to either the Estate of Jessica Mustin or Allstate Insurance; 2) completion of at least 12 hours of CLE in professional ethics for each year of respondent's suspension in addition to what he may be required to complete pursuant to Gov.Bar.R. X; and 3) no further misconduct by respondent. Respondent agreed to this sanction. (Hrg. Tr., Pg. 208:8.)

On February 10, 2020, the Board of Professional Misconduct ("board") filed its Findings of Fact, Conclusions of Law, and Recommendation ("board report") with this court. The board determined that respondent had violated all charged violations, including Prof.Cond.R. 1.4(a) and 3.4(c), and recommended that respondent be permanently disbarred from the practice of law.

STATEMENT OF FACTS

On June 23, 2018, Jessica Mustin ("Jessica") was killed when her car collided with a wrong-way driver on a highway in Cleveland, Ohio. (Bd. Rpt., ¶ 10.) At the time of her death, Jessica was the mother of a four-year-old child, whose father is Jerome A. Watkins, Sr. ("Watkins"). *Id*. Jessica was also in a relationship with Anthony Hodge ("Hodge"), who had known respondent since at least 2002. *Id*.

Shortly after Jessica's death, Hodge referred Jessica's mother, Juanita Mustin ("Mustin"), to respondent to pursue a wrongful death case. (Bd. Rpt., ¶ 11.) On or about June 25, 2018, Mustin spoke to respondent for the first time, and on June 30, 2018, Mustin signed a contingency fee agreement with respondent agreeing to pay him 33% if settlement was achieved without the necessity of filing a lawsuit, 38% if suit was filed, and 40% if trial was necessary. *Id*. Later in the representation, respondent also agreed to represent Mustin with regard to an *Application for Crime Victim Compensation* (CVC) that either Mustin or Watkins had previously filed with the Ohio Attorney General's Office. *Id*. Mustin, however, did not personally meet respondent until December 13, 2018. *Id*. Between June 25, 2018 and December 13, 2018, all of Mustin's communications with respondent were over the phone or through Hodge. *Id*.

After being retained, respondent contacted Allstate Insurance ("Allstate") – the insurance company for the wrong-way driver – and notified them that he represented Jessica's estate. (Bd. Rpt., ¶ 12.) On August 21, 2018, Allstate offered a policy-limits settlement of $50,000. *Id*. Respondent advised Mustin of the settlement offer and told her that $50,000 was the maximum that Allstate would award. *Id*. He also advised her that all proceeds of the settlement, minus his attorney fees and any reimbursement for advanced costs, would go to Jessica's minor child. *Id*. Respondent later advised Mustin that she would also receive a $500 fiduciary fee. *Id*. Finally,

respondent advised Mustin that before any settlement could be distributed, he would have to have her appointed fiduciary of Jessica's estate and obtain probate court approval for the settlement. *Id*. Mustin acknowledged all of the above and accepted it willingly because the settlement would benefit her grandson. *Id*.

On September 6, 2018, respondent accepted the $50,000 settlement on behalf of Mustin. (Bd. Rpt., ¶ 13.) Around this same time, respondent also prepared and caused Mustin to sign an *Application for Authority to Administer Estate*, an *Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims*, an *Entry Approving Settlement and Distribution of Wrongful Death and Survival Claims*, a *Report of Distribution of Wrongful Death and Survival Claims*, and documents necessary for the Ohio Department of Taxation. *Id*. Consistent with what respondent had told Mustin, the *Report of Distribution of Wrongful Death and Survival Claims* indicated that the $50,000 settlement would be disbursed as follows:

- $500 to Mustin for fiduciary fees;
- $16,665 to respondent for attorney fees; and
- $32,835 to a trust for the minor child.[1] *Id*.

On October 15, 2018, respondent went to the Cuyahoga County Probate Court to file the documents that he had prepared and that Mustin had signed. (Bd. Rpt., ¶ 14.) However, while there, he only filed the *Application for Authority to Administer Estate*. *Id*. Respondent falsely claimed that it was because he had a conversation with Magistrate Mary Haas McGraw that led him to believe:

[1] The *Report of Distribution of Wrongful Death and Survival Claims* should have actually reflected an attorney fee to respondent of $16,500, not $16,665. Per respondent's fee agreement with Mustin, his attorney fee was 33% if suit was not required; however, it appears that in creating the *Report of Distribution of Wrongful Death and Survival Claims,* respondent calculated his fee at 33 1/3 %.

- that he could streamline the probate court process by reducing the distribution amount to the minor child to less than $25,000;

- that he could and should disburse settlement proceeds to Jessica's cousins or other family members in order to reduce the amount of the distribution to the minor child to less than $25,000; and

- that he could make those distributions at the direction of the fiduciary and without probate court approval. *Id*.

However, as part of the disciplinary proceeding, Magistrate McGraw authored an affidavit stating what she would and would not have told respondent if she spoke to him. (Bd. Rpt., ¶ 15.) In her affidavit, Magistrate McGraw specifically stated that she did not advise respondent to disburse funds without probate court approval, that she did not advise him that settlement funds could be distributed per the fiduciary's directive, and that she did not advise respondent to "streamline" the probate court process by reducing the amount to the minor to less than $25,000. *Id*. Respondent testified that he does not believe that anything in Magistrate McGraw's affidavit is false or incorrect. (Bd. Rpt., ¶ 16.) Accordingly, the board determined that respondent's decision to file only the *Application for Authority to Administer Estate* was not because of any conversation that he may have had with Magistrate McGraw, but because it was the only document that could be filed. *Id*. The remainder of the documents indicated or assumed that Mustin had been appointed fiduciary, which she had not been as of October 15, 2018. (*See* Stip. Exs. 14-18.)

On November 6, 2018, the Cuyahoga County Probate Court granted the *Application for Authority to Administer Estate* on condition that Mustin post bond in the amount of $10,000. (Bd. Rpt., ¶ 17.) On November 15, 2018, respondent paid a $100 fee to obtain a $10,000 bond from Western Surety Company for Mustin. *Id*. On November 26, 2018, respondent filed

documentation concerning the $10,000 bond with the probate court, and on the same day, Mustin was officially appointed fiduciary of Jessica's estate. *Id.*

On November 28, 2018, respondent was suspended from the practice of law for two years with 18 months stayed on several conditions. (Bd. Rpt., ¶¶ 3 & 18.) In light of this suspension, respondent could no longer represent Mustin or Jessica's estate; however, he made no attempt to notify Mustin or the probate court of his suspension even though he was required to do so by this court's suspension order. (Bd. Rpt., ¶¶ 3, 18, 35, & 36.) Instead, respondent filed a false affidavit with this court stating that he had notified Mustin and the probate court of his suspension and that he had maintained a record of steps taken pursuant to the court's November 28, 2018 order. (Bd. Rpt., ¶ 19.)

Furthermore, respondent continued to represent Mustin and the estate despite his suspension. (Bd. Rpt., ¶ 20.) He continued to communicate with Allstate Insurance regarding the settlement release and issuance of the settlement check, and he continued to communicate with representatives of Crime Victims' Services. *Id.* In fact, on November 30, 2018, respondent sent a letter on his attorney letterhead to Shawn Moser, a Crime Victims' Services Representative, which stated "As additional information becomes available to our office, you will be advised. We look forward to working with you on this claim." (Bd. Rpt., ¶ 21.) On the same day, respondent also sent Allstate a settlement release on which he had forged Mustin's signature without her knowledge or consent and notarized his own signature. (Bd. Rpt., ¶¶ 21 & 29-31.)

On December 10, 2018, respondent received the $50,000 settlement check from Allstate. (Bd. Rpt., ¶ 22.) Respondent signed Mustin's name on the back of the check, again without her knowledge or consent, and deposited it into his IOLTA. (Bd. Rpt., ¶¶ 22 & 29-31.) Thereafter,

he immediately began using what he had calculated to be his earned fees to pay personal financial obligations. (Bd. Rpt., ¶ 22.) At the time respondent began using settlement funds, he had no authority from the probate court to expend any settlement funds. *Id*.

On December 13, 2018, respondent personally met Mustin at her house; however, he again failed to tell her that he had been suspended from the practice of law. (Hrg. Tr., Pg. 150:23.) Instead, he led her to believe that he was still permitted to practice law by giving her a $4,734 check and telling her that it was from the settlement. (Hrg. Tr., Pg. 69:19.) Respondent also announced that he was giving $2,000 to Hodge, which he later did through Earth Temple, a 501(c) corporation registered to Hodge. (Bd. Rpt., ¶ 23.)

Throughout the disciplinary proceedings, including at the disciplinary hearing, respondent claimed that he and Mustin mutually agreed on the distribution amounts to her and Hodge and that she "consented" to the distributions; however, Mustin's testimony on these issues proved that respondent's testimony was false. (Bd. Rpt., ¶ 32.) Mustin testified that when respondent appeared at her house, the check for $4,734 was already written, and she was "shocked" to see that it was so much more than the $500 that respondent had previously told her she would receive. (Hrg. Tr., Pgs. 50:4 & 57:13-58:22.) Mustin further testified that she never asked respondent for money from the settlement because she knew the money was going to her grandson and that the only information she received from respondent regarding the $4,734 check was that it was an "early Christmas present" and that it was related to taxes on the settlement. (Bd. Rpt., ¶ 32; Hrg. Tr., Pgs. 55:22, 58:6, 69:19, & 79:21.) Finally, Mustin testified that she only accepted the check because respondent told her that she was entitled to the money and she trusted him. (Hrg. Tr., Pgs. 70:12, 71:3, 71:18, & 72:22.)

With regard to the $2,000 check to Hodge, Mustin testified that respondent "just said he had another additional $2,000 for Tony Hodges (sic), and - - and he felt that he should get that by him and my daughter was dating." (Bd. Rpt., ¶ 33; *See also* Hrg. Tr., Pg. 81:10.) She further testified that she only "consented" to the distribution to prevent escalation of an argument between respondent and her daughter, Chantil Harris, who believed that Hodge should not receive anything from the settlement. (Hrg. Tr., Pgs. 56:21 & 69:19.) Based on Mustin's testimony, the board concluded that there was no negotiation over the amount of the check to Hodge and that the only dispute was whether Hodge should receive any money at all. (Bd. Rpt., ¶ 33.)

On February 5, 2019, Moser called Mustin having not received a response to a December 27, 2018 letter that he had sent to Mustin, as well as to respondent.[2] (Bd. Rpt., ¶ 24.) During this call, Moser advised Mustin that he could no longer work with respondent because respondent's license to practice law had been suspended. *Id*. This was the first time that Mustin learned of respondent's suspension. *Id*. Thereafter, Mustin called respondent. *Id*. Respondent advised Mustin that his license had been suspended, but that he would have it back in a few months. *Id*. Respondent told Mustin nothing more. *Id.* He did not tell her to consult with counsel, nor did he return her file to her. *Id*.

Following his call with Mustin, Moser emailed respondent on February 21, 2019. (Bd. Rpt., ¶ 25.) On March 15, 2019, respondent left Moser a voicemail in response to his email. *Id*. In his voicemail, respondent stated that he was not representing the estate "at this time," but that he "may resume his representation" after he had been reinstated to the practice of law. *Id*.

[2] Even though Moser was aware of respondent's suspension, he sent respondent a copy of his December 27, 2018 letter because respondent had not yet notified his office as to whether Mustin was being represented by other counsel. (Stip. Ex. 24.)

In March 2019, respondent's misconduct came to the attention of relator through Sean Allan ("Allan"), an attorney contacted by Mustin after she learned of respondent's suspension. (Bd. Rpt., ¶ 26.) On March 27, 2019, relator emailed respondent regarding the information from Allan, and on March 28, 2019, relator spoke with respondent. *Id.* It was during this call that respondent first falsely advised relator that Magistrate McGraw had told him to reduce the settlement distribution to Jessica's son to less than $25,000 by disbursing it at the direction of the fiduciary. *Id.* He later repeated this false claim in two letters to relator, at his deposition, and during his testimony at the hearing. *Id.*

On November 26, 2019 - approximately one week before his disciplinary hearing - respondent sent two checks to Allan. The first check was for $26,251 and represented the funds still remaining in respondent's IOLTA from the wrongful death settlement. The second check was for $17,015 and represented the remainder of the $50,000 settlement minus the amounts that respondent had distributed to Mustin and Hodge. (Stip. ¶¶ 22 & 26; Hrg. Tr., Pg. 138:21.) Upon receipt of the checks, Allan returned them to respondent stating that Allstate had already agreed to pay the $50,000 settlement a second time and that respondent may wish to contact Allstate regarding repayment of the funds that were given to him. (Respondent's Ex. A.)

RELATOR'S RESPONSE TO RESPONDENT'S OBJECTIONS

Response to Objection No. 1: Respondent violated Prof.Cond.R. 1.4(a)(1).

Respondent objects to the board's finding that he violated Prof.Cond.R. 1.4(a)(1). Although relator only charged respondent with violating Prof.Cond.R. 1.4(a)(1) by failing to notify Mustin of his suspension, the board actually determined that respondent violated Prof.Cond.R. 1.4(a)(1) in two ways – first by failing to notify Mustin of his suspension and second by disbursing wrongful death proceeds to himself, Mustin, and Hodge without obtaining

Mustin's informed consent for the distributions. (Bd. Rpt., ¶ 40.) After consideration of the board's analysis, relator agrees. Moreover, given respondent's admission at the hearing that he violated Prof.Cond.R. 1.4(a)(1) and his multiple admissions that he failed to notify Mustin of his suspension, relator submits that this objection is nothing more than additional evidence of respondent's failure to fully acknowledge his misconduct and accept responsibility for his actions. (Stip. ¶ 31; Hrg. Tr., Pgs. 150:20-151:14 & 180:3.)

Prof.Cond.R. 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent is required. Prof.Cond.R. 1.0(f) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

The board correctly noted that respondent's representation of Mustin automatically terminated on November 28, 2018 by virtue of his suspension. (Bd. Rpt., ¶ 39.) As a result, Mustin had an important decision to make. She could either 1) retain a new lawyer to finalize the settlement with Allstate and conclude the administration of the estate at the risk of potentially having to pay a new lawyer additional attorney fees or 2) "wait out" respondent's suspension at the risk of potentially being removed as fiduciary of her daughter's estate for failure to timely administer the estate. (*See* Bd. Rpt., ¶ 36.) As soon as respondent learned of his suspension, he should have immediately advised Mustin of his suspension, explained the two options to her, and advised her of the "material risks" and "reasonably available alternatives" of each option so that Mustin could make an informed decision as to which option was in her best interest. However, by failing to advise Mustin of his suspension, respondent not only deprived Mustin of the opportunity to make an informed decision, he forced her, unknowingly, to "wait out" his

suspension with him even though this option carried potentially negative consequences for Mustin. (Bd. Rpt., ¶ 36.)

As to the board's conclusion that respondent violated Prof.Cond.R. 1.4(a)(1) by improperly disbursing money to himself, Mustin, and Hodge, this court has previously held that a fiduciary may be held liable for the unlawful acts of the attorney that the fiduciary selects to serve as his or her counsel. *In re Estate of Deardorf* (1984), 10 Ohio St.3d 108, 461 N.E.2d 1292. Here, respondent was acutely aware that he had to obtain probate court approval before making any disbursements of the wrongful death settlement proceeds. Recall that on October 15, 2018, respondent went to the probate court with the intention of filing an *Application to Approve Settlement and Distribution of Wrongful Death and Survival Claims* to obtain such approval. Even though respondent never received probate court approval for any distributions, he, nonetheless, proceeded to distribute money to himself, Mustin, and Hodge without advising Mustin that the distributions were improper. In doing so, respondent exposed Mustin to potentially negative consequences as the fiduciary of her daughter's estate. Even more troubling, respondent not only failed to advise Mustin that the distributions were improper, he actively misled Mustin into believing that the distributions were proper as shown by Mustin's testimony at the hearing:

- "Because he - - he - - he said he was giving me the check, you know, I thought it was for me. I was her mother, so - - that came from the insurance. So he the lawyer, so I'm thinking he knows what's best….So that's why I accepted it." (Hrg. Tr., Pg. 70:14.)

- "Yeah. I thought it was right. Because at first, he had me thinking I wasn't going to receive anything. So when he came to me with that, besides the $500, then I thought that it was okay for me to receive it. He – you know, he told me. (Hrg. Tr., Pg. 71:3.)

- "He my lawyer. I thought, you know, it was okay for me - - to get it. I didn't know that I wasn't supposed to receive it because he's my lawyer, so… (Hrg. Tr., Pg. 71:18.)

- "I -- I mean, I didn't know that I was supposed to receive it. I mean, he was my lawyer, so I'm going by what he was telling me." (Hrg. Tr., Pg. 72:22.)

Because respondent failed to obtain Mustin's informed consent to "wait out" his suspension and because he failed to obtain her informed consent to make improper disbursements of wrongful death proceeds, this court should overrule respondent's first objection and find that respondent violated Prof.Cond.R. 1.4(a)(1).

Response to Objection No. 2: Respondent violated Prof.Cond.R. 3.4(c).

Respondent objects to the board's finding that he violated Prof.Cond.R. 3.4(c) claiming that the "scope of the rule is limited to a lawyer's conduct toward an adversary *during* litigation, and not beyond final resolution by voluntary dismissal or court order." Emphasis added. (Respondent's brief at 11.) Respondent's claim is not only baseless, it is not supported by this court's prior case law.

First, Prof.Cond.R. 3.4(c) unequivocally states that "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists." The plain language of the rule does not limit its applicability in any way. Furthermore, respondent has acknowledged that Comment 7 to Prof.Cond.R. 1.4 requires lawyers to comply with court orders under Prof.Cond.R. 3.4(c).

Second, the goal of all litigation is to obtain some sort of "final resolution" whether it be by voluntary dismissal or court order. The court order that respondent is charged with violating is the final resolution of prior litigation between relator and respondent, i.e. respondent's first disciplinary case. To accept respondent's position that he cannot be held liable for violating this court's order simply because it did not occur *during* litigation would be tantamount to excusing lawyers from complying with final orders in all types of cases. For instance, if a lawyer is found

to be jointly liable for sanctions, the lawyer could not be held professionally liable under Prof.Cond.R. 3.4(c) if the lawyer fails to pay those sanctions. Similarly, if a lawyer is required to disburse funds held in trust pursuant to a final divorce decree, the lawyer cannot be held liable under Prof.Cond.R. 3.4(c) if he fails to disburse those funds. While this may sound ludicrous, that is essentially the argument that respondent is making by claiming that he did not violate Prof.Cond.R. 3.4(c) when he failed to comply with this court's November 28, 2018 suspension order.

Third, this court's prior case law does not support respondent's claim that the scope of Prof.Cond.R. 3.4(c) is limited by its title. (Respondent's brief at 10.) In fact, this court has previously held that the titles of the Professional Conduct Rules do not limit their applicability. *Disciplinary Counsel v. Robinson*, 126 Ohio St.3d 371, 2010-Ohio-3829, 933 N.E.2d 1095. In *Robinson*, Attorney David Robinson claimed that Prof.Cond.R. 3.4(a) did not apply to him because at the time of his misconduct, he was not acting as an advocate – the title under which all Section III rules fall. The court rejected Robinson's argument finding that Robinson had not cited any authority that limited the applicability of Prof.Cond.R. 3.4(a) and that both the Supreme Court of Delaware and the Court of Appeals of Maryland had found non-advocates in violation of Prof.Cond.R. 3.4(a). Moreover, after *Robinson*, this court continued to apply Section III rules to non-advocates. Specifically, in *Columbus Bar Assn. v. Okuley*, 154 Ohio St.3d 124, 2018-Ohio-3857, 111 N.E.3d 1173 and *Cleveland Metro. Bar Assn. v. Azman*, 147 Ohio St.3d. 379, 2016-Ohio-3393, 66 N.E.3d 695, this court found violations of Prof.Cond.R. 3.1, 3.3(a)(1), 3.4(a), and 3.4(c) even though Okuley and Azman were not acting as advocates. And in *Disciplinary Counsel v. Camboni*, 145 Ohio St.3d 395, 2016-Ohio-653, 49 N.E.3d 1284 and *Disciplinary Counsel v. Piazza*, Slip Opinion 2020-Ohio-603, this court determined that

attorneys violated Prof.Cond.R. 3.4(c) by failing to comply with no-contact orders in their personal criminal cases.

Finally, Chief Justice O'Connor and Justice Fischer recently determined that an attorney's failure to comply with her suspension order violated Prof.Cond.R. 3.4(c). *Disciplinary Counsel v. Corner*, Slip Opinion No. 2020-Ohio-961. Although this determination was made in a dissenting opinion, the majority did not opine on this particular issue finding that the count in which that rule was charged was not reviewable by the court. *Id.*

For the above-mentioned reasons, this court should overrule respondent's second objection and find that respondent violated Prof.Cond.R. 3.4(c) by failing to comply with this court's November 18, 2018 suspension order.

Response to Objection No. 3: Respondent presented no significant evidence of mitigation.

The board correctly determined that respondent produced no evidence of mitigation. Gov.Bar R. V(13)(C) lists eight factors that may be considered in mitigation:

1. The absence of a prior disciplinary record;
2. The absence of a dishonest or selfish motive;
3. A timely, good faith effort to make restitution or to rectify consequences of misconduct;
4. Full and free disclosure to the Board or cooperative attitude toward proceedings;
5. Character or reputation;
6. Imposition of other penalties or sanctions;
7. Existence of a disorder upon satisfaction of four conditions; and
8. Other interim rehabilitation.

Respondent has a prior disciplinary record, and he stipulated to acting with a selfish and dishonest motive. (Bd. Rpt., ¶ 42.) In addition, respondent did not fully and freely disclose his conduct to the board. In fact, the board found that respondent displayed a "lack of candor" with the panel and that respondent's testimony was the "exact opposite" of mitigating. (Bd. Rpt., ¶¶ 43 & 45.) Respondent also submitted no evidence of character or reputation, other penalties or sanctions, or other interim rehabilitation. Finally, he specifically stated that he was not claiming that any underlying disorder caused or contributed to his misconduct. (Hrg. Tr., Pg. 193:12.)

The only evidence that respondent presented that could possibly be considered mitigating is his last-minute attempt to make *partial* restitution; however, for the reasons below, relator respectfully submits that if anything, respondent's restitution attempt should be considered aggravating.

First, respondent did not attempt to make restitution until approximately one week before his disciplinary hearing. As such, respondent's restitution attempt was not timely as required by Gov.Bar.R. V(13)(C)(3). (Stip., ¶ 65.) This court has repeatedly held that restitution that is not timely should receive little or no mitigating credit. *See Cleveland Metro. Bar Assn. v. Wrentmore*, 138 Ohio St.3d 16, 2013-Ohio-5041, 3 N.E.3d 149 (finding that restitution had little mitigating weight since it was made after relator became aware of misconduct); *Cleveland Metro. Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, 769 N.E.2d 816 (finding that restitution had little mitigating weight since it was made a year after respondent learned of grievance and only after legal action was initiated against respondent to reclaim funds); *Disciplinary Counsel v. Noel*, 134 Ohio St.3d 157, 2012 Ohio-1008, 980 N.E.2d 1008 (finding that restitution had no mitigating weight because it was made at disciplinary hearing).

Second, respondent intentionally decided not to send Allan the full $50,000 because he has selfishly taken the position that Mustin and Hodge should be required to make restitution to Jessica Mustin's estate for the amounts that he knowingly and wrongfully distributed to them and on which at least Mustin understandably relied. (Hrg. Tr., Pgs. 72:19 & 157:10.) Further, he has taken the position that he will only repay those amounts if ordered to do so. (Hrg. Tr., Pg. 157:10.) Respondent's self-serving position does nothing other than cause more harm to Mustin than he has already caused by failing to advise her of his suspension.

Finally, at the time respondent attempted restitution, he was aware that 1) anything short of the $50,000 would prevent the estate from recovering additional funds from Allstate and 2) that Allstate had already agreed to pay the full $50,000 settlement a second time. (Stip., ¶¶ 65 & 66, which were filed on the same day that respondent sent the two checks to Allan.) As such, respondent's attempt at restitution was not only dilatory, it potentially placed the second settlement with Allstate at risk.

In light of the above, this court should overrule respondent's third objection and find that respondent presented no evidence of mitigation.

Response to Objection No. 4: Permanent disbarment is an acceptable sanction.

Relator has recommended that respondent be indefinitely suspended from the practice of law. For the reasons stated in relator's post-hearing brief, relator stands by this recommendation. However, given respondent prior's discipline, the fact that respondent "conducted himself in a fashion …consistent with his actions in his prior disciplinary case," and the fact that respondent's misconduct occurred while he was under suspension from his prior case, the board's recommended sanction of permanent disbarment is certainly not unwarranted. (Bd. Rpt., ¶ 43.)

CONCLUSION

Relator respectfully requests that this court adopt the board's Findings of Fact and Conclusions of Law and that at the very minimum, indefinitely suspend respondent from the practice of law.

Respectfully submitted,

/s Joseph M. Caligiuri
Joseph M. Caligiuri (0074786)
Disciplinary Counsel
Relator

/s Karen H. Osmond
Karen H. Osmond (0082202)
Assistant Disciplinary Counsel
Donald M. Scheetz (0082422)
Chief Assistant Disciplinary Counsel
Co-Counsel for Relator

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Relator's Response to Respondent's Objections* was served on respondent's counsel, Philip King, via electronic mail, at pking@pkesq.com on this 8th day of April 2020. A courtesy copy was also served on Richard A. Dove, Esq., Director of the Board of Professional Conduct, via electronic mail, at BOCfilings@bpc.ohio.gov.

/s Karen H. Osmond
Karen H. Osmond (0082202)
Counsel for Relator