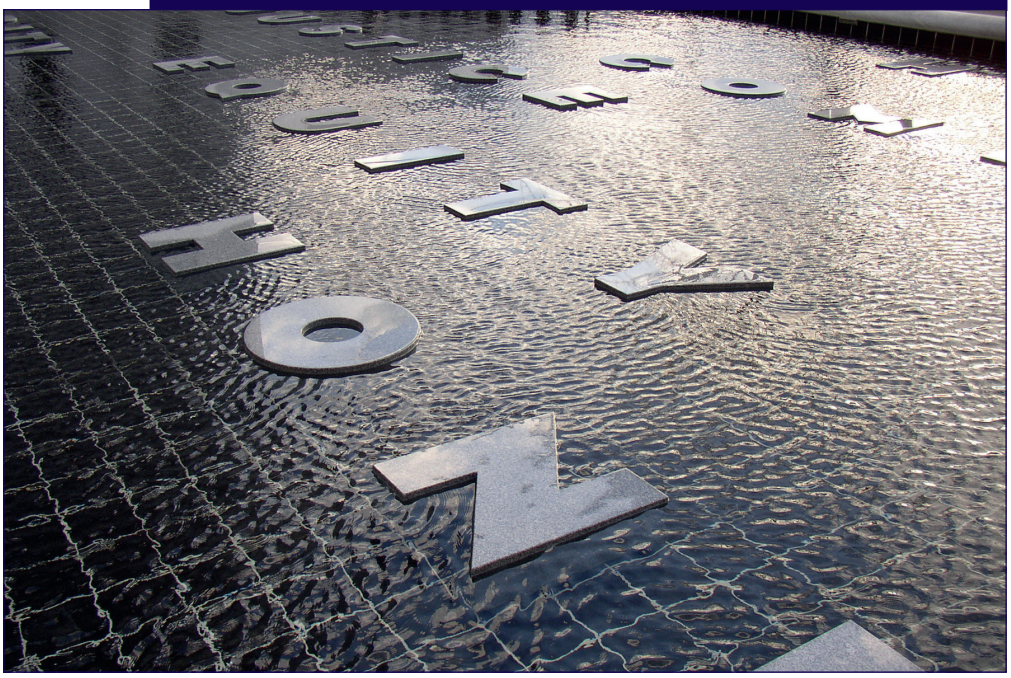
THE MILLER BECKER 2016 SEMINAR



OCTOBER 21, 2016

Ohio State Bar Association
Columbus, Ohio

6.5 CLE hours

The 2016 Miller Becker Seminar

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ACKNOWLEDGMENT

The University of Akron gratefully acknowledges attorney Joseph G. Miller, who established The Joseph G. Miller Center for Professional Responsibility at The University of Akron School of Law in 1993. The Center is a nonprofit national center devoted to serving the legal profession and the judiciary. Joseph Miller's generous support has allowed the Institute to achieve the goals Joseph envisioned when forming the Institute.

Joseph Miller and William Becker were distinguished lawyers, public servants, and community leaders. Both were highly respected in the legal community. Mr. Miller was a litigator specializing in Family Law and Land Use Development Law, and Mr. Becker was General Counsel and Vice President of BFGoodrich Chemical Group and Professor/Associate Dean/Chair of various committees at Akron Law. Their close friendship and shared interest in the growing fields of Professional Responsibility and Ethics led to Mr. Miller asking Mr. Becker to serve as Founding Director of the Institute.

Mr. Miller practiced law in the Akron community for 44 years. He chaired the Akron Bar Association's Committee on Unauthorized Practice of Law, as well as the Ethics and Professional Responsibility Committee. He was active on the Ohio State Bar Association Ethics Committee, and chaired its Opinions and Regional subcommittees. He passed away in 2005.

Mr. Becker had a long career as corporate counsel with BFGoodrich Chemical Group, culminating in his service as general counsel and vice president. He then joined The University of Akron School of Law as a Professor and later served as Associate Dean. He was active for many years on the Ohio State Bar Association's Ethics Committee, serving as vice chair. He also served as bar counsel to the Akron Bar Association. Even before the founding of the Institute, he was a respected and sought after speaker on lawyer ethics subjects. Mr. Becker passed away in 2003.

Upon Mr. Becker's death, Joseph G. Miller sought to recognize the valuable contributions of Mr. Becker and directed that the Center be renamed to include the name of his longtime friend and colleague, leading to its current designation as the Joseph G. Miller and William C. Becker Center for Professional Responsibility. Thanks to their legacy, we have learned much from them and continue to benefit from their many contributions.

THE MILLER BECKER 2016 SEMINAR

Agenda

ANNUAL MILLER-BECKER SEMINAR AGENDA*
Friday, October 21, 2016
Ohio State Bar Association Headquarters, Columbus

8:55 – 9:00 a.m.	**Welcome** ➢ TBD
9:00 – 10:15 a.m.	**Impairment in the Legal Profession (Tab II) and Disciplinary Process** ➢ Douglas Beech, M.D.
10:15 – 10:30 a.m.	**Break**
10:30 – 11:30 a.m.	**Identification and Application of Mitigating and Aggravating Factors (Tab III)** ➢ Jack P. Sahl, Moderator ➢ Scott R. Drexel ➢ Robert B. Fitzgerald ➢ Monica A. Sansalone
11:30 a.m.–12:15 p.m.	**Lunch**
12:15 – 1:30 p.m.	**Case Study—Charging Strategies and Decisions (Tab IV)** ➢ Joseph M. Caligiuri, Moderator ➢ Richard C. Alkire ➢ Lori J. Brown ➢ Donald Holtz ➢ Richard S. Milligan
1:30 – 2:30 p.m.	**Development and Use of Stipulations (Tab V)** ➢ Richard A. Dove, Moderator ➢ Joseph M. Caligiuri ➢ George D. Jonson ➢ McKenzie K. Davis ➢ David L. Dingwell
2:30 – 3:30 p.m.	**Succession Planning (Tab VI)** ➢ D. Allan Asbury, Moderator ➢ Heidi Wagner Dorn ➢ Jay E. Michael ➢ Amy C. Stone ➢ Heather M. Zirke
3:30 – 4:30 p.m.	**Optional Disciplinary Process Overview (Tab VII)** ➢ Scott J. Drexel ➢ Richard A. Dove
4:30 p.m.	**Conclusion**

Tab VIII of the Handbook contains recent Supreme Court decisions of note.

* Presenter bios are located behind Tab VIII of the seminar handbook.

THE MILLER BECKER 2016 SEMINAR

Impairment in the Legal Profession & Disciplinary Process

Impairment in the Legal Profession & Disciplinary Process

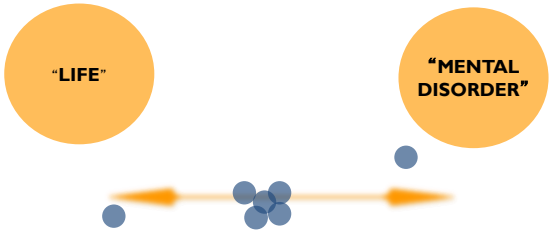
Douglas Beech, MD

OUTLINE

- OVERVIEW: MENTAL HEALTH ISSUES & PSYCHIATRIC ASSESSMENT IN THE DISCIPLINARY PROCESS
- THE ASSESSMENT PROCESS
- DSM UPDATE (DSM 5)
- COGNITIVE DECLINE/AGE-RELATED CONCERNS
- ASSESSMENT ISSUES
- QUESTIONS

Is This a Mental Disorder?

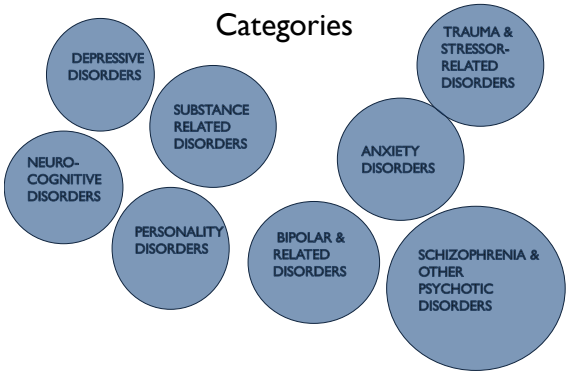
Is This a Mental Disorder?



DIAGNOSTIC ISSUES

- How is a diagnosis made?
- Clinical interview and examination (there is no definitive test)
- The Diagnostic & Statistical Manual (DSM)
  - Current: DSM 5 (2013)
  - DSM-IV-TR (2000)
  - **DSM III (1980, revised 1987) marked the key transition to descriptive format**
  - DSM IV (1994, revised 2000)

Categories



DSM: Categorical & Descriptive

- Categories/Groups of Diagnoses with a common feature
- Lists of symptoms/features ("criteria") combined with time frames
- Exclusionary criteria (e.g. must not be…)
- "Other specified" or "unspecified" _____ disorder
- Must cause impairment to be a "disorder"

Criteria Example: Major Depressive Disorder (5 of 9)

1. Depressed mood most of the day, nearly every day
2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day
3. Significant weight loss when not dieting or weight gain decrease or increase in appetite
4. Insomnia or hypersomnia nearly every day
5. Psychomotor agitation or retardation

Criteria Example: Major Depressive Disorder (cont' d)

6. Fatigue or loss of energy nearly every day
7. Feelings of worthlessness or excessive or inappropriate guilt
8. Diminished ability to think or concentrate, or indecisiveness
9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation

DSM: Necessity and Limitations

- Advantages:
  - Systematic; reliability when clinicians apply structured interview approach to criteria
  - consistent sets of symptoms for research
  - Consensus terminology used for billing
  - serves as a guide for pharmacologic treatments

DSM: Necessity and Limitations

- Disadvantages:
  - promotes an overly "medicalized" and reductionist view of extremely complicated unique individuals
  - highly subjective on the part of both patients and clinicians
  - Overlapping criteria, two very different clinical presentations (i.e. two different problems) may have same diagnosis

DSM 5: WHAT'S NEW

- Did away with the multi-axial system
- Additional categories and re-organization of some categories and diagnoses
- Some earnest attempts to reveal the "spectrum" nature of mental disorders

DSM 5: WHAT'S NEW

- DEMENTIA →
  MAJOR NEUROCOGNITIVE DISORDER
- ASPERGER'S DISORDER →
  AUSTISIC SPECTRUM DISORDER (ASD)
- SUBSTANCE DEPENDENCE/ABUSE →
  SUBSTANCE-RELATED & ADDICTIVE DISORDERS (mild, moderate, severe)

CLUES TO "SEVERE" MENTAL DISORDER

- Prior inpatient treatment
- Community based treatment
- Prior NGRI or ITST
- Prior disability
- Family history of same

ISSUES RELATED TO AGING

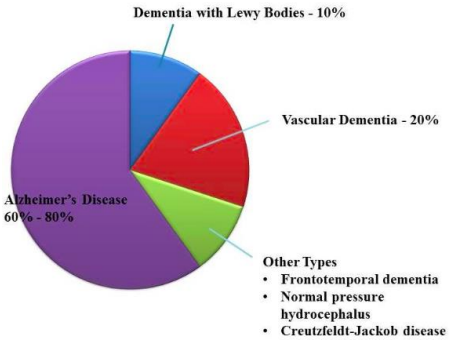
DEMENTIA (Neurocognitive Disorder)

- Progressive decline in cognitive functions
  - Complex attention -Language
  - Executive function -Perceptual/Motor
  - Learning/memory -Social cognition (emotions &
  - Language mindfulness
- Presumed physical or "organic" etiology
- Not reversible (distinct from "delirium" which is temporary)

DEMENTIA (Neurocognitive Disorder)

- Need full medical/physical evaluation
- Is more in the realm of neurology and general medicine than psychiatry, though psychiatric symptoms common
- Affects 1-2% at age 65; ~30% by age 85
- Sometimes specific cause is identified, if not, AD is presumed ("probable") cause
- No definitive test for AD, some on the horizon
  - (genetic test for inherited form of AD)

DEMENTIA TYPES



DEMENTIA (Neurocognitive Disorder)

- Mini Mental Status Exam:
  ("Folstein MMSE")

  30 point screening test for cognitive function

DISCOVERY ISSUES: RESPONDENT

- Monitor own emotional reaction(s) during course of investigation
- Seek specific detail, especially regarding
  - Substances
  - Sleep
  - Treatment

DISCOVERY ISSUES: COLLATERAL SOURCES

- Providers:
  - range of responsiveness
  - Conflicts of interest
  - Fact Witnesses vs. Expert Witnesses
- Family/Friends/Colleagues/Counsel
  - range of responsiveness
  - Maintaining the position of objectivity in an adversarial

DEPRESSION/ANXIETY & BPC INVESTIGATION: WHICH CAME FIRST?

- Establish a timeline:
  - Complaints
  - Symptoms
  - Treatment of current symptoms/episode
  - Prior treatment history

THE ROLE OF INDEPENDENT EVALUATION

- Though very common, treating clinician not in the best position to offer objective opinion
  - May serve as fact witness, not expert
- Role of independent evaluator, no other interest than striving for objectivity
- Forensic specialists psychiatry, psychology

Reference: Strasburger LH, Gutheil TG, Brodsky A. Am J Psychiatry. 1997 Apr;154(4):448-56. *"On Wearing Two Hats…"*

Identification & Application of Mitigating and Aggravating Factors

The Evidence Required to Establish Aggravating and Mitigating Factors - Differing Views and Perspectives

Rule V(13) of the Supreme Court Rules for the Government of the Bar of Ohio ("Gov. Bar R.") sets forth a non-exclusive list of nine potential aggravating factors and eight potential mitigating factors that may be considered by the Board of Professional Conduct ("Board") in determining the appropriate sanction to be recommended to the Supreme Court in a pending disciplinary proceeding.

However, while identifying the potential aggravating and mitigating factors, Gov. Bar R. V(13) does not define those terms or offer guidance regarding the nature and extent of the evidence that is needed to qualify the potential factor for consideration and weight by the Board.

The purpose of this program segment is to offer the perspective of the Disciplinary Counsel, an experienced defense counsel, and a distinguished member of the Board on each of the aggravating and mitigating factors.

FACTORS IN AGGRAVATION

Gov. Bar R. V(13)(B)(1): Prior Disciplinary Offenses:

***Disciplinary Counsel's View*:** For purposes of aggravation, prior disciplinary offenses include (a) any prior disciplinary proceeding in which the Supreme Court has entered a final order imposing discipline; (b) a suspension from the practice of law due to the respondent attorney's failure to comply with biennial attorney registration requirements; and (c) a suspension from the practice of law due to the respondent's failure to comply with his or her continuing legal education (CLE) requirements. Although it may not technically qualify as "aggravation" because it is not yet final, Disciplinary Counsel's view is that the Hearing Panel and Board should take into consideration any pending disciplinary proceeding in which the Board has issued a report of its findings of fact, conclusions of law and a recommendation for the imposition of discipline and has filed that report with the Supreme Court, even though the Court has not yet issued a final disciplinary order.

Moreover, in Disciplinary Counsel's view, not all instances of prior discipline should be treated equally. While each of the above-referenced events constitute aggravation, significantly greater weight in aggravation should be accorded depending upon (a) the number of instances of prior discipline; (b) whether the prior discipline involved serious misconduct (e.g., misappropriation of funds or acts of dishonesty, fraud, deceit or misrepresentation); (c) whether the prior discipline is recent; or (d) whether the prior discipline involved conduct similar to the conduct involved in the current proceeding.

***Respondent Counsel's View*:** In Respondent Counsel's view, a disciplinary proceeding not yet concluded should not be considered an aggravating factor. Although Respondent Counsel generally agrees that the failure to comply with Biennial and/or CLE requirements are aggravating

factors, their impact on resulting disciplinary sanctions should be more moderate than the more serious types of prior discipline outlined above. As a result, Respondent Counsel agrees with Disciplinary Counsel that not all instances of prior discipline are equal and severity with closeness in time are important to consider when applying this aggravating factor.

Gov. Bar R. V(13)(B)(2): Dishonest or Selfish Motive

***Disciplinary Counsel's View*:** A respondent attorney has a dishonest or selfish motive if a significant motivating factor for his or her conduct is financial gain, personal aggrandizement (e.g., sexual activity with a client), the concealment of the respondent's negligence or misconduct or the avoidance of liability for, or the potential adverse consequences of, the lawyer's conduct. In Disciplinary Counsel's view, in order to qualify as aggravation, the dishonest or selfish motive does not need to be the "predominant" motive but, rather, only needs to be a "significant" motive for his or her conduct.

***Respondent Counsel's View*:** From Respondent Counsel's view, dishonest or selfish motive is one of the most concerning aggravating factors in defending a respondent because the Board and the Supreme Court impose harsher sanctions when this factor is determined to exist. Respondent Counsel generally agrees that "significant" motive is sufficient to demonstrate this factor.

Gov. Bar R. V(13)(B)(3): Pattern of Misconduct

***Disciplinary Counsel's View*:** The main issues relating to this aggravating factor are (a) how many instances of misconduct constitutes a "pattern"; (b) how similar must the acts of misconduct be; and (c) how close in time must the instances of misconduct be. Other statutory schemes provide important guidance. For instance, Ohio Revised Code section 2903.211(A)(1) (Menacing by Stalking) prohibits any person from engaging in "a pattern of conduct" that knowingly causes another person to believe that the offender will cause physical harm to the other person or a family or household member. For purposes of that section, subdivision (D)(1) defines "pattern of conduct" as "two or more actions or incidents closely related in time . . ." Similarly, in the definition section of federal legislation relating to stalking, 18 U.S.C. § 2266(2) provides that "[t]he term 'course of conduct' means a pattern of conduct composed of two or more acts, evidencing a continuity of purpose." Thus, a reasonable interpretation of the meaning of "pattern of misconduct" is two or more violations that are similar in nature and closely related in time.

***Respondent Counsel's View*:** Whether violations constitute a "pattern of misconduct" depends in part on the nature of the violations. For example, for neglect of a client matter, two such violations would not constitute a pattern within the meaning of this aggravating factor in the view of Respondent Counsel. If the violations are more serious, such as theft of settlement proceeds, this could be a "pattern of misconduct" in the view of Respondent Counsel because such acts are intentional in nature.

Gov. Bar R. V(13)(B)(4): Multiple Offenses

***Disciplinary Counsel's View*:** The respondent attorney has committed "multiple offenses" if his or her misconduct violates two or more provisions of the Ohio Rules of Professional Conduct and/or the Rules for the Government of the Bar of Ohio. Thus, the respondent attorney can commit "multiple offenses" in a one-count complaint that involves a single client matter.

***Respondent Counsel's View*:** Respondent Counsel's view regarding "multiple offenses" is generally consistent with Disciplinary Counsel's view.

Gov. Bar R. V(13)(B)(5): Lack of Cooperation in the Disciplinary Process

***Disciplinary Counsel's View*:** This aggravating factor should NOT be alleged for the respondent's failure to cooperate with the investigative process IF the relator has separately charged that lack of cooperation in the Complaint as violations of Prof. Cond. R. 8.1(b) and/or Gov. Bar R. V(9)(G). However, the respondent's failure to fully participate in proceedings before the Board (e.g., failure to participate in prehearing telephone conferences, failure to respond to discovery requests, failure to exchange witness/exhibit lists or failure to appear at the hearing) qualifies for this aggravating factor.

***Respondent Counsel's View*:** Based upon applicable case law on lack of cooperation with the disciplinary process, Respondent Counsel agrees with Disciplinary Counsel on this factor.

Gov. Bar R. V(13)(B)(6): Submission of False Evidence, False Statements, or Other Deceptive Practices During the Disciplinary Process

***Disciplinary Counsel's View*:** In order to qualify as an aggravating factor, the relator must show (or the Hearing Panel must conclude) that the respondent not only submitted evidence or made statements that were false but that the respondent knew or should have known that the evidence or statement was false. However, knowledge of such falsity can be shown by circumstantial evidence and can be inferred from the circumstances.

***Respondent Counsel's View*:** Respondent Counsel's view on the submission of false evidence, false statements or other deceptive practices is generally consistent with Disciplinary Counsel's view regarding this aggravating factor.

Gov. Bar R. V(13)(B)(7): Refusal to Acknowledge Wrongful Nature of Conduct

***Disciplinary Counsel's View*:** This factor applies in cases where, despite clear and convincing evidence of the violation of one or more provisions of the Rules of Professional Conduct, the respondent refuses to admit or acknowledge that his or her conduct violated the rule(s). This factor also applies in those cases where the respondent fails or refuses to express genuine remorse or

regret for the harm that his or her conduct caused to the respondent's victim(s) and/or to the administration of justice.

***Respondent Counsel's View*:** Respondent Counsel generally agrees with Disciplinary Counsel's view regarding the refusal to acknowledge wrongful conduct and adds that remorse must be for the act and the damage caused to the victim/grievant, not for the consequences to the attorney being disciplined.

Gov. Bar R. V(13)(B)(8): Vulnerability of and Resulting Harm to Victims of Misconduct

***Disciplinary Counsel's View*:** A client who is unsophisticated and does not have extensive experience with the court system or the law, and has placed his or her trust and confidence in the respondent for the resolution of a legal issue is a "vulnerable client" within the meaning of this aggravating factor. Likewise, the victim is vulnerable when he/she has difficulty in coming up with money to pay to the respondent for his/her fees and, as a result, has no choice but to "trust" that the respondent will competently perform services as promised because he/she cannot afford to hire another attorney. There is clearly harm to the victim when he/she loses a cause of action or appellate rights due to the attorney's neglect or failure to perform, even if the respondent claims that the client's cause of action was not valid. Likewise, there is harm when a client is required to wait a significant period of time for a refund of unearned fees or restitution of misappropriated funds. Additionally, a client is vulnerable when he or she is subjected to unwanted sexual advances by the respondent, especially in light of the inherent imbalance of power and influence between the respondent and the client.

***Respondent Counsel's View*:** Respondent Counsel's view on the victim's vulnerability and resulting harm is more limited because under Disciplinary Counsel's view, almost every situation would result in the application of this factor. Rather, this aggravating factor should be restricted to situations such as when a guardian attorney steals from the client with diminished capacity.

Gov. Bar R. V(13)(B)(9): Failure to Make Restitution

***Disciplinary Counsel's View*:** This aggravating factor applies to a variety of circumstances in which the respondent has failed to pay monies to clients and third parties, including both the failure to repay misappropriated funds and the failure to refund unearned fees. The respondent's failure to pay medical lien holders in cases where the respondent has withheld funds from a settlement distribution for that purpose should also be included. The failure to refund a portion of a flat fee or nonrefundable fee in cases where the attorney did not complete the representation also constitutes a failure to make restitution.

Respondent Counsel's View: The failure to make restitution is a serious aggravating factor in the view of Respondent Counsel and usually results in more serious disciplinary sanctions. As a result, advising respondents to make restitution when appropriate and when able is very important to obtain a more favorable ultimate for an attorney being disciplined.

FACTORS IN MITIGATION

Gov. Bar R. V(13)(C)(1): Absence of a Prior Disciplinary Record

***Disciplinary Counsel's View*:** Since all attorneys are expected – and in fact, required – to practice law in a competent and ethical manner, it is somewhat ironic to grant a respondent mitigation credit for not having been previously disciplined. If there is a rationale for giving credit for the absence of a prior disciplinary record, it is that, if applied correctly, the prior discipline-free record is some indication that the attorney is a competent and ethical practitioner and that his or her misconduct in the current matter is aberrational. However, this approach only makes sense if the attorney has practiced law for a significant period of time before the act of misconduct occurred or the course of misconduct commenced. In Disciplinary Counsel's view, "full" mitigation credit should only be accorded where the attorney has practiced law without prior discipline for a significant period of time, e.g., ten years or more.

***Respondent Counsel's View*:** Respondent Counsel's view differs on this mitigating factor. Lack of a prior disciplinary record is important especially when the misconduct is clearly a one-time mistake. Perhaps giving credit for lack of a prior disciplinary record to a lawyer who has only practiced for one year may not be equitable. The question of how long may be a judgment call, but a hard and fast rule seems inappropriate.

Gov. Bar R. V(13)(C)(2): Absence of a Dishonest or Selfish Motive

***Disciplinary Counsel's View*:** The fact that relator is unable to prove, or may have chosen not to allege, a dishonest or selfish motive as an aggravating factor, does not prove the absence of a dishonest or selfish motive. The respondent has the burden of proving the absence of such motive by clear and convincing evidence. Even if the underlying rule violation results from the failure to competently perform legal services or to adequately communicate with the client, or involves some similar misconduct, the respondent should not be entitled to mitigation under this factor where the attorney has: concealed the misconduct, made false or misleading representations to the client about the conduct, or failed to communicate or to render appropriate accounts as a means of delaying discovery of the misconduct.

***Respondent Counsel's View*:** Respondent Counsel's view is that this is an important mitigating factor just as selfish motive is an important aggravating factor. It should not be a one way street as suggested by Disciplinary Counsel. Sometimes lawyers make mistakes and they are sanctioned as a result. The fact, however, that the lawyer lacks a selfish or dishonest motive is important, especially when there was a mistake based upon a lack of knowledge and there was no intent to harm (e.g., placing money in an operating account verses a trust account by mistake, but the funds are accounted for).

Gov. Bar R. V(13)(C)(3): Timely, Good Faith Effort to Make Restitution or to Rectify Consequences of Misconduct

***Disciplinary Counsel's View*:** While even last-minute restitution and rectification of misconduct should be encouraged, it should NOT qualify for substantial mitigation unless it is made as soon as possible after the misconduct occurred, preferably before the misconduct is discovered and before a disciplinary investigation has been initiated. Restitution or rectification of misconduct that is made under the pressure of a disciplinary investigation or proceeding or a criminal investigation should, at best, be entitled to only partial mitigation, depending upon the stage at which it is made. The closer the restitution or rectification is made to the disciplinary hearing or a criminal sentencing hearing, the less mitigation credit should be received.

***Respondent Counsel's View*:** Respondent Counsel generally agrees with Disciplinary Counsel regarding timely, good faith efforts to make restitution or rectify consequences. This factor raises the interesting question of whether it is appropriate to close an inquiry at the investigation stage when restitution is made at that stage.

Gov. Bar R. V(13)(C)(4): Full and Free Disclosure to the Board or Cooperative Attitude Toward Proceedings

***Disciplinary Counsel's View*:** All attorneys have a duty under Prof. Cond. R. 8.1(b) and Gov. Bar R. V(9)(G) to truthfully respond to requests for information from a disciplinary authority and to assist in an investigation or testify in a hearing before the Board. Thus, as in the case of the absence of a prior record of discipline, it is ironic to grant mitigation credit to the respondent for simply doing what he or she has a legal obligation to do. However, since the Gov. Bar R. grants potential mitigation credit for this conduct, Disciplinary Counsel believes that the weight given to this mitigating factor should be less than the weight given to other factors, such as timely restitution. Moreover, mitigation credit should not be given unless the respondent has been cooperative throughout the course of the Board proceedings. Where the respondent's cooperation has been intermittent or commenced only at the middle or latter stages of the proceeding, it should not be considered as mitigation because the respondent's earlier cooperation and disclosures may have made the resolution or disposition of the proceeding possible at a much earlier stage.

***Respondent Counsel's View*:** In Respondent Counsel's view, cooperation is an important mitigating factor. If a respondent acknowledges his or her conduct, accepts responsibility, and is cooperative with the proceedings, this should certainly be considered as compared to the respondent who fights the process at every stage.

Gov. Bar R. V(13)(C)(5): Character or Reputation

***Disciplinary Counsel's View*:** In order to qualify for mitigation credit, the testimony or letter of a character witness should reflect (a) the length of time and capacity in which he or she has known the respondent; (b) the frequency and nature of their contact at the current time (and time of the misconduct); (c) their understanding of the nature of the charges against the respondent and the source of that knowledge; and (d) an opinion regarding whether, if some or all of the charges are

found to be true, it would change the witness's opinion regarding the respondent's character or reputation and, if not, why not.

Additionally, in Disciplinary Counsel's view, a character letter or testimony from one or two witnesses is insufficient to demonstrate that the respondent is a person of good moral character or that he or she has an excellent reputation in the community. The underlying rationale for giving mitigation credit for character letters or testimony is to demonstrate that the current misconduct is aberrational and not consistent with respondent's established character or reputation. In order to qualify for mitigation credit, the respondent should present a significant number of character letters or character witness testimony. Moreover, there should be testimony from a variety of witnesses, including other attorneys, judges, members of the respondent's community, religious leaders, etc. A convincing presentation of good character and reputation should include evidence of the respondent attorney's public service and charitable activities.

***Respondent Counsel's View*:** Respondent Counsel agrees with (a) through (c) as outlined by Disciplinary Counsel, but disagrees with (d) because asking whether character witnesses would revise their opinions based on whether the charges prove to be true eliminates the entire purpose of this mitigating factor. In Respondent Counsel's view, obtaining a variety of character letters from clients, judiciary, opposing counsel, and even religious and civil individuals who know the respondent well is significant. It is the quality, rather than the quantity, of character letters which are important in Respondent Counsel's view.

Gov. Bar R. V(13)(C)(6): Imposition of Other Penalties or Sanctions

***Disciplinary Counsel's View*:** Typically, the most common penalties or sanctions that are offered for consideration as mitigating factors involve (a) imprisonment or the imposition of restitution or monetary fines for criminal behavior; (b) the loss of public or private employment as a direct consequence of the misconduct; (c) the imposition of punishment or monetary penalties for contempt or sanctions imposed in a civil proceeding in which the misconduct occurred; or (d) the attorney's liability for legal malpractice or other civil damages. Presumably, the public policy that underlies giving mitigation credit for these collateral consequences of the respondent's misconduct is that the purpose of discipline is to protect the public and to ensure that such the misconduct will not be repeated. Thus, if the attorney has been criminally or civilly sanctioned for the same misconduct, the argument may be that "what additional deterrent effect will a harsher disciplinary sanction have". A natural extension of this argument might be that a 25-year prison sentence should be accorded more weight in mitigation than a one-year sentence or a period of community control because the other penalties or sanctions are more severe. Thus, the attorney would benefit in the disciplinary proceeding by having engaged in arguably more serious criminal conduct. That does not make sense.

In Disciplinary Counsel's view, the other penalties or sanctions imposed as a result of the respondent's misconduct, while personally unfortunate for the respondent, are simply the natural consequence of the respondent's behavior and has little or nothing in common with the question of whether the respondent's misconduct warrants the imposition of discipline. In Disciplinary Counsel's view, the fact that other penalties or sanctions have been imposed is simply irrelevant

to the determination of the appropriate sanction to be imposed in the disciplinary proceeding. Nevertheless, if these consequences are to be considered in mitigation, it is my view that little weight should be accorded to them.

***Respondent Counsel's View*:** Respondent Counsel's view is much different and is dependent on the nature of the other penalties or sanctions. For example, if an attorney has already been publically admonished or sanctioned by a court for the same conduct at issue, that fact should be considered in mitigation, especially if the attorney has accepted such adverse action (i.e., not appealing the adverse ruling). Additionally, it is the view of Respondent Counsel that restitution paid through other proceedings should be considered as a mitigating factor in related disciplinary proceedings. Respondent Counsel would agree that a prison sentence, however, for illegal conduct should not be a significant mitigating factor in considering discipline for an attorney who has committed a crime.

Gov. Bar R. V(13)(C)(7): Existence of a Mental Health or Substance Abuse Disorder

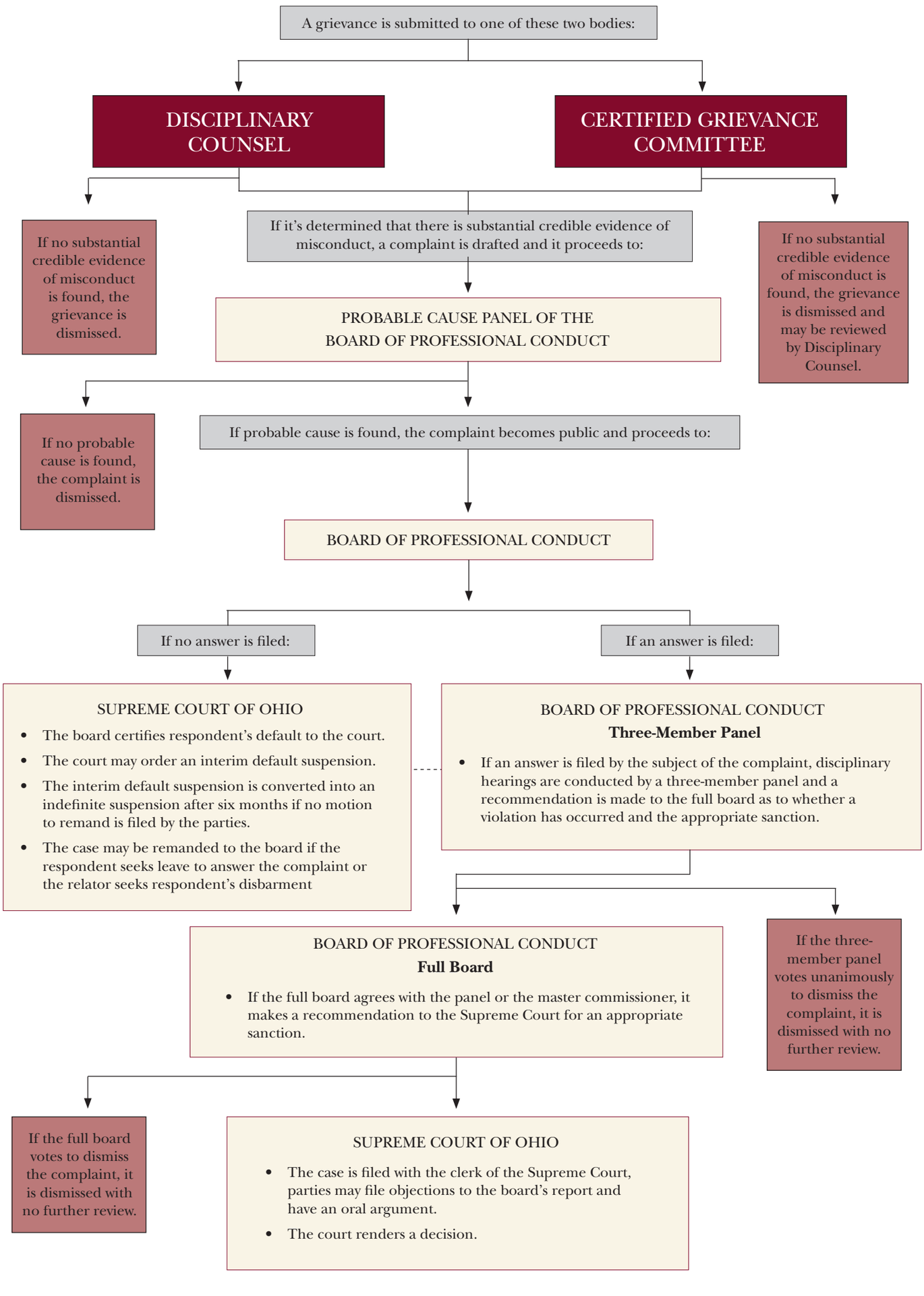
***Disciplinary Counsel's View*:** Full credit for this mitigating factor should only be accorded if all four of the criteria set forth in subdivision (C)(7) have been established by clear and convincing evidence. However, I believe that some mitigating credit should be granted where subdivisions (a) [a diagnosis of a disorder by a qualified healthcare or chemical dependency professional] and (b) [a determination that the disorder contributed to cause the misconduct] have been met and the respondent has at least commenced treatment for the disorder or condition. In terms of what constitutes "a sustained period of successful treatment", that period will vary depending upon the nature of the disorder or condition but, in any event, should be a sufficiently significant period of time to permit a qualified healthcare or chemical dependency professional to give an assessment of the likelihood that the respondent will continue with treatment and is able to resume the ethical and competent practice of law.

***Respondent Counsel's View*:** In Respondent Counsel's view, where there has been a diagnosis of a disorder by a qualified healthcare or chemical dependency professional (such as OLAP) and the disorder contributed to cause the misconduct, the mitigation factor is applicable and should have an impact on the resulting disciplinary sanction (stayed verses actual suspension), especially with the requirement of ongoing treatment.

Case Study: Charging Strategies & Decisions

DISCIPLINARY PROCESS

A grievance against a judge or attorney may be submitted to the Disciplinary Counsel or a certified grievance committee of a local bar association. If either of those bodies determines that there exists substantial credible evidence of professional misconduct, a formal complaint is drafted. It then moves to a probable cause panel of the Board of Professional Conduct, which determines if there is probable cause. If the panel determines that there is probable cause, the formal complaint becomes public and is filed with the Board of Professional Conduct. Hearings are then conducted by the board and if it finds a violation, a recommendation is made to the Supreme Court of Ohio. The Supreme Court of Ohio makes the final decision as to findings of misconduct and issues an appropriate sanction.



THE MILLER BECKER 2016 SEMINAR

Case Study—Charging Strategies and Decisions

Jen Smith was arrested and charged with OVI after she struck a parked car and refused a breath test. Based upon a referral from a friend, Jen met with Larry Lawyer about representing her. Larry told Jen that he would represent her for $2,500 but that if she paid in cash, he would charge her $2,000. Within a week, Jen paid Larry $2,000 cash, which she borrowed from a friend. Jen did not sign any documents. Jen met with Larry before the first pre-trial and really liked his style and sense of humor.

After the meeting, Larry texted Jen to tell her that he could pick her up for court on Thursday, since she had lost her driving privileges. On the way to court, Larry hit the brakes pretty hard and reached across the seat to prevent Jen from propelling forward. When Larry motioned toward Jen, his right hand cupped Jen's left breast. Jen felt uncomfortable, as she didn't see a need to brake so hard.

That evening, Larry sent Jen a text telling her that he thought things went well and that he was confident the prosecutor would offer a plea at the final pre-trial next week. Jen responded with a smiley face emoji. Larry texted Jen stating that he was looking forward to the weekend and that he would pick Jen up for court next Thursday at 8am. Over the weekend, Larry texted Jen a few times asking how her day/night was going.

The night before court, Larry sent a text telling Jen to wear appropriate clothing to court. Jen replied with a picture of the outfit she intended to wear to court. Larry responded, "Perfect!" with a little heart emoji. Jen replied stating that she knew Larry would like the outfit. A few minutes later, Larry texted Jen asking her to send a picture of her getting dressed for court. Jen did not respond, but in the morning, she texted a picture of herself in her outfit.

At court that morning, Larry successfully negotiated a plea for Jen; however, due to this being her third OVI arrest in a short period of time, the judge set the sentencing date two weeks out to obtain a pre-sentence investigation report from the probation department.

On the way back from court, Larry invited Jen to lunch. During lunch, Larry insinuated that another $500 would convince the judge to grant probation. During the conversation, Larry placed his hand under the table and caressed Jen's

leg. Once in the car, Larry reached over to kiss Jen and also placed his hand on her breasts. Jen kissed Larry but stated that she did not want to get involved with him until after the case was over. Larry told Jen that since she already pled guilty, the case was over. Larry again tried to kiss Jen, but she turned away. Without further incident, Larry drove Jen home. That evening, Jen sent Larry a text stating that she had the $500 and that she was looking forward to getting the case over with, followed by a smiley face emoji. Larry replied with a heart emoji.

At sentencing, the judge sentenced Jen to three days in jail. While in jail, Jen filed a grievance, explaining that Larry had "put the moves" on her, sent inappropriate text messages, and that she wanted her money back or would sue Larry for malpractice since he promised that she would get probation.

Larry failed to respond to the initial letter of inquiry (LOI). Upon receipt of the second LOI, Larry contacted relator and requested a one-week extension; however, Larry failed to reply, despite the extra time. Relator then issued a subpoena for Larry to appear at a deposition. Larry failed to appear, but later in the day, Larry's response to the LOI arrived in the mail. In his response, Larry admitted to being a bit too informal in his communications, but categorically denied the allegations that he touched and kissed Jen, alluding to her many arrests for OVI along with a misdemeanor conviction for forgery. He also stated that he received $2,500 in two installments, but denied any discount for a cash transaction. Although Larry did not use a written fee agreement in this case, he attached his standard agreement to establish that he always charges $2,500 for OVIs. The fee agreement stated that the "$2,500 flat fee is non-refundable." Larry also stated that he recently purchased liability insurance and that he was prepared to refund the entire $2,500 as he did not want an unhappy client.

A week later, Larry retained counsel.

Development
& Use of Stipulations

Tips Regarding Stipulations

1. Organize the stipulations by count, as set forth in the complaint.

2. Make the factual rendition chronological and as complete as possible.

3. Incorporate all admissions made in the complaint.

4. Stipulate to all facts not in dispute.

5. If facts are contained in a document, stipulate to those facts and refer to the document. ("Respondent and his client entered into a contingency fee for 1/3 of any recovery obtained for the client. See Exhibit 1")

6. Stipulate to rule violations, if possible, and to any violations alleged in the complaint that are being dismissed or withdrawn.

7. Stipulate to mitigation and aggravation. Set forth any additional mitigation or aggravation which the parties intend to litigate.

8. Ensure the exhibits include items relevant to stipulated mitigation or aggravation. Examples: proof of restitution; OLAP contract; correspondence from health care provider.

9. Stipulate to a proposed sanction or state that the parties reserve the right to present a recommendation regarding a proposed sanction, agreed upon or not, at the hearing.

10. Stipulate to authenticity and admissibility of exhibits. If you can only stipulate to authenticity – do that, it saves the time at the hearing.

11. Stipulate to character letters – the parties can agree to redactions where the author of the letter has included material which should not be contained in a character letter.

12. Stipulate to the testimony of witnesses who have not been deposed and who will not be called at the hearing. ("If Mr. Smith were called to testify, he would testify that he saw Respondent in the courthouse on the afternoon of October 15, 2015.")

13. Stipulate that depositions of witnesses which have been filed are to be entered into evidence in lieu of live testimony or that they are being filed for cross examination purposes only and should not be read by the panel before the hearing. If a deposition is being filed for possible impeachment purposes [Civ. R. 32(A)(1)], the party filing the deposition should include a cover sheet to that effect.

PREHEARING ORDER NOTICE REGARDING STIPULATIONS

The following notice has been adopted by the Board of Professional Conduct regarding the presentation and use of stipulations in disciplinary cases. This language was approved by the Board following the Supreme Court decision in *Cleveland Metro. Bar Assn. v. Paris*, 2016-Ohio-5581, ¶17. The notice will be included in each prehearing scheduling order issued by the Board and may be modified by the panel chair based on the circumstances of a particular case.

> The parties are encouraged to collaborate on the preparation of stipulations for consideration by the hearing panel. The parties are reminded that stipulations of fact regarding rule violations must be supported by clear and convincing evidence, and that neither the panel nor Board is required to accept stipulated rule violations that are not supported by sufficient evidence. Evidence presented at a hearing that contradicts a stipulation of fact or a stipulated rule violation will not be considered by the panel, unless a party timely moves to withdraw the stipulation for good cause, a party seeks and is granted leave to present additional evidence, or the panel *sua sponte* rejects a factual stipulation.
>
> The parties may submit stipulations regarding aggravating and mitigating factors. However, because the existence of aggravating and mitigating factors bears directly on any sanction the panel will recommend, the panel is not bound by such stipulations. The panel will make findings regarding aggravating and mitigating factors based on the totality of the record, including evidence presented at the hearing. The parties may make a joint recommendation regarding sanction; however, the panel is not bound to accept any recommendation regarding sanction. The panel will make a sanction recommendation based on the totality of the record, applicable case precedents, and standards established by the Supreme Court that govern the administration of professional discipline.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Cleveland Metro. Bar Assn. v. Paris,* Slip Opinion No. 2016-Ohio-5581.]

SLIP OPINION NO. 2016-OHIO-5581

CLEVELAND METROPOLITAN BAR ASSOCIATION *v.* PARIS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Cleveland Metro. Bar Assn. v. Paris,* Slip Opinion No. 2016-Ohio-5581.]

Attorneys—Misconduct—Violations of the Rules of Professional Conduct—Conditionally stayed six-month suspension.

(No. 2015-2009—Submitted February 24, 2016—Decided August 31, 2016.)

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2015-005.

Per Curiam.

{¶ 1} Respondent, Tasso Paris of Cleveland, Ohio, Attorney Registration No. 0038609, was admitted to the practice of law in Ohio in 1987.

{¶ 2} In a January 2015 complaint, relator, Cleveland Metropolitan Bar Association, alleged that Paris violated multiple Rules of Professional Conduct by

making unwelcome sexual advances toward a female client and failing to appear at her criminal-sentencing hearing.

{¶ 3} The parties entered into stipulations of fact, misconduct, and aggravating and mitigating factors and jointly recommended that Paris be suspended from the practice of law for six months, all stayed on the condition that he engage in no further misconduct. A panel of the Board of Professional Conduct conducted a hearing at which it admitted stipulations submitted by the parties and heard testimony from Paris and the affected client. The panel largely adopted the stipulations, but, noting that Paris's testimony contradicted some of those stipulations, also found that he failed to understand and acknowledge the wrongful nature of his conduct. The panel therefore rejected the sanction suggested by the parties and recommended that Paris serve a six-month actual suspension from the practice of law in Ohio. The board adopted the panel's report in its entirety.

{¶ 4} Paris objects to the board's finding of an additional aggravating factor to which the parties had not stipulated. He also argues that given the parties' comprehensive stipulations and the limited nature of the testimony given before the panel, this court should reject the sanction recommended by the panel and adopt the stipulated sanction of the parties. We adopt the board's findings of fact and misconduct but sustain Paris's objections and suspend him from the practice of law in Ohio for six months, all stayed on conditions.

Misconduct

{¶ 5} Following an automobile accident that occurred on March 17, 2013, a woman hired Paris to defend her in the Cleveland Municipal Court against charges of driving under the influence and driving under suspension, and her fiancé paid him $1,000. Paris stipulated that he referred to her as his "beautiful Irish girl" but testified that he had referred to her as "a red haired Irish girl, coming out of an Irish bar, in Cleveland, Ohio, on March 17th" only in the context of explaining that no one was going to believe her claim that she had had only one drink before her St.

Patrick's Day automobile accident. Paris also stipulated that during the course of his representation, he asked his client to go out with him several times and invited her to his house to join him in his hot tub on more than one occasion. Although he never denied the truth of that stipulation, he also testified that the client's fiancé was present at all but one of their meetings.

{¶ 6} Paris stipulated that his client was afraid to do anything about his conduct out of fear that it would affect his representation. The client testified that his conduct made her uncomfortable but that she never told him that she would not go out with him. Instead, she attempted to avoid the issue by saying, "[W]e'll see" or "We will talk about it." The client and her fiancé discussed her concerns on several occasions and agreed that she would just go out with Paris so that he would do a better job representing her, but she could not bring herself to go through with it. She testified that as the case dragged on, however, she would have done "whatever he want[ed]" to get it resolved.

{¶ 7} On August 6, 2013, the client pleaded guilty to driving while under suspension and failure to maintain reasonable control of her vehicle and was ordered to appear at a later date for sentencing. Paris stipulated that he not only failed to attend the sentencing hearing but that he also failed to notify the client of his absence and to request that another attorney attend the hearing on his behalf. At the panel hearing, Paris acknowledged that stipulation and confirmed its truth. He testified, however, that he had asked his father to attend the client's sentencing hearing and that upon returning to the office after the hearing, his father reported that the case had been "sent to another judge." Paris's father was not called as a witness, but he represented Paris before the panel. During his closing argument, he stated that he attended the sentencing hearing at Paris's request. But the parties had stipulated—and the client's testimony confirmed—that when the judge asked her whether she was represented by counsel, she responded that Paris had failed to

appear and that she did not expect him to because "[h]e's be[en] doing nothing but trying to get in my pants."

{¶ 8} Based on the client's statement, the judge vacated the client's plea and recused herself from the case. The case was reassigned, and a public defender was appointed to represent the client. The client ultimately pleaded guilty to operating an unsafe vehicle and was fined $200. She later filed a grievance against Paris.

{¶ 9} The board adopted the parties' stipulations and agreed that Paris's conduct violated Prof.Cond.R. 1.3 (requiring a lawyer to act with reasonable diligence in representing a client) and 1.8(j) (prohibiting a lawyer from soliciting or engaging in sexual activity with a client unless a consensual sexual relationship existed prior to the lawyer-client relationship).[1]

Recommended Sanction

{¶ 10} When imposing sanctions for attorney misconduct, we consider several relevant factors, including the ethical duties that the lawyer violated, relevant aggravating and mitigating circumstances, and the sanctions imposed in similar cases. *See* Gov.Bar R. V(13)(A).

{¶ 11} The board adopted the parties' stipulation that Paris has no prior disciplinary record and cooperated with relator's investigation. *See* Gov.Bar R. V(13)(C)(1) and (4). It also noted that Paris did not present evidence of any other mitigating factors.

{¶ 12} In addition to adopting the parties' stipulated aggravating factors—that Paris acted with a selfish motive and engaged in multiple offenses—the board found that Paris's conduct harmed a vulnerable client. *See* Gov.Bar R. V(13)(B)(2), (4), and (8). The board also found that Paris did not understand or accept the wrongful nature of his conduct based on testimony in which he (1) asked why the client referred a female friend to him after terminating his representation if he was

[1] In accordance with the parties' stipulations, the panel unanimously dismissed two additional alleged violations of the Rules of Professional Conduct.

"hitting on" her, (2) stated that the client's fiancé was present during all but one of their meetings, (3) claimed that he merely referred to the client as a "red haired Irish girl"—and only when explaining that no one was going to believe her claim that she had had only one drink before her St. Patrick's Day automobile accident, and (4) claimed that his father had attended the client's sentencing hearing. *See* Gov.Bar R. V(13)(B)(7). While noting that relator offered no evidence that Paris engaged in a pattern of misconduct, the board also commented that "there is likewise no evidence to assure the panel that it was an isolated event that is unlikely to reoccur." *See* Gov.Bar R. V(13)(B)(3) (providing that a pattern of misconduct is an aggravating factor that may be considered in favor of recommending a more severe sanction).

{¶ 13} The parties jointly recommend that Paris be suspended for six months but that the suspension be stayed in its entirety on the condition that he engage in no further misconduct. In support of that sanction, the parties cited *Disciplinary Counsel v. Hubbell*, 144 Ohio St.3d 334, 2015-Ohio-3426, 43 N.E.3d 397 (imposing a conditionally stayed six-month suspension on an attorney who attempted to initiate a romantic relationship with a client whom he represented, pro bono, in a custody dispute), and *Disciplinary Counsel v. Quatman*, 108 Ohio St.3d 389, 2006-Ohio-1196, 843 N.E.2d 1205 (imposing a conditionally stayed one-year suspension on an attorney who put his hands on a client's breasts for several seconds and told her that they were "very nice").

{¶ 14} Noting the increasing frequency of cases involving repeated and unwelcome solicitation of clients for sexual activity, the board, however, urges us to hold that in the absence of significant mitigating factors, this court will impose an actual suspension on attorneys who have engaged in such conduct—as we do in cases involving attorneys who have engaged in a material misrepresentation to a court or have engaged in a pattern of dishonesty with a client. *See Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 190, 658 N.E.2d 237 (1995) (creating

a presumption that an attorney who has engaged in a course of conduct involving dishonesty, fraud, deceit, or misrepresentation will receive an actual suspension). *But see Dayton Bar Assn. v. Kinney*, 89 Ohio St.3d 77, 78, 728 N.E.2d 1052 (2000) (recognizing that mitigating factors may justify a lesser sanction in some cases involving attorney dishonesty).

{¶ 15} In accordance with this suggested presumption and in light of Paris's repeated and unwelcome solicitation of his client, his failure to appear for her sentencing hearing after she rebuffed his advances, his failure to acknowledge the wrongful nature of his conduct, and the absence of additional mitigating evidence, the board recommends that we suspend Paris from the practice of law for six months with no stay.

Paris's Objections

{¶ 16} In his objections to the board's report and recommendation, Paris urges us to reject the board's finding of the additional aggravating factor that Paris failed to accept the wrongful nature of his conduct. He also challenges the board's recommended sanction and urges us to adopt the parties' stipulated sanction of a fully stayed six-month suspension.

{¶ 17} We agree that Paris did not plainly acknowledge the wrongful nature of his conduct or make a particularly strong showing of remorse at the panel hearing. But we also note that despite the intention of the parties to submit the case entirely upon their stipulations, the panel sought to hear testimony not only from Paris but also from the grievant. This created some confusion regarding the scope of the evidence to be presented at the hearing. It also resulted in the inadvertent admission of testimony that touched upon stipulated issues. Although relator and the panel chairperson expressed that it was their intention to rely on the stipulations rather than the testimony in those instances, there is a possibility that some of Paris's contradictory testimony was offered to rebut portions of the grievant's testimony on those stipulated issues. Therefore, in the interest of fairness, we

decline to adopt additional aggravating factors based on that testimony. Moreover, in light of Paris's nearly 30 years of practice with no disciplinary record prior to this incident, we are inclined to agree that there is some evidence that his behavior in this matter is an isolated incident.

{¶ 18} We have consistently disapproved of the conduct of lawyers who have solicited or engaged in sexual activity with their clients even before the adoption of Prof.Cond.R. 1.8(j), and depending on the relative impropriety of the situation, we have imposed a wide range of disciplinary measures for such conduct. *Akron Bar Assn. v. Miller*, 130 Ohio St.3d 1, 2011-Ohio-4412, 955 N.E.2d 359, ¶ 18. We have publicly reprimanded attorneys who have commenced consensual sexual relationships with their clients that have not compromised the clients' interests. *See, e.g., Disciplinary Counsel v. Engler*, 110 Ohio St.3d 138, 2006-Ohio-3824, 851 N.E.2d 502 (publicly reprimanding an attorney who had two consensual sexual encounters with a client while representing her in a divorce). On the other end of the spectrum, we have disbarred an attorney who solicited sex from clients in exchange for a reduced legal fee, made inappropriate sexual comments to clients, touched them in a sexual manner, exposed himself to a client, and lied repeatedly during the disciplinary process. *Disciplinary Counsel v. Sturgeon*, 111 Ohio St.3d 285, 2006-Ohio-5708, 855 N.E.2d 1221.

{¶ 19} In between those two extremes, we typically impose term suspensions with all or part of the suspension stayed, depending on the severity of the misconduct and the applicable aggravating and mitigating factors. *Disciplinary Counsel v. Bunstine*, 136 Ohio St.3d 276, 2013-Ohio-3681, 995 N.E.2d 184, ¶ 32. *See also Toledo Bar Assn. v. Burkholder*, 109 Ohio St.3d 443, 2006-Ohio-2817, 848 N.E.2d 840 (imposing a conditionally stayed six-month suspension on an attorney who relentlessly asked a client out on dates, inappropriately touched her, and made a sexual comment to her); *Disciplinary Counsel v. Freeman*, 106 Ohio St.3d 334, 2005-Ohio-5142, 835 N.E.2d 26 (imposing a six-month actual

suspension on an attorney who paid a young client for photographs of herself in various states of undress and requested photographs of her in the nude and sex acts from her in exchange for money after the attorney-client relationship ended); *Akron Bar Assn. v. Miller*, 130 Ohio St.3d 1, 2011-Ohio-4412, 955 N.E.2d 359 (imposing a conditionally stayed six-month suspension and monitored probation on an attorney who asked a client about her breast size, asked her to show him her breasts as a reward for the work he was performing on her behalf, and suggested that she perform oral sex on him—all during a period when he was not taking medication prescribed for his depression and attention-deficit disorder); *Bunstine* (imposing a conditionally stayed one-year suspension on an attorney who, in his second disciplinary matter, solicited sex from a client in lieu of payment for his fees).

{¶ 20} We by no means condone Paris's conduct in this matter, but on the stipulated facts before us, we find that his actions are most comparable to cases in which we have imposed fully stayed suspensions. Therefore, we sustain Paris's objection to the board's recommended sanction and find that a six-month suspension, stayed on conditions, is the appropriate sanction for his misconduct.

{¶ 21} Accordingly, Tasso Paris is suspended from the practice of law for six months, all stayed on the conditions that he make full restitution of $1,000 to the affected client[2] and engage in no further misconduct. If Paris fails to comply with the conditions of the stay, the stay will be lifted and he will serve the full six-month suspension. Costs are taxed to Paris.

Judgment accordingly.

PFEIFER, O'DONNELL, KENNEDY, and FRENCH, JJ., concur.

KENNEDY, J., concurs, with an opinion.

LANZINGER, J., dissents, with an opinion joined by O'CONNOR, C.J., and O'NEILL, J.

[2] Paris stipulated that he was willing to refund the affected client's entire fee of $1,000. At oral argument, however, his counsel stated that the refund had not yet been made.

KENNEDY, J., concurring.

{¶ 22} I agree with the majority that a six-month suspension, stayed on conditions, is the appropriate sanction for the misconduct of respondent, Tasso Paris. The majority opinion tacitly rejects the board's request that we adopt a new presumption that in the absence of significant mitigating factors, the court will impose an actual suspension for the repeated and unwelcome solicitation of vulnerable clients for sexual activity. The dissenting opinion argues in favor of adopting this presumption. I write separately to squarely address whether it is this court's role to create a new presumption in favor of an actual suspension in lieu of our deeply rooted process of determining the appropriate sanction in each individual case.

{¶ 23} Gov.Bar R. V(13) imposes a duty on the Board of Professional Conduct to examine the unique facts and circumstances of each disciplinary case, the aggravating and mitigating factors applicable to the individual attorney, and his or her life circumstances, in order to determine the appropriate sanction for that particular attorney. Therefore, the establishment of a presumption of an actual suspension would be antithetical to our rules.

{¶ 24} In 1995, this court established a presumption of an actual suspension in cases with misconduct involving dishonesty, fraud, deceit, or misrepresentation, absent mitigating factors justifying a stay. *See Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 658 N.E.2d 237 (1995). A majority of the court in *Fowerbaugh* reasoned that a presumption was warranted for conduct by an attorney involving deception, falsehood, or fraud because "[s]uch conduct strikes at the very core of a lawyer's relationship with the court and with the client. Respect for our profession is diminished with every deceitful act of a lawyer." *Id.* at 190.

{¶ 25} In my view, however, deception and fraud are not the only types of misconduct that strike at the core of a lawyer's relationship with the court and with the client. Instead, every act of misconduct does so and diminishes the honor and nobility of our great profession. But, to echo the views expressed in Justice Resnick's separate opinion in *Fowerbaugh*:

> It is the responsibility of this court to give guidance as to what conduct constitutes a violation of the Disciplinary Rules. It is not the province of this court to use syllabus law to mandate a particular sanction once a violation has been found. The sanction in each individual's case should be determined based upon the unique facts and circumstances of that case.

Id. at 191 (Resnick, J., concurring in judgment only).

{¶ 26} Without question, inappropriate sexual conduct by an attorney toward his or her client undermines the attorney-client relationship and diminishes respect for our profession. However, if we were to adopt a presumption of an actual suspension for this category of misconduct based on the reasoning advanced by the majority in *Fowerbaugh*, why not extend this approach and establish a similar presumption for any and all cases involving violations that undermine the attorney-client relationship and diminish respect for our profession? Adoption of the proposed presumption in this case would move us closer to a reality in which the "exception swallows the rule."

{¶ 27} Gov.Bar R. V(2)(A) provides that "[e]xcept as otherwise expressly provided in rules adopted by the Supreme Court, all grievances involving alleged misconduct by * * * attorneys * * * shall be brought, conducted, and disposed of in accordance with the provisions of this rule." This provision applies to all of Gov.Bar R. V, including Gov.Bar R. V(13). Presuming an actual suspension would

fundamentally transform our well-established individualized process of attorney discipline into a formulaic "one size fits all" system. This philosophical shift should be carried out, if ever, only pursuant to this court's longstanding rulemaking process, not through judicial fiat. It is for the members of the legal community—guided by the principle that the primary purpose of the disciplinary process is not to punish the offender but to " 'protect the public against members of the bar who are unworthy of the trust and confidence essential to the relationship of attorney and client,' " *Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510, 858 N.E.2d 368, ¶ 10, quoting *Ohio State Bar Assn. v. Weaver*, 41 Ohio St.2d 97, 100, 322 N.E.2d 665 (1975)—to debate whether it would be appropriate to establish a presumption of an actual suspension.

{¶ 28} Accordingly, I respectfully concur.

LANZINGER, J., dissenting.

{¶ 29} This court has been asked to consider establishing a presumption that in the absence of significant mitigating factors, we will impose an actual suspension on attorneys who engage in the repeated and unwelcome solicitation of vulnerable clients for sexual activity. We already presume that an actual suspension will be the sanction for behavior involving dishonesty, fraud, deceit, or misrepresentation, unless mitigating factors justify a stay. *See Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187, 190, 658 N.E.2d 237 (1995). I believe that the same type of sanction should be imposed upon respondents like Tasso Paris, especially because it appears that cases of this type are increasing.

{¶ 30} In my view, this court should do more than merely express disapproval of the attorney's actions by imposing a stayed suspension. The extent of the mitigation is that he has no previous discipline and has cooperated with the investigation. On the other hand, he stipulated that he acted with a selfish motive and engaged in multiple offenses. In addition, the board found that he did not

understand or accept the wrongful nature of his actions and so failed to show that his misconduct was unlikely to recur. Most importantly, the client was harmed when Paris did not appear for her sentencing, which she attributed to her rebuffing his sexual advances.

{¶ 31} I respectfully dissent from the court's judgment with respect to the sanction in this case. I would adopt the recommendation of both the panel and the board and would suspend Paris from the practice of law for a period of six months.

O'CONNOR, C.J., and O'NEILL, J., concur in the foregoing opinion.

Thomas L. Anastos; Ulmer & Berne, L.L.P., and Corey N. Thrush; and Heather M. Zirke, Bar Counsel, for relator.

Thomas Paris and John T. Paris, for respondent.

SLIP OPINION NO. 2016-OHIO-3333

DISCIPLINARY COUNSEL *v.* BARTELS.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Disciplinary Counsel v. Bartels*, Slip Opinion No. 2016-Ohio-3333.]

Attorneys—Misconduct—Violation of the Rules of Professional Conduct—One-year suspension with six months stayed on conditions.

(No. 2015-1638—Submitted January 6, 2016—Decided June 14, 2016.)

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2014-097.

Per Curiam.

{¶ 1} Respondent, N. Shannon Bartels of Lima, Ohio, Attorney Registration No. 0064012, was admitted to the practice of law in Ohio in 1994. In March 2010, we publicly reprimanded Bartels for engaging in a sexual relationship with a client. *Allen Cty. Bar Assn. v. Bartels*, 124 Ohio St.3d 527, 2010-Ohio-1046, 924 N.E.2d 833.

{¶ 2} On November 25, 2014, relator, disciplinary counsel, charged Bartels with professional misconduct for soliciting or engaging in sexual activity—texting sexually oriented messages—with a client. The parties stipulated that Bartels had committed the charged misconduct and that a stayed one-year suspension was the appropriate sanction. A panel of the Board of Professional Conduct recommended that the agreement be adopted except that the stay be subject to conditions. The board, however, amended the recommended sanction and instead recommended a one-year suspension with six months stayed on conditions.

{¶ 3} Bartels has filed objections to the board's recommendation, and relator has agreed with her arguments. We, however, agree with the board's findings and recommended sanction and therefore overrule Bartels's objections.

Misconduct

{¶ 4} After spending portions of her legal career working for other entities, Bartels reopened a solo law practice in 2012, focusing primarily in family law and workers' compensation.

{¶ 5} In November 2012, Troy Bailey retained Bartels to represent him in his divorce. The divorce was finalized by court entry in July 2013. However, commencing in late February or early March 2013, Bartels and Bailey began exchanging multiple text messages with each other that were sexually oriented. The messages continued for approximately one month and were mutual and reciprocal in their sexual content, but Bartels and Bailey did not actually engage in sexual intercourse with each other.

{¶ 6} In April 2013, Bartels received a text from Bailey's cell phone number containing a veiled threat that if the results of the divorce proceeding were not satisfactory to Bailey, the sexually oriented texts as well as nude photographs that Bartels had exchanged with him would be sent to the disciplinary authorities. During a May 2013 phone conversation with Bartels about his divorce proceeding, Bailey put a female—later identified as his girlfriend—on the line who told Bartels

that she "had better get Bailey everything he wanted" from the proceeding. The female also told Bartels to bring $3,000 to a hearing scheduled for six days later. At the hearing, neither Bailey nor Bartels mentioned the threat, nor was any monetary payment made.

{¶ 7} For several months after the hearing, neither Bartels nor Bailey mentioned their message exchanges or the purported extortion attempt. Then, in September 2013, Bartels received a text message from Bailey's cell phone number stating that the Ohio State Bar Association and the Better Business Bureau would be contacted if Bartels did not refund at least $2,500 to Bailey. At that point, Bartels reported the extortionate conduct to the Allen County Sheriff's Office and gave that office a statement. Following a law-enforcement investigation, Bailey and his girlfriend, who had sent the extortionate text messages from his cell phone, were indicted and convicted of obstructing justice.

{¶ 8} The parties stipulated and the board found that Bartels's conduct in engaging in sexually oriented text messaging with her client violated Prof.Cond.R. 1.8(j) (prohibiting a lawyer from soliciting or engaging in sexual activity with a client unless a consensual sexual relationship existed prior to the client-lawyer relationship). We adopt the board's findings of fact and misconduct.

Sanction

{¶ 9} When imposing sanctions for attorney misconduct, we consider several relevant factors, including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16. In making a final determination, we also weigh evidence of the aggravating and mitigating factors listed in Gov.Bar R. V(13).

{¶ 10} The board found one aggravating factor, that Bartels has a record of prior discipline—namely, her public reprimand for violating the same provision as here. *See* Gov.Bar R. V(13)(B)(1). In mitigation, the board found that she fully

cooperated in the disciplinary process and submitted evidence of good character. *See* Gov.Bar R. V(13)(C)(4) and (5).

{¶ 11} As a sanction, the parties jointly recommend that Bartels receive a stayed one-year suspension. The parties cite *Disciplinary Counsel v. Detweiler*, 135 Ohio St.3d 447, 2013-Ohio-1747, 989 N.E.2d 41 ("*Detweiler II*"), as the appropriate guidepost in our analysis. That case was the second time that the respondent was disciplined. *See Disciplinary Counsel v. Detweiler*, 127 Ohio St.3d 73, 2010-Ohio-5033, 936 N.E.2d 498 ("*Detweiler I*"). In *Detweiler I*, we publicly reprimanded Detweiler for engaging in sexual activity with a client during representation that was consensual and legal and did not compromise the interests of the client. In *Detweiler II*, however, Detweiler repeatedly sent a vulnerable client sexually oriented text messages, including nude photos, that were unwelcome and unsolicited. The client "felt trapped" and could not afford new counsel at that stage of the litigation. *Id.* at ¶ 5. Although the board recommended that Detweiler be suspended for one year with six months stayed on conditions, *id.*, we determined that to adequately protect the public from future harm, a one-year actual suspension from the practice of law was appropriate for his misconduct, *id.* at ¶ 20.

{¶ 12} Here, based on testimony at the hearing, the panel was troubled by Bartels's lack of appreciation that her conduct was contrary to the letter and spirit of the rule. Therefore, although it recommended adoption of the parties' agreement, including the fully stayed one-year suspension, the panel further recommended that the stay be conditioned on Bartels's completion of six additional hours of continuing legal education ("CLE") on professional conduct and professionalism focused on proper communications and interactions with clients and, upon reinstatement, that she work for a period of one year with a mentoring attorney approved by relator. The board, however, recommends that we suspend Bartels from the practice of law for one year with only six months stayed, subject to the two conditions recommended by the panel.

{¶ 13} To support its recommendation, the board cited *Lake Cty. Bar Assn. v. Mismas*, 139 Ohio St.3d 346, 2014-Ohio-2483, 11 N.E.3d 1180, in which we suspended an attorney for one year with six months stayed for conduct that included sending explicit text messages to a law-student employee and demanding sexual favors as a condition of her employment. We found that Mismas abused the power and prestige of our profession with his conduct and thus deserved a harsher sanction than that proposed by the panel and board, who, as here, also considered the *Detweiler* decisions.

{¶ 14} Bartels filed objections to the board's report, and relator joined her request for a stayed one-year suspension. Both parties noted that the conduct was mutual and consensual, she did not have sexual relations with her client, the exchanges did not impair her ability to effectively advocate on behalf of her client, and her conduct did not rise to the same level as that in *Mismas*, in which the respondent abused his position of power and took advantage of his student-employee's vulnerable position. Bartels also noted that both *Detweiler II* and *Mismas* were decided after Bartels's conduct in this case had occurred and that she therefore would not have known that mutual, consensual text messaging could be included within the meaning of "sexual activity" under Prof.Cond.R. 1.8(j).

{¶ 15} We disagree with the parties and find, consistently with the board, that *Mismas* is instructive here. We emphasize our statement in *Disciplinary Counsel v. Booher*, 75 Ohio St.3d 509, 510, 664 N.E.2d 522 (1996), that "the burden is on the lawyer to ensure that all attorney-client dealings remain on a professional level." Because this is Bartels's second disciplinary action within five years for a violation of the same rule and her responses to questions at the hearing indicate a lack of awareness of the nature of her wrongdoing, we conclude that the board's recommended sanction is the more appropriate option.

{¶ 16} Thus, having considered Bartels's misconduct, the aggravating and mitigating factors, and the sanctions imposed in comparable cases, we adopt the

board's recommended sanction. N. Shannon Bartels is suspended from the practice of law in Ohio for one year with six months stayed, subject to the conditions that she (1) complete an additional six hours of CLE, in addition to the general requirements of Gov.Bar R. X(13), that are approved by relator, on professional conduct and professionalism focused on proper communications and interactions with clients, (2) commit no further misconduct, (3) pay all costs, and (4) upon reinstatement, serve a one-year period of monitored probation pursuant to Gov.Bar R. V(21) with a mentoring attorney approved by relator. Costs are taxed to Bartels.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, and O'NEILL, JJ., concur.

KENNEDY and FRENCH, JJ., dissent and would follow the recommendation of the Board of Professional Conduct panel and impose a suspension of one year fully stayed.

Scott J. Drexel, Disciplinary Counsel, for relator.

Charles J. Kettlewell, for respondent.

Succession Planning

OHIO ETHICS GUIDE

CLIENT FILE RETENTION

Ohio Board of Professional Conduct

Client File Retention

At some point, most lawyers face the question of **"What do I do with client files that are closed and dormant?"** How long should the lawyer retain a client file? What documents in the file are required to be maintained by the lawyer? Which contents of the file belong to the client? Can the contents of the file be electronically scanned and then destroyed? What do the Rules of Professional Conduct require?

Lawyers are required to comply with a number of ethical and legal obligations related to client files and property. Applicable Rules of Professional Conduct include:

- **Prof.Cond.R. 1.1**
  A lawyer shall provide competent representation.
- **Prof.Cond.R. 1.3**
  A lawyer shall act with reasonable diligence and promptness.
- **Prof.Cond.R. 1.4**
  A lawyer shall communicate with a client and comply promptly with all of a client's reasonable requests for information.
- **Prof.Cond.R. 1.6**
  A lawyer shall keep a client's confidences.
- **Prof.Cond.R. 1.15**
  A lawyer shall safeguard the property of the client.
- **Prof.Cond.R. 1.16(d)**
  A lawyer shall, upon termination of representation, take reasonable steps to protect a client's interests including surrendering all papers and property to which the client is entitled.

Confidentiality of Files

What must be kept confidential?

Maintaining the confidentiality of client files is a duty imposed upon lawyers by Prof.Cond.R. 1.6. An important step toward complying with this duty is the maintenance of a paper or digital filing system with access limited only to authorized personnel.[1] Confidentiality is further ensured by the requirement in Prof.Cond.R. 1.15 to identify and segregate the client file from the lawyer's property, and from the property of other clients and third persons. Equally important, a lawyer must use "reasonable efforts to prevent the inadvertent or unauthorized disclosure" or access to a client's file regardless of whether it is maintained in paper or digital format.[2]

Ohio's Client File Retention Requirements

How long must a lawyer maintain a closed client's file?

The Rules of Professional Conduct do not prescribe a minimum period of time for the retention of client files, nor is a lawyer required to permanently preserve all files of current or former clients.[3] It is nearly impossible to establish a minimum retention period for client files that applies in all circumstances. The decision of how long to maintain a client file always lies within the professional judgment of the lawyer, and may be influenced by the nature and subject matter of the representation, relevant statutes of limitations, and potential malpractice issues.

However, lawyers should always be mindful of two time periods for document retention required by the Rules of Professional Conduct:

- The notice signed by the client stating that the lawyer does not maintain liability insurance must be kept for *five years* after termination of representation **(Prof.Cond.R. 1.4)**; and
- IOLTA/trust account records shall be kept by lawyer for *seven years* after termination of representation **(Prof.Cond.R. 1.15)**.

Despite the lack of minimum file retention requirements in Ohio, other jurisdictions suggest client file retention periods that run concurrently with IOLTA/trust account recordkeeping requirements. In these situations, a lawyer maintains both the required trust account and financial records and the underlying client file for the entire IOLTA retention period, *i.e.* seven years.

Although maintaining client files for the duration of the IOLTA retention period may be appropriate in many cases, certain client matters may require a longer or possibly an indefinite period of retention. For example, files related to minors, probate matters, estate planning, tax, criminal law, corporate formation, business entities and transactional matters should be retained until the files no longer serve a useful purpose to the current or former client. Consequently, a careful and particularized review of each client file, and the establishment of a specific file retention period for the file, may be necessary with regard to some matters. See also *Client File Retention Policy*, page 4.

What are Client Papers and Property?
Certain documents in a client file are subject to surrender at the request of the client. Client property traditionally includes documents provided to the lawyer by the client.[4] Although Prof.Cond.R. 1.16(d) applies to a situation in which the representation of a client is terminated prior to completion, whether by the client or the lawyer, the rule's definition of "client papers and property" can provide guidance useful in the context of client file retention. The rule states that "'client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."[5]

The Board also has further held that "papers and property to which the client is entitled" to receive includes, but is not limited to materials acquired or prepared for the purpose of representing the client and other materials that might prove beneficial to the client, such as significant correspondence, investigatory documents, reports for which the client has paid, and filed or unfiled pleadings and briefs.[6]

Are a Lawyer's Notes and Related Documents Considered Client Property?
A client is not entitled to all materials possessed by the lawyer in the client file, such as the lawyer's work product. However, the lawyer's ethical obligations may "give [] rise to an entitlement to those materials that would likely harm the client's interest if not provided."[7] For example, a lawyer's notes regarding facts about the client's case, as well as any notes regarding legal theories, strategies, and analysis, may be reasonably necessary to the client's representation.[8]

Among the items in a client file that may not be items reasonably necessary to a client's represenation and thus not client files or papers are:

1. A lawyer's notes "to himself or herself regarding passing thoughts, ideas, impressions, or questions will probably not be items reasonably necessary to a client's represenation;"[9]
2. A lawyer's notes, research, firm documents, internal memoranda generated for a lawyer's own purposes;[10] and
3. "Internal office management memoranda such as personnel assignments or conflicts of interest checks."[11]

Client File Retention Policy

A lawyer should adopt and consistently follow a client file retention policy. Such a policy should meet the needs of the lawyer's practice and comply with the Rules of Professional Conduct. A retention policy should include the step-by-step details necessary for the lawyer to close and store the client file, transfer the file to the client, a third party or subsequent lawyers, and eventually destroy the file. The policy also should address document review processes and procedures, IOLTA records, backup and archival procedures of digital and paper documents, the designation and duties of a firm client file custodian, and the creation of a destroyed client file register.

In developing a retention policy, a lawyer should consider the nature of his or her practice and the types of client materials that come into his or her possession. A different retention period may be required for each area of the lawyer's practice. For example, a corporate practice may require the retention of closed files for the life of the corporation; a collections practice may require a retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Even if a lawyer concentrates his or her practice in a single area of the law, the retention policy may need to distinguish between different case types within that area of practice. For example, a lawyer practicing domestic relations law would likely need to establish a longer file retention period for divorce cases involving minor children compared to the dissolution of a marriage with no children retention period until a judgment can no longer be revived; and a practice that includes cases involving minors may require retention beyond the age of majority. The separate retention period established for each practice area or matter type should be described in the firm's retention policy.

Notice to Clients

At the beginning of the representation, the lawyer should notify the client, in writing, of the general provisions of the firm's file retention policy. This is best accomplished through a statement in the initial engagement letter or fee agreement explaining when the file will be returned to the client. It is also acceptable and strongly advised that the lawyer provide the client with copies of correspondence, pleadings, deposition transcripts and expert reports during the representation to keep the client reasonably informed as well as to comply with requests for information as required by Prof.Cond.R. 1.4(a)(3)-(4).[12] The release of materials to the client during representation does not relieve the lawyer of obligations to maintain a complete client file or to turn over documents upon request.

The following is a sample statement in an initial engagement letter, regarding the final disposition of the client's file:

The firm will maintain your file for _____ years after the date of the file closing letter. After that date, the file and all of its contents will be permanently destroyed. You may request your file and all of its contents at any time before the date of destruction.

The closing letter at the conclusion of representation should include a recitation of the firm's file retention policy and the date when the file will be destroyed. The letter should allow the client a reasonable period of time to request a copy of his or her file before it is destroyed.

The file closing letter may contain language similar to the following:

Under the firm's file retention and destruction policy, your file will be kept for _____ months/years from the above date after which time the file will be permanently destroyed. You may retrieve your file and its contents at any time prior to the date of destruction.

A file retention policy, explained in both the initial engagement and file closing letters, gives the client sufficient notice of the length of time the file will be retained and that it may not be kept indefinitely by the lawyer. A retention period for the client file should take into consideration the statute of limitations to bring claims against the lawyer or any retention period required by the lawyer's malpractice carrier. Special attention should also be given to the Ohio's discovery rule and its application to legal malpractice matters when establishing a file retention policy.[13]

A retention policy may still be adopted even after lawyer has been in practice for a significant period of time. When implementing a policy after accumulating flies for years or even decades, the lawyer should set a date for implementation and draft a letter to current and former clients detailing the retention policy, dates for file destruction, and the time period the client may request and obtain their file.

Closing and Transmittal of the Client File

A lawyer is required to take reasonable steps to protect the client's interest when a client file is closed at the end of representation.[14] This duty applies regardless of the reason for the termination of the representation.

A lawyer should take certain steps when closing a client file:

1. Determine that the matter has concluded (*e.g.*, file contains a dismissal entry, satisfaction of judgment, lease termination, etc.) and personally inventory the file to determine its contents;
2. Determine which documents the client is entitled to receive;
3. Determine whether the file contains other client property, such as, items provided by the client and original documents: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, cash, bonds, negotiable instruments, deeds, official corporate or other business and financial records, and settlement agreements produced during the representation; and
4. Cull, at the lawyer's discretion, publicly available documents such as pleadings and briefs, hard copies of transcripts available digitally, and work product (*e.g.*, internal firm correspondence, drafts of documents, and lawyer's notes.)

When the client file is transferred to the client at the end of representation, a letter listing the general contents of the file should be prepared with a receipt to be signed by the client. Clients should be encouraged to pick up the file from the lawyer's office whenever possible. A lawyer should maintain a copy of the signed receipt with his or her copy of the client file. Files mailed at the client's direction should be sent by certified mail. If the client directs the lawyer to send the file to a third party or another lawyer, the request should be made in writing with a signed release to transfer the file. If the location of the client is generally unknown, it is advisable to withhold all original documents or client papers for transmittal until the client's address is confirmed or the client contacts the lawyer. A lawyer may not charge the

client for providing the file or making copies of the file.[15] Charging a client a separate fee to store his/her file during any retention period is discouraged unless the expense was previously agreed upon in writing.[16]

Destruction of Retained Files

A file may be destroyed at any time with the client's consent. However, it is a best practice for a lawyer to retain either a paper or scanned copy of the file for the duration of the firm's file retention period. Even if the client previously has been advised of the file retention period, it is a best practice to send a final file destruction notice to the client before any client files are destroyed.

The file destruction notice should be sent to the last known address of the client. A lawyer is required to take reasonable steps, but not extraordinary measures, to locate missing clients.[17] For example, contacting known family members, placing a notice in a newspaper of general circulation, or a search of commonly used electronic databases, social media, or the internet are considered reasonable efforts to locate a client. The lawyer should document all efforts undertaken to locate the client.

Lawyers are not required to send a file destruction notice by certified mail, but unique circumstances may warrant the use of this method. For example, the use of certified mail may be prudent when a client has made contact with the firm requesting to pick up a copy of the file prior to its destruction, but has failed to do so after a reasonable period of time.

A file destruction notice should inform the client when the file will be destroyed:

You are advised that your file will be destroyed any time after _____ pursuant to the file closing letter dated _____. You may request the file at any time before that date.

Each file that is scheduled to be destroyed should be reviewed again by the lawyer. A lawyer should use care not to destroy or discard information that the "lawyer knows or should know may still be necessary or useful in the assertion or defense of the client's position in a matter for which the applicable statutory limitations period has not expired."[18] This will require a lawyer to consider all relevant statutes of limitations, substantive law, and the nature of the client's case before destroying the client's file. If a client cannot be located, but the file contains property owned by the client, it should be "segregated and preserved."[19]

Although the Rules of Professional Conduct do not prescribe any particular method for the destruction of client files, a lawyer is obligated to maintain client confidentiality even after the representation terminates, including when disposing of a client's file.[20] Cross-hatch shredding or incineration of closed files are recommended methods of destruction of client files. If third party vendors are contracted to destroy records, the lawyer is primarily responsible to ensure the vendor uses methods that minimize the risk of disclosure of confidential information. Destruction of email and other digital records also requires the use of technologically secure methods to preserve confidentiality. Lastly, it is recommended that physical hard drives be wiped pursuant to National Institute of Standards and Technology guidelines prior to resale or disposal of electronic devices.[21]

After a file is destroyed, a lawyer should maintain a permanent record of a "destroyed client file register" in either paper form or an electronic database organized by client and matter number that includes:

1. The date of the opening and closing of the file;
2. The date of the termination of the representation;
3. A copy of the letter to the client notifying him or her of the pending destruction of the file;
4. The name of the lawyer that reviewed the file at closing, prior to destruction, and authorized the destruction; and

5. Receipt for a file transferred to the client or a subsequent lawyer at the end of representation.

Electronic Correspondence

Email messages constitute papers or property to which the client is entitled under Prof.Cond.R. 1.16(d). Like other forms of client papers and property, a lawyer's ethical obligation to retain and safeguard materials relating to the representation of a client depends on the facts and circumstances of each representation.[22] A lawyer should retain emails that have a substantive impact upon the client's future representation. For example, a lawyer should retain an email that communicates and evaluates a settlement offer from an insurance company, but may discard a nonsubstantive email confirming a meeting or providing directions to a deposition.[23]

The retention and maintenance of client related emails should be incorporated into the firm's file retention policy. A lawyer is responsible for following the firm's email policy and understanding the underlying technology that creates and stores the emails.[24] Failure to do so may cause the inadvertent loss of important lawyer-client communications that adversely affect the client's future legal needs. Consequently, a lawyer should undertake steps to collect and store emails by client and matter to ensure they are physically or electronically associated with the client file.

Digital Media and "Cloud" Storage of Client Files

As law firms adopt digital records as the primary method for producing and storing client papers and files, lawyers must ensure client information is securely stored. Lawyers who continue to handle paper documents may consider digital scanning as an alternative to traditional file storage methods. The Rules of Professional Conduct do not prohibit the scanning and simultaneous destruction of paper documents; however, there are instances when original paper records may constitute part of the client's file and will still need to be maintained. Client property or originals of legally significant documents in paper form should never be destroyed after scanning, and should be returned to the client.

When using technology a lawyer is required to use the requisite "legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation" including making decisions concerning the maintenance of digital client files.[25] The dual application of Prof.Cond.R. 1.6 and 1.15 requires that any internal or external digital file storage method employed by a lawyer must be secure, and that reasonable measures be taken to protect the confidentiality and security of the client property.

"Cloud" File Storage

Although not required to do so, a lawyer should inform clients regarding the use of "cloud" storage of all or part of the client's file.[26] Some clients may have legitimate concerns about the level of security employed by vendors selected by the lawyer. A lawyer must exercise due diligence in selecting a vendor that the lawyer has determined will provide services consistent with the lawyer's ethical obligations. Outside service providers hired for "cloud" storage of client files are considered nonlawyer assistants under Prof. Cond.R. 5.3(a), thus a lawyer must use reasonable efforts to ensure that a vendor's "conduct is compatible with the professional obligations of the lawyer."[27]

The ABA has concluded that the Model Rules of Professional Conduct allow for the outsourcing of legal and nonlegal support services, if the lawyer ensures compliance with the rules relating to competency, confidentiality, and supervision.[28] A lawyer has a supervisory obligation to ensure compliance with professional ethics standards even if the lawyer has an indirect affiliation with the selected service.[29]

The use of "cloud" storage systems should prompt the lawyer to consider a vendor's compliance with the same confidentiality standards set forth in Prof.Cond.R. 1.6. In selecting a vendor, the lawyer must "act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision or monitoring."[30] Consequently, a lawyer using the services of an outside service provider for digital "cloud" storage is required to undertake reasonable efforts to prevent the unauthorized disclosure of client information.[31] This may require a reasonable investigation by the lawyer of the methods employed by the third-party vendor. Factors to be considered in

determining the reasonableness of the lawyer's efforts to safeguard information include, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, and the cost of employing additional safeguards.[32]

At a minimum, the lawyer employing "cloud" storage methods should ensure that:

1. The vendor understands the lawyer's obligation to keep the information confidential;
2. The vendor is itself obligated to keep the information confidential; and
3. Reasonable measures are employed by the vendor to preserve the confidentiality of the files.

Client Files and Succession Planning

A lawyer's duty of competent representation includes safeguarding the client's interests in the event of the lawyer's death, disability, impairment, or incapacity.[33] This can be ensured through a firm succession plan that contains explicit instructions to a named successor lawyer for the handling of open client files and matters, as well as closed client files maintained pursuant to a file retention policy.[34] The instructions should include the location of the client files and, in the event the files are maintained electronically either locally or in the "cloud," any necessary passwords or login information.

The retirement or resignation of a lawyer can also present client file issues if the lawyer has never implemented an adequate file retention and destruction schedule. A lawyer considering retirement or resignation should take certain steps to ensure the proper transfer of the files to a successor lawyer, or begin the process of inventorying and disposing of client files. The inventorying process should follow the aforementioned steps in this guide, including using reasonable efforts to contact former clients prior to the destruction of files.

Issued March 18, 2016.

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[1] *See* RESTATEMENT OF LAW III: THE LAW GOVERNING LAWYERS, Sec. 46.

[2] Prof.Cond.R. 1.6(c); "Reasonable" when used in relation to conduct by a lawyer means conduct of a reasonably prudent and competent lawyer. Prof.Cond.R. 1.0(i).

[3] *See* ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384 (1989).

[4] *Sacksteder v. Senny*, 2nd Dist., Montgomery, 25982, 2014-Ohio-2678 (June 20, 2014); ABA Comm. on Ethics & Prof'l Responsibility Formal Op. 471 (2015).

[5] *See supra* n.2 for definition of "reasonable."

[6] Adv. Op. 1992-8.

[7] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 471 (2015).

[8] *Id.*

[9] Adv. Op. 2010-2; ABA Comm. on Ethics & Prof'l Responsibility, Informal Opinion 1376 (1977).

[10] ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1376 (interpreting former Model Code of Professional Responsibility DR 9-102(B)(4).)

[11] Adv. Op. 2010-2 (interpreting Prof. Cond. R. 1.16(d).)

[12] *Id.*

[13] *Omni-Food & Fashion, Inc. v. Smith* (1988), 38 Ohio St.3d 385, 528 N.E.2d 941; *Zimmie v. Calfee* (1989), 43 Ohio St.3d 54, 538 N.E.2d 398.

[14] Prof.Cond.R. 1.16(d).

[15] Prof.Cond.R. 1.16, Comment [8A]; Adv. Op. 1992-8.

[16] Prof.Cond.R. 1.5(b).

[17] *See supra* n.3.

[18] *Id.*

[19] GEORGE CUNNINGHAM, JOHN MONTAÑA, THE LAWYERS' GUIDE TO RECORDS MANAGEMENT AND RETENTION, ABA (2006) at 117.

[20] Prof.Cond.R. 1.6. See also ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1384; *Kala v. Aluminum Smelting & Ref. Co.*, 81 Ohio St.3d 1, 1998-Ohio-439 (1998); *Disciplinary Counsel v. Shaver*, 121 Ohio St.3d 393, 2009-Ohio-1385 (respondent disciplined for not properly disposing of client files and records in violation of Prof.Cond.R. 1.6(a) and 1.9(c)(2)); *Disciplinary Counsel v. Robinson*, 126 Ohio St.3d 371, 2010-Ohio-3829.

[21] NIST Special Publication 880-88 Rev. 1.

[22] *See supra* n.7.

[23] *Id.*

[24] Prof.Cond.R. 1.1, Comment [8].

[25] *Id.*

[26] *See* Prof.Cond.R. 1.4(a)(2).

[27] Prof.Cond.R. 5.3(b).

[28] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008).

[29] *Id.*; Adv. Op. 2009-06.

[30] Prof.Cond.R. 1.6, Comment [18].

[31] *See* Prof.Cond.R. 5.3

[32] *See supra* n.30.

[33] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 369 (1992).

[34] *Id.*

AGREEMENT FOR CONTINUATION OR TERMINATION

OF LAW PRACTICE

This Agreement for Continuation or Termination of Law Practice ("Agreement"), dated _____, is entered into between A, Attorney at Law, of Cleveland, Ohio ("A"), and B, Attorney at Law, of Cleveland, Ohio ("B").

RECITALS

1. Whereas A desires to appoint B to serve in the capacities herein specified, for the benefit of A, A's heirs, estate and clients in order to continue or terminate A's law practice in the event of A's disability or death.

2. Whereas the protection of the rights and privileges of A's clients and the protection of the attorney-client relationship between A and his clients are of overriding importance to the parties to this Agreement.

NOW, THEREFORE, IN CONSIDERATION of the mutual covenants and promises set forth herein, the parties agree:

Section 1. Definition. Unless the context otherwise requires, the following definitions shall apply to this Agreement:

1.1. "State Bar" means the Ohio State Bar Association.

1.2. "Representative" means the executor, administrator or personal representative of A's Estate in the event of A's death, or A's legal representative in the event of A's disability. If A is competent to designate a Representative, the person so designated shall serve as A's "Representative" for purposes of this Agreement. If a Representative has not been designated nor appointed or if a Representative is not acting, the term "Representative"

shall include A's spouse or next of kin or other appropriate person who is acting on behalf of A in the event he is disabled or deceased.

1.3. "Disability" means any condition whereby A has been declared to be under a legal disability by a Court of competent jurisdiction or a condition whereby A is so incapacitated as to make it impossible or impracticable for him to give prompt and intelligent consideration to business matters. An unexplained absence from the practice of law for a period of 14 or more consecutive days shall also constitute a disability for purposes of this Agreement.

1.4 "Death" shall mean A's demise subsequent to the effective date of this Agreement.

Section 2. Purpose. The purpose of this Agreement is to provide assistance to A's Representative in the continuation of A's law practice if A is disabled and in the disposition of A's law practice if A is deceased.

Section 3. Establishing Disability. In determining whether A is disabled, B may act upon such evidence as she shall deem reasonably reliable, including, but not limited to, communications with A's Representative or a written opinion of one or more medical doctors duly licensed to practice medicine. Similar evidence or medical opinions may be relied upon to establish that A's disability has terminated. B is relieved from any responsibility and liability for acting in good faith upon such evidence in carrying out the provisions of this Agreement.

Section 4. Notification of Clients. Upon A's disability or death, B shall, as soon as appropriate under the circumstances, send a letter (Suggested "Form 1", attached) to each of A's clients advising of A's disability or death. B shall also advise A's clients that B has been named to assist A's Representative in continuing or winding up A's law practice, as the case may be. If A is disabled and if, in B's judgment, a personal notification from A to his clients can be

obtained and is appropriate under the circumstances, B may prepare and obtain A's signature upon such notification (Suggested "Form 7", attached). After signature by A, B shall promptly send a copy of the notification to A's clients. A shall also notify any other persons or entities as may be appropriate under the circumstances.

Section 5. Undertakings in Event of Disability or Death.

5.1. B agrees to serve as provided herein, unless B is unwilling or unable to do so at the time of A's disability or death. During such time as B or B's alternate, who is identified in Section 9.2, is acting under this Agreement, A designates B and/or B's alternate to act as A's special trustee, attorney-in-fact, conservator, special administrator or special personal representative of A's estate. When acting in any of these capacities, B's or B's alternate's powers shall be specifically limited to actions which are required to carry out the provisions of this Agreement and to continue or wind up A's professional practice of law in the event of A's disability or death. If B declines to act on A's behalf, B shall promptly notify A's Representative and confirm such notice in writing. In such event, B's alternate shall then be eligible to act under this Agreement.

5.2. B may serve as A's designee under any statute, rule, regulation, or requirement of any Federal or State court or of the State Bar for the purpose of continuing, conducting or terminating A's professional law practice upon A's disability or death. A, while not under disability, shall have the power to designate and appoint other or additional qualified individuals to carry out the provisions of this Agreement.

5.3. In the event of A's disability, A hereby designates B as signator to, or in substitution of A's signature, on all of A's law office accounts with any bank or financial institution, including, but not limited to, checking accounts, savings accounts and trust (including

IOLTA) accounts. A agrees on behalf of himself, his heirs, and his estate, to indemnify and hold any such bank or financial institution harmless against any loss suffered as a result of such bank's or financial institution's good faith actions and reliance upon the power of attorney or other powers granted herein without having received notice of revocation of such power. If required by any bank or financial institution, A or A's Representative shall execute and deliver any documents which may be necessary to authorize B to carry out the provisions of this subparagraph.

5.4. B shall review all of A's law office files and, subject to the wishes and directions of A's clients, shall take such action as B deems appropriate, including the prompt return of files to clients, retention of other attorneys to provide legal services to clients or individually providing legal services for specific clients in the areas of practice with which B is familiar. When files are to be returned to clients, B shall retain copies of such portions of the client's file or files as in B's judgment should be retained for future reference.

5.5. While acting under this Agreement, B shall perform the following fiscal functions:

5.5.1. Inventory and collect A's law office accounts receivable with diligence;

5.5.2. Invoice and collect any unbilled fees from clients for services rendered by A prior to the date of A's death or disability;

5.5.3. Invoice and collect any unbilled costs advanced on behalf of any client;

5.5.4. Deposit all receipts from A's law practice into A's law office bank accounts and make disbursements from such accounts in payment of A's law firm obligations, including the continuation and operation of A's law office, but excluding any obligations not related to A's law practice;

5.5.5. Inventory the assets and list the liabilities of A's law practice.

5.5.6. B shall use care to ensure that funds which should be categorized and treated as "trust" funds are deposited in A's trust account or accounts, including IOLTA accounts, and that any funds disbursed therefrom shall be in keeping with applicable ethical and legal requirements;

5.5.7. Pay over to A's Representative, on a monthly basis and at such other times as B may deem appropriate, all funds which are deemed by A's Representative to be in excess of reasonable requirements for carrying out B's responsibilities hereunder;

5.5.8. Request A's Representative to advance any funds reasonably necessary to carry out the provisions of this Agreement;

5.5.9. Render an interim accounting to A's Representative at the end of each six-month period after B's assumption of responsibility hereunder, and a final accounting at the conclusion of such responsibilities. Such final accounting shall be accompanied or preceded by final distribution to A's Representative of all funds remaining in B's hands pursuant to this Agreement;

5.5.10. The terms and conditions of any retainer agreement between A and any of A's clients shall remain in full force and effect, notwithstanding A's death or disability, subject, however, to the substitution of legal counsel to perform the services undertaken by A pursuant to such retainer agreement; and

5.5.11. Substitution of counsel shall be arranged pursuant to this Agreement, but only with the client's prior consent and approval.

Section 6. Delivery of Personal Property. Unless necessary to continue or wind up A's law practice, B shall deliver A's personal property, furniture, fixtures, equipment and records to A's Representative; provided, however, that the disposition of A's clients' files and documents shall be subject to the written directions of the affected clients. B shall make arrangements with A's Representative for the temporary and permanent storage of, and access to, clients' files (or copies thereof) retained on A's behalf.

Section 7. Completion of Pending Matters; Compensation.

7.1. B shall facilitate the completion of each matter pending at the time of A's death or disability. If the respective clients shall so approve, pending matters shall be completed by B herself or by attorneys designated by B; otherwise pending matters shall be turned over to the attorneys or other persons designated by the respective clients. Files relating to pending matters shall be retained by B or delivered to such other attorneys or other persons, as the case may be. As to any matter not to be completed by B, she shall retain copies of all or such portion of the related files as she shall deem appropriate.

7.2. B shall not commit A's Representative to responsibility for compensation to an attorney (including B herself) to whom a pending matter is transferred. Such attorney shall look solely to the client for compensation for completion of a pending matter, except to the extent that A received advance payment of fees and/or disbursements in excess of amounts earned or disbursed by A. B shall endeavor to obtain reimbursement for the benefit of A's Representative for any incidental expenses (such as the services of accountants, photocopies, secretaries, movers and others) necessarily incurred in transferring pending matters, but B shall have authority to incur such expenditures even where no such reimbursement can be or is obtained.

7.3. In the case of pending matters on a contingent-fee or other basis where the amount payable for the services rendered by A prior to his death or disability is not clearly determinable, the following shall apply:

7.3.1. If an attorney other than B (whether designated by B or by the client) is retained to complete the matter, B shall negotiate with such other attorney as to a fair and equitable division of any ultimate fee recovery between A's Representative and such other attorney. If agreement for such division is not obtained, B shall endeavor to obtain such other attorney's agreement to arbitration of the fee division under State Bar auspices. If such arbitration agreement is not obtained, B may bring an action or may refer the matter to A's Representative to obtain adjudication of such division; or

7.3.2. If B herself is retained to complete the matter, the division of any ultimate fee recovery between B and A's Representative shall be submitted to arbitration under State Bar auspices, except that arbitration shall not be required if A's Representative is an attorney or is represented by independent counsel and agrees with B as to the division.

Section 8. Spendthrift provision. B shall not recognize any transfer, mortgage, pledge, hypothecation, assignment, or order (other than by A while not under disability) which anticipates the payment of any part of the income from A's law practice.

Section 9. Appointment of Attorney-in-Fact.

9.1. A hereby appoints B as his attorney-in-fact, with full power to do and accomplish all of the actions contemplated by this Agreement as fully and as completely as A could do personally as though A were not disabled. It is A's specific intent that this appointment of B as his attorney-in-fact shall become effective only upon A's disability; provided, that the appointment of B shall not be invalidated because of A's incapacity or disability, but instead the appointment shall fully survive such disability or incapacity and shall be fully enforceable so long as it is necessary or convenient to carry out the terms of this Agreement.

9.2. If B is unable or unwilling to act on behalf of A, A appoints as B's Alternate, (name) _____, Attorney at Law, (address) _____, to act on behalf of A under this Agreement. As shown by the acceptance which appears on the final page of this Agreement, B's Alternate has consented to act hereunder.

Section 10. Termination.

10.1. This Agreement shall be terminated upon the happening of either of the following events:

10.1.1. Delivery of a written notice of termination by A to B during any time that A is not under Disability; or

10.1.2. Delivery of a written notice of termination given by B to A, or if A is deceased or under disability, to A's Representative, subject to any ethical obligation to continue or complete any matter undertaken by B pursuant to this Agreement.

10.2. While B or B's Alternate is acting on behalf of A under this Agreement,

A's Representative cannot terminate or discharge B or B's Alternate except for good cause shown.

10.3. If, while acting on behalf of A, B or B's Alternate ceases for any reason to act on A's behalf, B (or his Alternate if then acting) shall (1) within thirty (30) days prepare and file with A's Representative a full and accurate accounting of any financial activities undertaken on A's behalf and (2) turn over to A's Representative, all of A's funds, files and records.

Section 11. Disputes. Any controversy or claim arising out of or relating to this Agreement or any breach thereof shall be settled by arbitration administered by the Ohio State Bar Association in accordance with its applicable rules. If no rules have been adopted by the Ohio State Bar Association with regard to arbitration proceedings, the rules of commercial arbitration of the American Arbitration Association shall apply, provided, however, a single arbitrator or a panel of arbitrators may be utilized as agreed by the parties to the dispute. If the parties are unable to agree, a single arbitrator shall act. Any arbitration shall take place in Cuyahoga County, Ohio.

Section 12. Indemnification. A and A's heirs, personal representatives and assigns do hereby indemnify B and B's Alternate (and their heirs and personal representatives) against any claims, loss or damage arising out of any act or omission by B or B's Alternate under this Agreement, if B or his Alternate acted, or failed to act, in good faith and in a manner reasonably believed to be in A's best interest, excepting only gross negligence and willful misconduct.

Section 13. Controlling Law. The parties to this Agreement are subject to and shall be bound by all Rules of professional conduct and any other Federal, State or local rules or laws which apply to the legal profession within the State of Ohio and B shall carry out her responsibilities under this Agreement pursuant to such rules and laws. This Agreement shall be construed and enforced under the laws of the State of Ohio, and shall be binding upon the heirs, personal representatives and assigns of the parties.

_____

A

_____

B

STATE OF OHIO)
:SS
COUNTY OF)

The foregoing Agreement was acknowledged before me this ____ day of _____, ____, by A, for the purposes therein contained.

_____
Notary Public

STATE OF OHIO)
:SS
COUNTY OF)

The foregoing Agreement was acknowledged before me this ____ day of _____, ____, by B, for the purposes therein contained.

_____
Notary Public

ACCEPTANCE OF ALTERNATE

I hereby agree to act as B's Alternate pursuant to the foregoing Agreement.

DATE:_____

NAME:_____
Attorney at Law (Alternate)

ADDRESS:_____
_____

Optional Disciplinary Process Overview

OVERVIEW OF THE OHIO DISCIPLINARY PROCESS

Scott J. Drexel, Esq.
Disciplinary Counsel
scott.drexel@sc.ohio.gov

Richard A. Dove, Esq.
Director
Board of Professional Conduct
rick.dove@sc.ohio.gov

GOV. BAR RULE V

- Allegations of violations of the Code of Professional Responsibility, Rules of Professional Conduct, and the Code of Judicial Conduct
- All formal complaints heard by the Board of Professional Conduct
- Complaints brought by ODC or Certified Grievance Committees (CGC)

GRIEVANCES AND FORMAL COMPLAINTS

STATISTICS

- 4,200 grievances per year
- 2,600-2,700 through ODC
- 60% dismissed on intake
- 40% opened for investigation
- 40-60 result in formal complaints
- Percentages similar for CGC

GRIEVANCE PROCESS

- Letter of Inquiry (LOI)
- Investigation
- Letter of Dismissal or Notice of Intent

LETTER OF INQUIRY

- Includes copy of grievance
- Written response within 2 weeks (may extend)
- Failure to respond—not a good idea
- Lawyers and judges must cooperate

INVESTIGATION

- Response from attorney/judge
- Response may be provided to grievant
- Investigators
- Subpoena power
- Witness interviews

INVESTIGATION

- Time limitations
  - Extensions beyond 150 days for "good cause"
  - Beyond 1 year = unreasonable delay
- To Dismiss or Not to Dismiss?
  - Internal probable cause determination
  - If no probable cause, closing letter to grievant

FORMAL COMPLAINT

- Notice to attorney or judge
- Attorney or judge may respond to proposed complaint
- Submit complaint, response, and a summary of investigation to Board

PROBABLE CAUSE

- 3-member panel appointed by Board
- Panels meet monthly
- Confidentiality preserved
- Standard—substantial, credible evidence
- If no probable cause found—dismissed and complaint remains confidential
- Partial dismissals and appeals
- If probable cause found—certified and public

POST-COMPLAINT PROCEEDINGS

- Attorney or Judge must file an answer—20 days
- If no answer, Board initiates default proceedings:
  - Notice of Intent to Respondent
  - 30 days to respond
  - If no response, board certifies default to Court
  - Show cause order from Court
  - Interim default suspension; indefinite suspension

CERTIFIED COMPLAINT

- Answer filed--director assigns a 3-member panel
- Prehearing phone conference
- Discovery
- Hearing within 150 days
- Amended complaint—leave required; no separate probable cause determination on amended complaint
- Encouraged to stipulate to facts

HEARING

- Formal hearing
- Rules of evidence apply
- Relator bears burden of proof—clear and convincing evidence
- Four primary issues
  - Facts
  - Rule Violations
  - Aggravating and Mitigating Factors
  - Sanction

HEARING (CONT.)

- Panel often questions respondent
- Panel may dismiss or recommend finding of discipline
- Panel prepares written report to the full Board
- Full board deliberates and votes
- Dismiss or approve findings of fact, conclusions of law, and recommended sanction

SUPREME COURT OF OHIO

- If board recommends discipline, the Supreme Court issues order to show cause (except consent to discipline)
- Parties may object to the Board's report and recommendation
- Brief and argument before the Supreme Court
- Supreme Court not bound by Board

WHAT INFLUENCES A SANCTION

Aggravating Factors:

- Prior discipline (includes CLE and registration)
- Dishonest or selfish motive
- Pattern of misconduct
- Lack of cooperation
- Failure to make restitution
- Vulnerability of victim
- False statements/deceptive practices during disciplinary process

WHAT INFLUENCES A SANCTION

Mitigating Factors:

- No prior discipline
- Absence of dishonest or selfish motive
- Full and free disclosure during process
- Character and reputation
- Restitution (timely)

WHAT INFLUENCES A SANCTION

- Disorder (defined in Gov. Bar R. V, Section 35)
- Four requirements for disorder to be considered in mitigation:
  - *Diagnosis*—qualified health care professional
  - *Causation*—disorder contributed to misconduct
  - *Treatment*—sustained period of successful treatment (mental disorder) or completion of an approved treatment program (substance use disorder)
  - *Prognosis*—opinion that attorney is able to return to the competent, ethical professional practice of law

DISPOSITION TIMES

- ODC/CGC—investigation up to one year
- Board—average 8-9 months (includes service)
- Supreme Court—approximately 8-10 months; longer if objections and oral argument

QUESTIONS?

THE MILLER BECKER 2016 SEMINAR

Recent Decisions of Note

RECENT DISCIPLINARY DECISIONS OF NOTE
(September 2016)

Sex with Clients—Prof. Cond. R. 1.8(j)

Disciplinary Counsel v. Bartels, Slip Opinion No. 2016-Ohio-3333

Facts: Respondent engaged in a consensual exchange of sexually oriented text messages with her client for a period of one month before she terminated the exchanges. At no time did the respondent or her client engage in sexual activity. Subsequently, the client and the client's girlfriend attempted threatened respondent with disciplinary action if she did not pay money to the client or refund a portion of the legal fee. The respondent reported the attempted extortion to law enforcement.

Rule violation: Respondent stipulated to a violation of Prof. Cond. R. 1.8(j).

Sanction: The parties stipulated to a sanction of a one-year, fully stayed suspension, and that sanction was recommended by the panel. Based on the panel's finding the respondent did not appreciate that her conduct was in violation of Prof. Cond. R. 1.8(j), the fact that the respondent had previously received a public reprimand for engaging in a sexual relationship with a client, and in reliance on *Lake Cty. Bar Assn. v. Mismas*, 2014-Ohio-2483, the Board recommended and the Supreme Court imposed a one-year suspension with six months stayed on conditions.

Cleveland Metro. Bar Assn. v. Sleibi, 2015-Ohio-2724

Facts: Respondent engaged in sexual relationships with four different clients, one of whom filed a rape charge, and sent sexually explicit messages to at least three of the clients. Two of the clients filed grievances against the respondent, and the other two relationships were disclosed by the respondent during the investigation.

Rule violations: Respondent violated Prof. Cond. R. 1.8(j) and 8.4(h). With regard to the latter violation, the panel and Board found that the respondent's conduct was egregious, applying the standard set forth in *Disciplinary Counsel v. Bricker*, 2013-Ohio-3998.

Sanction: The panel and Board recommended a two-year suspension with one year stayed on conditions, including continued treatment for a diagnosed sex addiction, anxiety, and depression. Citing the respondent's conduct with four vulnerable clients who came to him for legal representation, his claim that the encounters were consensual, and the fact that the respondent's hearing testimony included attempts to discredit and embarrass at least two of the clients, the Supreme Court imposed a two-year suspension with six months stayed. Three justices dissented and would have imposed an indefinite suspension.

Cleveland Metro. Bar Assn. v. Paris, 2016-Ohio-5581

Facts: Respondent made repeated and unwelcomed sexual advances to a female client. After the client rebuffed the advances, Respondent failed to appear at the client's sentencing hearing, and public defender was assigned to represent the client when the sentencing hearing was rescheduled.

Rule violation: Respondent stipulated to violations of Prof. Cond. R. 1.3 and 1.8(j).

Sanction: The parties stipulated to aggravating and mitigation factors and a sanction of a six-month, fully stayed suspension. Based on hearing testimony, the panel found additional factors that Respondent's conduct harmed a vulnerable client and that he did not understand or accept the wrongful nature of his conduct. Because of these findings, the panel and Board rejected the agreed-upon sanction and recommended a six-month suspension. The Board further indicated that an actual suspension should be expected for Prof. Cond. R. 1.8(j) violations, absent significant mitigation. Citing confusion regarding the consideration of the parties' stipulations and the testimony presented at the hearing, the Supreme Court declined to adopt the additional aggravating factors cited by the Board and imposed a six-month, stayed suspension. Three justices dissented and would have adopted the Board's recommended sanction and established a presumption of an actual suspension for Prof. Cond. R. 1.8(j) violations.

Prosecutorial Misconduct

Disciplinary Counsel v. Phillabaum, 2015-Ohio-4346

Facts: As an assistant prosecutor, the respondent failed to disclose exculpatory evidence to defense counsel, ordered a staff person to prepare an indictment that included a gun specification not presented to the grand jury, and signed the false indictment after the assistant who presented the case to the grand jury refused to do so. Respondent was subsequently fired from his job and entered a plea of guilty to dereliction of duty.

Rule violations: Respondent violated Prof. Cond. R. 3.3(a)(1), 8.4(c), 8.4(d), and 8.4(h).

Sanction: The Board recommended imposition a one-year suspension with six months stayed. The Supreme Court rejected the recommendation and suspended the respondent for one year.

Disciplinary Counsel v. Brockler, 2016-Ohio-657

Facts: The respondent was investigating a murder case and believed the alibi offered by the alleged perpetrator was untrue. In an effort to determine the validity of the alibi, the respondent created a fictitious Facebook account in order to contact two alibi witnesses. In contacting the two witnesses via Facebook and chatting on-line with

them for several hours, the respondent made false representation and did not disclose his identity to either of the two witnesses. During pretrial conferences, he did not disclose to defense counsel his contacts with the two alibi witnesses. The respondent's ruse was uncovered when another assistant prosecutor was assigned to the case while the respondent's medical leave. Respondent's employment was terminated for engaging in unethical conduct, creating false evidence, and lying.

Rule violations: Prof. Cond. R. 8.4(c) and (d).

Sanction: The Board recommended and the Supreme Court imposed a one-year stayed suspension. Three justices dissented and would have imposed an indefinite suspension.

Public Official Misconduct

Disciplinary Counsel v. Kramer, 2016-Ohio-5734

Facts: The respondent was employed as a hearing officer for the county board of revision. In the course of his employment, he submitted false time records that resulted in him receiving compensation for hours he did not work. An initial grievance was reviewed and dismissed by a certified grievance committee, and the committee dismissed the grievance stating, "The Committee believes Mr. Kramer has already been sanctioned by the loss of his employment and that further disciplinary action is not warranted." Prior to the dismissal, a second, anonymous grievance was filed with Disciplinary Counsel. Disciplinary Counsel conducted an investigation and filed a formal complaint alleging the respondent engaged in professional misconduct. The respondent moved to dismiss the complaint, citing the prior investigation conducted by the certified grievance committee. The Board overruled the motion and, after a hearing, found the respondent engaged in professional misconduct.

Rule violations: Prof. Cond. R. 8.4(c) and (d).

Sanction: The Board recommended the sanction of a one-year stayed suspension. The relator objected to the recommendation and argued for a one-year unstayed suspension. A majority of the Supreme Court agreed with the Board's recommendation and imposed the one-year stayed suspension. The majority also rejected the respondent's claim that Disciplinary Counsel should have given "full faith and credit" to the grievance committee's prior dismissal of a grievance predicated on the same facts. Three justices dissented and would have dismissed the case because of the investigation and dismissal of the initial grievance.

Attempted Rule Violation

Geauga Cty. Bar Assn. v. Bond, 2016-Ohio-1587

Facts: The respondent was contacted by an individual seeking representation in a personal injury case. The respondent met with the client, and the client requested

financial assistance for medication and living expenses. The respondent entered into a contingent fee agreement with the client and provided a $2,000 loan to the client. After the client failed to repay the loan, the respondent contacted law enforcement. The client was later convicted of theft. The Board dismissed the alleged violation of Prof. Cond. R. 1.8(e) [prohibition against financial assistance to a client], finding that no client-attorney relationship was formed because of the client's intention to defraud the respondent. The Board did find a violation of Prof. Cond. R. 8.4(a) based on the respondent's admitted attempt to violation Prof. Cond. 1.8(e).

Rule violation: Prof. Cond. R. 8.4(a).

Sanction: The Board recommended and the Supreme Court imposed a public reprimand.

Practicing under Suspension

Cleveland Metro. Bar Assn. v. Pryatel, 2016-Ohio-865

Facts: Following the respondent's indefinite suspension in 2013, he appeared on behalf of a client in three court proceedings in two different municipal courts. At his deposition, the respondent denied appearing on behalf of clients in these proceedings, claimed that he informed the client's family members that he was suspended, and stated that he had not been paid for any legal work after he was suspended. The respondent's claims were contradicted by testimony and evidence presented at the disciplinary hearing, including video recordings of the court proceedings.

Rule violations: Prof. Cond. R. 5.5(a), 8.1(a), 8.4(c), and 8.4(d).

Sanction: The Supreme Court agreed with the Board's recommendation and permanently disbarred the respondent. Three justices dissented and would have imposed an indefinite suspension.

Judicial Misconduct

Disciplinary Counsel v. Terry, 2016-Ohio-563

Facts: While serving as a judge, the respondent made favorable judicial rulings in exchange for campaign contributions. He was indicted, tried, and found guilty of three felony offenses and was sentenced to a prison term of 63 months. The respondent resigned from judicial office following the felony convictions. As a result of the felony convictions, the respondent was found to have engaged in professional misconduct.

Rule violations: Former Code of Judicial Conduct Canons 1, 2, 3(B)(7), 3(E), and 4; Prof. Cond. R. 8.4(d) and 8.4(h).

Sanction: The Supreme Court agreed with the Board's recommendation and permanently disbarred the respondent.

Unauthorized Access to Electronic Materials

Cleveland Metro. Bar Assn. v. Azman, 2016-Ohio-3393

Facts: Following the respondent's termination of employment at a law firm, he used log-in credentials and passwords provided during his employment to access the firm's email accounts. During a two and one-half week period, he accessed the email accounts at least 20 items, deleting communications from the accounts of the managing partner and other employees of the firm, and emails he had sent to the managing partner after his termination. After discovering that emails had been deleted, the managing partner contacted law enforcement, and law enforcement traced the unauthorized access to the respondent's IP address. Respondent denied accessing the accounts during a deposition but admitted to his misconduct at the disciplinary hearing.

Rule violations: Prof. Cond. R. 3.4(a), 8.4(c), and 8.4(d).

Sanction: The Board recommended and the Supreme Court imposed a one-year suspension with six months stayed.

Noncooperation in the Disciplinary Process

Disciplinary Counsel v. Eichenberger, 2016-Ohio-3332

Facts: On more than 200 occasions, the respondent used his IOLTA for personal and nonclient related business expenses. The respondent refused to provide copies of his trust account records during the investigation and when ordered to do so by the panel chair. He also attempted to conceal his misconduct by making representations in correspondence to the relator and by intentionally redacting incriminating information from bank statements provided to the relator. The respondent showed no remorse for his misconduct or his misrepresentations.

Rule violations: Prof. Cond. R. 1.15(a), 8.1(b), 8.4(c), and 8.4(d); Gov. Bar R. V, Section 4(G).

Sanction: The hearing panel recommended a sanction of a two-year suspension, with one year stayed, but the Board recommended a two-year suspension with no stay. The Supreme Court imposed the partially stayed suspension recommended by the hearing panel.

False Statements to a Tribunal

Toledo Bar Assn. v. DeMarco, 2015-Ohio-4549

Facts: The respondent was representing a client in a civil suit, and entered into an agreement with defense counsel authorizing a computer expert to search the defendants' electronic devices pursuant to a strict discovery protocol. Relevant

documents were to be delivered to the trial judge for an in camera inspection to determine what documents may be turned over to the respondent. The expert searched the computers of one of the defendants and placed the results of his search on a disc. The expert gave the disc to the respondent, who reviewed it and determined that none of the documents would be useful for his case. The respondent never submitted the disc to the trial judge. At a pretrial conference, defense counsel asked Respondent about the results of the computer search, and the respondent indicated that there was nothing of value in the documents. The respondent denied having possession of the disc containing the documents. After the conference, the respondent telephoned the expert and left a voicemail essentially admitting that he had lied to the court about having the disc. The respondent then returned the disc to the expert. The respondent repeated multiple times, both in the judge's chambers and in open court, that he had never received the disc and that he had not reviewed the documents on the disc. The expert then played the respondent's voicemail for the judge.

Rule violations: Prof. Cond. R. 3.3(a)(1), 3.3(a)(3), and 8.4(c).

Sanction: The hearing panel recommended a one-year suspension with six months stayed. The Board recommended a one-year, unstayed suspension. The Supreme Court imposed the panel's recommended sanction of a one-year suspension, with six months stayed.

Violations of Another State's Disciplinary Rules

Disciplinary Counsel v. Lee, 2016-Ohio-85

Facts: The respondent was on a regular retainer with a collective bargaining unit and received a fixed, monthly fee to handle teacher disciplinary matters. Respondent was contacted by a teacher to represent her pursuant to the collective bargaining agreement. After undertaking the representation, the responded failed to communicate with the client, failed to exercise reasonable diligence. When the client retained new counsel, the respondent failed to turn over the client file to counsel. Respondent claimed he was immune from discipline under federal law and claimed that no client-lawyer relationship existed.

Rule violations: Prof. Cond. R. 8.1(b) and Gov. Bar R. V, Section 4(G); Kentucky Rules of Professional Conduct 1.3, 1.4(a)(3), 1.4(a)(4), 1.16(d), 5.5(a), and 8.4(c).

Sanction: Based on the significant aggravating factors present in the case, the Board recommended and the Supreme Court imposed an indefinite suspension.

Presenters' Bios

PRESENTERS' BIOGRAPHICAL INFORMATION

RICHARD C. ALKIRE is the managing member of Alkire & Nieding, LLC in Independence and devotes a portion of his practice to the representation of respondents in disciplinary proceedings. He served three terms on the Board of Professional Conduct and chaired the Board in 2002-2003. Mr. Alkire graduated from the College of the Holy Cross and *cum laude* from the Cleveland-Marshall College of Law. He is admitted to practice in Ohio, the United States District Court for the Northern and Southern Districts of Ohio, various United States Circuit Courts of Appeal, and the Supreme Court of the United States.

D. ALLAN ASBURY joined the Board of Professional Conduct in September 2014 as Senior Counsel. Before joining the Board, Mr. Asbury served as administrative counsel for the Supreme Court and secretary to the Board on the Unauthorized Practice of Law. His primary duties for the Board include researching and drafting advisory opinions, providing ethics advice to Ohio lawyers, judges and judicial candidates, and assisting in the Board's ethics education efforts. Mr. Asbury received his undergraduate and law degrees from Capital University. He is admitted to practice in Ohio, the United States District Court for the Southern District of Ohio, and the Supreme Court of the United States.

DOUGLAS BEECH, MD is a psychiatrist who has been in practice in central Ohio for 22 years. He is board-certified in Psychiatry and Forensic Psychiatry. He has served as a consultant to Franklin County Residential Services of the Franklin County Board of MRDD since 1993, and to Consumer Support Services of Licking County since 1996. After an internship in Pediatrics at Children's Hospital in Columbus, he completed his residency in Psychiatry at Harding Hospital where he also served as Chief Resident. After serving as medical director of partial hospitalization at Harding, Dr. Beech then served as Chief of Adult Inpatient Psychiatry (1995-1999) at Riverside Methodist Hospital in Columbus, where he was a member of the active medical staff from 1995 through 2015. Dr. Beech is on the clinical faculty at the Ohio State University Department of Psychiatry where he serves as a psychotherapy supervisor for senior psychiatry residents. Dr. Beech is a past president of the Psychiatric Society of Central Ohio. He has been selected by his same-specialty peers as an outstanding physician in his specialty for 12 consecutive years through the Best Doctors survey organization. Dr. Beech received his medical degree from the Northeastern Ohio Universities College of Medicine, after a bachelor's degree in Integrated Life Sciences from Kent State University.

LORI J. BROWN was appointed as Bar Counsel for the Columbus Bar Association in October 2015. For two years prior to assuming the role of Bar Counsel, Ms. Brown practiced law in the area of Professional Ethics as Lori J. Brown LLC. Before that, Brown was an Assistant Disciplinary Counsel for the Supreme Court of Ohio for more than 18 years. In January 1999, she was promoted to First Assistant Disciplinary Counsel and in January 2009, she was named Chief Assistant Disciplinary Counsel. On March 1, 2005, Ms. Brown received the 2004 Professional Excellence Award from the Supreme Court of Ohio. Before joining the Disciplinary Counsel, Ms. Brown was in-house counsel for

Safelite Glass Corp. and clerked for Justice Alice Robie Resnick and Judge George M. Glasser. Also admitted in the United States Supreme Court and the Federal District Court for the Southern District of Ohio, Ms. Brown received her Bachelor of Science in Education from Miami University, Master of Education from Bowling Green State University, and Juris Doctor from the University of Toledo College of Law.

JOSEPH M. CALIGIURI is the Chief Assistant Disciplinary Counsel in the Office of Disciplinary Counsel, where he has worked since 2002. He is responsible for investigating and prosecuting lawyers and judges accused of ethical misconduct. Mr. Caligiuri is a frequent lecturer for the Ohio Judicial College, Ohio State Bar Association, and the Association of Judicial Disciplinary Counsel. Mr. Caligiuri is also an adjunct professor of law at the Ohio State University, where he teaches Professional Responsibility. Mr. Caligiuri is a former criminal prosecutor in Buffalo, NY, and is a graduate of SUNY Buffalo, New England Law, and the Clemson University MBA Program.

MCKENZIE K. DAVIS is a partner with The Success Group, a public affairs and lobbying firm headquartered in Columbus. After getting his start in the White House Communications Office, Mr. Davis served as a staffer on several political campaigns throughout Ohio. He then returned to Columbus to earn his Juris Doctorate at Capital University Law School, during which time he completed two internships at prominent Columbus law firms and an externship with Justice Evelyn Lundberg Stratton. Prior to joining The Success Group, Mr. Davis worked with the Ohio Academy of Nursing Homes as Director of Government Affairs. He is serving his ninth year on the Board of Professional Conduct.

PAUL M. DE MARCO is Chairman of the Board of Professional Conduct and has served on the Board since 2008. Mr. De Marco is a founding member of the Cincinnati law firm of Markovits, Stock and De Marco, LLC, where his practice focuses on class actions, complex litigation, and appellate litigation. He is admitted to practice in Ohio and California, before several federal circuit and district courts, and before the United States Supreme Court. Mr. De Marco is a graduate of the College of Wooster, University of the Pacific School of Law, and the University of Cambridge.

DAVID L. DINGWELL is a partner in the Canton law firm of Tzangas Plakas Mannos Ltd. He presently serves on the Board of Professional Conduct, having originally been appointed in 2012. Mr. Dingwell has served as the President of the Stark County Bar Association (2012-2013), serves as a member of the Board of Directors of Arts In Stark, and has served on the boards of several area organizations. Prior to his appointment to the Board of Professional Conduct, he served for many years on the Stark County Bar Association's certified grievance committee, and chaired that committee from 2006 through 2008. Mr. Dingwell's passion is photography, and his current project involves photographing all 88 of Ohio's county courthouses.

SCOTT J. DREXEL is Disciplinary Counsel for the state of Ohio, having been appointed to a four-year term in October 2013. Prior to relocating to Ohio, Mr. Drexel spent 31 years with the state bar of California, including four years as Chief Disciplinary Counsel, 17 years as Administrative Officer and Chief Counsel to the state bar court, and 10 years as

Chief Assistant General Counsel. He also served two years in the Professional Responsibility Advisory Office of the United States Department of Justice and represented attorneys in disciplinary actions. Mr. Drexel is a graduate of the University of Southern California and the Hastings College of Law and is admitted to practice in Ohio, California, before several federal courts, and before the United States Supreme Court.

HEIDI WAGNER DORN serves as Counsel for the Board of Professional Conduct. At the Board, Ms. Dorn provides ethics advice to lawyers and judges, researches and drafts advisory opinions, and assists in the Board's ethics education efforts throughout Ohio. Prior to joining the Board, Ms. Dorn served as an Assistant Attorney General, representing the State Medical Board of Ohio; she served as a staff attorney and magistrate for Judge W. Duncan Whitney in the Delaware County Court of Common Pleas; and she was in private practice in Michigan for several years. Ms. Dorn received her undergraduate degree in finance, *cum laude*, from the University of Dayton and her law degree from Capital University Law School. She is admitted to practice in Ohio, Michigan, the United States District Court for the Southern District of Ohio, and the Supreme Court of the United States.

RICHARD A. DOVE is the Director of the Board of Professional Conduct, and serves as the Board's chief legal and administrative officer. Prior to his appointment in 2011, Mr. Dove served for more than 22 years on the staff of the Supreme Court of Ohio, the last four of which as Assistant Administrative Director. He is immediate past president of the National Council of Lawyer Disciplinary Boards. Mr. Dove is a graduate of Wittenberg University and Capital University Law School and is admitted to practice in Ohio, before the United States District Court for the Southern District of Ohio, and before the Supreme Court of the United States.

ROBERT FITZGERALD is a member of the Board of Professional Conduct and serves on the Board's Advisory Opinion Committee. Before joining the Board, he served as bar counsel for the Allen County certified grievance committee. A practitioner for 34 years, Mr. Fitzgerald is the managing member of the Lima law firm of Fitzgerald, Reese and Van Dyne where his practice focuses on insurance defense. He is a graduate of Ohio Northern University and the Pettit College of Law at Ohio Northern and is admitted to practice in Ohio, the United States District Court for the Northern District of Ohio, the Sixth Circuit Court of Appeals, and before the United States Supreme Court.

DONALD R. HOLTZ is an Investigator with the Office of Disciplinary Counsel, a position he has held since 2009. He previously was employed as the Director of Security for the Longaberger Company from 2000 to 2009. Mr. Holtz retired after 25 years of service as a Staff Lieutenant assigned to the Ohio State Patrol's Office of Investigative Services. He also served for three years as a police officer with the Metropolitan Police Department, Washington, D.C. Mr. Holtz attended Jefferson Technical College, and is a graduate of the FBI National Academy and the Maryland Institute of Criminal Justice. He is a certified polygraph examiner, and completed various specialized law enforcement training throughout his law enforcement career. Mr. Holtz served in various positions including the Marion Post Commander, commander of the Ohio State Patrol's Scientific

Investigation Unit, and commander of the Hostage Negotiation Team. He was an instructor at the Ohio State Patrol's Academy providing instruction to Ohio State Highway Patrol Cadets and officers attending the Basic Police Officer's Training Course. Mr. Holtz provided instruction in Investigative Techniques, and Interviews and Interrogations. He holds a permanent Instructor's certificate from the Ohio Peace Officers Training Academy. Mr. Holtz also managed and conducted major criminal investigations for the Ohio State Patrol.

GEORGE D. JONSON is a partner in the Cincinnati firm of Montgomery, Rennie and Jonson, LPA. He practices civil litigation with an emphasis on the defense of legal malpractice and disciplinary claims. He served on the Supreme Court Task Force to Review the Code of Judicial Conduct (2007-2008) and in 2014, received the Weir Award for Ethics and Professionalism from the Ohio State Bar Association. A graduate of Miami University and the University of Cincinnati College of Law, Mr. Jonson is admitted to practice in Ohio, Kentucky, several federal courts, and before the United States Supreme Court.

JAY E. MICHAEL is a sole practitioner in Columbus, Ohio. His practice is concentrated in probate administration, estate planning, real estate and small business law. Mr. Michael received his B.S. degree from West Liberty State College in West Liberty, West Virginia, and his J.D. degree from Capital University in Columbus. Mr. Michael has received certification as a specialist from the Ohio State Bar Association Estate Planning, Trust and Probate Law Specialty Board, is listed as an Ohio Super Lawyer, and has received the Capital University Distinguished Alumnus Award. He has written several articles on estate planning and estate issues. Additionally, he has lectured on probate and real estate issues for the Ohio State Bar Association, the Columbus Bar Association, and formerly lectured for Ohio BarBri Bar Review. He is a member of the American, Ohio State, and Columbus Bar Associations, and is a fellow in the American Bar Foundation and Columbus Bar Foundation. Mr. Michael served as president of the Columbus Bar Association in 2015-2016.

RICHARD S. MILLIGAN is bar counsel for the Stark County Bar Association and partner in the Canton firm of Milligan Pusateri, Co., LPA. In addition to his disciplinary-related work, Mr. Milligan regularly defends medical professionals and providers in malpractice actions. He formerly served on the Board of Commissioners on Grievances and Discipline and by appointment of the Chief Justice to the Task Force to Review the Ohio Disciplinary System. Mr. Milligan is a graduate of Kenyon College and the University of Akron School of Law.

JOHN P. SAHL is the Inaugural Joseph G. Miller of Professor of Law and the Director of the Miller-Becker Center for Professional Responsibility at the University of Akron School of Law where he regularly teaches professional responsibility, evidence, and sports law. He is currently working with co-authors on a Professional Responsibility textbook slated for publication in 2017. Professor Sahl clerked for Chief Judge William Holloway Jr. of the U.S. Court of Appeals for the Tenth Circuit and was senior counsel to the Subcommittee on the Constitution, Federalism and Property Rights of the U.S. Senate Judiciary Committee.

MONICA SANSALONE is a partner, the Professional Liability Practice Group manager at Gallagher Sharp LLP, and a member of the firm's Management Committee. She represents lawyers in grievance proceedings and defends them against malpractice claims. She consults on ethics and risk management matters, pre-suit evaluation, and claim repair. She provides representation in trial courts and on appeal, including matters before the Supreme Court of Ohio. Ms. Sansalone is a graduate of Cleveland-Marshall College of Law and Loyola University of Chicago. She is Martindale-Hubbell, AV Peer Review Rated, an Ohio Super Lawyer, and a former Law Clerk to the Honorable Terrance O'Donnell, Ohio Court of Appeals Eighth Appellate District. She serves on the Supreme Court of Ohio Lawyers' Fund for Client Protection Board of Commissioners and the Advisory Committee of the Solo Practitioner Incubator at Cleveland-Marshall College of Law. She formerly served on the Commission on Professionalism of the Supreme Court of Ohio, chairing the Commission from 2007-2008. Ms. Sansalone is a member of the Claims and Litigation Management Alliance (CLM), the Lawyers Professional Liability Committee of the American Bar Association, as well as the Ohio State and Cleveland Bar Associations.

AMY C. STONE has been the Assistant Disciplinary Counsel in charge of Intake at the Office of Disciplinary Counsel since 1999. In that capacity, Ms. Stone oversees the processing and initial probable cause review of approximately 2,500 grievances annually. This number includes the IOLTA overdraft reports received by the office pursuant to statute and those grievances making allegations of the unauthorized practice of law. She is also the office's point of contact for abandoned client file issues. Ms. Stone obtained her undergraduate degree from the University of Wisconsin-Madison and her law degree from The University of Akron. She is also a Certified Court Manager.

HEATHER M. ZIRKE is Bar Counsel for the Cleveland Metropolitan Bar Association serving as an advisor to the association's grievance, ethics, unauthorized practice, fee dispute and admissions committees. Prior to joining the CMBA in 2005, Ms. Zirke was a prosecutor for the City of Cleveland. Ms. Zirke is a graduate of Baldwin-Wallace College and Cleveland-Marshall College of Law.

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