Supreme Court of Ohio Clerk of Court - Filed October 28, 2020 - Case No. 2020-1205

THE SUPREME COURT OF OHIO

Columbus Bar Association,	:	Case No. 2020-1205
Relator,	:	(Practice of Law Case)
v.	:	
Lawrence Edward Winkfield,	:	
Respondent.	:	

RESPONSE OF RESPONDENT TO ORDER TO SHOW CAUSE;

OBJECTIONS TO FINAL REPORT OF BOARD OF

PROFESSIONAL CONDUCT AND BRIEF IN SUPPORT

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THE SUPREME COURT OF OHIO

Columbus Bar Association, Relator, v. **Lawrence Edward Winkfield,** Respondent.	**:** **:** **:** **:**	Case No. 2020-1205 (Practice of Law Case) **RESPONSE OF RESPONDENT TO ORDER TO SHOW CAUSE; OBJECTIONS TO FINAL REPORT OF BOARD OF PROFESSIONAL CONDUCT AND BRIEF IN SUPPORT**

Respondent, by and through counsel, hereby responds to this Court's Order to Show Cause dated October 8, 2020, from the final report of the Board of Professional Conduct, *In re Complaint against Lawrence Edward Winkfield,* Board of Professional Conduct, Case No. 2019-042, Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct (hereafter "the Board Report", attached hereto as Appendix). Respondent makes no argument herein opposed to any finding of fact or conclusion of law by the Board, but objects to the recommendation of sanction contained in the Board's final report. Respondent has filed a renewed Application for Retirement or Resignation and begs the Court to grant the Application before considering the Board's Recommendation.

In the Disciplinary Cases section of this Court's Case Announcements for January 15, 2020, (*01/15/2020 Case Announcements,* 2020-Ohio-88), this Court denied Respondent's application for retirement or resignation with discipline pending (*In re Resignation of Winkfield,*

2019-1761), pursuant to Gov. Bar R. VI(11)(C). At that time, the charges brought against Respondent in this present case were still pending. Since that time, the Board held a hearing on June 4, 2020, and on October 2, 2020, voted to adopt the findings of fact, conclusions of law, and recommendation of the hearing panel.

The Complaint against Respondent alleged 11 violations of the Ohio Rules of Professional Conduct. The hearing panel found, and the Board voted to adopt, that Relator proved by clear and convincing evidence that Respondent violated only one of the alleged violations, a single violation of Prof. Cond. R. 8.4(d) (Board Report, ¶110). The hearing panel unanimously dismissed the other 10 alleged violations after finding that Relator failed to prove the allegations by clear and convincing evidence including:

Count One

Prof. Cond. R. 1.1: Failure to Provide Competent Representation (dismissed at ¶101)

Prof. Cond. R. 1.16(e): Failure to Return Unearned Fees (dismissed at ¶105)

Prof. Cond. R. 8.4(d): Conduct Prejudicial to the Administration of Justice (dismissed at ¶110)

Prof. Cond. R. 1.2(a): Failure to Abide by Client's Decisions (dismissed at ¶112)

Prof. Cond. R. 1.3: Failure to Act With Reasonable Diligence and Promptness (dismissed at ¶116)

Prof. Cond. R. 3.3(a)(1): Misrepresentation to a Tribunal (dismissed at ¶121)

Prof. Cond. R. 8.1: Failure to Cooperate in a Disciplinary Proceeding (dismissed at ¶126)

Prof. Cond. R. 3.5(a)(6): Impartiality and Decorum of the Tribunal (dismissed at ¶128)

Count Two

Prof. Cond. R. 8.4(d): Conduct Prejudicial to the Administration of Justice (dismissed at ¶144)

Prof. Cond. R. 8.1: Failure to Cooperate in a Disciplinary Proceeding (dismissed at ¶146)

The Office of Disciplinary Counsel referred the present grievance concerning Sileye Dia to the Columbus Bar Association, who received it on February 21, 2018 (Board Report ¶18). In April 2018, the Columbus Bar Association filed a complaint in another matter concerning other clients of Mr. Winkfield, not including Mr. Dia (Board Case No. 2018-016). That was the case that eventually reached this Court and resulted in the decision and order indefinitely suspending Mr. Winkfield, *Columbus Bar Assn. v. Winkfield*, 159 Ohio St.3d 61, 2019-Ohio-4532.

After Relator filed the Complaint in this present case, Board Case No. 2018-016 was pending and had not yet gone to hearing. Relator could have and should have sought leave to file an Amended Complaint to include the present grievances. Relator argued to the Board that Respondent was responsible for any delay in prosecuting the present case because notices sent to Respondent's previous counsel went unanswered. However, the hearing panel found that "Respondent, without knowledge of a pending complaint" was not responsible for the actions of his attorney (Board Report ¶125) and that Relator failed to prove that any delay in responding to the present Complaint was attributable to Respondent. Respondent objects to the recommended sanction of permanent disbarment and asks this Court to consider that, had the grievances been combined and Respondent found to have violated this one additional violation of the 11 charged, that the sanction in *Columbus Bar Assn. v. Winkfield*, 159 Ohio St.3d 61, 2019-Ohio-4532 would have been the same. This one additional violation, that resulted in no prejudice to the client, would not have amounted to "the straw that broke the camel's back" (Board Report ¶161) because it would have been considered contemporaneous with the other violations.

The hearing panel stated that "a review of the Supreme Court's precedent would indicate a sanction of a suspension from the practice of law with time stayed", (Board Report ¶153). The panel also recognized that a less severe sanction against a lawyer with multiple cases might be

justified under the circumstances of each case. In this case, Respondent did answer the Complaint, made a timely and good faith effort to make restitution, made a free and full disclosure to the Board, demonstrated a cooperative attitude, and faces no other penalties or sanctions than those currently pending in *Columbus Bar Assn. v. Winkfield*, 159 Ohio St.3d 61, 2019-Ohio-4532.

The hearing panel also cited this Court's rejection of Respondent's previous Application for Retirement or Resignation. Now that the 11 charges of misconduct pending at the time of this Court's rejection of that Application have been resolved, Mr. Winkfield has submitted, contemporaneous with the submission of this Brief, a renewed Application for Retirement or Resignation. Respondent is currently serving an indefinite suspension and cannot and is not practicing law. He is 74 years old with health issues and desires to retire from the practice permanently.

This Court has consistently held that the primary purpose of sanctions is not to punish the offender but to protect the public. *Disciplinary Counsel v. Edwards* (2012), 134 Ohio St.3d 271, 2012-Ohio-5643. By accepting Mr. Winkfield's renewed Application for Retirement or Resignation, resulting in a permanent surrender of Mr. Winkfield's license with no avenue to reinstatement, this Court will have done its duty to protect the public while permitting Respondent to resign with some sense of dignity intact. In addition, Respondent has paid all fees to former clients previously ordered by this Court, as well as those from the present case that were not recommended by the Board (Board Report ¶151).

Accordingly, Respondent Lawrence Winkfield asks this Court not to confirm the report of the Board and enter a disciplinary order, but instead accept his Application for Retirement or Resignation with discipline pending.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served electronically and by regular U.S. Mail this **28th** day of **October 2020**, upon Richard A. Dove, Director of the Board of Professional Conduct, 65 South Front Street, 5th Floor, Columbus, OH 43215-3431, and upon Kent Markus and Thomas E. Zani, counsel for Relator Columbus Bar Association, 175 South Third Street, Suite 1100, Columbus, OH 43215.

BIESER, GREER & LANDIS LLP

/s/ David P. Williamson
David P. Williamson (0032614)

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

In re:

Complaint against

Lawrence Edward Winkfield
Attorney Reg. No. 0034254

Respondent

Columbus Bar Association

Relator

Case No. 2019-042

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

OVERVIEW

{¶1} This matter was heard on June 4, 2020, via remote video teleconferencing, before a panel consisting of Adrian D. Thompson, Dr. John R. Carle and Hon. John W. Wise, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing and represented by David P. Williamson. Judith E. Galeano, Jennifer L. Wilson and Kent R. Markus appeared on behalf of Relator. The parties and counsel affirmed their consent to the hearing being conducted via remote video teleconferencing.

{¶3} This proceeding arose from two separate matters. Count One involved Respondent's representation of Sileye Dia in a contract dispute for the purchase of a business that resulted in Relator, charging Respondent with nine violations of the Rules of Professional Conduct. In Count Two, Relator charged Respondent with two violations of the Rules of Professional Conduct arising from Respondent's involvement in a traffic accident. The panel finds Relator proved, by clear and convincing evidence, one violation in Count One and no violations in Count

Two. Based on Respondent's prior disciplinary history, the panel finds the proper sanction is disbarment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶4} Respondent was admitted to the practice of law in Ohio on November 7, 1975.

Respondent's Disciplinary History

{¶5} Respondent has been disciplined by the Supreme Court of Ohio on four previous occasions.

{¶6} On June 5, 1996, Respondent was suspended from the practice of law in Ohio for one year, with that suspension stayed on condition of Respondent's compliance with the terms of the Court's order. *Columbus Bar Assn. v. Winkfield*, 75 Ohio St.3d 527 (*Winkfield I*).

{¶7} On April 11, 2001, Respondent was suspended from the practice of law in Ohio for two years, with the final year stayed on condition of Respondent's compliance with the terms of the Court's order. *Columbus Bar Assn. v. Winkfield*, 91 Ohio St. 3d 364, 2001-Ohio-70 (*Winkfield II*). Chief Justice Moyer and Justice Cook dissented from the April 11, 2001 decision, indicating that they would have adopted the Board's recommendation of an indefinite suspension.

{¶8} On December 2, 2005, Respondent was suspended for noncompliance with Gov. Bar R. VI, associated with the filing of a required Certificate of Registration and the payment of applicable fees. Stipulations ¶6.

{¶9} On January 11, 2006, Respondent was indefinitely suspended from the practice of law in Ohio and ordered to complete the restitution ordered in his 2001 disciplinary matter. *Columbus Bar Assn. v. Winkfield*, 107 Ohio St. 3d 350, 2006-Ohio-6 (*Winkfield III*).

{¶10} On September 21, 2006, Respondent was found in contempt by the Ohio Supreme Court for failure to comply with the Court's order of January 11, 2006. *09/21/2006 Case Announcements,* 2006-Ohio-4877.

{¶11} On July 7, 2008, Respondent sought reinstatement to the practice of law in Ohio, and on September 29, 2009, the petition was denied by the Supreme Court. *Columbus Bar Assn. v. Winkfield,* 123 Ohio St. 3d 1211, 2009-Ohio-5682.

{¶12} After filing a second petition for reinstatement, Respondent was reinstated to practice in Ohio on June 12, 2014 and ordered to serve a three-year term of monitored probation. *Columbus Bar Assn. v. Winkfield,* 139 Ohio St. 3d 1248, 2014-Ohio-2490.

{¶13} On April 15, 2016, the Ohio Supreme Court issued an order which, in part, extended the period of Respondent's monitored probation for an additional two years. *Columbus Bar Assn. v. Winkfield,* 2016-Ohio-1555.

{¶14} The Supreme Court's April 15, 2016 order included, as one of the conditions of probation: "Respondent shall refrain from any further illegal conduct." *Id.*

{¶15} In 2019, Respondent was again indefinitely suspended in his fourth disciplinary proceeding. *Columbus Bar Assn. v. Winkfield*, 159 Ohio St.3d 61, 2019-Ohio-4532 (*Winkfield IV*). Three justices dissented from the majority opinion and would have ordered Respondent disbarred. This case is discussed more fully below.

Procedural Background

{¶16} This case presents a somewhat unique review for the panel. Relator chose to present no witnesses, except the Respondent upon cross-examination, and rely solely upon the joint stipulations of the parties to prove by clear and convincing evidence the rule violations alleged in the complaint. This presents Relator with an interesting challenge. All parties are

advised in the prehearing instructions, "Parties should bear in mind that stipulation of rule violations must be supported by clear and convincing evidence of each alleged rule violation. The hearing panel is not bound to accept stipulated rule violations that are not supported by the evidence presented at the hearing." Respondent took the stand and testified to facts, not set forth in the stipulations, as to why his actions were not in violation of Rules of Professional Conduct. Relator offered no evidence to rebut Respondent's testimony. Without rebuttal witnesses to challenge the testimony of Respondent, the panel, in most instances, must accept Respondent's unrebutted testimony. Relator's only opportunity to challenge the testimony of Respondent would be to challenge his veracity. A review of the transcript does not reveal any significant factual challenges to any specific testimony of Respondent.

{¶17} Relator references Respondent's prior disciplinary history and emphasizes the fact that he has been previously found guilty of violating the Code of Professional Responsibility and Rules of Professional Conduct on four separate occasions. The panel does not believe that it can use Respondent's prior conduct as a basis to find, by clear and convincing evidence, that he is lying as to his conduct in this matter. There are references within the stipulations that Relator claim contradict Respondent's testimony. Respondent argues that his testimony does not contradict the stipulations, but provides the background as to what happened. With this backdrop, the panel will review each of the alleged violations based on the stipulations and the testimony presented at the hearing. The panel will only consider Respondent's prior ethical record for purposes of aggravating circumstances during the sanctions portion of this report.

{¶18} The present grievance concerning Sileye Dia was referred to Relator by the Office of Disciplinary Counsel "for administrative reasons" and was received by Relator on February 21, 2018. Stipulations ¶13; Stipulated Ex. 7.

{¶19} In April 2018, Relator filed a complaint in a new matter concerning four separate client matters, not including Dia. This complaint eventually reached the Supreme Court and resulted in the decision in *Winkfield IV.*

{¶20} On September 13, 2018, a Board panel conducted a hearing on the new matter filed in April 2018. Geoff Oglesby represented Respondent. Stipulations ¶15; Stipulated Ex. 12.

{¶21} Following the hearing, the Board of Professional Conduct recommended, on February 11, 2019, that Respondent be suspended for two years, with 18 months stayed. On November 6, 2019, the Supreme Court issued an order indefinitely suspending Respondent, with three justices dissenting and recommending disbarment. *Winkfield IV, supra.*

Count One—Dia Matter

{¶22} Respondent represented Sileye Dia in a contract dispute. The details are set forth in the stipulations and transcript of proceedings. In summary Dia entered into an agreement to buy the "Buzz in and Buzz Out." Following the completion of the contract, Dia discovered that there were significant liens on the property. These liens ultimately made it impossible for Dia to conduct business. Dia filed a *pro se* complaint for breach of contract. Eventually he hired Respondent to represent him in the litigation.

{¶23} Relator alleges that Respondent, in the course of his representation of Dia, violated the nine provisions of the Rules of Professional Conduct. As previously noted above, Relator cites solely to the stipulations in support of these charges. Relator does not cite to any testimony presented at trial in support of its charges. Therefore the panel will review the stipulations cited in support of the charges and the testimony of Respondent.

Failure to Provide Competent Representation

{¶24} Prof. Cond. R. 1.1 states: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

{¶25} The relevant stipulations set forth the following.

{¶26} In April 2012, AJ II LLC (Seller) and Kane & Dia Service LLC (Buyer) entered into a Purchase and Sale Agreement for the sale of the assets, including a liquor permit, of "Buzz In and Buzz Out Carryout" in Columbus. Stipulations ¶31; Stipulated Ex. 16.

{¶27} Nabil Saa signed the Agreement for AJ II LLC, who in April 2012 was the sole member of the LLC. Stipulations ¶32; Stipulated Ex. 16.

{¶28} Jacques Diallo signed the Agreement for Kane & Dia service LLC, who in April 2012 was the sole member of Kane & Dia Service LLC. Stipulations ¶33; Stipulated Ex. 16.

{¶29} The purchase price, according to the written terms of the agreement, was $19,000. Stipulations ¶34; Stipulated Ex. 16.

{¶30} In September 2013, Dia filed a *pro se* complaint against Saa in Franklin County Common Pleas Court (Case No. 13CV10477). Stipulations ¶35; Stipulated Ex. 17.

{¶31} In his *pro se* complaint, Dia alleged that he had bought the carryout from Saa and had paid Saa more money than the $19,000 written in the agreement. Stipulations ¶35; Stipulated Ex. 17.

{¶32} Dia retained Respondent in August 2014 to represent him. Stipulations ¶37; Stipulated Ex. 18.

{¶33} Dia signed a fee contract, drafted and provided by Respondent, on August 24, 2014. Stipulations ¶38; Stipulated Ex. 18.

{¶34} The contract provided for Dia to pay $2,500 for Respondent's services, in specified installments, between August 28, 2014 and September 23, 2014. Stipulations ¶39; Stipulated Ex. 18.

{¶35} Respondent added a handwritten addition to the form agreement that reads as follows:

> The above fee will include legal representation and advice to Mr. Dia up to and including a non-jury trial of this matter, on or about 9/23 or another day if so ordered by the court. LEW.
>
> Stipulations ¶40; Stipulated Ex. 16.

{¶36} Dia timely made all the payments called for under the fee agreement. Stipulations ¶41.

{¶37} Respondent filed an amended complaint, naming both Dia and Kane & Dia Service LLC as plaintiffs, and Saa and AJ II LLC as defendants. When defendants failed to answer, Respondent filed a motion for default judgment that the court granted on September 23, 2014. Saa and AJA II LLC then filed a motion for relief from judgment, which the Court granted, and filed an answer to the amended complaint also on September 23, 2014. Stipulations ¶42; Stipulated Ex. 19.

{¶38} Respondent wrote Dia a letter on October 19, 2014 and included an itemization for professional services. Stipulations ¶43; Stipulated Ex. 20.

{¶39} Respondent prepared and filed a second amended complaint in the matter on October 23, 2014. Stipulations ¶44; Stipulated Ex. 21.

{¶40} The case was set for trial on October 28, 2014 and was continued by agreement of the parties to January 13, 2015. Stipulations ¶45; Stipulated Ex. 22.

{¶41} Respondent sent opposing counsel a request for admissions and other discovery on December 12, 2014. Stipulations ¶46; Stipulated Ex. 23-24.

{¶42} Defendants' counsel withdrew on January 7, 2015, and Respondent and new counsel for defendants agreed to and the court issued an amended case schedule on January 22, 2015, setting a trial date of August 24, 2015 and granting plaintiffs until February 2, 2015 to file a third amended complaint. Stipulations ¶47; Stipulated Ex. 25.

{¶43} Respondent sent Dia a letter on January 21, 2015 advising of the new case schedule among other matters. Stipulations ¶48; Stipulated Ex. 26.

{¶44} Respondent filed a third amended complaint on February 2, 2015, which added Jacques Diallo and Marieme Kane as plaintiffs. Stipulations ¶49; Stipulated Ex. 27.

{¶45} Respondent filed a motion to compel discovery on March 11, 2015. Stipulations ¶50; Stipulated Ex. 28.

{¶46} Defendants filed an answer and counterclaim to the third amended complaint on March 25, 2015. Stipulations ¶51; Stipulated Ex. 29.

{¶47} Respondent filed a motion for summary judgment on July 29, 2015. Stipulations ¶52; Stipulated Ex. 30.

{¶48} The counsel and the parties participated in a mediation conference on September 14, 2015, which failed to resolve the case. Stipulations ¶53; Stipulated Ex. 31.

{¶49} Following the mediation, Respondent wrote Dia on September 16, 2015 and included an invoice. Stipulations ¶54; Stipulated Ex. 32.

{¶50} The court denied Respondent's motions to compel and for summary judgment on September 22, 2015. Stipulations ¶55; Stipulated Ex. 33.

{¶51} On October 19, 2015, the Court issued an amended case schedule setting trial for March 7, 2016. Stipulations ¶56; Stipulated Ex. 34.

{¶52} In preparation for trial, Respondent issued subpoenas to third party witnesses on February 12, 2016. Stipulations ¶57; Stipulated Ex. 35.

{¶53} On March 6, 2016, at 5:16 pm, the evening before trial, defendants filed a motion in limine seeking to exclude any testimony from plaintiffs that contradicted the purchase price of $19,000 contained in the written agreement between AJ II LLC and Kane & Dia Service LLC. Stipulations ¶58; Stipulated Ex. 36.

{¶54} On the scheduled March 7, 2016 trial date, Dia appeared for trial and brought two witnesses with him who were prepared to testify on his behalf. Stipulations ¶59; Stipulated Ex. 15.

{¶55} On March 7, 2016, the court issued an entry noting that all parties were present for trial; that the trial began at 10:30 a.m.; and, that prior to opening statements, Respondent moved for a recess in order to have the opportunity to brief a response to defendant's motion in limine. The court granted Respondent's motion and set March 18, 2016 as his deadline to file a memoranda contra. The court recessed the trial until April 4, 2016. Stipulations ¶60; Stipulated Ex. 37.

{¶56} Respondent timely filed his response to the motion in limine on March 18, 2016, and defendants filed a memorandum in support on March 25, 2016. Stipulations ¶61; Stipulated Ex. 38.

{¶57} On April 11, 2016, Respondent wrote Dia a letter summarizing the events of April 4, 2016, stating that "I made a professional decision to agree on plaintiff and defendant Rule 41(a) dismissal without prejudice." Stipulations ¶62; Stipulated Ex. 39.

{¶58} On April 15, 2016, the attorneys for both plaintiffs and defendants filed a written stipulation of dismissal with the court. Stipulations ¶63; Stipulated Ex. 40.

{¶59} On September 22, 2016, Respondent wrote to Dia, explaining he had "made a conscious/personal decision to voluntarily dismiss the case * * * upon the advice [sic] the judge in chambers." Stipulations ¶64; Stipulated Ex. 41.

{¶60} A September 22, 2016 letter from Respondent also claimed that Dia had rejected Respondent's proposed new fee terms to continue work on this case and claimed that the grievant and Respondent had then subsequently agreed to new terms, including a term that Dia "will not seek a refund of attorney fees previously paid by you to me, nor file a complaint with the Columbus Bar Association or the Disciplinary Counsel of the Supreme Court." Stipulations ¶65; Stipulated Ex. 41.

{¶61} On March 27, 2017, Respondent wrote Dia a letter to remind Dia of the approaching one-year anniversary of the filing of the stipulation of dismissal filed on April 15, 2016. Attached to the letter was a copy of Respondent's April 11th letter to Dia and a copy of the stipulation of dismissal. The letter also summarized the discussions Respondent and Dia had about future fees for refiling the lawsuit. Respondent stated: "You wanted me to work on a contingency fee basis; which I rejected because you were already aware that you could not find any visible assets in Mr. Saa's name as an individual or in the name of AJ II LLC." Stipulations ¶66; Stipulated Ex. 42.

{¶62} On March 29, 2017, Respondent wrote Dia a letter as a follow up to an office conference between the two on March 28, 2017. The letter noted that Dia acknowledged that Respondent had prepared the paperwork to refile the case, but Respondent declined to continue to represent Dia without a "new contract with an up-front retainer." Dia mentioned at the meeting that in the parties original August 24, 2014 agreement, Respondent agreed to represent Dia

"through trial" and the case was not tried. Respondent responded in the letter that in the initial fee agreement Respondent "reserved the right to renegotiate the contract in the event of protracted litigation and/or as billable hours involves more than originally foreseeable." Stipulations ¶67; Stipulated Ex. 43.

{¶63} On April 14, 2017, Respondent filed a new complaint in Case No. 17CV03514. Stipulations ¶68; Stipulated Ex. 44.

{¶64} On May 9, 2017, the defendant filed a counterclaim against Dia. Stipulations ¶69; Stipulated Ex. 45.

{¶65} According to Dia's grievance, Respondent informed Dia that because of the counterclaim, his representation of Dia "would cost more" and sought an additional fee of $2500. Stipulations ¶70; Stipulated Ex. 15.

{¶66} According to Dia's grievance, Dia objected to the additional fee as unwarranted under the fee agreement he had with Respondent. Stipulations ¶71; Stipulated Ex. 15.

{¶67} On May 17, 2017, Respondent sent Dia a "letter of disengagement" because Respondent and Dia "could not agree on contract terms for [Respondent] to represent [Dia]." Respondent stated: "I urge you to contact and retain an attorney now. The opposition has filed an answer and counterclaim. The counterclaim should be answered by Plaintiffs within twenty-eight (28) days of the date the counterclaim was filed. Time is of the essence." Stipulations ¶72; Stipulated Ex. 46.

{¶68} On May 18, 2017, Respondent filed a motion to withdraw, acknowledging that withdrawal was only permissible when, among other considerations, the withdrawal would have no material adverse effect upon a client. Stipulations ¶73; Stipulated Ex. 47.

{¶69} Respondent's motion represented that continued representation of his client would cause "unreasonable financial burden" to Respondent but made no representation regarding the effect withdrawal would have on his client. Stipulations ¶74; Stipulated Ex. 47.

{¶70} The May 18, 2017 motion to withdraw did not evidence compliance with the requirements of Franklin County Common Pleas Court Local Rule 18 regarding withdrawal of trial attorney in that the motion must contain the last known address of the client and certification by the attorney that notice of the motion has been made upon the client and opposing counsel. Stipulations ¶75; Stipulated Ex. 47.

{¶71} The certificate of service indicated the motion was served on defendant's counsel, John Waddy, Jr. Stipulations ¶76; Stipulated Ex. 47.

{¶72} On June 2, 2017, Mr. Dia wrote Respondent a letter stating that "you are aware I am going to retained (sic) another attorney to represent me in the matter in which you relieved yourself." Dia requested a return of the money he had paid Respondent. Stipulations ¶77; Stipulated Ex. 48.

{¶73} No answer to defendant's counterclaim had been filed at the time of Respondent's motion to withdraw. Stipulations ¶78; Stipulated Ex. 47.

{¶74} On June 20, 2017, defendant filed a motion for default judgment against Dia on the counterclaim in the matter. Stipulations ¶79; Stipulated Ex. 49.

{¶75} Between June 20, 2017 and June 22, 2017, Respondent took no action with respect to the motion for default judgment filed against his client. Stipulations ¶80; Stipulated Ex. 44.

{¶76} On June 22, 2017, Respondent filed an amended motion to withdraw which indicated that it complied with Franklin County Common Pleas Court Local Rule 18. Stipulations ¶81; Stipulated Ex. 50.

{¶77} The brief in support of Respondent's June 22, 2017 amended motion to withdraw expressly acknowledged that defendants in the underlying matter had filed an answer and a counterclaim and emphasized in italics, bold font, and underline that, *"The undersigned has informed Plaintiff Dia that opposing counsel contacted the undersigned and indicated his client intends to fight the case all the way."* Stipulations ¶82; Stipulated Ex. 50.

{¶78} The brief in support claimed that such a withdrawal could occur without material adverse effect to Respondent's client. Stipulations ¶83; Stipulated Ex. 50.

{¶79} On June 26, 2017, the court granted Respondent's motion to withdraw. Stipulations ¶84; Stipulated Ex. 51.

{¶80} The next day, on June 27, 2017, the court issued a notice of motion for default judgment, granting plaintiffs (Dia) additional time, until July 17, 2017, to respond to the motion for default judgment. The court stated: "This motion will be ruled upon automatically after the response time has elapsed." Stipulations ¶85; Stipulated Ex. 52.

{¶81} For the next month following the court's grant of leave for Respondent to withdraw, Dia filed nothing with the court. Stipulations ¶86; Stipulated Ex. 44.

{¶82} On July 24, 2017, the court entered default judgment on the counterclaim against Dia and in favor of the defendants. Stipulations ¶87; Stipulated Ex. 53.

{¶83} A review only of the above-cited stipulations does not present an obvious case for misconduct on Respondent's part that would prove a violation of Prof. Cond. R. 1.1 by clear and convincing evidence.

{¶84} Relator, in its post-hearing brief, presented two arguments as evidence of Respondent's violation of Prof. Cond. R. 1.1.

{¶85} First, Relator argues "Respondent's failure to prepare for trial – and his decision to take on a matter for which he might never have been able to properly prepare – was a violation of his duty to provide competent representation to his client."

{¶86} The stipulations show that Respondent, on behalf of his client, took the following actions:

- Filed amended complaints (Stipulated Ex. 21 and 27);
- Prepared and served discovery requests (Stipulated Ex. 23 and 24), pretrial motions including motions for default judgment (Stipulated Ex. 19), a motion to compel (Stipulated Ex. 28), and a motion for summary judgment (Stipulated Ex. 30);
- Participated in a mediation conference (Stipulated Ex. 31);
- Issued trial subpoenas (Stipulated Ex. 35);
- Prepared for and began a bench trial;
- Filed a memorandum contra to motion in limine (Stipulated Ex. 38);
- Engaged in settlement negotiations' and
- Had legal conversations with defendants counsel concerning the course of the litigation.

{¶87} The panel finds these actions to be the normal, customary, and straight-forward acts of an attorney actively involved in litigation.

{¶88} The panel finds that the specific area of contention between Respondent and Relator is the Civ. R. 41(A) dismissal without prejudice that was filed in the underlying matter. Relator argues that Respondent, without prior consultation with Dia, voluntarily dismissed the complaint. Relator cites to Stipulation ¶62 as evidence of that fact. However, a review of Stipulation ¶62 reveals that Respondent wrote a letter to Dia summarizing the events of April 4, 2016 stating that, "I made a professional decision to agree on plaintiff and defendant Rule 41 (a) dismissal without

prejudice." Relator asks the panel to infer from this statement that Respondent is admitting that he had no contact or communication with his client prior to filing the motion to dismiss. Could this panel possibly draw such an inference? Possibly. However, Respondent took the stand and testified both on direct and cross-examination concerning the dismissal.

{¶89} Relator solicited the following testimony from Respondent upon cross-examination at the hearing:

> Q. At the time you entered into Exhibit 40, (Ex 40 is the dismissal entry) you did not have Mr. Dia's approval did you?
>
> A. Yes, I did."
>
> Q. How -- did you document in any way his approval to dismiss this complaint?"
>
> A. There probably were some notes that we made in the attorney conference room as we went back and forth several times prior to the agreement.
>
> Hearing Tr. 56-57.

{¶90} Following those specific questions and answers in response to a question from Relator, Respondent indicated if there had been notes he didn't have them when this grievance was filed.

{¶91} Relator then asked:

> Q. And Mr. Dia was not happy with you for dismissing his complaint, isn't that true?
>
> A. He wanted to proceed with the trial. We discussed the – the pros and cons. And he agreed to a stipulated dismissal as being in his best interest."
>
> Hearing Tr. 56-57.

{¶92} Respondent's attorney on direct examination followed up with the same line of questioning.

> Q. Did you come out of chambers and explain this to your clients?

A. Yes. Prior to the court coming back and approving the – the stipulation, I had extensive conversation with Mr. Dia going back and forth between chambers and with him, Ms. Diallo – I mean Mr. Diallo and his wife as to the propriety of dismissal without injury – I without prejudice.

Q. Was Mr. Dia happy about this?

A. No. He wasn't happy about it but, ultimately, agreed to it because he did not want a judgment for $19,000.00 after he paid $85,000.00.

Q. Did Mr. Dia tell you at that time, I refuse to allow you to dismiss this case?

A. No.

Q. Did he instruct you, "don't dismiss this case"?

A. No

Q. Did you go back into open court?

A Yes

Q. Did the judge take the bench again?

A He did.

Q Was the subject of the joint dismissal raised in open court?

A. Yes

Q. Did Mr. Dia at any time stand up and inform the court, "I am against this. I don't want it. He's acting on his own"?

A. No.

* * *

Q. Okay. Did you receive any communication at any time from Mr. Dia that he refused to authorize this joint stipulation of dismissal?

A. No, I did not.

Q. Did he ever tell you not to sign the joint stipulation of dismissal?

A. No, he did not, because he agreed to it with the understanding that it would be refiled within a year.

Hearing Tr. 109-110, 112.

{¶93} Because Dia was not called to testify, Respondent's testimony goes unrebutted and the panel cannot and does not find clear and convincing evidence that Respondent dismissed Dia's complaint without his knowledge and approval.

{¶94} Relator then alleges in its post-hearing brief, that:

> Respondent lacked the legal knowledge and skill to thoroughly read, understand, and comply with the Franklin County Court of Common Pleas local rules and the Ohio Rules of Civil Procedure associated with Respondent's withdrawal as counsel in a pending case. Further, Respondent's failure to take action to address a pending counterclaim during his undisputed tenure as Dia's attorney, regardless of whether he had filed a motion to withdraw, does not comport with his obligation to provide competent representation with the degree of legal knowledge, skill, thoroughness and preparedness required by ORPC 1.1.

{¶95} With respect to the first part, Respondents lack of legal knowledge and skill to thoroughly read and understand and comply with the Franklin County Court of Common Pleas local rules and the Ohio Rules of Civil Procedure associated with withdrawal as counsel in a pending case, the panel finds Dia suffered no detriment. Respondent was required to refile his motion to withdraw because it did not comply with Franklin County's local rules. However, in the end, the court, upon his proper refiling of the motion, did grant the motion to withdraw. The fact it required Respondent two attempts did not in any way prejudice Dia. The real issue is not whether Respondent had to file twice to comply with the local rules. The pertinent issue is whether the act of withdrawing, in and of itself, was in the end, substantively prejudicial to Dia.

{¶96} Following the dismissal of Dia's complaint, the stipulations show that a new complaint was filed within time by Respondent. Defendants filed an answer and counterclaim. Relator argues that Respondent's withdrawal was a violation of his duty to his client because he

failed to protect his client's interest with respect to the counterclaim pending at the time of his withdrawal.

{¶97} The stipulations and testimony indicate the following. On May 17, 2017, Respondent sent Dia a "letter of disengagement" because Respondent and Dia "could not agree on contract terms for [Respondent] to represent [Dia]". In a letter to Dia, Respondent stated: "I urge you to contact and retain an attorney now. T he opposition has filed an answer and counterclaim. The counterclaim should be answered by plaintiffs within twenty-eight (28) days of the date the counterclaim was filed. Time is of the essence." Stipulated Ex. 46. On June 2, 2017, Mr. Dia wrote Respondent a letter stating that "you are aware I am going to retain (sic) another attorney to represent me in the matter in which you relieved yourself." He requested a return of the money he had paid Respondent. Stipulated Ex. 48. No answer to defendant's counterclaim had been filed at the time of Respondent's motion to withdraw. Stipulations ¶78; Stipulated Ex. 47. On June 20, 2017, defendant filed a motion for default judgment against Dia on the counterclaim in the matter. Stipulated Ex. 49. Between June 20, 2017 and June 22, 2017, Respondent took no action with respect to the motion for default judgment filed against his client. Stipulated Ex. 44.

{¶98} Nothing in these stipulations proves, by clear and convincing evidence, that Respondent's actions prejudiced his client. Respondent advised his client that he should retain an attorney. Dia wrote Respondent and stated he was hiring a new attorney to represent him. Respondent testified at the hearing that Dia, prior to his letter, verbally indicated to him, "He had retained another attorney." Hearing Tr. p. 122. Respondent was effectively terminated by Dia on the date of the statement and certainly no later than the date of Dia's letter. It would be incumbent upon Dia or his new attorney to respond to the counterclaim and motion for default judgment. Relator suggests, at a minimum, that Respondent should have filed a request for a continuance to

respond to the motion for default on the counter-claim on Dia's behalf. Perhaps that would have been helpful, but it was not a requirement pursuant to his obligation under the Rules of Professional Conduct. It would potentially have been improper for him to do so because of Dia's representation that he was hiring new counsel.

{¶99} Relator also asserts that Respondent was in violation of his duty to his client because he breached his fee agreement by demanding additional fees to continue his representation. With regard to Relator's claims that Respondent breached his fee agreement, we must look to the terms of the fee agreement. Stipulated Ex. 18. Relator cites us to language on page 1 of the agreement for the proposition that Respondent agreed to represent Dia from complaint through a non-jury trial for $2,500. The language Relator refers to states, "...I estimate that the ultimate cost to you could be approximately $2,500.00 for a non-jury disposition of this matter. Up to the time the complaint was dismissed, Mr. Dia had paid all installments timely in a total amount of $2,500.00. However, the rest of that paragraph states "The ultimate fee to you in this case will depend upon the eventual complexity of the case and hours spent representing you." Further, on page 2 of the fee agreement in handwriting it states, "The above fee will include legal representation and advice to Mr. Dia up to and including a non-jury trial of this matter, on or before 9/23 or another date if so ordered by the court." Based on the plain language of the fee agreement Respondent had complied with the terms of the contract. He represented Dia up to completion of the case, that being a dismissal without prejudice of the complaint.

{¶100} Respondent further testified his time in representing Dia prior to the dismissal was well in excess of the $2,500 fee paid by Dia. Hearing Tr. 121, 147. His unrebutted testimony was that he had expended hours clearly in excess of $2,500. There is no clear and convincing evidence that Respondent was in breach of his fee agreement. Respondent had a right to renegotiate his fee

agreement as set forth in their fee agreement. Dia refused to renegotiate the fee agreement, and Respondent was within his rights to ask the court to allow him to withdraw as attorney of record and terminate his representation as attorney in fact.

{¶101} Upon a review of the stipulations, exhibits and testimony at the hearing, the panel finds Relator failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.1 and unanimously dismisses that alleged violation.

Failure To Return Unearned Fees

{¶102} Prof. Cond. R. 1.16(e) provides that "[a] lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17."

{¶103} Relator argues in its post-hearing brief, "that under no reasonable interpretation of the plain language of the rule could three years be deemed prompt. Taking into further consideration Respondent's failure to cooperate with the investigation of the Dia matter by a disciplinary body which resulted directly in a nearly two-year stalemate, it should be clear that the delay was caused by Respondent's own selfish motive and served to deprive Dia of his funds for an unreasonable length of time."

{¶104} Normally, the panel would have to agree that three years is an unreasonable time to delay in returning unearned fees in a case such as this. However, this presupposes that the fees in this matter were unearned. The stipulations, exhibits, and testimony indicate Respondent spent well in excess of the number of hours necessary to earn the $2,500 in fees he received. Respondent estimated he spent in excess of 45 or 50 hours on the original case. At $125 per hour, his earned fees would have been in excess of $5,000. The panel would note that Respondent, nonetheless, returned the fees of $2,500 to Dia. Respondent urges the panel that his actions render the Prof.

Cond. R. 1.16(e) allegations moot. The panel disagrees with the Respondent's argument of mootness had the fees been owed. This panel would have reviewed this under a reasonableness standard as to the time taken to return unearned fees.

{¶105} The panel, upon review of the stipulations, exhibits, and testimony find the Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.16(e) and unanimously dismisses this alleged violation.

Conduct Prejudicial to the Administration of Justice

{¶106} Prof. Cond. R. 8.4(d) states that "[i]t is professional misconduct for a lawyer to * * * engage in conduct that is prejudicial to the administration of justice."

{¶107} In support of its allegations that Respondent violated Prof. Cond. R. 8.4(d), Relator points out Respondent suggested in his letter proposing new terms for his representation of Dia, that Dia would "not seek a refund of attorney fees previously paid by you to me, nor file a complaint with the Columbus Bar Association or the Disciplinary Counsel of the Supreme Court." Stipulation ¶65. Relator asked Respondent the following during the hearing:

> Q. As part of your negotiation, in September of 2016, you represented that you and Mr. Dia agreed that, in exchange for you drafting a revised complaint and set of plaintiff's interrogatories, you would -- Mr. Dia would not seek a refund of attorney's fees he previously -- previously paid, nor would he file a complaint with the Columbus Bar Association or Disciplinary Counsel of the Supreme Court. Do you see that?
>
> A. It's the third bullet. Correct. Third bullet point.
>
> Q. And that was -- that was something you negotiated with -- you were negotiating with him?
>
> A. Yes.
>
> Q. And in your negotiations, you continued to represent to him that if he agreed to not file a grievance with either the Columbus Bar Association or the Supreme Court, you would revise his complaint?

A. Not –

Q. Am I –

A. Not totally true, no.

Q. That's -- that's what you put in Exhibit 40 -- 42 -- or I'm sorry -- 41, correct?

A. Not totally true. However –

Hearing Tr. 62.

{¶108} Respondent does not address this issue in his post-hearing brief or during his direct testimony at the hearing. The facts as they stand in the stipulations and Respondent's testimony are that Respondent negotiated with Dia to further represent him if he would agree not to file a grievance against him with either the Columbus Bar Association or Disciplinary Counsel.

{¶109} The panel upon review of its prior case law refers to *Disciplinary Counsel v. Bruce*, 158 Ohio St.3d 382, 2020-Ohio-85, ¶¶16-17. In *Bruce,* the criminal charges against Greg Zetts were dismissed on March 27, 2018. That day, Bruce entered into a confidential settlement agreement and release with the Zettses in which they represented that they had not filed any claims, complaints, charges, or lawsuits against Bruce with any governmental agency, this court, or any other court and that they would immediately withdraw any claims they may have filed against Bruce. The next day, Laura Zetts e-mailed relator and asked to withdraw the grievance that she and Greg had filed against Bruce. The parties stipulated and the board found that Bruce's conduct violated Prof. Cond. R. 1.2(e) [prohibiting a lawyer from presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter] and 4.2 [prohibiting a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or a court order]. They also

agreed that his inclusion of a provision in the settlement agreement that prevented the Zettses from filing a grievance with a disciplinary authority and required them to withdraw any pending disciplinary grievances violated Prof. Cond. R. 8.4(d).

{¶110} The panel, upon review of the stipulations, exhibits, testimony at hearing, and the supporting case law, find that Relator has proven by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(d).

Failure to Abide by Client's Decisions

{¶111} Prof. Cond. R. 1.2(a) reads as follows:

> Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

{¶112} Based on our analysis of Respondent's alleged violations of Prof. Cond. R. 1.1 in this matter where we found Relator failed to prove by clear and convincing evidence that Respondent acted without his client's permission and in contravention of his client's instructions, the panel finds that Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.2(a). The panel unanimously dismisses this alleged violation.

Failure To Act With Reasonable Diligence and Promptness

{¶113} Prof. Cond. R. 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client.

{¶114} Relator argues in its post-hearing brief:

> Consistent with the discussion above, Respondent's three years of unproductive activity on this case, followed by a withdrawal prior to its resolution, can in no way be seen as diligent or prompt representation of his client. That is all the more true when, at the end of that extended, unproductive time, Respondent dismissed the case – without client consultation – because he was not prepared to proceed. Respondent's client was prejudiced and harmed due to his complete lack of diligence and promptness. Respondent's strategy was to obtain whatever settlement he might be able to get to avoid trial – and without regard to his client's interests. His sustained lack of diligence was placed in dramatic relief by his selfish, unilateral withdrawal, which resulted in the entry of a default judgment on a counterclaim against his (then former) client. Further, Respondent's failure to return unearned fees to Dia, as outlined with specificity beginning at page 5 of this brief, demonstrates his failure to act with reasonable diligence and promptness, again in direct contravention of the mandate of ORPC 1.3.

{¶115} The panel has already answered this issue in its analysis of the facts in the alleged violation of Prof. Cond. R. 1.1. We found that Relator had failed to prove by clear and convincing evidence that Respondent was unprepared or that he dismissed the case without consulting his client. The panel would also note that the parties stipulated to Respondent's making "A timely and good faith effort to make restitution or rectify consequences of his misconduct."

{¶116} Therefore the panel finds that Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3 and unanimously dismisses this alleged violation.

Misrepresentation to a Tribunal

{¶117} Prof Cond. R. 3.3(a)(1) provides that "[a] lawyer shall not knowingly * * * make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

{¶118} Relator argues that Respondent's motion filed with the court asking to withdraw as counsel contained false and misleading statements. Specifically, the Relator refers to Respondent's statement that his withdrawal would have no adverse effect on his client. Relator points out that a counterclaim was pending at the time the motion was filed. Respondent answers,

the court was aware of the matters before it. Respondent, in his motion to withdraw, specifically points out to the court:

> In further conformity thereto the undersigned further represents that he gave notice to Plaintiff Dia of the severance of the attorney – client relationship through a May 15, 2017 **LETTER OF DISENGAGEMENT** * * . In said May 15, 2017 letter of disengagement, the undersigned urged Plaintiff Dia to 1) "contact and retain an attorney now" 2) **"file an answer to counterclaim within 28 days of the date the counterclaim was filed"**, and 3) that time was of the essence."
>
> Stipulated Ex. 50 (emphasis in original).

{¶119} Respondent further stated in his motion:

> On or about June 4, 2017, plaintiff Dia notified the undersigned by a letter dated June 2, 2017 notifying the undersigned that he had retained another attorney to represent him, and demanding the undersigned refund attorney fees previously paid and/or to itemize professional services rendered and refund any unused fees. Thus, the undersigned was expressly fired effective June 2, 2017.
>
> *Id.*

{¶120} The panel does not find that Respondent made any material misrepresentation within his motion to withdraw. The stipulations and testimony support Respondent's position that he properly made the court aware of the pertinent facts of his client's situation at the time of his motion to withdraw.

{¶121} The panel finds Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 3.3(a)(1) and unanimously dismisses this alleged violation.

Failure to Cooperate in a Disciplinary Proceeding

{¶122} Prof. Cond. R. 8.1 states:

> In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:
>
> (a) knowingly make a false statement of material fact;

> (b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or knowingly fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

{¶123} Relator cites this panel to Stipulations ¶¶18-30 as evidence of Respondent's noncooperation. Relator notes that Respondent is responsible for the actions or inactions of his counsel and cannot be excused from his improper conduct by claiming that he was unaware of various disciplinary obligations he had which went unfulfilled. Relator provides no case precedent or rule citation to support this position.

{¶124} The panel finds no case law supporting Relator's proposition. The facts of this case are somewhat unique in that Geoffrey Oglesby was representing Respondent at the time this matter was filed. It was Oglesby who was served with the new complaint pertaining to the current case. Unfortunately, Oglesby was very ill and passed away prior to a resolution of Respondent's current disciplinary matter. Respondent testified that he never was served or received a courtesy copy of the notice of intent to file, and Oglesby never informed him of the notice. Respondent testified he first became aware of the potential grievance when Relator sent him a letter of the notice of intent to file. Hearing Tr. 130-131. Respondent testified upon receipt of the notice of intent, he sought new counsel and hired his current counsel, who then filed a response. Nothing in the testimony or stipulations contradicts this statement. Relator does not contradict Respondent's claim that he was not served with a copy of the notice of intent or served with a courtesy copy.

{¶125} The panel cannot agree with Relator that Respondent, without knowledge of a pending complaint, is responsible for the actions of his attorney. The panel has found no authority to support Relator's position and finds no logic to that position. To hold a Respondent responsible to answer questions with which he or she has never been served or has seen would, in any other arena of law, violate due process at a minimum. The panel might view this matter differently had

Respondent been aware of the pending matter and failed to follow up with his attorney. It is obvious from the questioning that Relator does not believe that Oglesby failed to inform Respondent of the notice of intent to file, but under these circumstances the panel cannot find sufficient reason to disbelieve the Respondent.

{¶126} The panel finds Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.1 and unanimously dismisses this alleged violation.

Impartiality and Decorum of the Tribunal

{¶127} Prof. Cond. R 3.5(a)(6) provides that "[a] lawyer shall not * * * engage in undignified or discourteous conduct that is degrading to a tribunal." Relator does not address this charged violation in its post-hearing brief. Relator in its complaint captions the charge as a failure to be truthful to the court. The panel will assume Relator is arguing the same conduct as alleged in their charged violation of Prof. Cond. R. 3.3(a)(1).

{¶128} For the same reasons set forth in its analysis of Prof. Cond. R. 3.3(a)(1), the panel finds Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 3.5(a)(6). The panel unanimously dismisses this alleged violation.

Count Two—Traffic Accident

{¶129} Relator relies upon the stipulations and Respondent's testimony upon cross-examination to support the alleged violations of Prof. Cond. R. 8.1 and 8.4(d). The stipulations set forth the following.

{¶130} On February 19, 2018, Attorney Charles T. Leighton, Respondent's then-appointed monitor informed Relator's then-bar counsel, Lori Brown, of an automobile accident and citation from February 7, 2018 involving Respondent. Stipulation ¶88; Stipulated Ex. 54.

{¶131} The docket in the above-captioned matter shows that on February 7, 2018, a citation was issued to Respondent for "failure to control" under R.C. 4511.202. Stipulation ¶89; Stipulated Ex. 55.

{¶132} The citation indicated that Respondent "ran off road right, struck a curb, struck decorative wall, struck a bench and struck a light pole." Stipulation ¶90; Stipulated Ex. 55.

{¶133} The police officer checked the box on the citation "NO" after the words "Personal Appearance Required". Stipulation ¶91; Stipulated Ex. 55.

{¶134} The citation summoned Respondent to appear on February 20, 2018 in the Franklin County Municipal Court. Stipulation ¶92; Stipulated Ex. 55.

{¶135} Respondent did not appear in person for his arraignment on February 20, 2018. No arrest warrant was issued, and no other action was taken by the court. Stipulation ¶93; Stipulated Ex. 55.

{¶136} Instead of appearing in person, Respondent exercised his option to pay the fine online on February 21, 2018, entered a guilty plea, was convicted of a violation of R.C. 4511.202(A), and paid the costs and fine levied by the court. Stipulation ¶94; Stipulated Ex. 55.

{¶137} On March 5, 2018, Relator wrote to Respondent seeking an explanation regarding the circumstances of the conviction and for other information associated with the matter. Stipulation ¶95; Stipulated Ex. 34.

{¶138} Respondent failed to provide a response within ten days or any direct response to Relator's letter of March 5, 2018. Stipulation ¶96.

{¶139} More than a year later, on June 10, 2019, Respondent's counsel, in his reply to Relator's notice of intent to file a complaint, provided Respondent's first comment on the allegations contained in this count. Stipulation ¶97; Stipulated Ex. 57.

{¶140} The June 10, 2019 letter provided some purported context regarding the February 7, 2018 incident but provided no comment or explanation regarding Respondent's failure to respond to Relator's inquiries regarding that incident. Stipulation ¶98; Stipulated Ex. 55.

{¶141} At the time of Respondent's February 21, 2018 conviction in *State of Ohio v. Lawrence E. Winkfield,* Case No. 2018 TR D 109134, he was still subject to the April 15, 2016 order in *Columbus Bar Assn. v. Winkfield,* Case No. 2005-1115, including the condition that "Respondent shall refrain from any further illegal conduct. Stipulations ¶99.

Misconduct

{¶142} Relator alleges in his post hearing brief, "Respondent's failure to appear in court as ordered, his entering a plea of guilty to ORC 4511.202 and paying his fine on line, was in direct violation of the Supreme Court's April 15, 2016 order..." The pertinent provision is condition "(5) Respondent shall refrain from any further illegal conduct." Relator argues, "This conviction cannot be explained away, nor can it ever be viewed as anything other than illegal conduct, in direct violation of the terms of his monitored probation."

{¶143} The question before the panel is whether a violation of R.C. 4511.202, failure to control, a minor misdemeanor traffic offense, is a criminal act within the meaning of the Supreme Court's condition of probation. Relator adamantly argues it can be viewed as nothing else but does not cite us to any authority for that position. It is the panel's opinion that the Supreme Court was not seeking to protect the public from Respondent's driving deficiencies. The panel does not find that a traffic conviction for a minor misdemeanor failure to control equates to a violation of Supreme Court conditions of probation that he not commit a criminal act. The panel presumes that this condition of his probation encompasses a criminal act that either reflects poorly on Respondent's moral turpitude or conduct that reflects poorly on his ability to practice law in an

ethical manner. The conditions of probation could have specifically included traffic offenses, but it did not. Following the accident and receipt of the citation, Respondent plead guilty and paid his fine on line. Relator appears to object to his failure to appear in court to plead guilty. The panel finds no misconduct in complying with the procedure set forth by the court for pleading and paying fines on its citations forms.

{¶144} The panel, based upon the stipulations, exhibits and testimony at the hearing, finds Relator has failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(d). The panel unanimously dismisses this alleged violation.

Failure to Cooperate with Disciplinary Authorities

{¶145} Relator alleges in his post hearing brief, "Respondent utterly failed to answer the simple inquiry from Relator on March 5, 2018, for an explanation of the violation in connection with the monitoring order, which request was made on March 5, 2018. Stipulations ¶95. No response was provided to Relator until June 10, 2019, more than *one year* after the date of Relator's first request. Stipulations ¶98. Respondent answers that he reported the accident, which occurred on February 7, 2018, to his monitor on February 19, 2018. Respondent, as previously testified to in the Dia matter, indicated he did not receive the letter of inquiry because his attorney was served with letter and he was not served or mailed a copy of the letter from Relator. The record does not disclose whether the letter was sent to Oglesby or Respondent. Relator did not provide evidence of Respondent being sent the notice, Respondent's receipt of the notice, or his knowledge of the notice from some other source. The panel again would note that Relator stipulates to Respondent's "Full and free disclosure to the Board or cooperative attitude toward proceeding."

{¶146} The panel finds, after a review of the stipulations, the exhibits, and the transcript, that Relator failed to prove by clear and convincing evidence that Respondent violated Prof. Cond. R. 8.1 and unanimously dismisses that alleged violation.

Summary of Violations

{¶147} The panel finds Relator proved by clear and convincing evidence that Respondent violated one of the alleged 11 violations—Prof. Cond. R. 8.4(d) in Count 1. The panel finds Relator failed to prove by clear and convincing evidence that Respondent violated any of the other 10 alleged violations and unanimously dismisses those alleged violations.

AGGRAVATION, MITIGATION, AND SANCTION

{¶148} The Supreme Court has consistently recognized that "in determining the appropriate length of the suspension and any attendant conditions, we must recognize that the primary purpose of disciplinary sanctions is not to punish the offender, but to protect the public." *Disciplinary Counsel v. O'Neill* 103 Ohio St.3d 204, 2004 Ohio 4704, ¶53; *see, also, Ohio State Bar Assn. v. Weaver* (1975), 41 Ohio St. 2d 97, 100. As the Court stated in *Weaver,* "'In [a] disciplinary matter, the primary purpose is not to punish an offender; it is 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; it is to ascertain whether the conduct of the attorney involved has demonstrated his unfitness to practice law, and if so to deprive him of his previously acquired privilege to serve as an officer of the court.'" *Id.*, quoting *In re Pennica* (1962), 36 N.J. 401, 418-419, 177 A.2d 721. *Disciplinary Counsel v. Agopian,* 112 Ohio St.3d 103, 2006-Ohio-6510, ¶10, cited most recently by *Disciplinary Counsel v. Cheselka,* 159 Ohio St.3d 3, 2019-Ohio-5286, ¶ 42.

{¶149} Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary standards, the Board shall give consideration to specific professional misconduct and

to the existence of aggravating or mitigating factors. In determining the appropriate sanction, the Board shall consider all relevant factors, precedent established by the Supreme Court of Ohio, and the aggravating and mitigating factors set forth in this section.

Aggravating Factors

{¶150} With regard to aggravating factors, the parties stipulated and the panel finds by clear and convincing evidence the following aggravating factor: four prior disciplinary actions, as set forth in ¶¶5-21, *supra*.

Mitigating Factors

{¶151} With regard to mitigating factors, the parties stipulated to the following and the Panel finds by clear and convincing evidence the following:

- A timely and good faith effort to make restitution or rectify consequences of misconduct. This is a surprising stipulation considering the strong language contained in Relator's post-hearing brief. It would appear the Relator was presenting evidence to disprove its stipulation but did not at the hearing withdraw the stipulation. It should be noted that Respondent, prior to the hearing did make restitution of attorney fees in this matter. Respondent refunded a payment to another client also, who claimed he was owed a refund. The payments were confirmed by the Relator.

- Full and free disclosure to the Board or cooperative attitude toward proceedings.

- Imposition of other penalties or sanctions. Though there are no other penalties imposed in this grievance, he is currently serving an indefinite suspension.

Sanction

{¶152} As a preliminary matter, the panel notes that Respondent, prior to this matter going forward, applied to the Supreme Court to resign from the practice of law with discipline pending. The Supreme Court denied his application. Respondent is currently serving an indefinite suspension and, therefore, cannot and is not practicing law. Respondent, both at the hearing and

by his application to surrender his license, has evidenced the fact that he no longer desires to practice law.

{¶153} A review of the Supreme Court's precedent would indicate a sanction of a suspension from the practice of law with time stayed. However, due to Respondent's lengthy history with the disciplinary system, this panel must decide how much that history factors into the appropriate sanction to be imposed for this offense. This latest offense was committed prior to the Supreme Court's order indefinitely suspending his license. The panel cannot speculate as to what sanction the Court might have imposed had this matter been before it as part of the 2019 case. The panel considered the following cases as a guideline.

{¶154} A violation of Prof. Cond. R. 8.4(d) violation relating specifically to an attempt to avoid the investigation of or filing of a grievance would have resulted in the imposition of one-year fully stayed suspension, as evidenced by the following cases:

- *Cincinnati Bar Assn. v. Dearfield*, 130 Ohio St.3d 363, 2011-Ohio-5295. One-year stayed suspension. In response to a grievance, Dearfield offered to refund monies to a former client in exchange for a "full and complete satisfaction of any claim" including ethical violations or other complaints. Violations of other rules were also found.

- *Disciplinary Counsel v. Chambers,* 125 Ohio St.3d 414, 2010-Ohio-1809. One-year stayed suspension. The parties stipulated to a violation of 8.4(d) due to respondent's attempt to settle a civil suit arising from Chambers' criminal conduct on terms that required the plaintiff to dismiss a grievance filed simultaneously with the complaint. Multiple other violations were found arising from other grievances.

- *Disciplinary Counsel v. Bruce*, 158 Ohio St.3d 382, 2020-Ohio-85. One-year stayed suspension. Bruce threatened former tenants with criminal charges in an effort to collect past due rent payments in a civil suit. The former tenants filed a disciplinary complaint against Bruce. As part of a settlement agreement, Bruce required the tenants to withdraw their grievance.

- *Cleveland Bar Assn. v. Kodish*, 110 Ohio St.3d 162, 2006-Ohio-4090. Indefinite suspension. Kodish attempted to settle a potential grievance after he determined that he was conflicted from representing a client in a bankruptcy

matter. The settlement offer proposed a weekly payment of $350 over a two-year period with a lump sum payment, in exchange for the client dismissing, or not filing bar association complaints against the Kodish or his firm. Other violations, including sex with a client, were found in several counts.

{¶155} In rare occasions, it is possible for the Court to issue a sanction lesser than a previously imposed sanction. Typically, that is not the case; usually the greater number of disciplinary cases, the steeper the sanction. *Ohio Legal Ethics Law Under the Rules of Professional Conduct*, Marc L. Swartzbaugh & Arthur Greenbaum (2019 Edition). A sanction lesser than a previously imposed sanction typically occurs when a significant amount of time has passed since a prior case, there are significant mitigating factors, possibly involving a mental health or substance abuse disorder, or the misconduct was considered substantially less severe than the prior sanctioned misconduct. There are multiple cases that involve lesser sanctions than a previously imposed sanction, but that do not involve a prior indefinite sanction. See *Akron Bar Assn. v. DeLoach*, 133 Ohio St.3d 329, 2012-Ohio-4629 (six-month stayed suspension followed by public reprimand for failure to notify clients she did not have malpractice insurance) and *Cincinnati Bar Assn. v. Hartke*, 132 Ohio St.3d 116, 2012-Ohio-2443 (one-year suspension in 1993 followed by a six-month suspension in 2012 for threating a client with criminal action to collect fees)

{¶156} The following cases are examples of a lesser sanction following an indefinite suspension:

- *Disciplinary Counsel v. Bennett*, 154 Ohio St.3d 314, 2018-Ohio-3973. One-year suspension. Prior indefinite suspension in 2010 as a result of a criminal conviction for improperly structuring financial transactions to avoid federal reporting requirements. In the 2018 case, Bennett failed to provide competent representation to a client in connection with post-conviction proceedings, failed to keep the client reasonably informed about the status of a matter, and engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

- *Columbus Bar Assn. v. Gill*, 137 Ohio St.3d 277, 2013-Ohio-4619. Two-year suspension, with the second year stayed. Gill stipulated to 41 rule violations, including Prof. Cond. R. 8.4(d) violations, originating from nine grievances involving neglect, failure to communicate, failure to disclose lack of professional liability insurance, improperly accepting a flat fee without informing the client the circumstances in which the fee could have been returned. Several judges submitted grievances as a result of the Gill appearing late for hearings and once appearing under the influence of alcohol. Gill also had a criminal conviction and failed to respond to the relator's inquiries. The Court indicated that the Gill's alcoholism and recently diagnosed bipolar disorder weighed heavily in its analysis of the appropriate sanction. In 1988, Gill was indefinitely suspended for improperly endorsing a client's name on check and converting portion of the settlement amount for personal use. He also had been suspended for failing to comply with CLE requirements.

Multiple Indefinite Suspensions

{¶157} The Court has issued the same attorney multiple indefinite suspensions, however typically those cases involve at some point a failure to answer a complaint, a default interim suspension, followed by an indefinite suspension. See *Disciplinary Counsel v. Bellew*, 152 Ohio St.3d 430, 2017-Ohio-9203; *Cuyahoga Cty. Bar Assn. v. Church*, 116 Ohio St.3d 563, 2008-Ohio-81; *Cuyahoga Cty. Bar Assn. v. Judge*, 96 Ohio St.3d 467, 2002-Ohio-4741.

{¶158} The Court has also previously rejected the Board's recommendation of a second indefinite suspension in favor of disbarment. In *Disciplinary Counsel v. Lawson*, 130 Ohio St.3d 184, 2011-Ohio-4673, Lawson was previously sanctioned with an indefinite suspension for neglect and failure to properly represent 15 clients, failure to return unearned fees, stealing settlement funds from six clients, misusing his IOLTA to conceal his personal funds from creditors, failing to cooperate in numerous grievance investigations, and making repeated dishonest statements to clients and relator during investigations. A second disciplinary complaint was subsequently filed alleging that several years earlier Lawson had entered into a conspiracy with a doctor to illegally obtain prescription drugs. Lawson ultimately pled to a felony criminal charge. The Court rejected the Board's recommendation for a second indefinite suspension citing the cumulative nature and

continuing pattern of Lawson's misconduct, the pervasive scheme he concocted which involved and harmed his clients, and the fact that his conduct was criminal. *Id.* at ¶19-21. The Court went on to state:

> The purpose of disbarment is not to punish the individual. It is intended to protect the public, the courts and the legal profession. Thus the moral character of an attorney is at all times to be scrutinized for the purpose of insuring that protection. And such moral character is necessarily at issue in a disbarment proceeding. If a prior attempt at discipline has been ineffective to provide the protection intended for the public, then such further safeguards should be imposed as will either tend to effect the reformation of the offender or remove him entirely from the practice. The discipline for a repeated offense may be much greater than would have been imposed were it a first offense, yet such greater discipline is not a meting out of further punishment for prior acts but is a determination of the attorney's fitness to practice.
>
> *Id.* at ¶34, citing
> *In re Disbarment of Lieberman*, 163 Ohio St. 35, at 41.

{¶159} Collectively, the history of cases involving Dennis DiMartino is the most similar recent example of the Court issuing more than one indefinite suspension. The Court has previously considered DiMartino in reference to this Respondent in support of imposing an indefinite suspension. *Winkfield IV, supra*, ¶25. The Court imposed three indefinite suspensions over the course of DiMartino's disciplinary history. However, it should be noted that there is also a significant difference compared to Respondent's current case in that DiMartino's final indefinite suspension was issued 2018 as a result of his default in failing to answer yet another certified complaint filed in April 2017 related to two client grievances. The outcome may have been different had DiMartino participated in his final case. Here, Respondent actively participated in the disciplinary process. DiMartino's disciplinary history includes the following:

- **First case 1994:** A six-month stayed suspension for failing to respond to a client's inquiries, failing to provide that client with a settlement statement, and failing to forward the client's portion of settlement proceeds. *Mahoning Cty. Bar Assn. v. DiMartino*, 71 Ohio St.3d 95, 642 N.E.2d 342 (1994).

- **Second case 2007:** A stayed one-year suspension for neglecting a client matter. *Mahoning Cty. Bar Assn. v. DiMartino*, 114 Ohio St.3d 174, 2007-Ohio-3605.

- **Third case 2010:** A six-month suspension for dishonesty about his false representation on an out-of-state marriage application that he had never been married, although his Ohio divorce case was pending at that time. Because his misconduct occurred during the period of his 2007 stayed suspension, the Court reinstated the one-year suspension from the previous case and ordered that he serve the six-month suspension concurrently. *Mahoning Cty. Bar Assn. v. DiMartino*, 124 Ohio St.3d 360, 2010-Ohio-247.

- **Fourth case February 2016:** An indefinite suspension for neglecting two client matters, misusing his client trust account, engaging in dishonest conduct toward a client, failing to communicate the nature and scope of his representation to a client and the basis of his fees, and failing to cooperate in disciplinary investigations. *Mahoning Cty. Bar Assn. v. DiMartino*, 145 Ohio St.3d 391, 2016-Ohio-536.

- **Fifth case September 2016:** An indefinite suspension for failing to act with reasonable diligence, failing to keep the client reasonably informed, failing to hold a client's property in an interest-bearing client trust account, and failing to cooperate in a disciplinary investigation. *Mahoning Cty. Bar Assn. v. DiMartino*, 147 Ohio St.3d 345, 2016-Ohio-5665.

- **Sixth case February 2018:** An indefinite suspension after certification of default for failure to answer a certified complaint filed April 2017. *Mahoning Cty. Bar Assn. v. DiMartino*, 152 Ohio St.3d 1241, 2018-Ohio-653.

{¶160} As indicated from the above, it is possible and the Court has in the past approved more than one indefinite suspension or a lesser sanction following a past indefinite suspension. This panel must decide whether either of these sanction scenarios are appropriate in this case and consider the Court's willingness to approve the same in light of the strong language found in prior *Winkfield* dissents (See Justice Kenney and Justice Fisher's dissents in at ¶28 and ¶48), the Court's unwillingness to allow Respondent to resign with disciplinary action pending, and his significant history of misconduct, including a prior charge of practicing under suspension.

{¶161} The panel weighing all the factors finds that this was the straw that broke the camel's back. Respondent's past disciplinary history is too extensive to not suspend him from the

practice of law in some fashion. An additional indefinite suspension serves no purpose. The panel finds, despite Respondent having been found to have violated only one of the 11 charged violations and that violation alone would have resulted in a fully stayed suspension, his prior disciplinary history indicates the appropriate sanction is disbarment.

{¶162} Therefore the panel recommends the Respondent be permanently disbarred from the practice of law.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct considered this matter on October 2, 2020. The Board voted to adopt findings of fact, conclusions of law, and recommendation of the hearing panel and recommends that Respondent, Lawrence Edward Winkfield, be permanently disbarred from the practice of law in Ohio and ordered to pay the costs of these proceedings.

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

RICHARD A. DOVE, Director