

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION, :

Relator :

v. :

ROBERT C. SCHWIETERMAN, :

Respondent. :

Case No. 2006-2306

RELATOR'S BRIEF IN RESPONSE TO RESPONDENT'S OBJECTIONS TO REPORT
AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
ARGUMENT.....	6
PROPOSITION OF LAW.....	6
AN ATTORNEY WHO REPEATEDLY STEALS CLIENT FUNDS FROM HIS EMPLOYER AND CONVERTS THEM FOR HIS OWN USE, FAILS TO DEPOSIT CLIENT FUNDS IN AN IOLTA ACCOUNT, FAILS TO ACCOUNT FOR CLIENT FUNDS, NEGLECTS LEGAL MATTERS ENTRUSTED TO HIM, PREJUDICES A CLIENT DURING THE COURSE OF REPRESENTATION, AND DISOBEYS A COURT ORDER, THEREBY VIOLATES DISCIPLINARY RULES 1-102(A)(3) and (A)(4), 9-102(A) and (B)(3), 6-101(A)(3), 7-101(A)(1), (A)(2), and (A)(3), and GOV. BAR RULE V (8)(E)(1)(a), AND SHOULD BE INDEFINATELY SUSPENDED FROM THE PRACTICE OF LAW WITH NO CREDIT FOR HIS INTERIM SUSPENSION.	
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE:</u>
<i>Office of Disciplinary Counsel v. Brown</i> , 87 Ohio St. 3d 316, 1999-Ohio-74.....	9
<i>Office of Disciplinary Counsel v. Crowley</i> , 69 Ohio St. 3d 554, 1994-Ohio-214.....	6,7
<i>Office of Disciplinary Counsel v. Yajko</i> , 77 Ohio St. 3d 385, 1997-Ohio-263.....	7,9
<i>Cincinnati Bar Ass'n v. Hennekes</i> , 110 Ohio St. 3d 108, 2006-Ohio-3669.....	7,8
<i>Toledo Bar Association v. Crossmock</i> , 111 Ohio St. 3d 278, 2006-Ohio-5706.....	6,7,9
<i>Toledo Bar Ass'n v. Lockhart</i> , 95 Ohio St. 3d 145, 2002-Ohio-1758.....	9
<u>DISCIPLINARY RULES:</u>	<u>PAGE:</u>
DR 1-102(A)(3), Code of Professional Responsibility.....	4,6,7,9,10
DR 1-102(A)(4), Code of Professional Responsibility.....	4,6,7,9,10
DR 1-102(A)(6), Code of Professional Responsibility.....	7,9
DR 1-102(A)(6), Code of Professional Responsibility.....	6
DR 6-101(A)(3), Code of Professional Responsibility.....	4,6,10
DR 7-101(A)(1), Code of Professional Responsibility.....	4,6,10
DR 7-101(A)(2), Code of Professional Responsibility.....	4,6,10
DR 7-101(A)(3), Code of Professional Responsibility.....	4,6,10
DR 9-102(A), Code of Professional Responsibility.....	4,6,10
DR 9-102(B)(3), Code of Professional Responsibility.....	4,6,10
<u>GOVERNMENT RULE:</u>	<u>PAGE:</u>
Gov. Bar Rule V(8)(E)(1)(a).....	4,6,10

STATEMENT OF FACTS

Robert C. Schwieterman, Respondent herein, is an attorney at law admitted to the practice of law in the State of Ohio in 1993.

Respondent was employed as an associate at the Phillips Law Firm, Inc. from March 24, 2003, until November 14, 2003. In June, 2003, while employed by Phillips Law Firm, Respondent undertook representation of Brantford Butts in a breach of contract action. Respondent obtained a \$2,000 retainer from Mr. Butts, however Respondent failed to list Mr. Butts as a firm client and did not deposit the funds into the Phillips Law Firm IOLTA account, but rather converted the funds for his own use. When John Phillips, of Phillips Law Firm, learned of this discrepancy from Mr. Butts, Respondent lied to Mr. Phillips and said he never received funds from Mr. Butts. After Respondent's actions were discovered, Respondent returned the funds to Mr. Butts. (Board Findings, pp. 2-3).

Respondent undertook representation of Becky A. Schaaf and acquired from Ms. Schaaf a flat fee of \$450 for the creation of a "will package." Respondent failed to deposit the funds in the Phillips Law Firm IOLTA account and misappropriated the funds for his own use. (Board Findings, p. 3).

In April, 2003, Respondent undertook representation of Donald Lucas in connection with a child custody matter. Respondent received a \$1,000 retainer from Mr. Lucas, but failed to deposit the retainer in the Phillips Law Firm IOLTA account or any other law firm bank account. When Mr. Lucas received invoices from the Phillips Law Firm that did not reflect the retainer was already paid, Respondent told Mr. Lucas not to pay the bill and not to worry about it. In the summer of 2003, Respondent requested and received another \$500 from Mr. Lucas, which was in the form of a check made out to the Phillips Law Firm. Respondent failed

to deposit the funds in the Phillips Law Firm IOLTA account and never cashed the check. Additionally, Respondent arranged for several continuances in Mr. Lucas's case without his client's knowledge. Respondent told Mr. Lucas the opposing party had filed the continuances. (Board Findings, p. 4).

During the fall of 2003, Respondent represented Tonya Duritsch in a divorce action. The court set a date for the final decree to be entered on October 10, 2003. Respondent failed to submit the decree by that date, and was notified by the court that the case would be dismissed if the final decree was not submitted by October 17, 2003. Respondent again failed to submit the final decree to the court, which dismissed the divorce for failure to prosecute. (Board Findings, p. 5).

In October, 2003, Respondent paid the filing fee for a client's case with a personal check. That same day, the Phillips Law Firm reimbursed Respondent for the amount of the filing fee. In October, 2003, the Clerk of Courts believed the case had concluded and issued a refund check, made payable to Respondent, in the amount of \$283. Respondent took possession of the check and converted the funds for his own use. The client never received a refund of the filing fee. (Board Findings, p. 7).

In November, 2003, Respondent undertook representation of John D. Lahni in a child custody matter. Respondent requested and received a \$300 retainer from Mr. Lahni, which he failed to deposit in the Phillips Law Firm IOLTA account and converted for his own use. (Board Findings, p. 3).

Respondent undertook representation of Cindy Stepanic in a criminal matter. Respondent received and failed to turn over the \$2,000 filing fee to Phillips Law Firm; rather he converted it for his own use. Respondent undertook representation of Sheri Moore in connection

with a criminal matter and received a \$525 retainer from Ms. Moore. Respondent failed to deposit the retainer in the Phillips Law Firm IOLTA account and converted the funds for his own use. Respondent undertook representation of Qing S. Mei in connection with a family law matter and received \$875 for his services. Respondent failed to turn over this income to the firm and converted the funds for his own use. (Board Findings, p. 4).

In early December, 2003, a grievance was filed against Respondent by Mr. Phillips. (Tr. p. 85). Pursuant to an intervention by the Ohio Lawyer's Assistance Program on December 13, 2003, Respondent entered a 30-day inpatient program at Menninger Clinic in Houston, Texas for treatment. (Board Findings, pp. 7-8). At Respondent's hearing, Dr. John Kennedy, a forensic psychiatrist, concluded that at the time of his misconduct, Respondent was suffering from some mild depression and anxiety. (Tr. p. 43). Dr. Kennedy also testified that Respondent's mental state would not have impaired his ability to appreciate the consequences and wrongfulness of his actions. (Tr. pp. 49, 53).

In 2003, while employed by the Phillips Law Firm, Respondent was retained to defend Ewell Brock, Jr. and Laura Brock in a lawsuit involving a family-owned business. Respondent later failed to notify the Brocks of his departure from the Phillips Law firm in late 2003, or his departure from the city for the month of January. (Board Findings, p. 6).

On March 15, 2004, a Hamilton County Grand Jury returned an eight-count indictment against Respondent for theft from the Phillips Law Firm in regard to the foregoing client matters. (Board Findings, p. 8). The same month, Respondent contacted the Brocks and asked for another chance to represent them. They agreed, however they were concerned about Respondent's handling their case and eventually retained substitute counsel. Substitute counsel

determined that Respondent had failed to file a timely answer and that a default judgment had been taken against the Brocks. (Board Findings, p. 6).

In July, 2004, Respondent was engaged by Edward L. Flottman and his wife to prepare a living trust and to assist in the transfer of assets to that trust. Respondent received \$1,500 as payment in full. Respondent prepared and the Flottmans executed the documents, including a deed to transfer the Flottmans' residence to the trust. Respondent failed to record the deed. Mr. Flottman attempted unsuccessfully to contact Respondent concerning the status of the deed on numerous occasions between July and late November. Respondent failed to respond to any of these inquiries. (Board Findings, pp. 6-7).

On September 20, 2004, Respondent pled guilty to one count of theft, a felony of the fifth degree. The other counts were dismissed. Respondent was sentenced to five years of community control, and ordered to make restitution in the amount of \$9,400.00 to the Phillips Law Firm. He subsequently made restitution. By order of November 8, 2004, the Supreme Court of Ohio suspended Respondent from the practice of law for an interim period on the basis of his felony conviction. (Board Findings, p. 8).

In late November, 2004, Mr. Flottman was finally able to reach Respondent by phone to ascertain the status of the deed. At this time, Respondent informed him that he would file the deed promptly. Respondent failed to inform Mr. Flottman that he was under suspension from the practice of law by order of the Supreme Court of Ohio. The November 8, 2004 order required Respondent to notify clients of his suspension within 30 days. Respondent failed to record the deed until Relator sent a copy of the grievance to Respondent's counsel. (Board Findings, pp. 6-7).

The hearing panel found that Respondent had violated Disciplinary Rules 1-102(A)(3) and (A)(4), 9-102(A) and (B)(3), 6-101(A)(3), 7-101(A)(1), (A)(2), and (A)(3), and Gov. Bar Rule V(8)(E)(1)(a). (Board Findings, pp. 9-10). The hearing panel recommended that Respondent be indefinitely suspended from the practice of law, with no credit for the interim suspension ordered by the Supreme Court. The Board adopted the findings of fact, conclusions and recommendation of the hearing panel. (Board Findings, p. 14).

ARGUMENT

PROPOSITION OF LAW

AN ATTORNEY WHO REPEATEDLY STEALS CLIENT FUNDS FROM HIS EMPLOYER AND CONVERTS THEM FOR HIS OWN USE, FAILS TO DEPOSIT CLIENT FUNDS IN AN IOLTA ACCOUNT, FAILS TO ACCOUNT FOR CLIENT FUNDS, NEGLECTS LEGAL MATTERS ENTRUSTED TO HIM, PREJUDICES A CLIENT DURING THE COURSE OF REPRESENTATION, AND DISOBEYS A COURT ORDER, THEREBY VIOLATES DISCIPLINARY RULES 1-102(A)(3) and (A)(4), 9-102(A) and (B)(3), 6-101(A)(3), 7-101(A)(1), (A)(2), and (A)(3), and GOV. BAR RULE V (8)(E)(1)(a), AND SHOULD BE INDEFINATELY SUSPENDED FROM THE PRACTICE OF LAW WITH NO CREDIT FOR HIS INTERIM SUSPENSION.

The Board has recommended that, for illegally misappropriating client funds on seven different occasions, Respondent be indefinitely suspended from the practice of law with no credit for the interim suspension imposed by the Supreme Court of Ohio. In light of Respondent's pattern of misconduct culminating in a felony conviction, such sanction is warranted to ensure that Respondent is actually suspended from the practice of law for a period of time before he can apply for reinstatement.

When an attorney misappropriates client funds for his own use, the Court has held on numerous occasions that an indefinite suspension is the appropriate sanction. In *Toledo Bar Association v. Crossmock*, 111 Ohio St. 3d 278, 2006-Ohio-5706, Respondent converted funds belonging to his law firm. Respondent Crossmock's theft exceeded \$300,000; however upon leaving the law firm, he repaid the money he had improperly taken. The Court found that he had violated Disciplinary Rules 1-102(A)(4) and (A)(6), along with 5-103(B) on another count, and ordered that he be indefinitely suspended from the practice of law. In issuing the sanction of indefinite suspension, the Court considered mitigating evidence such as Respondent Crossmock's continuing treatment for bipolar disorder. In *Office of Disciplinary Counsel v.*

Crowley, 69 Ohio St. 3d 554 1994-Ohio-214, Respondent used false expense reimbursement requests to misappropriate over \$200,000 from his employing law firm. The Court found that although no clients were harmed, Respondent Crowley had violated Disciplinary Rules 1-102(A)(3), (4), and (6) and ordered an indefinite suspension from the practice of law.

In *Office of Disciplinary Counsel v. Yajko*, 77 Ohio St. 3d 385 1997-Ohio-263, Respondent converted client funds to result in a theft of over \$21,000 from his law firm. Respondent Yajko attempted to justify his behavior by claiming that his family suffered from financial difficulties. The court rejected this excuse, finding that he violated Disciplinary Rules 1-102(A)(4) and (6), ordered an indefinite suspension from the practice of law, noting that “Respondent committed theft, plain and simple.” *Id.* at 389.

Much like Respondents Crossmock, Crowley, and Yajko, the instant Respondent’s theft from his employer evidences a serious pattern of misconduct with a selfish motive. Although Respondents Crossmock, Crowley, and Yajko misappropriated funds in a greater amount than did the instant Respondent, none of the aforementioned cases included a criminal conviction. Respondent, however, was convicted of felony theft. Furthermore, Respondent Crossmock made restitution on his own volition upon leaving the law firm from which he stole; the instant Respondent failed to make restitution to Mr. Phillips until sentenced by a court to do so.

In *Cincinnati Bar Ass’n v. Hennekes*, 110 Ohio St. 3d 108, 2006-Ohio-3669, the Court suspended Respondent from the practice of law on February 25, 2005, upon notice of his conviction of a felony drug charge. Relator charged Respondent Hennekes with having violated Disciplinary Rule 1-102(A)(3). In recommending a sanction, the Board noted that lawyers have been permanently disbarred for felony convictions. However, because Respondent Hennekes

presented mitigating evidence, such as the fact that he was never in possession of the drugs, the board recommended a two-year suspension to be applied retroactively. The Court found this sanction to be inappropriate given the serious nature of Respondent Hennekes' violation. The Court noted that, "The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach. He should refrain from any illegal conduct. Anything short of this lessens public confidence in the legal profession." *Id.* at 110. Ruling on August 2, 2006, the Court ordered that Respondent Hennekes be suspended from the practice of law for two years without retroactive application because his "affront to the legal system and to the legal profession warrants a sanction that does more than permit the guilty lawyer to return to the practice of law at or about the time we pass judgment." *Id.* at 111.

Like Respondent Hennekes, the instant Respondent pled guilty to a felony and as a result was suspended from the practice of law by the Court. In recommending a sanction, the Board noted that, "The Supreme Court of Ohio has stated on numerous occasions that the appropriate sanction for misappropriation of funds from a client is presumptively disbarment with the possibility that mitigating circumstances could lead to a lesser sanction." (Board Findings, p. 14). Respondent offered a series of mitigating factors, which the board considered, but nevertheless recommended a sanction of an indefinite suspension with no credit for the interim suspension imposed by the Court. (Board Findings, pp.10-11). In his brief, Respondent contended that the sanction recommended by the board was too severe (Respondent's Brief, p. 5), however if the Court were to impose upon him an indefinite suspension with credit for the two year interim suspension already served, Respondent could apply for reinstatement as soon as the order is issued. The lenient sanction proposed by Respondent does not meet the standard of the order issued by the Court in *Hennekes*.

According to *Office of Disciplinary Counsel v. Brown*, 87 Ohio St. 3d 316, 1999-Ohio-74, once the Court determines the sanction that a respondent's conduct warrants, it may then consider aggravating and mitigating circumstances to determine whether the sanction should be adjusted. *Id.* at 321. The instant Respondent has submitted a plethora of mitigating factors for the Court to consider; among those emphasized in Respondent's brief are mental illness, which allegedly contributed to his misconduct, family issues, and financial pressure. (Board Findings 10-11). Although the Panel already considered this mitigating evidence in recommending an indefinite suspension as opposed to disbarment, Respondent still contended that these circumstances warrant an even lesser sanction.

In *Toledo Bar Ass'n v. Lockhart*, 95 Ohio St. 3d 145, 2002-Ohio-1758, Respondent was found guilty of petty theft after she was caught shoplifting. The Court found that Respondent Lockhart had violated Disciplinary Rules 1-102(A)(3), (A)(4), and (A)(6) and ordered that she be indefinitely suspended from the practice of law with no credit to her prior suspension for the same charges. Respondent Lockhart submitted as mitigating circumstances that she had several health, family, and financial problems, but the Court declined to reduce her sanction. The Court also declined to reduce the sanctions of Respondent Yajko who cited to financial difficulties and Respondent Crossmark who claimed mental illness. Furthermore, as the Panel noted, the instant Respondent suffered only mild symptoms of depression and anxiety, which were insufficient to have contributed or caused his misconduct. (Board Findings p. 11). At the hearing, Dr. Kennedy testified that at the time of his theft, Respondent was clearly able to discern the difference between right and wrong behavior. (Tr. p. 53).

Therefore, in accordance with the Board's recommendation, Relator respectfully submits that Respondent's misconduct mandates an indefinite suspension from the practice of

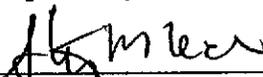
law with no credit for the interim suspension imposed by the Supreme Court of Ohio on November 8, 2004.

CONCLUSION

In the course of representing seven different clients, Respondent stole funds belonging to the Phillips law firm and converted them for his own use. As a result of his misconduct, Respondent was convicted of felony theft and the Supreme Court of Ohio imposed an interim suspension on Respondent's license to practice law.

Respondent violated Disciplinary Rules 1-102(A)(3) and (A)(4), 9-102(A) and (B)(3), 6-101(A)(3), 7-101(A)(1), (A)(2), and (A)(3), and Gov. Bar Rule V(8)(E)(1)(a). Such violations warrant an actual period of suspension from the practice of law subsequent to the Court's order. Therefore, Relator respectfully requests that this Court indefinitely suspend Respondent from the practice of law with no credit for his interim suspension.

Respectfully Submitted,



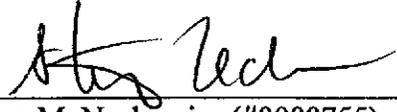
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief of Relator was mailed by first class U.S. mail, postage prepaid, to H. Fred Hoefle, 810 Sycamore Street, Cincinnati, Ohio 45202 on this 6 day of March, 2007.



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