

IN THE SUPREME COURT OF OHIO

CLEVELAND BAR ASSOCIATION, : CASE NO. 07-344
Relator, :
 :
v. : On Certified Report From Board of
 : Commissioners on Grievances and
 : Discipline of the Supreme Court of Ohio
HOWARD V. MISHLER, : Case No.: 05-40
Respondent. :

**RESPONDENT HOWARD V. MISHLER'S RESPONSE TO
RELATOR CLEVELAND BAR ASSOCIATION'S OBJECTIONS
TO THE CERTIFIED REPORT OF THE
BOARD OF COMMISSIONERS ON
GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO**

Lester S. Potash (0011009)
55 Public Square, Suite #1717
Cleveland, OH 44113
Tel.: (216) 771-8400
Fax: (216) 771-8404
E-mail: lsp@potash-law.com

Counsel for Respondent
Howard V. Mishler

Robert J. Hanna (0037230)
Benjamin C. Sassé (0072856)
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414
Tel: (216) 592-5000
Fax: (216) 592-5009
E-mail: robert.hanna@tuckerellis.com
benjamin.sasse@tuckerellis.com

Counsel for Relator
Cleveland Bar Association

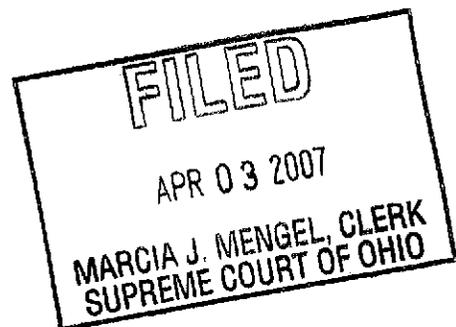


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
RESPONSE TO RELATOR’S OBJECTIONS	1
The Board’s Recommendation Achieves the Balance of Protecting Clients and the Public, Ensuring the Administration of Justice, and Maintaining the Integrity of the Legal Profession	1
CONCLUSION	5
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Page

CASES

Cleveland Bar Association v. Glassman, 104 Ohio St.3d 484, 2004-Ohio-6771 3
Columbus Bar Association v. Winkfield, 91 Ohio St.3d 364, 2001-Ohio-70 5
Dayton Bar Association v. Gerren, 110 Ohio St.3d 297, 2006-Ohio-4482 3
Disciplinary Council v. Beeler, 105 Ohio St.3d 188, 2005-Ohio-1143 2
Disciplinary Counsel v. Claflin, 107 Ohio St.3d 31, 2005-Ohio-5827 4
Disciplinary Counsel v. Conese, 96 Ohio St.3d 458, 2002-Ohio-4797 4
Disciplinary Counsel v. Lord, 111 Ohio St.3d 131, 2006-Ohio- 5341 3
Disciplinary Council v. O’Neill, 103 Ohio St.3d 204, 2004-Ohio-4704 2
Toledo Bar Association v. Kramer, 89 Ohio St. 3d321, 2000-Ohio-163 3

RULES OF COURT

Code of Professional Responsibility

DR 1-102(A)(4) 3, 4
DR 1-102(A)(5) 3, 4
DR 1-102(A)(6) 3, 4, 5
DR 6-101(A)(3) 3, 5
DR 7-101(A)(1) 3, 5
DR 7-101(A)(2) 3, 5
DR 9-102(A) 4
DR 9-102(A)(2) 5
DR 9-102(B)(3) 4, 5
DR 9-102(B)(4) 4, 5

Rules for the Government of the Bar

Gov.Bar R. V(4)(G) 5

Section 10, Rules and Regulations Governing Procedure and Complaints and Hearings Before
the Board of Commissioners on Grievances and Discipline 2, 5

**RESPONDENT HOWARD V. MISHLER'S RESPONSE TO
RELATOR CLEVELAND BAR ASSOCIATION'S OBJECTIONS
TO THE CERTIFIED REPORT OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE
OF THE SUPREME COURT OF OHIO**

The Board's Recommendation Achieves the Balance of Protecting
Clients and the Public, Ensuring the Administration of Justice, and
Maintaining the Integrity of the Legal Profession

Respondent Howard Mishler began his legal career in November 1973. He has been actively engaged in the practice of law, concentrating in the employment law field, representing those who have been fired, demoted, discriminated against, or otherwise subject to unwarranted adverse treatment in violation of state and/or federal statute, regulation, and public policy. Respondent has conducted himself, as a solo practitioner, honorably and successfully, as attested by letters submitted to the Hearing Panel, and, until these proceedings, without blemish. At all times, Respondent fully cooperated with the disciplinary proceedings,¹ entering into numerous and detailed stipulations.

¹ At page 15, n5 of Relator's Objections, Relator commented that the "Hearing Panel did not find that Respondent cooperated fully in the disciplinary process." Relator's comment is clinically accurate, as would be the comment that the Hearing Panel did not find that Respondent failed to cooperate fully in the disciplinary process. What the Board wrote was that Respondent "responded in a timely manner during the disciplinary process." Report, at 11. With Respondent having appeared several times at Relator's office for deposition, having reproduced hundreds of documents and produced boxes and boxes of Respondent's files in response to Relator's Request for Production, and having entered into detailed Stipulations of Facts, one is hard-pressed not to conclude that Respondent did anything but cooperate fully in the disciplinary process.

Respondent acknowledged that in some instances there existed a Disciplinary Rules infraction as charged,² while contesting the remaining charges brought by Relator. After observing the witnesses and weighing the evidence, the Board determined that Respondent's conduct in representing Walton and Dellipoala violated provisions of the Code of Professional Responsibility.

Just as it does in every disciplinary matter where the Board finds a violation, the 28-member Board – comprised of judges, educators, practicing attorneys, and members of the public – evaluates the individual upon whom it must recommend a sanction. The criteria employed by the Board, and presumably its considerations, in recommending a sanction to this Court are no different than those applied by this Court when issuing the sanction affecting the lawyer's professional career.

The disciplinary opinions of this Court reflect that this Court independently reviews the fate of each attorney to whom a disciplinary order is issued in that there are certain guideposts, not “automatics,” which serve the attorney disciplinary system, the purpose of which is not to punish the offender but rather to protect the public. *Disciplinary Council v. Beeler*, 105 Ohio St.3d 188, 2005-Ohio-1143 at ¶44, citing *Disciplinary Council v. O'Neill*, 103 Ohio St.3d 204, 2004-Ohio-4704 at ¶53.

The Board's recommendation of a twelve-month suspension with six months stayed properly took into consideration the aggravating and mitigating factors of Section 10 of the Rules

² I.e., the second fee agreement with Dellipoala (Tr. Vol. 1, p. 28) and the failure to promptly disburse funds to Dellipoala and Walton. (Tr. Vol. 1, p. 39-40.)

and Regulations Governing Procedure and Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, and decisions of this Court in prior instances of the same or similar misconduct. Respondent submits that the Board's recommendation achieves the balance of protecting clients and the public, ensuring the administration of justice, and maintaining the integrity of the legal profession. *Disciplinary Counsel v. Lord*, 111 Ohio St.3d 131, 2006-Ohio- 5341, ¶28.

Just as Relator has called this Court's attention to cases where this Court ordered a more severe sanction than that recommended by the Board, Respondent calls this Court's attention to decisions where the Board's recommendation herein is consistent with discipline meted out by this Court for the same or similar offenses.

In addition to the two cases cited by Relator, i.e., *Toledo Bar Association v. Kramer*, 89 Ohio St. 3d321, 2000-Ohio-163 and *Dayton Bar Association v. Gerren*, 110 Ohio St.3d 297, 2006-Ohio-4482, below are other examples of this Court fashioning the sanction to fit the attorney and the circumstances.

In *Cleveland Bar Association v. Glassman*, 104 Ohio St.3d 484, 2004-Ohio-6771, Glassman [and Respondent herein] violated DR 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 6-101(A)(3), 7-101(A)(1), and 7-101(A)(2).³ Additionally, there was the Bankruptcy Court's sanction of Glassman for "flagrant abuse" of the bankruptcy system. The Board commented that Glassman "had acted with a dishonest or selfish purpose, that he had committed multiple

³ Glassman also engaged in conduct, i.e., felony convictions for theft, which Respondent did not commit.

offenses, and that a pattern of misconduct existed.” Additionally, the Board “was not completely satisfied that Glassman had acknowledged the wrongfulness of his conduct, * * * finding that although [Glassman] claimed to take responsibility for his transgressions, he sometimes suggested that others were also at fault.” Without dissent or comment, this Court accepted the Board’s recommendation and imposed a one-year suspension.

In *Disciplinary Counsel v. Conese*, 96 Ohio St.3d 458, 2002-Ohio-4797, this Court had to decide the sanction for an attorney who failed to deposit in a trust account funds earmarked to pay his client’s child support arrearages and then did not honestly account for these funds. This Court agreed with the Board that Conese engaged in misconduct [similar to the misconduct the Board found Respondent to have committed] violating DR 9-102(A) and (B)(3) and DR 1-102(A)(4) and (5) and further agreed with the Board’s recommendation of a one-year suspension with the final six months stayed.

In *Disciplinary Counsel v. Clafin*, 107 Ohio St.3d 31, 2005-Ohio-5827, where Clafin violated DR 1-102(A)(4), 1-102(A)(6), 9-102(B)(3), and 9-102(B)(4), this Court concluded that the Board struck the right balance by recommending a two-year suspension with one year of that suspension stayed notwithstanding (1) Clafin’s months-long misuse of his client’s funds, (2) Clafin’s misrepresentations to the Cuyahoga County Bar Association, (3) the Board’s concerns about Clafin’s expressions of remorse and (4) the complete absence of any support in the record regarding Clafin’s character or reputation. Explaining, this Court commented, “we have tempered sanctions imposed on misbehaving lawyers when their misconduct is ‘an isolated incident and not a course of conduct in an otherwise unblemished legal career.’ ” *Id.*, at ¶15.

Herein, Respondent Mishler did not misrepresent to Relator, and he presented evidence of his good character and reputation in supporting the Board's recommended one-year suspension with the last six months stayed.

In *Columbus Bar Association v. Winkfield*, 91 Ohio St.3d 364, 2001-Ohio-70, this Court agreed with the Board's finding that the attorney violated DR 1-102(A)(6), 6-101(A)(3), 7-101(A)(1), 7-101(A)(2), 9-102(A)(2), 9-102(B)(3), 9-102(B)(4), and Gov.Bar R. V(4)(G), and accepted the Board's recommendation that Winkfield be suspended from the practice of law for two years with the final year of that suspension stayed provided that the attorney make full restitution with interest. Respondent herein fully cooperated with the disciplinary process, which mitigates against a more severe sanction.

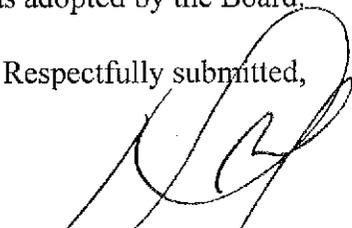
As this Court looks at the individual attorney to assess his career and how such should be effected, the facts presented to the Hearing Panel, Section 10 of the Rules and Regulations Governing Procedure and Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, and this Court's precedent support the Board's recommended sanction that Howard V. Mishler be suspended from the practice of law for twelve months with the last six months stayed upon the conditions specified by the Hearing Panel as adopted by the Board.

CONCLUSION

WHEREFORE, for the reasons set forth in his Objections and in response to Relator's Objections, Respondent Howard V. Mishler accepts and respectfully requests that this Court adopt as the Order of this Court the Recommendation of the Board of Commissioners, to wit,

that he be suspended from the practice of law for twelve months with the last six months stayed upon the conditions specified by the Hearing Panel as adopted by the Board.

Respectfully submitted,



Lester S. Potash
Attorney for Respondent

CERTIFICATE OF SERVICE

A true copy of the foregoing Objection of Respondent Howard V. Mishler's Response to Relator Cleveland Bar Association's Objections has been deposited in the United States Mail, postage prepaid, this 2nd day of April, 2007, for service upon:

Robert J. Hanna
Benjamin C. Sassé
Tucker Ellis & West LLP
1150 Huntington Building
925 Euclid Avenue
Cleveland, OH 44115-1414

Counsel for Relator
Cleveland Bar Association



Lester S. Potash
Counsel for Respondent