

**BEFORE THE BOARD OF COMMISSIONER  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

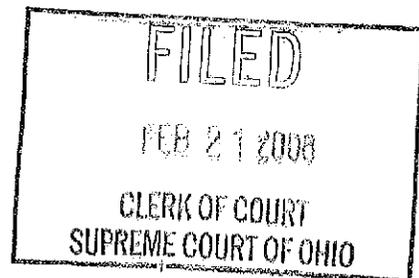
**08-0397**

<b>In Re:</b>	:	
<b>Complaint against</b>	:	<b>Case No. 07-067</b>
<b>Thomas H. Vogtsberger</b>	:	<b>Findings of Fact,</b>
<b>Attorney Reg. No. 0023305</b>	:	<b>Conclusions of Law and</b>
	:	<b>Recommendation of the</b>
<b>Respondent</b>	:	<b>Board of Commissioner on</b>
	:	<b>Grievances and Discipline of</b>
<b>Disciplinary Counsel</b>	:	<b>the Supreme Court of Ohio</b>
	:	
<b>Relator</b>	:	
	:	

This matter was referred to Jeffrey T. Heintz, a Master Commissioner of the Board of Commissioners on Grievances and Discipline (“Board”) of the Ohio Supreme Court by the Secretary of the Board, for disposition pursuant to Rule V(6)(F)(2) of the Ohio Supreme Court Rules for the Government of the Bar (“Gov. Bar Rules”). Master Commissioner Heintz then proceeded to prepare a report pursuant to Gov. Bar R. V(6)(J).

**Procedural Background**

The proceedings were commenced by the filing of Relator’s complaint on August 13, 2007, which was certified by a probable cause panel of the Board on August 13, 2007 and served on Respondent on August 17, 2007. On September 14, 2007, the Secretary of the Board notified Relator that Respondent was in default and had not filed an answer.



Thereafter, on January 4, 2008, Relator filed its Motion for Default (“Motion”) and the matter was referred to the Master Commissioner.

In support of the Motion, Relator submitted a memorandum and seven Exhibits which set forth the contact between Relator and Respondent before and after the filing of the complaint, during which time Relator conducted a comprehensive investigation into Respondent’s conduct. Initially, Respondent failed to timely reply to Relator’s inquiry, but ultimately, he was deposed on April 23, 2007 (Motion, Exhibit 3) and produced books and records relating to his practice.<sup>1</sup> In addition, Relator obtained bank records of overdrafts with respect to Respondent’s IOLTA account (*id.*, Exhibit 7). Based on the foregoing, and pursuant to Gov.Bar R. V (6)(F)(1)(b), the Motion is supported by “[s]worn or certified documentary prima facie evidence in support of the allegations made.” See *Dayton Bar Association v. Sebree*, 104 Ohio St. 3d 448, 2004-Ohio-6560.

### **Findings of Fact**

Respondent was admitted to the practice of law on November 7, 1975. Until September, 2001, Respondent practiced with the Bowling Green, Ohio firm of Spitler, Vogtsberger and Huffman. Thereafter Respondent was a sole practitioner. After he went out on his own, he did not engage sufficient staff support, and there was considerable “disorganization” in his practice (Motion, Exhibit 3, at 14).

In 2004, Respondent was divorced, and he assumed significant additional financial responsibility in connection therewith (*id.* at 18). He encountered difficulties in fulfilling

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<sup>1</sup> The records offered by Respondent in connection with his IOLTA account consisted largely of copies of checks paid to him by clients, and copies of checks for personal expenses that were paid from the account. No ledger or book of account was produced.

these obligations and civil judgments were taken against him. His office bank account was garnished (*id.*). Ultimately, this bank account was closed, and thereafter, by his own admission, he deposited personal funds into his IOLTA account, in order to shield them from the collection efforts of his creditors. As he said in his deposition, this “admittedly [was] a misuse of the account.”

As a result of his persistent financial difficulties, Respondent’s IOLTA account was overdrawn on 24 occasions between June, 2006 and April 2007 (Motion, Exhibit 7).

In May, 2006, Respondent was suspended for failing to fulfill the minimum requirements relating to continuing legal education. While all of the overdrafts on his IOLTA account occurred after that time, at least one retainer was paid to Respondent by Christine Lynn Pruitt on May 3, 2006 and deposited into that account (Motion, Exhibit 6, at 23). Respondent’s explanation for the apparent commingling of client and personal funds, at least with respect to Ms. Pruitt’s check, is that he performed legal work sufficient to earn the retainer paid, and that “no client ever made a demand for [the return of] a retainer.”

Based on the foregoing, Relator alleges that Respondent has committed the following violations of the Code of Professional Responsibility:

1. DR 1-102(A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation];
2. DR 1-102(A)(5) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice];

3. DR 1-102(A)(6) [a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law];

4. DR 9-102(A) [all funds of clients paid to a lawyer shall be deposited into one or more identifiable bank accounts and no funds belonging to the lawyer or the law firm shall be deposited therein];

5. DR 9-102(B) [a lawyer shall maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his clients]; and

6. Gov. Bar R. V(4)(G) [no lawyer shall neglect or refuse to assist or testify in a disciplinary investigation or hearing].

#### **Conclusions of Law**

Relator's allegations in connection with DR 1-102(A)(4) and (A)(5) arise out of Respondent's intentional use of the IOLTA account "for personal banking matters in order to avoid garnishment and attachment proceedings" (Motion at 6).<sup>2</sup> Respondent, in his deposition, admitted that he used his IOLTA account to pay personal bills, because "I felt I had to have some vehicle to write checks" after his office account was closed (Motion, Exhibit 3 at 19). In support of its conclusion as to these allegations, Relator cites *In Re Lund*, 270 Kan. 865 (2001), and *Disciplinary Counsel v. Mazer*, 76 Ohio St. 3d. 481, 1996-Ohio-378. In *Lund*, the respondent was found to have commingled funds and he made

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<sup>2</sup> Violations of these disciplinary rules are regarded as among the most serious. When they occur because a lawyer misuses an IOLTA account, it is usually because of commingling, or because the lawyer converted client funds. Here, neither the Complaint nor the Motion alleges conversion or commingling, and Relator has not offered any evidence in support of such claims. Accordingly, whether Respondent violated DR 1-102(A)(4) and (5) on these grounds is not at issue.

affirmative misrepresentations to a court trustee to the effect that only client funds were in his IOLTA, when in fact they were personal funds. In *Mazer*, respondent did not use client funds for personal purposes; Mazer deposited personal funds in his IOLTA account to shield them from creditors. His behavior was found to constitute conduct adversely reflecting on his fitness to practice law, not an act of dishonesty or conduct that was prejudicial to the administration of justice. Here, while Respondent did adopt the stratagem of depositing personal funds into his IOLTA account in order to avoid creditors' collection efforts, Relator has not shown (or offered proof) that Respondent actively misrepresented to creditors the nature, location or extent of his assets. The funds were the proceeds of loans from Respondent's mother (Motion, Exhibit 3 at 27) and he could have achieved the same result, *vis a vis* his creditors, by maintaining them in cash or by opening a new account at a different bank.

Similarly, there is no evidence that his conduct was prejudicial to the administration of justice. Unless one assumes that Respondent would have committed perjury (an assumption that is unwarranted, given the tenor of Respondent's deposition), had any of his creditors undertaken a judgment debtor's examination of him, the fact that he maintained personal funds in his IOLTA account would have been easily discovered, and the funds attached for the creditor's benefit.

Based on the foregoing, Relator has not demonstrated, by clear and convincing evidence, that Respondent violated DR 1-102(A)(4) or (A)(5). Accordingly, it is

recommended that the Board dismiss the allegations of Relator's complaint with respect to DR 1-102(A)(4) and 1-102(A)5).

Given Respondent's admissions, Relator's motion is sufficient as to the remaining allegations of misconduct. Respondent's behavior with respect to his IOLTA account violates the express provisions of DR 9-102(A) and (B), and adversely reflects on his fitness to practice law. Accordingly, it is recommended that the Board find that Respondent has violated DR 9-102(A) and (B) and DR 1-102(A)(6).

Finally, Relator has alleged that Respondent failed to cooperate in Relator's investigation, causing it to be delayed. However, Respondent eventually appeared for a deposition at which he gave a detailed and apparently truthful account of his misuse of the IOLTA account. Only Respondent's creditors might have been prejudiced by Respondent's actions, and had the creditors exercised the rights and remedies available to them, they could have discovered, and countered, Respondent's collection-avoidance strategy. As a result, it is recommended that the Board dismiss the allegation that Respondent violated Gov. Bar R. V(4)(G).

#### **Mitigation, Aggravation and Sanction**

Section 10 of the Board Regulations sets forth guidelines for imposing lawyer sanctions, and provides factors to be considered in aggravation, and in mitigation of punishment. Here, Respondent committed multiple violations of the rules governing IOLTA accounts. On the other hand, Respondent evidently enjoyed at least moderate success as a practicing lawyer until he struck out on his own in 2001. Thereafter, his office

management techniques, combined with the financial difficulties brought on by a shrinking practice and family troubles, resulted in persistent misuse of his IOLTA account. He ultimately cooperated fully with the disciplinary process, making a full and complete disclosure of his actions, and appears to be otherwise of good character, but for his the misconduct that led to these proceedings. There is no evidence of mental disability or substance abuse.

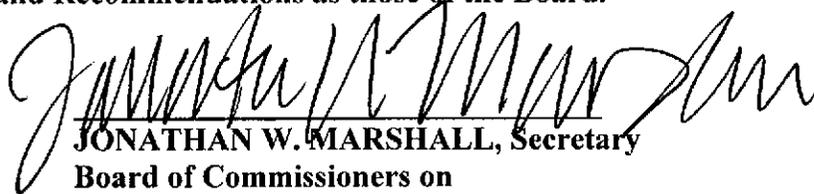
When misuse of an IOLTA account involves the misappropriation of client funds, an actual suspension is called for. *See Columbus Bar Association v. DeVillers*, 116 Ohio St. 3d 33, 2007-Ohio-5552. Even though Respondent's misuse of his account did not involve client funds, it constitutes a serious breach of professionalism, adversely reflects on his fitness to practice law, and occurred largely while he was already under a suspension, albeit not a disciplinary one.

Relator has recommended that Respondent be suspended for one year. Based on the state of Respondent's practice, however, and the factors that contributed to his deterioration into misconduct, it is recommended that Respondent be suspended for two years, with the second year of such suspension stayed on the following conditions of probation: (i) Respondent purge himself of his CLE suspension; (ii) satisfactorily complete 12 hours of additional continuing legal education in law office management and accounting; (iii) during the year of the stayed suspension, practice with oversight from a probation monitor appointed by Relator; and (iv) pay the costs of these proceedings.

RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on February 8, 2008. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Master Commissioner and recommends that the Respondent, Thomas H. Vogtsberger, be suspended from the practice of law for a period of two years with one year stayed and upon the conditions of probation contained in the panel report. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.**



**JONATHAN W. MARSHALL, Secretary  
Board of Commissioners on  
Grievances and Discipline of  
The Supreme Court of Ohio**