IN THE SUPREME COURT OF OHIO

In Re:	:	Case No. 08-0824
Cuyahoga County Bar Association Relator	: : :	On Objection from the Decision of the Board of Commissioners on Grievances and Discipline
Anne Veneziano Respondent	: :	Case No. 07-003

RELATOR'S REPLY TO RESPONDENT'S OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

Ellen S. Mandell (#0012026)
55 Public Square, Suite 1717
Cleveland, OH 44113-1901
(216) 771-7080
(216) 771-8404 *fax*

Andrew A. Zashin (0062033)
55 Public Square, 4th Floor
Cleveland, OH 44113 -1901
(216) 696-4441
(216) 696-1618 *fax*

Leif B. Christman (0070014)
1370 Ontario Street
Suite 2000
Cleveland OH 44113
(216) 241-5019
(216) 241-5022 *fax*

COUNSEL FOR RELATOR

Anne D. Veneziano (0064382)
24100 Chagrin Blvd., Suite 480
Beachwood, OH 44122
(216) 464-8420
(216) 464-1210 *fax*

RESPONDENT, PRO SE

FILED
JUN 23 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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BRIEF IN SUPPORT

Procedural History and Statement of Facts

Trial of this multi-count Complaint against Respondent commenced on January 10, 2008. Pending before the Panel were three counts of misconduct[1]:

In Count One, Relator alleged and the Board found that Respondent violated DR 1-102(A)(6) for her failure to comply with the requirement that she pay employer withholding taxes for her employees. The parties stipulated:

1) Respondent did not pay required employer withholding taxes for her employees for a number of years, until 2002 when she learned such taxes were required to be withheld and paid; and

2) Respondent's failure to pay required employer withholding taxes was a result of her ignorance about employment taxes and was not the result of any conscious effort to disregard her obligations.

In Count Five, Relator alleged that Respondent violated DR 9-102(A) when she deposited $29,000.00 into her IOLTA account which were not "client funds," and that she deposited other personal funds into her IOLTA account for purposes other than coverage of normal bank fees. While the Panel unaniously found that respondent had violated DR 9-102(A) as alleged, the Board dismissed that charge, holding that there was no prohibition against commingling an

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[1] Several counts were dismissed with prejudice by Relator prior to the hearing. Count Three was dismissed without prejudice by Relator prior to the hearing. During the hearing Respondent was unsuccessful in her attempts to introduce evidence related to Count Three. Subsequent to the close of evidence, Respondent has attempted, once again, to submit evidence related to Count Three. Relator withdrew its objection to admission of a Common Pleas Court Journal Entry of a misdemeanor theft conviction of Joan DeNigris; however the document does not have any relevance to the issues before the Panel herein.

attorney's funds with those of a non-client in an IOLTA account. [2]

In Count Seven, Relator alleged that Respondent violated DR 1-102(A)(6) as a result of numerous federal and state tax liens against her resulting form her failure to timely prepare and file tax returns. With respect to Count Seven, the parties stipulated:

1) Respondent has or had seventeen (17) tax liens filed against her as a result of her failure to timely file federal and state income tax returns and/or her failure to pay taxes owed for the years 2001 - 2005;

2) Respondent has filed her federal and state tax returns on a delayed basis; and

3) Respondent has entered into a payment plan with the federal and state taxing authorities.

While the parties were able to reach agreement on substantial factual issues, the parties were not able to reach agreement on the alleged disciplinary rule violations because, despite the acknowledgment that she had failed to file and pay employer withholding taxes and income taxes, and that she had deposited funds into her IOLTA account which were not related to any client matter, Respondent maintained – and continued to maintain throughout the hearing – that she was not guilty of any ethical lapse governed by the Code of Professional Responsibility.

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[2] Although Respondent was found unanimously by the Panel to have violated DR 9-102(A), the Board concluded that, while the facts found by the Panel were supported by the evidence, the Disciplinary Rule was not violated because it contained no prohibition against depositing funds belonging to a non-client, third party into an attorney's IOLTA account. This conclusion is subject to review by this Court even without objection, should it so choose. Dayton Bar Assn. v Randall, 2008-Ohio-2709; Ohio State Bar Assn. v Reid (1999) 85 Ohio St. 3d 327, 708 N.E.2d 193, syllabus ¶1.

ARGUMENT

Response to First Proposition of Law Asserted

> Neither the Panel Nor the Board Is Bound to Accept a Stipulation of Fact or Violation Proposed by the Parties If the Evidence at Hearing Contradicts the Stipulated Matter. It Is Within the Exclusive Purview of the Panel to Determine the Credibility of Any Evidence or Witness Before it and to Make its Factual Findings Accordingly.

As to Count One, Respondent's defense can be summed up as follows: "I didn't know I as supposed to do these things and the people I thought were taking care of these things that I didn't know about, didn't do their jobs."

Respondent testified that she had worked as an employee since she was a teenager and that she received paychecks in exchange for her work. After college, she was employed as a social worker at University Hospitals of Cleveland, receiving regular paychecks as a W-2 employee. After law school, Respondent worked as an associate attorney in a law firm, receiving pay checks as an employee of the firm. She claims not to have ever realized that taxes were withheld and paid by her employers.

The evidence is undisputed that when Respondent decided to open her own office, she delegated to her husband, a certified public accountant, the "business" aspect of running the office. According to Respondent, the mere act of delegating the business of running the non-legal aspects of her office relieves her of the responsibility for the lapses for which she is charged.

Sometime in 2001, Respondent's associate Wendy Rossett, advised Respondent that as an

employer, Respondent was required to withhold taxes from employee paychecks and to contribute an employer's share – what Americans commonly know as F.I.C.A., or Social Security and Medicare taxes[3]. Respondent checked with her husband, who told her that Rosett was incorrect; then she checked with her mother's estate attorney, who referred her to her present tax counsel. As a result, at the end of 2001, Respondent commenced the process of having past due tax returns prepared for her by her husband and filed seven (7) years of payroll returns[4] and personal income tax returns. Payroll taxes for the years prior to 2002 have been designated as uncollectible by the IRS[5]; as a result, Respondent's former employees – including attorney Gayle Vojtush who worked for Respondent for four (4) years, and several paralegals[6] – from those years will not be credited with Social Security and Medicare taxes which should have been contributed on their behalf, reducing their eventual retirement benefits.

Having discovered in 2001 that her husband had not properly handled the payroll tax aspect of her law office, Respondent still permitted him to complete the preparation of the late filings. Her explanation? Douglas Carlson and his associate were overseeing everything[7]. When the payroll tax withholdings, once again, were not being deposited, albeit by the Respondent's

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[3] Trial Transcript (hereinafter "TR") p. 178.

[4] TR. 177.

[5] Exh. 6. Letter from Douglas Carlson to Barry Freeman, dated 1/16/2007.

[6] TR. 182-184.

[7] TR. 181-182.

assigned employee, it was Douglas Carlson's responsibility because he never alerted her to fact that the deposits weren't being made[8].

Respondent, an intelligent person as evidenced by the advanced degrees in diverse fields she has obtained or is currently pursuing, urges, that her misconduct should be excused because the parties stipulated that she was wholly unaware of that which every employee in America knows: that there is a difference every payday between their gross earnings and their take-home pay because employers withhold taxes and make separate tax contributions with respect to their employees. Indeed, during the period when she was operating her own law office Respondent briefly enrolled in a Masters in Taxation program at Case Western Reserve University because she wanted to be a tax attorney.

The stipulations as to Count One, in their entirety, provide:

1) Respondent did not pay required employer withholding taxes for her employees for a number of years, until 2002 when she learned such taxes were required to be withheld and paid; and

2) Respondent's failure to pay required employer withholding taxes was a result of her ignorance about employment taxes and was not the result of any conscious effort to disregard her obligations.

Relator did not stipulate, and the evidence does not support, a conclusion that Respondent had an excuse for her failure to educate herself about and comply with her obligations under various state and federal tax statues. It was not necessary that Relator prove and that the Board find that Respondent intended to violate the law, as she suggests, in order to establish that her conduct

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[8] TR. 146; Veneziano Depo. TR. 34-38.

adversely reflects upon her fitness to practice law. It is sufficient, and the evidence in the record establishes, that Respondent should have known that employers are required to withhold and pay taxes and that she was inexcusably ignorant, cavalier and irresponsible regarding her legal obligations to pay federal and state taxes as an employer – including FICA, social security, Medicare, and other taxes.

Even if the Stipulations were construed to suggest that Relator agreed that Respondent was excusably ignorant, neither the Panel, the Board, nor this Court are bound by the Stipulation. Pursuant to Gov. Bar R. V(2)(B), the Board is charged with making findings of fact; the ultimate determination of the facts is left to this Court. Dayton Bar Assn. v Randall, 2008-Ohio-2709; Ohio State Bar Assn. v Reid (1999) 85 Ohio St. 3d 327, syllabus ¶1.

Similar evidence and explanations were offered with respect to the allegations in Count Seven, related to Respondent's personal tax returns. She trusted that her husband was timely filing the required tax returns. She really never gave the matter any thought and never paid attention every April to the one thing the entire country focuses on. As a result, Respondent has overdue tax obligations totaling approximately $150,000.00. The Board found that respondent had ignored her personal tax obligations for "six or seven years."

The Respondent's lapses as to taxes constitute violations of DR 1-102(A)(6) in that the conduct reflects adversely on her fitness to practice law. She violated state and federal laws. See, Columbus Bar Ass'n. v. Patterson, 95 Ohio St.3d 502 (2002), in which the Supreme Court found a violation of DR 1-102(A)(6) where an attorney had failed to file federal income tax

returns for two years and had plead guilty on two federal misdemeanor charges as a result. Toledo Bar Assn. v. Abood, 104 Ohio St. 3d 655 (2004), the Supreme Court found a violation of DR 1-102(A)(6) where attorney had failed for five years during the period of 1987-1993 to file his tax returns, but had paid a substantial portion of the taxes, interest and penalties by 1994, when the IRS seized his home and sold it.

The ethical violations exist even in the absence of IRS action or criminal sanctions. In Cleveland Bar Assn. v. Smith, 102 Ohio St. 3d 10 (2004), in which the Supreme Court found violations of DR 1-102(A)(3); (5) & (6) where the attorney had failed to file tax returns for nine years. (All tax returns were filed before the formal hearing on the disciplinary matter commenced).

In Cuyahoga County Bar Assn. v. Freedman, 107 Ohio St. 3d 25 (2005), where an attorney had failed to file personal and business tax returns for as many as ten years, the Supreme Court found violations of DR 1-102(A)(3); (5) & (6). Similarly, in Cuyahoga County Bar Assn. v. Lazzaro, 98 Ohio St.3d 509 (2003), where an attorney had failed to file tax returns for five years, the Supreme Court found violations of DR 1-102(A)(3); (5) & (6). .

In Geauga County Bar Ass'n. v. Bruner, 98 Ohio St.3d 312 (2003), an attorney was indefinitely suspended where he failed to pay his employee secretary's withholding taxes for ten years. Bruner was well-liked and had a long, unblemished professional history. Bruner had paid all owed unemployment compensation payments due relative to his employees and had filed documents with the IRS to determine his unpaid tax liability prior to the disciplinary hearing.

Respondent's excuse – that other people were responsible for handling the office

employee tax matters and failed to do so -- is unpersuasive. Her liability for her husband's[9] inaction results from her total abdication of her legal obligations and her ultimate personal responsibility to insure that the tasks were performed.

> Respondent's inattention created an office environment that allowed [the paralegal] to place false information on documents and provide misleading information to a mortgage company.
> Mahoning County Bar Assn. v. Lavelle, 107 Ohio St. 3d 92 (2005);
>
> It is a lawyer's duty to establish a system of office procedure that ensures delegated legal duties are completed properly.
> Disciplinary Counsel v. Ball, 67 Ohio St. 3d 401, 404 (1993).

While the Lavelle and Ball cases are factually distinct because they involve misconduct related to client files, the underlying rationale is applicable to Respondent's situation. It cannot be a valid excuse that legal obligations were not met because of the inaction of others where Respondent herself took no action to actually insure that the obligations were met.

If Respondent were seeking admission to the practice of law in Ohio, appearing before the Board on Character and Fitness instead of the Board of Commissioners on Grievances and Discipline, the subject conduct would prevent or delay her acceptance into the Ohio bar. In re Application of Stewart, 112 Ohio St. 3d 415, 418 (2006), where the applicant had, among other things, failed to withhold payroll taxes from employees in his contracting business:

> An applicant's tendency toward financial irresponsibility makes him a poor risk to entrust duties owed to clients, the courts, adversaries, and others in the practice of law.

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[9] Respondent's husband was, and he remains, a licensed certified public accountant. He prepares Clifford Thornton's tax returns. Thornton depo. TR. 17-18.

The failure of Respondent to file and pay payroll taxes for her employees over the course of at least seven years, as well as her failure to insure that her personal tax returns were timely filed constitutes conduct which adversely reflects on her fitness to practice law.

Response to Second Proposition of Law Asserted by Respondent

the Sanction Imposed Is Neither Excessive Nor Disproportionate to Sanctions Imposed in Similar Cases and Is Appropriate under the Circumstances of the Case

Each disciplinary case presents unique facts and circumstances, as recognized in BCGD Proc.Req.10. As a result, unless all the facts and circumstances of two cases were identical, one could not assume an identical outcome.

In determining the proper sanction, it is critical to evaluate the Respondent's ability to properly manage her law practice and to comply with her legal obligations.

The Board found three mitigating factors as set forth in Gov. Bar R. V§10(B):

Respondent has not been subject to any prior disciplinary sanctions;

Respondent did not act out of selfish or dishonest motives; and

Respondent has taken remedial steps to insure that she does not fail in the future to meet her obligations with respect to filing taxes returns and paying payroll taxes.

Although Respondent has taken remedial steps to insure that taxes will properly be withheld, filed and paid, those steps were in place in 2005 when payroll taxes were not filed and paid, for which Respondent still holds her tax counsel responsible.

The following aggravating factors were found to exist under §10(B):

a pattern of misconduct, in that Respondent's failure to comply with various state and federal tax laws continued over the course of at least seven years; and

refusal to acknowledge the wrongful nature of the conduct, in that Respondent placed responsibility for her failures to comply with the tax laws on her husband and her tax counsel; and

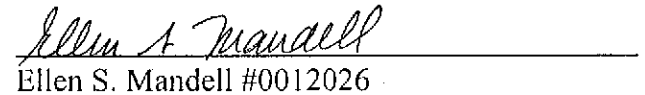
In cases involving attorneys who had failed to file tax returns in multiple years, but who had filed the returns prior to the commencement of the disciplinary hearings, stayed suspensions were imposed, rather than the lesser sanction of public reprimand. Cuyahoga County Bar Assn. v Freedman, supra; Cuyahoga County Bar Assn. v Lazzaro, supra; Cleveland Bar Assn. v Smith, supra. The sanction recommended by the Board is consistent with the sanction in those cases. In addition, the Board properly has recommended that Respondent be subject to a term of probation in order to insure that she is able to properly manage her law office, presumably including payment of employees.

CONCLUSION

The Board correctly concluded that there was sufficient evidence that Respondent violated the disciplinary rules as charged and that the sanction is appropriate under the circumstances.

Respectfully submitted,

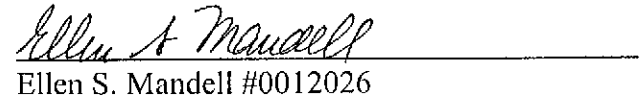
CUYAHOGA COUNTY BAR ASSOCIATION
BY:



Ellen S. Mandell #0012026
Bar Counsel

PROOF OF SERVICE

A copy of the foregoing Relator's Reply to Respondent's Objections to Findings of Fact, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio was sent by ordinary United States mail to Respondent, at 24100 Chagrin Blvd., Suite 480, Beachwood OH 44122, on this 23rd day of June, 2008.



Ellen S. Mandell #0012026
Bar Counsel