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IN THE SUPREME COURT OF OHIO

Todd Austin Brenner :
Brenner Law Office :
555 Metro Place North :
Dublin, OH 43017 :

Attorney Reg. No. (0051839) :

CASE NO. 2008-2438

Respondent :

**RELATOR'S ANSWER TO
RESPONDENT'S OBJECTIONS TO
THE BOARD OF COMMISSIONERS
REPORT AND RECOMMENDATIONS**

Disciplinary Counsel :
250 Civic Center Drive, Suite 325 :
Columbus, Ohio 43215-7411 :

Relator :

:

Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

STATEMENT OF FACTS

On February 9, 2009, relator filed objections to the Board report, and this pleading included relator's detailed statement of the facts. Relator relies on this prior statement of facts with the following additional factual clarifications. First, it is undisputed that on eight separate occasions, respondent intentionally directed staff at his law office to record an operating account check for payment of his personal expenses, as an expense of his clients Mary Stailey or Linda

Weaver. As a result, funds being held on behalf of these two clients were taken as an additional fee by respondent, without the knowledge of respondent's law firm.

These eight checks were written in November 2003 [two payments], April 2004 [two payments], August 2006, September 2006 [two payments] and October 2006. [Stip. Ex. 1, 3, 5, 10, 12, 14, 16; Tr. at 37:18, 146:14] During this same time period, 13 law firm documents – including settlement recapitulations, client invoices and firm billing statements -- were created at respondent's direction. [Stip. Ex. 2, 4, 6, 8, 9, 11, 13, 15, 17] These 13 documents falsely asserted that these personal expenses of respondent were the legitimate expenses of Stailey and/or Weaver. Despite the extent and breadth of respondent's dishonest scheme, his objection brief misleadingly and repeatedly refers to his actions as "two instances of misconduct." As is clear from these facts, respondent committed multiple instances of misconduct.

Second, respondent asserts several times that "there is no evidence of harm to a client" and/or there is no evidence of any harm caused by respondent's actions. However, it is clear that respondent renegotiated the Weaver fee agreement, to the disadvantage of Weaver. As a result, Weaver paid 53.5 per cent of her settlement in fees to respondent. Further, respondent's secret taking of additional fees, deprived his partners of their potential share of these fees. The Board's report states "the funds that respondent stole could have been utilized by his former law firm" and notes this as an aggravating factor. [Report at 4] Therefore, the evidence establishes that both Weaver and respondent's partners were harmed.

Additional harm was alleged in relator's amended complaint. Respondent was charged with violating DR 2-106(A) [a lawyer shall not enter into an agreement for, charge or collect a clearly excessive fee] and DR 5-101(A)(1) [except with consent of a client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial and personal interests] with regard to his representation of Weaver. The Board dismissed these disciplinary rule violations, and relator has filed objections. If relator's objections are sustained by this Court, these violations offer ample evidence of additional harm caused by respondent.

Third, respondent's brief is written to create the impression that he told his partners not to expect a fee in the Stailey matter and that "it was not unusual" for law firm partners to represent family members for free. However, the actual testimony and evidence at the hearing shows the limits of respondent's claims. When questioned by the panel, respondent admitted that "it is overstating it to say that there was a firm policy that the firm did not charge family members a fee." [Tr. at 194:13] Respondent admitted that law firm billing records indicate that the Stailey matter was a contingency fee case. [Tr. at 206:15; Stip. Ex. 6] Respondent acknowledged that these records were created based upon information he provided to staff. [Tr. at 206:12] Respondent agreed that he saw these records at the time they were created and apparently took no action to "correct" the error that he now claims is present on the document. [Tr. at 208:7, 208:12] The only evidence in support of respondent's claims about the Stailey fee arrangement is his own after-the-fact self-serving testimony.

Fourth, respondent asserts that Stailey “was never sent a final bill in this matter.”

Respondent makes this assertion to suggest that his dishonesty was limited to the law firm and did not extend to any clients. However, the actual evidence is not so conclusive in respondent’s favor. According to the testimony of respondent’s stepfather Josh Stailey, a false settlement recapitulation was likely provided to client, Mary Stailey. [Tr. at 79:5; Stip. Ex. 2] This settlement recapitulation lists two of respondent’s personal expenses as if they were expenses of Stailey. Based upon this evidence, it is clear the only support for respondent’s claims, are his own self serving testimony.

Fifth, respondent’s statement of facts, asserts that his oral agreement with Weaver regarding her medical bills “was reduced to writing . . . on the reconciliation statement.” This is misleading, as respondent’s assertion refers to one of the three revisions of the fee agreement. The original fee agreement is represented in totality by the terms listed on the one-page document. [Stip. Ex. 7] The fee terms are limited to a one-third contingency fee agreement and do not include the additional terms mentioned by respondent. The first oral modification by respondent took place in August 2005 and respondent stipulated that “the reconciliation statement did not specifically state that respondent agreed to be personally liable for the payment of Weaver’s medical bills or that he would receive any surplus funds.” [Stip. 22]

The second oral modification took place in early October 2006. Under this modification, respondent returned a portion of the leftover funds to Weaver and kept \$4,790 for himself. This is the oral agreement that respondent asserts was reduced to writing through notations on the reconciliation statement. [Stip. Ex. 8] However, an examination of this document reveals that

the so-called “agreement” is nothing more than a series of numbers handwritten on the original settlement reconciliation. Further, the amount that respondent kept himself [\$4,790] is handwritten on this document and followed by two words that misleadingly suggest that these funds are Weaver’s medical expenses, not funds received by respondent. Additionally, the claim that this random list of numbers constitutes an “agreement” is only supported by respondent’s self-serving testimony. Finally, relator notes that this “agreement” does not include any explicit statement that respondent agreed to be personally responsible for Weaver’s medical bills or clearly indicate that he would be keeping \$4,790 in additional funds from Weaver’s settlement.¹

RELATOR’S ANSWER TO RESPONDENT’S OBJECTIONS

Respondent’s objections are organized under seven separate subheadings. As three of these subheadings appear to make the same argument, that the evidence supports a lesser sanction, subheadings A, F and H will be combined into one response to this issue.

¹ The fourth agreement was an oral modification made by respondent after his misconduct was discovered by his law firm and he was terminated. On October 20, 2006, respondent refunded the \$4,790 to Weaver and verbally advised her that she would now again be responsible for any outstanding medical bills. None of this “agreement” was put in writing.

I.

BASED UPON THE SCOPE OF RESPONDENT'S "EXTENDED PATTERN OF FRAUD AND DECEPTION" A TWO YEAR SUSPENSION WITH ONE YEAR STAYED IS APPROPRIATE IN THIS MATTER.

The Board's found respondent engaged in the "inappropriate, fraudulent use of client/law firm funds for his personal use." [Report at 3] Specifically, the Board found that "respondent through deception took funds in his law firm's operating account to pay his own personal expenses." [Report at 3] In searching for an explanation for respondent's misconduct, the Board concluded that "respondent apparently felt that he had been wronged by his law partners and that the stealing and deceptive practices involved in this case were justified." [Report at 4] On this basis, the Board found that respondent committed two violations of DR 1-102(A)(4), two violations of DR 1-102(A)(5) and two violations of DR 1-102(A)(6).

The Board found four aggravating factors in this matter. The Board found that that respondent engaged in a pattern of misconduct and committed multiple offenses. [Report at 4] The Board found that "respondent deliberately acted dishonestly and selfishly," thereby exhibiting a selfish and dishonest motive. [Report at 4] The Board also found harm to respondent's partners. In support of this finding, the Board report states that "the funds that respondent stole could have been utilized by his former law firm." [Report at 4] Further, the evidence shows that respondent took an inappropriate portion of the Weaver and Stailey personal injury settlements, thereby injuring both of these clients.

In addition to what the Board found, the record clearly shows that Weaver and Stailey were vulnerable clients. Weaver was an unsophisticated client with many longstanding illnesses, who relied upon her roommate for advice on financial matters. [Tr. at 82:20, 83:2, 83:6, 107:9, 108:5] Stailey was in her 80s, and living with one of her children, who acted as her power of attorney and financial advisor. [Tr. at 65:1] Additionally, both Weaver and Stailey were very worried about ensuring that their medical bills were paid. [Tr. at 69:7, 71:19, 88:3, 89:23, 91:20] Respondent used his position of superior knowledge to negotiate personally beneficial agreements with Stailey and Weaver, while at the same time purporting to fairly represent them. Based upon respondent's "extended pattern of fraud and deception" the Board recommended a two year suspension with one year stayed. [Report at 7] And for the reasons stated below, this sanction is both appropriate and consistent with this Court's prior case law.

The Supreme Court of Ohio has spoken several times on the appropriate sanction for an attorney who engages in an extended pattern of deceit and dishonesty while misappropriating law firm funds. In five cases, the Supreme Court of Ohio has held that the appropriate sanction for this type of theft and dishonesty is an indefinite suspension. In *Disciplinary Counsel v. Yajko*, 77 Ohio St.3d 385, 389, 1997-Ohio-263, 674 N.E. 2d 684, Yajko converted client fees on 20 different occasions over a seven year period totaling \$21,402. The Court characterized Yajko's actions as "a deliberate scheme to defraud his employer over a period of years." *Yajko* at 389. Yajko attempted to justify taking funds due to the fact that he was not awarded bonuses by his law firm. The Court found that Yajko's actions constituted a pattern and practice over a prolonged period and that Yajko used his position as an attorney to steal firm funds. For this

misconduct, the Court found violations of DR 1-102(A)(4) and (6) and ordered an indefinite suspension.

In *Toledo Bar Assn v. Crossmock*, 111 Ohio St.3d 278, 2006-Ohio-5706, 855 N.E.2d 1215, Crossmock converted over \$300,000 in law firm funds to his own use between 1993 and 2003. Crossmock took these funds in violation of agreement he had with his law firm on how such fees should be divided. Based upon this misconduct the Court found violations of DR 1-102 (A)(4) and (6). After considering the fact that Crossmock repaid the funds and that he was diagnosed with bipolar disorder, the Court ordered an indefinite suspension.

In *Disciplinary Counsel v. Bussinger* (1989), 44 Ohio St.3d 145, 541 N.E. 2d 609, Bussinger converted \$3,000 in legal fees on nine separate occasions between 1986 and 1988. Based upon this evidence, the Court found a violation of DR 1-102(A)(4) by default, and ordered an indefinite suspension.

In *Columbus Bar Assn v. Osipow* 68 Ohio St.3d 338, 1994-Ohio-145, 626 N.E. 2d 935, Osipow provided representation to two clients using law firm letterhead and resources, but did not report the legal fees to the law firm and instead kept the legal fees for himself. Osipow also submitted false expense vouchers. For this misconduct, the Court found a violation of DR 1-102(A)(4) and ordered an indefinite suspension.

Finally, in *Disciplinary Counsel v. Crowley*, 69 Ohio St.3d 554, 1994-Ohio-214, 634 N.E.2d 1008, Crowley engaged in the misappropriation of over \$200,000 in law firm funds

through improper expense reimbursements. Crowley double-billed for cash advances and reimbursement expenses, and submitted altered credit card receipts. After finding violations of DR 1-102 (A) (3), (4) and (6) and noting that no funds had been repaid by Crowley, the Court ordered an indefinite suspension.

The Court explained that the sanction was based upon the calculated and deliberate manner in which Crowley conducted and concealed his theft, his gross abuse of a position of trust for personal gain, the amount of the theft, the length of time over which the thefts occurred and a concern that Crowley had a lack of appreciation of his ethical duties.

Respondent's actions were spurred by his greed and resulted in repeated acts of dishonesty that require an actual suspension from the practice of law. However, it is apparent that respondent's conduct is not as egregious as the five indefinite suspension cases cited by relator above. When respondent's conduct is compared to this case law several differences are readily obvious.

- The amount of respondent's theft is smaller than the several hundred thousand dollars at issue in *Crossmock* and *Crowley*.
- The span of time in which respondent engaged in the misconduct, is less than *Yajko*, *Crossmock* and *Crowley*.
- Respondent made restitution, unlike *Crowley* and *Bussinger*.
- Respondent has provided some mitigation evidence, unlike *Bussinger* which was a default proceeding.
- There is no additional financial misconduct, unlike *Crossmock* and *Osipow*.

Therefore, respondent's extensive dishonest conduct requires the two-year suspension from the practice of law with one year stayed, as recommended by the Board.

II.

THE BOARD PROPERLY FOUND THAT RESPONDENT MISAPPROPRIATED FUNDS AND ENGAGED IN REPEATED ACTS OF DISHONESTY

Respondent's brief asserts that respondent "was never charged with misappropriation" by relator, but then concedes that the Board's finding that respondent misappropriated law firm funds "is not wholly unreasonable." Respondent then suggests that instead of misappropriation, "this case is more properly analyzed under a misrepresentation theory." However, respondent's assertions about the contents of the disciplinary complaint filed against him and the appropriate framework for analysis are not supported by the facts.

First, the third paragraph of the complaint filed against respondent alleged that he "was terminated from Brenner, Brown, Golian & McCaffrey on October 18, 2006 . . . after it was discovered that he converted funds in the law firm operating account to pay his personal expenses." [Emphasis added]. Second, relator agrees that respondent engaged in numerous acts that constitute misrepresentation. However, these actions are in addition to respondent's improper and dishonest taking of funds from the law firm operating account. For these reasons, the Board's description of respondent's conduct as misappropriation is correct.

III.

RESPONDENT'S CONDUCT VIOLATES DR 1-102(A)(5)

Respondent argues that the Board's finding that his conduct violated DR 1-102(A)(5) is erroneous because his actions were not connected to any proceeding pending before a court or administrative tribunal. In support of this assertion, respondent states that "it appears from the cases that some type of adjudicatory or administrative hearing and an impact thereon must occur to warrant a finding of a violation of DR 1-102(A)(5)." Respondent's argument is incorrect and unsupported by this Court's case law.

A review of this Court's recent disciplinary cases shows that attorneys have been found to have violated DR 1-102(A)(5) in numerous circumstances entirely unrelated to actual court appearances and proceedings. For example, a DR 1-102(A)(5) violation has been found when an attorney forged signatures on a deed and then notarized those signatures;² used an IOLTA account as a personal bank account, commingling client funds and causing overdrafts;³ failed to cooperate in the investigation of a grievance;⁴ used an IOLTA account to shield personal funds from creditors;⁵ improperly disbursed funds from an IOLTA account in a way that assisted a client in evading bankruptcy laws;⁶ and systematically deceived several clients into believing court cases had been filed and that these cases were advancing, when no such cases had been filed.⁷

² *Disciplinary Counsel v. Walker*, 119 Ohio St.3d 47, 2008-Ohio-3321, 891 N.E.2d 740.

³ *Disciplinary Counsel v. Freeman*, 119 Ohio St.3d 330, 2008-Ohio-3836, 894 N.E.2d 31.

⁴ *Disciplinary Counsel v. Freeman*, 119 Ohio St.3d 330, 2008-Ohio-3836, 894 N.E.2d 31.

⁵ *Disciplinary Counsel v. Vogtsberger*, 119 Ohio St.3d 458, 2008-Ohio-4571, 895 N.E.2d 158.

⁶ *Disciplinary Counsel v. O'Brien*, 120 Ohio St.3d 334, 2008-Ohio-6198, 899 N.E.2d 125.

⁷ *Disciplinary Counsel v. Lentz*, 120 Ohio St.3d 431, 2008-Ohio-6355, 900 N.E.2d 167.

Clearly, when respondent repeatedly deceived his own law firm, acted to the detriment of Stailey and Weaver to advance his own financial enrichment, failed to put his secret agreements with Weaver in writing, suspiciously disposed of the Weaver file and attempted to stop his former law firm from reporting his misconduct, he engaged in conduct prejudicial to the administration of justice. From the above case law, it is clear a DR 1-102(A)(5) violation has been found by this Court in instances that involved unprofessional conduct, whether or not it took place in a legal proceeding.

IV.

RESPONDENT ENGAGED IN A PATTERN OF MISCONDUCT

Respondent challenges the Board's finding that he engaged in a pattern of misconduct and mistakenly relies on two words in the Board's report to advance this argument. However, the undisputed facts fully support the Board's finding.

On eight separate occasions, respondent intentionally directed staff at his law office to record an operating account check for payment of his personal expenses, as an expense of Stailey or Weaver. Over \$14,000 in funds being held on behalf of these two clients were taken as an additional fee by respondent, without the knowledge of respondent's law firm. These eight payments occurred in 2003, 2004 and 2006. During this same time period, 13 law firm documents – including settlement recapitulations, client invoices and firm billing statements -- were created by respondent or at his direction. These 13 documents all falsely asserted that respondent's personal expenses were the legitimate expenses of Stailey and/or Weaver.

Respondent's actions encompassed repeated dishonesty, conduct that adversely reflects on fitness to practice law and conduct that is prejudicial to the administration of justice.⁸

When discussing respondent's mitigation, the Board report credits respondent with establishing good character and describes his misconduct as "isolated instances."⁹ Respondent's brief then builds on this misnomer and repeatedly refers to his actions as "two instances of misconduct." As is clear from these facts, respondent committed misconduct more than two times and respondent's objection to the Board's finding of a pattern of misconduct should be overruled.

V.

RESPONDENT'S RESTITUTION WAS NOT TIMELY OR IN GOOD FAITH

This Court has previously held that restitution must be both timely and in good faith to merit credit as a mitigating factor. In *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, 769 N.E.2d 816, this Court found that the "circumstances surrounding" Dixon's restitution determinative of the weight to be given to its mitigating effect. *Id.* at ¶ 21. In the case of *Dixon*, the Court found that while she had made restitution, it was not completed timely or in good faith, because she could and should have repaid the funds sooner. See also *Disciplinary Counsel v. Hunter*, 106 Ohio St.3d 418, 2005-Ohio-5411, 835 N.E.2d 707 and *Lorain County Bar Assn. v. Fernandez*, 99 Ohio St.3d 426, 2003-Ohio-4078, 793 N.E.2d 434.

⁸ If relator's objections are sustained respondent's misconduct will be expanded to include charging clearly excessive fees and engaging in an impermissible conflict of interest.

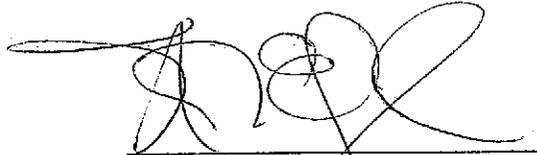
⁹ Relator suggests that the words "isolated instances" are an oxymoron when used to describe respondent's repeated and lengthy misconduct.

Respondent claims that the Board should have given him credit for his “timely good faith effort to make restitution.” Upon closer examination, respondent’s claim is not supported by the evidence. Respondent improperly and deceptively took and expended funds from the Stailey and Weaver settlements in 2003, 2004 and 2006. Respondent attempted to repay Stailey in November 2007, but only after respondent “was charged in this matter.” [Ex. K; Tr. at 70:9] Respondent repaid Weaver in October 2006, but only after his misconduct was discovered by his law partners, his employment was terminated and he was advised to address the situation by his former law firm. [Stip 2, 31; Tr. at 173:21] Additionally, the amount of funds respondent repaid did not include interest. For these reasons, respondent’s objection to the Board’s decision to not consider his repayment as mitigation, should be overruled.

CONCLUSION

For the foregoing reasons, respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline should be overruled by this honorable Court.

Respectfully submitted,



Jonathan E. Coughlan (0026424)



Robert R. Berger (0064922)
Assistant Disciplinary Counsel
Counsel of Record
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
614.461.0256

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Relator's Answer to Respondent's Objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline has been served upon the Board of Commissioners on Grievances and Discipline, c/o Jonathan W. Marshall, Secretary, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431, and respondent's counsel Dianna M. Anelli, The Anelli Law Firm, 1650 Lake Shore Drive, Suite 180, Columbus, OH 43204-4894, via regular U.S. mail, postage prepaid, this 23rd day of February, 2009.



Robert R. Berger (0064922)