

BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO

In Re: : 09-1548

Complaint against: : Case No. 09-020

Thomas Fairchild Vivyan, : Findings of Fact,  
Attorney Reg. No. 0028977 : Conclusion of Law and  
Respondent : Recommendation of the  
Disciplinary Counsel, : Board of Commissioners on  
Relator : Grievances and Discipline of  
the Supreme Court of Ohio

FILED  
AUG 28 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

INTRODUCTION

1. This matter was filed on February 4, 2008. Respondent filed his answer on March 25, 2009. Attorney William J. Novak, Patrick L. Sink and Judge Arlene Singer, Chair, were appointed as members of the panel on April 1, 2009. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Respondent represented himself throughout these proceedings and attorney Stacy Solochek Beckman, Assistant Disciplinary Counsel, represented Relator, Disciplinary Counsel.

2. A pre-hearing conference was held on April 24, 2009 and continued to June 2, 2009, at which time a formal hearing date was set. The parties submitted a request for an extension of time to submit an agreement for Discipline by Consent, Pursuant to BCGD Proc. Reg. 11(B), and the parties were granted an extension to file a Discipline by Consent no later than June 30, 2009.

3. On July 2, 2009, the parties submitted Agreed Stipulations of Fact and Law, Stipulated Exhibits and their Joint Waiver of Hearing. The panel has agreed to proceed on the stipulations and vacated the formal hearing.

4. Respondent was charged in a single count Complaint of violating Prof. Cond. Rules:

1.15 (a) a lawyer shall hold property of clients separate from the lawyer's own property;

1.15 (b) a lawyer may deposit own funds in trust account solely to pay or waive bank charges;

1.15(c) a lawyer shall deposit into a client trust account advances to be withdrawn only when earned;

8.4(c) conduct involving dishonesty, fraud, deceit, or misrepresentation;

8.4 (h) conduct that adversely reflects on the lawyer's fitness to practice law.

5. Relator withdrew the charged violation of Prof. Cond. R. 8.4 (c), pursuant to the agreed stipulations.

#### **STIPULATED FINDINGS OF FACT**

6. Respondent was admitted to the practice of law in Ohio on October 30, 1971.

7. Respondent, a sole practitioner, maintained both an IOLTA account and a business account at Huntington Bank.

8. On December 6, 2007, respondent settled an accident case on behalf of his clients, Lizzie Blount, Roderick Blount, and Opal Moreland for \$7700.

9. That same day, respondent reached an agreement with one of his client's physicians reducing the outstanding medical bill owed by 20%; from \$1863 to \$1490. Respondent also agreed to reduce his agreed upon 1/3 contingency fee, and to accept a fee equal to each of his client's share of the settlement that amounted to \$850.

10. Respondent's clients asked him to continue negotiations with the doctor and keep the funds in his trust account. Respondent agreed.

11. Pursuant to the settlement agreement, the defendants in the accident case paid \$2566 directly to a subrogated interest, and paid the rest in two checks to respondent and his clients. One check was in the amount of \$2884 and the other, \$2250.

12. On December 20, 2007, respondent deposited the \$2884 check into his operating account. (Ex. 4) On January 7, 2008, respondent issued a check from his operating account to the IOLTA account for \$1700, retaining \$584 as partial payment of his attorney fees. On January 16<sup>th</sup> he deposited the \$2250 check into his IOLTA. He issued checks to Anita Blount and Roderick Blount in the amount of \$850 each as payment of their settlement proceeds on January 15, 2008. (The panel notes that the figures agreed upon in stipulations 12, 13 and 14 may not, in fact, balance.)

13. Respondent then discovered that a \$242 medical bill had already been paid, prepared an Addendum to the Settlement Statement, sent a check to Opal Moreland for \$910 and checks to Lizzie and Roderick Blount for \$60 each. Each client thereby received \$910.

14. From January 18, 2008 through February 14, 2008, respondent withdrew \$1535 of settlement funds in his IOLTA account by issuing eight checks payable to cash. These withdrawals were for personal use.

15. Respondent advised relator of his improper use of IOLTA funds when he received a notice from Disciplinary Counsel that his IOLTA account had been overdrawn. Respondent then deposited \$1500 of his own funds into the IOLTA account and paid the outstanding medical bill on his client's behalf in the amount of \$1490, the originally agreed upon reduced amount.

16. The parties stipulated that at all times, respondent had sufficient funds in his personal account to cover the outstanding medical bill.

## CONCLUSIONS OF LAW

17. The parties have stipulated to and the panel has found that the facts stipulated support a finding that respondent violated:

- 1.15 (a) a lawyer shall hold property of clients separate from the lawyer's own property;
- 1.15 (b) a lawyer may deposit own funds in trust account solely to pay or waive bank charges;
- 1.15(c) a lawyer shall deposit into a client trust account advances to be withdrawn only when earned.

18. The parties have stipulated to a violation of Prof. Cond. R. 8.4(h), however, the panel finds that relator failed to provide sufficient proof to support that violation. Respondent promptly deposited \$1500 of his own funds into the IOLTA account and paid the outstanding medical bill on his client's behalf when he discovered that his IOLTA account was overdrawn. He at all times had sufficient personal funds to cover any client medical bills. In his letter to relator dated May 31, 2009, written in response to inquiry from relator and stipulated to in Exhibit 26, respondent explained that during this period of time he was busy preparing for a number of trials, and his wife who, at the time was the sole account holder for their personal funds, was working and dealing with considerable pain from a herniated disc. He utilized trust account funds to pay certain usual expenses because it was faster. This appears to be a lapse in judgment rather than any action that adversely reflected on his fitness to practice law.

19. The panel therefore dismisses the charged violation of Prof. Cond. R. 8.4(h).

## MITIGATION AND AGGRAVATION

20. The parties stipulated to and the panel finds the following mitigating factors pursuant to BCGD Proc. Reg. 10(B)(2):

- (a) absence of prior disciplinary record;
- (b) absence of a dishonest or selfish motive;

- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (e) character and reputation.

21. The panel also notes that no clients were harmed, and respondent himself promptly reported to Disciplinary Counsel his improper use of IOLTA funds when notified by relator of his overdrawn IOLTA account.

22. The parties also stipulated and the panel finds that there are no aggravating factors as listed in BCGD Proc. Reg. 10(B)(1).

### SANCTION

23. Relator and respondent recommend a six month suspension, all stayed, as the appropriate sanction.

24. The panel has reviewed recent case law dealing with trust and IOLTA account violations.

25. In *Disciplinary Counsel v. Fletcher*, Slip Opinion No. 2009-Ohio-3480, respondent did not have an operating account from 2002 to 2007, paid his personal and business expenses from the IOLTA account, wrote at least 150 checks from 2005 to 2007 and received a 6 month stayed suspension.

26. In *Disciplinary Counsel v. Johnston*, 121 Ohio St.3d 403, 2009-Ohio-1432, respondent received a one year suspension, all stayed. He used his IOLTA account for operating and personal expenses for two years, commingling his own funds with his clients.

27. In *Cuyahoga Cty. Bar Assn. v. Cook*, 121 Ohio St.3d 9, 2009-Ohio-259, respondent had a prior disciplinary record, and was found to have charged a clearly excessive fee, failed to deposit unearned fees in a client trust account, and failed to maintain records of client funds in his possession. He received a six month stayed suspension on conditions.

28. In *Cuyahoga Cty. Bar Assn. v. Nance*, 119 Ohio St.3d 55, 2008-Ohio-3333, respondent admitted that he had violated DR 1-102(A)(6) and 9-102(A) by misusing his client trust account. He received a six month stayed suspension with conditions.

29. In *Columbus Bar Assn. v. Peden*, 118 Ohio St.3d 244, 2008-Ohio-2237, respondent received a six month suspension, all stayed, where he had no IOLTA account and also violated Gov.Bar V(4)(G).

30. In *Disciplinary Counsel v. Newcomer*, 119 Ohio St.3d 351, 2008-Ohio-4492, respondent received a six month suspension, stayed. Respondent's personal account was closed by his bank and he then used the IOLTA account for personal expenses.

31. In *Medina Cty. Bar Assn. v. Piszcek*, 115 Ohio St.3d 228, 2007-Ohio-4946, respondent received a public reprimand. He did not oversee his IOLTA account properly and as a result, his law firm mishandled the account and client funds. Respondent was cooperative, restitution was timely, and he took steps to remedy the situation.

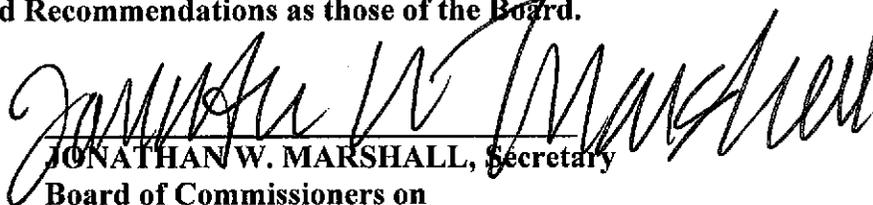
32. In most of the cases cited a six month stayed suspension was the sanction issued by the Supreme Court. Those cases involved various other violations and varying degrees of mitigation and aggravation. However, each case must be decided on its own merits and "involves unique facts and circumstances" as recited in BCGD Proc. Reg. 10. The panel feels a public reprimand is a sufficient sanction to protect the public from future misconduct of respondent. In light of his many years of practicing law without blemish and the limited period of time, limited amount of money involved, and no harm to a client, we recommend a public reprimand.

#### **BOARD 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 August 14, 2009. The

Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Thomas Fairchild Vivyan, be publicly reprimanded in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to 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.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall", is written over a horizontal line. The signature is cursive and somewhat stylized.

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

BEFORE THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE  
OF THE SUPREME COURT OF OHIO

FILED

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BOARD OF COMMISSIONERS  
ON GRIEVANCES & DISCIPLINE

THOMAS F. VIVYAN, ESQ. :  
Attorney Reg. No. 0028977 :  
17 Lookout Lane SW :  
Pataskala, OH 43062, :

Respondent, :

vs. :

DISCIPLINARY COUNSEL :  
250 Civic Center Drive, Suite 325 :  
Columbus, Ohio 43215-7411 :

AGREED STIPULATIONS OF  
FACT AND LAW  
BOARD NO. 09-020

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AGREED STIPULATIONS OF FACT AND LAW

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Relator, Disciplinary Counsel, and respondent, Thomas F. Vivyan, do hereby stipulate to the following facts, mitigating factors, violations of the Ohio Rules of Professional Conduct and sanction as well as to the admission and authenticity of the attached exhibits.

**STIPULATED FACTS**

1. Respondent, Thomas Fairchild Vivyan, was admitted to the practice of law in the state of Ohio on October 30, 1971.
2. At all times relevant to the allegations in this formal complaint, respondent maintained both an IOLTA and a business account at The Huntington National Bank, account numbers xxxxxxxx6064 and xxxxxxxx6051, respectively.
3. At all times relevant to the allegations in this formal complaint, respondent was the only individual with signature authority on the IOLTA.

4. At all times relevant to the allegations in this formal complaint, respondent practiced law as a sole practitioner.
5. On December 6, 2007, respondent settled a Franklin County Municipal Court case arising out of a motor vehicle accident on behalf of his clients, Lizzie Blount, Roderick Blount and Opal Moreland. *Lizzie Blount, et al., v. Donald Knight, et al.*, Franklin County Municipal Court, Case No. 2007 CVE 027987. Mr. and Mrs. Blount were residents of Reynoldsburg, Ohio; Ms. Moreland lived in Griffin, Georgia. Ms. Moreland's minor child was riding in the Blounts' vehicle at the time that the accident occurred.
6. The case settled with a total payment to respondent's clients in the amount of \$7,700.
7. At the time that the matter settled, respondent agreed to reduce his 1/3 contingency fee and to accept a fee equal to the amount received by each client, \$850.
8. Respondent also spoke with Dr. Nicholas, one of his client's physicians, on the day of the settlement about reducing his outstanding medical bill. At that time, Dr. Nicholas agreed to reduce his bill by approximately 20%, from \$1,863 to \$1,490.
9. Despite this, respondent's clients requested that respondent attempt to negotiate a further reduction in Dr. Nicholas's bill, which respondent agreed to do. As such, respondent retained the remaining settlement proceeds in his IOLTA.

10. From the date of the settlement through March 2008, respondent spoke with Dr. Nicholas's office on numerous occasions in an attempt to further negotiate Dr. Nicholas's bill.
11. Pursuant to the settlement agreement, the defendants paid a portion of the proceeds, \$2,566, directly to a subrogated interest.
12. The defendants paid the remainder of the settlement proceeds by issuing two checks to respondent and his clients, one in the amount of \$2,884 and the other in the amount of \$2,250.
13. On December 20, 2007, respondent deposited the \$2,284 settlement check into his operating account.
14. On January 7, 2008, respondent issued a check from his operating account in the amount of \$1,700, which he deposited into the IOLTA. Respondent retained \$584 of the settlement proceeds as a partial payment of his agreed-upon attorney fees.
15. On January 16, 2008, respondent deposited the \$2,250 settlement check into his IOLTA.
16. On January 15, 2008, respondent issued checks to Anita Blount and to Roderick Blount in the amount of \$850 each as payment of the settlement proceeds.
17. On January 21, 2008, respondent prepared an Addendum to Settlement Statement after determining that a medical bill in the amount of \$242 had been previously paid.

18. On January 20, 2008, respondent issued a check in the amount of \$910 to Opal Moreland as payment of the settlement proceeds, which included a portion of the \$242 that respondent determined his clients were entitled to receive.
19. On January 21, 2008, respondent forwarded Lizzie and Roderick Blount each a check in the amount of \$60, for a total disbursement of \$910 to each plaintiff.
20. Beginning on January 18, 2008 and continuing through February 14, 2008, respondent withdrew the settlement funds remaining in his IOLTA (\$1,535) for his own personal use by issuing an IOLTA check to Cash on eight separate occasions.
  - (a) Check 1123 issued to Cash in the amount of \$230 and dated January 18, 2008.
  - (b) Check 1126 issued to Cash in the amount of \$200 and dated January 22, 2008
  - (c) Check 1127 issued to Cash in the amount of \$200 and dated January 25, 2008.
  - (d) Check 1128 issued to Cash in the amount of \$300 and dated January 28, 2008.
  - (e) Check 1129 issued to Cash in the amount of \$355 and dated January 29, 2008.
  - (f) Check 1034 issued to Cash in the amount of \$100 and dated February 1, 2008.
  - (g) Check 1035 issued to Cash in the amount of \$120 and dated February 6, 2008.
  - (h) Check 1036 issued to Cash in the amount of \$30 and dated February 14, 2008.

21. On March 28, 2008, relator sent a letter of inquiry to respondent relating to a notice from The Huntington National Bank that respondent had overdrawn his IOLTA.
22. In response to relator's letter of inquiry, respondent advised relator of the improper use of the funds in the IOLTA.
23. On April 7, 2008, respondent deposited \$1,500 of his own funds into the IOLTA in order to pay the outstanding medical bill on his clients' behalf. Respondent sent Dr. Nicholas a payment in the amount of \$1,490 on the same date.
24. At all times, respondent maintained sufficient funds in his personal account to pay Dr. Nicholas's outstanding bill. (See, i.e., Stipulated Exhibit 26).

#### STIPULATED EXHIBITS

- |           |   |
|-----------|---|
| Exhibit 1 | Settlement Agreement, <i>Lizzie Blount, et al., v. Donald Knight, et al.</i> , Franklin County Municipal Court, Case No. 2007 CVE 027987, dated December 6, 2007.   |
| Exhibit 2 | Settlement Agreement Distribution Sheet, <i>Lizzie Blount, et al., v. Donald Knight, et al.</i> , Case No. 2007 CVE 027987, dated January 7, 2008.  |
| Exhibit 3 | Telephone records for Thomas F. Vivyan telephone, (614) 371-9131.   |
| Exhibit 4 | Check issued by American Insurance Group to Lizzie & Roderick Blount & Atty Tom Vivyan in the amount of \$2,884 and dated December 17, 2007.  |
| Exhibit 5 | Check issued by Cincinnati Equitable Insurance Company to Lizzie Blount, Roderick Blount, Lizzie Blount as Next Friend of Quenton Blount, Opal Moreland as Next Friend of Okeria Williams and Attorney Tom Vivyan in the amount of \$2,250 and dated January 2, 2008. |

- Exhibit 6      Huntington National Bank Statement for December 1, 2007-December 31, 2007 for Account No. xxxxxxx6051.
- Exhibit 7      Check issued by Thomas F. Vivyan to Thomas F. Vivyan in the amount of \$1,700 and dated January 7, 2008.
- Exhibit 8      Huntington National Bank Statement for January 1, 2008-January 31, 2008 for Account No. xxxxxxx6064.
- Exhibit 9      Check issued by Thomas F. Vivyan to Anita Blount in the amount of \$850 and dated January 15, 2008.
- Exhibit 10     Check issued by Thomas F. Vivyan to Roderick Blount in the amount of \$850 and dated January 15, 2008.
- Exhibit 11     Check issued by Thomas F. Vivyan to Opal Moreland in the amount of \$910 and dated January 20, 2008.
- Exhibit 12     Addendum to Settlement Statement dated January 21, 2008.
- Exhibit 13     Letter from Thomas F. Vivyan to Roderick and Lizzie Blount dated January 21, 2008.
- Exhibit 14     Check issued by Thomas F. Vivyan to Roderick Blount in the amount of \$60 and dated January 21, 2008.
- Exhibit 15     Check issued by Thomas F. Vivyan to Lizzie Blount in the amount of \$60 and dated January 21, 2008.
- Exhibit 16     Check issued by Thomas F. Vivyan to Cash in the amount of \$230 and dated January 18, 2008.
- Exhibit 17     Check issued by Thomas F. Vivyan to Cash in the amount of \$200 and dated January 22, 2008.
- Exhibit 18     Check issued by Thomas F. Vivyan to Cash in the amount of \$200 and dated January 25, 2008.
- Exhibit 19     Check issued by Thomas F. Vivyan to Cash in the amount of \$300 and dated January 28, 2008.
- Exhibit 20     Check issued by Thomas F. Vivyan to Cash in the amount of \$355 and dated January 29, 2008.
- Exhibit 21     Check issued by Thomas F. Vivyan to Cash in the amount of \$100 and dated February 1, 2008.

- Exhibit 22 Check issued by Thomas F. Vivyan to Cash in the amount of \$120 and dated February 6, 2008.
- Exhibit 23 Check issued by Thomas F. Vivyan to Cash in the amount of \$30 and dated February 14, 2008.
- Exhibit 24 Huntington National Bank Statement for April 1, 2008-April 30, 2008 for Account No. xxxxxxxx6064.
- Exhibit 25 Check issued by Thomas F. Vivyan to Huntington Nat'l Bank in the amount of \$1,490 and dated April 7, 2008.
- Exhibit 26 Letter from Thomas F. Vivyan to Stacy Solochek Beckman dated May 31, 2009.
- Exhibit 27 Letter from Thomas F. Vivyan to Stacy Solochek Beckman dated June 25, 2009.

**STIPULATED VIOLATIONS OF THE OHIO RULES OF  
PROFESSIONAL CONDUCT AND STIPULATED SANCTION**

Respondent admits that his conduct, which occurred after February 1, 2007, violated the Ohio Rules of Professional Conduct, specifically: **Rule 1.15 (a)** [a lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property]; **Rule 1.15 (b)** [a lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank charges on that account]; **Rule 1.15 (c)** [a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as the fees are earned or expenses incurred]; and, **Rule 8.4 (h)** [it is professional misconduct for a lawyer to engage in any other conduct that adversely reflects on the lawyer's fitness to practice law].

Relator and respondent recommend that the board impose a six-month stayed suspension against respondent.

### **ADDITIONAL STIPULATIONS**

Relator agrees to withdraw the charge of Rule 8.4 (c) [it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation] from the Formal Complaint.

### **STIPULATED MITIGATING FACTORS**

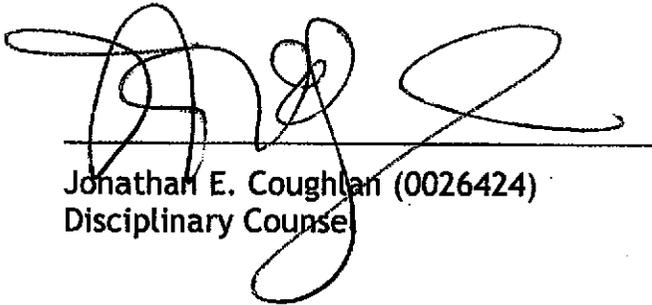
Relator and respondent stipulate that respondent's conduct involved the following mitigating factors as listed in BCGD Proc. Reg. § 10(B)(2):

- (a) absence of prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; and,
- (e) character and reputation.

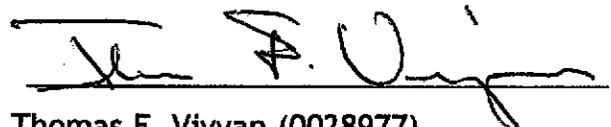
Relator and respondent agree that none of the aggravating factors listed in BCGD Proc. Reg. § 10 (B)(1) are applicable in this matter.

CONCLUSION

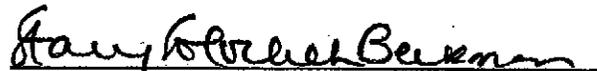
The above are stipulated to and entered into by agreement by the undersigned parties on this 2<sup>nd</sup> day of July, 2009.



Jonathan E. Coughlan (0026424)  
Disciplinary Counsel



Thomas F. Vivyan (0028977)  
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*Respondent*



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