

ORIGINAL

THE SUPREME COURT OF OHIO

AKRON BAR ASSOCIATION

*

CASE NO. 2009-1522

Relator

*

Board of Commissioner's
Case No. 08-036

v.

*

MICHELLE SMITHERN

*

Respondent

*

RELATOR'S MEMORANDUM IN SUPPORT OF THE BOARD'S FINDING

NATHAN A. RAY
Registration #0045170
137 South Main Street, Suite 201
Akron, Ohio 44308
330-253-7171
330-253-7174 (fax)
burdon-merlitti@neo.rr.com

Counsel of Record for Relator

CHARLES E. GRISI
Registration #0002599
1030 Key Building
159 South Main Street
Akron, Ohio 44308
(330) 535-8171
(330) 535-0106 (fax)
cegrisi@grisilaw.com

Counsel of Record for Respondent

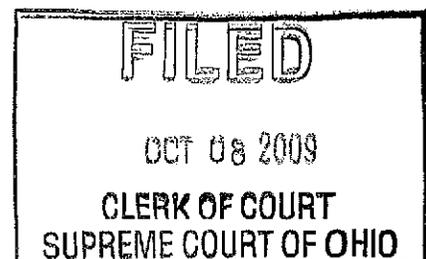


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STATEMENT OF CASE AND FACTS

In July of 2007, Respondent Smithern was indicted by the Summit County Grand Jury for One Count of Aggravated Theft, a felony of the third degree. The indictment set forth that Respondent Smithern deprived Buckingham, Doolittle and Burroughs of US currency in an amount in excess of One Hundred Thousand (\$100,000.00) Dollars. Specifically, as stipulated to by the parties, Respondent Smithern stole approximately One Hundred and Eight Thousand (\$108,000.00) Dollars (Board of Commissioners, Findings of Fact, p.2). On July 19, 2007, Respondent Smithern entered a plea of not guilty. On July 29, 2008, Respondent Smithern entered a plea of guilty to a lesser charge of Theft, a felony of the fourth degree. On October 23, 2008, Respondent Smithern was sentenced to twelve months of incarceration which was suspended, and she was placed on five years of probation.

During the times of the thefts in this case, Respondent Smithern was a partner at the law firm of Buckingham, Doolittle and Burroughs. Her primary area of expertise was domestic relations. Clients would come to Respondent Smithern for legal representation, at which time they would pay her a retainer. Respondent Smithern had the checks from the clients for attorney fees made out to her personally. The checks for the fees were expected to be made out to the law firm of Buckingham, Doolittle and Burroughs and deposited into the appropriate firm account. However, Respondent Smithern instead would endorse these checks to herself and then place them into her own personal account. As set forth in the Complaint, there were thirty-two (32)¹ separate allegations where Respondent Smithern took clients funds and stole them from the law firm that employed her, misappropriating them to her own personal use (Board of Commissioners, Findings of Fact, p.2-3). As set forth in the Complaint, Respondent Smithern

¹ The original complaint contained thirty-three counts. As the hearing Relator withdrew count twenty-five.

stole funds from April of 2004 (Count 1) through October 2006 (Count 33), a period of two and one half years. As set forth above, the total amount of client's funds that Respondent Smithern stole was approximately One Hundred and Eight Thousand (\$108,000.00) Dollars.

The violations as found by clear and convincing evidence by the panel, and adopted by the Board of Commissioners, are as follows:

1. DR1-102(A)(4), Engaging in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation;
2. DR1-102(A)(6), Engaging in Any Other Conduct That Adversely Reflects on a Lawyer's Fitness to Practice Law;
3. DR9-102(A) and (B)(3), Preserving the Identity of Funds of a Client.²

(Board of Commissioners, Findings of Fact, p.4, 6).

Having found that Respondent Smithern had violated the above DR's as set forth in the Thirty-Two Counts of the complaint, and after a careful consideration of the aggravating and mitigating factors, the panel recommended, and the Board of Commissioners on Grievances and Discipline adopted, that Respondent be indefinitely suspended from the practice of law, and that the indefinite suspension be retroactive to the date of her interim suspension (Board of Commissioners, Findings of Fact, p.6).

This matter is now before this Honorable Court for its review.

² The panel unanimously dismissed all alleged violations of DR 7-101(A)(3) as had been set forth in the complaint.

ARGUMENT IN SUPPORT OF THE BOARD OF COMMISSIONERS ON GRIEVANCES
AND DISCIPLINES FINDINGS AND RECOMMENDATIONS IN THIS CASE

PROPOSITION OF LAW NUMBER 1: THE RECOMMENDATION OF THE BOARD
OF COMMISSIONERS OF INDEFINITE SUSPENSION IS APPROPRIATE UNDER
THE FACTS AND CIRCUMSTANCES OF THIS CASE.

A review of the Board of Commissioner's findings of fact and conclusions of law, and this Court's prior decision's, establishes that indefinite suspension is the appropriate sanction in this case.

In *Cincinnati Bar Association v. Schwieterman*, 115 Ohio St.3d 1, 873 N.E.2d 810, 2007-Ohio-4266, the Board had noted that respondent "...had admitted his misconduct, had apologized, and was genuinely remorseful for his actions. Respondent also fully cooperated at every level of the disciplinary investigations. BCGD Proc.Reg. 10(B)(2)(d). Respondent has also made full restitution." *Id.* at p.5. In determining that an indefinite suspension was the appropriate sanction in the matter, this Court noted "...respondent committed multiple violations showing a pattern of misconduct involving fraud and dishonesty. We find that respondent's pattern of misconduct, and the fact that he used his position as an attorney to steal the funds, 'makes respondent wrongdoings particularly egregious.' *Disciplinary Counsel v. Yajko*, 77 Ohio St.3d 387-388, 674 N.E.2d 684." *Schwieterman*, at p.6. In the *Yajko* case, respondent stole a total of \$21,402.57 from his former employer, a law firm. The thefts pertained to twenty separate instances, each involving a different client. *Yajko*, supra, at 386. In *Yajko*, the Court noted respondents mitigation, but went on to recognize that "[h]owever, this does not erase the fact that he committed thefts against his former employer, Aronson. His (respondent's) conduct exhibited a pattern and practice of theft over a prolonged period. This pattern of conduct, along with the fact that respondent used his position as an attorney to steal the funds, makes

respondent's wrongdoings particularly egregious." *Id.* at 387-88. This Court also indefinitely suspended respondent in *Disciplinary Counsel v. Crowley*, 69 Ohio St.3d 554, 634 N.E.2d 1008, 1994-Ohio-214, where respondent had submitted improper expense reimbursements totaling over Two Hundred Thousand Dollars.

In *Toledo Bar Association v. Crossmock*, 111 Ohio St.3d 278, 855 N.E.2d 1215, 2006-Ohio-5706, respondent had converted for his own use funds that belonged to the law firm. The total amount of money belonging to the firm which respondent converted for his own use, appeared to exceed \$300,000.00. In that case, respondent, before leaving the firm, had repaid the money that he had improperly taken. This Court determined that an indefinite suspension was the appropriate sanction given the fact that the attorney had misappropriated funds from the law firm.

In *Columbus Bar Association v. Osipow*, 68 Ohio St.3d 338, 626 N.E.2d 935, 1994-Ohio-145, the respondent was charged with three counts of disciplinary infractions. Upon respondent's employment with the law firm, he had agreed that all fees on cases he worked upon were to be paid to the firm and that he would not do legal work for non-firm clients. The complaint set forth in count one involved the loss of \$800.00 to the law firm; count two involved fees and gifts from two clients that went to respondent and not to the law firm; and count three involved \$3,221.00 for expenses never incurred by respondent but submitted to the law firm. The Panel recommended and the Board adopted the recommendation, that respondent be suspended from the practice of law in Ohio for one year. This Court, however, determined that "...respondent's repeated instances of fraud and deceit upon his clients and his employer, for his own personal benefit, warrant a more severe punishment than a one-year suspension.

Accordingly, we order that respondent be suspended indefinitely from the practice of law in Ohio.” *Id.* at 340.

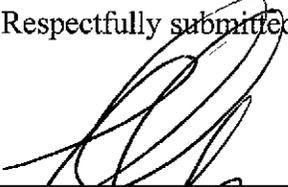
The cases above are consistent with the factual background here, in that they involve the theft of money from a law firm, they involve a pattern of fraud and dishonesty which occurred over a period of time, and they involve an attorney who used her position as an attorney at a law firm to steal money that should have gone to the law firm. Here, respondent Smithern used her position as a partner at a law firm to steal approximately One Hundred and Eight Thousand (\$108,000.00) Dollars. This was not an isolated incident, but rather was an ongoing course of conduct that lasted for over two and one half years, and involved misappropriating funds from thirty two different clients. The fraud and dishonesty can best be shown by respondent’s actions in having the client make out the check to her personally, and then depositing it into her own checking account.

CONCLUSION

It is the position of the Relator, Akron Bar Association, that the findings of fact and conclusions of law in this case are fully supported by the record. It is further the position of the Relator that the recommendation of both the Panel and the Board of Commissioners on Grievances and Discipline that Respondent be indefinitely suspended is the appropriate sanction.

Relator would request that this Court adopt the findings of fact and conclusions of law of the Board of Commissioners and indefinitely suspended Respondent.

Respectfully submitted,



NATHAN A. RAY #0041570
Attorney for Relator
137 South Main Street, Suite 201
Akron, Ohio 44308
330-253-7171
330-253-7174 (fax)
burdon-merlitti@neo.rr.com

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 11/13 day of October, 2009, to Charles Grisi, Attorney for Respondent, 159 South Main Street, 1030 Key Building, Akron, Ohio 44308; Jonathan W. Marshall, Secretary, Board of Commissioners on Grievances and Discipline, 65 South Front Street, 5th Floor, Columbus, Ohio 43215; Jonathan E. Coughlan, Office of Disciplinary Counsel, The Supreme Court of Ohio, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215-7411


NATHAN A. RAY
Attorney for Relator

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

In Re:	:	
Complaint against	:	Case No. 08-036
Michelle A. Smithern Attorney Reg. No. 0032850	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Akron Bar Association	:	
Relator	:	
	:	

This matter was heard on May 15, 2009, in Akron, Ohio before a panel consisting of members Judge Arlene Singer of Toledo, Martha L. Butler of Columbus, and Joseph L. Wittenberg of Toledo, Chair of the panel. None of the panel members resides in the appellate district from which this matter arose or served as members of the probable cause panel in this case. Relator was represented by Nathan A. Ray and Vincent J. Alfera. Respondent was represented by Charles E. Grisi. Respondent was present at the hearing.

INTRODUCTION

Respondent graduated from the University of Akron Law School and was licensed to practice law in 1986. While in law school, Respondent worked full time as a legal secretary and in her third year of law school, started working for the law firm of Buckingham, Doolittle & Burroughs (Buckingham). Respondent clerked full time for Buckingham while in law school and began working with Buckingham as an attorney in 1986. At the time of her termination

from Buckingham, she was a shareholder/partner in the firm.

In her early years at Buckingham, Respondent practiced primarily litigation law. She basically did defense work for insurance companies, product liability cases, personal injury claims, and other type cases. Eventually as Respondent became a more senior associate, she started handling domestic relation cases and that then became her area of expertise at the law firm.

Between 2004 and 2006, Respondent converted to her own use approximately \$108,000 of funds that belonged to Buckingham.

In July 2007, Respondent was indicted by the Summit County Grand Jury for one count of aggravated theft, a felony of the third degree.

The indictment set forth that, from on or about June 2004 through on or about November 2006, Respondent deprived Buckingham, Doolittle & Burroughs of U.S. currency in an amount in excess of \$100,000. On July 19, 2007, Respondent entered a plea of not guilty. On July 29, 2008, Respondent entered a plea of guilty to a lesser charge of theft, a felony of the fourth degree. On October 23, 2008, Respondent was sentenced to twelve months of incarceration which was suspended, and she was placed on five years of probation.

During the times of the thefts, Respondent was a partner at Buckingham. Clients would retain Respondent for legal representation, at which time they would pay her a retainer. The checks that were payable to Respondent individually were converted by Respondent to her own use when she needed money and were not deposited into Buckingham's IOLTA account. Respondent would endorse the checks to herself and place them into her own personal account. There are thirty-three separate allegations in the complaint where Respondent took

funds from clients and misappropriated them for her personal use.

A thirty-three count complaint was filed against Respondent by the Akron Bar Association. At the hearing count twenty-five was withdrawn by Relator and of the remaining thirty-two counts, each count alleged violations of the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation];
2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];
3. DR 7-101(A)(3) [intentional prejudice or damage to a client during the course of the professional relationship];
4. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

The panel unanimously found that the evidence presented by Relator as to a violation of DR 7-101(A)(3) alleged in all thirty-two counts was not clear and convincing and therefore the violation of DR 7-101(A)(3) in all thirty-two counts was unanimously dismissed.¹

Findings of Fact as to Counts 1 through 33

In her answer, Respondent admitted to every rule violation alleged in all thirty-two counts of Relator's complaint with the exception of DR 7-101(A)(3), which as previously noted, the panel unanimously dismissed. At the hearing Respondent admitted she stole money from Buckingham. (Tr. 87)

Conclusions of Law

Based on Respondent's admission to Relator's complaint and Respondent's

¹ Pursuant to Gov. Bar R. V(6)(H), the panel unanimously dismissed all alleged violations of DR 7-101(A)(3).

testimony at the hearing, the panel finds by clear and convincing evidence that Respondent with respect to all thirty-two counts of the complaint, violated the following disciplinary rules:

1. DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation];
2. DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law];
3. DR 9-102(A) and (B)(3) [preserving the identity of funds of a client].

Mitigation and Aggravation

Respondent was admitted to practice law in the State of Ohio in 1986 and has no prior disciplinary record. She has cooperated throughout these proceedings.

A licensed Psychologist, Karen T. Cimini, Ph.D., testified that she began seeing Respondent in December 2006 and has continued to see her over thirty-one times. (Tr. 33) She testified that Respondent was a workaholic in that she became fiercely competitive. She was working many hours a day, seven days a week, and immersed herself in whatever she did. (Tr. 34) The primary diagnosis by Dr. Cimini was that Respondent suffers from a gambling addiction. In addition, she was using alcohol in excess. The alcohol addiction became interactive with the gambling addiction. (Tr. 36)

Dr. Cimini recommended that Respondent get an independent assessment at an institution known as Glenbeigh and treatment if necessary. Glenbeigh is a recognized, certified hospital, which provides inpatient and outpatient treatment for different kinds of addictions. Respondent did go to Glenbeigh, which is located in Cleveland. After Respondent's experience at Glenbeigh, Dr. Cimini testified that Respondent understood her gambling addiction. In addition, she understood she had an alcohol addiction.

Dr. Cimini testified that she believes the gambling and alcohol addictions were the cause

of Respondent's stealing money from Buckingham. (Tr. 45) It is Dr. Cimini's opinion that Respondent can overcome her addictions with continued treatment.

Respondent has been attending meetings since February 2008 regarding her alcohol addiction and since January 2007 has been attending meetings regarding her gambling addiction. (Tr. 48)

At the present time Respondent works as a waitress at a restaurant in Cleveland, Ohio approximately 12 hours a day. Respondent had been the primary breadwinner for the family. Her husband is a high school football coach and she has two children in high school and a child in college. Her home is currently in foreclosure. (Tr. 43)

Character letters were written on behalf of Respondent by Judge Carol J. Dezso of the Domestic Relations Division of the Summit Court of Common Pleas, Attorney Wayne M. Jones of Akron, Ohio, and Attorney Frank G. Mazgaj of Akron, Ohio. The character letters are attached to this report.

Respondent did enter into a settlement agreement with Federal Insurance Company whereby she agreed to pay all funds back she stole. Federal Insurance Company is the company that insures Buckingham. Attached to this report is a copy of the settlement agreement.

Sanction

In determining the appropriate sanction, this panel gave consideration to the guidelines for mitigation and aggravation.

Relator recommends that Respondent receive an indefinite suspension, and that the indefinite suspension be retroactive from October 23, 2008, which is the date of her sentencing on the fourth degree felony.

Respondent urges that she be given a two year suspension with eighteen months suspended and receive credit from the date of her interim suspension, which was February 17, 2009.

From the beginning, Respondent has acknowledged the wrongfulness of her actions and has been cooperative with her former law firm, Relator, and the Akron Police Department. Respondent voluntarily ceased the practice of law on November 3, 2006, when she was terminated from Buckingham. The panel recommends that Respondent be given an indefinite suspension with credit from the date of her interim suspension on February 17, 2009, and before she can be readmitted to the practice of law, the following conditions must be complied with:

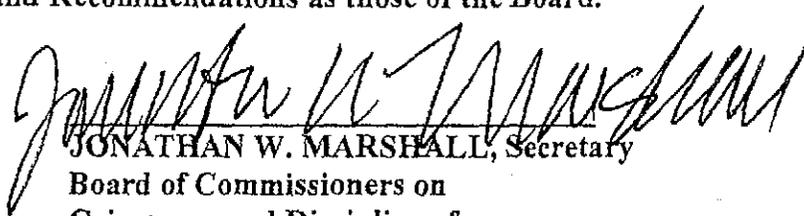
1. Respondent must enter into a contract with OLAP and be in compliance with any requirements required by OLAP;
2. Respondent must be in compliance with all terms of her probation in the criminal case;
3. Respondent must be in compliance with the settlement agreement between her and Federal Insurance Company and stay current on her payments of restitution;
4. There must be prognosis from a qualified healthcare professional or alcohol/substance abuse counselor that Respondent will be able to return to competent, ethical professional practice of law.

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, Michelle A. Smithern, be indefinitely suspended retroactive to the date of her interim suspension upon the conditions contained in the panel report. 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.

JONATHAN W. MARSHALL, Secretary

Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

FILED

The Supreme Court of Ohio

SEP 04 2009

CLERK OF COURT
SUPREME COURT OF OHIO

Akron Bar Association,
Relator,

Case No. 2009-1522

v.

Michelle A. Smithern,
Respondent.

ORDER TO SHOW CAUSE

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio has filed a final report in the office of the clerk of this court. This final report recommended that pursuant to Rule V(6)(B)(2) of the Supreme Court Rules for the Government of the Bar of Ohio the respondent, Michelle A. Smithern, Attorney Registration Number 0032850, be indefinitely suspended from the practice of law, retroactive to the date of her interim suspension upon the conditions contained in the panel report. The board further recommends that the costs of these proceedings be taxed to the respondent in any disciplinary order entered, so that execution may issue. Upon consideration thereof,

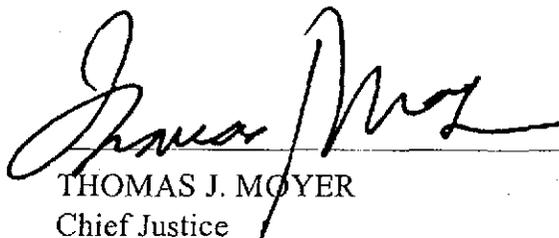
It is ordered by the court that the respondent show cause why the recommendation of the board should not be confirmed by the court and the disciplinary order so entered.

It is further ordered that any objections to the findings of fact and recommendation of the board, together with a brief in support thereof, shall be due on or before 20 days from the date of this order. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

After a hearing on the objections or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper which may be the discipline recommended by the board or which may be more severe or less severe than said recommendation.

It is further ordered, sua sponte, that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings and further that unless clearly inapplicable, the Rules of Practice shall apply to these proceedings.

It is further ordered, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, by certified mail to the most recent address respondent has given to the Office of Attorney Services.



THOMAS J. MOYER
Chief Justice