

ORIGINAL

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

In Re:	:	10-0316
Complaint against	:	Case No. 08-091
Kenneth Norman Shaw Attorney Reg. No. 0005525	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

**FILED**  
 FEB 18 2010  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

**INTRODUCTION**

This matter was heard on September 29, 2009, and December 3, 2009, at the Ohio Judicial Center. The Board hearing panel consisted of Lawrence Elleman of Hamilton County, Lynn Jacobs of Lucas County and McKenzie Davis of Franklin County, the panel Chair. None of the panel members resides in the district from which the Complaint originated or served on the probable cause panel that certified the grievance.

Respondent appeared pro se. Relator was represented by Robert Berger, Disciplinary Counsel.

**BACKGROUND**

Respondent's alleged misconduct occurred both before and after February 1, 2007, the date the Ohio Rules of Professional Conduct went into effect. The misconduct that occurred prior to February 1, 2007 is governed by the Code of Professional Responsibility, while conduct

that occurred after February 1, 2007, or that is ongoing in nature, is subject to the Ohio Rules of Professional Conduct.

Counts One, Two and Three arose from Respondent's relationship and representation of Eleanor Blackburn. Count Four arose from Respondent's representation of Carol Thornton and Monica Johnson in a guardianship matter.

On December 8, 2008, a Complaint was filed against the Respondent alleging violations of two counts of DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (conduct that adversely reflects upon the lawyer's fitness to practice law); DR 5-101(A)(1) (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 interest); one count of DR 5-101(A)(2) (a lawyer shall not prepare or draft, or supervise the preparation or execution of a will, codicil or inter vivos trust for a client in which the natural children of the lawyer are named as a beneficiary); DR 5-104(A) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein) Prof. Cond. R. 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law); and Gov. Bar R. V(4)(G) (failure to cooperate with Relator's investigation).

On January 8, 2009, Respondent requested additional time to file an answer.

On January 16, 2009, Respondent filed an Answer to the Complaint.

On August 14, 2009, Relator filed an Amended Complaint to include Count Four. In addition to the alleged violations set forth in the original Complaint, Relator alleged violations of Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Respondent did not file an answer to the Amended Complaint.

On September 29, 2009, a panel hearing was scheduled. However, just prior to the hearing, Respondent indicated he would not be able to attend due to illness. The panel chose to move forward with the Relator's case and provide Respondent an opportunity to be heard at a later date.

On December 3, 2009, the panel conducted a second hearing. Respondent was given the opportunity to present his case.

### **FINDINGS OF FACT**

Respondent is a solo general practitioner with a significant percentage of work in estate planning.

As indicated earlier, Counts One, Two and Three arose out of Respondent's representation of Eleanor Blackburn. Ms. Blackburn was an elderly woman whom Respondent befriended at church and other religious activities. Over the years, Ms. Blackburn had grown close with Respondent and his family, often times spending holidays with them. Respondent handled some personal affairs for Ms. Blackburn while she was in a nursing home and at other various time periods. From that relationship, Ms. Blackburn requested legal services from Respondent.

In August of 1998, Respondent prepared a quit claim deed that deeded property belonging to Blackburn to Chris Gilger and the Warren City Rescue Mission. In February of 1999, Respondent assisted Blackburn in transferring her ownership of a duplex in Warren, Ohio to Angelo Lagos. Respondent stopped providing legal services for Ms. Blackburn at the end of 2000.

In May of 2004, Ms. Blackburn passed away.

### **COUNT 1**

In September of 1999, Ms. Blackburn requested Respondent draft a power of attorney and create a revocable living trust for her. Respondent prepared a power of attorney for Ms. Blackburn that named Respondent as attorney-in-fact for Ms. Blackburn. Respondent prepared a revocable living trust for Ms. Blackburn that named Respondent as both co-trustee for the trust and first successor trustee. In addition, the trust named Respondent's five children as beneficiaries. Under the terms of the trust, each child of Respondent would receive \$5,000, for a total of \$25,000. Ms. Blackburn executed the power of attorney and signed the trust documents on September 27, 1999. (Tr. 40)

Prior to preparing the documents and obtaining Ms. Blackburn's execution, Respondent admitted he did not:

- advise Blackburn to obtain disinterested advice from another independent, competent and knowledgeable person;
- advise Blackburn to seek advice from another attorney or to have the trust drafted by another attorney; and
- discuss the conflict of interest presented by this situation with Blackburn. (Tr. 40-41)

Relator alleges violations of DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (conduct that adversely reflects upon the lawyer's fitness to practice law); 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) and DR 5-101(A)(2) (a lawyer shall not prepare or draft, or supervise the preparation or execution of a will, codicil or inter vivos trust for a client in which the natural children of the lawyer are named as beneficiaries).

## COUNT 2

In August of 2000, Respondent obtained a \$13,000 loan from Ms. Blackburn. (Tr. 41) Respondent requested the loan in order to purchase a building to house his law practice. At the time of the loan, Respondent was Ms. Blackburn's attorney. The funds from the loan came from assets Respondent had placed in her revocable living trust. Respondent conceded that loan was to be paid back in six months at six percent interest. However, Respondent failed to repay Ms. Blackburn as agreed. (Tr. 42)

After a couple of years, Ms. Blackburn sued Respondent for the money loaned and subsequently defaulted. Warren Municipal Court granted a judgment against Respondent in the matter. As part of the settlement of the matter, Respondent agreed to pay off the judgment at the rate of \$250 per month. However, Respondent later filed for bankruptcy and was granted a discharge of this debt. To date, Respondent has repaid only \$750 of the loan to her estate. (Tr. 42)

In September of 2007, the executor of the Blackburn estate filed a complaint for concealment of assets against several parties, including Respondent. The Trumbull County Probate Court later found Respondent had "unduly influenced" Ms. Blackburn to make the loan and that the loan constituted "self-dealing" and was "detrimental" to the trust. As a result, the court ordered Respondent repay the Blackburn estate \$12,250. Respondent appealed the probate court's decision.

Prior to requesting and obtaining the loan from Ms. Blackburn, Respondent admitted he did not:

- advise Blackburn to obtain disinterested advice from another independent, competent and knowledgeable person;

- advise Blackburn of the risks of making a loan, including the risks associated with making a loan not secured by collateral; and
- discuss the conflict of interest presented by this situation with Blackburn. (Tr. 41-42)

Relator alleges violations of DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (conduct that adversely reflects upon the lawyer's fitness to practice law); 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) and DR 5-104(A) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein).

### COUNT 3

On February 27, 2008, Relator sent a letter of inquiry to Respondent regarding the allegation in Counts 1 and 2 via certified mail. Respondent's law office received the letter of inquiry and Respondent signed the certified mail return receipt. However, Respondent failed to respond.

On March 31, 2008, Relator sent a second letter of inquiry to Respondent regarding the allegations in Counts 1 and 2 via certified mail. Respondent's law office received the letter of inquiry and Respondent signed the certified mail return receipt. Again, Respondent failed to respond.

Respondent was subpoenaed to appear for a deposition. Respondent, prior to the scheduled deposition, provided information previously requested. Respondent later appeared for the deposition and fully cooperated with Disciplinary Counsel.

Relator alleges a violation of Rule 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law) and Gov. Bar R. V(4)(G) (failure to cooperate with Relator's investigation).

#### COUNT 4

Respondent's alleged violations in Count 4 arose out of representation of Carol Thornton and Monica Johnson. They hired Respondent in order to pursue a guardianship for their grandmother, Jessie Marks.

Respondents filed an application for appointment of guardian on January 5, 2007. Both Thornton and Johnson were subsequently appointed co-guardians by the probate court on May 11, 2007.

On May 22, 2007, Marks passed away. That same day, Respondent accepted two checks for a total of \$2,000. Respondent cashed the \$800 check (memo line listed "attorney fees") and deposited the \$1,200 check (memo line listed "legal fees: expenses").

However, Trumbull County Probate Court rules require court approval prior to the payment of any attorney fees. Respondent accepted payment by Thornton and Johnson without the approval of the Trumbull County Probate Court. (Tr. 45-46)

On October 29, 2007, Respondent filed his first application for payment of attorney fees with the Trumbull County Probate Court. Respondent requested \$4,668.75 for 51.75 hours of legal work. This amount requested was in addition to the \$2,000 already paid to Respondent on May 22, 2007.

In October of 2008, a complaint for concealment of assets was filed in the probate court. Two months later, the probate court found Respondent "guilty of concealment of assets." The probate court also approved the payment of \$800 to Respondent on May 22, 2007. However, the probate court ordered Respondent repay the estate the \$1,200 paid to Respondent on May 22,

2007. Respondent filed a motion for reconsideration, which was subsequently denied.

Respondent has yet to pay the probate court ordered \$1,200.

Relator alleges violations of Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. R. 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law).

### **CONCLUSIONS OF LAW**

The panel finds that the evidence presented by Disciplinary Counsel, stipulations of the parties prior to and during the disciplinary process and admissions made by Respondent are clear and convincing evidence that Respondent's conduct violated the following disciplinary rules:

#### Count 1

- DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice);
- DR 1-102(A)(6) (conduct that adversely reflects upon the lawyer's fitness to practice law);
- 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); and
- DR 5-101(A)(2) (a lawyer shall not prepare or draft, or supervise the preparation or execution of a will, codicil or inter vivos trust for a client in which the natural children of the lawyer are named as beneficiaries).

#### Count 2

- DR 1-102(A)(5) (conduct that is prejudicial to the administration of justice);
- DR 1-102(A)(6) (conduct that adversely reflects upon the lawyer's fitness to practice law);

- 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); and
- DR 5-104 (A) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein).

#### Count 4

- Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal);
- Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and
- Prof. Cond. R. 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law).

With regards to Count 3, the panel concluded Respondent's failure to respond to the first two letters of inquiry does not rise to the level of a violation of Prof. Cond. R. 8.4(h) and Gov. Bar. R. V(4)(G). The panel therefore requests the Board dismiss Count 3.

The panel acknowledges the wrongful conduct in not immediately responding to the inquiries of Disciplinary Counsel. However, the panel is able to distinguish Respondent's lack of cooperation from the Supreme Court's findings in *Cleveland Bar Assn. v. James*, 109 Ohio St.3d 310, 2006-Ohio-2424, in that the Respondent in *James* never filed an answer or cooperated in any manner. Here, Respondent neglected two letters, but cooperated after that point. Thus, the panel could not find that neglecting two initial letters from Disciplinary Counsel constituted a violation of Prof. Cond. R. 8.4(h) and Gov. Bar. R. V(4)(G).

#### **AGGRAVATION AND MITIGATION**

The guidelines governing Aggravation and Mitigation in attorney disciplinary cases are found in BCGD Proc. Reg. 10(B)(1) and (2), which list factors that may be considered in recommending either a more or less severe sanction than is recommended by either party.

### AGGRAVATION

Relator suggested aggravating factors that would justify a more severe sanction at the hearing. Respondent disputed some of the factors articulated by Relator, however, the panel finds the following aggravating factors as set forth in BCGD Proc. Reg. (10(B)(1):

- (c) A pattern of misconduct. Respondent drafted a trust that had improper beneficiaries, his five children, took an improper loan, initially failed to cooperate, and took fees without court approval. In addition, Respondent failed to make proper restitution.
- (d) Multiple offenses. Respondent admitted to violations in three separate counts.
- (h) Vulnerability of and resulting harm to victims of the misconduct. Respondent took advantage of an elderly woman in obtaining an improper loan and has yet to repay the Blackburn estate \$12,250 and the Marks estate \$1,200.
- (i) Failure to make restitution. Respondent has yet to repay the Blackburn estate \$12,250 and the Marks estate \$1,200.

### MITIGATION

Neither party submitted factors in mitigation that would justify a less severe sanction. However, the panel finds the following factor present as set forth in BCGD Proc. Reg. (10)(B)(2):

- (j) Absence of a prior disciplinary record. Respondent has no prior disciplinary record.

### RECOMMENDED SANCTION

Respondent admits all the misconduct alleged by the Relator. However, Respondent attempts to minimize the misconduct due to his previous close personal relationship and “kindred spirit” with Eleanor Blackburn. Respondent indicated that although Ms. Blackburn was an elderly lady, she was still sharp and she knew he was not trying to take advantage of her. In fact, Respondent stated that he was protecting her from others that were attempting to take advantage

of her. Respondent took care of her affairs for a significant period, while she was in a nursing home.

Ohio law provides for circumstances when there is a close relationship between the attorney and the client. It will permit the attorney to assist the clients in meeting their objectives. However, in order to protect the public, the lawyer must meet specific criteria to accomplish the client's objectives. Unfortunately, Respondent did not meet those additional requirements designed to protect the public and ensure the integrity of our profession.

Relator recommended the panel suspend Respondent from the practice of law for 24 months, with 12 months stayed upon the condition of restitution to the Blackburn and Marks estate and completion of his OLAP contract. In support of his position, Relator cited the following case law: *Toledo Bar Assn. v. Cook*, 97 Ohio St.3d 225, 2002-Ohio-5787; *Disciplinary Counsel v. Kelleher*, 102 Ohio St.3d 105, 2004-Ohio-1802; and *Disciplinary Counsel v. Dettinger*, 121 Ohio St.3d 400, 2009-Ohio-1429.

In *Cook*, the Court found misconduct when Cook named her siblings' corporation as a beneficiary in a will she prepared. Cook's license was suspended for one-year, with six months stayed. The Court ruled "even with the best intentions, an attorney risks the possibility of exploiting his client when their interests become so intertwined." The Court, balancing the panel's recommendation (six months, all stayed) and the Board's recommendation (two year, one year stayed) relied on mitigating character references and the selfless nature of Cook.

In *Kelleher*, Respondent drafted a trust for a client, and the trust drafted by Respondent named Respondent's wife, children and grandchildren as beneficiaries. The Court, following the ruling in *Cook*, ordered a one year suspension with six months stayed.

In *Dettinger*, Respondent received a \$25,000 loan from a client without disclosing the conflict of interest, or advising the client to consult with independent counsel and without disclosing to the client his financial distress. The Court ordered a six month suspension with six months stayed.

Relator did not provide case law regarding the misconduct alleged in Count 3 and Count 4.

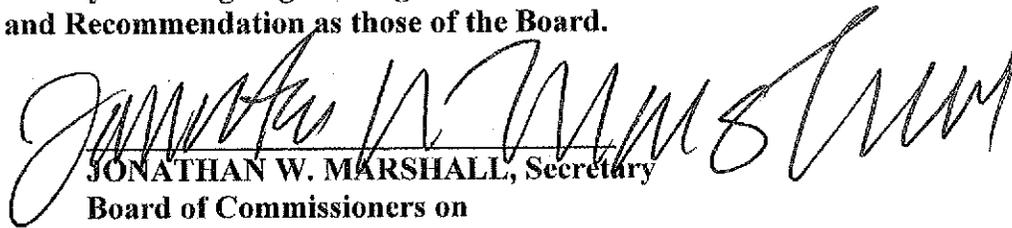
Respondent recommended the panel order no more than a six month suspension. Respondent did not provide any case law or justification for the recommendation. Additionally, Respondent did not provide any mitigating evidence. Recognizing the pro se nature of his representation, the panel probed Respondent about possible mitigating factors. Respondent replied with excuses of third party interference with his relationship with his clients and judicial biases against him. The panel is not convinced that these excuses should be considered as mitigation.

The panel finds the Respondent's behavior similar to the misconduct in all three cases cited by Relator. Furthermore, Respondent did not provide any evidence to the contrary or any justifiable mitigating factors. Therefore, the panel recommends a two-year suspension from the practice of law with one year stayed including the condition of restitution to the Marks estate. Respondent filed for bankruptcy after the misconduct in the Blackburn matter and therefore the panel cannot, as a condition of re-instatement, order restitution of an amount discharged in bankruptcy. *Cleveland Bar Assn. v. Gay*, 94 Ohio St.3d 404, 2002-Ohio-1051. The panel did not include the fulfillment of the OLAP contract because it was never made clear the problem OLAP was addressing for him.

**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 February 5, 2010. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board, however, recommends, based on his serious acts of fraud and misconduct, that Respondent, Kenneth Norman Shaw, be suspended for two years with the condition that he pay restitution to the Marks estate before being reinstated. 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 Recommendation as those of the Board.**



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