ORIGINAL

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

In Re:	:	10-2245
Complaint against	:	**Case No. 09-089**
David Nitskoff **Attorney Reg. No. 0025471**	:	**Findings of Facts, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

This matter was referred to Master Commissioner, Judge W. Scott Gwin, on October 4, 2010, by the Secretary of the Board pursuant to Gov. Bar R. V(6)(F)(2) for a ruling on Relator's motion for default judgment. Master Commissioner Gwin then proceeded to prepare a report pursuant to Gov. Bar R. V(6)(J).

FILED
DEC 23 2010
CLERK OF COURT
SUPREME COURT OF OHIO

PROCEDURAL HISTORY

On March 20, 2009, Relator began an investigation of Respondent based on a grievance filed by Attorneys Tamara Karel and L. Jason Blake. Relator sent Respondent a letter of inquiry, but he did not respond. On July 21, 2009, in response to Relator's subpoena duces tecum, Respondent appeared at the office of Disciplinary Counsel. Respondent testified and also provided the materials Relator had subpoenaed.

On October 27, 2009, Relator received a notice from Charter One Bank that Respondent did not have sufficient funds in his IOLTA account to cover checks, withdrawals, deductions, and/or charges presented for payment. Thereafter, Disciplinary

Counsel researched "Nittskoff Co., LPA" and determined it was cancelled by the State of Ohio in 2007 for failure to file tax returns, and for non-payment of franchise taxes.

On November 3, 2009, Relator sent a draft copy of the formal complaint to Respondent via certified mail. Respondent did not reply. Relator then sent a letter of inquiry regarding the IOLTA overdraft, via certified mail. Respondent did not respond to the letter.

On December 4, 2009, a probable cause panel certified the matter to the Board. The complaint was filed on December 7, 2009, and the Secretary of the Board sent Respondent a copy of the complaint with a notice his written answer was due twenty days after December 10, 2009.

On April 30, 2010, Relator filed an amended complaint, which the Secretary of the Board sent by certified mail to Respondent with a notice that his written answer must be filed within twenty days.

Respondent has not filed an answer or any other pleading or response in this proceeding. On September 21, 2010, Relator filed its motion for default.

FINDINGS OF FACT

Count One

Jack Gordon died on September 27, 2005, leaving an estate and the Jack Gordon Revocable Trust (Trust). Stanley P. Frankel was the successor trustee of the Trust. Respondent had performed legal services for the Gordon family on prior occasions, and was retained to provide legal services for the estate and Trust. The estate and Trust proved more complicated than expected, particularly in determining the assets. During his lifetime, Jack Gordon had operated a bicycle shop in a declining area near downtown

Cleveland. His estate was ultimately found to be worth more than $5,000,000.

In October 2008, Frankel, as Administrator with the Will Attached, and as Trustee of the Jack Gordon Trust, filed a complaint against Respondent in the Cuyahoga County Court of Common Pleas, alleging legal malpractice. See *Frankel v. Nittskoff,* Case No. CV-08-673876. Frankel alleged Respondent had been retained to handle all matters with the estate and the Trust, including preparation and timely filing of estate tax returns. Frankel alleged Respondent repeatedly represented himself as competent to handle all the affairs of the estate and the Trust. However, Respondent did not file certain estate tax returns and did not ask for an extension of time to file the returns. Frankel alleged Respondent reassured him the estate would not be liable for any penalties or interest charges.

On November 5, 2007, the IRS informed Frankel that because of the failure to file the federal estate tax return, the estate was required to pay a penalty in the amount of $317,146.20, plus interest in the amount of $134,358.26. Frankel alleged despite his reassurances, Respondent did not pay the penalties and interest on behalf of the estate. Respondent did not file an answer to the complaint and the court entered default judgment against him. Respondent filed a motion for relief from judgment pursuant to Ohio Civil Rule 60(B), which was overruled. The judgment against him is in the amount of $451,504.46. Frankel filed a judgment lien against Respondent, and the judgment remains unpaid. Respondent did not return any of the file documents to Frankel despite his request.

Count Two

In his deposition Respondent admitted he failed to inform any of his clients that

he did not maintain professional liability insurance.

Count Three

Respondent had an overdraft of $49.04 in his IOLTA account in October, 2009.

CONCLUSIONS OF LAW

Count One

Respondent's conduct in Count One occurred both prior to and after February 1, 2007, when the Supreme Court adopted the Ohio Rules of Professional Conduct to supersede the Ohio Code of Professional Responsibility.

Respondent's conduct with regard to the Gordon Estate and Trust matters has violated the following provisions of the Code of Professional Responsibility:

DR 1-102(A)(5) [conduct prejudicial to the administration of justice];

DR 1-102(A)(6) [conduct that adversely reflects upon the lawyer's fitness to practice law];

DR 6-101(A)(1) [handle a legal matter which he knows or should know that he is not competent to handle]; and

DR 6-101(A)(3) [neglect a legal matter entrusted to him].

Respondent's conduct with regard to the Gordon Estate and Trust violates the following Rules of Professional Conduct:

Prof. Cond. R. 1.1 [failing to provide competent representation to a client];

Prof. Cond. R. 1.3 [failing to act with reasonable diligence and promptness in representing a client];

Prof. Cond. R. 1.4(a)(2) [failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished];

Prof. Cond. R. 1.4(a)(3) [failing to keep the client reasonably informed about the status of the matter];

Prof. Cond. R. 1.4(a)(4) [failing to comply as soon as practicable with reasonable requests for information from the client];

Prof. Cond. R. 1.4(b) [failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation];

Prof. Cond. R. 8.4(d) [conduct 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].

Count Two

Respondent's conduct in Count Two violated the following provisions of the Code of Professional Responsibility:

DR 1-102(A)(6) [conduct adversely reflecting upon the lawyer's fitness to practice law]; and

DR 1-104(A) [failing to inform a client at the time of the client's engagement of the lawyer or at anytime subsequent to the engagement if the lawyer does not maintain professional liability insurance].

Count Three

Respondent's conduct in Count Three violated the following Rules of Professional Conduct:

Prof. Cond. R. 8.1(b) [failing to respond to a request for information from a disciplinary authority in connection with a disciplinary matter]; and

Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to

practice law.

MITIGATING FACTORS

At least four of the eight mitigating factors set forth in BCGD Proc. Reg. 10 (B)(2) are present here:

(a) Absence of a prior disciplinary record;

(b) Absence of a dishonest or selfish motive;

(d) Full and free disclosure to the Disciplinary Board or cooperative attitude towards the proceedings, in that Respondent complied with the subpoena duces tecum and participated in a deposition; and

(f) Imposition of other penalties or sanctions.

AGGRAVATING FACTORS

At least two of the nine aggravating factors set forth in BCGD Proc. Reg. 10(B)(1) are present here:

(e) Lack of cooperation in the disciplinary process, in that Respondent failed to file an answer to the complaint and the amended complaint; and

(h) Vulnerability of and resulting harm to victims of the misconduct.

RECOMMENDED SANCTION OF RELATOR

Relator recommends Respondent be disbarred from the practice of law.

RECOMMENDATION OF MASTER COMMISSIONER

The Master Commissioner recommends a sanction of one year suspension from the practice of law with six months suspended, for the reasons stated in the case law discussion.

CASE LAW DISCUSSION

Respondent practiced law since 1970 with no prior discipline. He represented various members of the Gordon family on prior occasions for relatively minor cases over approximately 30 years.

The decedent here operated a bicycle shop in an inner-city area of town. Decedent also lived in the inner city and worked in the shop until his 70's or 80's. When Respondent took this case no one, including the family, had any idea of the size of the estate. The decedent had kept much of the paper the business had generated over many years, and simply to sort through the records was a huge task. Respondent testified in his deposition that he did not file for an extension for the estate taxes because he did not believe the estate was large enough to be required to pay any tax. It was not until more than five months had passed did the parties gradually discover the estate and trust had numerous investments and assets worth over $4,000,000 to 5,000,000.

The Successor Trustee and Administrator with the Will Attached was a CPA who had been decedent's accountant for over 30 years. He informed Respondent the value of the bicycle shop was zero.

In *Disciplinary Counsel v. Sabroff,* 123 Ohio St.3d 182, 2009-Ohio-4205, the Board recommended that the Supreme Court permanently disbar Respondent, based on findings that he misappropriated clients' funds, settled a client's claim without her consent, failed to maintain all client funds in an attorney trust account, commingled client and personal funds in his trust account, practiced law while under suspension, was convicted of a felony involving dishonesty, and failed to cooperate in the efforts to

investigate his misconduct. The Supreme Court listed situations where disbarment is warranted:

"We have previously explained that "misappropriation of client funds carrie[s] a 'presumptive sanction of disbarment.' " *Trumbull Cty. Bar Assn. v. Kafantaris*, 121 Ohio St.3d 387, 2009-Ohio-1389, ¶ 14, quoting *Cleveland Bar Assn. v. Dixon*, 95 Ohio St.3d 490, 2002-Ohio-2490, ¶ 15. Similarly, " 'permanent disbarment is an appropriate sanction for conduct that violates DR 1-102 and results in a felony conviction.' " *Disciplinary Counsel v. Stern*, 106 Ohio St.3d 266, 2005-Ohio-4804, ¶ 8, quoting *Disciplinary Counsel v. Gallagher* (1998), 82 Ohio St.3d 51, 52. Further, " '[t]he normal penalty for continuing to practice law while under suspension is disbarment.' " *Disciplinary Counsel v. Frazier,* 110 Ohio St.3d 288, 2006-Ohio-4481, ¶ 54, quoting *Disciplinary Counsel v. Allison*, 98 Ohio St.3d 322, 2003-Ohio-776, ¶ 12, and *Disciplinary Counsel v. Mbakpuo*, 98 Ohio St.3d 177, 2002-Ohio-7087, ¶ 13. See also *Medina Cty. Bar Assn. v. Wootton*, 110 Ohio St.3d 179, 2006-Ohio-4094, ¶ 10 (disbarring attorney for theft of his clients' funds, dishonesty, financial harm to his clients, and the failure to cooperate)." *Sabroff* at ¶21.

Respondent's conduct here clearly does not rise to the level of misconduct demonstrated in the above- cited cases.

In *Cuyahoga Cty. Bar Assn. v. Johnson,* 123 Ohio St.3d 65, 2009-Ohio-4178, the Court found although the respondent had neglected a series of responsibilities to her client, failed to maintain insurance, and caused her clients to suffer an adverse judgment, because the respondent had no prior disciplinary record, candidly cooperated during the disciplinary proceedings, admitted and apologized for her ethical breaches, and expressed

deep remorse for the consequences to her client that the evidence of mitigation was persuasive. Finding no evidence of a selfish motive, the Court determined that the respondent's inaction and neglect resulted from a combination of poor scheduling practices and competing personal and professional demands. The Court issued a public reprimand, although two justices dissented, finding the sanction was insufficient.

In *Toledo Bar Assn v. Farah*, 125 Ohio St.3d 455, 2010-Ohio-2116, Farah failed to pursue two personal injury cases, failed to return phone calls, and failed to cooperate with disciplinary investigation. In mitigation, there was the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, and the respondent's eventual cooperative attitude toward the disciplinary proceedings. The Supreme Court imposed a one year suspension, stayed on conditions including cooperating with OLAP, and serving a one year supervised probation.

In *Cleveland Metro.Bar Assn. v. Dawson,* 124 Ohio St.3d 22, 2009-Ohio-5959, the Supreme Court reviewed a case wherein an attorney neglected a pending lawsuit, resulting in a judgment against his clients, and he failed to notify his clients he had no malpractice insurance. The original judgment against his clients was for $184,675, but the clients were able to settle the obligation for $27,000. Respondent had agreed to pay his former clients $22,000, but experienced financial setbacks and filed for bankruptcy, discharging the debt to the clients. He had also failed to comply with attorney registration requirements. In mitigation, the Court found he had no selfish or dishonest motive, cooperated with the disciplinary proceedings, and made full disclosure. The Supreme Court found Dawson should be suspended from the practice of law for six months.

In *Disciplinary Counsel v. Broeren* 115 Ohio St.3d 473, 2007-Ohio-5251 the attorney failed to respond to discovery, failed to timely notify the client of the trial date, and failed to notify the client of a debtor examination. The attorney fabricated several letters to conceal his negligence. The Supreme Court imposed a six month suspension.

Although Respondent in the instant case ultimately incurred interest and penalties of nearly $500,000, this was nevertheless a single and very exceptional occurrence in a legal career spanning 40 years. The sheer size of the IRS debt should not be the sole reason to disbar Respondent given the circumstances of the case.

Respondent should have done the taxes. Respondent was surprised because the Trustee had most of the necessary documents and was a CPA. Respondent hypothesized the estate actually profited by not paying the taxes right away because the money was in the stock market and the market was on the rise at the time in question.

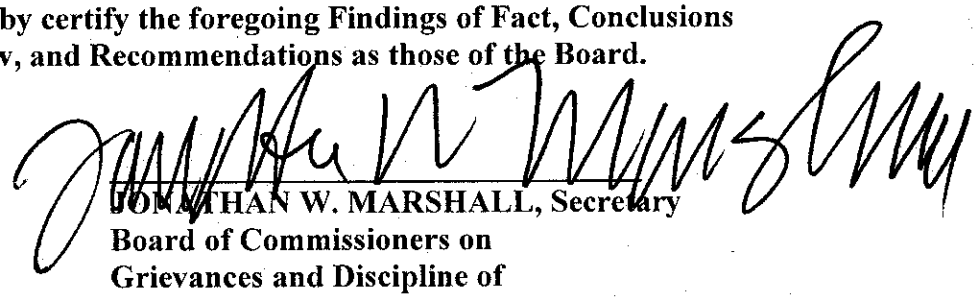
Respondent did not take money from the estate or trust and testified he had few assets. Respondent failed to do the necessary work on the estate and failed to carry insurance that might have ameliorated the estate's and trust's losses. However, the Master Commissioner does not believe this warrants disbarment, particularly in light of the large civil judgment taken.

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 December 2, 2010. The Board adopted the Findings of Fact and Conclusions of Law of the Master Commissioner. It recommends, however, based on the extraordinary circumstances set forth in the record, that the Respondent, David Nittskoff, be suspended from the practice

of law in the State of Ohio for six months. The Board further recommends that the cost of these proceedings be taxed to the 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.



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