

ORIGINAL

No. 2010-1846

IN THE SUPREME COURT OF OHIO

**OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATIONS OF THE BOARD OF
COMMISSIONER ON GRIEVANCES AND DISCIPLINE OF
THE SUPREME COURT OF OHIO
BOARD OF COMMISSIONER'S CASE NO. 09-083**

**Columbus Bar Association
Relator,**

v.

**Kenneth Ray Boggs
Respondent.**

**RELATOR'S ANSWER BRIEF
TO THE RESPONDENT'S OBJECTIONS**

**Michael L. Close, Esq. (0008586)
Bruce A. Campbell, Esq. (0010802)
A. Alysha Clous (0070627)
Columbus Bar Association
175 South Third Street, Suite 1100
Columbus, Ohio 43215
Tel: 614-221-4112, Fax: 614-221-4850**

**Kenneth Ray Boggs, Esq. (0025305)
2560 Slateshire Drive
Dublin, Ohio 43016
Tel: 614-598-6918, Fax: 614-798-1575
Respondent Pro Se**

Counsel for Relator Columbus Bar Association

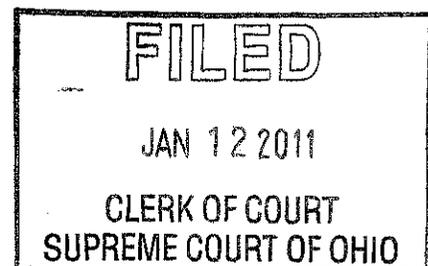


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RELATOR'S BRIEF

1. Facts

The Board of Commissioners on Grievances and Discipline has found that Kenneth Ray Boggs, Registration No. 0025305, has twice been previously disciplined by the Supreme Court of Ohio. The first instance was for betrayal of client confidences, which resulted in a public reprimand. *Columbus Bar Assn. v. Boggs*, (1989) 39 Ohio St.3d 601. The second was for trust account violations, which resulted in a stayed suspension. *Columbus Bar Assn. v. Boggs*, 103 Ohio St.3d 108, 2004-Ohio-4657.

Before addressing specifically the Objections of the Respondent, it is important to note that the Respondent admitted, in *three* separate counts of the current Complaint, his failure to give notice that he did not carry professional liability insurance, a violation of Prof. Cond. Rule 1.4(c). He further admitted *three* trust account violations of Prof. Cond. Rule 1.15(a) & (c). Finally, he admitted that he failed to keep a client informed, thus violating Prof. Cond. Rule 1.4(a). Considering the Respondent's prior sanctions, these violations, are sufficient, in and of themselves, to warrant an indefinite suspension.

Beyond the admitted violations, however, the Board found multiple additional violations not admitted by Respondent. It concluded that Respondent also committed: *two* counts of failure to provide competent representation, in violation of Prof. Cond. Rule 1.1; *two* instances of failure to act with diligence and promptness, in violation of Prof. Cond. Rule 1.1 *two* counts of failure to keep a client reasonably informed, in violation of Prof. Cond. Rule 1.4 (a); *two* instances of charging a clearly excessive fee, in violation of Prof. Cond. Rule 1.5(a); *one* count of conduct adversely reflecting on his ability to practice law, in violation of Prof. Cond. Rule 8.4(h), and,

one additional instance of failure to provide the required information concerning lack of professional liability insurance, in violation Prof. Cond. Rule 1.4(c).

All of the violations found by the Panel and the Board were based on factual determinations supported by clear and convincing evidence in the record, as articulated in its Findings and Conclusion. Respondent, however, despite his own acknowledgement that the Panel had “the greater advantage of all concerned in weighing the credibility and demeanor of the witness for all parties,” (Resp. Brief, p. 8),¹ nevertheless, challenges those factual determinations with respect to the Dotters and Peacock matters. His contentions are without substance, and worse, they are a strong indication that he does not accept full responsibility for his professional failings.

2. The Dotters Grievance

A close review of the Respondent’s Objections concerning the Dotters grievance shows that the matters to which the Respondent objects do not go to the core of the Board’s Findings. Rather than addressing the thrust of the Findings, Respondent picks minor scraps of evidence that he contends *could* be construed in different way and attempts to build upon these alternative constructions a conclusion other than the ones reached by the Board.

One example of his tenuous reasoning amply demonstrates the general nature of arguments on which his Objections hang. In attempting to show that the Board was wrong in concluding that Respondent did not adequately inform his client of the nature and scope of his representation, he points to his own testimony at the Panel Hearing that he had mailed an engagement letter (Hr. Ex. 11) to Ms. Dotters shortly after their initial meeting. (Hr.Tr., pp. 337-

¹ Since Respondent has not complied with the Court’s page-numbering requirements, Relator will cite to the pages of his Objections and Brief starting with the cover page as page 1.

8, line 14). On the foundation of this assertion, Respondent argues (Resp. Obj., p. 6) that the Panel and this Court must presume that the letter Ms. Dotters actually received the letter, notwithstanding her testimony that she did not. He divines this presumption from *Griffin v. General Action Fire & Life Assure. Co.* (1953) 94 Ohio App 403, 116 N.E.2^d 41 (6th App. Dist.), (involving a notice sent to an insured of a policy cancelation), however, his reading of *Griffin* is flawed. The 6th District Court of Appeals specifically recognized in its opinion that “mere proof of the depositing of the notice in the mail addressed to the insured at the address stated in the policy is sufficient, but not conclusive, proof of notice, and may be overcome by evidence that such notice was not actually received by the insured” *Id.*, 441. What Respondent fails to appreciate is that any “presumption” here is rebutted by competent evidence that, in fact, the letter was *not* received. Daniele Dotters flatly denied receiving such a letter. The Panel found her to be a “very credible” witness (Findings, 4), and, to emphasize their belief in her credibility over Respondent’s on this point, they extensively quoted her testimony. (Findings, pp. 6-7).

What is clear from the totality of the evidence regarding the Dotters matter is that Respondent did no beneficial work on the case; that he would not initiate communication with the client, and that she was only occasionally able to reach him by phone when she dogged him. He took advantage of this client on a limited disability income and did so for his own financial gain. Ms. Dotters expected Respondent to open an estate and to secure for her the authority to recover her dad’s personal effects. He did not. She expected him to keep her informed. He did not. She paid him what, for her, was a great deal of money and expected him to do meaningful work on her case. He did nothing. There is not a single allegation in this section of his Brief that addresses those critical issues.

On top of these breaches of a client's trust, Respondent, by his own admission deposited the fees paid by Ms. Dotters directly into his operating account instead of putting them into his trust account to be drawn upon when he had actually earned them. In so doing, he violated Prof. Cond. Rule 1.15 (a) & (c).

In view of these failures, Respondent has no valid reason to suggest that the Panel and the Board wrongfully concluded that he acted unprofessionally in his handling of the Dotters case.

3. The Peacock Grievance

Respondent's actions in the Peacock matter were just as egregious. Mr. Peacock had been fired from the Ohio Department of Youth Services for use of excessive force. Respondent, by his own admission, knew from the beginning of this representation that the union would provide counsel for Mr. Peacock in the arbitration hearing and that it wanted to exercise its contractual right to do so. Nevertheless, Respondent accepted fees of \$4,000, part of which paid Respondent to unnecessarily duplicate the work of union representatives.

In his Brief, Respondent says, "the Panel had a difficult time understanding what Mr. Peacock had hired." (Resp. Obj., p. 7). Presuming he means "what Mr. Peacock had hired *him to do*," Relator could not agree more with the statement. Mr. Peacock clearly was not properly informed as to what Respondent proposed to do for the fee charged. The Panel itself had a difficult time understanding what Respondent's work was supposed to encompass.

Mr. Peacock certainly did expect that Respondent, as part of the work covered by the fees, to assist him in pursuing a complaint with the Civil Rights Commission, yet Respondent, by his own admission (Resp. Obj., p. 8) refused to do so. Despite these admissions, he once again argues that the Findings against him are not supported by clear and convincing evidence.

Respondent's contentions here and in his other Objections are based upon self-serving interpretation of selective snippets of evidence. They ignore the central thrust of the Board's Findings and Conclusions. His contentions are at odds with the record taken -- as it must be -- as a whole. Simply put, the Board got it right.

4. Aggravating and Mitigating Factors

Respondent argues he should be suspended for two (2) years with one year stayed on conditions (including restitution). The Board rejected that finding and instead, weighing the aggravation versus mitigation found that he should be suspended. It is important to balance the aggravating circumstances against the mitigating factors. In analyzing the aggravating factors as required by BCGD Proc. Reg. 10(B)(1), the enumerated factors "shall not control the Board's discretion, but may be considered in favor of recommending a more severe sanction." Here, the evidence supports and the Board found the following aggravating factors:

- (a) Prior disciplinary offenses. The Respondent has twice been disciplined previously.
- (b) Dishonest or selfish motive: The Relator took excessive fees of approximately \$12,000.00 from Ms. Doters and Mr. Peacock
- (c) Pattern of misconduct. The Board found violations to have occurred with respect to four different clients.
- (d) Multiple offenses. Relator has been found, by clear and convincing evidence, to have committed 17 separate violations.

By way of mitigation, the only factor found in Respondent's favor was that he had made full disclosure to the Board and exhibited a cooperative attitude toward the proceedings, just as

he did in the prior disciplinary cases against him. The reality, however, is that contrite and cooperative though he may be when facing ethics charges, Respondent still has not set right his subsequent professional behavior. His trust account violations here are even worse than in his preceding discipline in 2004. He failed to learn then; he cannot now be trusted to conform his conduct to the Rules.

5. Indefinite Suspension is Appropriate

Relator submits that analogous cases decided by this Court suggest, as the Board concluded, that an indefinite suspension is the appropriate sanction in this matter. While each disciplinary case is unique, there are clear parallels between this case and others in which the Court applied the penultimate sanction or even the ultimate sanction.

In *Disciplinary Counsel v. Wise*, 108 Ohio St.3d 381, 2006-Ohio-1194, the Court found that the respondent used his IOLTA account improperly. There, as here, the respondent had been the subject of a prior suspension. Unlike the Respondent here, Wise did not commit multiple acts of neglect, but, on the other hand, was not entirely cooperative in the disciplinary process.

In *Wise*, the Board had recommended a one-year suspension with six months stayed; however, this Court found an indefinite suspension to be appropriate. It held that:

{¶ 15} Ten years ago, we stated that it is “of the utmost importance that attorneys maintain their personal and office accounts separate from their clients’ accounts” and that any violation of that rule “warrants a substantial sanction whether or not the client has been harmed.” [*Erie-Huron Counties Joint Certified Grievance Committee v. Miles*, [1996] 76 Ohio St.3d 577, 669 N.E.2d 831. And in an earlier case, we explained that the “mishandling of clients’ funds either by way of conversion, commingling, or just poor management, encompasses an area of the gravest concern of this court in reviewing claimed attorney misconduct.” *Columbus Bar Assn. v. Thompson* (1982), 69 Ohio St.2d 667, 669, 23 O.O.3d 541, 433 N.E.2d 602.

When dealing with attorneys who have misused public funds, the Court on several occasions has issued indefinite suspensions even though the respondents in question had no prior

disciplinary record, had made restitution, and had fully cooperated in the disciplinary process. *Disciplinary Counsel v. Kelly*, 121 Ohio St.3^d 39, 2009-Ohio-317; *Disciplinary Counsel v. Muntean*, 124 Ohio St. 3^d 1422, 2010-Ohio-6133. Whether an attorney uses public money not his own or takes unearned fees from clients, the ethical issue is the same -- breach of fiduciary duty. Respondent' violation of that duty is no less detrimental to the profession and the public than that of an attorney serving as a public official.

In another recent case, *Cleveland Metro. Bar Assn. v. Kaplan*, 124 Ohio St.3d 278, 2010-Ohio-167, the Court dealt an attorney who engaged in a pattern of neglect, non-communication and failing to maintain IOLTA records in three cases. Mr. Kaplan had no prior disciplinary record in 43 years of practice but was uncooperative and evasive in the disciplinary process. The Court agreed with the Board's Recommendation and issued an indefinite suspension.

Last year the Court also decided that an indefinite suspension was appropriate in a case in which the Respondent misappropriated substantial funds belonging to a client. It did so even though the lawyer had no prior disciplinary record and was fully cooperative in the disciplinary process. *Columbus Bar Assn. v. Thomas*, 124 Ohio St.3d 498, 2010-Ohio-604.

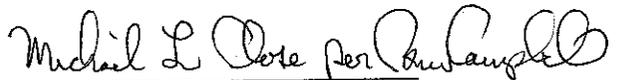
In another recent case, *Cleve. Metro Bar Assn. v. Hildebrand*, ___ Ohio St. 3^d ___, 2010-Ohio-5712, the court disbarred a lawyer who had a prior registration suspension and took unearned fees from three clients.

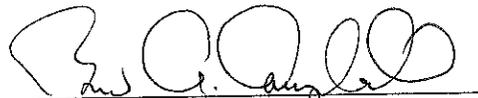
Taken together, these cases and others cited within them, strongly point to the propriety of an indefinite suspension for a lawyer who has twice before been sanctioned for material breaches of the ethical Rules, who has failed to carry out commitments to multiple clients, who has misused his IOLTA account and who has not keep even rudimentary accounting records regarding client funds.

Conclusion

There must finally come a time when the Respondent is held fully to account for his failure to conform his practice to professional norms. He must learn that the need to protect the public transcends his personal desires. There is simply no justification for the Respondent to be allowed to return to the practice of law after a partially stayed suspension as he is requesting. The Objections of Respondent should be overruled, and the Respondent should be suspended from the practice of law indefinitely. Any application to be re-admitted to the Bar should be predicated upon restitution to the victims, payment of costs, a long period of monitored probation as well as appropriate continuing education on law office practice to include trust accounting.

Respectfully submitted,


Michael L. Close (0008586)


Bruce A. Campbell (0010802)


A. Alysha Clous (0070627)

COUNSEL FOR RELATOR

CERTIFICATE OF SERVICE

The undersigned counsel for Relator certifies that he mailed, by US Mail, postage prepaid, a true copy of Relator's Answer Brief to the Respondent pro se, Kenneth Ray Boggs, Esq., at 2560 Slateshire Drive, Dublin, Ohio 43016, this 12th day of January 2011.

A handwritten signature in black ink, appearing to read "Bruce A. Campbell", written over a horizontal line.

Bruce A. Campbell (0010802)