ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel 250 Civic Center Drive, Suite 325 Columbus, OH 43215 **Relator**	:	**CASE NO. 2010-2245**
	:	**RELATOR'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT**
David Nittskoff Attorney Reg. No. 0025471 4491 Mayfield Rd. South Euclid, OH 44121-4061 **Respondent**	:	

RELATOR'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT

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RELATOR'S OBJECTIONS TO THE BOARD OF COMMISSIONERS' FINDINGS OF FACT AND CONCLUSIONS OF LAW AND BRIEF IN SUPPORT

INTRODUCTION

Now comes relator, Disciplinary Counsel, and hereby submits objections to the report of the Board of Commissioners on Grievances and Discipline (the board) filed with this Court on December 22, 2010. The report is attached as Appendix A. See S. Ct. Prac. R.6.2(B)(5)(b).

Pursuant to Gov. Bar R.V(6)(F)(2), this matter was referred to a Master Commissioner for a ruling on a motion for default judgment filed by relator. Based upon the evidence presented in relator's motion for default, the board determined that as to

Count One, respondent, David Nittskoff, violated the Code of Professional Responsibility and the Ohio Rules of Professional Conduct:

- **DR 1-102(A)(5)** (a lawyer shall not engage in conduct that is prejudicial to the administration of justice);
- **DR 1-102(A)(6)** (a lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law);
- **DR 6-101(A)(1)** (a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it);
- **DR 6-101(A)(3)** (a lawyer shall not neglect a legal matter entrusted to him);
- **Prof. Cond. Rule 1.1** (a lawyer shall provide competent representation to a client);
- **Prof. Cond. Rule 1.3** (a lawyer shall act with reasonable diligence and promptness in representing a client);
- **Prof. Cond. Rule 1.4(a)(2)** (a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished);
- **Prof. Cond. Rule 1.4(a)(3)** (a lawyer shall keep the client reasonably informed about the status of the matter);
- **Prof. Cond. Rule 1.4(a)(4)** (comply as soon as practicable with reasonable requests for information from the client);
- **Prof. Cond. Rule 1.4(b)** (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation);

- **Prof. Cond. Rule 8.4(d)** (it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice); and,
- **Prof. Cond. Rule 8.4(h)** (it is professional misconduct for a lawyer to engage in conduct that adversely reflects on the lawyer's fitness to practice law).

As to Count Two, the board determined that respondent violated:

- **DR 1-102(A)(6)** (a lawyer shall not engage in conduct that adversely reflects upon his fitness to practice law), and
- **DR 1-104(A)**(a lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability information).

The board determined that as alleged in Count Three, respondent violated:

- **Prof. Cond. Rule 8.1(b)** (in connection with a disciplinary matter, a lawyer shall not knowingly fail to respond to a request for information from a disciplinary authority), and
- **Prof. Cond. Rule 8.4(h)** (it is professional misconduct for a lawyer to engage in conduct that adversely reflects on the lawyer's fitness to practice law).

The board rejected relator's recommendation that respondent be disbarred and recommended that respondent be suspended from the practice of law for six months. Report at 11. The board's report was certified to this Court and an order to show cause was filed January 4, 2011. Now comes relator and objects to the board's report and recommendations.

FACTS OF THE CASE

Introduction

Respondent was admitted to the practice of law in the state of Ohio on May 2, 1970. As a licensed attorney and on and before January 31, 2007, respondent was subject to the Code of Professional Responsibility. Respondent is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

The formal complaint was certified with probable cause on December 7, 2009. Id. at 2. Respondent was notified that he was required to file an answer to said complaint within 20 days after December 10, 2009. Id. Respondent did not file an answer to relator's complaint.

Relator filed an amended complaint containing three counts of misconduct against respondent on April 30, 2010. Id. Respondent was served with the amended complaint and was notified that he was required to file an answer to said complaint within 20 days. Id. Respondent did not file an answer or any other pleading or response in this disciplinary proceeding.

On September 21, 2010, relator filed a motion for default. In granting relator's motion for default, the board made findings of fact with regard to the amended complaint. The board's findings of fact follow along with other relevant facts that are of record in this disciplinary case.

Facts in Count One

Relator's initial investigation of respondent was based upon a grievance filed by attorneys who represent Stanley P. Frankel, Administrator of the Estate of Jack Gordon.

Exb. 1.[1] Jack Gordon died on September 27, 2005, leaving assets in an estate and in the Jack Gordon Revocable Trust. Report at 2. During his lifetime, Jack Gordon operated a bicycle shop in a declining area near downtown Cleveland. Id. In total, Jack Gordon amassed an estate worth approximately $5 million. Id. at 7.

Frankel was named as Successor Trustee of the Trust and respondent was retained to provide legal services for the estate and the Trust. Id. Prior to Jack Gordon's death, respondent had maintained an attorney-client relationship with Jack Gordon as well as with other members of Jack Gordon's family, including his nephew, Louis I. Gordon. Id. at 2 and 7.

After Jack Gordon's death, respondent performed legal services on behalf of the Jack Gordon Estate and the Jack Gordon Revocable Trust. Inter alia, respondent engaged in communication with Gordon's heirs; attempted to determine the extent of the trust's assets; completed partially handwritten drafts of probate court filings; and, communicated with Stanley P. Frankel. See Exbs. 5, 7, 8, and 23.

In February 2006, respondent communicated with Andreas Traks, a beneficiary of the Jack Gordon Estate. Exb. 7. Respondent asked Traks to sign a "Declination to Serve as Executor" of the Gordon Estate. Id. Respondent's letter explained to Traks that signing the form would permit Frankel to be appointed as the executor of Gordon's estate. Id.

On March 3, 2006, respondent wrote a letter to Attorney Gregory Nolfi. Exb. 8. Respondent's letter stated:

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[1] Exhibit references are to those exhibits that were presented to the board in support of relator's motion for default.

> I have been retained by the family of Jack Gordon regarding representation of his estate. They have retained me because you have not returned their calls. They understand that you prepared and have in your possession, his Last Will and Testament, and a trust document.
>
> Since Mr. Gordon died in September, they are very anxious to get this processed. The (sic) feel that without someone legally being appointed to handle the estate, that the business is being jeopardized.
>
> If you do not have the Will, please advise me.
>
> If you do, I would appreciate it if you would either send it to me so it can be probated, or present it to the Probate Court for Cuyahoga County for deposit so it could be probated.
>
> Please advise me as to which you will be doing.
>
> Upon admission to probate, I presume that the executor/executrix will then authorize the release of the trust documents and other legal documents to me.
>
> Should you have any concerns, do not hesitate to contact me.

By letter dated March 31, 2006, Nolfi sent the original will and trust agreement of Jack Gordon to respondent along with various probate forms. Exb. 11.

In 2006 and early 2007, Frankel continued to contact respondent to determine the status of Jack Gordon's Estate. Exb. 23. In response to Frankel's inquiries, respondent indicated that "everything was being taken care of." Id. Respondent told Frankel that respondent would "take care of" any tax penalty that might be assessed. Id.

On behalf of a trust beneficiary, in February 2007, Frankel sent respondent a letter that he received from Attorney Ronald S. Schickler. Exb. 14. Respondent did not respond; however, respondent continued to indicate his intention to file the tax returns

and to pay himself attorney fees. Exb. 9. Frankel terminated respondent on April 2, 2007. Exb. 10.

Stanley Frankel was appointed as Administrator W.W.A. to the Estate of Jack Gordon on June 20, 2007. Exb. 23. Frankel continues to serve as the Trustee of the Jack Gordon Trust. Id.

On or about November 5, 2007, the Internal Revenue Service informed Frankel that an estate tax return had never been filed and that the Estate was required to pay the IRS a penalty of $317,146.20 and interest in the amount of $134,358.26 (collectively, the "penalty"). Exb. 21, 23. On November 13, 2007, Frankel requested that respondent pay the penalty and/or reimburse the Estate for the penalty. Id.

Respondent did not pay the penalty and did not respond to Frankel's request for reimbursement. Exb. 23. After November 13, 2007, through Frankel, the Estate paid taxes and the penalty to the IRS. Id.

On October 20, 2008, Frankel filed a lawsuit against respondent and Nittskoff & Co., L.P.A. in the Cuyahoga County Court of Common Pleas. Id., Exb. 15, and Exb. 31. The complaint, *Frankel v. Nittskoff*, alleged legal malpractice and was assigned Case No. CV-08-673876. Exb. 15.

At no time relevant to the allegations of misconduct in this formal complaint did respondent maintain professional liability insurance coverage for himself or "Nittskoff & Co., L.P.A." Exb. 3 at page 71. At the time respondent was performing legal services for the Jack Gordon Estate, the entity "Nittskoff & Co., L.P.A." was a legal nullity having been canceled by the Ohio Secretary of State on January 4, 2007 for failure to file tax returns and nonpayment of franchise taxes. Exb. 22.

On and about October 30, 2008, Frankel requested that respondent return all file materials to the Trust and/or the Estate.[2] Exb. 20, 23. To date, respondent has not provided Frankel with any file materials. Report at 3. See, also Exb. 23.

Respondent never filed an answer to the malpractice complaint in *Frankel v. Nittskoff*. Exb. 16. Frankel attempted to conduct discovery; however, respondent never provided responses despite initially communicating with Frankel's counsel. Exb. 17.

On March 25, 2009, Frankel filed a motion for a default judgment against respondent in the malpractice case. Exb. 18, 23. Respondent did not respond to the motion for default judgment. On April 28, 2009, the court entered a default judgment against respondent and "Nittskoff Co., L.P.A." in the amount of $451,504.46. Exb. 19.

Frankel filed a judgment lien against respondent on May 22, 2009, Case No. JL-09-377659. Exb. 32. The judgment lien remains pending. Respondent has not paid the judgment obtained against him obtained by Frankel on behalf of the estate. Exb. 23.

On May 24, 2010, acting pro se, respondent filed a motion for relief from judgment in the Cuyahoga County malpractice case. Report at 3 and Exb. 25. In his Civ.R.60(B) motion, respondent asked that the judgment against him be vacated and that a hearing on damages "be heard de novo." Id. Frankel submitted a response in opposition to respondent's motion for relief from judgment. Exb. 26. By judgment entry filed July 1, 2010, the court denied respondent's motion for relief from judgment. Report at 3 and Exb. 27.

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[2] The Estate was reopened on October 14, 2008 in connection with the malpractice

Failure to Cooperate in Count One

In February 2009, relator sent respondent a Letter of Inquiry. See, Affidavit of Lori J. Brown ("Brown Affidavit"). Despite receiving relator's letter, respondent did not respond. Id. Relator sent respondent a second letter. Id. Again, respondent did not respond. Id. Ultimately relator served respondent with a subpoena duces tecum to attend a deposition in relator's office. Exb. 2. Respondent appeared and was deposed in relator's office on July 21, 2009.

Violations in Count One

As determined by the board and charged in the amended complaint, respondent's conduct violates: DR 1-102(A)(5); DR 1-102(A)(6); DR 6-101(A)(1); and, DR 6-101(A)(3). The board further determined that on and after February 1, 2007, respondent's conduct as set forth in Count One violates: Prof. Cond. Rule 1.1; Prof. Cond. Rule 1.3; Prof. Cond. Rule 1.4(a)(2); Prof. Cond. Rule 1.4(a)(3); Prof. Cond. Rule 1.4(a)(4); Prof. Cond. Rule 1.4(b); Prof. Cond. Rule 8.4(d); and, Prof. Cond. Rule 8.4(h).

Facts and Violations in Count Two

During the period of time related to his handling of the Jack Gordon Estate and the Trust, respondent failed to inform any of his clients, including Stanley Frankel, that neither he nor "Nittskoff Co., L.P.A." maintained professional liability insurance. Report at 3. As determined by the board, respondent violated DR 1-102(A)(6) and DR 1-104(A).

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lawsuit filed against respondent. Frankel was reappointed on October 17, 2008.

Facts in Count Three

In 2009 respondent maintained an interest bearing account at Charter One Bank. Exb. 27. The interest-bearing account at Charter One Bank is known as the "David Nittskoff, Atty at Law IOLTA" and bears Account No. 450xxx-2786 (the IOLTA). Id. In October 2009, respondent had an overdraft of $49.04 in his IOLTA. Report at 4.

Failure to Cooperate in Count Three

As a result of the bank's overdraft notification and on November 30, 2009 relator sent respondent a Letter of Inquiry regarding the overdraft. Exb. 28. Respondent received the first Letter of Inquiry but did not respond. See, Brown Affidavit. On December 31, 2009 relator mailed respondent a second Letter of Inquiry regarding the IOLTA overdraft. Exb. 29 and id. Respondent did not respond to the December 31, 2009 letter. Id.

Violations in Count Three

As alleged in Count Three and as determined by the board, respondent violated Prof. Cond. Rule 8.1(b) and Prof. Cond. Rule 8.4(h).

RELATOR'S OBJECTION

This Court Should Reject the Board's Recommendation And Enter an Order Disbarring Respondent

Citing numerous aggravating factors, an absence of meaningful mitigation evidence, and relying on cases previously decided by this Court, relator recommended in his motion for default that respondent be disbarred. Despite numerous ethical violations and a plethora of aggravating factors, the board concluded that respondent should receive a six-month suspension from the practice of law.

The board assigned no conditions to respondent's reinstatement and stated that "the extraordinary circumstances set forth in the record" justified its recommendation. Unfortunately, the board failed to explain precisely what those "circumstances" were or how they could possibly justify such a shocking departure from precedent. This Court should reject the board's recommendation and enter a sanction that is consistent with the facts of this case and prior decisions.

In the section of its report titled "Case Law Discussion," the board accepts some of the explanations offered by respondent at his deposition in July 2009. As previously noted, respondent's court-ordered appearance at his deposition was his <u>only</u> participation in the entire disciplinary case. Respondent brought documents to the deposition that relator had never seen and gave self-serving testimony that remains entirely unverified.

The deposition was conducted as part of relator's investigation of the initial grievance filed against respondent. Had respondent participated in the formal disciplinary case, relator would have conducted discovery to determine the accuracy of respondent's explanations. Notwithstanding that this case was a default the board

relied upon respondent's self-serving claims to mitigate his serious neglect, his mishandling of the Jack Gordon Estate, and his failure to cooperate in this disciplinary case.

As one example, during his deposition, respondent justified the fact that he did not ask the IRS for an extension to file tax returns by claiming that he initially did not believe that the estate was large enough to pay taxes. Report at 7. The board noted that when he took the case, respondent had no idea how large the estate was and observed that it took "more than five months" for respondent to discover the breadth of the assets. Id. While those statements may be an accurate reflection of respondent's state of mind, neither is relevant nor are they mitigating factors in this disciplinary case.

The board also relied upon claims that are entirely irrelevant to a determination of the appropriate sanction. Relying solely upon respondent's deposition testimony, the board noted that Frankel had been Jack Gordon's accountant for more than 30 years. Id. The board also relied entirely upon respondent's irrelevant and hearsay deposition testimony to conclude that Frankel "informed [r]espondent the value of the bicycle shop was zero." Id.

In reaching its recommendation, the board stated:

> 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.

Report at 10. The foregoing conclusions are legally unsupportable and are based solely upon irrelevant, hearsay deposition testimony.

It is not relevant to this disciplinary case that Frankel was a CPA. Whether the stock market was "on the rise" is irrelevant. It is not relevant that respondent thought that someone else was in possession of "necessary documents." There is no evidence regarding what "documents" the board is referring to or who thought they were "necessary." Other than his self-serving testimony, there is no evidence that respondent tried unsuccessfully to obtain the "necessary" documents.

It is relevant that respondent agreed to provide legal representation to the Jack Gordon Estate and to Frankel. It is relevant that respondent did not file certain estate tax returns and that he did not ask for an extension of time to file the returns. Id. at 3.

The board's conclusion that respondent did not literally "take money from the estate" may be technically correct. Nevertheless, respondent's misconduct had the same ultimate effect. Respondent's misconduct caused damage and caused the estate to lose significant value. The evidence establishes that because of respondent's misconduct, the Estate was required to pay the IRS a penalty of $317,146.20 and pay interest in the amount of $134,358.26. Id. See, also Exb. 21, 23.

Had respondent participated in this disciplinary case as the Rules of Professional Conduct and the Rules for the Government of the Bar require him to do, respondent may have been able to present evidence that tempered the obvious damage caused by his misconduct. Respondent did not participate in this disciplinary case in any way,

shape or form.[3] The claims respondent made during his deposition are in large part self-serving and mostly irrelevant to this Court's determination of an appropriate sanction.

The board's list of mitigating factors at page six of its report defies explanation. Among the mitigating factors the board concluded were "present" in this case is BCGD Proc. Reg. 10(B)(2)(d), i.e. "[f]ull and free disclosure to the Disciplinary Board or cooperative attitude towards the proceedings." Report at 6. After finding an aggravating factor in respondent's "failure to cooperate" in the disciplinary process, the board then inexplicably "credited" respondent for his appearance at a deposition during the investigation.

Respondent was subpoenaed for that deposition. Respondent did not appear voluntarily. The testimony given by respondent under order of this Court is the only participation by respondent in relator's initial investigation. More importantly, respondent never participated in the case after a formal complaint was filed. Under those facts, the board's conclusion that respondent gave full and free disclosure to the "disciplinary board" or displayed a "cooperative attitude toward the proceedings" is simply wrong. As this Court has held, respondent's attendance at his deposition "is offset by his subsequent indifference to the disciplinary process." See *Disciplinary Counsel v. Mathewson*, 113 Ohio St.3d 365, 368, 2007-Ohio-2076, 865 N.E.2d 891 (indefinite suspension with restitution of $600 required for neglect, misuse of IOLTA funds, and a failure to cooperate).

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[3] As previously set forth, respondent's deposition was taken during relator's investigation and before the formal complaint was filed.

recommendation of a six-month suspension bears not even a modicum of resemblance to the sanction appropriate for respondent's misconduct in this case.

For example, in support of its recommendation, the board relied on *Cuyahoga Cty. Bar Assn. v. Johnson*, 123 Ohio St.3d 65, 2009-Ohio-4178, 914 N.E.2d 180. The 2009 *Johnson* decision is distinguishable for several reasons not limited to the fact that it was not decided on a motion for default. Johnson appeared and participated in the process and offered mitigation evidence.

The *Johnson* Court issued a public reprimand and concluded that Johnson's inaction and neglect resulted from poor scheduling practices and competing personal and professional demands. In contrast, in the instant case, respondent was found to be in default in the board case and there is no relevant evidence in this case regarding what may have "caused" respondent's misconduct. The mitigating factors listed in *Johnson* are not present in this case.[5]

The board also relied on *Toledo Bar Assn. v. Farah*, 125 Ohio St.3d 455, 2010-Ohio-2166, 928 N.E.2d 1097. The respondent in *Farah* was suspended for 12 months with the entire suspension stayed upon conditions. Unlike the instant case, the respondent in *Farah* eventually displayed a cooperative attitude toward the disciplinary proceedings. The *Farah* case was not decided upon a motion for default and is therefore inapplicable to the instant case. In further contrast, there was no evidence in the *Farah* case that a client was damaged by the misconduct and the Court found a

[5] One year after the 2009 *Johnson* decision, the same respondent, Rita A. Johnson, was disciplined a second time. *Cleveland Metropolitan Bar Assn. v. Johnson*, 127 Ohio St.3d 97, 2010-Ohio-4832, 936 N.E.2d 938. For her misconduct in the second case, Johnson was suspended for 12 months with six months stayed. Johnson's

single violation of DR 6-101(A)(3) for neglect of a client's matters and Prof. Cond. Rule 8.1(b) for failing to cooperate. The instant case is distinguishable from *Farah* and an increased sanction is appropriate.

Cleveland Metropolitan Bar Assn. v. Dawson, 124 Ohio St.3d 22, 2009-Ohio-5959, 918 N.E.2d 519, was also cited by the board to support its recommendation. Like the other cases, *Dawson* was not a default. Dawson cooperated throughout the disciplinary process, made full and free disclosure, and was suspended from the practice of law for six months for violations of DR 1-102(A)(6), DR 1-104(A), and DR 6-101(A)(3). Dawson's failure to reimburse his clients for the damage caused by his neglect cannot be equated to the misconduct in the instant case.

The board also cited *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, 875 N.E.2d 935 in support of a six-month suspension. Like the others, the oft-cited *Broeren* case is not a default and is therefore inapplicable to the instant case.

Finally, the board appears to have credited the respondent for mitigation in the form of the large malpractice judgment against him. The report states, "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." Report at 10. This Court recently rejected precisely the same reasoning in *Lorain Cty. Bar Assn. v. Godles*, Slip Opinion No. 2010-Ohio-6274.

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reinstatement is conditioned upon submitting to a mental health examination and if necessary, entering into an OLAP contract.

In *Godles*, this Court stated:

> The mere fact that a malpractice suit was pending should not have been considered as a mitigating factor, as the suit itself is not a penalty. Respondent has since submitted a notice of restitution, but we do not accept this as a mitigating factor either, because he settled the case with no admission of malpractice, which means that respondent did not admit to the misconduct and is not technically being penalized for it.

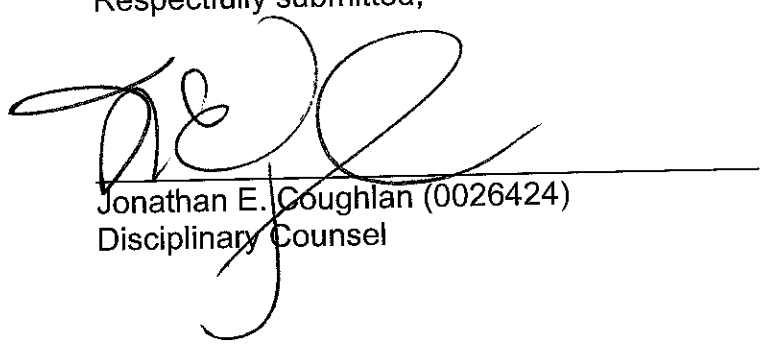
Id. at ¶16 (citation omitted).

In addition to the neglect and default cases cited above, in his motion for default, relator cited cases in which an attorney was disbarred for conduct similar to that of respondent. To wit, in *Columbus Bar Assn. v. Kiesling*, 125 Ohio St.3d 36, 2010-Ohio-1555, 925 N.E.2d 970, the court held that disbarment was the appropriate sanction after determining inter alia, that Mark C. Kiesling "neglected client matters, failed to seek the lawful objectives of his client, failed to consult with and respond to reasonable requests for information from his clients, and failed to promptly deliver client funds and other property that his clients were entitled to receive." Id. at 44. See, also *Cincinnati Bar Assn. v. Weaver*, 102 Ohio St.3d 434, 2004-Ohio-2683, 809 N.E.2d 1113 (persistent neglect, failure to perform as promised, failure to account for client funds, and lack of participation in the disciplinary process warrants disbarment) and *Disciplinary Counsel v. Henry*, Slip Opinion No. 2010-Ohio-6206 (permanent disbarment warranted for attorney who failed to act with reasonable diligence in representing multiple clients over a period of three years; failed to keep two clients reasonable informed about the status of a legal matter; failed to return unearned fees, twice failed to return papers and property to his clients; charged a clearly excessive fee; and, failed to cooperate in nine separate disciplinary investigations).

As noted in *Kiesling*, the primary purpose of the disciplinary process is not to punish the offending attorney, "but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship." *Kiesling*, 125 Ohio St.3d at 44 (citation omitted). There is no evidence that respondent is worthy of the trust or confidence that is essential to an attorney-client relationship. The multiple offenses, the resulting harm and the lack of cooperation all show that respondent is "a danger to the public and is not fit to remain in the legal profession." *Cleveland Bar Assn. v. Dadisman*, 109 Ohio St.3d 82, 88, 2006-Ohio-1929, 847 N.E.2d 26.

Accordingly and based upon all of the foregoing, this Court should overrule the board's recommended sanction and issue an order that is consistent with previous decisions of this Court. Respondent, David Nittskoff, should be disbarred from the practice of law in the state of Ohio.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon the Board of Commissioners on Grievances and Discipline, c/o Jonathan W. Marshall, Secretary, 65 South Front Street, 5th Floor, Columbus, Ohio 43215, and respondent's counsel David Nittskoff, 4491 Mayfield Rd., South Euclid, OH 44121-4061, via regular U.S. mail, postage prepaid, this 20th day of January, 2011.

Lori J. Brown

Lori J. Brown (0040142)

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

In Re:	:	
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).

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

APPENDIX
A

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.

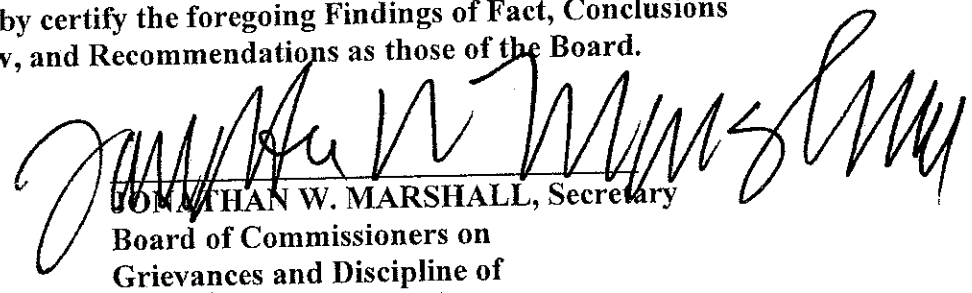
Respondent did not take money from the estate or trust and testified he had few assets. Respondent failed to do the necessary work on the estate and failed to carry insurance that might have ameliorated the estate's and trust's losses. However, the Master Commissioner does not believe this warrants disbarment,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