

ORIGINAL

IN THE SUPREME COURT OF OHIO

In re

Complaint Against

John W. Hauck (#0023153)
RESPONDENT

Case No. 2011-0023

CINCINNATI BAR ASSOCIATION
RELATOR

RELATOR'S BRIEF
IN SUPPORT OF OBJECTIONS

**RELATOR'S OBJECTION TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

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IN THE SUPREME COURT OF OHIO

In re

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Case No. 2011-0023

CINCINNATI BAR ASSOCIATION
RELATOR

RELATOR'S BRIEF
IN SUPPORT OF OBJECTIONS

**RELATOR'S OBJECTION TO THE FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE
BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE**

Respondent hereby objects, in part, to the Findings of Fact, Conclusions of Law, and Recommendation filed by the Board of Commissioners on Grievances and Discipline, to wit:

Relator agrees with the Board's finding that Respondent violated Professional Conduct Rules 1.15 (a) and 1.15 (b).

Relator agrees with the Board's finding that Respondent violated Professional Conduct Rule 1.4 (c).

Relator agrees with the Board's finding that Respondent violated Professional Conduct Rule 8.4 (c).

Relator objects to the Board's recommended sanction against Respondent.

Relator submits the following brief in support of this objection.

STATEMENT OF FACTS

On or about January 30, 2009, Respondent began a guardianship case in the Hamilton County Probate Court after settling a personal injury claim for a minor. [Findings of Fact, Conclusions of Law and Recommendation of the Board (Board Opinion), p.2]. A guardian was appointed for the minor on February 10, 2009. (Board Opinion, p. 3). The guardian was to deposit the net proceeds from the minor's personal injury claim in a custodial account. (Board Opinion, p. 3).

On or about February 10, 2009, Respondent wrote a check from a National City bank account to the guardian for the net settlement proceeds. (Board Opinion, p. 3). However, the guardian never deposited the check into the custodial account. (Board Opinion, p.3).

There were a series of hearings in which the Magistrate attempted to determine the status of the minor's settlement check. (Hearing Transcript, p. 54). Respondent testified at hearing that he told the Magistrate the balance in his account had fallen below the minor's \$2,800 settlement amount due to commingling. (Hearing Transcript, p.54). Respondent did not keep records of the funds in the account. (Board Opinion, p. 4). Once the account balance had been replenished, Respondent returned the funds on June 11, 2009. (Stipulations of Facts, ¶ 5; Respondent's Answer to Amended Complaint, ¶ 2).¹

The account from which Respondent wrote the check was an account legally titled "ABC Company." (Board Opinion, p. 3). ABC Company was the name of a former 501 (c)(3) non-profit corporation controlled by the Respondent. (Board Opinion, p. 3). Respondent commingled his personal, business and client funds in this account for a number of years. (Board Opinion, p. 3). The checks for this account had the Respondent's

¹ Board Opinion, p. 3, has an apparent error, listing the date as July 11, 2009.

name, "Attorney at Law", and "IOLTA" printed at the top. (Board Opinion, p. 3). They did not say "ABC Company." (Hearing Transcript, p. 41). Respondent admitted at hearing that this was deceptive and would lead payees to believe checks they received had been issued from Respondent's IOLTA account. (Board Opinion, p. 3).

One of Respondent's reasons for using the ABC Company account was to prevent the IRS from garnishing the money in the account, as Respondent had a history of tax problems. (Board Opinion, p. 3) Respondent admitted that avoiding or delaying tax garnishments "could be one of the effects of having that one account." (Hearing Transcript, p. 59). Respondent also admitted he chose the account for the purpose of minimizing exposure to IRS garnishments. (Hearing Transcript, p. 75). At hearing, Respondent admitted that the nature of this set up was "deceptive and dishonest." (Hearing Transcript, p. 34).

Respondent was found to have violated Rule 1.15(a), Rule 1.15(b), and Rule 8.4(c). (Board Opinion, p. 4). Respondent was also found to have violated Rule 1.4 (c), though the Board mistakenly listed the violation as Rule 1.1 (c). (*See* Stipulation of Facts, ¶ 9; *see also* Respondent's Answer to Amended Complaint, ¶ 6).

At the conclusion of the hearing on this matter, Relator recommended that Respondent be suspended for two years, with one year of the suspension stayed. (Hearing Transcript, p. 77). Respondent requested a stayed suspension, with conditions, including monitoring. (Hearing Transcript, p. 82). The hearing panel recommended a 12 month suspension, with six months stayed on conditions. (Board Opinion, p. 6). The Board adopted the Findings of Fact and Conclusions of Law of the panel, but recommended a

12 month suspension, with the entire suspension stayed on conditions. (Board Opinion, p. 6).

ARGUMENT

PROPOSITION OF LAW

An actual suspension should be imposed on a Respondent who commingles his personal and client funds in a business account mislabeled as an IOLTA account, and does so in order to shield his personal funds from garnishment by the Internal Revenue Service.

The Ohio Supreme Court has “consistently recognized that the ‘mishandling of client’s funds, either by way of conversion, commingling, or just poor management, encompasses an area of gravest concern of this court in reviewing the claimed attorney misconduct.” *Disciplinary Counsel v. Riek*, 2010-Ohio-1556 at ¶ 10; see also *Disciplinary Counsel v. Crosby*, 2009-Ohio-6763 at ¶ 15. The Court has reiterated many times that “it is of the utmost importance that attorneys maintain their personal and office accounts separate from their clients’ account and that any violation of that rule warrants a substantial sanction whether or not the client has been harmed.” *Riek* at ¶ 10; see also *Crosby* at ¶ 15. Additionally, the Court has held that “a lawyer may not use his trust account, which is a tool established for the benefit of the profession, as a ‘safe haven’ for his money to avoid his personal financial responsibilities.” *Disciplinary Counsel v. Vogtsberger*, 2008-Ohio-4571 at ¶ 10.

When determining a sanction, the court considers sanctions handed down in similar cases. In *Disciplinary Counsel v. Riek*, 2010-Ohio-1556, the respondent commingled funds in his trust account. The respondent then wrote a settlement proceeds check to a client, which was dishonored for insufficient funds. *Id.* at ¶ 7. When the client

confronted the respondent, the respondent lied to the client, insisting that there was a mix-up at the bank. *Id.* The Board found no aggravating factors, and found mitigating factors of no prior disciplinary action, cooperation, and positive character evidence. *Id.* at ¶ 11. Respondent received an 18 month suspension, with 12 months stayed. *Id.* at ¶ 14.

In *Disciplinary Counsel v. Vogtsberger*, 2008-Ohio-4571, the respondent commingled funds in his trust account. He admitted to doing so in order to shield the funds from personal creditors. *Id.* at ¶ 3-4. The respondent received a two year suspension with one year stayed. *Id.* at ¶ 11.

Lastly, in *Disciplinary Counsel v. Crosby*, 2009-Ohio-6763, the respondent commingled funds in his trust account. He also allowed an employee to write checks from the account for business and personal expenses, leading to several overdrafts. *Id.* at ¶ 3-5. In aggravation, the respondent was found to have a dishonest motive, as he was attempting to hide funds from tax authorities and other creditors. *Id.* at ¶ 16-17. The respondent also did not cooperate. *Id.* at ¶ 16-17. He received a two year suspension.

The above cases feature varying levels of commingling. Much like the respondents in *Vogtsberger* and *Crosby*, the instant Respondent commingled his funds in order to evade creditors. In this case, Respondent had two reasons for commingling his funds. First, he did so to avoid overdraft fees. Respondent also commingled the funds in order to shield the funds from tax authorities, as he had tax problems in the past. Respondent's conduct is most like the respondent in *Vogtsberger*, because the respondent in *Crosby* allowed others to access the IOLTA account unsupervised, resulting in numerous overdrafts, and did not cooperate with the disciplinary investigation.

Respondent's conduct is also very similar to that in *Riek*. Respondent commingled his funds, and as a result, was unable to pay a client's settlement proceeds when ordered to do so. Additionally, Respondent also was charged with dishonesty for both his use of the "ABC Company" account as a safe haven for his personal funds and his use of checks with "IOLTA" printed on them, even though the account was not a trust account.

In addition to the violations found in the cases above, Respondent also was charged with a violation of Rule 1.4 (c) for failure to notify clients of his lack of malpractice insurance. This violation alone results in a public reprimand. *Cincinnati Bar Ass'n v. Trainor*, 2006-Ohio-3825.

In each of the above cases, the respondents received actual suspensions. These ranged from six months to two years. Respondent's case is very similar to the cases above in which a partially stayed suspension was imposed. Respondent should serve time on an actual suspension, with the remainder of the suspension stayed on conditions.

The Court must also consider aggravating and mitigating factors when imposing a sanction. In the instant case, the Board found the mitigating factors of no prior discipline and cooperation with the investigation. In aggravation, the Board found that Respondent acted with a dishonest motive.

While the mitigating factors should be considered in this case, they should not outweigh the aggravating factor. Respondent's dishonest motive is a serious aggravating factor that should be considered when imposing a sanction.

CONCLUSION

Respondent's conduct in commingling his funds is serious in nature, as has been evidenced by the numerous decisions of this Court attesting to the gravity of the offense. Additionally, Respondent has acted with a dishonest motive and was charged with a violation of Rule 8.4. As such, Relator requests that Respondent serve at least 6 months of any suspension that is imposed.

Respectfully submitted,

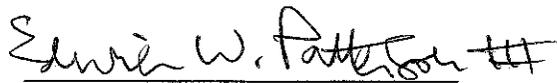
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Relator's Objections to the Findings of Fact, Conclusions of Law, And Recommendation of the Board of Commissioners on Grievances and Discipline has been served via regular U.S. Mail, postage prepaid, this 28th day of January, 2011 upon John H. Burlew, Counsel for Respondent, The Nathaniel Ropes Building, 917 Main St., 2nd Floor, Cincinnati, OH 45202.


Edwin W. Patterson (#0019701)

APPENDIX

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

In Re:	:	
Complaint against	:	Case No. 10-022
John W. Hauck	:	Findings of Fact,
Attorney Reg. No. 0023153	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Cincinnati Bar Association	:	the Supreme Court of Ohio
	:	
Relator	:	
	:	

INTRODUCTION

A formal hearing was held in this matter on September 29, 2010 in Columbus, Ohio before a Panel consisting of members Irene Keyse-Walker, Keith A. Sommer, and William J. Novak, Panel Chair. None of the Panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Respondent, John W. Hauck, was present and represented by attorney John H. Burlew. Relator, the Cincinnati Bar Association, was represented by Richard H. Johnson and James K. Rice.

Following the filing of the complaint and Respondent's answer the parties submitted a proposed agreed consent to discipline that was filed on June 21, 2010. Upon review, this Panel found that the agreement conformed to BCGD Proc. Reg. Sec. 11. However, the Panel members did not accept the agreement or Respondent's proposed sanction as set forth by the parties. Following the rejection of the consent to discipline, an amended complaint was filed and Respondent retained John H. Burlew who filed an answer. The parties submitted a final set of

stipulation of facts including stipulated violations of the Rules of Professional Conduct (the stipulations were not signed by Respondent). In addition, Respondent, John W. Hauck, testified during the hearing. There was also a character witness, Magistrate Kathy King of the Hamilton County Domestic Relations Court, who testified on behalf of the Respondent regarding his honesty.

BACKGROUND OF RESPONDENT

Respondent John W. Hauck was admitted to the practice of law in the State of Ohio on November 20, 1978. Respondent is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. Respondent is not licensed in any other states and he has never been subject to any prior discipline. From 1985 to present he is a sole practitioner whose practice is primarily civil. He divested himself of significant inherited personal wealth to aid low-income individuals and communities in need in the Cincinnati area. His wife is disabled and he supports four children.

CHARGES

Respondent was charged in an Amended Complaint filed on August 23, 2010 with misconduct in violation of the following provisions:

1. Prof. Cond. R. 1.15(a) and 1.15(b) [failing to keep client funds separate from attorney's personal funds, failing to maintain those funds in a trust account, and failing to maintain adequate records of the funds in the account];
2. Prof. Cond. R. 1.1(c) [failing to provide notice to clients of attorney's failure to carry professional malpractice insurance];
3. Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation].

FINDINGS OF FACT

1. On or about January 30, 2009 Respondent commenced a guardianship case in the Hamilton County Probate Court as a result of the settlement of a personal injury claim of a minor.

2. A guardian was appointed for the minor on February 10, 2009. The guardian was ordered to deposit the net settlement proceeds from the minor's personal injury claim in a custodial account.

3. On or about February 10, 2009 Respondent issued a check from a National City Bank account number X617 to the guardian for the net settlement proceeds for the minor's personal injury claim but the guardian never deposited the check in the custodial account.

4. As a result of learning of the inaction by the guardian on or about March 30, 2009, Respondent put a stop payment on the check he issued from National City Bank account number X617. Respondent did not return the funds to the guardian until on or about July 11, 2009.

5. National City Bank account number X617 is an account formally titled in the name of "ABC Company" which is a name of a former 501(c)(3) non-profit corporation previously formed by Respondent. On or about 2001 through 2009, Respondent began comingling his personal, business and client funds in account number X617. Respondent used that account for all purposes. The checks had Respondent's name, as attorney at law, and IOLTA printed at the top. Even though the checks are printed with the words IOLTA account they are used for purposes of paying personal and business expenses. A recipient or payee of one of these checks would clearly assume that this check was coming from the John W. Hauck, Attorney at Law, IOLTA account when in fact this account was registered in the name of "ABC Company." During his testimony Respondent admitted that it was deceptive to issue these checks to payees.

6. Because of prior issues with the Internal Revenue Service (IRS) in the 1980's and 1990's, one of the motivations for setting up the foregoing account was to prevent the IRS from recognizing money going in and out of that account and to minimize Respondent's possible exposure to the IRS on personal tax garnishments, although there are no current tax issues pending.

7. The filing of the original grievance in this matter was instituted by the Probate Court of Hamilton County. At one of the probate hearings, Respondent admitted to the magistrate that there may have been comingling in that account and that he needed time to cover a check to be reissued for the guardian.

8. Respondent did have an IOLTA account which was inactive.

9. Respondent has not maintained malpractice insurance since April 1, 2009.

Respondent did not begin informing his clients that he did not have malpractice insurance until on or about February 8, 2010.

10. Respondent has failed to keep adequate records of client funds.

CONCLUSIONS OF LAW

The Panel finds by clear and convincing evidence and unanimously adopts the rule violations that the parties stipulated. Respondent engaged in misconduct by using the “ABC Company” account as the John W. Hauck, Attorney at Law IOLTA account and for comingling personal, business and client funds in that account. In addition, Respondent failed to inform his clients of his lack of malpractice insurance coverage. The violations are as follows:

1. Prof. Cond. R. 1.15(a) and 1.15(b) [failing to keep client funds separate from attorney’s personal funds, failing to maintain those funds in a trust account, and failing to maintain adequate records of the funds in the account];
2. Prof. Cond. R. 1.1(c) [failing to provide notice to clients of attorney’s failure to carry professional malpractice insurance];
3. Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation].

AGGRAVATING/MITIGATING FACTORS

Based upon the evidence, stipulations and exhibits, the Panel finds the following mitigating factors in this matter:

1. Respondent has not been the subject of prior discipline;
2. Respondent has made a full and free disclosure to the Disciplinary Board and has exhibited a cooperative attitude toward the proceedings.

Based upon the evidence, stipulations, and exhibits, the Panel finds the following aggravating factor:

1. Respondent has acted with a dishonest motive.

SANCTION

In determining appropriate sanctions for attorney misconduct, all relevant factors must be considered, including the duties of the Respondent, the violations incurred and the sanctions imposed in similar cases, *Stark County Bar Association v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743. We therefore direct our attention to *Disciplinary Counsel v. Vogtsberger*, 119 Ohio St.3d 458, 2008-Ohio-4571 and *Toledo Bar Assn. v. Weisberg*, 124 Ohio St.3d 274, 2010-Ohio-142. In *Vogtsberger* the respondent commingled personal funds with his client trust account to shield funds from creditors. In that case, the Court adopted the recommended sanction and ordered a suspension for two years with one year stayed with conditions. In *Weisberg*, the Court issued a two year suspension all stayed. However, in that case the respondent's conduct and the ultimate sanction was impacted by his gambling problem. In this case, while the panel finds the conduct of the Respondent inappropriate, there were no pending tax liens or judgment creditors.

As the foregoing demonstrates, there were mitigating factors taken into consideration in imposing the recommended appropriate sanction in this case. Of significance was the compelling testimony of Kathy King, Magistrate of the Domestic Relations Court of Hamilton County who vouched for this Respondent's integrity and honesty. This witness recounted Respondent's record

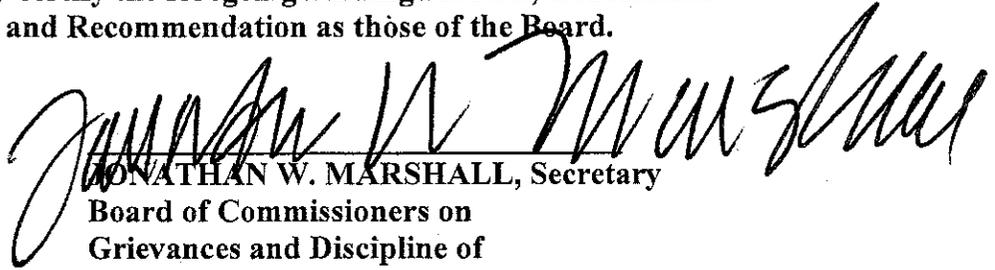
of public service since law school throughout 30 years of practice as noteworthy with many of his projects and investments designed to strengthen Cincinnati's low income community.

On the other hand, Respondent admitted that the practice of issuing the checks on the "ABC Company" account was deceitful, both to payees and potentially the IRS. IRS, however, has taken no action against Respondent for his actions in this regard. Moreover, throughout his course of conduct no clients were harmed. Therefore, this Panel recommends that the sanction for Respondent's misconduct be a twelve (12) month suspension with six (6) months stayed on the condition that Respondent commit no further misconduct and that Respondent complete a monitored probation under Gov. Bar R. V(9) relating to law office and IOLTA account management.

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 3, 2010. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. It recommends, however, based on the extraordinary evidence of mitigation in the record, that Respondent, John W. Hauck, receive a twelve month suspension with the entire suspension stayed upon the conditions contained in the panel report. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

**Pursuant to the order of the Board of Commissioners on
Grievances and Discipline of the Supreme Court of Ohio,
I hereby certify the foregoing Findings of Fact, Conclusions
of Law, and Recommendation as those of the Board.**



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

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

FILED
SEP 24 2010
BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In re: :
John W. Hauck (#0023153) : Case No. 10-022
2406 Auburn Ave. :
Cincinnati, OH 45219 :
RESPONDENT :
: STIPULATION OF FACTS
:
Cincinnati Bar Association :
225 East Sixth Street, 2nd Floor :
Cincinnati, Ohio 45202 :
RELATOR :

STIPULATION OF FACTS

1. Respondent, John W. Hauck, was duly admitted to the practice of law in the State of Ohio in 1978, and is a sole practitioner in Cincinnati, Ohio.
2. On or about January 30, 2009, Respondent commenced a guardianship case in the Hamilton County Probate Court as a result of settling a personal injury claim of a minor.
3. A guardian was appointed for the minor on or about February 10, 2009. The guardian was ordered to deposit the net settlement proceeds from the minor's personal injury claim in a custodial account.
4. On or about February 10, 2009, Respondent issued a check from National City Bank Account No. X617 to the guardian for the net settlement proceeds from the minor's personal injury claim, but the guardian never deposited the check in the custodial account.
5. As a result of learning of the inaction by the guardian, on or about March 30, 2009, Respondent put a stop payment on the check he issued from National City Bank Account No. X617. Respondent did not return the funds to the guardian until on or about June 11, 2009.

6. National City Bank Account No. X617 is titled "ABC Company" which is the name of a former non-profit company Respondent had formed. Beginning some time in 2001, Respondent began commingling his personal and business funds with the funds of his clients in Account No. X617. Respondent's purpose in selecting this account was to avoid overdraft charges on his personal and business accounts and to avoid tax garnishments by the Internal Revenue Service for income taxes and earnings taxes owed by Respondent to the Internal Revenue Service.

7. Respondent has not maintained malpractice insurance since April 1, 2009. Respondent did not begin informing his clients that he did not have malpractice insurance until on or about February 8, 2010.

8. Respondent has failed to keep adequate records of client funds.

9. By reason of the foregoing, Respondent has violated his oath of office and the rules of Professional Conduct, specifically:

- A. Rule 1.15(a) and 1.15(b) by failing to keep client funds separate from Respondent's personal funds, failing to maintain those funds in a trust account, and failing to maintain adequate records of the funds in the account.¹
- B. Rule 1.4(c) by not carrying professional malpractice insurance and failing to give his clients notice of such fact.
- C. Rule 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation by using the ABC Company account to hide funds from the Internal Revenue Service.

¹ Because Respondent's misconduct occurred both prior to and after the adoption of the Rules of Professional Conduct on February 1, 2007, and the substance of Rule 1.15 (a) and (b) is the same as former Disciplinary Rule 9-102 (a), this charge was consolidated under the current rule. See Office of Disciplinary Counsel v. Crosby, 124 Ohio St. 3d. 226, 227 fn. 1 (2009).

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