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OF THE SUPREME COURT OF OHIO**

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**IN
THE SUPREME COURT OF OHIO**

Disciplinary Counsel,
Relator

Kenneth Levon Lawson
Respondent

CASE NO. 2011-0131

**RELATOR'S ANSWER TO
RESPONDENT'S OBJECTIONS
TO THE BOARD OF
COMMISSIONERS' REPORT
AND RECOMMENDATIONS**

**RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS
TO THE BOARD OF COMMISSIONERS' REPORT AND RECOMMENDATIONS**

Now comes relator, Disciplinary Counsel, and hereby submits this answer to Respondent Kenneth L. Lawson's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

STATEMENT OF FACTS

On February 8, 2011, relator filed objections to the Board report seeking respondent's permanent disbarment, and this pleading included relator's detailed statement of the facts. Relator relies on this prior statement of facts with the following additional factual clarifications.

First, respondent asserts that he has engaged in no misconduct since January 2007. [Respondent's objection brief at 2]. However, respondent overlooks some relevant information

about his conduct since that time. This Court's prior indefinite suspension decision, ordered respondent to comply with his Ohio Lawyers Assistance Program [OLAP] contract. [Stip. Ex. B] This contract required respondent to have at least one weekly contact with his OLAP monitor and to submit monthly logs of his attendance at Alcoholics Anonymous meetings. [Tr. at 82-83] Despite these requirements, since his release from prison on March 9, 2010, respondent has failed to have weekly contacts with his OLAP monitor and has failed to submit any AA meeting logs to OLAP. [Tr. at 83, 85] Additionally, this Court has previously found an attorney's failure to comply with an OLAP contract to be an aggravating factor. *Disciplinary Counsel v. Pullins*, 127 Ohio St. 3d 436, 2010-Ohio-6241, 940 N.E.2d 952 at ¶82-83. See also *In re Application of Tilson*, Slip Opinion No. 2011-Ohio-551 where a failure to follow the terms of an OLAP contract was found to demonstrate, in part, that Tilson did not possess the requisite character, fitness and moral qualifications to be approved to take the bar examination.

Second, respondent attempts to minimize his criminal acts and illegal conduct involving moral turpitude by pointing out that there is "no evidence or suggestion that [respondent] distributed any of the medication to other persons." [Respondent's objection brief at 2] However, notwithstanding the fact that respondent was never convicted for being a drug dealer, the undisputed evidence indicates that he engaged in a substantial and extended pattern of illegal drug-related misconduct, including:

- A three and one-half year long criminal conspiracy involving an estimated 700 illegal prescriptions;
- Solicitation and use of law office staff and criminal defense clients to obtain these illegal prescriptions [Tr. at 37-38];

- Lying to and attempting to “blackmail” his client/co-conspirator, Dr. Broadnax [Tr. at 27-30];
- Falsely advising his client, Dr. Broadnax, that respondent could bribe a state official to protect Broadnax from criminal charges [Tr. at 29];
- Paying Dr. Broadnax with free legal services for the illegal prescriptions;
- Using the names of clients, without their knowledge, to obtain illegal prescriptions [Tr. at 36];
- Making false statements to pharmacy employees claiming he was picking up a prescription for a client [Tr. at 38];
- Lying to judges and attorneys, claiming that he had multiple sclerosis and/or Lou Gerig’s disease to conceal his drug abuse [Tr. at 41-42]; and
- Soliciting false and/or misleading letters from Dr. Broadnax about his client’s medical status for use in court proceedings [Tr. at 42].

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS¹

I.

DISCIPLINE OF RESPONDENT IS NOT BARRED BY RES JUDICATA, DOUBLE JEOPARDY OR COLLATERAL ESTOPPEL

Respondent argues that his felony conviction for participating in a three and one-half year conspiracy to illegally obtain prescription drugs; attempting to swindle one of his co-conspirators, who was also his client, out of \$50,000 by falsely asserting that he could bribe state officials; solicitation of his criminal defense clients and law office staff to participate in his drug conspiracy and theft of over \$60,000 in funds belonging to two clients, cannot be considered in this disciplinary proceeding based upon the legal principles of res judicata, double jeopardy and/or collateral estoppel. Respondent's objection does not have merit for the following reasons.

A. Respondent's Drug Conspiracy and Resulting Felony Conviction Were Not Adjudicated Or Able To Be Adjudicated in Respondent's 2008 Disciplinary Case

Under the umbrella of res judicata, respondent argues the legal concept of claim preclusion "foreclose[s] litigation of a matter that has never been litigated, because of a determination that it should have been advanced in an earlier suit." [Respondent's brief at 4] He

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Relator notes that in the conclusion to respondent's objection brief, he seeks relief from the "restitution burden that would be represented by taxing him the cost of proceedings that should not have been pursued." Because respondent has not raised this as a formal objection, relator will not respond beyond pointing this Court to the evidence recounted below demonstrating that discipline is proper in this matter.

further asserts that “issue preclusion bars the relitigation of a matter that was actually previously litigated and decided.” [Respondent’s brief at 4]

However, the evidence in the present matter does not support the legal theories respondent is asking this Court to apply. The plain facts show us that this Court’s July 2008 disciplinary decision could not have considered respondent’s subsequent April 2009 felony conviction. [Report at 2-3] Additionally, each count of alleged misconduct in the prior and current disciplinary complaints involved different parties, clients, agreements to provide legal representation, fee agreements and actions by respondent. Further, in this Court’s July 2009 order that respondent be subject to an interim suspension, it further “ordered that this matter is referred to the Disciplinary Counsel for investigation and commencement of disciplinary proceedings.” [Stip. Ex. G] As such, respondent’s felony conviction and the supporting facts could not “have been advanced” in his prior disciplinary proceeding and claim preclusion does not apply.

Respondent’s assertion of issue preclusion similarly fails. Respondent’s prior disciplinary matter was focused on respondent’s neglect of the legal matters and failure to properly represent 13 clients, his theft of settlement funds from six clients, his misuse of his IOLTA account to conceal his personal funds from creditors, his failure to cooperate in numerous grievance investigations, and his repeated dishonest statements to clients and relator during investigation of these matters. [Stip. Ex. B] Further, the disciplinary complaints filed against respondent by relator and the Cincinnati Bar Association in the prior proceeding do not allege any of the specific misconduct detailed in the complaint currently pending before this Court. As such, there is no “relitigation of a matter that was actually previously litigated and decided” and issue preclusion does not apply.

This Court previously examined res judicata in an attorney disciplinary matter in *Ohio State Bar Assn. v. Weaver* (1975), 41 Ohio St.2d 97, 99, 322 N.E.2d 665, and held that “the doctrine of res judicata renders final judgments conclusive only when the subsequent actions involve the same parties, or those in privity with them as in the first action; when the issues to which the evidence is directed are identical in both actions; and when the quantum of proof necessary to render both the original and subsequent judgments are identical.” [Emphasis added] As such, “the issues to which the evidence is directed” are not identical in respondent’s prior and current disciplinary cases as required by this Court in *Weaver*, and as the Board correctly found, res judicata is not applicable.

B. Adjudication of the Present Disciplinary Complaint Does Not Violate

Due Process and Double Jeopardy Constitutional Protections

Respondent next argues that any discipline for his criminal conviction and the conduct supporting the conviction is barred by the constitutional protections affording him due process and protecting him from double jeopardy. He asserts that when “there are successive attempts to impose disciplinary sanctions in a case involving the same operative facts and pattern of misconduct” double jeopardy should attach. [Respondent’s objection brief at 9] The Board correctly found this argument to be without merit, and this Court should also.

Lawyer discipline cases are neither criminal nor civil, as the principal aim is protection of the public from individuals who are unfit to practice law. As a result, the procedural protections available in a criminal matter do not necessarily apply to attorney discipline proceedings. Therefore, an attorney’s due process rights are limited to fair notice of the charges against him or her, the facts on which they are based, and a meaningful opportunity for explanation and defense.

See *In re Ruffalo* (1968), 390 U.S. 544, 88 S.Ct. 1222, *In re Cordova-Gonzalez* (C.A. 1, 1993), 996 F.2d 1334, *cert. denied*, (1993) 510 U.S. 992, 114 S.Ct. 549, *Statewide Grievance Comm. v. Presnick* (1990), 215 Conn. 162, 575 A.2d 210. Because respondent has been provided complete notice of the charges against him and an opportunity to defend against these charges, it is clear he has not been deprived of the due process to which he is entitled. Further, double jeopardy is a criminal law concept, to prevent multiple punishments for the same crime. As such, double jeopardy is not applicable in attorney discipline cases where protection of the public, not punishment, is the aim.

Next, respondent's factual premise for his argument is not accurate. As stated above, each count of alleged misconduct in the prior and current disciplinary complaints involved different parties, clients, agreements to provide legal representation, fee agreements and actions by respondent. As such, the matters for which was respondent was previously disciplined and for which he is currently facing discipline are not the same matters.

Finally, relator notes that respondent has provided no attorney discipline case law from Ohio or any other jurisdiction that supports his novel argument. Therefore, because respondent's argument is not supported by the evidence or precedent, relator requests this objection be overruled.

II.

RESPONDENT'S PRIOR INDEFINITE SUSPENSION IS AN AGGRAVATING FACTOR

The Board found respondent's prior indefinite suspension to be an aggravating factor. [Report at 6] Respondent now argues that his prior discipline cannot be considered as an

aggravating factor in the current disciplinary case because he was sanctioned for a “pattern of misconduct.” in both disciplinary proceedings for the same misconduct. Respondent’s objection should be overruled for four reasons.

First, respondent’s argument is not supported by the facts. Respondent’s “pattern of misconduct” in his prior disciplinary case involved the neglect of and theft from multiple clients. Respondent’s “pattern of misconduct” in the present matter involved his three and one-half year criminal conspiracy to obtain prescription drugs and his underlying unethical conduct. As such, the Board has recommended that respondent be disciplined for additional ethical misconduct beyond that which was previously addressed by this Court.

Second, BCGD Proc. Reg. 10(B)(1) sets out the factors to be considered in aggravation and BCGD Proc. Reg. 10(B) states that “the Board shall consider all relevant factors.” Further, BCGD Proc. Reg. 10(B)(1)(a) identifies “prior disciplinary offenses” as the first in a series of aggravating factors for consideration by the Board. As such, it is clear that a prior disciplinary sanction is a relevant and appropriate factor to be considered in aggravation.

Third, in *Disciplinary Counsel v. Young*, 113 Ohio St.3d 36, 2007-Ohio-975, 862 N.E.2d 504, this Court rejected a similar “argument that when relatively contemporaneous ethical infractions are prosecuted separately and suspensions are ordered in both cases, the sanction in the second case should necessarily run concurrently with the first.” *Id.* ¶30. As such, it is proper for respondent’s prior discipline for contemporaneous, but different, ethical misconduct to be considered as an aggravating factor. Finally, relator notes that respondent has offered no case law in support of this legal theory that he seeks this Court to adopt.

III.

THIS COURT'S PRIOR CASE LAW DOES NOT SUPPORT A CONCURRENT INDEFINITE SUSPENSION

The Board recommended that respondent receive an indefinite suspension to be served consecutively to his prior indefinite suspension. Respondent objects and asserts that this second indefinite suspension should be served concurrently because “the specific conduct which is the subject of this proceeding is part of the same pattern of misconduct which has already been sanctioned.” [Respondent’s objection brief at 10] For the following four reasons, respondent’s objection should be overruled.

First, as discussed above, respondent’s prior disciplinary case involved his neglect and failure to properly represent 13 clients, theft of settlement funds from six clients, misuse of his IOLTA account to conceal his personal funds from creditors, failure to cooperate in numerous grievance investigations and repeated dishonest statements to clients and relator during the investigation of these matters. [Stip. Ex. B] The present matter involves respondent’s felony conviction for participating in a three and one-half year conspiracy to illegally obtain prescription drugs; attempting to swindle one of his co-conspirators, who was also his client, out of \$50,000 by falsely asserting that he could bribe state officials; solicitation of his criminal defense clients and law office staff to participate in his drug conspiracy and theft of over \$60,000 in funds belonging to two clients. As such, respondent is arguing that he should receive no additional disciplinary sanction for a felony conviction and his extended pattern of illegal conduct involving moral turpitude. Respondent’s extensive additional unethical and illegal conduct in the present matter does not support such an outcome.

Second, the few cases in which this Court has ordered a second disciplinary suspension be served concurrently with a prior suspension are factually distinguishable from the present matter. In *Cuyahoga Cty. Bar Assn. v. Scott-Chestang*, 113 Ohio St.3d 310, 2007-Ohio-1956, 865 N.E.2d 48, a default proceeding, Scott-Chestang received an indefinite suspension for neglect of one client and failure to return an unearned retainer. This Court ordered this indefinite suspension be served concurrently with the prior indefinite suspension she received in *Cuyahoga Cty. Bar Assn. v. Scott-Chestang*, 109 Ohio St.3d 405, 2006-Ohio-2711, 848 N.E.2d 507. In explaining the basis for two concurrent indefinite suspensions, this Court held a “single ethical lapse, which was similar to the prior misconduct, was insufficient justification for increasing the severity of her sanction.” ¶8. Clearly, the ethical misconduct by respondent in the present matter exceeds “a single ethical lapse” and requires additional discipline.

In *Cleveland Bar Assn., et al v. Smith*, 120 Ohio St.3d 298, 2008-Ohio-6138, 898 N.E.2d 937, this Court disposed of two separate disciplinary cases involving Smith, but pending at the same time, in one decision. This Court ordered an indefinite suspension for Smith’s abandoning four clients’ cases and failure to cooperate and a concurrent two year suspension with one year stayed for the same conduct involving two additional clients. In *Cuyahoga Cty. Bar Assn. v. Jaynes*, 66 Ohio St.3d 245, 1993-Ohio-40, 611 N.E.2d 807, Jaynes was found to have neglected two client’s legal matters, made a false statement to one client and failed to cooperate with the bar association investigation. This Court ordered a second indefinite suspension to be served concurrently with a prior indefinite suspension for neglecting the legal matters of four clients in *Akron Bar Assn. v. Jaynes* (1990), 53 Ohio St.3d 9, 557 N.E.2d 1204. Clearly, respondent’s neglect of 13 clients, multiple thefts from clients, repeated dishonesty, extended criminal conduct and felony conviction far exceed the conduct at issue in the *Smith* and *Jaynes* cases.

Third, while relator is advocating for respondent's permanent disbarment, this Court has ordered consecutive disciplinary sanctions for misconduct much less egregious than that of respondent's in the present matter.² In *Cuyahoga Cty. Bar Assn. v. Marosan*, 109 Ohio St.3d 439, 2006-Ohio-2816, 848 N.E.2d 837, this Court ordered a six month suspension for neglect, failure to cooperate in a disciplinary investigation, failure to maintain funds of client in a separate account, failure to promptly pay funds of client and failure to notify a client of insufficient liability insurance. These allegations involved one client. This suspension was ordered to run consecutive to a prior 24-month suspension for neglect and failure to cooperate involving eight clients in *Stark Cty. Bar Assn. v. Marosan*, 106 Ohio St.3d 430, 2005-Ohio-5412, 835 N.E.2d 718.³

This Court ordered a consecutive suspension in *Marosan*, despite the fact that “the Board found that this misconduct was duplicative of and cumulative to [Marosan’s] previous misconduct, warranting only a concurrent suspension.” *Cuyahoga Cty. Bar Assn. v. Marosan* at ¶ 16. This Court found an additional suspension was appropriate, in part, because Marosan “acted with a dishonest or selfish motive” and “a sanction for that misconduct is appropriate.” *Id.* As a result of this analysis, this Court found that “for purposes of determining an appropriate

² In *Disciplinary Counsel v. Gallagher*, 82 Ohio St.3d 51, 1998-Ohio-592, 693 N.E.2d 1078, Gallagher, this Court held that “disbarment is not uncommon where DR 1-102(A)(3) and DR 1-102(A)(6) violations stem from felony convictions.” *Id.* at 52. The Court further observed that “permanent disbarment is an appropriate sanction for conduct that violates DR 1-102 and results in a felony conviction.” *Id.* Accord *Disciplinary Counsel v. Phillips*, 108 Ohio St.3d 331, 2006-Ohio-1064, 843 N.E.2d 775.

³ This 24 month suspension was originally ordered with 18 months stayed. The stay was revoked in *Stark Cty. Bar Assn. v. Marosan*, 108 Ohio St.3d 1220, 2006-Ohio-1505, 844 N.E.2d 846.

sanction, the conduct in this complaint is independent of the conduct in *Stark Cty. Bar Assn. v. Marosan*.” Id.

In *Toledo Bar Assn. v. Hickman*, 113 Ohio St.3d 164, 2007-Ohio-1256, 863 N.E.2d 169, this Court ordered Hickman be suspended for one year for two counts of neglect. The one year suspension was ordered to run consecutive to a prior one year suspension with six months stayed for neglect, dishonesty and dismissal of a client’s lawsuit without consent in *Toledo Bar Assn. v. Hickman*, 107 Ohio St.3d 296, 2005-Ohio-6513, 839 N.E.2d 24. Finally, in *Cincinnati Bar Assn. v. Greenberger*, 113 Ohio St.3d 162, 2007-Ohio-1255, 863 N.E.2d 167, this Court ordered a one year suspension for stealing \$1,850 in client funds. This suspension was ordered to run consecutive to a prior two year suspension with six months stayed for taking fees from five clients and failing to provide legal services in *Muskingum Cty. Certified Grievance Comm. v. Greenberger*, 108 Ohio St.3d 258, 2006-Ohio-790, 842 N.E.2d 1042.

Finally, the ethical violations committed by respondent in the present matter are substantial.⁴ After a one day hearing, the Board found that respondent’s conduct in the present matter violated the Code of Professional Responsibility: DR 1-102(A)(3) [a lawyer shall not engage in illegal conduct involving moral turpitude]; DR 1-102 (A)(4) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; 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 on the lawyer’s fitness to practice law]; DR 5-101(A)(1) [except with consent of a client after full disclosure, a lawyer shall not

⁴ Despite respondent’s extended pattern of ethical misconduct and criminal conviction, respondent did not stipulate to any disciplinary rule violations.

accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial and personal interests]; DR 7-102(A)(7) [a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent]; and DR 7-102(A)(8) [a lawyer shall not knowingly engage in illegal conduct]. As such, respondent's request for a concurrent indefinite suspension should be overruled and relator's objection requesting permanent disbarment should be granted.

CONCLUSION

For the foregoing reasons, respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline should be overruled by this honorable Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Relator's Answer to Respondent's Objections to the Board of Commissioners Report and Recommendation has 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 43215-3431, and Respondent's Counsel David C. Greer, Esq., Bieser, Greer & Landis, 400 National City Center, 6 North Main Street, Dayton, OH 45402-1908, via regular U.S. mail, postage prepaid, this 28th day of February, 2011.



Robert R. Berger (0064922)