

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

11-1049

In Re:	:	
Complaint against	:	Case No. 10-090
Robert J. Berk	:	Findings of Fact,
Attorney Reg. No. 0001031	:	Conclusions of Law and
Respondent	:	Recommendation of the
	:	Board of Commissioners on
Cleveland Metropolitan Bar Association	:	Grievances and Discipline of
	:	the Supreme Court of Ohio
Relator	:	

FILED
JUN 22 2011
CLERK OF COURT
SUPREME COURT OF OHIO

INTRODUCTION

This matter was heard on May 6, 2011 in Cleveland, Ohio, before a panel consisting of Walter Reynolds, Keith Sommer and Judge Arlene Singer, 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. Attorneys Michael E. Murman and Edward Kagels represented Respondent, and attorneys David O. Simon and Heather M. Zirke represented Relator, the Cleveland Metropolitan Bar Association.

Respondent was charged in a Complaint, filed October 11, 2010, with violating Prof. Cond. R. 1.3 that states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client" in each of the two counts.

Respondent was admitted to the practice of law in Ohio on November 8, 1969.

On August 29, 2007, Respondent's license to practice law was suspended for one year, stayed on conditions for violating five disciplinary rules. He was also placed on probation for

two years. Respondent had not applied for termination of his probation at the time this complaint was filed. See *Cleveland Bar Assn. v. Berk*, 114 Ohio St.3d 478, 2007-Ohio-4264.

FINDINGS OF FACT

Count One

Respondent filed suit on behalf of his clients Winston Lewis, Rachel Lewis and Irene Papadelis for damages resulting from an auto accident against the driver of the other automobile and her insurance company. The accident occurred on April 23, 2005. Suit was filed on April 10, 2007. The plaintiffs voluntarily dismissed the case, but re-filed it on August 21, 2008.

On March 23, 2009 a case management conference was scheduled in that matter and the court ordered Respondent to initiate the telephone conference. He did not. The matter was continued to April 20, 2009. The trial court stated that Respondent's failure to appear at that conference may result in dismissal. Respondent failed to appear, and the court dismissed the case without prejudice the following day.

Respondent filed a Civ. R. 60(B) motion on May 8, 2009, citing a scheduling oversight, which the court denied on May 13, 2009. New counsel, on behalf of the plaintiffs filed an appeal of this denial. The court of appeals affirmed the trial court's denial.

The plaintiffs in the underlying case filed a malpractice claim against Respondent in March 2010, which was voluntarily dismissed in February 2011, but the parties may still have been in settlement discussions.

Count Two

Respondent filed suit on behalf of his client Kenneth Render for damages resulting from an automobile accident. The accident occurred on August 23, 2005. Suit was filed on July 30, 2007.

A case management conference was scheduled for October 24, 2007, and Respondent was notified of the date, however, Respondent failed to appear. The court scheduled a settlement conference on February 29, 2008, and stated that the failure of Respondent to appear at future court dates may result in dismissal of the case. Respondent failed to appear at the settlement conference. The trial judge dismissed the case with prejudice, stating that Respondent failed "to appear at the case management conference and settlement conference," failed "to conduct or respond to discovery," and failed "to contact the court to explain his absence." With new counsel, plaintiff filed a Civ. R. 60(B) motion, which was denied. The denial was reversed on appeal. However, the appellate court reversed under Civ. R. 60(B)(5) – "interests of justice," not Civ. R.60(B)(1), stating that "Respondent's conduct went 'beyond mere mistake, inadvertence or excusable neglect.'"

Render settled the case with the tortfeasor's insurance company and dismissed the case in November 2010.

CONCLUSIONS OF LAW

The panel finds that Respondent violated Prof. Cond. R. 1.3 in each count. Respondent argues that, while perhaps negligence or malpractice, his actions were insufficient to constitute a rule violation. He cites the last sentence in Comment [3] of Prof. Cond. R. 1.3, "The lawyer disciplinary process is particularly concerned with lawyers who *consistently* fail to carry out obligations to clients or consciously disregard a duty owed to a client" (emphasis added), to argue that these two cases are out of the many cases Respondent has handled, and thus no consistent neglect is shown.

The evidence belies this argument. The Supreme Court of Ohio has distinguished neglect from negligence when there is a "pattern of disregarding obligations or repeated omissions."

Disciplinary Counsel v. Fowerbaugh (1995), 74 Ohio St.3d 187, 190.

Here, Respondent neglected his duties in two different cases and twice in each case. He explains that somehow the notices from the court "did not make it into his calendar."

Respondent claims that his yearly case load is about 400 to 450 files a year, most of which are in the area of bankruptcy or consumer debt, and these cases were personal injury cases – cases out of the ordinary for his current case load. However, Respondent's prior disciplinary case arose out of similar neglect.

Pursuant to the terms of his previous case, Respondent met with the monitoring attorney appointed for the one-year term of Respondent's probation. The first meeting was in October 2007 and the monitoring continued, at least through July 2009. It was during this period of time that Respondent committed the acts that are the subject of this complaint. The monitor's reports do not reference these cases at all. The first missed court date was in the Render case on October 24, 2007 just two months after the Supreme Court's decision in Respondent's prior disciplinary case on August 29, 2007.

MITIGATION AND AGGRAVATION

The panel finds the following aggravating factors pursuant to BCGD Proc. Reg. 10(B)(1):

- (a) a prior disciplinary offense;
- (c) pattern of misconduct; and
- (d) multiple offenses.

The panel finds the following mitigating factors pursuant to BCGD Proc. Reg. 10(B)(2):

- (b) absence of a dishonest or selfish motive;

- (c) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (d) full and free disclosure and a cooperative attitude; and
- (e) character and reputation.

Though not charged as a violation, the monitor did report an incident in November 2008 when Respondent failed to file a document in bankruptcy court and a show cause order was issued by the bankruptcy judge. Respondent promptly filed the document, but failed to attend the show cause hearing as he thought the matter was concluded. The monitor indicated in his quarterly report that the judge concluded the matter anyway as the document had been filed.

Another event in bankruptcy court during the pendency of this case was also explored during the hearing. Respondent represented a bankruptcy petitioner. Respondent failed to attend a hearing involving an issue between who he described as the "real party in interest" and the trustee. Respondent described his client as merely a "stakeholder." Respondent did not think it necessary for him to appear for the hearing, making a deliberate choice not to appear. The bankruptcy judge however had issued a show cause order for which Respondent appeared and explained his reasoning to the judge, who then dismissed the citation. He was, however, admonished because he did not inform the court prior to the court date that he would not appear.

The monitor reported a grievance against Respondent that had been filed in early 2009. Respondent could not promptly find the paperwork in his office to resolve the grievance until several months later. The grievance was then dismissed.

Though not considered as proof of violation of Prof. Cond. R. 1.3, these uncharged incidents are considered as an aggravating factor under BCGP Proc. Reg. 10 (B)(1)(c).

Respondent submitted four letters from individuals attesting to his reputation and good character. Judge Harry Hanna, Alita Struze and Solomon Harge testified in person. These last

three individuals are long time professional acquaintances of Respondent who testified to the many years Respondent has represented the interests of people, either pro bono or for minimal fees, who would have otherwise been unable to afford counsel. Mr. Berk received several awards for this service.

Respondent paid for appellate counsel for Lewis and Renders, insisted upon withdrawing a defense in a malpractice case to benefit his prior client, and insisted to appellate counsel that any blame be directed at him, not his clients, in fashioning arguments to reinstate his clients' cases. Respondent continues to carry malpractice insurance which he relies on to safeguard his clients' interests. In the Lewis case, his malpractice carrier is in settlement discussions with his former client. In Render, the case was settled by his former client and the tortfeasor's insurance company after the case was reinstated on appeal.

SANCTION

Relator requests a one-year suspension of Respondent's license with no more than six months stayed.

Respondent's previous discipline revolved around similar circumstances. Respondent had filed a personal injury suit on behalf of his clients in 2003. He failed to appear at two case management conferences and failed to file a motion for default judgment, resulting in dismissal of his clients' case. When he re-filed the case in 2004, he failed to produce documents and the case was dismissed again.

In addition to a violation of DR 6-101(A)(3) (neglecting an entrusted legal matter), Respondent was found to have violated DR 5-103(B) (providing financial assistance or advancing funds to a client for expenses other than litigation costs); DR 6-102(A) (attempting to exonerate himself or limit his liability to his client for personal malpractice); DR 7-101(A)(2)

(intentionally failing to carry out a contract of professional employment), and DR 7-101(A)(3) (conduct that intentionally prejudices or damages a client). He received a stayed sanction and was placed on probation with a monitor.¹

Respondent has completed the required additional six hours of CLE ordered in law office management. He took an additional CLE on law office management just prior to the hearing. His monitor reported that Respondent had taken steps to improve his calendar system and had organized his office better.

Respondent argues that if any actual suspension is imposed, the public will be harmed as he contributes many hours for minimal fees or pro bono representing people who might not otherwise have representation.

Respondent's large case load is of concern to the panel. Respondent has tried to limit his caseload to bankruptcy and consumer debt cases; both he and his secretary have tried with the help of his monitor to refine his calendar system and keep his office more organized. The panel feels that Respondent has his clients' best interests at heart, and his complained of actions were not deliberate, but that he may still pose harm to the public.

Respondent has apparently made progress with the help of his monitor, has adjusted his calendar system and his caseload. His caseload appears to still be substantial and the continued but uncharged incidents are troubling.

The panel is not unanimous in its recommendation for a sanction. The majority of the panel declines to recommend an actual suspension of Respondent's license. His dedication to his

¹ The Supreme Court's discussion of the sanction in Respondent's previous case referenced *Columbus Bar Assn. v. Micciulla*, 106 Ohio St.3d 19, 2005-Ohio-3470 (neglect of client matters, no prior disciplinary record, no dishonest or selfish motive, and cooperation); *Columbus Bar Assn. v. Halliburton-Cohen* (2002), 94 Ohio St.3d 217 (poor office management resulting in client fund violations); and *Toledo Bar Assn. v. Westmeyer* (1988), 35 Ohio St.3d 261 (neglect of client's legal matter and attempt to exonerate himself from malpractice liability.)

clients is obvious and he shows true remorse. What remains to be seen is if Respondent is capable of practicing law without missing deadlines and court appearances. A third panel member recommends an actual suspension be imposed, namely a one-year suspension, possibly with up to six months stayed.

Therefore, a majority of the panel recommends that Respondent's license be suspended for 18 months, all stayed. In addition, Respondent should be placed on two years' probation with a monitor, to be chosen by Relator. The panel suggests that the monitor be a lawyer who has had more than one successful experience as a monitor, and is familiar with the disciplinary system as well as law office management.

DISSENT

Member Keith Sommer respectfully dissents from the recommended sanction suspending Respondent's license for 18 months, all stayed, and recommends an 18-month suspension with 12 months stayed. I agree that Respondent be placed on two-year probation with a monitor to be chosen by Relator.

The findings of facts and conclusions of law are accurate and the following is submitted to support the dissenting recommended sanction.

On August 29, 2007, the Supreme Court disciplined Respondent for violating five disciplinary rules, including neglecting an entrusted legal matter; attempting to exonerate himself from liability for personal malpractice; and intentionally failing to carry out a contract of professional employment.

Respondent failed to attend a scheduled case management conference April 2003 and the rescheduled conference the following month. Respondent stated at the disciplinary hearing that his conduct was "not good lawyering" and was "not reasonable or appropriate."

The trial judge ordered Respondent to file a motion for default within ten days after June 25, 2003. Respondent failed to file a motion and trial court dismissed his client's case for want of prosecution.

Respondent refilled the case in January 2004 and defendant again failed to respond to the complaint. Respondent was ordered by the court to provide documents to allow the court to grant a default judgment. Respondent did not provide requested documents and the case was again dismissed.

In the Kenneth Render count of the instant case, Respondent failed to appear at a case management conference scheduled on October 24, 2007, which was two months after his initial Supreme Court suspension. On October 30, 2007, the court issued a journal entry stating failure to appear at future court dates may result in dismissal and set a settlement conference for February 29, 2008. Respondent failed to appear, and the judge dismissed the case with prejudice. The Eighth District Court of Appeals reversed the trial court's denial of a motion to vacate judgment filed by the new counsel, but stated that Respondent's conduct was "beyond mere mistake, inadvertence or excusable neglect."

In the Lewis/Papadelis case, a case management conference was scheduled on March 23, 2009, and the court ordered Respondent to initiate the telephone conference, which he did not do. The conference was continued to April 20, 2009, and the trial court stated that Respondent's failure to appear at that conference may result in dismissal. Respondent failed to appear, and the judge dismissed the case without prejudice. The Court of Appeals affirmed the dismissal, stating Respondent "did not assert any operative facts explaining to the trial court how his scheduling oversight amounted to 'excusable neglect' or 'extraordinary circumstances'."

It is also apparent that Respondent did not report the above incidents to his probation monitor.

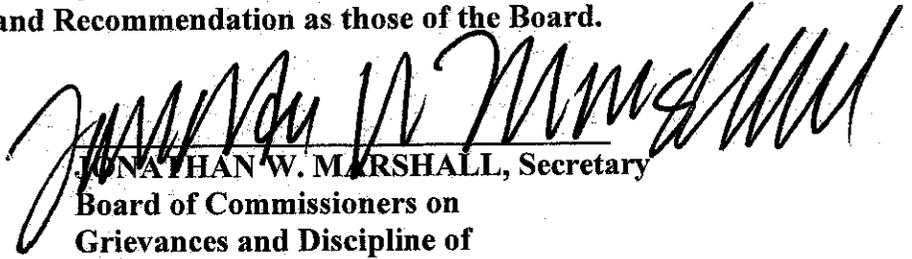
The panel report correctly reflects an incident in November 2008 when Respondent failed to file a document in bankruptcy court, and a show-cause order was issued by the bankruptcy judge. Respondent filed the required document but failed to attend the show-cause hearing as he thought the matter was concluded.

In that case, Respondent failed to attend a hearing and the bankruptcy judge issued a show-cause order against Respondent a few days before this panel hearing. Respondent explained that his client was merely a stakeholder, and he did not think it was necessary for him to appear at the hearing. Respondent testified that he explained this to the bankruptcy judge who then dismissed the citation. He was, however, admonished because he did not inform the court prior to the court date that he would not appear.

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 June 10, 2011. The Board adopted the Findings of Fact, and Conclusions of Law of the Panel. The Board adopted the dissent on sanction and recommends that Respondent, Robert J. Berk, be suspended from the practice of law for a period of eighteen months with twelve months stayed and that Respondent be placed on two-year probation with a monitor following his suspension. 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.**

A large, stylized handwritten signature in black ink, appearing to read 'Jonathan W. Marshall', is written over the printed name and title.

**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

MAY 04 2011

BOARD OF COMMISSIONERS
ON GRIEVANCES & DISCIPLINE

In Re:

Complaint Against

ROBERT J. BERK
Respondent

CLEVELAND METROPOLITAN
BAR ASSOCIATION
Relator

:

:

:

:

Bd. Case Number 10-090

AGREED STIPULATIONS

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Relator, the Cleveland Metropolitan Bar Association, and Respondent Robert J. Berk do hereby stipulate to the admission of the following facts and exhibits.

STIPULATED FACTS

1. Robert J. Berk, Ohio Supreme Court Registration Number 001031, was admitted to practice law in Ohio on November 18, 1969, and is subject to the Supreme Court Rules for the Government of the Bar of Ohio and the Ohio Rules of Professional Conduct.
2. On August 29, 2007, the Ohio Supreme Court disciplined Respondent for violating five disciplinary rules, including neglect of a legal matter to the prejudice of a client and attempting to limit his liability for legal malpractice. *Stip. Exhibit A.*
3. As a result of Respondent's five disciplinary rule violations, the Court suspended Respondent's license to practice law for a one-year term which was stayed on

conditions, and ordered two years of probation. Respondent has not applied for termination of his probation.

COUNT ONE

4. Respondent was hired by Winston Lewis, Rachel Lewis, and Irene Papadelis ("Plaintiffs") to file a lawsuit against Ashley Brzozowski and her insurance company because of an accident caused by Ms. Brzozowski on April 23, 2005.

5. Respondent filed a complaint on behalf of the Plaintiffs which was captioned *Winston Lewis, et al. v. Ashley Brzozowski* in the Cuyahoga County Court of Common Pleas on April 10, 2007. *Stip. Exhibit B.*

6. Plaintiffs voluntarily dismissed their case on October 26, 2007, and subsequently re-filed it on August 21, 2008.

7. The first case management conference was scheduled for December 11, 2008, but Plaintiffs were not able to effectuate service of process by that date.

8. The trial court rescheduled the case management conference for March 23, 2009, and ordered Respondent to initiate the conference by telephone.

9. Respondent did not initiate or otherwise participate in the March 23, 2009 case management conference.

10. On March 24, 2009, the trial court issued a judgment entry stating that Respondent failed to appear, and rescheduled the conference.

11. The trial court rescheduled the case management conference for April 20, 2009, and stated that Respondent's failure to appear may result in dismissal.

12. Respondent failed to attend the April 20, 2009 case management conference.

13. On April 21, 2009, the trial court issued a judgment entry stating that Respondent failed to appear, and dismissed the Plaintiffs' case without prejudice.

14. On May 8, 2009, Plaintiffs sought relief from judgment in the trial court by filing a Civ.R.60(B) motion, arguing that Respondent's failure to attend the case management conferences was due to mistake, inadvertence, or excusable neglect because of a scheduling oversight.

15. On May 13, 2009, the trial court denied Plaintiffs' Civ.R.60(B) motion.

16. Plaintiffs, through new counsel, appealed the trial court's denial of their Civ.R.60(B) motion to the Eighth District Court of Appeals. The Court of Appeals affirmed the trial court's ruling to dismiss the case, stating that Respondent "did not assert any operative facts explaining to the trial court how his scheduling oversight amounted to 'excusable neglect' or 'extraordinary circumstances.'" *Stip. Exhibit C.*

17. On March 12, 2010, Plaintiffs filed a legal malpractice action against Respondent. The case was voluntarily dismissed on February 18, 2011.

COUNT TWO

18. On or about August 23, 2005, Kenneth Render ("Mr. Render") was involved in a motor vehicle accident in Highland Heights, Ohio.

19. On July 30, 2007, Respondent, on behalf of Mr. Render, filed suit against the other driver, Sherri Belle, in the Cuyahoga County Court of Common Pleas, alleging damages resulting from the accident. *Stip. Exhibit D.*

20. On September 29, 2007, the trial court scheduled a case management conference for October 24, 2007, and notified Respondent of the date.

21. Respondent failed to appear for the October 24, 2007 case management conference.

22. On October 30, 2007, the court issued a journal entry stating that Respondent's failure to appear at future court dates may result in dismissal of the case. In the same entry, the court set a settlement conference for February 29, 2008.

23. Respondent failed to appear for the February 29, 2008 settlement conference.

24. On March 12, 2008, the trial court issued a journal entry stating that Respondent failed to appear, and Judge Shirley Strickland Saffold dismissed the case with prejudice.

25. On March 9, 2009, Mr. Render, through new counsel, filed a Motion to Vacate Judgment pursuant to Civ.R.60(B).

26. On March 30, 2009, the trial court denied Mr. Render's motion, citing Respondent's failure to appear at the case management conference and the settlement conference, his failure to conduct or respond to discovery, and his failure to contact the court to explain his absence.

27. On April 22, 2009, Mr. Render appealed the trial court's ruling to the Eighth District Court of Appeals.

28. The Eighth District reversed the trial court's decision denying Mr. Render's Motion to Vacate Judgment, holding that such denial was an abuse of the trial court's discretion. The Eighth District found that Mr. Render was not entitled to relief under Civ.R.60(B)(1) since Respondent's conduct went "beyond mere mistake,

inadvertence or excusable neglect,” but granted relief based on Civ.R.60(B)(5) based on the “interests of justice.” *Stip. Exhibit E.*

29. On November 23, 2010, Mr. Render’s case was settled and dismissed.

AGGRAVATING FACTORS

30. Respondent admits that he has prior discipline. *Stip. Exhibit A.* (BCGD Proc. Reg. 10(B)(1)(a))

STIPULATED EXHIBITS

Exhibit A	Cleveland Bar Association v. Berk, 114 Ohio St.3d 478 (2007).
Exhibit B	Cuyahoga County Court of Common Pleas Docket for Winston T. Lewis, et al. v. Ashley Brzozowski, et al., Case No. CV-08-668431.
Exhibit C	Eighth District Court of Appeals Decision dated November 5, 2009, Case No. CA-09-93413.
Exhibit D	Cuyahoga County Court of Common Pleas Docket for Kenneth Render v. Sherri Bellet, et al., Case No. CV-07-631227.
Exhibit E	Eighth District Court of Appeals Decision dated May 27, 2010, Case No. CA-09-93181.

CONCLUSION

The above are stipulated to and entered into by agreement by the undersigned parties on this 3 day of May, 2011.



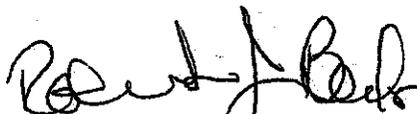
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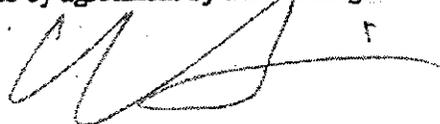
Respondent

CONCLUSION

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CERTIFICATE OF SERVICE

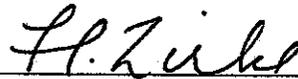
A copy of the foregoing has been served upon the following individuals via email this 3 day of May, 2011:

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