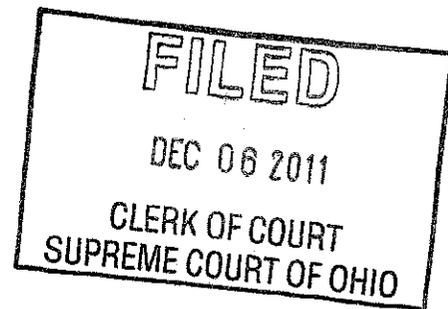


11-2037

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



In Re:	:	
Complaint against	:	Case No. 10-072
Kevin T. Toohig	:	Findings of Fact,
Attorney Reg. No. 0067447	:	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	:	

INTRODUCTION

{¶1} On August 16, 2010, a three-count complaint was filed against Respondent to which an answer was filed on Respondent's behalf by Craig Morice.

{¶2} On December 14, 2010, Respondent entered a plea of guilty to one count of Income Tax Evasion, a felony.

{¶3} A telephone conference between Respondent and his counsel, counsel for Relator, and the panel chair was held on January 7, 2011. During the telephone conference, the parties were advised that a final hearing would be conducted on April 4 and 5, 2011.

{¶4} On January 7, 2011, Respondent was given an interim felony suspension by the Supreme Court of Ohio. *In re Toohig, 01/07/2011 Case Announcements*, 2011-Ohio-18.

{¶5} On January 13, 2011, Relator filed a five-count amended complaint.

{¶6} Morice subsequently withdrew as Respondent's counsel. Monica Sansalone entered an appearance, requested a continuance of the final hearing, but withdrew as counsel six days later.

{¶7} On March 2, 2011, Respondent filed his *pro se* answer to the amended complaint.

{¶8} On March 28, 2011, Relator requested leave to file a second amended complaint and moved to continue the scheduled hearing due in part to difficulties it was experiencing in obtaining documents from Respondent.

{¶9} Leave was granted to Relator to file its second amended complaint by May 1, 2011, and the hearing was reset to August 8, 9, and 10, 2011, pursuant to an order of the panel chair filed on March 31, 2011.

{¶10} Relator's second amended complaint was filed on May 2, 2011. The second amended complaint consisted of six counts in which the first four counts were identical to that set forth in its amended complaint. The fifth count in the preceding complaint was expanded, and Relator added a sixth count in which additional IOLTA account violations were alleged.

{¶11} The Board of Commissioners on Grievances and Discipline unsuccessfully attempted to serve Respondent with the second amended complaint by certified mail at the following addresses: 1940 E. 6th St.; 7th Floor; Cleveland, Ohio 44414; and 29225 Chagrin Blvd.; Suite 350; Beachwood, Ohio.

{¶12} Relator mailed a copy of the second amended complaint to Respondent by ordinary mail to 30600 Emery Rd., Chagrin Falls, Ohio 44022, which was the address was listed by Respondent in his *pro se* answer to Relator's amended complaint.

{¶13} On August 3, 2011, Respondent left a voice mail message at the office of the panel chair which requested a continuance of the final hearing scheduled to commence five days later.

{¶14} On August 4, 2011, the parties and the panel chair participated in a telephone conference wherein Respondent claimed he was never served a copy of the second amended complaint by the Board, and that he wanted a continuance of the final hearing so that he may obtain legal counsel.

{¶15} Respondent never filed an answer to the second amended complaint.

{¶16} At the final hearing, Respondent again requested a continuance on the ground that he wanted to obtain legal counsel, and in the event that request was denied, he maintained that only the five count amended complaint was properly before the panel.

{¶17} Respondent argued that the second amended complaint was not properly before the panel because Relator was only given leave to file but “At no point following that [leave] did the Court ever rule on whether or not that Complaint would be accepted or would be used. Leave to file an Amended Complaint does not admit an Amended Complaint.” (Hearing Tr. Vol. I, p. 15, line 25 through p. 16, line 5)

{¶18} Respondent claimed that he never had the opportunity to read the second amended complaint (Hearing Tr. 17, lines 10-11) and that he was never served a copy of the complaint by certified mail. (Hearing Tr. 17, lines 5-6)

GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. PROCEDURE

{¶19} There are two overriding issues relative to the procedural history in this matter.

The first concerns Respondent's last minute request that the final hearing be continued so that he could proceed with legal counsel.

{¶20} The panel chair overruled Respondent's request for a continuance. In support, it is noted:

- Respondent's last attorney withdrew as his counsel on February 28, 2011. The final hearing was held on August 8, 2011. Accordingly, Respondent had more than four months to obtain legal counsel and failed to do so;
- At the final hearing, Respondent claimed his prior two attorneys terminated their representation because of Respondent's inability to compensate them. Respondent offered no explanation as to how that problem, if it exists, would have been rectified if a continuance was granted;
- The oral motion first communicated on August 3, 2011 and again on August 8, 2011, was untimely.

{¶21} The second overriding procedural issue concerns whether or not the panel should have conducted the hearing on the five-count amended complaint, or the six-count second amended complaint. The panel convened to discuss the issue and unanimously concluded that the hearing should proceed on the second amended complaint.

{¶22} In support of this conclusion, it is noted that Respondent was properly served a copy of the second amended complaint for several reasons:

- Civ. R. 5(B) merely requires delivery of a copy to the attorney or party by "mailing it to the last known address of the person to be served * * *."
- As noted above, on May 2, 2011, Relator mailed a copy of its second amended complaint to Respondent at the address listed by Respondent in his *pro se* answer to the amended complaint.

- Respondent acknowledged in his deposition held on July 15, 2011, and at the final hearing, that he received a copy of said second amended complaint.
- Pursuant to his notice of interim suspension and order of the Supreme Court of Ohio filed in January 2011, Respondent was required to “keep the Clerk, the Cleveland Metropolitan Bar Association, and the Disciplinary Counsel advised of any change of address where respondent may receive communications.” Respondent acknowledged that he failed to do so.
- Pursuant to that same order, the Supreme Court stated “It is further ordered, sua sponte, that service shall be deemed made on respondent by sending this order, and all other orders in this case, to respondent’s last known address.”
- That order was mailed to Respondent at his last known address, *i.e.* 1940 E. 6th St., 7th Floor, Cleveland, OH 44114. This was the same address utilized by the Board in its failed attempt to serve a copy of the second amended complaint upon Respondent by certified mail.

{¶23} Respondent not only was properly served with a copy of Relator’s second amended complaint, he sustained no prejudice in proceeding on that complaint as it consisted primarily of the addition of a sixth count that consisted of allegations of ongoing misconduct relative to his IOLTA account which was the subject of the fifth count of Relator’s prior complaint.

{¶24} Furthermore, in his July 15, 2011 deposition, Respondent stated, as follows:

“Q. Is there some reason you haven’t answered this second amended complaint?”

“A. No. I don’t have a valid reason.” (July 15, 2011 Depo. p. 49, l. 5-7)

{¶25} Finally and specifically addressing Respondent’s claim at the final hearing, there is no requirement that a pleading filed within the time parameters given pursuant to a leave must be followed by an order accepting the filing. Respondent offered nothing in support of such a proposition and the panel is not aware of any basis to find merit with that contention.

B. STIPULATIONS OF FACT

{¶26} Prior to the hearing, the parties entered into the following stipulations:

(a) Respondent Kevin Toohig (“Toohig”) was admitted to the practice of law in Ohio on November 22, 1996 under Ohio Supreme Court Registration No. 0067447.

(b) On June 22, 2010, Toohig pleaded guilty to Count 1 of the Information in the case captioned *United States of America v. Kevin T. Toohig*, in the United States District Court for the Northern District of Ohio, Eastern Division, Case No. 1:10-CR-231.

(c) The Supreme Court of Ohio issued an order dated January 7, 2011 that Toohig be suspended from the practice of law for an interim period, effective as of that date.

(d) Respondent Toohig stipulates to the authenticity of the exhibits of Relator Cleveland Metropolitan Bar Association at the hearing before the Panel of the Board of Commissioners on Grievances and Discipline.

C. BACKGROUND

{¶27} Respondent is a forty-two year old graduate of the law school at the University of Akron.

{¶28} He is married with three children under the age of five at the time of the hearing.

{¶29} The only prior disciplinary proceeding involving Respondent was an interim felony suspension which is the subject of count three of the second amended complaint.

{¶30} Respondent has been participating in a contract with the Ohio Lawyers Assistance Program (OLAP) since November 18, 2009, and as of the date of the final hearing in this matter, has been fully compliant with the terms thereof.

{¶31} Respondent has failed to file an answer or other responsive pleading to Relator’s second amended complaint.

{¶32} However, Relator’s amended complaint and its second amended complaint are similar. The first four counts in each are identical. Count five was modified slightly and Count six was added to the second amended complaint. Respondent’s *pro se* answer to the amended complaint will be utilized wherever it is applicable to identical language found in the second amended complaint.

COUNT ONE – DAN RUDOLPH

Finding of Fact

{¶33} In 2007, Respondent met with Dan Rudolph who was looking for a lawyer to represent his brother-in-law who was charged with sex crimes involving a minor.

{¶34} Rudolph represented that he would pay the legal bills for his brother-in-law.

{¶35} The brother-in-law (Edmunds Petersons) executed a fee agreement with Respondent which called for an initial nonrefundable retainer in the amount of \$5,000 “as advanced retainer fees.”

{¶36} Dan Rudolph paid Respondent the \$5,000 retainer contemplated in the fee agreement between Respondent and Petersons.

{¶37} In December 2007, Respondent recommended to Rudolph that a more experienced criminal defense attorney be retained as lead counsel for Petersons.

{¶38} Respondent suggested Attorney Ian Friedman as said lead counsel.

{¶39} After consultation with Friedman, Rudolph and Petersons agreed to his representation as additional lead counsel with Respondent.

{¶40} Attorney Friedman also required a retainer in the approximate amount of \$29,000 for the defense of Petersons.

{¶41} Respondent volunteered to hold Friedman’s retainer and instructed Rudolph to write a check for \$29,000 payable to Respondent’s law office.

{¶42} Respondent then deposited the \$29,000 check into his IOLTA account from which Respondent issued a check for \$20,000 to Friedman for his representation of Petersons.

{¶43} As of that time, Respondent was paid a total of \$34,000 by Rudolph (the \$5,000 retainer plus \$29,000). After deducting the \$20,000 Respondent paid to Friedman, there was a total of \$14,000 left under Respondent's control.

{¶44} In July 2008, Petersons pleaded guilty to lesser charges which terminated Friedman's and Respondent's representation.

{¶45} In August 2008, Attorney Friedman submitted a final bill to Rudolph for his representation of Petersons in the amount of \$5,900.71.

{¶46} Rudolph contacted Respondent to request that Friedman's final bill be paid from the \$14,000 remaining under Respondent's control. However, Respondent had by this time withdrawn the \$14,000 from his IOLTA account. (Hearing Tr. 118, lines 4-6)

{¶47} After not receiving a favorable response, Rudolph demanded an accounting from Respondent. Only then did Respondent prepare a statement for time spent in Petersons' defense, which included time purportedly expended by Respondent before and after Friedman was retained as lead counsel.

{¶48} The original fee agreement between Respondent and Petersons stated an hourly compensation rate of \$200. The aforementioned statement prepared by Respondent totaled 38.75 hours. Included in that statement were five visits to the jail where Petersons was incarcerated (i.e. October 5, 12, 19 and 30, 2007 and December 7, 2007) that were not reflected in the visitation records of the jail.

{¶49} Discounting the five hours for the nonexistent jail visits, Respondent was seeking payment for 33.75 hours.

{¶50} Rudolph continued to contact Respondent about the balance of Friedman's bill and told Respondent that if he would pay Friedman the \$5,900.71 remaining as due and owing, Respondent could keep any balance of funds as his fees.

{¶51} On October 21, 2009, Respondent, after almost fifteen months had passed, eventually paid Friedman the balance due on Petersons' account.

{¶52} Edmunds Petersons did not testify and no evidence was offered relative to any disagreement he might have with the fees charged by Respondent.

{¶53} While Relator cited the provisions in the fee agreement between Respondent and Petersons that fee agreement was not between Respondent and Rudolph. Rudolph was not Respondent's client but merely acted as a fee guarantor.

Conclusions of Law

{¶54} Relator requested that the panel find that four violations have been proven by clear and convincing evidence with regard to Count One. Here, the attorney-client relationship was with Respondent and Edmunds Petersons. There was no testimony from either Petersons or from the grievant Dan Rudolph that the fee charged was excessive. Moreover, there was no evidence disputing the fact that Respondent expended at least 33.75 hours in his representation of Petersons. Of the \$14,000, Respondent should have had in his control (\$5,000 retainer plus \$29,000 remitted by Dan Rudolph, less \$20,000 paid to Attorney Friedman) he eventually paid Friedman \$5,900.71. This left a balance of \$8,009.29. Dividing that amount by 33.75 hours comes to almost \$240 per hour. Utilizing the standard set forth in Rule 1.5(a) that "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee" and considering the lack of evidence from the client in this matter, we do not find that there has been a violation of Rule 1.5(a).

{¶55} Relator made a prima facie case that the fee agreement in question does not, on its face, meet the requirement set forth in Prof. Cond. R. 1.15(d)(3), notwithstanding the fact that the client (Petersons) did not testify. The instrument itself was problematic. Since Respondent offered no evidence which showed the existence of some other written instrument that complies with the Rule, we find that there has been a violation of Rule 1.15(d)(3)

{¶56} We find by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(c) when he spent funds entrusted to him which he had not earned.

{¶57} The panel does not find that Relator proved allegation violation of Prof. Cond. R. 8.4(c) by clear and convincing evidence and dismisses this alleged violation.

COUNT TWO - COLORADO EVENTS

Findings of Fact

{¶58} Some time in 2006, Respondent met Hysear Don Randell at a boxing match in Las Vegas, Nevada.

{¶59} Randell was a promoter who sponsored among other things major boxing matches for Floyd Mayweather.

{¶60} Respondent advised Randell that he ought to consolidate his cadre of lawyers and hire Respondent as his main legal counsel.

{¶61} Respondent maintained a "one or two year social relationship" with Randell and was hoping to obtain him as a client. (Hearing Tr. 122)

{¶62} In the latter part of April 2007, Respondent received a phone call from Randell's wife (Trudy Randell) who stated that there were "a whole lot of people with a search warrant" running through her house in Denver, Colorado. (Hearing Tr. 413)

{¶63} After consulting with her husband, Trudy Randell called Respondent again and advised him to get on the next available flight to Denver.

{¶64} Respondent was met at the airport in Denver by some of Randell's security personnel and taken to a hotel in Denver where Randell was staying.

{¶65} Respondent stayed at the hotel for several days and eventually met with Randell who "explained the situation." (Hearing Tr. 414, line 17)

{¶66} Hysear Randell and his girlfriend, Michelle Cawthra, were suspects in a fraud and theft scheme whereby Cawthra, in her role as an employee of the Colorado Department of Taxation, would process fraudulent tax refunds to businesses controlled by Randell.

{¶67} Within a day or two of his arrival in Denver, Respondent became aware that Randell was being sought in connection with the fraudulent tax refunds and that the amount allegedly stolen was at least \$4 million to \$5 million.

{¶68} At Randell's direction, Respondent contacted several law firms for possible retention as counsel for Randell and received estimates for such legal services.

{¶69} At Randell's direction, Respondent went to one of Randell's stockbrokers to liquidate one of his accounts. To facilitate this goal, Respondent delivered a handwritten note to the stockbroker which directed that the proceeds be electronically transferred to Respondent's IOLTA account at National City Bank in Cleveland, Ohio.

{¶70} On April 30, 2007, a wire transfer in the amount of \$710,098.39 was made into Respondent's IOLTA account from Hysear Randell's account. (Relator's Ex. 68)

{¶71} On the same day of the wire transfer, Respondent directed that a check be drawn from his IOLTA account payable to Toohig Law Offices in the amount of \$50,000 as and for "Partial Randell Fees." (Relator's Ex. 70)

{¶72} On May 1, 2007, Respondent was at the airport in Denver for a return flight to Cleveland when he received a call on his cell phone from “the district attorney or someone in law enforcement” requesting that Respondent not leave and to try and find out where Hysear Randell is. (Hearing Tr. 135)

{¶73} Respondent contacted someone in Randell’s entourage who made arrangements to pick Respondent up from the airport to meet Randell.

{¶74} While Respondent was in a vehicle with Randell, the highway in which they were travelling was shut down, and their vehicle was stopped by a concentrated law enforcement effort that included a helicopter that landed on the freeway, at least fifteen police cars, and snipers on a nearby bridge.

{¶75} On May 1, 2007, Respondent and Hysear Randell were arrested at gunpoint.

{¶76} Pursuant to actions by the Office of the Denver District Attorney, all of the funds deposited into Respondent’s IOLTA account were frozen and the entire amount initially transferred was subsequently released back to the State of Colorado.

{¶77} Although Respondent was arrested, he was not prosecuted and returned to Cleveland a few days after his arrest.

{¶78} At the time Respondent met with Randell to wire funds into his IOLTA account, and at the time he participated in the wire transfer of \$710,098.39 into his IOLTA account, he knew Randell was a fugitive and the subject of a massive manhunt.

{¶79} Randell was eventually convicted in 52 of 54 felony counts and was sentenced to a 58-year prison term for his role in the theft of almost \$11 million from the Colorado Department of Taxation.

Conclusions of Law

{¶80} The panel finds that Relator had proven by clear and convincing evidence that Respondent's conduct constituted violations of the following: Prof. Cond. R. 1.5(a); Prof. Cond. R. 1.15(c) [withdrawal of fees from a trust account only as fees are earned or expenses incurred]; Prof. Cond. R. 8.4(c) [a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation]; and Prof. Cond. R. 8.4(d) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice]. At the time Respondent wire transferred over \$710,000 into his IOLTA account, he knew that the source of the funds was a person who was subject to a massive manhunt wanted for a fraud scheme involving millions of dollars. At the time, Respondent was not acting as the attorney for the fugitive even though he immediately caused the transfer of \$50,000 from his trust account into his business account.

COUNT THREE - TAX EVASION

Findings of Fact

{¶81} On May 21, 2010, a complaint was filed against Respondent alleging evasion of payment of income taxes in the United States District Court for the Northern District of Ohio in Case No. 10-00231 which alleged Respondent attempted to evade the payment of income taxes due and owing in the amount of \$184,964 for the year 2000.

{¶82} On June 22, 2010, Respondent entered into a plea agreement wherein he agreed to enter a plea of guilty to a one-count information charging a violation of 26 U.S.C. §7201 (Attempt to Evade or Defeat the Payment of Income Tax).

{¶83} Pursuant to the aforementioned plea agreement, Respondent stipulated to the following facts:

From on or about April 15, 2001, through on or about October 13, 2004, in the Northern District of Ohio, Eastern Division, and elsewhere, the Defendant,

KEVIN T. TOOHIGH, a resident of Orange Village, Ohio, did willfully attempt to evade and defeat payment of his income tax due and owing for the calendar year 2000 in the approximate amount of \$184,964.00, by concealing and attempting to conceal from the Internal Revenue Service the nature and extent of his true income and assets by, among other things:

- a. Concealing the true profit of his law practice by paying substantial personal expenses through it and falsely claiming them as legitimate business expenses;
- b. Structuring deposits to and withdrawals from both business and personal bank accounts to avoid currency reporting requirements;
- c. Withdrawing currency extensively from bank accounts to conceal large personal expenditures; and
- d. Providing false financial information to the Internal Revenue Service on or about October 13, 2004, in connection with Defendant's attempt to settle this debt.

(Relator's Ex. 21)

{¶84} On December 14, 2010, Respondent was sentenced to six months of electronically monitored house arrest and four years of probation that included provisions maintaining that Respondent participate in an approved program for substance abuse. (Relator's Ex. 22)

{¶85} On January 7, 2010, the Supreme Court of Ohio issued an interim felony suspension of Respondent. *In re Toohig, supra.*

{¶86} Notwithstanding his plea agreement, Respondent initially testified that he did not know his tax return was false (Hearing Tr. 48) and that his accountant prepared false tax returns without his knowledge (Hearing Tr. 46), but later acknowledged he was aware his tax returns were fraudulent.

Conclusions of Law

{¶87} Relator has proven by clear and convincing evidence that the conduct of Respondent in count three constituted violations of the following rules: Prof. Cond. R. 8.4(b) [a lawyer shall not commit an illegal act that reflects adversely on the lawyer's honesty or

trustworthiness]; Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(h) [a lawyer shall not engage in any other conduct that adversely reflects on the lawyer's fitness to practice law].

COUNT FOUR - SHANA KAZEN

Findings of Fact

{¶88} Shana Kazen engaged Respondent to represent her relative to an injury she sustained in an automobile accident in October 2006.

{¶89} At the request of Respondent, Kazen signed a "Limited Power of Attorney" that authorized Respondent to endorse on her behalf any settlement check and/or release related to her personal injury claim. (Relator's Ex. 24)

{¶90} Respondent initiated a lawsuit on behalf of Kazen which eventually settled for \$9,100.

{¶91} Stephen J. Proe represented the defendant in the Kazen litigation. On or about June 7, 2010, Proe mailed to Respondent a settlement draft payable to Shana Kazen and Kevin Toohig Law, Inc., in the aforementioned amount of \$9,100, a "Release of all Claims," and a cover letter which stated in relevant part:

Kindly have the release executed and returned to this office. Of course, it is understood that the draft will not be negotiated until you are in a position to return the executed release to me.

(Relator's Ex. 26)

{¶92} Respondent deposited the \$9,100 draft sent by Proe into his IOLTA account on June 9, 2010. That same day, he withdrew \$3,200 from that account pursuant to a check payable to Kevin Toohig Law, Inc. as for "Shana Kazen Fees and Exp." (Relator's Ex. 28)

{¶93} On July 1, 2010, Proe sent by certified and regular mail a letter advising Respondent that Proe had not received the Release he previously submitted even though the draft

had been negotiated. Furthermore, Proe noted that Ms. Kazen claimed that “she did not endorse the settlement check, nor has she received any settlement funds from your office.” (Relator’s Ex. 29)

{¶94} Pursuant to the statements of the financial institution in which Respondent had his IOLTA account, Respondent did not have a sufficient balance in his account as of the end of June 2010 (balance: \$2,803.97) or as of August 31, 2010 (balance: \$1,567.98) to pay Kazen her settlement proceeds. (Relator’s Ex. 27)

{¶95} On or about July 15, 2010, Proe filed a grievance against Respondent due to the fact that there had been no response from Respondent to his earlier communication concerning the lack of a signed release.

{¶96} On or about August 16, 2010, Ms. Kazen arrived at Respondent’s law office with a police officer from Beachwood, Ohio. Efforts to obtain Kazen’s settlement proceeds were unsuccessful. Respondent testified that he did not give Kazen her money at that time because “my attorney was telling me not to.” (Hearing Tr. 70, lines 1-2) At his deposition, Respondent stated that he tried to give her the money but “she wouldn’t take it.” (Hearing Tr. 71, lines 1-4)

{¶97} On November 8, 2010, Respondent issued a check to Shana Kazen from his IOLTA account in the amount of \$9,100. (Relator’s Ex. 34) However, this payment was made only after Relator had commenced a formal investigation and Respondent had a felony income tax evasion charge pending against him.

{¶98} Respondent’s testimony as to why he did not timely pay Ms. Kazen money due and owing was not credible. The evidence clearly shows that he did not have sufficient funds left in his IOLTA account to pay her.

Conclusions of Law

{¶99} Relator has proven by clear and convincing evidence that the conduct of Respondent relative to count four constituted violations of the following Rules of Professional Conduct: Prof. Cond. R. 1.15(d) and Prof. Cond. R.8.4(c).

COUNTS FIVE AND SIX - IOLTA VIOLATIONS; ROLIC MATTER

Findings of Fact – IOLTA Violations

{¶100} As evidenced by a letter dated April 14, 2010, from Liberty Bank, N.A., to the Office of Disciplinary Counsel, Respondent had created an overdraft on his IOLTA account in the amount of \$2,973.

{¶101} Respondent claimed that the overdraft was a “clerical error” as a result of the transfer of funds from one IOLTA account to another. (Relator’s Ex. 35)

{¶102} A check drawn on the Liberty Bank IOLTA account in the amount of \$4,800 payable to Nina Liuzzo was not honored due to insufficient funds. Respondent issued a new check from a different IOLTA account.

{¶103} From the period of December 2009 to March 2010, Respondent made payments from his IOLTA account to Equitable Property, Ltd. in an amount totaling \$16,400. (Relator’s Ex. 40) Equitable Property, Ltd. is not a client but is a business owned by Respondent (admitted by Respondent in his answer to the amended complaint and was not denied at the hearing).

{¶104} In late 2009 and the early part of 2010, Respondent had judgment liens against him totaling close to a million dollars. (Hearing Tr. 85-86) Respondent noted that “Every time I would put money into any account that had my name on it, it was swept by either the IRS or any number of folks that I owed a lot of money to.” (Hearing Tr. 85, lines 8-12) To counteract this, Respondent put money into his IOLTA account and wrote checks from that account payable to

Equitable Property, Ltd. At no point in the proceedings was Respondent able to identify the source of his IOLTA deposits that eventually made their way into Equitable Property, Ltd.

{¶105} Kacie Butcher was at one time an employee of Respondent. In the latter part of 2010, the following checks were drawn from Respondent's IOLTA account and payable to Ms. Butcher: \$1,979.88 (11/08); \$534.61 (11/29); and \$400 (12/21). (Relator's Ex. 37) Respondent offered no satisfactory response why those payments were drawn from his trust account or what they were for.

{¶106} On December 27, 2010, Respondent paid for a CLE course offered by the Ohio State Bar Association with check no. 1869 from his IOLTA account. (Relator's Ex. 38)

{¶107} On October 15, 2010, Respondent issued a check to Attorney Craig Morice from his IOLTA account in the amount of \$900 for partial attorney fees relative to obtaining legal counsel for the disciplinary matter before this panel. (Relator's Ex. 39) Morice filed an answer to Relator's original complaint but subsequently withdrew as counsel.

{¶108} Respondent wrote several checks from his IOLTA account to DiCillos, a tavern, in the amount of \$500 on November 20, 2010; \$500 on December 1, 2010; and \$100 on December 31, 2010. (Relator's Ex. 54) Respondent could not recall the reason why they were issued.

{¶109} On January 11, 2011, Respondent filed a complaint on behalf of Carla Tanguay in the Union County Court of Common Pleas and paid the Clerk of Court a filing fee of \$435 drawn on his PNC Trust Account. On February 4, 2011, Respondent notified his client that his law license had been suspended effective January 7, 2011 and that her "case was refiled * * * within the last thirty days." (Relator's Ex. 46)

{¶110} On January 18, 2011, the Office of Disciplinary Counsel was notified that Respondent's check to the Clerk of Court in the Tanguay matter was dishonored due to insufficient funds. (Relator's Ex. 48)

{¶111} On January 24, 2011, Respondent caused a check to be issued to "Carol A. Mead Clerk of Courts," in the amount of \$220 which stated in the memo line for "J. Jackson Complaint." That check was dishonored due to insufficient funds and notification of same was received by the Office of Disciplinary Counsel on February 9, 2011. (Relator's Ex. 52)

{¶112} Relative to the two complaints filed on January 11, 2011 in Union County, and January 24, 2011 in Jefferson County, Respondent subsequently paid the filing fees in those courts. However, he was listed as attorney of record after the effective date of his interim suspension.

{¶113} During all times relevant to this matter, Respondent did not maintain records for funds received, disbursements made, or return monthly reconciliation of his Liberty and PNC IOLTA accounts.

Findings of Fact – Rolic Matter

{¶114} Respondent represented Christopher Rolic in probate court to determine the distribution on a medical malpractice/wrongful death action in which there was a \$2.3 million verdict. Respondent did not participate in or provide any legal services to Rolic or anyone else in that action.

{¶115} Respondent's legal efforts on behalf of Rolic consisted of participation in a single mediation/settlement negotiation that resulted in Mr. Rolic being awarded \$275,790 as his share of the aforementioned judgment.

{¶116} Respondent and Rolic testified that Respondent was to receive ten percent of Rolic's share as his fee. (Hearing Tr. 151, line 4)

{¶117} Pursuant to Rolic's request, Respondent was to hold his distributive share so Rolic would be less likely to spend the money foolishly.

{¶118} On February 8, 2010, Respondent made a deposit into his IOLTA account at PNC Bank in the amount of \$275,790. (Relator's Ex. 42)

{¶119} From March 10, 2010 through December 9, 2010, Rolic received eighteen checks from said IOLTA account which totaled \$222,400. There were no payments after December 9, 2010. (Relator's Ex. 47A)

{¶120} Subtracting the \$222,400 in payments from the initial deposit leaves a balance of \$53,390.

{¶121} Assuming for the sake of argument that Respondent's ten percent fee was reasonable, Respondent's fee would have been \$27,579. Subtracting that amount from the aforementioned balance leaves \$25,811 due and owing to Christopher Rolic.

{¶122} Respondent's subpoenaed bank records reveal that the IOLTA account in which Rolic's award was deposited had a balance of \$2,784.15 as of March 31, 2011. Moreover, no activity occurred in that account as of the date of the hearing in this matter. Respondent initially testified that he felt he did not believe he owes Rolic any funds but could not articulate a reason why.

{¶123} Pursuant to the Supreme Court of Ohio's order that suspended Respondent's license to practice law as of January 7, 2011, Respondent was required to "refund any part of any fees or expenses paid in advance that are awarded or not paid, and account for any trust money or property in Respondent's possession or control." By failing to pay Christopher Rolic the

balance of the funds Respondent was holding in trust for him, Respondent had violated that order.

Conclusions of Law

{¶124} Relator has proven by clear and convincing evidence that the conduct of Respondent relative to counts five and six of the second amended complaint constituted violation of the following Rules of Professional Conduct: Prof. Cond. R. 1.15(a)(2) [a lawyer shall maintain a record for each client on whose behalf funds are held]; Prof. Cond. R. 1.15(a)(5) [a lawyer shall perform and retain a monthly reconciliation of the records of client funds]; Prof. Cond. R. 1.15(d) [a lawyer shall promptly notify the client or third persons upon receiving funds or other property in which a client or third person has an interest]; Prof. Cond. R. 8.4(b) [a lawyer shall not commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness]; and Prof Cond. R. 8.4(c)

AGGRAVATION AND MITIGATION

{¶125} Respondent's conduct exhibited six of the nine aggravating factors set forth in BCGD Proc. Reg.10(B)(1).

{¶126} Dishonest or selfish motive. The evidence illustrated multiple instances of dishonest and/or selfish motivation. First is a federal felony conviction for income tax evasion whereby Respondent pleaded guilty to an information in which he admitted he concealed his true profit of his law practice, falsely claimed personal expenses as business expenses, and provided false information to the Internal Revenue Service. In the Colorado incident he conspired with a fugitive to wire a substantial sum into his IOLTA account and immediately transferred \$50,000 of that money into his operating account when he had no clearly defined role as an attorney in the matter. In the Kazen matter, Respondent

endorsed and deposited a settlement draft and withdrew his fee even though the release was never presented to or executed by his client or anyone else. Months later, and only after a grievance had been filed and police visited his law office, he paid the client.

{¶127} Pattern of Misconduct. In addition to the foregoing examples, Respondent also persistently misused his IOLTA account by making unauthorized payments to himself and non-clients, overdrawing his account; and failing to maintain adequate records of funds received and disbursements made.

{¶128} Multiple offenses. To re-cap the violations which the panel found by clear and convincing evidence, Respondent is guilty of violating the following Rules of Professional Conduct:

- (a) Count One: Rules 1.5(d)(3) and 1.15(c).
- (b) Count Two: Rules 1.5(a); 1.15(c); 8.4(c); and 8.4(d).
- (c) Count Three: Rules 8.4(b); 8.4(c); and 8.4(h).
- (d) Count Four: Rules 1.15(d) and 8.4(c).
- (e) Counts Five and Six: Rules 1.15(a)(2); 1.15(a)(5); 1.15(d); 8.4(b); and 8.4(c).

{¶129} Lack of Cooperation in the Disciplinary Process. Due in part to Respondent's failure to keep the Supreme Court advised of his current address, the record consists of numerous examples of failure of service by certified mail even though the interim suspension order of the Supreme Court of Ohio issued on January 7, 2011 specifically required Respondent to advise Relator and Disciplinary Counsel of any change of address. Moreover, the efforts of Relator to obtain a response to its Request for Production of Documents first filed on April 7, 2011, was never obtained even though an order to compel was granted by the Board. Finally, an order granting sanctions against

Respondent failed to produce even a single document from Respondent. Finally, Respondent filed at least two complaints after the effective date of his interim suspension, withdrew funds from his IOLTA account, failed to refund any unearned fee or expense, and account for any trust money in his control -- all in violation of the Supreme Court's interim suspension order.

{¶130} Resulting harm to victim of the misconduct. Respondent had agreed to deposit the proceeds of a probate mediation into his IOLTA account on behalf of his client, Christopher Rolic. There should be at least \$53,390 of Rolic's money in that account. However, the balance in that account is less than \$2,800.

{¶131} Failure to make restitution. Respondent has not made any restitution relative to the balance owed to Mr. Rolic. At the hearing, and after first stating he felt he did not owe any money, Respondent admitted near the end of the hearing that he owes Rolic money.

{¶132} As to mitigating factors set forth in BCGD Proc. Reg. 10(B)(2), the panel finds as follows:

- (1) Respondent had no prior disciplinary record.
- (2) Although the OLAP witness offered testimony that seemed to comply with all of the requirements necessary to consider alcoholism as a mitigating factor, the opinions expressed were derived more from Respondent's narrative than an awareness of all of the specifics of the misconduct. Without knowing the specifics or timing of Respondent's misconduct, including the tax evasion that occurred almost nine years before the OLAP witness even met Respondent, the OLAP witness made the blanket assertion that all of his alleged misconduct could be

attributed to alcoholism. Under these circumstances, the panel gives little weight to his alcoholism as a mitigating factor.

(3) Respondent's Exhibit A, a written report from Lee J. Horowitz, Ph.D., and addressed to the hearing panel, purported to give a psychological diagnosis of Respondent and dated August 5, 2011, was admitted over objections into evidence with the qualification that it would be considered only if it is proper within the Rules of the Board and the Rules of Evidence. As Relator could not cross-examine the doctor and since it did not have prior knowledge, the panel could not consider it.

RECOMMENDED SANCTION

{¶133} Relator urged the panel to recommend disbarment as an appropriate sanction. Respondent did not offer an opinion on an appropriate sanction. The panel, considering the seriousness of the misconduct, believes only two possible sanctions would be appropriate: indefinite suspension or disbarment.

{¶134} In deciding an appropriate sanction, the Supreme Court looks at many factors such as the ethical duties that the lawyer violated; sanctions imposed in similar cases; and the existence of aggravating factors and mitigating factors. (See, e.g. *Disciplinary Counsel v. Smith*, 128 Ohio St.3d 390, 392, 2011-Ohio-957, ¶9.)

{¶135} Here, among the duties Respondent violated were: three separate instances involving dishonesty, fraud, deceit or misrepresentation [Rule 8.4(c)] and six violations of Rule 1.15 relating to maintenance of his IOLTA.

{¶136} In *Disciplinary Counsel v. Squire* (2011) Slip Opinion No. 2011-5578, the Supreme Court imposed an indefinite suspension on an individual who failed to keep

clients' funds separate from his personal funds and neglected to maintain adequate records of how he was using money entrusted to him. Similarly, an indefinite suspension was the appropriate sanction for an attorney who failed to "maintain accurate records of the funds held in her client trust account, * * * promptly deliver funds that a client was entitled to receive, and * * * cooperate in the disciplinary process." *Disciplinary Counsel v. Stubbs*, 128 Ohio St.3d 344, 346, 2011-Ohio-553, ¶11. Here, Respondent committed similar acts with the addition of multiple instances of dishonesty.

{¶137} In *Disciplinary Counsel v. Smith, supra*, Respondent was convicted of conspiracy to defraud the IRS, making false tax returns, and corruptly endeavoring to obstruct and impede an IRS investigation. The Supreme Court imposed an indefinite suspension with credit for time served while Respondent was placed on an interim suspension.

{¶138} On the other hand, where an attorney has demonstrated a proclivity for lying and deceit or a "propensity to scheme and deceive without any moral appreciation for the lies he tells or the fraud he perpetrates," disbarment is the appropriate sanction. *Cincinnati Bar Assn. v. Farrell*, 129 Ohio St.3d 223, 231, 2011-Ohio-2879, ¶35, citing *Disciplinary Counsel v. Manogg*, 74 Ohio St.3d 213, 217, 1996-Ohio-312.

{¶139} Here, Respondent was convicted of income tax evasion. He used his IOLTA account to shield funds from creditors and transferred money from his IOLTA account into a business account in furtherance of that scheme. Respondent, like the respondent in *Squire, supra*, kept no records relative to his IOLTA account. He failed to timely deliver funds to his client. He failed to comply with the orders set forth in his interim suspension by filing at least two complaints after the effective date of his

suspension and using IOLTA account checks to pay filing fees which were returned due to insufficient funds.

{¶140} Respondent's misuse of his trust funds resulted in several overdrafts, and an inability to pay clients funds to which they were entitled because he did not have a sufficient balance to meet his obligation. His total disregard for the rules relative to trust funds can be seen by his use of checks from his IOLTA account to pay a retainer to his attorney in this disciplinary action and to the Ohio State Bar Association to pay for a CLE course.

{¶141} In addition to the foregoing, Respondent flew to Colorado, met with a fugitive who was the subject of a massive manhunt, and agreed to transfer over \$700,000 from the liquidation of one of the fugitive's accounts into his IOLTA account despite the absence of an attorney-client relationship. Respondent then authorized the transfer of \$50,000 from the aforementioned \$700,000 wire transfer into his operating account.

{¶142} In *Toledo Bar Assn. v. Mason*, 118 Ohio St.3d 412, 2008-Ohio-2704, ¶32, the Supreme Court stated that a "continuous course of conduct involving deceit, misappropriation of clients' funds, neglect of clients' cases, failure to account for fees; failure to make restitution, and failure to cooperate in the investigation of this misconduct" warrants disbarment.

{¶143} Here, the absence of a prior disciplinary record and involvement in OLAP might be enough to tilt the scale toward an indefinite suspension. However, the sheer multitude of the offenses involving dishonesty and the ultimate goal of protecting the public mandates a more severe sanction. Moreover, Respondent and his OLAP contact

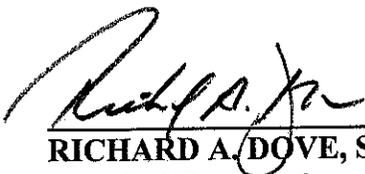
both testified that Respondent has been sober since October 2009. However, many of the IOLTA violations occurred after that date.

{¶144} In conclusion, to paraphrase Relator, integrity is the bedrock of the practice of law. When one considers the totality of the instances of misconduct, Respondent has shown a lack of integrity and a pattern of misconduct that requires the ultimate sanction of disbarment.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 2, 2011. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Kevin Toohig, be permanently disbarred from the practice of law in Ohio. 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.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**