

IN THE SUPREME COURT OF OHIO

**CLEVELAND METROPOLITAN
BAR ASSOCIATION**
1301 East Ninth Street, Second Level
Cleveland, Ohio 44114

Relator

MARK ROBERT PRYATEL
250 E. 264th Street
Euclid, Ohio 44132

Respondent

CASE NO. 2011-1727

**RELATOR'S RESPONSE TO
RESPONDENT'S MOTION TO
REMAND FOR HEARING AND
MOTION TO SUPPLEMENT THE
RECORD**

FILED
DEC 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

**RELATOR'S RESPONSE TO RESPONDENT'S MOTION TO REMAND FOR
HEARING AND MOTION TO SUPPLEMENT THE RECORD**

Now comes the Relator Cleveland Metropolitan Bar Association and hereby submits the following response to Respondent Mark Robert Pryatel's Motion to Remand for Hearing and Motion to Supplement the Record. Relator does not oppose Respondent's Motion to Remand for Hearing, but does oppose Respondent's Motion to Supplement the Record for reasons that are more fully discussed in Relator's Memorandum in Support contained herein.

MEMORANDUM IN SUPPORT

Relator filed its complaint against Respondent on or around February 14, 2011. *See*, Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio ("Board"), hereinafter "Board Report", attached as Appendix A. The complaint was served upon Respondent by certified mail, but Respondent failed to answer or otherwise respond to the complaint. *Id.* On or around August

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22, 2011, Relator filed its Motion for Default Judgment. *Id.* at 2. The Board considered this case on October 7, 2011. *Id.* at 9. The Board adopted the Findings of Fact and Conclusions of Law of the Master Commissioner and recommended that Respondent be permanently disbarred from the practice of law in the State of Ohio. *Id.*

On November 28, 2011, Respondent filed a Motion to Remand for Hearing. Attached to Respondent's motion were a personal affidavit and three character reference letters. On November 29, 2011, Respondent filed a Motion to Supplement the Record. Respondent requests that he be permitted to supplement the record with the information contained in his affidavit, the contents of the three character reference letters, the results of a future assessment to be conducted by the Ohio Lawyers Assistance Program ("OLAP"), and the results of a not yet scheduled psychological evaluation. Respondent further requests that this Court remand the case to the Board.

Relator does not object to Respondent's request to remand this case for hearing before the Board. However, Relator notes that this Court has only remanded cases for "the most exceptional circumstances." *Dayton Bar Assn. v. Stephan* (2006), 108 Ohio St.3d 327, 2006-Ohio-1063, 843 N.E.2d 771 (denying a request for a remand finding that "attorneys have an obligation to assist in disciplinary matters and that the record should be developed in the answers and hearings prior to reaching this Court"). *See also Cleveland Bar Assn. v. Witt* (1999), 85 Ohio St.3d 9, 1999-Ohio-198, 706 N.E.2d 763 (denying a request for a remand finding that the respondent only awoke to the "consequences of his inaction" after a show cause order was issued).

If the Court determines that this case qualifies as an "exceptional circumstance," Relator respectfully requests that the remand be strictly limited to the consideration of additional

mitigation evidence.¹ See *Butler County Bar Assn. v. Portman* (2007), 116 Ohio St.3d 1450, 2007-Ohio-6842, 878 N.E.2d 28 ; *Disciplinary Counsel v. McShane* (2009), 121 Ohio St.3d 169, 2009-Ohio-746, 902 N.E.2d 980 (remanding a case to the board after respondent “proffered compelling evidence of a mental disability in explanation for his failure to answer as well as substantial evidence in mitigation of his misconduct”); and *Disciplinary Counsel v. Johnson* (2011), 2011-Ohio-807 (granting Respondent’s motion to remand and supplement the record, but limiting the supplement of the record and the board’s review of the case on remand to consideration of mitigation evidence only). Respondent should not be permitted to contest the facts and/or provide additional information concerning the facts of this matter as found by the Board because Respondent has already forgone several opportunities to do so.² Instead, the Board’s review of this case on remand should be limited to the review of mitigation evidence only.

With regard to Respondent’s Motion to Supplement the Record, Relator opposes Respondent’s request because Respondent has exceeded the period in which new evidence may be introduced. This Court has consistently held that under Rule V of the Rules for the Government of the Bar of Ohio, “the time for the production of evidence is at the formal hearing before a panel...Rule V has no provision for the introduction of evidence in the brief filed in this court or in the oral argument to this court.” *Columbus Bar Assn. v. Sterner* (1996), 77 Ohio St.3d 164, 167-8, 672 N.E.2d 633. See Also *Columbus Bar Assn. v. Finneran* (1997), 80 Ohio

¹ The Board has already considered Respondent’s lack of prior disciplinary record.

² Relator filed its complaint on February 14, 2011 and secured service upon Respondent by certified mail. Respondent failed to answer or otherwise respond to the complaint. On August 22, 2011, Relator filed its Motion for Default Judgment. See, Board Report at 1-2. At any of these junctures, Respondent could have responded, denied and/or contested the facts of this matter, but Respondent chose not to do so.

St.3d 428, 432, 687 N.E.2d 405; *Disciplinary Counsel v. Lentes*, 120 Ohio St.3d 431, 2008-Ohio-6355, at ¶ 4, 900 N.E.2d 167. Furthermore, the Court has cautioned that at the show cause stage of disciplinary proceeding, “[o]nly in the most exceptional circumstances would we accept additional evidence at that late stage of the proceedings.” *Sterner*, at 168.

Relator does not believe that the circumstances surrounding Respondent’s failure to participate in these proceedings qualifies as an “exceptional circumstance” that would allow Respondent to introduce additional evidence at this late stage. Other than speculative and undocumented medical conclusions regarding Respondent’s mental health, Respondent has failed to provide any substantiated reasons establishing that his failure to participate in these proceedings was due to an exceptional circumstance. Because Respondent has not produced any evidence indicating that unique circumstances prevented him from participating in this disciplinary proceeding, Relator respectfully requests that this Court deny Respondent the opportunity to introduce evidence at this late stage.

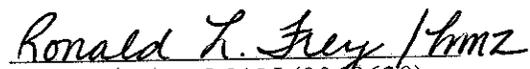
In the alternative, if the Court concludes that Respondent’s situation qualifies as an “exceptional circumstance”, Relator believes that any supplement of the record should be delayed because the contents of two of the proposed supplements are at this time unknown and purely speculative. Respondent proposes that the record be supplemented with the results of an OLAP assessment and a psychological evaluation. However, Respondent’s OLAP assessment is scheduled for December 8, 2011 and a psychological evaluation is yet to be scheduled. Therefore, the diagnoses and conclusions contained in these future evaluations are at this time unknown. However, Relator acknowledges that once Respondent undergoes the scheduled OLAP assessment and a psychological evaluation, the Board may then consider such mitigation evidence at a hearing and give such evidence its appropriate weight. If this Court allows

Respondent to supplement the record, Relator respectfully requests that any supplement be limited to the addition of relevant mitigation evidence only.

CONCLUSION

Relator does not oppose Respondent's request to remand this case to the Board. Relator notes, however, that this Court has only remanded cases under "exceptional circumstances". Should a remand be allowed, Relator requests that the purpose of the remand be strictly limited to the introduction of mitigation evidence. However, Relator does oppose Respondent's request to supplement the record because Respondent has surpassed the time period in which this Court allows the introduction of new evidence. If this Court concludes that a supplement of the record is appropriate in this case, Relator believes that speculative and unknown medical and mental health evaluation results should not be allowed into the record at this time. If this Court grants Respondent's Motion to Supplement the Record, Relator respectfully requests that the Court forestall admission of Respondent's proposed supplements until the Board has had an opportunity to review that evidence at a hearing and assign it proper weight for mitigation purposes.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Relator Cleveland Metropolitan Bar Association's Response to Respondent's Motion to Remand for Hearing and Motion to Supplement the Record was served via regular mail this 6 day of December 2011, upon the following:

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Ronald L. Frey / hmr
Ronald L. Frey (0078180)
Counsel for Relator

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

11-1727

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|-----------------------------------------------|---|-------------------------------------|
| In Re: | : | |
| Complaint against | : | Case No. 11-023 |
| Mark R. Prytatel | : | Findings of Fact, |
| Attorney Reg. No. 0019678 | : | Conclusions of Law and |
| Respondent | : | Recommendation of the |
| Cleveland Metropolitan Bar Association | : | Board of Commissioners on |
| Relator | : | Grievances and Discipline of |
| | : | the Supreme Court of Ohio |

MOTION FOR DEFAULT JUDGMENT

On August 23, 2011, this matter was referred by the secretary of the Board to Master Commissioner, Jeffrey T. Heintz pursuant to Gov. Bar. R. V, Section 6(F)(2) for ruling on the Relator's motion for default judgment.

PROCEDURAL BACKGROUND

{¶1} Respondent was admitted to practice of law in the State of Ohio on November 1, 1983. There is no record of any prior disciplinary proceedings against him. Relator's complaint was filed on February 14, 2011, after having been certified by a probable cause panel that same day. Service of the complaint was made upon Respondent by certified mail. He has failed to answer or otherwise plead in response to the complaint.

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On August 22, 2011, Relator filed its Motion for Default Judgment and the matter was referred to Master Commissioner Heintz.

FINDINGS OF FACT

{¶2} In its two-count complaint, Relator alleges ten violations of the Rules of Professional Conduct arising out of two separate instances in which Respondent undertook representation of Richard J. Troyan and Luis A. Martich.

{¶3} Count One of the complaint, involving Troyan, alleges that in February 2009, Respondent was engaged to file a motion for Troyan's judicial release from prison. In the motion for release, Respondent alleged that "Defendant Troyan has arranged for employment upon his release * * *." (Relator's Motion for Entry of Default, Ex. C at p. 4, ¶5.) However, in an affidavit submitted in support of the motion for default, Troyan says that Respondent knew that Troyan was permanently and totally disabled, and therefore unable to work. (Relator's Motion for Entry of Default, Ex. B at ¶6.) Relator thus alleges that Respondent misrepresented Troyan's ability and intent to secure employment upon his release from the institution, in violation of Prof. Cond. R. 3.3, regarding candor to the tribunal. Troyan obtained judicial release as a result of the motion filed on his behalf by Respondent.

{¶4} Count One goes on to allege that prior to Troyan's release from prison, Respondent took possession of a check payable to him in the amount of \$50,000, representing the net proceeds of a workers' compensation award obtained for Troyan by another attorney. Respondent deposited the check into his personal account, rather than an

IOLTA account as required by Prof. Cond. R. 1.15(a).¹ From time to time thereafter, Respondent disbursed some of these funds both to Troyan and, at his direction, to third parties. The majority of these funds, however, were kept by Respondent, supposedly in payment for other legal services rendered by Respondent to Troyan, both in connection with the motion for judicial release and thereafter, when Respondent represented Troyan in other criminal matters. In his affidavit, Troyan alleges that Respondent failed to provide him with an accounting of these funds and has not refunded them to Troyan, despite repeated requests. (Relator's Motion for Entry of Default, Ex. B at ¶10-11.) Relator alleges that in so doing, Respondent has violated Prof. Cond. R. 1.15(c) regarding deposit of client funds into an IOLTA account and withdrawing fees only as they are earned.²

{¶5} As a result of all the foregoing, Relator also alleges that Respondent also violated Prof. Cond. R. 8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

{¶6} Count Two of the complaint, dealing with Martich, alleges that Respondent was engaged by him to seal his criminal conviction in Cuyahoga County Common Pleas Court. Martich's father allegedly paid Respondent \$2,025 to be disbursed as follows: (i) \$1,406 to satisfy a restitution order in the underlying criminal case (presumably a condition precedent to sealing Martich's conviction); (ii) \$269 to pay the court costs associated with the motion for seal; and (iii) \$350 for Respondent's fee.

¹ Notably, no violation of Prof. Cond. R. 1.15(a) is alleged in the complaint.

² In paragraph 7 of the complaint, Relator alleges that Respondent "has failed to timely provide an accounting of fees to date in response to repeated requests made by Grievant." However, in paragraph 10, where Relator sets forth its formal charges against Respondent, Relator inexplicably fails to allege a violation of Prof. Cond. R. 1.15(d), which requires a full and prompt accounting to be rendered to a client upon request.

{¶7} It is alleged that Respondent failed to file for any relief on Martich's behalf or disburse any of the funds as agreed, and that he has not refunded any of the money. It is also alleged that as a result of Respondent's inaction, Martich has permanently lost the ability to seek to have his record sealed. It is alleged that Respondent's conduct in connection with Martich violated Prof. Cond. R. 1.15(c) regarding deposit of client funds into an IOLTA account and withdrawing fees only as they are earned, Prof. Cond. R. 1.1 regarding competent representation, Prof. Cond. R. 1.3 regarding acting with reasonable diligence, Prof. Cond. R. 1.4(a)(3) regarding keeping a client reasonably informed, Prof. Cond. R. 1.4(a)(4) regarding providing information to a client, Prof. Cond. R. 8.4(c) regarding conduct involving dishonesty, fraud, deceit, or misrepresentation, and Prof. Cond. R. 8.4(d) regarding conduct that is prejudicial to the administration of justice. All of the foregoing is attested to in an affidavit from Martich submitted in support of the motion for default. (Relator's Motion for Entry of Default, Ex. D.)

{¶8} The Troyan affidavit and the Martich affidavit, an affidavit from Heather M. Zirke, Relator's Counsel, together with certified copies of other documents that support the allegations of misconduct are attached to the motion for default. *See Cincinnati Bar Assn. v. Newman*, 124 Ohio St.3d 505, 2010-Ohio-928. In addition, Respondent, although he has not filed an answer to the complaint, was deposed by Relator on two occasions wherein he discussed at length the circumstances of his representation of Troyan and the deposit of the \$50,000 into his personal account. Accordingly and pursuant to Gov. Bar R. V, Section 6(F)(1)(b), the motion is supported by "[s]worn or certified documentary prima facie

evidence in support of the allegations made.” See *Dayton Bar Assn. v. Sebree*, 104 Ohio St.3d 448, 2004-Ohio-6560.

CONCLUSIONS OF LAW

{¶9} Troyan states unequivocally that “Mr. Pryatel was aware that I was unable to secure employment upon my release from an Ohio Penal Institute due to me being permanently disabled” (Relator’s Motion for Entry of Default, Ex. B at ¶6.) Respondent, on the other hand, testified at a deposition that the motion merely contained “boilerplate language; that it would allow him to look better to the judge if she [*sic*] indicated that there were at least prospects for him to return to employment * * *.” and that in Respondent’s opinion Troyan was “capable of performing certain tasks of employment.” (Relator’s Motion for Entry of Default, Ex. E at pp. 62-63.) On balance, Respondent’s blandishments in connection with the misrepresentation of a material fact in the motion for judicial release are insufficient to rebut Troyan’s unequivocal attestation as to his condition, even ascribing some tenuousness to the credibility of Troyan, an apparent career criminal.

{¶10} The remaining allegations with respect to Troyan relate to Respondent’s custody and disbursement of the \$50,000 workers’ compensation settlement. Respondent attributes the initial deposit into his personal account (an act any first year law student would realize is prohibited) to the unwillingness of his IOLTA bank to accept a two-party check. (Relator’s Motion for Entry of Default, Ex. E at p. 34.) He also vaguely describes disbursements he allegedly made to third parties at Troyan’s request (*id.* at p. 39). Finally, he alleges that he was entitled to pay himself from these funds for additional legal services

he performed for Troyan. (*id.* At p. 53, *et seq.*). Respondent's explanations ring hollow. He suggested at one point that he "would have cancelled checks to support" his claim of third party disbursements (*id.* At p. 45) but he never produced them. Similarly, he justified \$7,000 of additional legal fees by the theory that Troyan wrote him 70 letters, and Respondent charged him \$100 each (*id.* at p. 51). However, Respondent acknowledged that he had no formal agreements with Troyan for any of this additional legal work. (*see e.g., id.* at p. 58)

{¶11} All but one of the formal allegations regarding Martich³ are attested to by him in his affidavit. They are unrefuted and are supported by sworn documentary prima facie evidence in support of the allegations made. However, the allegation of Respondent's neglect, Martich "lost his eligibility to have his record sealed pursuant to a Motion to Seal the Record" (Complaint at ¶18), is supported only by Martich's affidavit. He is not an attorney, and there is otherwise no evidence submitted in support of the proposition that he has permanently lost the opportunity for his record to be sealed. Presumably, Relator's allegation is that Respondent's conduct in this regard violated Prof. Cond. R. 8.4(d) as conduct prejudicial to the administration of justice.⁴ Based on the foregoing, the allegation regarding Respondent's violation of Prof. Cond. R. 8.4(d) is not supported by *competent*

³ Again, there is an anomaly in Relator's complaint. Paragraph 16 alleges that Respondent failed to deposit Martich's funds into an IOLTA account. However, paragraph 20, where the formal allegations of misconduct are set forth, there is no formal allegation of a violation of Prof. Cond. R. 1.15(a). Moreover, no evidence has been offered by Relator as to where Martich's funds were deposited.

⁴ The complaint does not specifically describe which aspects of Respondent's conduct violate which Rules. The Master Commissioner's presumption that the alleged violation of Prof. Cond. R. 8.4(d) relates to the loss of Martich's eligibility for a sealing of his record is based on a process of elimination.

evidence sufficient to warrant a finding by clear and convincing evidence. Accordingly, the Master Commissioner recommends that the Board dismiss this allegation.

{¶12} Based on the information submitted in support of the motion, however, Relator has proven all of the remaining allegations of its complaint, as to both counts, by clear and convincing evidence and the Master Commissioner recommends that the Board so find.

MITIGATION, AGGRAVATION AND SANCTION

{¶13} BCGD Proc. Reg. 10 sets forth guidelines for imposing lawyer sanctions, and provides factors to be considered in aggravation and in mitigation of punishment.

{¶14} Respondent has no prior disciplinary record; however, there are no other discernible factors that mitigate Respondent's behavior. On the other hand, Respondent has committed multiple offenses, has failed to make restitution and has failed to acknowledge the wrongful nature of his conduct.⁵ While he has given a deposition, Respondent has otherwise failed to cooperate in these proceedings as required by Gov. Bar R. V, Section 4(G) and he has knowingly failed to respond to them in violation of Prof. Cond. R. 8.1.

{¶15} There is no evidence of any chemical dependency or mental disability.

{¶16} As to Respondent's conduct in connection with the motion for judicial release, instances wherein a lawyer misrepresents facts concerning his client in such a motion have been found to be acts of dishonesty under the former Disciplinary Rules, justifying actual suspension from the practice of law. *See e.g. Disciplinary Counsel v.*

⁵ Notwithstanding his admitted violation of the Rules regarding Troyan's \$50,000, the closest that Respondent came during his deposition to an acknowledgement in that regard was to suggest that he could "throw more money" at Troyan to settle the accounts between them (*id.* at 186).

Cirincione, 102 Ohio St.3d 117, 2004-Ohio-1810. As to Respondent's conduct regarding Troyan's \$50,000 and Martich's \$2,025, Relator argues that, "the normal sanction for misappropriation of client funds coupled with neglect of client matters is disbarment."⁶ *Cleveland Bar Assn. v. Glatki*, 88 Ohio St.3d 381, 384, 2000-Ohio-354. See also, *Trumbull Cty. Bar Assn. v. Kafantaris*, 121 Ohio St.3d 387, 2009-Ohio-1389: "misappropriation of client funds carrie[s] a 'presumptive sanction of disbarment.'"

{¶17} Here, Respondent's conduct is exacerbated by his commission of multiple offenses with two different clients and Relator argues that he should be disbarred. He has not acknowledged his misconduct, expressed remorse or made restitution. This is puzzling, given Respondent's initial participation in these proceedings and his lack of a prior record of discipline. A sanction of disbarment permanently forecloses Respondent from ever demonstrating fitness to re-enter the practice of law. Even though the unanswered questions about Respondent arise from his unexplained failure to participate in these proceedings, a sanction of indefinite suspension, with appropriate conditions, is consistent with the notion, repeatedly expressed by the Supreme Court, that the primary purpose of disciplinary sanctions is to protect the public, *see Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510. At the same time, it permits the possibility, however remote, that Respondent might one day resume the competent, ethical practice of law. Accordingly, the Master Commissioner recommends that the Respondent be indefinitely suspended from the practice of law, whereby his readmission to the practice will be conditioned on compliance

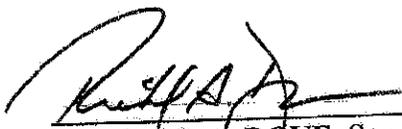
⁶ Although the whereabouts of Martich's funds is unknown, Relator has proven by clear and convincing evidence that Respondent received them, and did nothing to earn any fees in exchange therefore.

with all of the conditions of Gov. Bar R. V, Section 10, including restitution to Troyan and Martich.

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 October 7, 2011. The Board adopted the Findings of Fact and Conclusions of Law of the Master Commissioner. The Board after careful consideration amended the sanction and recommends that Respondent, Mark R. Prytatel, be permanently disbarred from the practice of law in the State of 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 Recommendations as those of the Board.



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