

ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel,)
)
 Relator,)
)
 -v-)
)
 Kevin T. Toohig,)
)
 Respondent.)

Case No. 2011-2037

RESPONDENT'S OBJECTIONS

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SUPREME COURT OF OHIO

Now comes the respondent, Kevin Toohig, pro se, and respectfully requests a finding less than permanent disbarment. Reasons for this are in the attached brief.

Respectfully submitted,



Kevin T. Toohig
Respondent, Pro SE

BRIEF IN SUPPORT

This case presents the question of whether the Respondent's felony tax evasion conviction and irresponsible and unethical behavior warrants the recommended sanction to take Respondent's license to practice law away for life. Respondent appreciates the magnitude of this proceeding and states that Pro Se representation is by necessity.

Please read the following as Respondent's acceptance of guilt and genuine remorse for his crime and ethical violations combined with an advocacy necessary to retain the opportunity to practice law. Again, Respondent accepts full responsibility for his actions and will not offer excuses for poor choices and behavior. Yet, the nature of this pleading mandates advocacy and the need to mitigate, explain or in some instances deny some of the allegations and findings of The Relator, The Panel and The Board. The review of hundreds of cases decided by This Court, seem to (respectfully) impose sanctions less than permanent disbarment for behavior that was (seemingly) more destructive Respondent's in the instant matter.

The permanent disbarment sanction recommended by the Board exceeds what this court has used in other pertinent cases. Rule 10 of the Board of Commissioners on Grievances and

Discipline contains a non-exhaustive list of mitigating and aggravating factors in determining sanctions. The sanction imposed should be in line with that in similar cases and be designed primarily to protect the public, not punish the offender. Respondent respectfully requests This Honorable Court, following their de novo review, impose a sanction less than one of permanent disbarment.

I. Standard Used by the Ohio Supreme Court

In determining an appropriate sanction, the court reviews both the aggravating and mitigating factors outlined in Section 10(B) of the Board of Commissioners on Grievances and Discipline's Rules.¹ *Cincinnati Bar Association v. Kellogg*, 126 Ohio St. 3d 360, 2010-Ohio-3285, 933 N.E.2d 1085, at ¶13, citing *Disciplinary Counsel v. Broeren*, 115 Ohio St. 3d 473, 2007-Ohio-5251, 875 N.E.2d 935. "Because each disciplinary case involves unique facts and circumstances, we are not limited to the factors specified in the rule and may take into account "all relevant factors" in determining which sanction to impose. BCGD Proc.Reg. 10(B)." Id.

Sanctions imposed in similar disciplinary cases are relevant in determining the sanctions to be imposed for attorney misconduct. *Toledo Bar Association v. Weisberg*, 124 Ohio St. 3d 274, 2010-Ohio-142, 921 N.E.2d 641, citing *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002 Ohio 4743, 775 N.E.2d 818. The primary purpose of disciplinary sanctions is not to punish the offender but to protect the public. *Disciplinary Counsel v. Hoppel*, 129 Ohio St. 3d 53, 2011-Ohio-2672, 950 N.E.2d 171.

GENERAL OBJECTIONS:

I. OLAP/AA

Respondent objects to the Board's decision to place little or no weight to the testimony of Paul Caimi, Esq., LCDC III, ICACD, the Associate Director of the Ohio Lawyer's Assistance Program (OLAP). Caimi can diagnose chemical dependency, and screen for mental illness.

¹ Available for review at <http://www.sconet.state.oh.us/LegalResources/rules/govbar/govbar.pdf#App2>

(Home Page OLAP at Ohio Supreme Court) Caimi is a Harvard graduate, a Boston University School of Law graduate and a licensed counselor with over 20 years of sobriety. Respondent objects to the lack of credence given to his testimony. Indent * ...without knowing the specifics or timing of Respondent's misconduct, including the tax evasion that occurred almost nine years before the 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. (Board Recommendation p.23-24). Respondent objects to this decision to simply ignore this expert testimony that was given by a professional to a degree of medical certainty. (transcript p.386)

Respondent voluntarily joined OLAP after his Dr. (Dr. Lee Horowitz) introduced him to a lawyer in recovery for 38 years and that lawyer informed him about the existence of OLAP. In November of 2009, long before his indictment in May 2010 and before any grievances were filed or certified, Respondent voluntarily signed a very demanding OLAP contract. Respondent voluntarily accepted responsibility, voluntarily acknowledged his alcoholism and mental illness and began a rigorous program of recovery that he continues to date. Respondent has successfully honored his OLAP requirements and again, voluntarily agreed to extend the contract's requirements from 2 to 3 years. Caimi testified in Federal Court on December 14, 2010 that "I've monitored many people and he (Respondent) is right up there at the top as far as his diligence and his compliance" (p. 11 federal sentencing transcript). Caimi's testimony * months later in the subject hearing echoed this expert opinion stating the Respondent continues to be a success story that has progressed in recovering from alcoholism, major depressive disorder and anxiety. Testimony and evidence presented in the subject hearing repeatedly stated that Respondent had rapidly become a different person filled with remorse and acceptance. Respondent is actively working a program, volunteering at treatment centers, sponsoring other alcoholics, sharing his story at meetings and diligently changing his life and making amends for

his destructive behavior and the consequences that have followed. Respondent has attended and participated in nearly 1000 AA meetings and has no intent to ever slow down his road to recovery.

Respondent objects to Relator's claims or inferences that Respondent was not truthful or remorseful and that he only joined OLAP to in an effort to displace blame or responsibility. The evidence is overwhelming that this is not the case.

The understandable ignorance of the disease of alcoholism may have lead to Relator's statements that some alleged violations occurred after the Respondent stopped drinking. Respondent is an alcoholic and will always be an alcoholic. Fortunately, treatment is available and lives can turn around and treated alcoholics still function at high levels all over the world. Alcohol is only a symptom of the disease. Abstaining from alcohol alone changes very little. Treating the disease on a daily basis and diligently working a strong program consistently leads to alcoholics thriving as productive human beings, fathers, husbands and even lawyers that certainly are not "a danger to their clients."

Respondent still stipulates that he broke the law. Respondent still stipulates that he violated ethical rules of professional conduct. Respondent still stipulates that his alcoholism, major depressive disorder and clinical anxiety were not the sole cause of all of his misdeeds. The objection is the decision to ignore the overwhelming lay and expert opinions, testimony and evidence including 28 months of active recovery.

II. Dr. Lee Horowitz

Respondent objects to the Board ignoring or not considering the expert report of Respondent's psychologist Dr. Lee Horowitz. The panel clearly admitted the Dr.'s report over objection. As will be discussed later in this brief, Horowitz did not testify live or by deposition because Respondent was indigent at the time of the hearing.

Yet, Relator was aware of the existence and role of Horowitz in Respondent's life and recovery for years or at least months before the hearing in August of 2011. During all of the three depositions Respondent volunteered for, Relator's review of the Federal sentencing of Respondent on Dec. 14, 2011 and several conversations with the Relator's counsel Respondent clearly advised Relator that Horowitz would author a report and offer expert opinions about Respondent's multiple diagnosis's and how these diseases affected his crimes and ethical violations.

Respondent realizes that Relator had no duty to depose or even speak with Horowitz. Yet, Relator obviously had the financial means to take a deposition or video testimony or even pay for a professional to come in live. Relator had the burden of proof and was very aware that Respondent was indigent and could never afford to properly bring live testimony from a doctor to the hearing. Respondent objects to the Board's choice to not consider Horowitz's report because he could not be cross examined. Relator could have examined or cross examined Horowitz at any time. Respondent's financial constraints severely prejudiced when the Board opted to not consider Horowitz's (who had treated me for 2 years at that point) expert opinions as a mitigating factor.

Without mitigation from OLAP or Horowitz, Respondent is relatively unarmed.

III. Evidence, Testimony

The Board considered, certified and made recommendations based on evidence presented by the Relator. While Respondent admits to ethical violations he must object to some technical issues in an effort to preserve a livelihood that provides for his family. To this end, Respondent objects to the type of evidence presented and not

presented in this disciplinary proceeding. The Board's recommendation brief separates the violations into 6 sections.

The Rudolf matter involved the representation of a client named Edmunds Petersons (the client). The client was obviously the central figure in this case. The client dealt with the Respondent from the beginning and willingly signed a contract hiring him as his lawyer in a sex and kidnap case involving 2 children. Petersons never expressed any displeasure with his representation, fees or about anything for that matter. Further, the client never filed a complaint with the Relator, and although available, never offered any evidence or testimony critical of the Respondent.

Likewise, in count II The Colorado Events, a complaint was never filed. This investigation began when a newspaper article was faxed to the Relator. There was no testimony or evidence from the client, Hysear Randell. Randell never filed a complaint and never expressed any displeasure with Respondent's behavior. Further, although available, Relator offered no evidence from any person related to the alleged violations. Nobody from Colorado, nobody from any banks, nobody from any of the law firms or lawyers the Respondent contacted for the client offered evidence or testimony critical of the Respondent.

While count III Tax Evasion is a felony and a per se violation of the law and the rules of professional conduct, there was no testimony from anyone from lawyers, prosecutors, IRS employees, accountants etc. Respondent was charged with a single count of tax evasion from the year 2000 and plead guilty, accepting full responsibility for his crime. He served his 6 months of house arrest and has completed 13 months of his 4 year probation without incident. Respondent has already completed all 180 hours of his community service and filed/reconciled all tax returns. A felony is certainly a violation (although a crime committed in 2000 may not be governed by the

current Rules of Professional Conduct) of ethics and an aggravating factor, yet the punishment imposed and the progress Respondent has made should be considered as mitigation.

If the Court does consider the Second Amended Complaint to be proper (discussed later) then the Rollic/IOLTA section of the Board's brief is also objected to. That is, Chris Rollic, the client, never filed a complaint, never contacted any bar associations or disciplinary bodies and never questioned the contract, the fees or the representation until subpoenaed as a witness 5 days prior to the hearing. Respondent continues to decipher and reconcile what Chris Rollic is owed and which checks he received. Regardless, Rollic has never filed a disciplinary complaint and prior to his testimony at the hearing, the client did not express a complaint. Christopher Rollic represents another count and violation where the client did not institute any action.

Respondent will once again stipulate and take full responsibility for mismanaging his trust account and virtually every bank account he had access to. This behavior was reprehensible, irresponsible and reckless. The bulk of the evidence presented by the Relator consisted of checks, bank statements and account ledgers they subpoenaed. Respondent only objects to the notion that his gross mismanagement and reckless record keeping (or lack of) and his inability to identify/explain particular checks or ledgers at the hearing are grounds for the ultimate sanction of permanent disbarment.

Respondent objects to the Board's decision to allow the 2d Amended Complaint into evidence at all. The Board's brief mentions the lack of authority for the Respondents objection. Respondent humbly states that Ohio Civil Rule 15 (nearly identical to Federal Civil Rule 15) should govern. If it is not necessary to get permission to file an amended complaint then Rule 15 wouldn't exist. Rule 15 mandates a party request leave to file an amended pleading. While this leave should be freely granted it must in fact be granted. *Wachunas v. MacMillan/McGraw Hill*

Co., 1993 Ohio App. Lexis 4511, 4-5 (Stark 1993) most clearly defines Respondent's position "...noting that although the rule directs that leave of the court (to amend) be liberally granted, nevertheless it is not given automatically." In the instant matter, Panel Chair Vucovich, in a March 28, 2011 telephone conference, reluctantly agreed to consider the admission of a second amended complaint. He gave Relator until May 1, 2011 to file **for leave**, to file their third complaint in this matter. Respondent contends that leave was never granted, that he was never served and that an answer was never filed to this complaint. Further, if a May 2, 2011 complaint was actually allowed into this case, Relator was required to file for default when an answer never appeared. Respondent claims that the massive impact the allegations contained in the 2d amended complaint had on the Panel and the Board should be ignored as improper. Moreover, any evidence or testimony that relate to the additional allegations this pleading contained should not be considered in this Court.

II. Discussion of Cases

The Ohio Supreme Court has routinely applied one year suspensions, with credit for the period of interim suspension, to attorneys who were convicted of tax evasion or fraud. See *Disciplinary Counsel v. Bennett*, 124 Ohio St. 3d 314, 2010-Ohio-313,318, 921 N.E.2d 1064 (discussing variety of cases including tax evasion which allowed credit for interim suspension); *Disciplinary Counsel v. Petroff*, 85 Ohio St.3d 396, 709 N.E.2d 111, 1999 Ohio 400 (attorney given one year suspension with credit for interim suspension arising from guilty plea in tax evasion case): *Dayton Bar Assn. v. Seall*, 81 Ohio St. 3d 280, 690 N.E.2d 1271, 1998 Ohio 630

(attorney received one year suspension with credit for interim suspension after being sentenced to prison for tax fraud).

In *Dayton Bar Association v. Lewis*, 84 Ohio St.3d 517, 1999-Ohio-418, 705 N.E.2d 1217. Lewis failed to file tax returns using a lie—that he was given an extension. Respondent did not misrepresent his failure and rather plead guilty to his charge involving this conduct and served his sentence. Lewis was not disbarred.

Office of Disciplinary Counsel v. Roetzel, 70 Ohio St. 3d 376, 1994-Ohio-254, 639 N.E.2d 50, shows that when the disciplinary complaint was brought against Roetzel arising from his guilty plea to tax evasion, he did not respond to the complaint, resulting in him being found in contempt and the panel issuing a decision based on the realtor's motion for default judgment. Respondent actively participated in the proceedings, cooperated fully with the IRS and affirmatively accepted personal responsibility for his conduct. Roetzel was not disbarred. Respondent agrees that he did not maintain complete records of all client funds coming into his possession or render appropriate accounting.

In *Disciplinary Counsel v. Doellman*, 127 Ohio St. 3d 411, the respondent was found to have committed misconduct in failing to properly separate and account for client's funds. The account balance regularly fell below that which was owned to the client. The respondent often commingled funds and deposited client funds in non-IOLTA accounts. The court noted that "in cases where attorneys have misused client trust accounts, as respondent did in this case, but without an improper motive or deceit, this court has regularly imposed six-month suspensions, conditionally stayed." *Disciplinary Counsel v. Vivyan*, 125 Ohio St.3d 12, 2010 Ohio 650, 925 N.E.2d 947, P 7-12. The motive in this case was admittedly not innocent. Respondent grossly mismanaged funds and his whole practice for that matter. Yet, this behavior occurred during the throws of his alcoholism and mental issues. He has been punished for this, served his time, and the federal court found "You've also worked hard to turn your life around and to get ahold of

your addictions. ...You have suffered from, as they say, co-morbidities or more than one diagnosis. That helps explain the errant behavior you engaged in. (Federal Sentencing p.20).

Billing clients for undocumented fees results in sanction less than permanent disbarment. See *Toledo Bar Association v. Stahlbush*, 126 Ohio St. 3d 366, 2010-Ohio-3823, 933 N.E.2d 1091 (Attorney received two years suspension, with one year stayed, for billing clients excess hours which she did not actually work); *Akron Bar Association v. Watkins*, 120 Ohio St. 3d 307, 2008-Ohio-6144, 898 N.E.2d 946 (suspended six month suspension imposed where attorney commingled funds and charged clients excessive fees and attorney cooperated in disciplinary process); *Disciplinary Counsel v. Johnson*, 113 Ohio St. 3d 344, 2007-Ohio-2074, 865 N.E.2d 873 (one year suspension appropriate where attorney charged and collected clearly excessive fees).

Discussion of intent

In considering what sanction should be imposed, the court must look to the mitigating factors outlined in the Board of Commissioners on Grievances and Discipline Procedural Regulations. The “absence of a dishonest or selfish motive” is a mitigating factor. BCGD Proc. Reg. 10(B)(2)(b). A significant mitigating factor is present where the respondent had no intent to obtain financial gain. *Akron Bar Association v. DeLoach*, 2011-Ohio-4201, at ¶13.

In *DeLoach*, the respondent received only a six month suspended sentence where the court determined that the respondent acted with no financial motive and no one was harmed by his conduct. (respondent had failed to file affidavit of indigency resulting in appeal being dismissed, then submitted false, redrafted letters to grievance investigation as if they were originals).

In *Cuyahoga County Bar Association v. Drain*, 128 Ohio St. 3d 288, 2008-Ohio-6141, 898 N.E.2d 580, the respondent attorney agreed to file a client’s dental malpractice claim. The

attorney missed the deadline for filing an expert report and failed to timely respond to the defendant's motion for summary judgment. Despite respondent's knowledge that he had mishandled his client's case, he allowed his malpractice insurance to lapse, leaving her with no recourse. The respondent then filed for bankruptcy and did not list the client as a creditor. The court determined that the attorney did not commit the misconduct for purposes of financial gain and that he showed good character aside from this limited misconduct, therefore, the attorney received only a six month stayed suspension.

In *Disciplinary Counsel v. Fumish*, 116 Ohio St. 3d 257, the respondent was found to have committed conduct by failing to inform a client for over two years that her case has been dismissed by the court. Instead, respondent represented to the client that the matter could be settled for \$16,000. Respondent then withdrew \$16,000 from his retirement account, placed it in his IOLTA account, and obtained a release from the client prior to providing her with the funds.

The court found the fact that the respondent did not act with a financial motive to be a significant mitigating factor, along with the fact that respondent had no prior disciplinary record and complied with the disciplinary process. The Board recommended that respondent be suspended from practice for twelve months with six months stayed. The Ohio Supreme Court agreed with the twelve month suspension, but stayed the entire period on the condition respondent commit no further misconduct on the basis of these mitigating factors. The court relied on the principle that the primary purpose of the disciplinary process was to protect the public. *Id.* at 260, citing *Disciplinary Counsel v. O'Neill*, 103 Ohio St.3d 204, 2004 Ohio 4704, 815 N.E.2d 286 (primary purpose of discipline is to protect the public, not to punish the offender). Respondent in this case did not intend to take money from anybody, only to take money and recklessly continue down his destructive path. Respondent made a lot of money and was used to money being around. When the large amounts of money stopped coming in the alcoholic behavior did not stop controlling the Respondent.

In *Medina County Bar Association v. Kerek*, 102 Ohio St. 3d 228, the respondent attorney agreed to take on a client's personal injury case but failed to file a complaint, return the client's phone calls, or immediately respond to the disciplinary process after the client has initiated a complaint. In determining that only a public reprimand was warranted the court noted significant mitigating factors, including that respondent "had no prior disciplinary record, had not sought or received financial gain through his misconduct, and had rectified the consequences of his misconduct by timely filing a complaint and negotiating a settlement." *Kerek* at ¶6. Similarly, in *Office of Disciplinary Counsel v. Shramek*, 98 Ohio St. 3d 441, 2003-Ohio-1636, 786 N.E.2d 869, where the respondent was found to have committed misconduct by egregiously mishandling a client's case, the court determined an appropriate sanction to be a one year suspension with six months stayed based on the fact that he did not act with a selfish motive and cooperated in the disciplinary process.

Numerous other cases have found the absence of dishonest or selfish motive to be a significant mitigating factor in determining sanctions. For example, in *Disciplinary Counsel v. Simon*, 128 Ohio St. 3d 359, 2011-Ohio-627, 944 N.E.2d 660, the respondent was found to have committed misconduct in failing to maintain separate accounts for client funds. He commingled his personal money with that of his clients, writing checks to his creditors from the same account client funds were deposited into. In imposing only a one year stayed suspension, the court noted that there was no evidence of a selfish motive or that any of the respondent's clients had actually been harmed by his conduct. See also *Columbus Bar v. Allerding*, 123 Ohio St.3d 382, 2009-Ohio-5589, 916 N.E.2d 808 (no suspension necessary where attorney mishandled case and was unable to account for client's fund where conduct was not motivated by a selfish motive, but by alcohol).

The case of *Disciplinary Counsel v. Kimmins*, 123 Ohio St. 3d 207, is very pertinent. This involved an attorney who committed multiple ethical violations but for a purpose he thought was proper. He received a one year stayed suspension. The court reasoned,

“[w]hile respondent's unilateral decision to clean up and dispose of Steiner's property against his client's known wishes, his misrepresentations to Steiner's children, which were designed to gain their agreement to his plan of action, his retention of his client's property, his failure to keep an accurate and complete inventory and to account for Steiner's personal property during the cleanup, and his failure to acknowledge the wrongfulness of his actions demonstrate that a suspension of his license to practice law for one year is warranted, there is no question that respondent acted in what he perceived to be Steiner's best interest.”

Respondent does not believe Relator proved by clear and convincing evidence that the Respondent ever intentionally took any funds that were not his. Certainly, Respondent intended to fund his lifestyle but that is different from intentionally stealing someone's money. With untreated alcoholism it is nearly impossible to determine Respondent's specific mind set.

Even in cases where the attorney's motive was financial gain less serious sanctions are imposed. See *Dayton Bar Association v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110, 812 N.E.2d 1280 (respondent suspended for six months for using nearly \$12,000 in client's trust fund account for his personal expenses); *Disciplinary Counsel v. Blaszak*, 104 Ohio St. 3d 330 (respondent received two year suspension with credit for interim suspension for his misconduct in offering to sell his testimony in an antitrust suit for \$500,000); *Medina County Bar Association v. Carlson*, 100 Ohio St. 3d 134, 2003-Ohio-5073, 797 N.E.2d 55 (attorney received a two year suspension for misconduct motivated by financial gain in deceitfully trying to purchase a mentally disabled individual's property for a fraction of its worth); *Disciplinary Counsel v. Blair*, 128 Ohio St. 3d 384, 2011-Ohio-767, 944 N.E.2d 1161 (attorney was suspended for two years with eighteen months stayed for writing checks to herself from incompetent ward's trust account, depleting the account and filing false affidavit with the court).

Permanent disbarment has rarely been found appropriate even with financial gain, and then in cases involving ongoing schemes to bilk multiple victims which is not the case here.

Cases which have resulted in permanent disbarment involved a higher number of violations and significantly more egregious conduct. In *Longino*, supra, the respondent was permanently disbarred for having a total of 48 disciplinary violations for a continuous pattern of fraudulent activity which permeated her practice. Longino routinely submitted false affidavits to the court, failed to obtain her client's consent to settle their actions, and even signed over and fully depleted a client's settlement check.

In *Lorain County Bar Association v. Fernandez*, 99 Ohio St. 3d 426, 2003-Ohio-4078, 793 N.E.2d 434, the attorney was permanently disbarred after continuously engaging in fraudulent activity during the period of time in which she was already indefinitely suspended from the practice of law. While she was indefinitely suspended, Fernandez retained client funds, ultimately leading to criminal charges for theft by deception. Additionally, Fernandez neglected multiple clients and failed to cooperate in the disciplinary investigation.

In *Office of Disciplinary Counsel v. Baumgartner*, 100 Ohio St. 3d 41, 2003-Ohio-4756, 796 N.E.2d 495, the respondent was disbarred for misconduct based on an eleven counts complaint demonstrating that she attempted to extort money from a client for her own financial gain, made numerous unfounded accusations against public officials, lied to a judge hearing her client's case, continued to represent clients during an interim suspension, failed to acknowledge that her conduct was wrongful, and failed to make any restitution to her victims.

In conclusion, Respondent will again apologize for the clumsy presentation of this objection and brief. Respondent respectfully requests This Honorable Court review this matter and find that Permanent Disbarment is not the proper sanction for this lawyer.

Respectfully,

Kevin Toohig Pro Se Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing was served upon R. Jeffery Pollock, McDonald Hopkins, LLC, 600 Superior Avenue, East- Suite 2100, Cleveland, Ohio, 44114, on January 13, 2011 via facsimile and regular U.S. Mail, postage prepaid.

A handwritten signature in black ink, appearing to read 'Kevin T. Toohig', written over a horizontal line.

Kevin T. Toohig
Respondent, Pro Se