

ORIGINAL

IN

THE SUPREME COURT OF OHIO

Disciplinary Counsel, :
Relator, : CASE NO. 2012-0287
v. :
Michael Brian Dockry, :
Respondent. :

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

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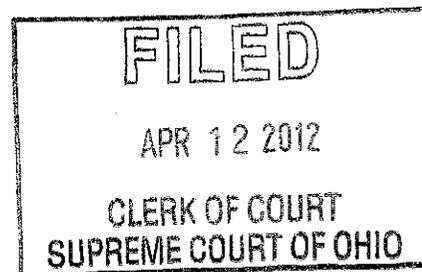


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Disciplinary Counsel,	:	
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	:	RELATOR’S ANSWER TO
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	:	TO THE BOARD OF
	:	COMMISSIONERS’ REPORT
	:	AND RECOMMENDATIONS
	:	

Relator, Disciplinary Counsel, submits this answer to respondent’s Objection to the Report and Recommendations (“Report”) filed by the Board of Commissioners on Grievances and Discipline (“Board”).

STATEMENT OF THE FACTS AND CASE

The facts and the disciplinary rule violations in this disciplinary case are not in dispute and are set forth in the Report filed on February 16, 2012, by the Board in this matter. Neither respondent nor relator objects to the Board’s findings regarding the facts and mitigating factors in this case. In addition, no one objects to the Board’s finding that respondent violated several Ohio Rules of Professional Conduct including Prof. Cond. Rule 1.15(a) (commingling personal and client funds) and Prof. Cond. Rule 8.4(c) (converting client funds) and that his misconduct was motivated by a selfish or dishonest motive. (Report ¶¶ 21 and 22.)

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

BASED ON THE COURT'S PRECEDENT, A ONE-YEAR SUSPENSION WITH SIX MONTHS STAYED IS AN APPROPRIATE SANCTION FOR RESPONDENT WHO COMMINGLED HIS PERSONAL FUNDS WITH CLIENT FUNDS IN HIS IOLTA ACCOUNT AND CONVERTED CLIENT FUNDS ON TWO OCCASSIONS.

Respondent's single objection is limited to the Board's recommended sanction – a one-year suspension with six months stayed upon conditions. Respondent argues that an “actual” suspension from the practice of law is too harsh and that a fully stayed six-month suspension is more appropriate. (Respondent's Objection at 1.) However, given the rule violations involved in this case and respondent's dishonest motive, a fully stayed suspension in this matter is inappropriate based on this Court's precedent.

In determining the appropriate sanction to impose for attorney misconduct, the Court considers “the duties violated, the actual or potential injury caused, the attorney's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases.” *Stark Cty. Bar Ass'n. v. Ake*, 111 Ohio St. 3d 266, 2006 Ohio 5704, 855 N.E.2d 1206. In the instant case, respondent commingled his funds with client funds in his IOLTA account in violation of Prof. Cond. Rule 1.15(a) and converted client funds on at least two occasions in violation of Prof. Cond. Rule 8.4(c). And in cases involving both a Prof. Cond. Rule 1.15(a) violation and a Prof. Cond. Rule 8.4(c), the presumed sanction is an actual suspension from the practice of law ranging from six months to disbarment. See *Disciplinary Counsel v. Johnson*, 2012 Ohio 1284, 2012 Ohio LEXIS 831; *Disciplinary Counsel v. Fowell*, 129 Ohio St. 3d 297, 2011 Ohio 3181, 951 N.E.2d 775; *Disciplinary Counsel v. Simon-Seymour*, 131 Ohio St. 3d 161, 2012 Ohio 114, 962 N.E.2d 309; *Disciplinary Counsel v. Stubbs*, 128 Ohio St. 3d 344, 2011

Ohio 553, 944 N.E.2d 225; *Trumbull County Bar Ass'n v. Kafantaris*, 121 Ohio St. 3d 387, 2009 Ohio 1389, 904 N.E.2d 875.

Here, the Board recommended that respondent received a one-year suspension with six months stayed resulting in an actual suspension of six months. This sanction is squarely within the range of sanctions this Court typically imposes in cases involving Prof. Cond. Rule 1.15(a) and Prof. Cond. Rule 8.4(c) violations and is, in fact, the most lenient actual suspension that respondent can receive under Gov. Bar Rule V for his violations. Moreover, a one-year suspension with six months stayed is in line with cases decided recently by this Court involving Prof. Cond. Rule 1.15(a) and Prof. Cond. Rule 8.4(c) violations based on misconduct similar to respondent's. See *Cincinnati Bar Ass'n v. Hauck*, 129 Ohio St. 3d 209, 2011 Ohio 3281, 951 N.E.2d 83 (imposing a one-year suspension with six months stayed for an attorney who commingled client funds and used deceptive checks); *Disciplinary Counsel v. Riek*, 125 Ohio St. 3d 46, 2010 Ohio 1556, 925 N.E.2d 980 (imposing a one-year suspension with six months stayed for an attorney who commingled client funds and used his client's settlement proceeds).

Nonetheless, in his objection, respondent argues that he should receive a fully stayed suspension relying on *Disciplinary Counsel v. Johnson*, 121 Ohio St.3d 403, 2009 Ohio 1432, 904 N.E.2d 892 and five other misappropriation cases in which the attorneys received fully stayed suspensions.¹ (Respondent's Objection at 1-3.) However, respondent is mistaken because those cases do not involve the Prof. Cond. Rule 8.4(c) violation present in the instant case that calls for an actual suspension. Respondent's misplaced argument is not a novel one. In fact, in *Riek*, 125 Ohio St. 3d 46, 2010 Ohio 1556, 925 N.E.2d 980, an attorney made a similar

¹ *Disciplinary Counsel v. Vivyan*, 125 Ohio St.3d 12, 2010 Ohio 650, 925 N.E.2d 947, P 7-12; *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009 Ohio 3480, 911 N.E.2d 897; *Cuyahoga Cty. Bar Ass'n v. Nance*, 119 Ohio St.3d 55, 2008 Ohio 3333, 891 N.E.2d 746; *Columbus Bar Ass'n v. Peden*, 118 Ohio St. 3d 244, 2008 Ohio 2237, 887 N.E.2d 1183; *Disciplinary Counsel v. Newcomer*, 119 Ohio St.3d 351, 2008 Ohio 4492, 894 N.E.2d 50.

argument to this Court in his disciplinary case involving both Prof. Cond. Rule 1.15(a) and Prof. Cond. Rule 8.4(c) violations. In response to *Riek's* argument, this Court agreed with the Board's determination that the attorney's deceptive conduct in violation of Prof. Cond. Rule 8.4(c) coupled with his commingling in violation of Prof. Cond. Rule 1.15(a) warrants an actual, not a fully stayed suspension. *Riek*, 125 Ohio St. 3d 46, 2010 Ohio 1556, 925 N.E.2d 980. So the above cases respondent cites are clearly distinguishable from this one.

Moreover, relator is unaware of a disciplinary case involving both Prof. Cond. Rule 1.15(a) and Prof. Cond. Rule 8.4(c) violations in which this Court has ordered a fully stayed suspension. However, relator has found two cases involving the corresponding violations [DR 9-102(A) and DR 1-102(A)(4)] under the Code of Professional Responsibility in which this Court ordered fully stayed suspensions. Those cases are *Toledo Bar Ass'n. v. Kramer*, 89 Ohio St. 3d 321, 323, 2000 Ohio 163, 731 N.E.2d 643, and *Disciplinary Counsel v. Fumich*, 116 Ohio St. 3d 257, 2007 Ohio 6040, 878 N.E.2d 6, cited in respondent's objections at 4. Nonetheless, the exceptions warranting a fully stayed suspension found in *Kramer* and *Fumich* do not apply in this case.

In *Kramer*, this Court determined that a fully stayed suspension was justified because the attorney's misconduct represented "an isolated incident in a previously unblemished career." *Kramer*, 89 Ohio St.3d 321, 2000 Ohio 163, 731 N.E.2d 643. However, respondent's misconduct in this case was not an isolated incident like *Kramer*. Rather, respondent commingled his personal funds and client funds for years and converted client funds on at least two separate occasions. (Report at ¶¶13, 14, 16 and 19.) Therefore, the narrow exception created by the *Kramer* case is inapplicable here.

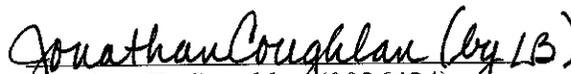
Similarly in *Fumich*, this Court ordered a fully stayed suspension where both DR 9-102(A)[now Prof. Cond. 1.15(a)] and DR 1-102(A)(4)[now Prof. Cond. Rule 8.4(c)] violations were present, stating that “while we do not condone such dishonesty, [*Fumich*] did not act with a motive to exploit his clients.” *Fumich*, 116 Ohio St. 3d 257, 260. However, unlike *Fumich*, the Board has found that respondent’s misconduct in this matter was motivated by a selfish or dishonest motive. (Report at ¶22.) Therefore, respondent’s misconduct is more egregious than in *Kramer* and *Fumich* and warrants a more serious sanction than the fully stayed suspension ordered in those cases.

Accordingly, considering the duties violated and the other relevant factors, a one-year suspension with six months stayed upon conditions is the appropriate sanction in this case.

CONCLUSION

For the foregoing reasons, respondent's objection to the Board's Report should be overruled by this honorable Court. Relator respectfully asks the Court to adopt the findings in the Board's Report and impose the recommended sanction of a one-year suspension with six-months stayed upon conditions.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing answer brief was served via U.S. Mail, postage prepaid, upon respondent's counsel, John B. Juhasz, Esq. at 7081 West Boulevard, Suite 4; Youngstown, Ohio 44512-4362, and upon Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, Ohio Judicial Center, 65 S. Front Street, Columbus, Ohio 43215, on April 12, 2012.


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