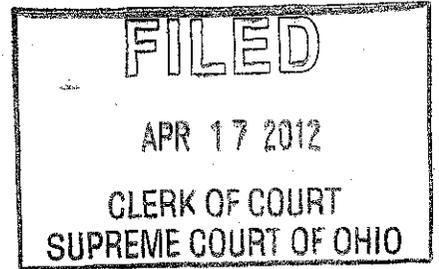


BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

12-0644



In Re:	:	
Complaint against	:	Case No. 11-008
Robert Leon Schwartz	:	Findings of Fact,
Attorney Reg. No. 0000818	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	
	:	

OVERVIEW

{¶1} This matter was heard on December 5, 2011 in Columbus, Ohio before a panel consisting of members Sharon Harwood, David Tschantz, and Janica Pierce Tucker, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1). Alvin Mathews represented Respondent, and Respondent was present at the hearing by telephone. Philip King represented Relator.

PROCEDURAL AND FACTUAL HISTORY

{¶2} On January 31, 2011, Relator filed a complaint for disciplinary action, with violations of the Rules of Professional Conduct based on respondent's conduct and subsequent criminal convictions for mail fraud and filing a false federal tax return.

{¶3} On May 21, 2009, an Information was filed in the United States District Court for the Southern District of Ohio, Western Division under Criminal Case No. 1:09-CR-67 with one

count of mail fraud, a violation of 18 U.S.C §1341 and one felonious count of filing a false tax return, a violation of 26 U.S.C. §7206(1).

{¶4} On June 11, 2009, Respondent pled guilty to both counts, mail fraud and filing a false tax return.

{¶5} On June 8, 2010, Respondent was sentenced to an aggregate four-year sentence followed by an aggregate three years of supervised release. Respondent was also ordered to pay an assessment of \$200, a fine of \$10,000, and \$3,227,686.12 in restitution.

{¶6} Respondent is currently serving his prison sentence at the federal prison camp in Ashland, Kentucky.

{¶7} On August 5, 2010, the Supreme Court of Ohio suspended Respondent from the practice of law as a result of the felony convictions. *In re Schwartz, 08/05/2010 Case Announcements #2, 2010-Ohio-3605.*

{¶8} Count I of Relator's complaint alleges Respondent violated the following provisions of the Code of Professional Responsibility for conduct that occurred before February 1, 2007:

- DR 1-102(A)(3) [illegal conduct involving moral turpitude];
- DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and
- DR 1-102(A)(6) [conduct that adversely reflects on fitness to practice law].

For Respondent's conduct that occurred on or after February 1, 2007:

- Prof. Cond. R. 8.4(b) [illegal act that reflects adversely on the lawyer honesty or trustworthiness];
- Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation];
- Prof. Cond. R. 8.4 (h) [conduct that adversely reflects on the lawyer's fitness to practice law].

{¶9} Count I of Relator's complaint alleges Respondent violated the following provisions of the Code of Professional Responsibility for conduct that occurred before February 1, 2007:

- Prof. Cond. R. 8.4(b) [illegal act that reflects adversely on the lawyer's honesty or trustworthiness];
- Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and
- Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

FINDINGS OF FACT

{¶10} Respondent was admitted to the practice of law in the State of Ohio on October 19, 1964. Respondent is subject to the Code of Professional Responsibility, Ohio Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio.

COUNT ONE—MAIL FRAUD

{¶11} On or about May 9, 2003, Respondent was given the Power of Attorney for the financial affairs of a client named Beverly W. Hersh.

{¶12} Respondent assisted Hersh in preparing several codicils to her will and arranged for the preparation of three trust agreements and subsequent amendments thereto by a local Cincinnati law firm.

{¶13} Pursuant to Hersh's estate plan, *i.e.*, her will and trust agreements as amended, her adjusted estate was to be placed in the Beverly W. Hersh Trust ("Hersh Trust"). Thereafter, the Hersh Trust would distribute the balance of her adjusted estate as follows:

- 20% to Hadassah, The Women's Zionist Organization of America, Inc. ("Hadassah Hospital")
- 30% to Beverly W. Hersh Charitable Trust ("Charitable Trust")
- 50% to Hersh Revocable Trust ("Discretionary Trust")

{¶14} Respondent was named executor for Hersh's will and trustee for the above trusts, and therefore, was responsible for the distribution of Hersh's estate according to her will and amended trust agreements.

{¶15} On May 5, 2005, Hersh passed away.

{¶16} The United States Estate Tax Return (Form 706) filed on or about August 2, 2006, by Respondent as trustee for the Hersh estate indicated that Hadassah Hospital was to receive approximately \$2,502,469 and that the Charitable Trust was to receive approximately \$3,756,703 from Hersh's adjusted estate.

{¶17} Respondent was to distribute the remaining residual estate balance of approximately \$6,261,172 at his discretion through the Discretionary Trust.

{¶18} Respondent did not distribute proceeds to Hadassah Hospital as required by the trust documents.

{¶19} On September 1, 2005, Respondent mailed a letter to Hadassah Hospital which included a material misrepresentation and omission regarding the distribution to the organization from Hersh's adjusted estate. Respondent's conduct constituted a violation of 18 U.S.C. §1341, mail fraud.

COUNT TWO—FILING A FALSE FEDERAL TAX RETURN

{¶20} On or about April 14, 2008, in the Southern District of Ohio, Respondent, a resident of Cincinnati, Ohio, willfully prepared, verified by a written declaration under the penalties of perjury, and filed with the Internal Revenue Service a 2007 U.S. Individual Income Tax Return (Form 1040). Specifically, the tax return failed to state the following: (1) substantial additional income that Respondent paid himself during 2007 for services as the executor and trustee of the Beverly W. Hersh Estate; (2) additional income he diverted from the Beverly W.

Hersh trust funds to care for Respondent's mother; and (3) unreported income from legal fees pertaining to his other clients' personal injury settlements.

{¶21} Respondent's conduct described in Count II constituted a violation of 26 U.S.C. §7206(1).

CONCLUSIONS OF LAW

{¶22} As it relates to Count I of the complaint, the panel finds by clear and convincing evidence that Respondent violated the following rules for his acts that occurred before February 1, 2007: DR 1-102(A)(3); DR 1-102(A)(4); and DR 1-102(A)(6). These findings are based on Respondent's failure to distribute the funds of the trust to the Hadassah Hospital and inform the Hadassah Hospital of the amount of money allocated to the organization from the trust.

{¶23} For Respondent's conduct that occurred on or after February 1, 2007, the panel finds by clear and convincing evidence that he violated the following rules: Prof. Cond. R. 8.4(b); Prof. Cond. R. 8.4(c); and Prof. Cond. R. 8.4(h). These findings are based on his plea of guilty for a violation of 18 U.S.C. §1341 and his conviction.

{¶24} In Count II, the panel finds by clear and convincing evidence that Respondent's conduct violated the following rules: Prof. Cond. R. 8.4(b), Prof. Cond. R. 8.4(c), and Prof. Cond. R. 8.4(h) for his plea of guilty for a violation of 26 U.S.C. §7206(1) and his conviction.

AGGRAVATION AND MITIGATION

{¶25} The panel finds the existence of two aggravating factors.

{¶26} Respondent has a prior disciplinary record. In 1996, respondent was found to have violated DR 5-105(A) and (B), and DR 5-107(A)(1) based on his failure to disclose dual representation and received a public reprimand. *Cincinnati Bar Assn. v. Schwartz*, 74 Ohio St.3d 489, 1996-Ohio-290.

{¶27} Respondent's conduct in this matter included a dishonest or selfish motive.

{¶28} The panel finds the existence of three mitigating factors: Respondent made a full and free disclosure and displayed a cooperative attitude during the proceedings; Respondent presented evidence regarding his character and opinion that was received by the panel; to date, Respondent has paid \$972,185.03 in restitution.

SANCTION

{¶29} Relator recommends disbarment. Respondent's counsel recommends indefinite suspension. Relator relies on *Disciplinary Counsel v. Bertram*, 85 Ohio St.3d 113, 1999-Ohio-440; *Disciplinary Counsel v. Sabroff*, 123 Ohio St.3d 182, 2009-Ohio-4205; *Toledo Bar Assn. v. Ritson*, 127 Ohio St.3d 89, 2010-Ohio-4504; and *Disciplinary Counsel v. Hunter*, 106 Ohio St.3d 418, 2005-Ohio-5411, in support of its recommendation for disbarment. Respondent distinguishes this case from the *Ritson* case because in *Ritson*, the respondent was unable to make restitution.

{¶30} The panel relies on *Disciplinary Counsel v. Smith*, 128 Ohio St.3d 390, 2011-Ohio-957 in support of its recommendation of an indefinite suspension. In *Smith*, the attorney had a felony conviction for tax fraud and impeding an IRS investigation. The Supreme Court ordered indefinite suspension for time served under interim suspension, but indicated that the respondent would not be permitted to petition for reinstatement unless the attorney has completed supervised release and a restitution agreement is reached with the federal government. Based upon the evidence and testimony presented at the hearing, Respondent has the ability to make restitution. The ability or inability to make restitution should be a factor to consider when determining whether a lawyer's conduct warrants an indefinite suspension or disbarment.

Ritson, supra. Further, Respondent acknowledges and appreciates the wrongfulness of his conduct.

{¶31} Based upon clear and convincing evidence, the testimony presented at hearing, and the relevant case law, the panel recommends an indefinite suspension with reinstatement conditioned upon completion of his supervised release and full restitution.

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 April 13, 2012. The Board adopted the panel's Findings of Fact and Conclusions of Law. However, the Board recommends that Respondent, Robert Leon Schwartz, 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**