ORIGINAL

12-0996

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

In Re:	:	
Complaint against	:	**Case No. 11-018**
Paul Nickolas Peterson **Attorney Reg. No. 0075730**	:	**Findings of Fact,** **Conclusions of Law and**
Respondent	:	**Recommendation of the** **Board of Commissioners on**
Disciplinary Counsel	:	**Grievances and Discipline of** **the Supreme Court of Ohio**
Relator	:	
	:	

OVERVIEW

{¶1} This matter was heard March 22 and 23, 2012 in Columbus, Ohio, before a panel composed of Judge Lee H. Hildebrandt Alvin R. Bell, and Judge Thomas F. Bryant, chair.

{¶2} None of the panel members is from the appellate judicial district in which the complaint arose and none served on the probable cause panel that certified the matter to the Board.

{¶3} Relator was represented by Assistant Disciplinary Counsel Carol A. Costa. Respondent was present, represented by Mary L. Cibella.

SUMMARY OF REPORT

{¶4} Respondent was convicted of stealing more than $5,000 but less than $100,000 from a client, a felony, and was sentenced to a jail term and ordered to make restitution to the client.

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SUPREME COURT OF OHIO

{¶5} The theft arose while Respondent was handling his client's funds in the course of advising and assisting her with both legal and nonlegal matters in the operation of her business, during the attorney-client relationship but without advising her of the potential conflicts of interest involved, and without advising her to seek the advice of separate counsel in the circumstances.

{¶6} Respondent has served his jail term and has paid the court-ordered restitution in full.

{¶7} The panel finds Respondent violated Prof. Cond. R. 8.4(b), 8.4(c), and 8.4(h) in the matter of the theft and in the course of his business relationship with the client and violated Prof. Cond. R. 1.7(a). 1.8(a)(1), (a)(2), (a)(3) and 1.15(a)(1) by his failure to comply with the rules.

{¶8} The panel recommends that Respondent be indefinitely suspended from the practice of law in Ohio.

FINDINGS OF FACT

{¶9} The parties and counsel have entered into 20 written stipulations of fact, three stipulated matters in mitigation, and have stipulated in writing to the receipt in evidence of 29 documentary exhibits. The panel adopts and incorporates the stipulations of fact in its findings of fact, has considered all the stipulated exhibits offered and received in evidence at the oral hearing, has considered as well all additional documents stipulated by counsel, offered and received at the formal hearing. In making its findings of fact conclusions of law and its recommendation, the panel also has considered the testimony of Respondent and that of the other witnesses offered at the formal hearing both live and by deposition. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶10} Respondent, Paul Nickolas Peterson, was admitted to the practice of law in the State of Ohio on November 27, 2002, and is thus subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio. He was admitted to the patent bar the same year.

{¶11} From January 1997 until January 2007, Respondent was employed in various capacities as an engineer by a manufacturer of water treatment equipment.

{¶12} In January 2007, Respondent began his private law practice as a sole practitioner.

{¶13} In February 2007, Linda Mae Gabriel hired Respondent to provide her with legal services with respect to estate, probate, and other matters arising from the death of her husband. On February 17, 2007, Respondent and Ms. Gabriel signed a fee agreement calling for the payment of Respondent's legal fees at the rate of $50 per hour. Relator's Stipulated Ex. 12.

{¶14} On March 29, 2007, Respondent filed Mr. Gabriel's will, an application to probate will, and other documents in the Geauga County Probate Court on behalf of Ms. Gabriel.

{¶15} The estate was closed on March 20, 2008. As a result of Mr. Gabriel's death, Ms. Gabriel received cash, insurance proceeds, real estate, and other interests of the value of approximately $1.7 million.

{¶16} Prior to the completion of the estate, Respondent advised Ms. Gabriel regarding her property and investments and their tax consequences to her and the plans she might make to remain a stay at home mom for her four-year-old daughter. It was decided that Ms. Gabriel should buy and refurbish houses and other real properties as her husband had done as a sideline during his lifetime. Since Ms. Gabriel had assisted her husband only incidentally in such projects, Respondent agreed to assist her in the enterprise by attending to the financial and other

matters including dealing with contractors and attending to the company's payment of some of the expenses concerning the refurbishment projects undertaken.

{¶17} Respondent prepared documents to create a LLC entitled LB2 on Ms. Gabriel's behalf, and on February 8, 2008 filed with the Ohio Secretary of State the documents necessary to establish the LLC. The purpose of the LLC was to buy, refurbish, and sell homes to supplement Gabriel's income. Linda Mae Gabriel was the only member of LB2, and by the terms the LB2 operating agreement, the management of the LLC was reserved to her as the only member. Anything delegated to another was required to be written, signed by her as the member, and attached to the operating agreement. Further, the agreement provided that only the member was entitled to receive allocations and distributions. Only one project was ever undertaken by LB2. Ms. Gabriel received no distributions from LB2.

{¶18} A bank checking account was opened for LB2. Respondent applied for, received, and carried with him a debit card for the LB2 account. Only Ms. Gabriel deposited money in the account, beginning with $10,000 and additional deposits for a total of more than $100,000. Respondent and Ms. Gabriel were the only signatories for banking business and both had check books for the checking account. Only Respondent received written monthly bank statements. Respondent was to keep the records and forward them to Ms. Gabriel's accountant. Nothing was sent to the accountant. Nobody seems to have reconciled the bank statements and the account, although Respondent testified "that I had been doing a running tally in my head." Hearing Tr., Vol. I at 37.

{¶19} In September 2008, Ms. Gabriel and Respondent signed a retainer agreement calling for the client to pay Respondent $400 per month for "the legal services of Paul N.

Peterson (hereinafter known as Attorney) to handle **any items you may need assistance with.**" (Emphasis in the original.) Relator's Stipulated Ex.13.

{¶20} Ms. Gabriel received bills from respondent for his legal services including "tax and finance issues," family law matters, and real estate matters virtually every month from February 2007 to December 2008. After September 1, 2008, Ms. Gabriel was also billed for the $400 monthly retainer. Relator's Stipulated Ex. 10. All the bills for legal fees from February 2007 to December 2008 were timely paid by Ms. Gabriel.

{¶21} Without authorization by or knowledge of Ms. Gabriel, Respondent paid himself $1,200 monthly from the LB2 account from April 2008 to March 2009. Relator's Stipulated Ex. 8.

{¶22} Respondent explained in answer to a panel member's question, in part: "The way that I viewed it was that I was an employee of LB2 receiving a paycheck of $1,200 from LB2. Therefore, the $400 was the retainer of being Linda Mae's attorney, handling her legal matters separate from LB2's letter (sic) matters or other services." Hearing Tr., Vol.1 at 161.

{¶23} Respondent paid some of his personal bills from the LB2 account, including a $4,300 payment for his wife's student loan, expenses charged to his personal American Express card and the costs of trips to Windsor, Ontario for his personal entertainment. Relator's Stipulated Ex. 1; Hearing Tr., Vol. 1 at 41-45. Respondent also wrote checks payable to himself for unauthorized advancements or loans he intended to repay. Respondent also wrote checks to reimburse himself for loans he made to LB2 to make purchases for it, although he was not authorized to lend money to or to borrow money from LB2.

{¶24} In February 2009, Ms. Gabriel deposited $25,000 in the LB2 checking account upon Respondent's advice to her that more money would be needed to pay bills. In March, she

wrote a $2,500 check for her project manager's monthly salary. When the project manager attempted to deposit the check, it was not paid because of insufficient funds in the account. Hearing Tr., Vol. 1 at 76.

Count One—Felony Conviction

{¶25} On or about September 8, 2010, Respondent was charged by way of information for theft in the case of *State vs. Peterson*, Case No. CR-10-540387-A in the Cuyahoga County Court of Common Pleas, pursuant to R.C. 2913.02(A)(3).

{¶26} The information was based on allegations that Respondent stole funds from a corporate client between April 2008 and March 2009, in the amount of at least five thousand dollars and less than one hundred thousand dollars.

{¶27} On November 22, 2010, Respondent pled no contest to theft pursuant to R.C.2913.02(A)(3), a fourth-degree felony, was sentenced to 30 days in jail, five years of community control, and was ordered to pay restitution in the amount of $80,000.

{¶28} Upon certification to the Supreme Court of Respondent's conviction of a felony, Respondent was suspended from the practice of law in the State of Ohio for the interim period commencing December 8, 2010.

{¶29} Respondent has stipulated that his conduct alleged in Count One of the amended complaint violates Prof. Cond. R. 8.4(b) [an illegal act that reflects adversely on 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 fitness to practice law].

Count Two—Gabriel Representation

{¶30} Respondent's criminal conviction and court order to pay $80,000 in restitution stems from his misuse of the funds contained in the LB2 account from April 2008 through March 2009.

{¶31} Linda Mae Gabriel did not know that Respondent was not acting as her counsel in all the work he did for her and for LB2.

{¶32} Respondent did not discuss with his client and did not confirm in writing the terms of his proposed participation in her business nor the fairness and reasonableness of the extent of his participation in the business and of his expected compensation for his nonlegal work.

{¶33} Respondent did not advise Linda Mae Gabriel in writing to engage independent counsel to review and advise her about the proposed nonlegal business association with Respondent, nor did he give Ms. Gabriel an opportunity to seek independent counsel for any purpose in the transaction.

{¶34} Respondent did not obtain Ms. Gabriel's written consent to the essential terms of Respondent's proposed role in the transaction. Respondent failed to advise Ms. Gabriel that he expected to occupy a position with LB2 for compensation for non-legal services and did not obtain her written consent establishing and authorizing those services and fair and reasonable compensation for them.

{¶35} Respondent failed to safeguard the funds of LB2 to which he had been granted unrestricted access for legitimate LB2 business purposes.

CONCLUSIONS OF LAW

{¶36} The panel concludes that the clear and convincing evidence establishes and Respondent has stipulated that his conduct in Count One violates Prof. Cond. R. 8.4(b), Prof. Cond. R. 8.4(c), and Prof. Cond. R. 8.4(h).

{¶37} The panel concludes further that the clear and convincing evidence establishes Respondent's conduct in Count Two violates the following rules: Prof. Cond. R. 1.7(a)(2) [a lawyer's continuation of representation creates a conflict if there is substantial risk that the lawyer's ability to carry out an appropriate course of action will be materially limited by the lawyer's own personal interests]; Prof. Cond. R. 1.8(a)(1) [a lawyer, shall not enter into a business transaction with a client unless the terms are fair and reasonable and are fully disclosed to the client in writing]; Prof. Cond. R. 1.8(a)(2) [a lawyer shall not enter into a business transaction with a client unless the client is advised in writing to seek and is given a reasonable opportunity to seek the advice of independent counsel]; Prof. Cond. R. 1.8(a)(3) [a lawyer shall not enter into a business transaction with a client unless the client gives written informed consent concerning the lawyer's role in the transaction]; and Prof. Cond. R. 1. 15(a) [a lawyer shall hold the property of the client separate from the lawyer's own property and keep such funds appropriately safeguarded].

MITIGATION

{¶38} BCGD Proc. Reg.10 establishes guidelines for imposing appropriate sanctions for misconduct.

{¶39} Among those guidelines considered by the panel in favor of a more severe sanction are Respondent's dishonest or selfish motive and the vulnerability of and resulting harm to the victim of the misconduct.

{¶40} Relator and Respondent have stipulated that three BCGD Proc. Reg. 10(B)(2) mitigating factors are present: Respondent cooperated in the disciplinary investigation; on March 31, 2009, Respondent self-reported his misconduct to the Office of Disciplinary Counsel; and Respondent has received other penalties or sanctions.

{¶41} The panel notes further that Respondent has made the restitution ordered by the court upon his conviction of theft from his client. The amount of restitution made was determined by agreement to resolve the criminal matter.

{¶42} Other litigation on the subject of the victim's loss is pending in Cuyahoga County Court of Common Pleas case, *Gabriel, et al vs. Peterson*, Case No. CY-10721720 in which allegations are made of Respondent's legal malpractice, fraudulent misrepresentation, and civil theft.

{¶43} The civil lawsuit was stayed for a period of time during the pendency of this disciplinary proceeding because Respondent filed a bankruptcy action on April 28, 2011. On September 21, 2011, the bankruptcy court granted a relief from stay allowing the civil case to proceed. Both the civil lawsuit and the bankruptcy case remain pending.

{¶44} BCGD Proc. Reg. 10(B)(2)(g) provides that a mental disability may be considered in mitigation of sanction when there has been: (i) a diagnosis of mental disability by a qualified health care professional; (ii) a determination that the mental disability contributed to cause the misconduct; (iii) a sustained period of successful treatment; and (iv) a prognosis from a qualified health care provider that the attorney will be able to return to competent, ethical professional practice under specified conditions.

{¶45} Respondent offered the testimony and reports of his treating health care professionals, Jane Miller Hellwig, PhD, a licensed psychologist who began treating Respondent

for recurrent depression in March 2006, and Alan Castro, M.D., a psychiatrist to whom Respondent was referred in January 2007, by Dr. Hellwig when his treatment required medication. Upon referral, Dr. Castro also diagnosed Respondent's depression. Both professionals continue to treat Respondent. Respondent told neither of the professionals of his activities with LB2 until after his theft was discovered. Respondent was not candid with either of them when relating the facts underlying his criminal charges. Hearing Tr., Vol. 2 at 227. Respondent told Dr. Hellwig he had mistakenly used the LB2 debit card for his personal purchases thinking it was his own similar appearing debit card for his personal account at the same bank.

{¶46} Dr. Castro first learned of Respondent's legal problems in May 2009. Relator's Stipulated Ex. 3 at 16. Respondent was not candid with Dr. Castro. In June 2010, Dr. Castro diagnosed Respondent's mental illness as low grade bipolar disorder. Id. at 19. Both Dr. Castro and Dr. Hellwig have given written opinions that Respondent's mental condition contributed to his misconduct, that he is progressing well with medication and family and community support. Both have written that respondent can return to practice with medication and under supervision. Neither, however, was informed of the true nature of that misconduct when expressing those opinions and both subsequently noted this lack of information in the course of their testimony. Both Dr. Castro and Dr. Hellwig in their testimony could only express opinions in terms of possibilities after learning the facts of Respondent's misconduct. Id. at 37-38; Hearing Tr., Vol. 2 at 243-244.

{¶47} In the absence of professional opinions based on probability, the panel does not consider that Respondent's mental condition contributed to his dishonesty.

{¶48} Dr. Hellwig initially expressed her opinion that Respondent could return to professional practice with proper support and supervision. Dr. Hellwig's testimony was not based on knowledge or clear understanding of the nature of law practice. Upon inquiry by the panel, she was able to render her opinion that Respondent possibly could return to practice under supervision consistent with legal professional standards. Hearing Tr. Vol. 2 at 245-250.

RECOMMENDATIONS FOR SANCTION

{¶49} Relator recommends that Respondent be disbarred from the practice of law in the State of Ohio, citing *Cleveland Bar Assn. vs. Dixon*, 95 Ohio St.3d 490, 2002-0hio-2490; *Disciplinary Counsel vs. Muhlbach*, 104 Ohio St.3d 340, 2004-Ohio-6563; *Disciplinary Counsel vs. Brickley*, 131 Ohio St.3d 228, 2012-Ohio-872, cases in each of which an attorney's misappropriation of client funds and conviction for the theft resulted in the attorney's disbarment.

{¶50} Relator suggests that at minimum, Respondent must be indefinitely suspended. Cases cited are *Disciplinary Counsel vs. Kurtz*, 82 Ohio St.3d 55, 1998-Ohio-278, in which Kurtz withdrew approximately $75,000 from a trust in which he was trustee and deposited the money into his business account for office expenses. Based on character evidence presented and partial restitution of the money taken, an indefinite suspension was ordered.

{¶51} Relator also cites *Cincinnati Bar Assn. vs. Rothermel*, 104 Ohio St.3d 413, 2004-Ohio-6559, Rothermel borrowed over $12,000 from a client's trust account without the client's consent, without documentation of the loan or specification of the terms for repayment, gave no security for the loan and failed to advise the client of the conflict of interest and the necessity for the advice of independent counsel. Considering that Rothermel admitted his misconduct and expressed remorse, he was indefinitely suspended.

{¶52} Respondent concedes that case authority suggests an indefinite suspension may be appropriate but his counsel requests that credit be given to Respondent for the time his license has been suspended for the interim.

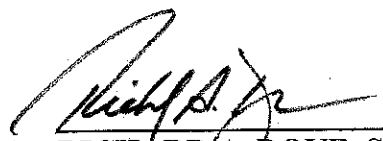
PANEL RECOMMENDATION

{¶53} Considering the recommendations of counsel and considering the seriousness of Respondent's misconduct tempered by the mitigating factors that Respondent has served a jail sentence, completed his probationary period, and has paid in full the restitution ordered as part of his criminal sentence, considering that Respondent is in continuing treatment for a mental disability, and considering further that Respondent is in continuing litigation concerning the matter of his misconduct, the panel recommends that Respondent be indefinitely suspended from the practice of law in Ohio with no credit for the period Respondent was subject to the interim felony suspension.

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 June 8, 2012. The Board adopted the Findings of Fact and Conclusions of Law of the panel. After discussion, the Board amended the sanction recommended by the panel and recommends that Respondent, Paul Nickolas Peterson, 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 Recommendation as those of the Board.



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