

No. 2012-1003

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**IN THE SUPREME COURT OF OHIO**

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APPEAL FROM THE BOARD OF COMMISSIONERS  
ON GRIEVANCES AND DISCIPLINE  
CASE No. 11-063

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CLEVELAND METROPOLITAN BAR ASSOCIATION,

*Relator,*

v.

JAMES W. WESTFALL, JR.,

*Respondent.*

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**RELATOR CLEVELAND METROPOLITAN BAR ASSOCIATION'S ANSWER TO  
RESPONDENT JAMES W. WESTFALL, JR.'S OBJECTIONS TO FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF  
COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT  
OF OHIO**

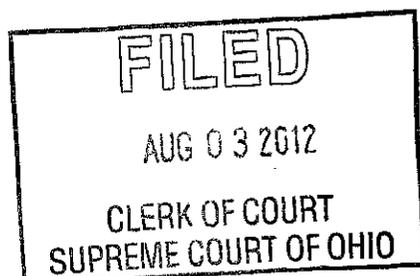
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## **I. INTRODUCTION**

The Board of Commissioners on Grievances and Discipline (the “Board”) appropriately recommended that Respondent James W. Westfall, Jr. (“Westfall”) be suspended from the practice of law for two years. Clear and convincing evidence of Westfall’s repeated violations of the Ohio Rules of Professional Conduct (“Prof. Cond. Rules”) supported the Board’s recommended sanction. Westfall failed to return unearned fees to clients. He failed to remit to the government taxes that he had withheld from his employees’ wages. He allowed the surreptitious recording of telephone calls with a client. He sent deceptive solicitation letters. All of Westfall’s misconduct was exacerbated by his non-cooperativeness during the disciplinary proceedings.

On July 7, 2012, Westfall objected to the Findings of Fact, Conclusions of Law and Recommendation of the Board (the “Report”). For the reasons set forth below, the Board’s recommended sanction of two year suspension is appropriate and reasonable when considering Westfall’s cumulative offenses coupled with aggravating factors. Therefore, Westfall’s objection should be overruled and the Board’s sanction affirmed.

## **II. STATEMENT OF THE CASE**

Westfall was admitted to the practice of law in Ohio on November 4, 1977, under Ohio Supreme Court Registration Number 0029420. On or about June 2, 2011 after four grievances were filed against Westfall, the Cleveland Metropolitan Bar Association (the “Relator”) filed its original Complaint asserting five counts of Westfall’s misconduct. After learning of additional misconduct, on November 14, 2011, Relator filed a First Amended Complaint, adding two additional counts of misconduct. Specifically, the Amended Complaint added Counts VI and VI,

which addressed Westfall's failure to pay employer's withholding taxes and his false statement to Relator and failure to cooperate with the investigation.

### **III. STATEMENT OF THE FACTS**

Westfall's ethical violations emanate from numerous separate instances of misconduct, which are set forth below.

#### **A. Unlawful Retention of Property Belonging to Clients and Employees**

Westfall's failure and refusal to return unearned fees and property to former clients, and his repeated failure to remit to the government taxes he withheld from his employees' wages, are two sides of the same coin: The lack of seriousness with which Respondent treats his professional obligation to handle money belonging to others.

1. Respondent Failed to Return Unearned Fees and Property to Former Clients.

The record at trial established by clear and convincing evidence that, after terminating his representation of Diana McCafferty, Charles and Setsuko Gresham, John Pestyk, and Reba Mosier, Respondent failed promptly to return their property (i.e., prepaid court costs) and unearned fees in violation of Rules 1.16(d) and (e) of the Ohio Rules of Professional Conduct. In the case of Diana McCafferty, she and her ex-husband Michael McCafferty prepaid \$1,400 including \$299 in court costs. When Respondent withdrew from his representation of her, yet continued to represent Mr. McCafferty, she wrote a letter to Respondent dated April 2, 2010 (Rel. Ex. 21), requesting a return of \$700 or half of the amount she and her husband had prepaid Respondent. Respondent did not respond to her letter and did not refund any money to Ms. McCafferty, even though her letter accurately advised Respondent that she had personally signed three checks totaling \$700 to Respondent's law firm. (Rel. Ex. 12-14, 21.)

Charles and Setsuko Gresham similarly sent Respondent a letter dated October 7, 2010, requesting a refund of the \$1,319, including \$299 in court costs, that they had prepaid Respondent. (Rel. Ex. 30.) Respondent did not refund any of that money, and instead sent the Greshams a letter and follow up invoices asking the Greshams to pay another \$300 to “reactivate” their case. (Rel. Ex. 31-32.) The Panel also found that Respondent’s failure to respond to Mr. Gresham’s multiple phone calls concerning case status violated Prof. Cond. R. 1.4(a)(2), (3), and (4), requiring reasonable consultation with the client, keeping the client reasonably informed and complying with reasonable requests for information.

John Pestyk’s case was “closed” on March 29, 2010 (as stated in the Best Case Bankruptcy Case Notes for his file (Rel. Ex. 33)), and he was sent a “deactivation” letter on that date without any refund of the \$1,299 he prepaid for the bankruptcy filing. Several months transpired after the termination of the representation without even a partial refund to Mr. Pestyk in violation of Rule 1.16(d) and (e). Mr. Pestyk contacted Respondent in September 2010 to request a refund, and eventually complained to the Better Business Bureau (“BBB”). Respondent admitted in his October 21, 2010 letter to Mr. Pestyk (sent to the BBB as a response to his complaint) that Respondent owed him at least \$499 in “our unearned fees.” (Rel. Exh. 6.) Yet instead of “promptly” returning those unearned fees to Mr. Pestyk in March or April 2010, Respondent has never refunded them.

Likewise, Reba Mosier paid Respondent \$1,299 to file a bankruptcy petition that was never filed. After the representation was abruptly terminated during William Mosier’s telephone call with Jay Westfall on July 1, 2010, Respondent failed to refund any unearned fees or the court costs to the Mosiers.

2. Respondent Failed to Remit to the Government Taxes that He Had Withheld from His Employees' Wages.

The Panel found and the Board agreed that, for several quarters in 2009, 2010, and 2011, Respondent repeatedly withheld his employees' federal income, Social Security, and Medicare taxes from their wages, but failed to remit those taxes to the government. (Tr. 472:10-21; 354:22-358:14; 427:23-428:11.) Respondent used those funds, amounting to approximately \$56,000, for "operating expenses" of his law firm such as rent payments to keep satellite offices open. (Tr. 428:6-11; 489:21-490:19; 511:12-512:9.)

**B. Respondent's Misconduct Shows a Pattern of Dishonesty and False and Misleading Statements.**

1. Surreptitious Recording of Telephone Call with Mosier.

The record established by clear and convincing evidence that Respondent's failure to supervise his nonlawyer staff resulted in further misconduct involving deception, namely Jay Westfall's surreptitious recording of William Mosier's telephone call on July 1, 2010. Respondent allowed his staff to record telephone calls but failed to provide them with a written policy ensuring their compliance with the limitations on surreptitious recordings set forth in Advisory Opinion 97-3. (Tr. 376:14-17.) Respondent's telephone system also did not automatically alert callers that their calls were being recorded (for example, with a recorded warning). (Tr. 375:6-11.) William Mosier testified unequivocally that he did not know that Jay Westfall recorded his call on July 1, 2011, and that he learned of the recording from Respondent's response to his grievance. (Tr. 269:16-270:4.)

Mosier's testimony is consistent with all relevant documents in the case. His grievance, dated July 10, 2010 – nine days after the call – makes no mention of the recording. (Rel. Ex. 7). The Best Case Notes make no mention that Mosier was advised of the recording. (Rel. Ex. 41). Respondent's response to Mosier's grievance does not state that Mosier was advised of the

recording, even though he spoke with Jay Westfall and listened to the recording before submitting his response. (Tr. 372:12-373:14.) Respondent also testified that, in listening to the recording, he did not hear a warning from Jay Westfall to William Mosier. (Tr. 374:6-24.) Jay Westfall testified that “typically” he begins recording before he tells callers that he is going to record their call. (Tr. 448:6-11.) And Jay Westfall testified that he had no recollection of Mosier consenting to the recording. (Tr. 450:15-18.) The Panel, who had the benefit of listening to Jay Westfall’s testimony, concluded that his testimony was not credible.

Respondent did not preserve the recording even though Mosier stated during the call that he was going to the Bar (Tr. 373:19-374:11, 446:25-447:12) and Respondent heard that warning when he listened to the recording (Tr. 373:19-24.) The Panel and the Board correctly concluded that Respondent violated Prof. Cond. R. 5.3(b) by failing to make reasonable efforts to ensure that his employee had the knowledge and consent of the client when the recording took place. At trial, Respondent did not meet his burden under Advisory Opinion 97-3 of establishing that the recording fell within one of the exceptions identified therein. *See* Ohio Sup. Ct. Bd. Of Comm’rs on Grievances and Discipline 97-3 (June 13, 1997) (withdrawn by the Board’s 2012 opinion, although the 2012 opinion adheres to the view that the surreptitious recording of conversations with clients and prospective clients is inconsistent with a lawyer’s duties of loyalty and confidentiality). The Panel and the Board, taken into consideration relevant recent authority, including Ohio Sup. Ct. Bd. Of Comm’rs on Grievances and Discipline Op. 2012-1 (June 8, 2012), correctly noted that these recordings, if made directly by the lawyer, could constitute acts of professional misconduct under Prof. Cond. R. 84(c) involving dishonesty, fraud, deceit, or misrepresentation.

2. Deceptive Solicitation Letters.

Respondent's standard solicitation letter also contained the false and misleading phrase "Attorneys At Law," which obviously suggested that Respondent had more than one lawyer at his firm to service the numerous offices listed on the letter. Any alleged continuing "Of Counsel" relationship with Respondent's "retired" partner Hermine Eisen (Tr. 19, 292-94) does not make the phrase "Attorneys At Law" any less misleading. *See* Advisory Op. 2006-02 (Rel. Exh. 89.) Each of the four grievants received the false and misleading letter. (Rel. Exs. 24, 44, 83, 87.) Respondent's letter to Diana McCafferty was postmarked July 14, 2011 (Tr. 69-23-70:5; Rel. Ex. 87-88), a month after Respondent was served with the Complaint on June 17, 2011. The Panel, after reviewing all the evidence submitted and hearing from all the grievants, concluded that Respondent violated Prof. Cond. R. 7.1 that prohibits a false or misleading communication about the lawyer or the lawyer's services.

IV. LAW AND ARGUMENT

A. A Two Year Suspension is the Appropriate Sanction.

The Board's recommended sanction of a two year suspension was supported by clear and convincing evidence of Westfall's numerous ethical violations, which included multiple instances of improperly retaining clients' funds, dishonesty, fraud, deceit or misrepresentation, and failure to cooperate in a disciplinary matter. When determining the appropriate sanction for attorney misconduct, the Ohio Supreme Court considers "the duties violated, the actual or potential injury caused, the attorney's mental state, and sanctions imposed in similar cases." *Disciplinary Counsel v. Broeren*, 115 Ohio St. 3d 473, 2007-Ohio-5251, 875 N.E.2d 935, *citing Stark Cty. Bar Ass'n v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818. The Court must weigh both aggravating and mitigating factors to ascertain whether a greater or lesser sanction is warranted. BCGD Proc. Reg. 10(B)(1); *Cleveland Bar Ass'n v. Jimerson*, 113 Ohio

St.3d 452, 2007-Ohio-2339, 866 N.E.2d 495. In this case, both case law and the cumulative aggravating factors militate in favor of the Board's recommended sanction of a two year suspension.

The Ohio Supreme Court has imposed an indefinite suspension for failure to promptly refund unearned fees and failure to cooperate in a disciplinary investigation. *See, e.g., Cuyahoga Cty. Bar Assn. v. Wagner*, 113 Ohio St. 3d 158 (2007) (determining that indefinite suspension was "the appropriate sanction for an attorney who failed to promptly refund unearned retainers and further failed to cooperate in a disciplinary investigation"). Respondent's misconduct is compounded by his withholding of payroll taxes from employee wages over a nearly two-year period and converting the funds for his own benefit. *See, e.g., Northwest Ohio Bar Ass'n v. Archer*, 129 Ohio St.3d 204, 2011-Ohio-3142 (recommending one year suspension when respondent withheld federal, state and local taxes from his secretary's wages for three years but failed both to submit the requisite forms or pay the withheld amounts to the proper governmental authorities); *Geauga Cty. Bar Ass'n v. Bruner*, 98 Ohio St.3d 312, 2003-Ohio-736 (imposing indefinite suspension for failure to remit approximately \$43,000 in withheld taxes for more than ten years, for not making any restitution and for failing to appreciate the gravity of his misconduct).

As explained by the Iowa Supreme Court, failure to pay employee withholding taxes "is tantamount to taking an employee's money. It constitutes a serious breach of trust established between employer and employee and imposes on the resources of the state to enforce compliance with the law by individuals sworn to uphold it. Lawyers violate their oath to uphold the law by violating a criminal statute." *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Morris*, 604 N.W.2d 653, 655 (Iowa 2000) (citations omitted).

In *Morris*, the Iowa Supreme Court went on to opine that failure to pay employee withholding taxes “can bear more significantly upon the professional competency of a lawyer than the failure of a lawyer to properly discharge individual tax obligations.” *Id.* “*The violation of the withholding provisions by a lawyer directly relates to the operation of the practice of law and may reflect the seriousness with which the lawyer treats the professional obligation to handle money belonging to others.*” *Id.* (emphasis added). The *Morris* Court’s insight is especially prescient here given Respondent’s pattern of misconduct in failing to promptly return unearned fees and property to clients upon termination of his representation.

**B. Several Aggravating Factors Support a Two-Year Suspension, and Few Mitigating Factors Exist.**

Respondent’s misconduct triggers a number of aggravating factors under BCGD Proc. Reg. § 10(B)(1), including his dishonest and selfish motive, pattern of misconduct, multiple offenses, lack of cooperation in the disciplinary process (thus requiring subpoenas to obtain his tax records), the vulnerability and resulting harm to his clients, and his failure to make restitution. The only mitigating factor is his lack of a prior disciplinary record, but even that factor should receive little weight given Respondent’s testimony that he negotiated his way out of prior grievances against him and his indignation that that did not happen with these four grievances. (Tr. 319-9-19, 322:2-12.) On the other hand, Respondent’s absolute refusal to acknowledge the wrongful nature of his conduct, or to accept any responsibility for his actions at any point in the proceedings, as amply demonstrated in his Objections, should be a significant aggravating factor in determining his sanction.

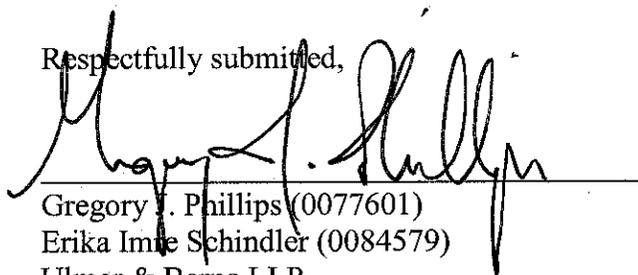
**V. CONCLUSION**

For all of the foregoing reasons, including Respondent’s myriad violations, the need to protect the public and his refusal to accept responsibility for his misconduct, Relator Cleveland

Metropolitan Bar Association urges this Court to adopt the recommendations of the Board regarding the sanction against James W. Westfall, Jr., namely a two-year suspension with reinstatement conditioned upon compliance with the conditions set forth in Paragraph 90 of the Report, that:

- (a) Respondent make restitution to the individual grievants Diana McCafferty, \$700; Charles and Setsuko Gresham, \$399; John Pestyk, \$499; and Reba L. Mosier, \$599;
- (b) Respondent remits to the IRS all unpaid payroll taxes, interest and penalty obligations from the tax period ending June 30, 2009 to the date of reinstatement for both the employee and employer shares relating to his law practice or that alternatively he enter into an agreement for payment with the IRS prior to reinstatement that is then current and remains current throughout the remainder of the stay;
- (c) Respondent provides evidence satisfactory to Relator of his compliance with conditions (a) and (b);
- (d) Respondent commits no further violations; and
- (e) Respondent pays the costs of these proceedings.

Respectfully submitted,



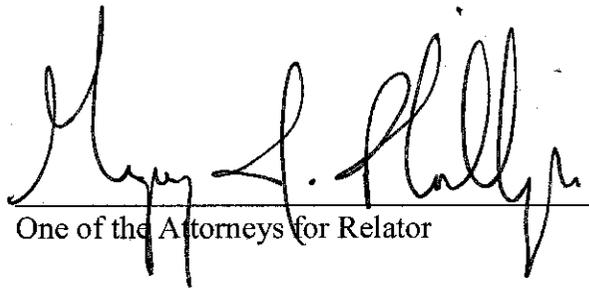
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served this 2nd day of August, 2012, via Federal Express, upon:

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