

ORIGINAL

IN THE SUPREME COURT OF OHIO

Cincinnati Bar Association,

Relator,

v.

Robert F. Alsfelder, Jr.,

Respondent.

: Case No. 2013-0223

:
:
:
: On Appeal from the Board of
: Commissioners on Grievances
: and Discipline of the
: Ohio Supreme Court

:
:
: Board of Commissioners
: Case No. 10-076

ANSWER BRIEF OF RESPONDENT ROBERT F. ALSFELDER, JR. TO RELATOR'S OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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I. COUNTERSTATEMENT OF THE FACTS

A. Facts Relating to Relator's Proposition of Law I – Alleged Tax Evasion

The record reflects that Respondent received many checks from Eastern Hills Dry Cleaners ("Eastern Hills") for reimbursement of expenses that would not be income to Respondent. These expenses included the purchase of dry cleaning parts, the purchase of office equipment, stamps and reimbursement for damaged slacks on at least one occasion. These are just some of the examples of many checks received by Respondent from Eastern Hills for the reimbursement of advanced expenses. (Tr. 437, 442-443, 452-453 and 478)

Records regarding these expenses were provided to Eastern Hills at the time so that Eastern Hills would be able to deduct the expenses in preparing its tax returns. (Tr. 442) In July of 2010 as part of Relator's investigation Respondent provided copies of some of the receipts for expenses Respondent advanced which were then reimbursed to him by Eastern Hills.¹ In addition to checks for the reimbursement of expenses, Respondent also on occasion received payment for business services from Eastern Hills. (Tr. 441-442) Respondent was only paid when the cash flow of Eastern Hills would permit and at no time was Eastern Hills current with its required payment. (Tr. 477-478)

Further, the testimony of Relator's expert, Mr. Marcum, only demonstrates that he was given "some" checks and records of Eastern Hills for the period from 2005 through 2009. (Tr. 278) The scope of the checks provided for Mr. Marcum was never

¹ Motion for Order to Compel Discovery and Hold Respondent in Contempt, (Ex. 2) email of Charles J. Kettlewell on July 12, 2010.

established. (Tr. 275-281) Mr. Marcum also reviewed Relator's Ex. 10, Eastern Hills checks made payable to Mr. Alsfelder. Relator's Ex. 10 was identified merely as a binder of copies of cancelled checks with Grievant's signature made out to Robert Alsfelder. (Tr. 233-234) Mr. Marcum created a summary of checks marked at the hearing as Relator Ex. 12. However, the record does not reflect which checks were included in the summary. (Tr. 281-284) The checks which were the subject of the Marcum summary were to be attached to the summary but never were. (Tr. 381-382) In addition, Relator entered into evidence Relator's Ex. 17 identified only as checks with memos made out to Respondent. (Tr. 452-454) The checks which make up Relator's Ex. 17 were also part of cancelled checks marked as Relator's Ex. 9. (Tr. 454-455) Relator's Ex. 9 was never offered into evidence. (Tr. 373-383) The Respondent was never provided the cancelled checks or the Marcum summary until the first day of the hearing despite Respondent's discovery directed to Relator requiring such production. (Tr. 277-278, 377, 383 and 455) Mr. Marcum never established which of the checks made payable to Respondent were for services rendered and which of the checks were for reimbursement of advanced expenses. (Tr. 275-281) It is undisputed that many of the checks were for reimbursement to Respondent of advanced expenses. (Tr. 478) Checks received by Respondent for reimbursement do not constitute income to Respondent and would not be included in his tax return as income. (Tr. 442-443)

Further, there is nothing in the admissions which establishes that the checks received by Respondent from Witschger and/or Eastern Hills for legal and business services, referenced in Request for Admissions No. 6, are the same checks that were made payable to Respondent which were cashed but allegedly the money was not

reported as gross income on Respondent's Ohio and/or Federal Tax Returns for the years 2004 through 2009 as set forth in Request for Admission No. 7.² The record reflects that many checks were provided to Respondent for the reimbursement of expenses. (Tr. 442-443 and 478) The record is devoid of evidence of tax evasion, much less clear and convincing evidence establishing tax evasion or the violation of Prof.Cond.R.8.4(b) or 8.4(c). (App. A) It is telling that Relator created this very ambiguity in its imprecise drafting of the Requests for Admission. Thus, it is the author of its failure to carry the burden of proof, in this regard.

Further, the record does not establish Relator's contention that Respondent has failed to comply with the November 2010 Subpoena. (Relator Brief, p. 5) Respondent never had the check register (item B of the subpoena *duces tecum*), as he had previously turned it over to Matrix, a vendor of the Grievant.³ By correspondence of March 24, 2011, Respondent hand delivered to Relator's counsel his monthly calendar from November 1, 2004 through January 31, 2009, item C of subpoena *duces tecum*.⁴ Respondent provided to Relator his 2004 tax return in March 2011 and his 2005 tax return in May 2011.⁵ As of May 6, 2011, Respondent had fully and completely provided all documents in his possession which were responsive to the subpoena *duces tecum*.⁶

Relator's Motion to Hold Respondent in Contempt of This Court Pursuant to Gov. Bar R. V(11)(c) (App. B) filed on April 18, 2011 in which Relator claimed that it "has not

² See Relator's Request for Admissions Nos. 6 and 7.

³ Board Chair Journal Entry, 3/22/11 at para. B

⁴ Respondent's Memorandum and Affidavit in Response to Entry dated April 26, 2011 and Filed April 27, 2011 and Related Motion for Contempt by Relator, Affidavit at para. 3 and attached correspondence of March 24, 2011.

⁵ *Id*, Aff., para. 4 and March 31, 2011 correspondence.

⁶ *Id*, Aff., para. 6.

received the documents requested in the November 18, 2010 Subpoena, which Respondent has been repeatedly ordered to produce” was an incorrect statement which Relator knew was incorrect at the time it was made and which ultimately misled this Court. Indeed, as quasi-prosecutor, Relator was obliged to forthrightly explain to this Court the actual status of document production by Respondent. Contrary to Relator’s assertion before this Court, Respondent had produced all records requested in the November subpoena *duces tecum* which were available to him, including his 2004 tax return on March 31, 2011. Respondent thereafter produced his 2005 tax return on May 6, 2011. Respondent simply was not able to obtain from his own existing records his tax returns other than for the years 2004 and 2005.⁷

Relator’s claim that Respondent has “failed and refused” to comply with the Subpoena is simply a misstatement of fact. (Relator Brief, p. 5) Because Respondent’s Memorandum and Affidavit in Response to Entry Dated April 26, 2011 and filed April 27, 2011 and Related Motion for Contempt by Relator was not filed with the Supreme Court, but rather with the Board of Commissioners in compliance with the Panel Chair’s Entry of April 27, 2011, it appears on this Court’s docket that Respondent did not oppose Relator’s Motion.⁸ Relator, again, misrepresented to this Court that Respondent had failed to comply with the subpoena *duces tecum* in its Motion for Sanctions filed on July 15, 2011.⁹ At that time, Relator not only knew pursuant to Respondent’s Affidavit of May 6, 2011 that Respondent had produced all documents and records in his possession responsive to the subpoena *duces tecum*, including his income tax returns

⁷ *Id.*, Aff., para 7.

⁸ *Id.*, see Board Chair’s Entry, 4/27/11

⁹ Relator’s Motion for the Imposition of Sanctions on Respondent and Memorandum in Support, p. 3

for the years 2004 and 2005, but also that Respondent had filed his original opposition to Relator's Motion to Hold Respondent in Contempt with the Board of Commissioners instead of the Supreme Court.¹⁰ The record herein establishes that Respondent has produced all documents and records in his possession in response to the November subpoena *duces tecum*, including his income tax returns for the years 2004 and 2005.

B. Facts Relating to Relator's Proposition of Law II – Alleged Failure to Produce an Accounting

The record reflects that after 2004, Respondent never submitted any billing to Eastern Hills because the number of hours per week that Respondent was working on Eastern Hills' matters became predictable and was agreed upon by the Grievant. (Tr. 471 and 475) It was agreed that Respondent and his wife would spend approximately 23 hours per week on the Eastern Hills account. (Tr. 79, 475 and 477) This agreement was based upon a conversation between Respondent and Grievant early in the relationship in 2004. (Tr. 477) The Grievant, during the Hearing, did not dispute this testimony, and it is consistent with Grievant's testimony admitting that during the four or five years of the relationship, Grievant never asked Respondent for an accounting or billing for Respondent's charges. (Tr. 228) The Grievant also acknowledged that at the time checks made payable to Respondent were presented to him for his signature, he would question Respondent about what services the checks were in payment for and if he thereafter signed the check, it was with his approval. (Tr. 228-229)

At all times the Grievant received and opened the mail, handled the accounts receivables, had sole signature rights on the checking account, signed all checks, wrote

¹⁰ Respondent's Memorandum and Affidavit in Response to Entry dated April 26, 2011 and Filed April 27, 2011 and Related Motion for Contempt by Relator, Affidavit at paras. 3-8 and attached correspondence of March 24, 2011.

out checks, received the cancelled checks each month from the bank and could see what was paid and to whom. (Tr. 149, 153, 157-158, 161-162 and 177) The Grievant was the only one with signature rights on his checking account and neither Respondent nor his wife signed checks. (Tr. 149-150) Grievant had complete control of his bank account, established his own passwords and could access his account online and in real time. (Tr. 411-412) There was no testimony or evidence that Respondent had ever held any funds belonging to the Grievant.¹¹ Grievant never claimed that Respondent stole money from him. (Tr. 226)

Respondent did provide Relator with a list of services provided by Respondent which was created after the grievance was filed. (Tr. 73-74) This list covers the period from July 2000 through February 2009. (Relator's Hearing Ex. 5) Although Relator did request in the November subpoena *duces tecum*, item A, "your account balance document showing a running account of charges for services rendered to Mr. Witschger and monies paid by Mr. Witschger," Respondent fully and completely responded that he had no responsive documents in his Affidavit of May 6, 2011.¹² Although Respondent kept track of the hours worked for the Grievant, at the time, Respondent no longer had those records by the time that the grievance was made. (Tr. 482-483)

Regarding Relator's claim that Respondent kept Grievant's business records, the record reflects that all mail, business records and bank statements which were provided to Respondent by Eastern Hills for the purpose of providing services were returned after use. (Tr. 413-485) Respondent did not have the capacity to store the records and had

¹¹ Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, p. 6, para. 26.

¹² *Id.*, fn 10

no use for them after providing his services. (Tr. 413) A checkbook/ledger that Respondent and/or his wife kept on a pad of paper was returned to Grievant in January 2009. (Tr. 485-487)¹³ The Grievant stored his own records on the second floor of his business premises. (Tr. 490)

Additionally, Respondent played no role in payroll, tax returns or tax deposits and all Eastern Hills tax returns were prepared by Matrix and/or its subsidiary Paymaster. (Tr. 413-414; Respondent's Hearing Exs. D and E) Respondent could not create profit or loss statements because he was not involved in payroll and did not have the information. (Tr. 82-83, 419) These functions were never part of Respondent's responsibilities. (Tr. 414) Respondent's testimony in this regard is substantiated by the Grievant's own testimony that during the entire relationship, from November 2004 through the end of 2008, Grievant never asked Respondent to prepare a tax return for Eastern Hills. (Tr. 225-226) Further, Grievant never once asked Respondent for a profit and loss statement during their relationship. (Tr. 163, 165 and 178-179) Grievant admitted that he had no need for a profit and loss statement during the relationship. (Tr. 163) The record simply does not support any claim that Respondent failed to produce Grievant's documents as alleged by Relator. (Respondent Brief, p. 4)

¹³ *Id.*, fn 3

II. LAW AND ARGUMENT

A. Relator's Proposition of Law No. I is Without Merit

Relator contends that Respondent's admission pursuant to Ohio Civ. R. 36 and his testimony at the hearing were sufficient to prove by clear and convincing evidence that Respondent violated Prof.Cond.R. 8.4(b) and 8.4(c) by committing tax evasion. The Board correctly found Relator failed to meet this burden of proof. In this regard, the Court will not disregard the Panel's findings as adopted by the Board unless the records weighs heavily against those findings. *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 2003-Ohio-6649, 800 N.E.2d 1117

The undisputed evidence of record establishes that not only did Respondent receive checks from Eastern Hills for the payment of services but he also received many checks from Eastern Hills for the reimbursement of expenses that would not be income to the Respondent and would not be included in his tax return as income. (Tr. 422-423, 452-452 and 478) Further, nothing in the admissions established that the checks received by Respondent from Witschger and/or Eastern Hills for legal and business services, referred to in Request for Admission No. 6 are the same checks that were made payable to Respondent from Eastern Hills and/or Witschger which were cashed but the money was not reported as gross income on Respondent's Ohio and/or Federal tax returns for the years 2004 through 2009 as set forth in Request for Admission No. 7.

The Board came to the only finding permitted by the evidence:

The deemed admissions, by themselves, are not sufficient to establish by clear and convincing evidence of a violation of either Prof.Cond.R. 8.4(b) or Prof.Cond.R. 8.4(c).

* * * * *

The admissions, however, do not prove tax evasion.

* * * * *

The admissions do not establish that the checks received for legal and business services were the same checks that were cashed and not reported as gross income.

* * * * *

The deemed admissions do not prove, by clear and convincing evidence, that Respondent violated this rule.¹⁴

Relator's statement that "ultimately, Respondent admitted that the majority of the checks were income to him" is a mischaracterization of Respondent's hearing testimony and is not supported by the record. (Relator Brief, p. 3) Initially, a review of the actual transcript demonstrates that it is far from clear what checks were the subject of the question. (Tr. 457) Immediately prior to the question, checks were being discussed that were part of Relator's Exs. 10 and 17. Relator's Ex. 17 was from different checks collectively marked as Relator's Ex. 9 which was never admitted into evidence. (Tr. 454-455) A review of Respondent's actual hearing testimony demonstrates that Respondent testified that he would need to review the checks to determine which were income to him and in absence of such a review Respondent could only guess. Specifically, Respondent testified, "without having had the opportunity to review the checks that you are referring to, I would have to guess that, that is a correct statement." (Tr. 457) Further, Respondent testified that he had not had an opportunity to review the

¹⁴ Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, p. 9

checks or do any type of a calculation. (Tr. 457) Respondent's testimony is far from an admission that a majority of the checks were for business services.

Likewise, the testimony of Relator's expert, Mr. Marcum fails to establish tax evasion. Mr. Marcum's testimony only demonstrates that he was given "some" checks and records of Eastern Hills for the period from 2005 through 2009. (Tr. 278) It was never established which of the checks payable to Respondent were for services rendered and which of the checks were for reimbursement of advanced expenses. (Tr. 275-280) It is undisputed that many of the checks were reimbursement to Respondent for advanced expenses, including payments advanced by the Respondent for the purchase of parts for Grievant's dry cleaning equipment, the purchase of office equipment and stamps. (Tr. 452-453)¹⁵

The record herein establishes that Relator failed to prove by clear and convincing evidence that Respondent committed tax evasion or violated Prof.Cond.R. 8.4(b) or Prof.Cond.R. 8.4(c). It certainly cannot be said that the record weighs heavily against the Panel's findings as adopted by the Board. See *Cincinnati Bar Assn. v. Statzer, supra*. Relator's Proposition of Law No. I must therefore be overruled.

¹⁵ Respondent prior to the hearing was never afforded an opportunity to review the checks that were admitted into evidence by Relator. The only check that was provided to Respondent was a check for the reimbursement for damaged slacks which Eastern Hills paid to Respondent as a customer. (Tr. 181, 377, 455 and 457) The Panel Chair noted that the Cincinnati Bar Association had failed to produce ahead of time documents that were produced at the hearing. (Tr. 423) (Despite Respondent's discovery directed to Relator requiring such production.)

B. Relator's Proposition of Law No. II is Without Merit

Relator contends that the Board erred in failing to find that Respondent's failure to produce an accounting of charges for services rendered to the Grievant and monies paid by the Grievant constitute a violation of Prof.Cond.R. 1.15(d). (App. C) The Rule states in pertinent part:

Upon receiving funds or other property in which a client or a third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, confirmed in writing, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

As the Board correctly found, "there was no testimony that Respondent had ever held any funds belong to [Grievant] Witschger.¹⁶ Grievant never claimed that Respondent stole money from him. (Tr. 226)

With regard to an accounting of charges for services rendered to the Grievant and monies paid by the Grievant, the Board also correctly found that the Grievant never asked the Respondent for an accounting or billing. In this regard, Panel Chair, Judge Street, questioned Grievant:

¹⁶ Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, p. 6, para. 26

JUDGE STREET: Right. Okay. But this relationship with him [Respondent] went on for four or five years. But you never asked during that four or five years for any of that information, is that what I understand?

MR. WITSCHGER: Correct.

* * * * *

JUDGE STREET: And then when we get to 2008 or '09 and your relationship falls apart, you get some of the records back and you look at them and you say, "Well, wait a minute. I don't know what all of this is for": Is that - -

MR. WITSCHGER: That is correct.

JUDGE STREET: And did you ever ask Mr. Alsfelder for an accounting or billing to show why he charged you the things that he charged you for?

MR. WITSCHER: I did not. There were times when I would sign checks that were just written to Bob Alsfelder and he would hand it to me and I would sign it. And I would say, "What is this for," and he would say, "For business services." So not all the checks that were written went unquestioned.

JUDGE STREET: And if he said it was for business services and you went ahead and signed it, you must have approved it.

MR. WITSCHER: Exactly. (Tr. 227-229)

Further, Panel Chair Street questioned the Grievant:

JUDGE STREET: But you signed all of these checks.

MR. WITSCHER: But I did.

JUDGE STREET: And you had the opportunity to look at the check - -

MR. WITSCHER: I did.

JUDGE STREET: - - and investigate and look at the bill that was attached to it and all of those things? He didn't prevent you from doing all of those things?

MR. WITSCHER: Didn't prevent it at all, but I had the confidence that everything was aboveboard.

JUDGE STREET: And do we know that it wasn't aboveboard at this point?

MR. WITSCHER: I don't have a document that tells what every check was for. A minute by minute if it was for business services.

* * * * *

JUDGE STREET: Well I understand that.

MR. WITSCHER: - - business services that come from Robert Alsfelder, there is no minute-by-minute documentation. (Tr. 226-227)

Further, it was Respondent's uncontested testimony that at some point in late 2004 the number of hours per week that Respondent was working on Eastern Hills matters became predictable and that it was agreed that Respondent and his wife would spend approximately 23 hours per week on the Eastern Hills account. (Tr. 79, 471, 475 and 477) Although Respondent kept track of the hours worked and payments received at the time, he did not have those records by the time of the grievance. (Tr. 482-483) Respondent did produce the only billing statements that he had provided to Grievant in 2004 and a partial list of Respondent's time records created after the filing of the grievance. (Rel. Hearing Exs. 4 and 5)

The uncontested evidence established that Grievant at all times had complete control of his business and bank account, established his own passwords and could access his account on line and in real time. (Tr. 409-412) As the above quoted testimony established, at the time each and every check was presented to Grievant he had the opportunity to investigate and look at the bill attached to it. As to all checks written to Respondent, the Grievant had the opportunity at the time to determine what

services and/or expenses the check was in payment for and did, in fact, question Respondent accordingly. (Tr. 226-229) Grievant's signature on the check establishes that after his review and questioning of Respondent the Grievant approved it. (Tr. 228-229) There is absolutely no evidence of record that Respondent received checks from the Grievant of his business Eastern Hills that were not explained, approved and signed by the Grievant. Relator's contention that Respondent failed to account to Grievant for money paid to him is not supported by the record. (Relator's Brief, pp. 14 and 17) In this regard, the Board made the only finding permitted by the evidence of record that Respondent did not violate Prof.Cond.R. 1.15(d).

Further, regarding Relator's claim that Respondent failed to return the business records of the Grievant, the undisputed evidence at the time of the hearing was that the Grievant was extremely disorganized with regard to his business paperwork and was unable to locate his business paperwork prior to his relationship with the Respondent. (Tr. 245-248 and 330) The evidence established that Respondent did not have the capacity to store Grievant's records and had no use for them after providing his services. (Tr. 413) The "blank checkbook" of Eastern Hills was returned in January of 2009. (Tr. 485 and 487) In fact, the Grievant stored his own records on the second floor of his business premises. (Tr. 490) In this regard, the Board came to the only conclusions the evidence would permit:

Although Witschger claimed that Respondent kept property belonging to Witschger, the Panel is not convinced that Respondent did. The Panel finds Respondent's testimony more believable than Witschger's on this point. Respondent testified that he returned the property to Witschger soon after he and/or his wife had recorded or made use of it, and that Witschger was responsible

for maintaining it. There is no testimony that Respondent had ever held any funds belonging to Witschger.¹⁷

In this regard, the Panel observed the witnesses first hand and thus possessed an enviable vantage point in assessing the credibility and weight of their testimony. For this reason, the Court in its independent review of the disciplinary case defers to the Panel determination of credibility unless the record weighs heavily against those findings. *Cincinnati Bar Assn. v. Statzer, supra*.

Relator's claim that Mrs. Witschger testified that as a result of not having Eastern Hills' business records, "she and Mr. Witschger were not able to keep their home" is a misrepresentation of her testimony. (Relator's Brief as p. 4) Rather, Mrs. Witschger testified that had they had certain unspecified documents, they may have closed the business. (Tr. 352-354) Mrs. Witschger testified that with the records, "we may have just closed the business, and Joe could have sought out some other type of employment." (Tr. 354) Mrs. Witschger never testified that as a result of not having business records, she and/or the Grievant were not able to keep their home. Further, Mrs. Witschger admits that she did not know anything about the business other than what her husband would tell her. (Tr. 302 and 330) As of October 30, 2012, the business was still in operation. (Tr. 353)

The Board's finding that Respondent did not violate Prof.Cond.R. 1.15(d) is supported by substantial evidence of record. Relator has completely failed to establish that the record weighs heavily against the Panel's findings which were adopted by the

¹⁷ Findings of Fact, Conclusions of Law, and Recommendations of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court, p. 6, para. 26

Board. Relator's Proposition of Law No. II is therefore without merit and must be overruled.

C. Relator's Proposed Sanctions are Inappropriate

Relator's cited cases in support of its objection to the Board's recommendation of an indefinite suspension and in support of permanent disbarment involves far more egregious misconduct than that of the Respondent in this matter. In *Cuyahoga County Bar Association v. Wagner*, 117 Ohio St.3d 456, 2008-Ohio-1200, 884 N.E.2d 1053, respondent had committed numerous rule violations involving two bankruptcy matters which involved the failure to return client fees as ordered by the court, the failure to make necessary filings and the failure to make ordered restitution. Further the Respondent had a prior indefinite suspension for identical conduct and a prior suspension due to failure to comply with attorney registration requirements. In *Disciplinary Counsel v. Marshall*, 74 Ohio St.3d 615, 660 N.E.2d 1161 (1996), the respondent did not participate at all in the disciplinary proceeding and a default was entered regarding all charges of misconduct. The respondent also had failed to comply with two subpoenas and had a prior suspension for neglect and dishonesty. In *Akron Bar Association v. Bodnar*, 90 Ohio St.3d 399, 739 N.E.2d 297 (2000), the respondent was found to have committed numerous rule violations, including engaging in illegal conduct and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Respondent had also failed to repay a loan and had prior disciplinary rule violations. In *Disciplinary Counsel v. Crosby*, 132 Ohio St.3d 387, 2012-Ohio-2872, 972 N.E.2d 574, respondent had multiple rule violations involving three matters, including a felony conviction for attempted income tax evasion, failing to

advise his client of the settlement of the client's legal matter, misappropriation of funds and a failure to disburse settlement funds for almost one year. In addition, respondent had a prior disciplinary matter in which he was suspended and also a suspension for failing to comply with attorney registration requirements. In *Cleveland Metropolitan Bar Association v. Mishler*, 127 Ohio St.2d 336, 2010-Ohio-5987, 939 N.E.2d 852, the respondent had over 50 code violations involving a failure to disburse client funds from a settlement, charging fees for unnecessary work, failing to return funds held in an escrow account, receiving fees for services not rendered, misappropriation of client funds and making false representations to a probate court in an application to settle a minor's claim.

In stark contrast, in the case at bar, the Board found, there was no clear and convincing evidence that Respondent committed any misconduct in the representation of the Grievant. Further, Respondent did participate extensively in the disciplinary proceedings, including presenting himself for his deposition on three occasions, taking the deposition of the Grievant, fully responding to the subpoena *duces tecum* by producing all documents and records requested that were in his possession and participated in the formal hearing on October 29th and October 30th, 2012. While Respondent does have a prior disciplinary violation, it is not similar to the alleged failure to cooperate in the within matter but rather involved advising a client concerning non-legal issues and accepting compensation for that advice. *Cincinnati Bar Assn. v. Alsfelder*, 103 Ohio St.3d 375, 2004-Ohio-5216, 816 N.E.2d 218.

Sanctions imposed in similar cases, such as this, involving a failure to cooperate where there is no other finding of misconduct have resulted in far less severe sanctions.

In *Mahoning County Bar Association v. Jones*, 127 Ohio St.3d 424, 2010-Ohio-6024, 940 N.E.2d 940, Respondent was found to have violated Gov. Bar R. V(4)(G) (App. D) as a result of a substantial lack of cooperation, including failure to timely provide contact information or to verify interrogatories, repeated delays in responding to discovery, failure to attend a deposition and failure to produce his client's file. There was no rule violation and Respondent had a prior disciplinary offense. He received a six-month suspension, all stayed. In *Disciplinary Counsel v. Lape*, 130 Ohio St.3d 273, 2011-Ohio-5757, 957 N.E.2d 772, there was a 4(G) violation, numerous stipulated rule violations and a prior disciplinary offense. He was given a six-month suspension, all stayed.

Sanctions imposed in Gov. Bar R. V(4)(G) cases involving far more egregious conduct than that of the Respondent herein are also germane. See *Dayton Bar Association v. Matlock*, 134 Ohio St.3d 276, 2012-Ohio-5638, 981 N.E.2d 861 (multiple rule violations, including mishandling client funds, prior disciplinary offenses and a pattern of misconduct resulted in a one-year suspension, stayed, upon conditions. *Disciplinary Counsel v. Seabrook*, 133 Ohio St.3d 97, 2012-Ohio-3933, 975 N.E.2d 1013 (multiple rule violations, including continuing to practice while under suspension and prior disciplinary violations resulted in a two-year suspension, with the second year stayed, upon conditions and one year monitored probation upon resuming practice); *Trumbull County Bar Association v. Large*, 134 Ohio St.3d 172, 2012-Ohio-5482, 980 N.E.2d 1021 (multiple rule violations, prior suspension, a pattern of misconduct, submitting false evidence and making false statements during the disciplinary process resulted in a two-year suspension, with the final six months stayed, upon conditions.)

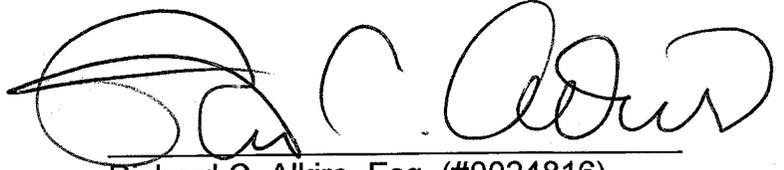
III. CONCLUSION

In the case at bar, the evidence of record overwhelmingly establishes that Respondent did not violate Prof.Cond.R. 8.4(b) or Prof.Cond.R. 8.4(c) as alleged in Count Three of the Amended Complaint and Prof.Cond.R. 1.15(d) as alleged in Count One of the Complaint. The evidence of record supports the Board's finding that Relator failed to prove by clear and convincing evidence any violation of these rules. It certainly has not been demonstrated by Relator that the record weighs heavily against the findings of the Panel as adopted by the Board. The Panel having observed the witnesses first hand was in an enviable vantage point in assessing their creditability and the weight of their testimony. *Cincinnati Bar Assn. v. Statzer, supra.*

Relator's request for a sanction of indefinite suspension is not supported by its cited cases or sanctions imposed in similar cases. In this case, Respondent has already been suspended for 18 months, a far greater sanction than those rendered in similar cases and much more akin to sanctions that have been imposed for more egregious conduct.

It is therefore respectfully submitted that given the sanction imposed in similar cases, Respondent has already served a far greater suspension and after receiving credit for his interim suspension to date, he should not be further sanctioned, or should at most receive a two year suspension with credit for the suspension already served.

Respectfully submitted,



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Attorneys for Respondent

APP. A

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

- (a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit an *illegal* act that reflects adversely on the lawyer's honesty or trustworthiness;
- (c) engage in conduct involving dishonesty, *fraud*, deceit, or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Division (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses

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APP. B

y of the Board. The Board arings and take and report bilitation of the petitioner ll the mental, educational, quired of an applicant for law in Ohio at the time of

Denial; Appeal
The Secretary, by lot, shall eree board members, none of the appellate district in or of the appellate district ded at the time of suspen- point an attorney or judge nel shall conduct a hearing on.

Board shall provide reason- to the petitioner or counsel ll persons or organizations (3) of this section. Hearings erested person, member of nary Counsel may appear support of or opposition to

ary Counsel. If a Certified ar association referred to ection determines that mat- qualifications for reinstate- is and complex as to require ry Counsel, the chair of the ritten request for assistance l. The Disciplinary Counsel ed matters and report the on to the committee that

earing panel shall make and rd of the proceedings before fact and recommendations. the panel and the Board, ll be governed by the provi- ng disciplinary proceedings, the Supreme Court for an ow cause why the final report e confirmed.

Denial; Appeal. The Board petitioner be required to take xamination of the Supreme admission. If the final report e petition, the petitioner shall t of notice of the date of filing is and a brief in support of the

Appeal. If the final report e petition, any person or orga- ision (C)(3) of this section the receipt of notice of filing tions to the recommendations the objections. The Supreme ppropriate order, which may mbursement of the costs and nection with the proceedings.

SECTION 11. Applicability of Rules; Regula- tions; Special Service; Contempt; Confidentiality; Reciprocal Discipline

(A) Applicability of Rules; Regulations of Board

(1) The Board and hearing panels shall follow the Ohio Rules of Civil Procedure and the Ohio Rules of Evidence wherever practicable unless a specific provi- sion of this rule or Board hearing procedures and guidelines provides otherwise.

(2) With the prior approval of the Supreme Court, the Board may adopt regulations consistent with this rule.

(3) With the prior approval of the Supreme Court, the Board shall adopt regulations that contain all of the following:

(a) Procedures for regularly reviewing the perfor- mance of Certified Grievance Committees, identifying Certified Grievance Committees that are not in com- pliance with the standards set forth in this rule, and for decertifying a Certified Grievance Committee that fails to improve its performance after being notified of noncompliance;

(b) Time guidelines for the processing of disciplinary cases pending before the Board and panels of the Board;

(c) Procedures to allow the Board to make a recom- mendation of discipline, other than an indefinite sus- pension or disbarment, where the Disciplinary Counsel or Certified Grievance Committee and the respondent enter into a written agreement in which the respondent admits to the existence of a disciplinary violation.

(B) Clerk is Agent for Service of Notices on Nonresident Justice, Judge, or Attorney Any non- resident of this state, having been admitted as an attorney by the rules of the Supreme Court, or any resident of this state, having been admitted as an attorney by the rules of the Supreme Court, who subsequently becomes a nonresident or conceals his or her whereabouts, by such admission to the practice of law within this state makes the Clerk of the Supreme Court his or her agent for the service of any notice provided for in any proceeding instituted against such justice, judge, or attorney, pursuant to this rule.

(C) Effect of Refusal to Testify The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and shall be punish- able accordingly.

(D) Rule to be Liberally Construed. The process and procedure under this rule and regulations ap- proved by the Supreme Court shall be as summary as reasonably may be. Amendments to any complaint, notice, answer, objections, report, or order to show cause may be made at any time prior to final order of the Supreme Court. The party affected by an amend- ment shall be given reasonable opportunity to meet any new matter presented. No investigation or procedure shall be held to be invalid by reason of any nonpreju- dicial irregularity or for any error not resulting in a miscarriage of justice. This rule and regulations relating to investigation and proceedings involving complaints of misconduct and petitions for reinstatement shall be construed liberally for the protection of the public, the

courts, and the legal profession and shall apply to all pending investigations and complaints so far as may be practicable and to all future investigations, complaints, and petitions whether the conduct involved occurred prior or subsequent to the amendment of this rule. To the extent that application of this amended rule to pending proceedings may not be practicable, the regu- lations in force at the time this amended rule became effective shall continue to apply.

(E) Proceedings Private; Public

(1) All proceedings and documents relating to review and investigation of grievances made under these rules shall be private except as follows:

(a) Where the respondent requests in writing that they be public;

(b) Where the respondent voluntarily waives privacy of the proceedings.

(c) Where the proceedings reveal reasonable cause to believe that respondent is or may be addicted to alcohol or other chemicals, is abusing the use of alcohol or other chemicals, or may be experiencing a mental health condition or problem that is substantially im- pairing the respondent's ability to practice law, the information giving rise to this belief shall be commu- nicated to a committee or subcommittee of a bar association, or to an executive officer or employee of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems.

(d) Where, in the course of an investigation by the Office of Disciplinary Counsel or a certified grievance committee, it is found that a person involved in the investigation may have violated federal or state criminal statutes, the entity conducting the investigation shall notify the appropriate law enforcement or prosecu- torial authority of the alleged criminal violation.

(2)(a) From the time a complaint has been certified to the Secretary of the Board by a probable cause panel, the complaint and all subsequent proceedings in connection with the complaint shall be public; except that deliberations by the panel and deliberations by the Board shall be confidential and the recommendations of the Board shall be private until filed with the Supreme Court. The Board-approved ADR process shall be confidential. Any knowledge obtained by a mediator or facilitator shall be privileged for all pur- poses under Rule 8.3 of the Ohio Rules of Professional Conduct, provided the knowledge was obtained while the mediator or facilitator was acting as a mediator or facilitator.

(b) Proceedings by a Certified Grievance Committee and Disciplinary Counsel shall be private until certified by a probable cause panel; except that deliberations by a Certified Grievance Committee, Disciplinary Coun- sel, panel, or Board, shall be confidential.

(c) As used in Section 11 of this rule, the terms "private" and "confidential" shall have the following meanings:

(i) "Private" acknowledges the right of the respon- dent to the right of privacy as to the proceedings relative to an uncertified complaint, which may be waived by the respondent as provided in Section 11(E)(1) of this rule;

APP. C

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution. For funds, the lawyer shall do all of the following:

- (1) maintain a copy of any fee agreement with each client;
- (2) maintain a record for each client on whose behalf funds are held that sets forth all of the following:
 - (i) the name of the client;
 - (ii) the date, amount, and source of all funds received on behalf of such client;
 - (iii) the date, amount, payee, and purpose of each disbursement made on behalf of such client;
 - (iv) the current balance for such client.
- (3) maintain a record for each bank account that sets forth all of the following:
 - (i) the name of such account;
 - (ii) the date, amount, and client affected by each credit and debit;
 - (iii) the balance in the account.
- (4) maintain all bank statements, deposit slips, and cancelled checks, if provided by the bank, for each bank account;
- (5) perform and retain a monthly reconciliation of the items contained in divisions (a)(2), (3), and (4) of this rule.

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(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying or obtaining a waiver of bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, *confirmed in writing*, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

(e) When in the course of representation a lawyer is in possession of funds or other property in which two or more persons, one of whom may be the lawyer, claim interests, the lawyer shall hold the funds or other property pursuant to division (a) of this rule until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or other property as to which the interests are not in dispute.

(f) Upon dissolution of any *law firm*, the former *partners*, managing *partners*, or supervisory lawyers shall promptly account for all client funds and shall make appropriate arrangements for one of them to maintain all records generated under division (a) of this rule.

(g) A lawyer, *law firm*, or estate of a deceased lawyer who sells a law practice shall account for and transfer all funds held pursuant to this rule to the lawyer or *law firm* purchasing the law practice at the time client files are transferred.

(h) A lawyer, a lawyer in the lawyer's *firm*, or a *firm* that owns an interest in a business that provides a law-related service shall:

(1) maintain funds of clients or third persons that cannot earn any net income for the clients or third persons in an interest-bearing trust account that is established in an eligible depository institution as required by sections 3953.231, 4705.09, and 4705.10 of the Revised Code or any rules adopted by the Ohio Legal Assistance Foundation pursuant to section 120.52 of the Revised Code.

APP. D

SECTION 4. Investigation and Filing of Complaints.

(A) **Referral by Board.** The Board may refer to a Certified Grievance Committee or the Disciplinary Counsel any matter filed with it for investigation as provided in this section.

(B) **Referral by Certified Grievance Committee.** If a certified grievance committee determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the chair of the certified grievance committee may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all matters contained in the request and report the results of the investigation to the committee that requested it.

(C) Power and Duty to Investigate; Dismissal without Investigation.

(1) The investigation of grievances involving alleged misconduct by justices, judges, and attorneys and grievances with regard to mental illness shall be conducted by the Disciplinary Counsel or a certified grievance committee. The Disciplinary Counsel and a certified grievance committee shall review and may investigate any matter filed with it or that comes to its attention and may file a complaint pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.

(2) A grievance may be dismissed without investigation if the grievance and any supporting material do not contain an allegation of misconduct or mental illness on the part of a justice, judge, or attorney. A certified grievance committee shall not dismiss a grievance without investigation unless bar counsel has reviewed the grievance.

(D) **Time for Investigation.** The investigation of grievances by Disciplinary Counsel or a certified grievance committee shall be concluded within sixty days from the date of the receipt of the grievance. A decision as to the disposition of the grievance shall be made within thirty days after conclusion of the investigation.

(1) **Extensions of Time.** Extensions of time for completion of the investigation may be granted by the Secretary of the Board upon written request and for good cause shown. Investigations for which an extension is granted shall be completed within one hundred fifty days from the date of receipt of the grievance. Time may be extended when all parties voluntarily enter into an alternative dispute resolution method for resolving fee disputes sponsored by the Ohio State Bar Association or a local bar association.

(2) **Extension Limits.** The chair or Secretary of the Board may extend time limits beyond one hundred fifty days from the date of filing in the event of pending litigation, appeals, unusually complex investigations, including the investigation of multiple grievances, time delays in obtaining evidence or testimony of witnesses, or for other good cause shown. If an investigation is not completed within one hundred fifty days from the date of filing the grievance or a good cause extension of that time, the Secretary may refer the matter either to a geographically appropriate certified grievance committee or the Disciplinary Counsel. The investigation shall be completed within sixty days after referral. No investigation shall be extended beyond one year from the date of the filing of the grievance.

(3) **Time Limits not Jurisdictional.** Time limits set forth in this rule are not jurisdictional. No grievance filed shall be dismissed unless it appears that there has been an unreasonable delay and that the rights of the respondent to have a fair hearing have been violated. Investigations that extend beyond one year from the date of filing are prima facie evidence of unreasonable delay.

(E) **Retaining Outside Experts.** A particular investigation may benefit from the services of an independent investigator, auditor, examiner, assessor, or other expert. A certified grievance committee may retain the services of an expert in accordance with the Board regulations.

(F) **Cooperation with Clients' Security Fund.** Upon the receipt of any grievance presenting facts that may be the basis for an award from the Clients' Security Fund under Gov. Bar R. VIII, the Disciplinary Counsel or a certified grievance committee shall notify the grievant of the potential right to an award from the Fund and provide the grievant with the forms necessary to initiate a claim with the Clients' Security Fund. The Disciplinary Counsel, a certified grievance committee, and the Board shall provide the Board of Commissioners of the Clients' Security Fund with findings from investigations, grievances, or any other records it requests in connection with an investigation under Gov. Bar R. VIII. The transmittal of confidential information may be delayed pending the termination of the disciplinary investigation or proceedings.

(G) **Duty to Cooperate.** The Board, the Disciplinary Counsel, and president, secretary, or chair of a certified grievance committee may call upon any justice, judge, or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and alternative dispute resolution procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No attorney, and no justice or judge, except as provided in Rule 3.3 of the Code of Judicial Conduct, shall neglect or refuse to assist or testify in an investigation or hearing.

(H) **Referral of Procedural Questions to Board.** In the course of an investigation, the chair of a certified grievance committee, the president of a bar association, or the Disciplinary Counsel may direct a written inquiry regarding a procedural question to the chair of the Board of Commissioners. The written inquiry shall be filed with the Secretary of the Board. Upon receipt of a written inquiry, the chair of the Board and the Secretary shall consult and direct a response.

(I) Requirements for Filing a Complaint.

(1) **Definition.** "Complaint" means a formal written allegation of misconduct or mental illness of a person designated as the respondent.

PROOF OF SERVICE

The foregoing **ANSWER BRIEF OF RESPONDENT ROBERT F. ALSFELDER, JR. TO RELATOR'S OBJECTION TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE** was mailed by ordinary U.S. mail this 9th day of April, 2013 to:

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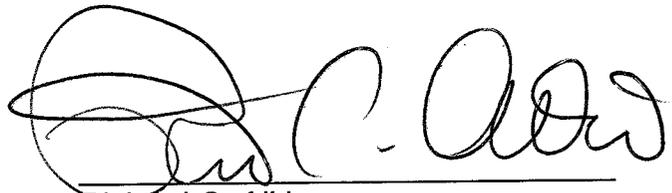
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