

ORIGINAL

IN THE SUPREME COURT OF OHIO

CINCINNATI BAR ASSOCIATION, : Case No. 2013-1984  
 Relator, :  
 v. :  
 : RELATOR'S ANSWER BRIEF  
 GEOFFREY P. DAMON, :  
 Respondent :

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RELATOR'S ANSWER BRIEF TO RESPONDENTS' OBJECTIONS TO THE  
 FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE  
 BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Ohio on October 29, 1984. Relator and Respondent entered into an extensive Stipulation of Facts (“Stip.”) on April 9, 2012, as well as a Supplemental Stipulation of Facts (“Supp. Stip.”) on May 29, 2012. Events and conduct relevant to this case occurred between 2008 and 2013.

Respondent is currently under an Interim Felony Suspension which became effective on May 21, 2013. He pled guilty to grand theft, a felony of the fourth degree, on March 11, 2013; he admitted that he stole over \$59,000 from the law firm of Butkovich & Crosthwaithe Co., LPA (“the Firm”), while he was employed there from January 2, 2009 through July 30, 2010. (Bd. Findings, ¶ 55). When he was hired, the Firm and Respondent agreed that he would be paid an annual salary of \$120,000. In return, he was to remit to the Firm all fees and costs collected while so employed, whether from work in progress before he joined the Firm or from new client matters undertaken after January 1, 2009. (Bd. Findings, ¶ 10; Tr. 45-47).

During this employment, Respondent accepted money for legal services and costs from each of the clients cited in Count I of Relator’s complaint: Michael Brautigam, Vicki McCoy, Terry and Veronica Patterson, Bonnie Schantz, Tammy Tribbey, and Darlene Merritt. Despite his agreement with the Firm, and unbeknownst to the Firm, Respondent did not deposit these funds in the Firm’s client trust account. Instead, he diverted these funds to a “secret” account in his own name, albeit one that was labeled as an IOLTA account. The Board, however, rejected Relator’s contention that use of a secret trust fund to deposit client funds, beyond the control or knowledge of Respondent’s law firm, is improper as a depository of client funds where the secret

fund is being used to divert and conceal those funds from Respondent's law firm.

Respondent stole money in this manner during the entire course of his employment with the Firm, although the exact amount he stole is unknown. (Bd. Findings, ¶ 4-5). Respondent admitted that he does not keep detailed time records (Tr. 122), resulting in an inability of the Firm to calculate the exact amount owed. (Tr. 59). Respondent and Relator stipulated that he stole approximately \$84,000 from the Firm in 2009, which corresponds with the \$84,066 of legal fees he declared on a Schedule C to his 2009 U.S. Income Tax Return. (Bd. Findings, ¶ 10). This sum does not include any moneys which Respondent diverted during the seven months of 2010 he was employed at the Firm. As part of his sentence for grand theft, Respondent was ordered to pay restitution to the Firm in the amount of \$59,553.98. (Bd. Findings, ¶ 55). This was over and above the approximately \$56,000 he has repaid to the Firm since the discovery of his criminal conduct. (Bd. Findings, ¶ 5 and Tr. 125-126). The Board found that Respondent's conduct in relation to the Firm violated both Prof. Cond. R. 8.4(b) and 8.4(c) (Bd. Findings, ¶ 56 and ¶ 11).

Additionally, the Board found that Respondent failed to provide an accounting upon request by the Pattersons (Count I(C)), and failed to return an expert fee of \$3,700 to the Pattersons after he dismissed their case without permission. The Board found violations of Prof. Cond. R. 1.15(c) and 1.15(d) in this regard.

In addition to Respondent's misconduct concerning clients of the Firm, the Board found multiple violations in relation to other clients. In all client matters in Counts II through VIII—the Thompson, Robinson, Jemison, Johnson, Long, Gehring, and Dubose matters—the Board found that Respondent violated Prof. Cond. R. 1.15(d). Respondent admitted, and the Board found that he consistently failed to keep time records for these clients (Tr. 121-122). In the

Thompson matter, Respondent accepted a \$5,000 retainer, filed a meritless law suit which was later dismissed, and did not refund any of Ms. Thompson's money (Bd. Findings, ¶ 36).

Likewise, Respondent did not return any of Mr. Robinson's \$25,000 after Respondent could not secure an expert to support Mr. Robinson's malpractice claim (Board Findings, ¶36), nor did he return any of Mr. Johnson's \$2,500 after voluntarily dismissing Mr. Johnson's case (Bd. Findings, ¶ 41). Respondent failed to provide an accounting of funds to Ms. DuBose (Bd. Findings, ¶ 53) or Mr. Long (Bd. Findings, ¶ 48), after he had been discharged by each of them, and he has yet to refund any portion of their money. In December 2010, Respondent did provide a \$500 refund to Mr. Jemison, but failed to provide an accounting for his time and an additional refund, as promised (Bd. Findings, ¶ 38).

Ms. Gehring paid Respondent \$1,500 for consultation and review of her medical records by a medical professional. Respondent failed to take action on her behalf; Ms. Gehring terminated Respondent's employment and requested the refund of her retainer and the return of her medical records. Respondent failed to refund the retainer and failed to return the records until after he was notified by Relator that the matter was under investigation. (Bd. Findings, ¶ 50). The Board found violations of Prof. Cond. R. 1.5(a) and 1.15(d).

The Board found additional violations of Prof. Cond. R. 1.5(a) in relation to two other counts in Relator's complaint. In the Thompson and Long matters (Counts II and VI), Respondent accepted retainers from the clients, filed meritless claims with a court on the clients' behalf, and then withdrew such claims when threatened with sanctions from the opposing party. Additionally, in the Long matter, Respondent accepted another retainer and filed a lawsuit in state court against General Motors, even though GM was going through bankruptcy and Mr. Long's claim constituted a pre-petition claim subject to the automatic stay. This cause of action

was dismissed for lack of prosecution (Bd. Finding, ¶48).

In the Thompson, Robinson, and Jemison matters (Counts II, III, and IV), Respondent did not keep an itemized record of the clients' funds nor did he keep time records. The Board found this conduct to be a violation of Prof. Cond. R. 1.15(a)(2). In the Johnson matter (Count V), Respondent agreed to represent Mr. Johnson for a retainer, and any other fees were contingent on an award for attorney fees by the court (Bd. Findings, ¶ 40). Respondent failed to enter into a written contingency fee agreement, and the Board found this to be a violation of Prof. Cond. R. 1.5(c).

Finally, the Board found four violations regarding the DuBose grievance (Count VIII). Ms. Dubose paid Respondent \$4,800, and Respondent filed a law suit on her behalf. Respondent failed to timely file a memorandum in opposition to the defendant's motion for summary judgment; at oral argument on the defendant's motion, Respondent voluntarily dismissed the case without discussing it with Ms. DuBose. The Board found that this conduct violated Prof. Cond. R. 1.2(a), 1.3, 1.4(a), and 1.4(b) (Bd. Finding, ¶54).

Based upon the forgoing, the Board recommended that Respondent be permanently disbarred from the practice of law in Ohio. The Board found three mitigating factors: (1) absence of prior disciplinary record, (2) Respondent's character reputation, and (3) the imposition of other penalties or sanctions, namely Respondent's criminal sanctions and his interim suspension. To the contrary, the Board found seven aggravating factors: (1) dishonest or selfish motive, (2) a pattern of misconduct, (3) multiple offenses, (4) Respondent's lack of cooperation in the disciplinary process, (5) Respondent's refusal to acknowledge to wrongful nature of his conduct, (6) the vulnerability of and resulting harm to the victims of Respondent's misconduct, and (7) Respondent's failure to make voluntary restitution that would rectify the

consequences of his misconduct. In recommending disbarment, the Board found that the “significant” aggravating factors outweighed the mitigating factors (Bd. Finding, ¶ 62).

On December 17, 2013, Respondent filed Objections to the Board’s Findings of Fact and Conclusions of Law, and argued that he be indefinitely suspended as opposed to disbarred, or in the alternative, that the case be remanded regarding the distribution of restitution payments made by him to the Firm.

## ARGUMENT

### PROPOSITION OF LAW I

The findings of the hearing panel and the Board are supported by the stipulated facts, the testimony of witnesses, and the exhibits admitted into evidence. To the extent the panel found Relator's witnesses to be credible and Respondent's testimony to be evasive, this Court should follow its own precedents and defer to the panel and the Board.

Respondent was employed as a full-time associate by the law firm of Butkovich & Crosthwaite Co., LPA, in Cincinnati, Ohio from January 2, 2009 until July 30, 2010. (Bd. Findings ¶3). At hearing, Respondent testified that when it became evident that he was going to be terminated from the Firm he "got copies of all deposit slips and also the accompanying documents for the deposits, and provided all that to the Butkovich Firm." (Objections, p. 2; Tr, 87-88).

Respondent asserts that the hearing panel erroneously found that the amount of restitution owed to the Firm for his theft cannot be calculated. (Objections, p. 6) Further, Respondent asserts the Board erroneously found that the amount of money which he converted from the firm is unknown even though Joseph Butkovich testified that they had arrived at a final restitution figure. (Objections, p. 2)

Contrary to Respondent's characterization of Mr. Butkovich's testimony, the following exchange took place during Respondent's cross-examination of Mr. Butkovich:

Q. And did you ever have occasion to advise me of what you considered restitution in full?

A. I am sure we had at some point when Mr. Mueller had completed his analysis.

The problem, Mr. Damon, is that you don't have records for us to make an accounting. And it doesn't account for the cash payments that you received that we have no idea who and when retained you because you didn't inform us of your clients. So I can't tell you what you owe us because you don't have records.

(Tr. 59)

One of the seven aggravating factors which the panel and the Board found in this case was a lack of cooperation in the disciplinary process: "The panel felt that while on the witness stand Respondent, on occasion, gave evasive answers and sometimes refused to answer the specific questions he was asked." (Bd. Findings, ¶60) The Board said:

Respondent also argues that he has made significant restitution payments. The Panel does not find this to be the case. The Panel finds that Respondent did not make timely, good-faith effort to make restitution or to rectify the consequences of his misconduct. Although Respondent has made partial restitution to some of the clients and to the Butkovich & Crosthwaite firm, the amount of restitution made pales to the amount of loss incurred. The exact amount stolen from Butkovich & Crosthwaite firm is unknown and cannot be ascertained. The stipulated amount of \$84,000 does not cover cash payments, if any, or any monies received in the calendar year 2010. There is no certainty that it even includes all of the money taken in 2009. . . .

(Bd. Findings, ¶58)

There is no doubt that Respondent stole money from the firm. He admitted it in his guilty plea to felony theft and he admitted it upon cross-examination at his disciplinary hearing:

Q. But there was also new money coming in after you took employment with the Butkovich firm that you did not turn over to the Butkovich firm, right?

A. That's correct.

- Q. And you put that into your own personal account, correct?
- A. I put it into an IOLTA account.
- Q. That was an IOLTA account not set up by the Butkovich firm?
- A. It was an escrow account, correct.
- Q. But it wasn't set up by the Butkovich firm?
- A. No.
- Q. Okay. And, in fact, you didn't even tell the Butkovich firm that you were receiving these funds, correct, when you received them?
- A. Sometimes yes, sometimes no.

(Tr. 103-104)

It seems that even Respondent himself was unsure of the amount he stole from the Firm. This Court recently said "Unless the record weighs heavily against a hearing panel's findings, we defer to the panel's credibility determinations, inasmuch as the panel members saw and heard the witnesses firsthand." *Disciplinary Counsel v. Bunstine*, 2013-Ohio-3681 ¶ 17, quoting *Cuyahoga Cty. Bar Assn. v. Wise*, 2006-Ohio-550. In the case at bar, the hearing panel and the Board were well within their discretion to believe Mr. Butkovich over Respondent when Mr. Butkovich testified Respondent had not provided records from which the amount stolen could be calculated.

## PROPOSITION OF LAW II

Respondent committed two distinct courses of misconduct, each of which carries the presumption of disbarment. Because the Board found that significant aggravating factors outweigh the mitigating factors, the Board's recommendation that respondent be disbarred should be adopted.

“When imposing sanctions for attorney misconduct, [this Court] consider[s] relevant factors, including the duties that the lawyer violated, the lawyer's mental state, and sanctions imposed in similar cases.” *Mahoning Cty. Bar Assn. v. Pritchard*, 2012-Ohio-44, 131 Ohio St.3d 97, 961 N.E.2d 165, ¶ 31, citing *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, 775 N.E.2d 818, ¶ 16. “In making a final determination, [this Court] also weigh[s] evidence of the aggravating and mitigating factors listed in Section 10(B) of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline (‘BCGD Proc.Reg.’).” *Id.*, citing *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, 875 N.E.2d 935, ¶ 21.

As stated above, the Board found seven aggravating factors in this case but only three mitigating factors. The Board found that the “significant aggravating factors” outweigh the mitigating factors. (Bd. Findings, ¶ 62).

In over 25 cases, this Court has recognized that “the act of accepting retainers or legal fees and failing to carry out contracts of employment is tantamount to theft of the fee from the client and that the presumptive sanction for that offense is disbarment.” *Cleveland Metro Bar Assn. v. Gruttadaurio*, 2013-Ohio-3662, 136 Ohio St.3d 283, 995 N.E.2d 190, ¶ 48. Here,

Respondent accepted funds from multiple clients and did not complete the work for which he was hired. Analogous to *Gruttadaurio* is Respondent's representation of Ms. Gehring, in which he accepted a \$1,500 retainer, did absolutely nothing, and failed to return any of Ms. Gehring's money. (Bd. Findings, ¶ 50). Likewise, he failed to refund or account for the \$5,000 retainer which Lisa Thompson paid him (Bd. Findings, ¶34), or the \$5,000 retainer he received from Michael Long. (Bd. Findings, ¶48). Moreover, he frequently accepted retainers to pursue claims he knew or should have known had no merit, and when the expected resistance to these claims came in the form of a threat of sanctions or a motion to dismiss from opposing counsel, Respondent dismissed the action and kept the entire retainer, with no attempt to account for his time or admission that the claim should never have been pursued.

In *Cincinnati Bar Assn. v. Britt*, 2012-Ohio-4541, 133 Ohio St.3d 217, 977 N.E.2d 620, ¶ 22, this Court said: "We have held that disbarment is the presumptive sanction for misappropriation, but we have recognized that this sanction may be tempered with sufficient evidence of mitigating or extenuating circumstances."

In requesting an indefinite suspension for himself, rather than a disbarment, the instant Respondent relies in part on this Court's imposition of an indefinite suspension in *Britt*. The facts and rule violations in that case are comparable, in part, to the case at bar, but *Britt* is hugely distinguishable in terms of mitigation evidence. Respondent Britt accepted over \$40,000 in retainers and filing fees from 41 clients, deposited the money into an operating account rather than an IOLTA, failed to perform the promised legal services, and spent at least part of the money for his own purposes without any regard for whether he had earned it. He also failed to withhold federal income taxes or pay unemployment taxes, and aided the unauthorized practice of law.

The instant case does not present nearly the level of mitigation the Court found in *Britt*. First, unlike Respondent here in, Respondent Britt was not charged with or convicted of a crime. His conduct was found not to be based on a dishonest or selfish motive, but rather on his inexperience and lack of guidance. *Id.* ¶ 27. In fact, he openly acknowledged his misconduct in a letter to his aggrieved clients, apologizing contritely and sincerely, and even made arrangements for substitute counsel for his clients should they choose to accept it. *Id.* ¶ 30-32. Furthermore, unlike Respondent, whose failure to maintain adequate records of client funds has prevented a final calculation of the amount he stole, Respondent Britt provided an accounting to Relator of the money he had accepted from the 41 clients. *Id.* ¶ 13. Finally, he expressed his desire to make amends for his misconduct, and this Court did enter an order of restitution. *Id.* ¶33.

“Disbarment is warranted when an attorney turns to crime and is convicted of theft offenses.” *Cincinnati Bar Assn. v. Blake*, 2003-Ohio-5755, 100 Ohio St.3d 298, 798 N.E.2d 610, ¶ 7 citing *Cincinnati Bar Assn. v. Banks*, 2002-Ohio-1236, 94 Ohio St.3d 428, 763 N.E.2d 1166. While *Blake* involved multiple felony convictions for theft and forgery, *Gruttadaurio*, *Britt*, and *Blake* stand for the proposition that, absent substantial mitigating factors, an attorney convicted of a theft offense should be disbarred from the practice of law in Ohio.

One of the cases which Respondent cites in support of his request for an indefinite suspension is *Disciplinary Counsel v. Asante*, 2012-Ohio-3906, 133 Ohio St.3d 102, 976 N.E.2d 843. Respondent Asante, an immigration lawyer, pled guilty in federal court to entering into a fraudulent marriage for the purpose of evading United States immigration law. She was sentenced to two years of probation, and stipulated to an order of removal. She left the United States in 2010, before the attorney disciplinary case was brought against her. *Id.* ¶ 5-6. As a result, she entered into a consent-to-discipline agreement, which the Court accepted, wherein she

admitted to violating Prof. Cond. R 8.4(b), 8.4(c), 8.4(h), and the comparable rules under the Ohio Code of Professional Responsibility. *Id.* ¶ 1, 7. The Court found multiple mitigating factors but only one aggravating factor: she had acted with a dishonest and selfish motive. *Id.* ¶ 9. The Court suspended her indefinitely from the practice of law in Ohio based solely on her criminal conduct. *Id.* ¶ 11. The sanction in *Asante* may be of no precedential value if that Respondent is forever barred from re-entering the United States. Nevertheless, Relator herein would distinguish that case from the instant one, because Respondent here not only engaged in felony theft, he also committed multiple violations of other Rules of Professional Conduct.

In 1986, this Court disbarred an attorney who embezzled \$40,000 from his law firm, finding violations of DR 1-102(A)(3) [engaging in illegal conduct involving moral turpitude], DR 1-102(A)(4) [engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation], DR 1-102(A)(6) [engaging in other conduct that adversely reflects on his fitness to practice law], and certain registration requirements. *Office of Disciplinary Counsel v. Nothstein*, 21 Ohio St.3d 108, 488 N.E.2d 180 (1986).

More recently, in *Cincinnati Bar Assn. v. Banks*, 2002-Ohio-1236, 94 Ohio St.3d 428, 763 N.E.2d 1166, The Court, applying the Code of Professional Responsibility, permanently disbarred an attorney after he was convicted of the interstate transportation of stolen laptops and had given materially false testimony at his trial criminal trial. Respondent's conduct differs only in the amount stolen, which cannot be determined with certainty but which exceeds \$100,000, based upon the restitution he has already made to the Firm, plus the additional restitution ordered by the Common Pleas Court. (Tr. 125-126) Additionally, unlike in *Banks*, the Board in this case found multiple violations in other client matters that are unrelated to Respondent's violations of Prof. Cond. R. 8.4(b) and 8.4(c).

The harm caused by Respondent goes beyond the sum of money he stole from the Firm and the fees and costs he has yet to return to his other clients. Mr. Butkovich testified that the Firm has already paid Attorney John Mueller \$61,291.52 for his assistance in attempting to calculate the amount Respondent stole and his representation of the Firm in malpractice suits filed against the Firm. (Tr. 47-48) As of the hearing, four malpractice suits had been filed against the Firm because of Respondent's malfeasance while employed there. Two of them had been dismissed. (Tr. 49). As a result of Respondent's misconduct, the Firm also suffered increased unemployment compensation expenses, a 40% increase in its malpractice insurance, a reduction in workforce, and countless hours of having to deal with disgruntled clients. (Tr. 51-54).

As the Board recognized, Respondent has refused to acknowledge the wrongfulness of his actions. (Bd. Findings, ¶ 60). The Board found that Respondent felt that he had no duty to return unearned fees unless the client asked for them or sued to recover them. (Bd. Findings, ¶ 58). He argues in his brief: "Given the findings of the Panel, some of the grievants are not entitled to any refund of fees paid, because there was no finding of any breach of duty by the Respondent. This includes, Grievants Michael Brautigam, Vickie McCoy, Bonnie Schantz, Tammy Tribbey and Darlene Merritt." (Objections, p. 4) In fact, the Board noted that Respondent filed a Chapter 13 bankruptcy which listed all or virtually all of the clients who had filed grievances, including the Firm. (Bd. Findings, ¶59).

Respondent herein committed three distinct courses of misconduct, each of which carries the presumption of disbarment: he misappropriated funds from his employer, he took fees from clients and failed to do the work, and he knowingly accepted and kept retainers to pursue, however briefly, claims that he knew or should have know were frivolous.. The Board said:

“Respondent has a total lack of remorse and apparent lack of interest in the harm he has thrust upon his clients and his employer.” (Bd. Findings, ¶62) In *Britt*, this Court expressed its belief that Mr. Britt “may one day be able to resume the competent, ethical, and professional practice of law.” *Cincinnati Bar Assn. v. Britt*, 2012-Ohio-4541, ¶ 33. The facts of this case do not warrant that same confidence.

**CONCLUSION**

WHEREFORE, Relator requests that the Board's Findings of Fact and Conclusions of Law be adopted by this Honorable Court and that Respondent be permanently disbarred from the practice of law in Ohio.

Respectfully submitted,

CINCINNATI BAR ASSOCIATION

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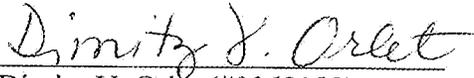
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Answer Brief to Respondent's Objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline was mailed by First Class United States mail, postage prepaid, to Geoffrey P. Damon, Respondent Pro Se, 2260 Francis Lane, Cincinnati, OH 45206; Richard A. Dove, Secretary, Board of Commissioners on Grievances and Discipline, Supreme Court of Ohio, 65 S. Front St., 5<sup>th</sup> Floor, Columbus, OH 43215; and Scott J. Drexel, Disciplinary Counsel Designate, Office of Disciplinary Counsel, 250 Civic Center Dr., Ste. 325, Columbus, OH 43215 on this 6 day of February, 2014.



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