

IN THE SUPREME COURT OF OHIO

OFFICE OF DISCIPLINARY COUNSEL

RELATOR

v.

Case No. 2015- 1315

On Appeal from Board

Case 2014-045

RAYMOND L. EICHENBERGER

RESPONDENT

* * * * *

BRIEF

OF RESPONDENT RAYMOND L. EICHENBERGER
IN SUPPORT OF RESPONDENT'S OBJECTIONS

* * * * *

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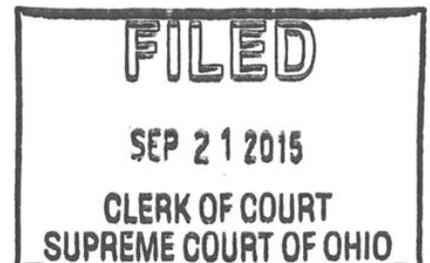


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STATEMENT OF FACTS

Respondent Raymond L. Eichenberger was admitted to practice law in the State of Ohio in November of 1980.

The Respondent, a sole practitioner, has had offices in Reynoldsburg since 1986, and has been a sole practitioner since 1983.

In May of 2013 the Relator received notice of an overdraft from PNC Bank concerning an old Trust Account of the Respondent's that was being closed at the request of the Respondent.

In fact, the Respondent had opened up another Trust Account at the same bank, PNC bank, and the Trust Account on which the overdraft was noted was closed several days after the alleged overdraft notice. The second Trust account had been opened several months before the May date, in March of 2013.

The overdraft item concerned a personal loan that was being deducted from the original Trust Account. The Respondent had specifically closed the old Trust Account in order to correct the situation with the personal loan, and to self-correct the errors in judgment which he had made concerning the loan and his office Trust account.

When contacted by the Relator's office, attorney Michelle Bowman, the Respondent answered the inquiry and explained to the Relator that the old Trust account in question had been in the process of being closed down.

Relator asked for bank account records from the Respondent's Trust Account, both old and new, which the Respondent sent to the representative of the Relator.

The Relator was not satisfied with the bank account records sent to it by the Respondent, and the Respondent did not hear back from the Relator for months. In the meantime, unbeknownst to the Respondent, the Relator's office had filed a Subpoena with PNC Bank seeking approximately two (2) years of bank records from PNC concerning the Trust account statements of the Respondent.

The Respondent was not made aware until the early spring of 2014 that the Relator's office had gained access to the Trust Account records of the Respondent, nor was the Respondent informed by PNC Bank that it had replied to the Subpoena issued to it by the Relator by sending the Relator the Trust account bank records of the Respondent.

When the Relator received the bank records of the Respondent, Relator filed a Complaint against the Respondent, alleging that the Respondent had made personal withdrawals to third parties from the Respondent's Trust account.

Through the course of the matter after the Complaint was filed, the Respondent produced for the Relator's office through the standard discovery process other bank records from his new Trust account (opened in March of 2013), as well as client billing records which showed and demonstrated the flow and destination of money coming into and out of his Trust account. These records also demonstrate the fact that the money in the Trust account was almost exclusively and predominantly on deposit in the account as client retainers paid to secure existing work being performed by the Respondent for his clients.

Respondent demonstrated to the Relator during discovery after the Complaint was filed, and during the hearing that was conducted before the Panel in this case on June 23, 2015, that the money coming out of the Trust account of Respondent had

been earned by him as attorney's fees, and did not belong to his clients when removed from the Trust account.

At the hearing before the Panel in this case on June 23, 2015, the Respondent brought forth evidence as mitigating factors in the case that the Respondent did not have a previous disciplinary record in nearly thirty-five (35) full years of practicing law, and that the Trust account practices complained of had not harmed his clients monetarily in any way, shape or form.

There were no allegations at the disciplinary hearing on June 23, 2015 that the Respondent had neglected client matters that he had undertaken, or that the Respondent owed his clients any money that did not amount to fees that were not already earned by the Respondent's clients.

No clients of the Respondent came before the disciplinary panel on June 23, 2015 to testify against any of the financial practices of the Respondent, or to state that the Respondent owed them any money from his Trust account which had not been paid back to the clients.

ARGUMENT

ARGUMENT ONE

THE PANEL AND BOARD ERRED IN FAILING TO DISMISS THE COMPLAINT OF THE RELATOR, SINCE THE EVIDENCE OF THE RELATOR WAS GAINED BY ISSUING A SUBPOENA FOR RESPONDENT'S BANK RECORDS WITHOUT NOTICE TO THE RESPONDENT, AND IN DOING SO VIOLATED THE RESPONDENT'S BASIC CONSTITUTIONAL RIGHTS OF DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW.

The Respondent filed a pre-hearing Motion to Dismiss with the Board during the Discovery process after the Complaint against him was filed by Relator, and again orally moved for Dismissal of the Complaint at the Disciplinary Hearing conducted in this matter on June 23, 2015. The Motions were each based on the fact that the Relator issued a Subpoena to PNC Bank in early spring of 2014 for his Trust account bank records from that bank, without notice to the Respondent and without giving the Respondent the opportunity to Move to quash the Subpoena as to the volume of the records sought and as to the long time frame of the banking records sought.

The Respondent only gained the knowledge that his Trust account records had been accessed by the Subpoena many months after the fact, and only after the Complaint was filed in this case by the Relator.

The Respondent does not challenge the right of the Disciplinary Counsel to issue a Subpoena for his Trust account bank records in and of itself, but instead objects to the fact that the Subpoena was issued without giving him contemporaneous notice of the issuance of the Subpoena so that he could have filed his objections to the same and moved to quash before the records were delivered to the Office of Disciplinary

Counsel by PNC Bank.

Procedural Due Process is uniformly defined as the basic Constitutional right to notice and opportunity to be heard.

The right to notice and opportunity to be heard by any party before a Court of law in Ohio and even before administrative hearing bodies is guaranteed by the Ohio Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. An excellent and seminal discussion of Procedural Due Process under the law of Ohio can be found in Arbino v. Johnson and Johnson, 116 Ohio St.3d 468, 880 N.E.2nd 420 (2007).

The right to procedural Due Process in any matter extends to all aspects where life, liberty or property rights might be denied and taken away by authoritative action, whether it be in a judicial proceeding, an administrative proceeding, or by executive order. Swander Ditch v. Joint Board of Huron and Seneca County Commisioners, 51 Ohio St.3d 131, 554 N.E.2d 1324 (1970), Roberts v. Skaggs, 176 Ohio App.3d 251, 891 N.E.2d 827 (Hamilton, 2008).

For an example of the application of procedural due process to an administrative hearing, see Smith v. City of Mayfield, 99 Ohio App. 501, 124 N.E.2d 761 (Cuyahoga, 1955), where a firefighter was contending to retain his employment before a disciplinary panel.

Although it should go without explanation and saying, using broad standards of common sense, the right to Procedural Due Process exists in the first place so that an accused or aggrieved party can come before a Court, administrative body, or governmental body, and have full chance and opportunity to defend his or her position.

Notice is to be given to the aggrieved or accused so that the aggrieved or the accused may present their side of the story or their objections. In re Thompkins, 115 Ohio St.3d 419, 875 N.E.2d 582 (2007).

In the case of In re Thompkins, 115 Ohio St.3d 419, 875 N.E.2d 582 (2007), this Court noted in a child custody matter that the requirement to give Procedural Due Process is satisfied if the party seeking to affect or remove fundamental rights at least makes a good faith and reasonable attempt to give notice to the party who should have received notice of the action.

In the case at bar, the Office of Disciplinary Counsel made no attempt at all to inform the Respondent that his Trust account bank records at PNC Bank had been the subject of a Subpoena by the Relator. The period covered by the Subpoena issued by the Relator was a span of approximately two (2) years.

When the Respondent made his written Motion to the Board and Panel concerning his Due Process concerns, and when he made his Oral Motion to Dismiss the proceedings at the beginning of his Disciplinary hearing on June 23, 2015, the response of the Relator's office and their attorney was that no written rule bound and required the Relator's office to send a copy of the Subpoena to the Respondent.

To the contrary of the Relator's stance in this case, there are certainly written rules which require the Relator's office to give notice and opportunity to be heard to the Respondent concerning the existence of a Subpoena issued for his bank records. The written rules ignored by the Relator's office are found in the Ohio Constitution and in the Fifth and Fourteenth Amendments to the United States Constitution.

The Relator violated the rights of the Respondent to procedural due process in this matter when a cover letter and a copy of the Subpoena could have and should have very easily been sent to the Respondent when the Subpoena was mailed to PNC bank. It should have been a simple matter to write a letter, copy the Subpoena, and to invest forty-nine (49) cents for a United States Postage stamp.

The gross violation of the Relator's office as to lack of notice to the Respondent concerning the issuance of the Subpoena in question has far-reaching effects beyond the violation of the rights of the Respondent to privacy and protection from undue intrusion into his financial records. The funds held in the Respondent's law office Trust account were predominantly, almost exclusively, amounts given to the Respondent by his clients for retainers towards legal work to be performed by the Respondent or legal work which had already been performed by the Respondent. Quite often, Respondent's checks being deposited from his clients were paid as a combination of legal work already performed by the Respondent, and a retainer for legal work to be performed in the future by the Respondent.

When the Relator's office subpoenaed the Trust account records of the Respondent without any notice to the Respondent, the privacy rights and privacy expectations of the clients of the Respondent were also grossly violated. When records were sent to the Relator by PNC Bank, without notice to the Respondent, the financial affairs of the clients also became endangered and violated, and the Relator unnecessarily became privy to such things as the financial account numbers of the Respondent's clients, where they owned their financial accounts, and what legal work they had retained the Respondent to perform on their behalf.

The actions of the Relator in failing to give the Respondent any notice at all of the issuance of the Subpoena to PNC Bank was a gross violation of the Constitutional rights of the Respondent in this case, as well as a gross violation of the Constitutional and attorney/client privilege rights of the clients of the Respondent.

This Court should not tolerate the violation of Due Process by the Relator's office and the Complaint against the Respondent should have been and should be Dismissed by this Court as a result.

ARGUMENT TWO

THE PANEL AND BOARD ERRED IN FINDING THAT THE RESPONDENT VIOLATED DISCIPLINARY AND ETHICAL RULES BY THE STANDARD OF CLEAR AND CONVINCING EVIDENCE, AND ERRED IN FINDING THAT VIOLATIONS EXISTED AT ALL.

In the case at bar, the Panel and Board held that the behaviors and actions of the Respondent violated Prof. Cond. R. 1.15 (a) in regard to failure to hold property of clients separate from a lawyer's own property.

Predominantly, this finding was based on allegations that the Respondent wrote checks from his Trust account to third parties to pay personal expenses for himself and for the operation of his law office.

Secondly, the Panel and Board found that the Respondent had violated Prof. Cond. R. 8.4 (c) concerning conduct involving dishonesty, fraud, etc. This finding was based on allegations that the Respondent had somehow altered bank records which he had voluntarily sent to the Relator's staff attorney in reply to the inquiries of said staff attorney before the Complaint was filed in this case in May of 2014.

Lastly, the Panel and Board found that the Respondent had failed to cooperate during the course of the investigation of the case, and after the Complaint was filed by the Relator.

This Court has held many times in attorney discipline cases that the burden to prove misconduct in allegations of violating the Code of Professional Conduct lies upon the Relator. The Relator's burden of proof in attorney discipline cases is severe. The Relator must prove to the Panel and to the Board that the Code of Professional Conduct has been violated by a standard of clear and convincing evidence. Cincinnati Bar v. Mezher & Espohl, 134 Ohio St.3d 319, 982 N. E.2d (2012).

The evidentiary standard defining the term "clear and convincing evidence" has been noted many times throughout Ohio history by this Court. In early Ohio jurisprudence, clear and convincing evidence was said to be an evidentiary standard that required that the evidence leave no reasonable doubt about the existence of a fact or behavior. Ashley v. Henohan, 56 Ohio St. 559, 47 N.E. 573 (1897).

More modern case law, and particularly in the area of attorney discipline in Ohio, has defined clear and convincing evidence as a firm belief and conviction, much more than a preponderance of the evidence, but no longer the same as the criminal tenet of beyond a reasonable doubt. Disciplinary Counsel v. Furth, 93 Ohio St.3d 173, 754 N.E.2d 219 (2001).

In the case at bar, the Relator failed to meet its burden of clear and convincing evidence in regard to the allegations of co-mingling of funds.

The evidence before the Panel in the hearing on June 23, 2015, and the evidence

on the record in this matter reveals that the Respondent wrote checks to third parties to pay his personal and office expenses from his Trust account.

But, the evidence also reveals that the monies which left his Trust account to go to third parties were earned fees by the Respondent at the time, and that the Respondent was not making an expenditure of client funds for personal use.

Indeed, the Panel specifically held in its Findings of Fact, Conclusions of Law, and Recommendation issued in this matter after the hearing was conducted on June 23, 2015 that , “No restitution is recommended because there was no evidence presented that any client funds were lost as a result of Respondent’s misconduct.” Findings of Fact, Conclusions of Law, and Recommendation, page 10, second complete paragraph.

Instead, the Panel and Board failed to mention or address at all the fact that the third party checks were written from monetary funds WHICH THE RESPONDENT HAD EARNED, WHICH HAD BEEN HELD IN THE TRUST ACCOUNT AS RETAINERS, AND WHICH HAD TO BE WITHDRAWN FROM THE TRUST ACCOUNT SINCE THEY HAD ATTAINED THE STATUS OF EARNED FEES.

In short, with all of the third party personal checks written from the Trust account by the Respondent, ALL of the money should have been withdrawn at the time that it was withdrawn due to its status as EARNED ATTORNEY’S FEES. The Relator would have had absolutely no complaint had the Respondent simply written the same checks for the same amounts, but made payable to his own name, when the funds were withdrawn.

Respondent will be the first to admit that writing checks from the Trust account to third parties gave the appearance of impropriety and should not have been done by the Respondent in that matter. But, since the checks instead could have (and should have) rightfully been made payable to the Respondent at the same time, the Respondent asserts that there is no violation of the Rules of Professional Conduct demonstrated to the exacting standard of clear and convincing evidence.

The Respondent ceased writing checks to third parties out of the Trust account soon after the Complaint was filed in this matter, and the Relator was duly informed of that fact.

In regard to the allegations of the two other alleged breaches of the Code of Professional Conduct, the Relator alleged that the Respondent somehow doctored or altered a copy of a Trust account monthly bank statement which was voluntarily provided to the Relator before this Complaint was filed.

Instead, there was absolutely no evidence before the Panel and Commission that bank records were intentionally altered, and at the June 23, 2015 hearing in this case the Respondent denied doing so with any ill motive. The Relator complained of alleged difference between the copy of a monthly bank statement sent to it voluntarily by the Respondent, and the copy of the same monthly statement given to Relator by PNC Bank (subject to the subpoena in question here). At the June 23 hearing in this matter, Respondent explained the difference in the documents as a copying error.

Respondent asserts that giving a sinister intent to a copying error in regard to that situation is grossly and unfairly defamatory to the Respondent, and does not meet the severe burden placed upon the Relator in this matter and in the hearing on June 23,

2015 to demonstrate violation of the Code of Professional Conduct by clear and convincing evidence.

Finally, in regard to the allegations that the Respondent did not cooperate in this matter, the Respondent has been pro se in the matter since its inception. The Respondent has never been involved in the disciplinary system prior to this time, in thirty-five years of practicing law, and perhaps did not understand the nuances and expected behaviors in the case.

Instead, the Respondent set out to zealously represent himself against these charges, and would assert that he did so under the rules and in the spirit of the proceedings as an adversarial administrative matter. Respondent asserts that there is a fine line between that zealous representation of himself, and the desire of the Board and Relator's office that the accused attorney cooperate in disciplinary proceedings. The Respondent does not believe that his zealous representation of himself amounts to failure to cooperate.

The allegations of failure to cooperate also involve an alleged failure to produce documents and written documents after the Complaint was filed and in the course of discovery in the case.

Instead, the Respondent cooperated in that regard as much as he could, and believed that the Relator's office did not fully explain to him what documents were desired. The Relator's office did not understand that certain documents were not available.

Respondent provided a variety of documents to the Relator's attorney after the case was filed, including Trust account ledgers and client billing statements. As a compromise concerning the issue of production of personal income tax records for a three (3) year period, the Respondent sent his personal and confidential income

tax records to the Panel chair. The Respondent believed at that time, and still believes, that the request to produce income tax records was a gross violation of his privacy and ridiculous. There were no allegations in the Complaint that the Respondent had failed to file income tax returns for any given year.

The Panel and Relator argue that the Respondent was found in contempt of Court by the Panel for failing to comply with time deadlines set by the Panel chair for discovery to occur. That particular situation occurred during the period of time between December, 2014 and February of 2015 when the Respondent was out of town for three (3) separate periods of time over the Christmas and New Year's holiday periods. During the time of his absence from his office those three (3) occasions, the Respondent simply had trouble complying with unreasonable time deadlines for that period of time due to the fact that he had previously planned holiday and vacation travel for those particular weeks.

Rather than simply ignoring the Requests of the Relator's attorney for the Production of Documents, and rather than ignoring the unreasonable time deadlines set by the Panel Chair for the Production of Documents, the Respondent filed several Motions for Protective Orders with both the Board and the Panel Chair in this matter during the pendency of discovery and when those issues first arose. The Motions for Protective Orders filed by the Respondent explained to both the Panel Chair and the attorney for the Relator that the Respondent was going to be and had in fact been out of his office for a total period of three (3) weeks between the Christmas holiday period, 2014, and February of 2015. The Panel Chair unreasonably failed to take into account the travel schedules of the Respondent, and ignored his explanations as to why documents had not been produced more speedily in the matter.

The Respondent ultimately provided to the Relator all of the available documents and records that the Relator had requested that he produce. Furthermore, the Respondent had at least one (1) and possibly several telephone conferences with the Relator's staff attorney as to what his record keeping practices had been, and specifically informed the Relator's attorney at that time what records were available. The records mentioned in that phone conversation or those conversations were voluntarily produced for the Relator's staff attorney.

ARGUMENT THREE

THE PANEL AND BOARD ERRED BY RECOMMENDING THAT THE RESPONDENT RECEIVE ANY HARSHER DISCIPLINE THAN A PUBLIC REPRIMAND IN THIS MATTER.

The Panel in this matter recommended that the Respondent be given a two (2) year suspension from the practice of law, with one (1) year of that suspension stayed with conditions.

The Order to Show Cause issued by the Board of Professional Conduct on August 12, 2015 mentioned the two (2) year suspension recommendation, but failed to mention the one (1) year stay.

The Respondent asserts that anything but a public reprimand or dismissal of the Complaint would be an outrage and fundamentally unfair in this case. The actions of the Respondent mentioned in the Findings of Fact of the Panel reveal that:

- 1) No client funds were affected in the actions of the Respondent, and there was no proof at the hearing that any client of the Respondent was adversely affected by the actions of the Respondent. No clients of the Respondent

testified at the hearing conducted by the Panel on June 23, 2015;

- 2) The Respondent wrote checks out of his Trust account to third parties that the Respondent had every right at the time to write to himself as legitimate and righteous draws of EARNED attorney's fees. Indeed, the funds belonging to the Respondent had to have been withdrawn from the Trust Account on the dates in question because they were earned fees at the time. To not accomplish the withdrawals would have been tantamount to co-mingling and a violation of the Disciplinary Rules. The Respondent admitted elsewhere herein that those draws should have been made by writing checks to himself rather than to third parties, in order to avoid any hint or evidence of impropriety.

- 3) The Respondent in thirty-five (35) years of practicing law, has never had a disciplinary problem up the time of the Complaint being filed against him by the Relator. The conclusions of the Panel that, "It is uncontroverted that Respondent failed to properly manage his IOLTA account for most of his 35 years in the practice of law" are simply outrageous and cannot be sustained by the facts of this case or the evidence brought before the Panel on June 23, 2015. Findings of Fact, Conclusions of Law, and Recommendation, page 6, Item 26 on that page.

- 4) No client work or pending matters for clients were adversely or otherwise affected by the behaviors that were the subject of the Complaint of the Relator, and there were no allegations by clients of any misconduct of the Respondent presented at the hearing of this matter on June 23, 2015.

Indeed, in the copious research performed by the Respondent in preparation

to write this Brief, the Respondent was not able to find any other disciplinary cases that seem on point and similar to this matter.

This Court has uniformly held in at least more recent disciplinary matters concerning attorneys that, 1) each disciplinary case is different, and that the results should be considered on a case by case basis so that the Court is not bound strictly to the factors outlined in the Code of Conduct, and 2) the Court reserves the right to totally ignore the punishment and suspension recommendations of the hearing Panel and the Board. Disciplinary Counsel v. Roberts, 117 Ohio St.3d 99, 881 N.E.2d 1236 (2008).

Indeed, public reprimands seem to occur with some frequency by this Court, and some of the public reprimands involved the overturning of suspensions levied against attorneys by a Panel and the Board in the preliminary stages of the matters. Some of the cases in which this Court levied a public reprimand as the punishment to the offending attorney (and overturned Panel recommendations of suspension) seemed to involve much more egregious behavior than the allegations against the Respondent in this case before the Court.

For example, and in a case with seemingly very egregious behavior on the part of the accused attorney, in Cleveland Metro Bar Association v. Cox, 98 Ohio St.3d 420, 786 N.E.2d 454 (2003) this Court levied a public reprimand in the case when it was demonstrated to the hearing panel that the accused attorney had lied to the grievance committee during its investigation of the allegations. This Court noted in that case that the circumstances of the misrepresentation to the grievance committee were an isolated incident and caused no harm to clients.

In Cincinnati Bar Association v. Mexher & Espohl, 134 Ohio St.3d 319, 982 N.E.2d 657 (2014) this Court gave a public reprimand in regard to a law firm which had failed to use fee agreements for contingent fee cases, and which had charged clients for an initial consultation when it advertised that there would be no such charge for initial consultations. This Court refused to give more than a public reprimand in that case because it found that there was no prior disciplinary record and that there was an absence of selfish motives on the part of the attorneys.

Indeed, a theme of this Court in disciplinary cases which levied a public reprimand as the punishment seems to be the lack of a prior disciplinary record by the attorneys who are the subject of this disciplinary case. Cincinnati Bar Association v. Hackett, 129 Ohio St.3d 186, 950 N.E.2d 969 (2011), Columbus Bar Association v. Dougherty, 105 Ohio St.3d 307 (2005).

Finally, in another seemingly unusual fact pattern which sounds fairly egregious to the Respondent, an attorney was given a public reprimand by this Court (the Panel and Board had recommended a six month suspension) when the accused attorney failed to correctly notarize legal documents multiple times, and in fact forged his clients' names and signatures to an insurance company's settlement release in a personal injury case. Disciplinary Counsel v. Roberts, 117 Ohio St.3d 99, 881 N.E.2d 1236 (2008). This Court found as the mitigating factors in that case: no prior disciplinary record on the part of the attorney; that the attorney did not act out of self interest; the attorney cooperated in the proceedings; and the attorney established that his course of conduct had good intentions.

If the attorney in Disciplinary Counsel v. Roberts, 117 Ohio St.3d 99, 881 N.E.2d

1236 (2008) merited a public reprimand, the Respondent in this case certainly also deserves a public reprimand and not a suspension.

The Respondent in this case has as many, if not more, positive mitigating factors on his behalf than the attorneys who received a public reprimand in the above cases. These mitigating factors, once more, are as follows:

- 1) The Respondent has practiced law for thirty-five (35) years without a previous disciplinary Complaint being filed against him;
- 2) No clients were harmed in any way by the actions of the Respondent;
- 3) No client funds were in any way compromised or put at risk by any of the actions of the Respondent dealing with his Trust account;
- 4) The Respondent acted without any motivation of self interest;
- 5) The evidence demonstrates that the Respondent acted with good intentions, and indeed acted to close out his original office Trust account and to open up a new Trust account when he self-discovered and realized that there could be potential problems caused by his Trust account practices. The opening of the new Trust account occurred before any involvement of the Disciplinary Counsel in this matter;
- 6) All of the checks written to third parties by the Respondent could have been (and should have been) written to the Respondent himself as legitimate draws of earned retainer fees out of his Trust account. Indeed, the Respondent was required to have written said checks at the time that they were written, since the funds consisted of earned attorney's fees. To leave the funds in his Trust account at that time would have been a co-mingling violation.
- 7) The Respondent presented evidence to the Panel at the June 23, 2015 hearing

that he is a Christian author, and that he has used his time, talents and writing abilities to create and self-publish over ten (10) electronic books with themes about Christianity and spiritual matters. Such writing and use of his time demonstrates a willingness and desire to help others and to advance Christian morals and values to the community at large.

8) The Respondent is a sole practitioner and is sixty-one (61) years of age. If the Respondent is suspended from the practice of law for any amount of time by this Court, due to his age and due to the fact that he does operate his own law office without associates or partners, the Respondent may well never practice law again. A suspension for any length of time would make it difficult if not impossible to re-open his office and to retain his existing client base if he did so.

Finally, the Findings of Fact of the Panel in this Court erroneously and wrongly note that the Respondent has shown no remorse for his actions in this case. Instead, the record of the June 23, 2015 hearing demonstrates that the Respondent stated that he has been deeply humiliated and embarrassed by this matter, and that the Complaint brought against him has caused his health to suffer and his personal relationships to suffer (the Respondent's wife filed a divorce against him during the pendency of the Complaint, due in part to the filing of this matter).

Furthermore, the Columbus Dispatch reported on the filing of the Complaint in this case with the defamatory and false statement that the Respondent was accused of stealing approximately \$ 14,000 in client funds from his office Trust account. The Findings of the Panel in this case specifically stated that no client funds were involved in the facts of this case. Findings of Fact, page 10. The publication of such

a newspaper article, full of false information and defamatory accusations, hardly makes the disciplinary process in Ohio a “private” matter until such cases are resolved.

In short, the Respondent in this case has already undergone sufficient humiliation, pain, anguish and monetary damage to his business over this matter, to a far greater extent than any punishment that this Court can levy against him at this time.

CONCLUSION

Any suspension given as discipline and punishment in this matter would be unduly harsh, penal and patently unfair to the Respondent in light of the facts and circumstances of this case.

The Respondent is a sole practitioner attorney, who has been practicing law for thirty-five (35) years this November. Any length of suspension would mean that the Respondent would have to shutter his law office (since he works alone) and would also probably mean that the Respondent would never be able to re-open his practice after such a closure.

The publicity concerning the Respondent has already been far from “private” and grossly unfair in this matter. The Columbus Dispatch ran an article in this matter soon after the Complaint was filed stating that the Complaint of the Relator alleged that the Respondent had stolen over \$ 14,000 from his Trust account, consisting of funds which were the property of his clients. As has already been said herein, the Panel in this case specifically found that NO client funds were affected at all by the behaviors of the Respondent in this matter, but the Respondent has already had his reputation damaged by the sharp and caustic pen of the press. No matter what this

court does concerning punishing the Respondent, the Respondent's reputation and business have already been severely and adversely affected by the defamatory publicity concerning this matter.

Respondent would urge the Court to hold in his case that the discipline to be invoked against him should fit the circumstances of the case. No client funds were affected at all by the client's Trust account practices, and no ongoing work that the Respondent was pursuing for clients has been alleged to be ignored or abandoned.

In short, the Respondent, a thirty-five (35) year practitioner should be given the benefit of the doubt here as a result of his otherwise unmarred and unblemished record before this point.

Respectfully Submitted,



RAYMOND L. EICHENBERGER

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Sup. Ct. # 0022464

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CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Brief has been served upon the attorney for the Relator/Disciplinary Counsel by ordinary U. S. mail pursuant to the Supreme Court Rules this 21 day of September, 2015:

Michelle R. Bowman
Scott J. Drexel
Office of Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215



RAYMOND L. EICHENBERGER
Attorney for Respondent

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In re:

Case No. 2014-045

Complaint against

**Raymond Leland Eichenberger III
Attorney Reg. No. 0022464**

**Findings of Fact,
Conclusions of Law, and
Recommendation of the
Board of Professional Conduct
of the Supreme Court of Ohio**

Respondent

Disciplinary Counsel

Relator

OVERVIEW

{¶1} This matter was heard on June 23, 2015 in Columbus before a panel consisting of David L. Dingwell, Sharon L. Harwood, and Lawrence A. Sutter, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11(A).

{¶2} Respondent appeared pro se. Michelle Bowman appeared on behalf of Relator.

{¶3} Respondent was charged in the complaint with the following violations: Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients separate from a lawyer's own property]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice]; and Prof. Cond. R. 8.1(b) and Gov. Bar R. V, Section 4(G) [failure to cooperate].

{¶4} Based upon the parties' stipulations and other evidence at the hearing, the panel concludes that Relator has established multiple violations by clear and convincing evidence and recommends a sanction of a two-year suspension, with the final year stayed on conditions.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to the practice of law in the state of Ohio on November 7, 1980 and is subject to the Code of Professional Responsibility, the Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio.

{¶6} On May 9, 2013, Relator received an overdraft notice from PNC Bank reporting that Respondent's IOLTA became overdrawn on May 2, 2013 (account number XX-XXXX-6377). Stipulated Ex. 2.

{¶7} On June 12, 2013, Relator sent a letter of inquiry to Respondent regarding the May 2, 2013 overdraft. Stipulated Ex. 3.

{¶8} On June 27, 2013, Relator received a written response from Respondent to the letter of inquiry. Respondent stated that the transaction that caused the overdraft was an unauthorized attempt to make a withdrawal from an account that was not currently being used and was in the process of being closed. Respondent provided no additional details about this transaction that caused the overdraft. Stipulated Ex. 4.

{¶9} Respondent also stated that his IOLTA account numbers XXXXX3339 and XXXXXX6377 are the same account but had two account numbers because of the bank's transition from National City Bank to PNC. *Id.*

{¶10} The overdraft notice from PNC Bank described the transaction causing the overdraft as PAYDAYADV CASHNETUSA in the amount of \$1,275.68, item returned, no charge. Stipulated Ex. 2.

{¶11} Respondent opened a new IOLTA account at PNC in March 2013 under account number XX-XXXX-1362. Respondent provided to Relator only page 1 of 3 of the March bank statement reflecting the new account number. Stipulated Ex. 4.

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{¶12} On July 15, 2013, Relator sent a letter to Respondent requesting additional information. In its second letter, Relator again requested copies of Respondent's monthly bank statements on account number XX-XXXX-6377 for the month of the overdraft, the month before the overdraft, and the month after the overdraft, (*i.e.*, April, May, and June 2013). Stipulated Ex. 5.

{¶13} On July 23, 2013, Relator received a response from Respondent. Respondent stated, in part, "I would once again emphasize to you, and state that you are missing the point, because, 1) this was a fraudulent and unauthorized transaction on an old account that was not even being used at the time, and 2) virtually all of the funds in my trust account at any given time are retainers being earned by me and not client funds." Stipulated Ex. 6.

{¶14} Respondent provided a copy of a letter that he wrote to PNC Bank dated March 13, 2013 reporting a check in the amount of \$30 as being fraudulent and unauthorized activity on his IOLTA account. *Id.*

{¶15} On August 21, 2013, Relator sent a letter to Respondent requesting additional information. Relator specifically asked for a more detailed explanation of the transaction that caused the overdraft in May 2013. Stipulated Ex. 7.

{¶16} On September 5, 2013, Relator received a response from Respondent. Stipulated Ex. 8.

{¶17} Respondent said that, in response to Relator's further inquiry regarding the electronic transfer that caused the overdraft in May 2013, "as this transaction was not initiated by me, in the way of writing a check or personally initiating a withdrawal, it is very unfair to attempt to blame the situation on me, or to attempt to state that I caused a deficiency in the bank account balance." He further stated "the fact that the account was, for all practical purposes

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closed and dormant at the time of this occurrence, also makes your inquiry more than a little silly.” *Id.*

{¶18} Respondent further stated “I will decline to send you the monthly statements from the new Trust Account, as there are no allegations pending of any problems with the Account.” He further stated “I find your threats to subpoena my bank records to be totally out of line and offensive. The authority of your office in this simple and easily explained matter surely cannot extend to such overly broad and invasive limits.” *Id.*

{¶19} Respondent had previously described the transaction that caused the overdraft as “fraudulent and unauthorized.”

{¶20} As reflected by Stipulated Exs. 9-25, Respondent used his PNC IOLTA accounts in the following manner from at least September 1, 2012 through October 8, 2013:

- On at least 25 occasions, Respondent wrote checks payable to Columbia Gas, WOW cable, and American Electric Power. These payments totaled approximately \$1,681.58.
- On at least 39 occasions, Respondent issued preauthorized electronic checks or wrote checks payable to Target. These payments totaled \$1,043.84.
- On 12 occasions, Respondent wrote checks payable to DEB group for monthly rent of Respondent’s law office. These payments totaled \$7,200.
- On 12 occasions, Respondent wrote checks payable to Spare Room Storage for storage units. These payments totaled \$1,057.68.
- On at least 87 occasions, Respondent wrote checks payable to himself. These payments totaled \$7,265.
- On August 22, 2012, Respondent wrote a check payable to Tobacco Road Golf and Travel in the amount of \$486.
- On April 19, 2013, Respondent wrote a check payable to Legacy Golf Packages in the amount of \$640.
- On May 8, 2013, Respondent wrote a check payable to the Memorial Tournament for two tournament badges in the amount of \$315.

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- On April 15, 2013, Respondent wrote a check payable to the U.S. Treasury in the amount of \$66.67, noting Irvin/Eichenberger and 2012 Form 1040, in the check's memo line, and Respondent wrote a check payable to Ohio Treasurer of State in the amount of \$10, noting Irvin/Eichenberger and Form 1040, in the check's memo line.
- On November 21, 2012, Respondent wrote a check payable to the Columbus Symphony for two tickets in the amount of \$85.75.
- Monthly payments in the amount of \$56.72 were issued to Protective Life Insurance by way of ACH deductions and checks written by Respondent.
- On August 16, 2013, Respondent wrote a check in the amount of \$128.25 to Squared Insurance Agency for partial payment on malpractice insurance premium.
- On 10 occasions, from July 31, 2013 through October 8, 2013, Respondent wrote and personally endorsed checks to Red Foot Racing Stables, LLC in the amount of \$3,990.
- On numerous occasions, Respondent wrote checks to Kroger, Hallmark, Kohl's, Walgreens, Anthony Thomas, Strader's, Darby Creek Nursery, JC Penney, Bath & Body Works, and Toys R Us.

{¶21} On April 1, 2014, Relator sent a letter to Respondent requesting an explanation from Respondent regarding the use of his IOLTA for personal transactions. Stipulated Ex. 26.

{¶22} On April 16, 2014, Relator received a response from Respondent.

{¶23} In his response to Relator, Respondent identified Red Foot Racing Stables as an Ohio LLC which is personally owned by him as its sole member. He further stated that "transfers to Red Foot once again involve the shifting of my personal income by the way of earned fees." Stipulated Ex. 27.

{¶24} Respondent stated "I repeat that the funds in my trust account are uniformly almost always retainers that have been or will be earned quickly, and that the funds belong to me personally. The funds are never withdrawn from the account until they are due and payable to

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me. Therefore, the transactions you mention in your letter are draws of my earned fees, and involve my personal income to use as I see fit.” *Id.*

{¶25} The panel finds, by clear and convincing evidence, that Respondent improperly used his IOLTA account for personal and nonclient related business.

{¶26} It is uncontroverted that Respondent failed to properly manage his IOLTA account for most of his 35 years in the practice of law.

{¶27} There are over 200 instances of improper transactions made through Respondent’s IOLTA account in the 24 months prior to the hearing.

{¶28} The panel finds, by clear and convincing evidence, that Respondent failed to cooperate with the investigation into his IOLTA account.

{¶29} Respondent repeatedly and consistently refused to provide copies of his IOLTA bank records during both the investigation and litigation phase of the proceedings.

{¶30} Even after having been ordered to produce information by the panel chair [January 9, 2015 Prehearing Order], Respondent refused to participate in the exchange of information.

{¶31} The panel was forced to issue an order recommending the Supreme Court of Ohio find Respondent in contempt due to the refusal to respond to produce financial information relevant to the allegations.

{¶32} The panel finds, by clear and convincing evidence, that Respondent intentionally and deceptively altered bank records before production in an effort to conceal transactions he knew were inappropriate. Said conduct was a willful act of deception, dishonesty, and fraud.

{¶33} Bank records were produced wherein incriminating information had been redacted from the pages. Stipulated Ex. 6, 9.

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{¶34} Respondent claimed the missing data was “a copy error” despite the fact that the missing information was in the middle of the page and only included data that was damaging to Respondent’s claims. Hearing Tr. 72-77.

{¶35} No attempt was made to rectify the situation even after Respondent was confronted with the actual bank records. Hearing Tr. 104.

{¶36} At no time prior to, or during the hearing, did Respondent show any remorse for the intentional and willful alteration of records.

{¶37} Additionally the panel finds, by clear and convincing evidence, that Respondent repeatedly made material misrepresentations in correspondence with Relator in a deceptive and willful effort to conceal the irregularities in his IOLTA accounts.

{¶38} The panel finds, by clear and convincing evidence, that Respondent’s lack of cooperation was prejudicial to the administration of justice.

{¶39} The panel finds, by clear and convincing evidence, that the conduct of Respondent violated the following violations: Prof. Cond. R. 1.15(a), Prof. Cond. R. 8.1(b), Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Gov. Bar R. V, Section 4(G).

MITIGATION, AGGRAVATION, AND SANCTION

{¶40} The panel finds, by clear and convincing evidence, that Respondent has no prior disciplinary record.

{¶41} The panel finds, by clear and convincing evidence, that Respondent acted with a dishonest or selfish motive; demonstrated a pattern of misconduct; committed multiple offenses; showed a lack of cooperation in the disciplinary process; and submitted false evidence, submitted false statements, and engaged in other deceptive practices during the disciplinary process.

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{¶42} Respondent's conduct in the matter displayed a clear disregard for Prof. Cond. R. 1.15(a)(2), Prof. Cond. R. 1.15(a)(3), and Prof. Cond. R. 1.15(a)(4). No records were ever produced in this matter indicating even an attempt at compliance with the requirements set forth in the rule. Respondent's disdain for the investigatory process, fraudulent conduct, and lack of cooperation only exacerbated the problem.

{¶43} In cases in which lawyers misused client trust accounts, the dispositions range from a one-year suspension, all stayed on conditions, to a six-month conditionally stayed suspension, to a public reprimand. Ordinarily at least a conditionally stayed suspension of six months for this misconduct is imposed. Examples include: *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009-Ohio-3480, (the respondent did not have an operating account from 2002 to 2007, paid personal and business expenses from the IOLTA account, wrote at least 150 checks from 2005 to 2007, and received a six-month stayed suspension); *Disciplinary Counsel v. Johnston*, 121 Ohio St.3d 403, 2009-Ohio-1432, (the respondent received one-year suspension, all stayed for using his IOLTA account for operating and personal expenses for two years and commingling his own funds with his clients); *Cuyahoga Cty. Bar Assn. v. Nance*, 119 Ohio St.3d 55, 2008-Ohio-3333, (the respondent admitted he violated the rules by misusing his client trust account and received a six-month stayed suspension with conditions); *Columbus Bar Assn. v. Peden*, 118 Ohio St.3d 244, 2008-Ohio-2237, (the respondent received a six-month suspension, all stayed, where he had no IOLTA account and also violated Gov. Bar R. V, Section 4(G)); *Disciplinary Counsel v. Newcomer*, 119 Ohio St.3d 351, 2008-Ohio-4492, (the respondent received a six-month suspension, all stayed, where his personal account was closed by his bank and then he used the IOLTA account for personal expenses); and *Disciplinary Counsel v. Vivyan*, 125 Ohio St.3d 12, 13-14, 2010-Ohio-650, (the respondent withdrew unearned fees from his

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IOLTA account and used them for personal expenses, and received a six-month suspension, stayed on condition of no further misconduct).

{¶44} Although some of the attorneys in the above cases were found to have engaged in conduct adversely reflecting on their fitness to practice law, see, e.g., *Johnston, Peden, Nance, Newcomer*, none of them was charged with dishonesty, fraud, deceit, or misrepresentation for their misconduct.

{¶45} There are two cases that appear to be on point in relation to this matter. In *Disciplinary Counsel v. Riek*, 125 Ohio St.3d 46, 2010-Ohio-1556, the Court held that an 18-month suspension, with 12 months conditionally stayed, was appropriate for attorney who used his trust account to pay personal expenses and subsequently provided a check to a client without sufficient funds to honor the check, and then was less than honest with his client as to the source of the problem. In *Disciplinary Counsel v. Dockry*, 133 Ohio St.3d 527, 532-33, 2012-Ohio-5014, the Court issued a one-year suspension, all stayed on conditions. Dockry deposited and maintained personal funds in his client trust account, used that account to pay personal and business expenses, borrowed client funds from the account for his personal use, failed to maintain ledgers of the client funds held in that account, and failed to reconcile the account. The Court did not impose an actual suspension because Dockry took corrective action and had significant mitigating factors. That is not the case in this matter.

{¶46} This matter does not involve just the inappropriate use of the IOLTA account; it also includes the deliberate and systematic attempts to deceive Relator through noncooperation, deception, and fraud. “Generally, misconduct involving dishonesty, fraud, deceit, or misrepresentation warrants an actual suspension from the practice of law.” *Disciplinary Counsel v. Karris*, 129 Ohio St.3d 499, 2011-Ohio-4243, ¶ 16, citing *Disciplinary Counsel v. Kraemer*,

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126 Ohio St.3d 163, 2010-Ohio-3300, ¶ 13; and *Disciplinary Counsel v. Fowerbaugh*, 74 Ohio St.3d 187 (1995), syllabus. In this matter, Respondent's misconduct during the process places him on a level well above those involved in the *Riek* and *Dockry* matters.

{¶47} As a result, the panel recommends a two-year suspension, with one year stayed. In addition, Respondent shall be assigned a mentor to provide oversight as to his IOLTA account and attend a continuing legal education course on law firm financial management.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on August 7, 2015. The Board adopted the findings of fact and conclusions of law of the panel. After discussion, the Board voted to amend the sanction proposed by the panel and recommends that Respondent, Raymond Leland Eichenberger III, be suspended from the practice of law in Ohio for two years, with reinstatement subject to the condition that Respondent complete a continuing legal education course on law firm financial management and pay the costs of these proceedings, as ordered by the Supreme Court. No restitution is recommended because there was no evidence presented that any client funds were lost as a result of Respondent's misconduct. The Board further recommends that upon reinstatement, Respondent be required to work with a mentoring attorney, assigned by Relator, to provide oversight of Respondent's compliance with IOLTA requirements.

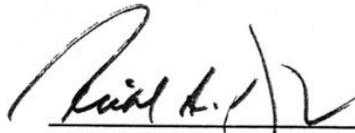
The Board's recommendation regarding the amended sanction is based on the following:

- (1) Respondent's failure for nearly 35 years of practice to adhere to the requirements for maintaining separation between his personal funds and funds belonging to his clients;
- (2) the deceptive and deceitful action of altering bank records provided to Relator in an attempt to

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conceal inappropriate transactions; (3) positions taken by him during the disciplinary proceedings that are clearly without merit and contrary to the requirements of the Rules of Professional Conduct; (4) his failure to appreciate or acknowledge the wrongfulness of his misconduct; and (5) his repeated and flagrant disregard for his duty to cooperate in the disciplinary proceedings. See *Cleveland Metro. Bar Assn. v. Gruttadaurio*, 136 Ohio St.3d 283, 2013-Ohio-3662, ¶¶47, 50 (indefinite suspension imposed against an attorney who engaged in conduct analogous to that of Respondent but who also neglected legal matters with resulting harm to clients).

**Pursuant to the order of the Board of Professional
Conduct of the Supreme Court of Ohio, I hereby certify
the foregoing Findings of Fact, Conclusions of Law, and
Recommendation as those of the Board.**



RICHARD A. DOVE, Director

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The Supreme Court of Ohio

FILED

AUG 12 2015

Disciplinary Counsel,
Relator,

v.

Raymond Leland Eichenberger III,
Respondent.

Case No. 2015-1315 CLERK OF COURT
SUPREME COURT OF OHIO

ORDER TO SHOW CAUSE

The Board of Professional Conduct of the Supreme Court of Ohio filed a final report in the office of the clerk of this court. In this final report the board recommends that, pursuant to Gov.Bar R. V(12)(A)(3), respondent, Raymond Leland Eichenberger III, Attorney Registration No. 0022464, be suspended from the practice of law for a period of two years, with reinstatement subject to the condition that respondent complete a continuing legal education course on law firm financial management and pay the costs of these proceedings. The board further recommends that upon reinstatement, respondent be required to work with a mentoring attorney, assigned by relator, to provide oversight of respondent's compliance with IOLTA requirements. The board further recommends that the costs of these proceedings be taxed to respondent in any disciplinary order entered, so that execution may issue.

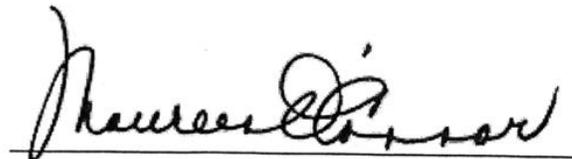
On consideration thereof, it is ordered by the court that the parties show cause why the recommendation of the board should not be confirmed by the court and the disciplinary order so entered.

It is further ordered that any objections to the findings of fact and recommendation of the board, together with a brief in support thereof, shall be due on or before 20 days from the date of this order. It is further ordered that an answer brief may be filed on or before 15 days after any brief in support of objections has been filed.

After a hearing on the objections, or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper which may be the discipline recommended by the board or which may be more severe or less severe than said recommendation.

It is further ordered that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings and further that unless clearly inapplicable, the Rules of Practice shall apply to these proceedings. All documents are subject to Sup.R. 44 through 47 which govern access to court records.

It is further ordered that service shall be deemed made on respondent by sending this order, and all other orders in this case, to respondent's last known address.



Maureen O'Connor
Chief Justice

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