

2010 WL 1680660 (Ohio) (Appellate Brief)
Supreme Court of Ohio.

Kenneth N. SHAW, Attorney Registration No. (0005525), Respondent,

v.

DISCIPLINARY COUNSEL, Relator.

No. 2010-0316.

April 18, 2010.

Relator's Answer to Respondent's Objections to the Board of Commissioners' Report and Recommendations

Jonathan E. Coughian (0026424), Disciplinary Counsel, Relator, 250 Civic Center Drive, Suite 325, Columbus, Ohio 43215, 614-461-0256, [Robert R. Berger](#) (0064922), Senior Assistant Disciplinary Counsel, Counsel for Relator.

[Richard S. Koblentz](#) (0002677), [Bryan L. Penvose](#) (0074134), Counsel for Respondent, Koblentz & Penvose, LLC, 55 Public Square, Suite 1170, Cleveland, Ohio 44113, 216-621-3012, Kenneth N. Shaw (0005525), Respondent.

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***1** Now comes relator, Disciplinary Counsel, and hereby submits this answer to respondent's objections to the Report and Recommendations filed by the Board of Commissioners on Grievances and Discipline (Board).

On August 14, 2009, relator filed an amended four count complaint against Respondent Kenneth N. Shaw alleging that he violated the ethical rules when he created a trust for an **elderly** client naming respondent's five children as beneficiaries without taking the appropriate precautions to avoid a conflict of interest and protect his clients differing interests, took a \$13,000 loan from the same **elderly** client without taking the appropriate precautions to avoid a ***2** conflict of interest and protect his clients differing interests and took attorney fees in a separate guardianship without obtaining advance court approval.

After a hearing on September 29 and December 3, 2009, the panel found respondent violated the disciplinary rules alleged in the complaint and recommended respondent be suspended for two years with one-year stayed.¹ Upon review, the Board found that a two year suspension with no period stayed, was appropriate "based on [respondent's] serious acts of fraud and misconduct." [Report at 13] For the reasons set forth herein, relator requests this Court overrule respondent's objections.

STATEMENT OF FACTS²

Respondent is a solo general practitioner who does a significant percentage of his law practice in estate planning. [Report at 3] Eleanor Blackburn was an **elderly** woman whom respondent knew from church and other religious activities. [Report at 3] In August of 1998, respondent prepared a quit claim for Blackburn. [Report at 3; Relator's Ex. 1] In February of 1999, respondent assisted Blackburn in transferring her ownership of a duplex in Warren, Ohio. [Report at 3; Relator's Ex. 2] Respondent stopped providing legal services for Blackburn at the end of 2000. [Report at 3] In May of 2004, Blackburn died. [Report at 3]

*3 COUNT I

In September of 1999, Blackburn requested respondent draft a power of attorney and create a revocable living trust for her. [Report at 4] Respondent prepared a power of attorney for Blackburn that named respondent as attorney-in-fact for Blackburn. [Report at 4; Relator's Ex. 3] Respondent prepared a revocable living trust for Blackburn that named respondent as both co-trustee for the trust and first successor trustee. [Report at 4; Relator's Ex. 4] In addition, the trust named respondent's five children as beneficiaries of the trust. [Report at 4; Relator's Ex. 4, p. 14] Under the terms of the trust, each child of respondent would receive \$5,000, for a total of \$25,000. [Report at 4] Blackburn executed the power of attorney and signed the trust documents on September 27, 1999. [Report at 4; Relator's Ex. 4]

Prior to preparing the documents and obtaining Blackburn's execution, respondent did not advise Blackburn to obtain disinterested advice from another independent, competent and knowledgeable person; seek advice from another attorney or to have the trust drafted by another attorney; and/or discuss the conflict of interest presented by this situation with Blackburn. [Report at 4; December 3, 2009 Tr. at 40-41]

COUNT II

In August of 2000, respondent requested and obtained a \$13,000 loan from Blackburn. [Report at 5; December 3, 2009 Tr. at 41; Relator's Ex. 6] Respondent requested the loan in order to purchase a building to house his law practice. [Report at 5] At the time of the loan, respondent was Blackburn's attorney. [Report at 5] The funds from the loan came from assets ***4** respondent

had placed in her revocable living trust. [Report at 5] The loan was to be paid back in six months at six percent interest. [Report at 5] However, respondent failed to repay Blackburn as agreed. [Report at 5; December 3, 2009 Tr. at 42]

In 2002, after respondent defaulted on repayment of the loan, Blackburn sued respondent for the money loaned. [Report at 5; Relator's Ex. 7] The Warren Municipal Court granted a judgment against respondent in the matter. [Report at 5; Relator's Ex. 8] As part of the settlement of the matter, respondent agreed to pay off the judgment at the rate of \$250 per month. [Report at 5] However, respondent later filed for bankruptcy and was granted a discharge of this debt. [Report at 5] To date, respondent has repaid only \$750 of the loan to Blackburn's estate. [Report at 5; December 3, 2009 Tr. at 42]

In September of 2007, the executor of the Blackburn estate filed a complaint for concealment of assets against several parties, including respondent. [Report at 5] The Trumbull County Probate Court later found respondent had "unduly influenced" Blackburn to make the loan and that the loan constituted "self-dealing" and was "detrimental" to the trust. [Report at 5; Relator's Ex. 9, p. 11] As a result, the probate court ordered respondent to repay the Blackburn estate \$12,250. [Report at 5; Relator's Ex. 9, p. 12] Respondent appealed the probate court's decision and the court of appeals affirmed the judgment of the probate court. [Report at 5; Relator's Ex. 10]

Prior to requesting and obtaining the loan from Blackburn, respondent did not advise Blackburn to obtain disinterested advice from another independent, competent and *5 knowledgeable person; advise Blackburn of the risks of making a loan, including the risks associated with making a loan not secured by collateral; and/or discuss the conflict of interest presented by this situation with Blackburn. [Report at 5, 6; December 3, 2009 Tr. at 41-42]

COUNT IV

Carol Thornton and Monica Johnson hired respondent to pursue a guardianship for their grandmother, Jessie Marks. [Report at 7] Respondent filed an application for appointment of guardian on January 5, 2007. [Report at 7; Relator's Ex. 13] Both Thornton and Johnson were subsequently appointed co-guardians by the probate court on May 11, 2007. [Report at 7; Relator's Ex. 13]

On May 22, 2007, Marks passed away. [Report at 7] That same day, Respondent accepted two checks for a total of \$2,000 from Carol Thornton for his legal fees. [Report at 7; Relator's Ex. 14] Respondent cashed the \$800 check and deposited the \$1,200 check. [Report at 7] However, Trumbull County Probate Court rules require court approval prior to the payment of any attorney fees. [Report at 7] As such, respondent accepted payment by Thornton and Johnson without the approval of the Trumbull County Probate Court. [Report at 7; December 3, 2009 Tr. at 45-46, 86-87]

On October 29, 2007, respondent filed his first application for payment of attorney fees with the Trumbull County Probate Court. [Report at 7; Relator's Ex. 15] Respondent requested \$4,668.75 for 51.75 hours of legal work. [Report at 7] This amount requested was in addition to the \$2,000 already paid to Respondent on May 22, 2007. [Report at 7]

*6 In October of 2008, a complaint for concealment of assets was filed in the probate court, [Report at 7] Two months later, the probate court found respondent "guilty of concealment of assets." [Report at 7; Relator's Ex. 16] The probate court also approved the payment of \$800 to respondent on May 22, 2007. [Report at 7] However, the probate court ordered respondent repay the Marks estate the remaining \$1,200 paid to respondent on May 22, 2007. [Report at 7] Respondent filed a motion for reconsideration, which was subsequently denied. [Report at 8; Relator's Ex. 17] As of the date of the disciplinary hearing, respondent had failed to repay the Marks estate the \$1,200 as ordered by the court. [Report at 8]

Based upon the evidence the Board found that respondent's conduct in Count I violated the [Code of Professional Responsibility: DR 1-102\(A\)\(5\)](#) (conduct that is prejudicial to the administration of justice); [DR 1-102\(A\)\(6\)](#) (conduct that adversely reflects upon the lawyer's fitness to practice law); [DR 5-101 \(A\)\(1\)](#) (except with consent of a client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's **financial** and personal interests); and [DR 5-101\(A\)\(2\)](#) (a lawyer shall not prepare or draft, or supervise the

preparation or execution of a will, codicil or inter vivos trust for a client in which the natural children of the lawyer are named as beneficiaries). [Report at 8]

Based upon the evidence the Board found that respondent's conduct in Count II violated the [Code of Professional Responsibility: DR 1-102\(A\)\(5\)](#) (conduct that is prejudicial to the administration of justice); [DR 1-102\(A\)\(6\)](#) (conduct that adversely reflects upon the lawyer's *7 fitness to practice law); [DR 5-101\(A\)\(1\)](#) (except with consent of a client after full disclosure, a lawyer shall not accept employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's financial and personal interests); and [DR 5-104\(A\)](#) (a lawyer shall not enter into a business transaction with a client if they have differing interests therein). [Report at 8-9]

Based upon the evidence the Board found that respondent's conduct in Count IV violated the Rules Professional Conduct: Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Prof. Cond. R. 8.4(d) (conduct that is prejudicial to the administration of justice); and Prof. Cond. R. 8.4(h) (conduct that adversely reflects upon the lawyer's fitness to practice law). [Report at 9]

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

I. RESPONDENT'S REQUEST FOR A REMAND IS NOT PROPER OR SUPPORTED BY THIS COURT'S PRIOR CASE LAW

Respondent requests that this Court remand his disciplinary case to the Board to hear additional mitigation evidence. However, respondent's arguments for a remand are not supported by the facts, this Court's rules or the governing disciplinary case law.

First, respondent appears to argue that this Court must remand his disciplinary case in any instance that the Court rejects a sanction recommended in a Board report, by quoting a *8 portion of [Gov. Bar R. V\(8\)\(D\)](#). However, the section of the Rules for the Government of the Bar upon which respondent relies, refers to a situation in which the Court rejects a sanction in a matter submitted to the Court pursuant to a consent to discipline agreement. Because this matter, was not submitted to the Court as a consent to discipline matter, respondent's first argument requesting a remand has no merit.

Next, respondent argues that a remand is appropriate “due to an utter lack of mitigation evidence present in the record.” [Respondent's Brief at 9] Respondent argues that due to his prior decision to proceed in the disciplinary hearing pro se, he should now be allowed to have a second opportunity to present mitigation evidence with the assistance of counsel. Respondent suggests given this second hearing opportunity, respondent would produce evidence of character and reputation, community involvement, his purported recent restitution in the Marks matter, and his claimed recent re-commitment to the Ohio Lawyers Assistance Program. [Respondent's brief at 10] Respondent's argument must fail.

First, respondent has had ample notice and opportunity to obtain legal counsel prior to the Board's report being filed with this Court. Respondent received a letter of inquiry from relator regarding the Blackburn matter in March 2008. [Relator's Ex. 11] Respondent was deposed by relator in June 2008. [Relator's Ex. 18] The initial disciplinary complaint was filed against respondent in December 2008 and respondent filed an answer in January 2009. A pre-hearing conference was held on May 21, 2009. In July 2009, respondent entered into a contract with the Ohio Lawyers Assistance Program, was advised by that office as to the value of obtaining legal counsel for his disciplinary proceeding and was given the names of several potential attorneys *9 with whom he might speak. [Relator's Ex. 21 at p. 8] An amended complaint was filed in August 2009. A hearing was held on the amended complaint on September 29, 2009 and December 3, 2009. Respondent appeared at the December 3, 2009 hearing pro se and testified in his own defense. At the time of the disciplinary hearing, respondent had been a licensed to practice law for over 29 years. [December 3, 2009 Tr. at 53] As such, respondent's knowing decision to participate in his disciplinary proceeding pro se, should not be interpreted as an involuntary disadvantage influenced by [an unsubstantiated] mental disability, that requires the extraordinary remedy of a remand.

Second, during the December 3, 2009 hearing, respondent fully participated in his defense and presented evidence in mitigation. He testified that “there was no concealment or embezzlement or anything of that nature in [the Blackburn matter], even though the court wrote in up to be that case.” [December 3, 2009 Tr. at 22] Respondent also testified that he had done a “significant amount of work” for Blackburn that he did not charge her for.” [December 3, 2009 Tr. at 371]

Respondent also testified at length regarding his contract with the Ohio Lawyers Assistance Program [OLAP] and the requirements of that contract. When asked by a hearing panel member if he was required to make regular calls to OLAP, respondent stated “so there were some things I was able to do and some things I wasn't. And some of the things I should have done, I was able to do, but didn't,” “well, I have been remiss in contacting [OLAP] on a regular basis,” and “*** I've still been lax in making - with having regular contact with them there.” [Relator's Ex. 21; December 3, 2009 Tr. at 30-31, 50] When asked to specify why he *10 did not contact OLAP as he had agreed to do in his contract, respondent stated “the reasoning would just be just - I don't have a valid reason.” [December 3, 2009 Tr. at 32] A status report from OLAP confirming respondent's failure to follow the terms of his OLAP contract is Relator's Ex. 22.

Respondent's objection brief suggests that respondent suffers from a [mental disability](#) that impaired his ability to effectively represent himself pro se. However, respondent's own testimony minimized the impact of any possible mental health diagnosis on his then-current ability to function. When respondent was asked “the state of [his] mental health today” he responded that his depression “*** comes and goes ***.” [December 3, 2009 Tr. at 54] When respondent was asked “are you still feeling distress” he responded “Well, I am from the standpoint that I still don't have, you know, gainful employment to where I can have some regular money coming in.” [December 3, 2009 Tr. at 53]. As such, there is no evidence that respondent previously suffered from the limitation he now argues was present.

Finally, this Court has previously granted a remand only in the most limited circumstances, and then only when a respondent was subjected to a Board disciplinary recommendation based upon a default motion. In *Dayton Bar Assn. v. Stephan*, 1.08 Ohio St.3d 327, [2006-Ohio-1063](#), [843 N.E.2d 771](#), this Court denied Stephan's motion for a remand after a master commissioner made a disciplinary recommendation to the Court based upon a default motion of the bar association. The Court held that “attorneys have an obligation to assist in disciplinary matters and that the record should be developed in the answers and hearings prior to reaching this Court.” Id. at ¶ 5 The Court further held that it would “consider supplements to *11 the record only under the most *exceptional* circumstances.” Id, [Emphasis added] See also *Disciplinary Counsel v. McShane*, 121 Ohio St.3d 169, [2009-Ohio-746](#), [902 N.E.2d 980](#) at ¶ 3 (Court granted motion to remand after indefinite suspension recommended upon a default motion, when attorney “proffered compelling evidence of a [mental disability](#) in explanation for his failure to answer as well as substantial evidence in mitigation of his misconduct.”) and *Butler County Bar Assn. v. Porlman*, 121 Ohio St.3d 518, [2009-Ohio-1705](#), [905 N.E.2d 1203](#) (Court remanded case after disbarment recommended upon a default motion, when attorney proffered “evidence of claimed [mental disability](#) and [full and complete] restitution.”)

Respondent is now requesting this Court grant an extraordinary remedy because he is dissatisfied with the recommendation of the Board. Because respondent participated in the disciplinary proceeding from the start pro se, had ample opportunity to obtain legal counsel and chose not to, appeared and fully participated in his disciplinary hearing and the evidence adduced at the hearing indicated that respondent was not in compliance with his OLAP contract and did not qualify for mental health mitigation, this Court should deny respondent's request to remand this matter.

II. THE BOARD'S RECOMMENDED TWO YEAR SUSPENSION IS APPROPRIATE AND SUPPORTED BY THIS COURT'S PRIOR CASE LAW

Respondent argues that his conduct does not merit a two year suspension. The evidence indicates otherwise. First, respondent created a trust for his [elderly](#) client Blackburn, naming *12 respondent's five children as the beneficiaries of \$25,000, without taking the appropriate precautions to avoid a conflict of interest and protect Blackburn's differing interests. Respondent next took a \$13,000 loan from Blackburn without taking the appropriate precautions to avoid a conflict of interest, without making full disclosure of the risks involved with a loan without collateral and without protecting Blackburn's differing interests. Finally,

respondent took \$2,000 in attorney fees in the Marks guardianship without obtaining the required advance probate court approval.

Respondent argues that relator never alleged that respondent committed fraud and respondent's conduct did not involve "serious acts of fraud and misconduct" as found by the Board. [Report at 13] As such, respondent argues without "fraud," the Board's recommended increased sanction is not proper. However, there is support for a finding of fraud by respondent. First, respondent engaged in three improper **financial** transactions, two involving conflicts of interest - all committed to a client's disadvantage. Further, in examining the Blackburn transactions, the Trumbull County Probate Court found that respondent "breached his fiduciary duty" as attorney and trustee in taking the loan and that the loan "constituted self-dealing and was detrimental to the trust ***." [Relator's Ex. 9 at p. 11] Finally, in examining respondent's taking \$2,000 in attorney fees in the Marks matter without obtaining the required advance court approval, the Trumbull County Probate Court found that respondent "was guilty of concealment of assets." [Relator's Ex. 16 at p. 2] Additionally, these findings by the probate court were restated in the amended complaint in paragraphs 29 and 47. Clearly, these probate court findings re-alleged in the disciplinary complaint and supported by the court's judgment entries, support the conclusion of the Board that respondent engaged in fraudulent conduct.

***13** The numerous aggravating factors also support the Board's recommended sanction. In aggravation, the Board found that respondent engaged in a pattern of misconduct, failed to make court ordered restitution in the Blackburn and Marks matters, engaged in multiple offenses and committed conduct that harmed two vulnerable victims - Blackburn and Marks. The Board further found that respondent offered unacceptable "excuses of third party interference with his relationship with his clients and judicial biases against him" as explanations for his conduct. [Report at 12]

The Board also noted two additional factors that demonstrate respondent fails to appreciate the gravity of his misconduct. The Board found that "respondent attempts to minimize the misconduct due to his previous close personal relationship" with Blackburn. [Report at 10] The Board also found that though respondent claimed Blackburn was mentally sharp and he was not trying to take advantage of her, he acknowledged that she was vulnerable and he was trying to protect her from *others* that were attempting to take advantage of her. [Report at 10-11; December 3, 2009 Tr. at 42-43]

Next, respondent appears to argue that he did not violate Prof. Cond. R. 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal) because he was **financially** unable to repay the Mark's estate the \$1,200 ordered by the probate court. [Respondent's brief at 17-18] However, respondent's violation of Prof. Cond. R. 3.4(c) is premised on respondent's failure to obey the probate court requirement that all attorney fee payments be approved by the probate court in advance. [December 3, 2009 Tr. at 45-46] As such, respondent's argument does not have merit.

***14** Finally, application of the appropriate case law supports a two year suspension. The Board relied upon three cases in finding that a two year suspension was appropriate in this matter. In *Toledo Bar Assn. v. Cook*, 97 Ohio St.3d 225, 2002-Ohio-5787, 778 N.E.2d 40, the Court found misconduct when Cook named her siblings' corporation as a beneficiary in a will she prepared. The hearing panel in *Cook* recommended a six month stayed suspension and the Board recommended a two year suspension with one year stayed. After considering all of the evidence, this Court ordered a one year suspension with six months stayed. In its decision, this Court held that "even with the best intentions, an attorney risks the possibility of **exploiting** his client when their interests become so intertwined." In *Disciplinary Counsel v. Kelleher*, 102 Ohio St.3d 105, 2004-Ohio-1802, 807 N.E.2d 310, Kelleher drafted a trust for a client that named his wife, children and grandchildren as beneficiaries. The Court, following the ruling in *Cook*, ordered a one year suspension with six months stayed.

In *Disciplinary Counsel v. Dellinger*, 121 Ohio St.3d 400, 2009-Ohio-1429, 904 N.E.2d 890, Dettinger accepted a \$25,000 loan from a client without disclosing the conflict of interest, advising the client to consult with independent counsel and without disclosing to the client his **financial** distress. Ultimately, Dettinger repaid the loan, absent interest, which was waived by the estate of the client who made the loan. The Court ordered a six month stayed suspension.

In the present matter, the respondent committed the same misconduct that resulted in a one year suspension with six months stayed in *Cook* and *Kelleher* and the same misconduct that resulted in a six month stayed suspension in *Dettinger*. Additionally, unlike *Dettinger*, *15 respondent's loan was discharged in bankruptcy and has never been repaid. Further, as additional misconduct, respondent took attorney fees in the Marks matter without advance court approval. Finally, unlike *Cook* and *Kelleher*, a probate court examined these transactions and found respondent "breached his fiduciary duty" as attorney and trustee, engaged in conduct that "constituted self-dealing and was detrimental to the trust ***" and "was guilty of concealment of assets." [Relator's Ex. 9 at p. 11; Relator's Ex. 16 at p. 2] On the basis of respondent's cumulative disciplinary violations, the numerous aggravating factors and the "serious acts of fraud and misconduct" as found by the probate court and the Board, relator requests that this Court adopt the Board's recommended two year suspension. [Report at 13]

CONCLUSION

For the foregoing reasons, respondent's objections to the Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline should be overruled by this honorable Court.

Footnotes

- 1 Count III of relator's amended complaint, alleging a failure to cooperate in the investigation of Count's I and II, was dismissed by the Board.
- 2 Respondent's four page introduction and four page statement of facts do not contain any citations to the record. Further, these portions of respondent's objection brief make various assertions regarding respondent's motivations and his explanations for his actions that relator has been unable to locate anywhere in the record.