

1 Columbus Bar Association v. Sterner.

2 [Cite as Columbus Bar Assn. v. Sterner (1996), ____Ohio St. 3d ____.]

3 *Attorneys at law -- Misconduct -- Permanent disbarment --*
4 *Misappropriating funds and neglecting to safeguard the*
5 *interests of clients over a five-year period.*

6 (No. 96-436 - - Submitted September 24, 1996 -- Decided December 18,
7 1996.)

8 On Certified Report by the Board of Commissioners on Grievances
9 and Discipline of the Supreme Court, No. 95-46.

10 On September 6, 1995 the Columbus Bar Association (“relator”) filed
11 an amended complaint charging in eight counts that James M. Sterner of
12 Columbus, Ohio, Attorney Registration No. 0034047 (“respondent”),
13 violated various Disciplinary Rules of the Code of Professional
14 Responsibility. Count One of the complaint concerned respondent’s
15 representation of Gregory M. Sabbato during 1991 in the purchase of a
16 business. Respondent did not inform Sabbato that he not only had previous
17 business dealings with the seller of the business but also had shared office
18 space with and was otherwise affiliated with the seller’s attorney.
19 Following respondent’s advice, Sabbato paid \$70,000 to the seller, who was

1 to pay off the liens on the business. The money, however, was used for
2 other purposes, the liens were not paid off, and the creditors foreclosed on
3 the business and took it from Sabbato. When Sabbato sued respondent for
4 malpractice, respondent refused to notify or cooperate with his insurance
5 carrier, and as a result Sabbato obtained a judgment against respondent for
6 \$208,000. Respondent then transferred assets out of his name to avoid
7 attachment by Sabbato and other creditors.

8 Count Two of the complaint was based on respondent's
9 representation in 1993 of John Malhalic, who had agreed to sell a liquor
10 license to John Scimone. As part of the transaction, respondent told
11 Scimone that the license was free and clear of liens and received \$7,500
12 from Scimone to be held in escrow until the completion of the sale.
13 Scimone later learned that there were tax liens against the license, that the
14 license had been revoked, and that in a contemporaneous negotiation
15 respondent had received funds from a third party who wished to purchase
16 the same license. The license was never transferred to Scimone, and
17 respondent both failed to return the escrow funds to Scimone and refused to
18 account for them.

1 Count Three involved respondent's receipt of \$24,000 from Mary
2 Lavelle in 1991 to be held by him as escrow agent and used for the payment
3 of Ohio sales tax and for payments to the Ohio Bureau of Employment
4 Services in connection with Lavelle's purchase of Norton Road Beverage,
5 Inc., a company represented by respondent. The transfer of the Norton
6 assets to Lavelle was delayed by respondent's failure to expeditiously
7 perform his duties as escrow agent. Respondent settled Lavelle's suit
8 against him for breach of his fiduciary duty for \$3,000, but he has never
9 accounted for the funds in the escrow account.

10 As to Count Four, respondent represented the seller of a bar business,
11 and received \$10,000 from James Flax, a potential purchaser, to be held in
12 escrow pending the transfer of the liquor permit. The permit was not
13 transferred and Flax was entitled to the return of the escrow money on and
14 after July 1, 1994. Despite requests from Flax, respondent did not return the
15 escrow money until February 28, 1995, with no interest and no explanation
16 for the delay.

17 As to Count Five, Robert and Delores Ruzendall in 1991 and 1992
18 retained respondent to reinstate their liquor license and entrusted respondent

1 with over \$20,000 to pay delinquent taxes related to the license.
2 Respondent told the Ruzendalls that he paid the funds for the intended
3 purpose. However, the state of Ohio placed two tax liens totaling over
4 \$25,000 on the Ruzendalls' property. Respondent has refused to account
5 for and document the disposition of the funds entrusted to him, and partly as
6 a result the Ruzendalls filed under Chapter 13 in the bankruptcy court.

7 As to Count Six, respondent in 1991 undertook to act as a fiduciary at
8 the closing of a real estate sale by Deborah Shirey to Network, Inc. and
9 received \$10,000, which was to be paid by him to release federal and state
10 tax liens on the property. As a result of respondent's failure to pay over the
11 money, the federal government foreclosed on the property. Respondent has
12 refused to account for the funds.

13 Underlying Count Seven was respondent's representation in 1995 to
14 Tony Canale that respondent could secure a liquor license for Canale's bar
15 business upon payment of \$6,000 in back taxes. Canale gave respondent a
16 certified check in that amount payable to the state of Ohio. Respondent
17 endorsed the check, "not used for purpose intended," signed Canale's name,

1 cashed the check, and received the funds. Respondent did not pay the taxes
2 and refused to account to Canale for the funds.

3 Count Eight was added to the complaint because respondent failed to
4 provide adequate responses and to cooperate with relator in its investigation
5 when he was notified of the charges.

6 Respondent failed to file an answer to the amended complaint and on
7 December 13, 1995, relator moved for an entry of default. Respondent filed
8 no response to the motion for default. Based upon the complaint, the default
9 motion, and supporting affidavits and documentation, a panel of the Board
10 of Commissioners on Grievances and Discipline of the Supreme Court
11 (“board”) found that respondent had violated DR 1-102(A)(3) (engaging in
12 conduct involving moral turpitude) with respect to Count Three; 1-
13 102(A)(4)(engaging in conduct involving dishonesty, fraud, deceit, or
14 misrepresentation) with respect to Counts One, Three, Five, Six, and Seven;
15 1-102(A)(6) (engaging in conduct adversely reflecting on fitness to practice
16 law) with respect to Counts One through Eight; 5-101(A) (not refusing
17 employment when the interest of the lawyer may impair independent
18 professional judgment) with respect to Count One; 6-101(A)(3) (neglecting

1 a legal matter entrusted) with respect to Counts Two, Four, Five, Six, and
2 Seven; 7-101(A)(1) (failing to seek the lawful objectives of a client) with
3 respect to Counts One, Five, Six, and Seven; 7-101(A)(2) (failing to carry
4 out a contract of employment) with respect to Counts Five, Six, and Seven;
5 7-101(A)(3) (prejudicing or damaging a client during the course of
6 representation) with respect to Counts One, Five, Six, and Seven; 9-
7 102(B)(3) (failure to maintain records of client funds) with respect to
8 Counts Five and Seven; and 9-102(B)(4) (failure to promptly pay over client
9 funds) with respect to Counts Five, Six, and Seven.

10 The panel recommended that the respondent be permanently
11 disbarred because of the length, breadth and egregious nature of his
12 conduct, his failure to participate in the disciplinary process, and the lack of
13 any mitigating circumstances. The board adopted the panel's findings, and
14 recommended permanent disbarment and that costs be taxed to respondent.

15 Respondent filed objections to the board's findings, conclusions of
16 law and recommendations, and requested oral argument before this court.
17 In respondent's objections and in oral argument, counsel for respondent

1 sought to introduce evidence that respondent's activities are explained by
2 his psychological condition and that he had made restitution.

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4 *Bruce A. Campbell, James E. Davidson and Janice M. Bernard*, for
5 relator.

6 *Charles W. Kettlewell*, for respondent.

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8 *Per Curiam.* The respondent misappropriated funds and neglected to
9 safeguard the interests of his clients over a five-year period. The rules of
10 our Code of Professional Responsibility are mandatory; they state the
11 minimum level of conduct below which no lawyer can fall without being
12 subject to disciplinary action. As the board found, respondent's conduct
13 clearly violated a number of these rules. We have said many times that the
14 appropriate sanction for misappropriation of client funds and continued
15 neglect of duty is disbarment. See, *e.g.*, *Mahoning Cty. Bar Assn. v.*
16 *Michaels* (1996), 75 Ohio St.3d 645, 647, 665 N.E.2d 676, 677;
17 *Disciplinary Counsel v. Connaughton* (1996), 75 Ohio St.3d 644, 645, 665
18 N.E.2d 675, 676; *Lake Cty. Bar Assn. v. Ostrander* (1975), 41 Ohio St.2d

1 93, 70 O.O.2d 173, 322 N.E.2d 653. These previous disbarment cases
2 involved one or two incidents over a limited time. Respondent's course of
3 action involved a series of similar infractions extending over a five-year
4 period.

5 Respondent has attempted in his brief and in oral argument to
6 introduce in mitigation evidence of his alleged attention deficit disorder, a
7 psychological condition which respondent did not connect to his five-year
8 pattern of neglect of duty. We decline to accept such evidence at this late
9 date.

10 Disciplinary matters are original actions. Rule V of the Rules for the
11 Government of the Bar of Ohio, setting forth detailed procedures for such
12 matters, is promulgated pursuant to our constitutional power to oversee all
13 phases of the conduct of the bar. *S. High Dev., Ltd. v. Weiner, Lippe &*
14 *Cromley, L.P.A.* (1983), 4 Ohio St.3d 1, 4, 4 OBR 1, 3-4, 445 N.E.2d 1106,
15 1109. Under Rule V, the time for the production of evidence is at the
16 formal hearing before a panel appointed by the Secretary of the Board of
17 Commissioners on Grievances and Discipline. After the board issues its
18 findings and recommendations based on the certified report of the panel,

1 this court issues an order to show cause to the respondent who then has the
2 opportunity to object and to support that objection with a brief. Rule V has
3 no provision for the introduction of evidence in the brief filed in this court
4 or in the oral argument to this court. Only in the most exceptional
5 circumstances would we accept additional evidence at that late stage of the
6 proceedings.

7 If respondent has any objection here, it must be to the findings and
8 recommendations of the board. The entire record sent to us from the board
9 consists of the pleadings, the default motion, the affidavits, and other
10 material filed in support of the motion, and the findings of fact and
11 recommendations of the board after respondent failed to answer, otherwise
12 plead, or appear before the panel. Matters in excuse and mitigation do not
13 appear in that record, nor do exceptional circumstances exist that would
14 allow such evidence to be introduced for the first time by way of brief or
15 oral argument in response to the order to show cause.

16 Respondent is hereby disbarred from the practice of law in Ohio.

17 Costs taxed to respondent.

18 *Judgment accordingly.*

1 MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and KLINE, JJ.,

2 concur.

3 DOUGLAS, J., not participating.

4 ROGER L. KLINE, J., of the Fourth Appellate District, sitting for

5 STRATTON, J.

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