

IN THE SUPREME COURT OF OHIO

COLUMBUS BAR ASSOCIATION, : Case No. 06-491
Relator, :
v. : On Objection to the Recommendation of
DEREK A. FARMER , ESQ., : the Board of Commissioners on
Respondent. : Grievances and Discipline

RESPONDENT'S MOTION FOR RECONSIDERATION

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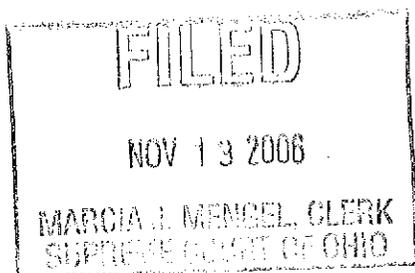
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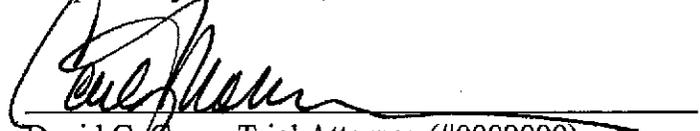
**IN THE SUPREME COURT OF OHIO
COLUMBUS BAR ASSOCIATION, RELATOR v.
DEREK A. FARMER, ESQ., RESPONDENT
CASE NO. 06-491**

Pursuant to Section 2 of Rule XI of the Rules of Practice of the Supreme Court of Ohio the Respondent Derek A. Farmer respectfully requests that this Court reconsider three specific issues framed by its decision filed in this matter on November 1, 2006:

1. The subjective basis on which rest the findings of violations of DR1-102(A)(4), DR1-102(A)(6) and DR6-101(A)(2).
2. The displaced burden of proof on which rest the findings of violations of DR2-106(A), DR9-102(B)(3) and DR9-102(B)(4).
3. The logical and equitable implications of the dismissal of counts and claims on assessment of costs.

Each of these issues, we respectfully submit, has broad implications for all Ohio attorneys who represent defendants in criminal cases, as well as significant impact on the life and the legal and constitutional rights of the Respondent.

Respectfully submitted,



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MEMORANDUM

None of the three issues presented for reconsideration – while urged by the Respondent at all stages of the lengthy and arduous path that led from the original grievance involving Melvin Tucker which was filed on August 9, 2004 to this Court’s decision which was filed on November 1, 2006 – has been addressed in the Findings and Conclusions of the Panel, the Recommendations of the Board or the Decision of this Court. The Respondent’s position on those issues is best summarized in three propositions of law for this Court’s reconsideration.

Proposition Of Law No. 1: In disciplinary proceedings involving grievants who have been convicted of serious crimes, as in other post-conviction proceedings, self-serving testimony from convicted defendants or their family members should be rejected clear and convincing evidence of findings adverse to the counsel who represented those defendants.

It is manifest from this Court’s opinion that the Respondent has been found to have violated DR1-102(A)(4), DR1-102(A)(6) and DR6-101(A)(2) as a result of a determination that he lost a swearing match with the sister of Charles Martin. Charles Martin was Respondent’s client and an individual convicted of crimes which counsel for the Relator have described as “about as unsavory as anything could be.” (TT at 386). Such a determination turns essentially on subjective perceptions. Anyone who has tried more than a few cases is painfully aware that the qualities which make an individual a “good,” effective, persuasive witness or a “poor,” ineffective, unpersuasive witness are, to a large extent, products of personality and stress. For insight into the personality and mind of Martin’s sister an interested observer should consider or reconsider Exhibit Q-1 at tabs 8, 9 & 10.

The first issue the Respondent poses for reconsideration, however, is not an issue of psychology, but an issue of law that grows out of compelling jurisprudential policy considerations that are grounded in psychological fact. Attached to this Memorandum as Appendix A are pages 21 and 22 from the Respondent’s Brief which was previously filed in support of his Objections to the

Board's Recommendations. Attached as Appendix B are pages 2 through 4 of the Respondent's Hearing Memorandum that was filed with the Board on June 28, 2005 while the matter was pending before the Panel. Those attachments cite and examine the Ohio caselaw which has articulated and firmly established the legal principle that testimony of convicted defendants or their family members claiming false promises made by their attorneys should be rejected as a basis for affording post-conviction relief or for supporting a claim of incompetence or ineffective assistance of counsel.

Were the law otherwise, courts would be inundated with swearing matches that could only be resolved by painstaking exercises in fallible subjectivity. "My lawyer promised" or "my lawyer told me" is a constant refrain in almost every post-conviction motion or habeas corpus petition filed in this or any other court system. The human impossibility of achieving objectively accurate and verifiable resolutions of the credibility contests thus proposed has led to the legal principle which, we respectfully submit, is squarely invoked by this case.

Neither the Panel, the Board nor this Court has addressed that principle or the applicable caselaw cited in Appendices A and B. A grievance filed by a convicted felon against a lawyer who represented him is, after all, just as much a post-conviction proceeding as is a motion claiming ineffective assistance of counsel or a habeas corpus petition. There is also evidence in this case that it has become an established maxim among the inmates in Ohio penitentiaries that you can "get your money back" by threatening to file a grievance against your lawyer if he or she refuses a request for a fee refund.

The decision thus far rendered by this Court has a potentially dramatic and negative impact on every Ohio lawyer who defends individuals charged with crimes. Are the essential and typically underpaid efforts of such lawyers who fill their critical role in the criminal justice system to be undertaken with "money back" guarantees? The decision also has a potentially dramatic and negative

impact on the effective functioning of the disciplinary mechanisms established by this Court. Does it not open the floodgates to “my- attorney-promised-me” grievances from countless numbers of convicted felons? We respectfully submit that the legal and constitutional rights of the Respondent to due process require that the established law of Ohio in post-conviction proceedings be addressed in and applied to these post-conviction proceedings.

Proposition Of Law No. 2 : While an attorney in a civil dispute with a client over the quantum meruit value of legal services rendered has the burden of proving the value of such services by a preponderance of the evidence, the burden of proof in a disciplinary proceeding involving claims of excessive fees or a failure to make appropriate accounts or refunds rests on the Relator and requires clear and convincing evidence.

Hard cases make bad law. This was and is a hard case. To avoid the old maxim about such cases, we respectfully submit, this Court should draw a bright line between the burden of proof applicable in disciplinary proceedings and the burden of proof applicable in a civil fee dispute between an attorney and his or her client. The drawing of such a line would eliminate the findings adverse to the Respondent with respect to alleged violations of DR2-106(A), DR9-102(B)(3), and DR9-102(B)(4). It would also eliminate the citation of this case as the latest example of the “curse of the billable hour” in the continuing series of academic articles on the decline of the lawyers’ trade from a profession to a business.

A significant component of the due process rights accorded to the Respondent in these proceedings is enshrined in Gov. Bar R. V (J)’s requirement that a determination of misconduct be made “by clear and convincing evidence.” Nothing in the Rule authorizes or justifies shifting that burden to the Respondent. As acknowledged by this Court at ¶ 33 of its recent decision in this matter, neither the Code of Professional Responsibility as it existed at the times relevant to this case nor the new Ethical Rules that will soon become effective in Ohio “require that lawyers keep

contemporaneous time records of the work they perform for a client.” The Respondent’s failure to keep such records – a failure which he has acknowledged to be a poor practice which he has since corrected – is simply not a legal, logical or justifiable basis for finding a violation of the Disciplinary Rules.

Yet this Court’s recent opinion concludes that by failing to keep time records “Respondent gambled here and lost.” (Decision of November 1, 2006 at ¶ 43). While acknowledging the abundant independent evidence of time and effort expended by the Respondent to earn fees of \$8,915.00 and \$4,000.00, and while further acknowledging that the Respondent has reconstructed in his Brief the services he provided, the opinion takes the Respondent to task for failing to provide an estimate of time devoted to each task. (*Id.* at ¶ 34.) Had he done so, would he not have opened himself to a charge of exaggerated and self-serving speculation? Why is it somehow improper to place before the trier of facts all of the direct and circumstantial evidence of services provided, and then let the trier of facts determine reasonableness of fees charged on the basis of such evidence?

While placing the burden of proof on the lawyer is appropriate in a civil dispute between lawyer and client as to the reasonableness of fees charged or the quantum meruit value of services rendered, the case before this Court is not such a dispute. This is a quasi-criminal proceeding involving an individual’s right to practice the profession in which he has invested his assets, energies, time, talent and training and from which he has earned his livelihood. The burden in this kind of a proceeding is the Relator’s burden, and the standard of proof is by clear and convincing evidence. The displacement of that burden to the Respondent is, we respectfully submit, a denial of the due process rights enshrined for him in Gov. Bar R. V and provided at the core by the Ohio and Federal Constitutions.

As with the issue posed by the First Proposition of Law, the issue posed by this Second Proposition of Law has far-reaching implications for Ohio lawyers. While this Court and the drafters of the revisions to the Code of Professional Responsibility have the power to dictate that a failure to keep time records should be considered a violation of professional ethics, such power should only be exercised – if at all – prospectively. To tell the lawyers of Ohio that they are subject to suspension or loses of their professional privileges for failure to keep time records would place an untold number of existing attorneys at risk. If they have “gambled and lost,” the only losses they should sustain are excessive portions of fees as determined in civil fee dispute proceedings. Neither they nor the Respondent should lose their professional privileges.

Proposition Of Law No. 3: Where a Respondent in disciplinary proceedings prevails on one or more of the counts or claims with which he or she has been charged, the costs of the proceedings should be equitably apportioned between the Relator and the Respondent.

Section 5(A)(4) of Rule XI of the Rules of this Court contemplates an apportionment of costs when each party prevails on some, but not all, of the issues presented. This case as originally filed presented a single grievant. That grievance, which involved a former client of the Respondent who was convicted and sentenced to a lengthy term in a federal penitentiary, consumed three out of the seven hearing days, and the remaining days were devoted in large part to character witnesses whose testimony was applicable to all claims. The original grievance generated approximately 58% of the number of exhibits placed in evidence by the parties. Exhibit P1 which contained the Respondent’s file documents with respect to that grievance fills two three-inch binders. The original grievance also required the Respondent to incur considerable out-of-pocket costs, including two trips to the federal penitentiary in West Virginia for the Relator’s perpetuation deposition of that former client and the cost of the deposition transcripts. That original grievance was unanimously dismissed by the Panel.

The add-on grievances in Counts One and Two of the Amended Complaint, which involved different grievants and different issues from those presented by Count One, resulted in split rulings. Seven of the claimed violations have thus far been resolved against the Respondent; eleven of the claimed violations have been resolved in his favor.

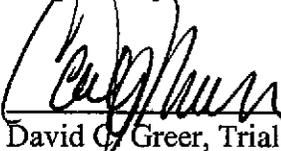
This Court's order provides that "Respondent be taxed the costs of these proceedings in the amount of ... \$20,047.26" We respectfully submit that, in the event that this Court ultimately finds that the Respondent has violated some provision or provisions of the Code of Professional Responsibility with respect to Count Two and/or Count Three, the costs taxed against him should be reduced in an equitable manner in accord with the spirit of Rule XI(5)(A)(4). Fairness suggests that such an adjustment would include a percentage adjustment coupled with an opportunity for the Respondent to tax as a setoff against his pro rata share of the costs his out-of-pocket expenditures in connection with Count One.

CONCLUSION

The Respondent is painfully aware of the fact that Motions for Reconsideration are not the darlings of the courts and that the human mind, faced with ever-mounting stacks of challenging new issues for decision, is reluctant to glance backward at issues already considered closed. And yet, an open and ever-questioning mind is the highest quality of an exemplary judicial approach to problem-solving. And yet, there is no articulated evidence that the three focused issues presented have been confronted and analyzed in depth at any of the three levels thus far called upon for decision-making. And yet, each of those issues appears to have far-reaching implications for Ohio lawyers.

Thankful for a system designed to ensure that all issues relevant to a human dispute be thoroughly explored and resolved, and hopeful for a fair resolution for all issues presented in this dispute, the Respondent urges this Court to grant his Motion.

Respectfully submitted,



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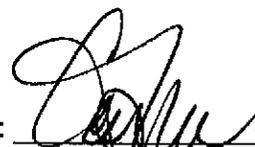
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CERTIFICATE OF SERVICE

This is to certify that the Relator has been served with the foregoing Motion for Reconsideration and Supporting Memorandum by ordinary mail to **Jonathan Marshall**, Secretary, Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, 65 South Front Street, 5th Floor, Columbus, Ohio 43215-3431, Counsel for Relators; **Don Ruben, Esq.**, 165 East Livingston Avenue, Columbus, Ohio 43215; **Terry K. Sherman, Esq.**, 52 West Whittier Street, Columbus, Ohio 43206; and **Bruce A. Campbell, Esq.**, **A. Alysha Clous, Esq.**, 175 South Third Street, S-1100, Columbus, Ohio 43215-5134 by mailing copies thereof to them this **13th** day of November, 2006.

BIESER, GREER & LANDIS, LLP

By: 

David C. Greer, Trial Attorney for
Respondent Derek A. Farmer

APPENDIX A

Pages 21 and 22 from the Respondent's Brief in Support of Objections to the Board's
Recommendations.

The Panel also overlooked basic legal principles that apply to Ohio post-conviction proceedings. Because prisoners do frequently accuse lawyers of wrongdoing after conviction, the law is clear that the mere words of prisoners or their family members is not sufficient evidence even to merit a hearing in Ohio courts.

Self-serving affidavits or testimony from convicted defendants claiming false promises made by their attorneys have been uniformly rejected by Ohio courts as a basis for affording post-conviction relief or for supporting a claim of incompetence or ineffective assistance of counsel. *See, e.g., State v. Capper* (1983), 5 Ohio St.3d 36, 38 (rejecting a defendant's self-serving declarations or affidavits that his counsel promised him he would serve no more than eighteen months if he entered a guilty plea to charges that resulted in consecutive sentences of 4 to 25 years and 6 months to 5 years); *State v. Dobson* (2005), Ohio 123 *p.9 (Second Appellate District) (defendant's self-serving affidavit insufficient to demonstrate that his guilty plea was coerced or induced by his attorney's false promises). The fact that Martin's sister picked up on the "not worth the paper it is written on" phrase does not salvage the credibility of the claimed violation of DR6-101(A)(2). The rule of the cases cited apply to family members with the same force that they apply to prisoners. *See, e.g., State v. Calhoun* (1999), 86 Ohio St.3d 279, 285 (one of the factors for determining credibility of affidavits in support of a request for post-conviction relief is "whether the affiants are relatives of the petitioner or otherwise interested in the success of the petitioner's efforts"); *State v. Saylor* (1998), 125 Ohio App.2d 636, 641 (rejecting affidavits of a defendant's father and mother alleging that the attorney made false promises as to the defendant's parole eligibility to induce him to enter a guilty plea); *State v. Moore* (1994), 99 Ohio App.3d 748, 754-55 (appropriate to deny a defendant a hearing on his request for post-conviction relief where the request is based on affidavits from three of the defendant's relatives asserting false promises by the defendant's attorney).

The sound legal reasoning and sound public policy behind the rule are amply reflected in the record here.

APPENDIX B

Pages 2 through 4 of the Respondent's Hearing Memorandum filed June 28, 2005.

The claim by desperate defendants of such promises is not an uncommon phenomenon, however, and the courts have applied stringent tests of credibility where such claims are presented.

Self-serving affidavits or testimony from convicted defendants claiming false promises made by their attorneys have been uniformly rejected by Ohio courts as a basis for affording post-conviction relief or for supporting a claim of incompetence or ineffective assistance of counsel. *See, e.g., State v. Kapper* (1983), 5 Ohio St.3d 36, 38 (rejecting a defendant's self-serving declarations or affidavits that his counsel promised him he would serve no more than 18 months if he entered a guilty plea to charges that resulted in consecutive sentences of 4-25 years and 6 months to 5 years); *State v. Dobson* 2005 Ohio 123 *p.9 (Second Appellate District) (defendant's self-serving affidavit insufficient to demonstrate that his guilty plea was coerced or induced by his attorney's false promises). The same stringent standard of credibility has been applied to affidavits and declarations of relatives, friends and fellow inmates alleging false promises of counsel. *See, e.g., State v. Calhoun* (1999), 86 Ohio St.3d 279, 285 (one of the factors for determining credibility of affidavits in support of a request for post-conviction relief is "whether the affiants are relatives of the petitioner or otherwise interested in the success of the petitioner's efforts"); *State v. Saylor* (1998), 125 Ohio App.2d 636, 641 (rejecting affidavits of a defendant's father and mother alleging that his attorney made false promises as to the defendant's parole eligibility to induce him to enter a guilty plea); *State v. Moore* (1994), 99 Ohio App.3d 748, 754-55 (appropriate to deny a defendant a hearing on his request for post-conviction relief where the request is based on affidavits from three of the defendant's relatives asserting false promises by the defendant's attorney).

Since self-serving statements of convicted defendants and their relatives which allege false promises by an attorney are insufficient as a matter of law even to justify a hearing on a request for post-conviction relief, how can they justify disciplinary proceedings based on the same allegations? How can such proceedings, in the absence of written or recorded corroboration of the alleged

promises, be justified when common sense negates any probability that such statements were in fact made? How, in the absence of such corroboration can such proceedings be justified under the “clear and convincing” burden of proof standard applicable to such proceedings?