BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

07 - 0746

In re:	:	
Complaint against	:	**Case No. 05-039**
Richard H. Rogers **Attorney Reg. No. 0017858**	:	**Findings of Fact,** **Conclusions of Law and**
Respondent	:	**Recommendation of the** **Board of Commissioners on**
Dayton Bar Association	:	**Grievances and Discipline of** **the Supreme Court of Ohio**
Relator	:	
	:	

FILED
APR 25 2007
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

1. This matter was heard at the offices of the Dayton Bar Association on the January 4 and January 5, 2007, before a panel of the Board of Commissioners on Grievances and Discipline consisting of Sandra Anderson, Martha Butler, and Stephen C. Rodeheffer, Chair.

2. None of the panel members resides in the district from which the Complaint originated or served on the probable cause panel that certified this grievance.

3. Appearing on behalf of the Dayton Bar Association was Attorney Jeffrey Slyman. The Respondent appeared in person represented by Attorney James Ambrose.

4. It should be noted that the hearing on this matter convened on two previous dates when it was represented to the Panel Chair that the parties had reached stipulations regarding the Respondent's conduct and that the Panel would only be hearing evidence regarding the imposition of a sanction – the Dayton Bar remaining silent on any recommended sanction. However, on each of these two occasions the Respondent and the Relator disagreed on what was being stipulated and the hearings were aborted because the Relator was not prepared to go

forward on the violations themselves. Stipulations were again discussed on January 4, 2007, but when the disagreement persisted and the parties went forward with their evidence.

Background

5. The Respondent is a 68 year old attorney who has practiced law in the Dayton, Ohio, area since 1989. Respondent told the Panel that prior to this he worked for a variety of companies in a variety of locations that were involved in the construction business. Respondent received his undergraduate degree from Miami University at Oxford, and his law degree from Duke University.

6. Dagmire and Roy Smith came to see Respondent in the early summer of 2000. Their initial consultation was prompted by the fact that their five year old home was literally rotting before their eyes. The exterior of the home had been constructed out of synthetic stucco that was supposed to be less expensive than brick or siding. Unfortunately this new technology did not take into consideration the fact that moisture would be let in, but not let out. Prior to consulting the Respondent, the Smiths had already received $10,000 from a class action lawsuit involving the product, but their construction costs for remedying the problem totaled $50,000. Thus the reason for their seeking legal help.

7. The Smiths chose the Respondent because his advertisement in the Yellow Pages implied that he had experience in construction litigation. During the initial consultation he told the Smiths that he had specific experience with synthetic stucco litigation or what is otherwise known as "EIFS" litigation (Exterior Insulation and Finishing Systems). The Smiths then retained the Respondent to represent them in an action against multiple defendants including the architect and contractor of their home, as well as the manufacturer of the product. The

engagement contract was signed July 13, 2000, and called for the Respondent to receive a $2,500 retainer fee and $175 per hour for his work.

8. Respondent's representation of the Smiths continued for about three years. During this time he billed his clients approximately $60,000 in fees. The Dayton Bar Association contends that Respondent charged a clearly excessive fee in violation of DR 2-106(A) (Count One), that the Respondent engaged in illegal conduct involving moral turpitude in violation of DR 1-102(A)(3) (Count Two), and that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation in violation of DR 1-102(A)(4) (Count Three).

9. The Respondent contends that while he may have been overzealous in representing the Smiths and put too much time in many of the tasks that he performed, he did not violate any disciplinary rule.

10. Based upon the findings of fact as set forth below, the Panel finds that the Relator proved its case by clear and convincing evidence as to all three Counts of the Complaint.

Findings of Fact

11. There are three aspects of the Respondent's representation of the Smiths which the Dayton Bar criticizes: 1) the time that the Respondent claims that he spent drafting the complaint; 2) the time the Respondent claims that he spent on responding to discovery and preparing requests for discovery; and 3) the time the Respondent claims that he spent consulting with the expert in the case.

12. *The Complaint.* The Relator alleges that Respondent spent 28 hours in preparing the Complaint. Respondent countered that he only spent about 19.6 hours in this endeavor. While either number seems absurdly high for the preparation of a 9 page document (65 paragraphs) Respondent has explained that many of his billing entries that note "work on

complaint" encompass a great many tasks – something that he refers to as "block billing." He also explained that before coming to a finished product he had to address many issues that his clients' case presented him with such as a statute of limitations problem, the effect of the Smiths having received compensation under the class action suit, the arbitration clause in the construction contract, and the collectibility of any judgment. The Relator presented no evidence to counter this explanation given by Mr. Rogers.

13. While the number of hours certainly gives one pause to wonder, the Panel is not prepared to second guess the Respondent on this issue and reluctantly accepts the explanation.

14. *Discovery*. The same is not true, however, of the issues involving Respondent's billings for discovery and consultations with the expert.

15. Respondent filed his complaint for the Smiths on March 13, 2001. During the interim between his being retained and filing this pleading Respondent's records reflect that he billed the Smiths for 91.5 hours of his time. Starting May 14, 2001, entries begin to appear in the Respondent's bills dealing with receiving, reviewing, drafting responses and otherwise dealing with discovery requests filed by the various defendants that were sued. From this date through August 16, 2001, Respondent invoiced the Smiths for 14.4 hours of work regarding discovery or discovery related issues. [1]

16. On August 20, 2001, Respondent, with the Smith's permission, engaged the services of Attorney Ronald Kozar to assist him in the case. As it turns out, the Respondent had often used Mr. Kozar's services in the past because he (the Respondent) had little trial experience. Indeed, the two had co-counseled on some 18 cases together.

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[1] The Panel notes that 14.4 may be an imprecise number since many of the billing entries blend discovery work with other non-discovery tasks. Even with this adjustment, however, a considerable amount of time was expended on discovery.

17. It was agreed that Kozar was going to bill the Smiths at the rate of $175 per hour. He was to submit his bills to Respondent who would in turn incorporate Kozar's bills into his. The Smiths would pay Respondent who in turn would pay Kozar. The Smiths did not know what part of their bill was for Respondent's work and what part of their bill was for Kozar's until February 2002, when Respondent developed the ability on his billing software to note initials next to the work performed. Kozar never saw any of the bills Respondent sent to the Smiths until May of 2003.

18. Respondent admits that he brought Kozar on board in order to respond to the many discovery requests that he had received in the case and to otherwise handle the litigation. In his initial letter to Kozar dated August 20, 2001, he provided little in the way of information and, more importantly, nothing by way of his work product regarding the discovery for which he had billed the Smiths over $2,500.

19. Kozar's time entries reflect that he did one hour of work on the discovery requests in October, and then two hours of work in November for a total of three hours to formulate responses to all of the multiple defendants' interrogatories and request for production of documents. During this same period of time (August through December 2001) the Respondent, who had now taken a second seat at least as far as the trial work was concerned, billed the Smiths 27.5 hours for working on discovery.[2]

20. Respondent's explanation for this billed time is vague at best. He told the Panel that it was essential that he review the finished product and go over it with the clients. He also insisted that he was working on draft responses alongside Kozar. Kozar testified that while

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[2] As in the prior billings, these bills also had blended or blocked time.

Respondent may have reviewed his work product he made absolutely no changes and that the final product that was filed was identical to what he had created. Kozar also contended that he did not consult with Respondent at all in preparing the drafts nor did he receive any material or information of any kind from Respondent to assist in completing the discovery. Finally, Kozar pointed out that in his bill for the November work, he described his work as "drafting" interrogatories. Respondent changed this entry in the bill to the Smiths to "revise." Kozar opines, with some credibility, that Respondent changed this wording because Respondent had already billed the Smiths extensively for allegedly "drafting" responses to the same interrogatories.

21. Although Respondent insisted that he did make changes, he admitted that he could not remember what they were and that they were at best very minor. In the end Respondent produced nothing to show that he had spent any time on discovery responses – not only during the period after Kozar's entrance in to the case, but for that matter even before.

22. Kozar's records and time entries reflect that he spent five hours during the months of January and February, 2002, preparing requests for discovery to be served on the defendants. Again, Kozar denied that Respondent had any input or otherwise provided any assistance in preparing these requests. During this same period Respondent continued to bill the Smiths multiple hours for allegedly working on discovery.

23. Respondent's explanation for these "discovery" entries in his billing are less than credible. First, he contends that his pre-Kozar billing entries were for formulating drafts of discovery that in the end he did not feel comfortable with. However, as noted above, Respondent was unable to produce one piece of paper or other evidence showing work product during this period despite the fact that he brought a banker's box full of materials to the

disciplinary hearing that he and his counsel continuously pointed to as proof of the Herculean effort he had made on behalf of the Smiths.

24. Second, Respondent argued that the Relator exaggerated the amount of his charges, and that it was impossible from the bills to tell what amount of time he worked on discovery. He claims that charges for working on discovery are included in blocks of time that involve other, non-discovery work such that it is impossible to segregate out from the block what time was spent on discovery and what time, for instance, was spent on receiving a hearing notice or drafting a letter.

25. While Respondent's argument regarding his entries is plausible as to some of his entries, there are many entries that describe work devoted solely to discovery. Given the paucity of discovery-related material turned over to Kozar when he came on board in August, 2001, and given the fact that Respondent contributed nothing to the final work product when the responses were completed, the Panel concludes that any work devoted to discovery-related items was superficial at best and certainly could not have reached the amount of time billed.

26. The Panel concludes that the Respondent intentionally and fraudulently billed for time that he claims he spent on discovery in his representation of the Smiths.

27. *Consultation with Expert.* The Panel's conclusion is the same with respect to Respondent's entries for consulting with experts in the case. When Respondent was initially hired, the Smiths were in the process of having a contractor do remediation work on their home. Respondent believed that before evidence was destroyed by repairs the dwelling needed to be inspected by someone with expertise in the area of synthetic stucco insulation. He contacted a firm in North Carolina by the name of BURIC, which sent a Joel Wilson to Montgomery County at no small expense to the Smiths. He did the usual taking of pictures and making notes.

28. Respondent gave notice to the defendants during the proceedings that Wilson and Wilson's supervisor, Ron Wright, were plaintiffs' experts. Since Wilson was the only one of the pair that had looked at the home, his discovery deposition was taken by the defendants in the spring of 2002. It was the unanimous opinion of Kozar, the Smiths and even Respondent that Wilson was a disastrous witness. He lacked the right education and training (he was an oceanographer) and his mastery of the facts was wanting. According to Kozar, it was agreed that an expert would not be used at all in the case although, for strategic reasons, the defendants would not be told this fact until later. According to Respondent, it was agreed only that Wilson would not be used and that there was still the possibility that Wright might be used.

29. After the Wilson debacle Respondent billed the Smiths 5.5 hours for consulting with the BURIC firm. Kozar asserted that if these phone consultations in fact occurred, it was of no value to the Smiths because the parties had decided not to use an expert. Respondent's explanation for these phone conferences goes something like this: The BURIC firm was trying to collect $3,000 from the Smiths for Wilson's time and expense in coming to Ohio for the deposition. Respondent was trying to talk Ron Wright of the firm into voiding these charges and also having the firm stay on board as a potential expert. Respondent asserted that this was a tricky maneuver under the circumstances.

30. While the Panel is not in a position to criticize Respondent for at least attempting this approach with BURIC, Respondent was simply unable to explain at the hearing how this effort consumed 5.5 hours of his time, and if it did why he would persist in this dialogue when his trial counsel had made it clear no expert was being used at all. In the end the Smiths were charged almost $1,000 for conversations over a bill that they eventually paid.

31. The manner in which all of Respondent's billing entries came to light is also worthy of comment.[3] The parties to the litigation engaged in a number of mediations. Kozar was not involved in the early efforts at settlement, but did discuss the outcome of each session with Respondent. After the second mediation Kozar learned that their clients were demanding $120,000 as settlement of the case. He found this number surprising given the fact that the actual damages were $40,000 ($50,000 cost of repair less $10,000 from class action settlement). Respondent explained to Kozar that the Smiths were going to need that much to make themselves whole because the attorney fees were so high. Attorney fees were potentially part of the claim because the main thrust of the plaintiff's case was a violation of the Ohio Consumer Sales Practices Act which allowed attorney fees.

32. Kozar asked Respondent at that time what the fees were and learned to his amazement that the billings exceeded $60,000. When he pressed Respondent for an itemization, it was refused and he was told to concentrate on the lawsuit rather than something that should not be of concern to him. When Kozar reminded Respondent that if they were going to make a claim for attorney fees the bills would have to be produced at some point, Respondent was evasive and even angry with Kozar for his persistence on this issue.

33. In a later mediation in which Kozar did participate the defendants began to offer what Kozar seemed to feel was "serious" money to settle the case. Naturally the issue of attorney fees came up again and this time Kozar insisted that he be given copies of the bills. Respondent reluctantly agreed and then produced them only after Kozar hounded him for the documents.

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[3] As noted in ¶17, Kozar was never copied with the monthly statements that were sent to the Smiths.

34. Kozar testified to the Panel that he was angered by what he found in the entries. The invoices totaled almost $70,000 - $13,000 was attributable to his work, and $57,000 was attributable to Respondent. He found entries that he believed exaggerated time spent and entries for which he knew no time had been spent. He went to Respondent and insisted that they both participate in the overall settlement with the Smiths by refunding fees. When Respondent balked, Kozar told Respondent that if he did not cooperate Kozar would go to the bar association.

35. In the end the Smiths received $60,000 from the various defendants in addition to the $10,000 they had received in the class action suit. Respondent and Kozar both agreed to a formula for refunding fees that consisted of each of them multiplying the number of hours they spent on the case by $25 per hour. Respondent refunded $6,650 (266 hours) and Kozar $850 (34 hours).

36. In the end, Kozar's conscience compelled him to file a complaint with the Dayton Bar notwithstanding his representation to Respondent. In addition he called the Smiths and told them that he believed that the Respondent had cheated them in his billings. Mr. Smith testified that during the pendency of the case he was somewhat concerned about the entries in the billings but felt that Respondent was doing a good job. After talking with Kozar he became angry and contacted the attorney that Kozar recommended to pursue a claim against Respondent over the bills, Andrew Root of Xenia, Ohio. With Mr. Root's help the Smiths reached a settlement with the Respondent, who paid them $11,400 in addition to the $6,650 he had paid at the time of the settlement.

37. The Panel finds by clear and convincing evidence that the Respondent is guilty of violating the following rules of the Code of Professional Responsibility:

a. DR 2-106(A) – A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

b. DR 1-102(A)(3) – A lawyer shall not engage in illegal conduct involving moral turpitude.

c. DR 1-102(A)(4) – A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Mitigation, Aggravation and Recommended Sanction

38. The Respondent is no stranger to the disciplinary process. In *Dayton Bar Assn. v. Rogers, 71 Ohio St.3d 283*, 1994-Ohio-279, he was publicly reprimanded for engaging in a scheme to get paid from a false invoice against a company known as Price Brothers for consulting fees that were not earned. The purpose behind the plan was for Respondent to be reimbursed for money he had personally expended to pay employees that he supervised in Libya. The court issued a public reprimand; Justice Pfeifer would have dismissed. In *Dayton Bar Assn. v. Rogers, 86 Ohio St.3d 25, 1999-Ohio-78,* Respondent was disciplined for hiding personal funds in his trust account from his estranged wife. To his credit none of his clients' funds was ever at risk and based on this the Supreme Court imposed a one year stayed suspension.

39. In addition to considering his disciplinary history, the Panel concludes that Respondent's motives in over-billing the Smiths were dishonest and selfish. This conduct is even more egregious given the fact that the Smiths were in a vulnerable position as a retired couple living on a fixed income supplemented by part time employment. The Panel also finds that the billing reflects a pattern of misconduct that continued throughout almost the entire attorney client relationship.

40. Finally, the Panel notes that Respondent simply does not think he did anything wrong other than spend too much time fighting for his clients. He offers no explanation for the

fact that he billed almost six times more than his co-counsel for working on a task that was not even his primary responsibility. Nor can he produce any work product to justify the billing entries despite the fact that he purports to have kept everything else that he created and/or accumulated during the course of this representation. When this conduct is viewed alongside the extensive time he billed for preparing the complaint and time he billed for other activities that Kozar was responsible for, Respondent's explanation rings hollow.

41. In mitigation it is noted that Respondent has paid a significant amount of money back to the Smiths. Given the fact that the Smiths, with the advice and assistance of independent counsel, reached a resolution of their claim against Respondent, the Panel concludes that full restitution has been made.

42. As additional mitigation evidence, Respondent submitted letters from two Dayton attorneys attesting to his competence, professionalism and reputation.

43. Post-hearing briefs were received in lieu of closing arguments. Relator's brief did not specifically include any recommendation on sanction, although it cited authorities holding that, for misappropriation, disbarment is the presumptive sanction absent sufficient mitigation. Respondent's brief argued that Relator failed to prove its case and, further, argued against imposition of any suspension from the practice.

44. Recent analogous authority includes *Disciplinary Counsel v. Holland*, 106 Ohio St.3d 372, 2005-Ohio-5322, where excessive fees charged by a public defender who padded client bills with hours not worked, with no history of disciplinary violations, resulted in a one year suspension from the practice of law.

45. Under the facts and circumstances of this case, and given the fact that the Panel has concluded that the Respondent has engaged in a violation of DR 1-102(A)(4), the Panel

recommends that the Respondent be suspended from the practice of law for two years, with one year of such suspension stayed.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on April 13, 2007. The Board adopted the Findings of Fact and Conclusions of Law of the Panel. The Board then voted to amend the panel's sanction based on Respondent's prior disciplinary record and recommend that the Respondent, Richard H. Rogers, be suspended from the practice of law in the State of Ohio for a period of two years. The Board further recommends that the cost of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio