

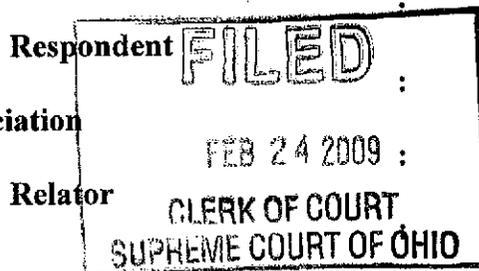
**BEFORE THE BOARD OF COMMISSIONERS  
ON  
GRIEVANCES AND DISCIPLINE  
OF  
THE SUPREME COURT OF OHIO**

**In Re:** : **SCO Case No. 08-0723**

**Complaint against** : **BOC Case No. 07-021**

**Harry J. Wittbrod** : **Findings of Fact,**  
**Attorney Reg. No. 0066021** : **Conclusions of Law and**  
: **Recommendation of the**  
: **Board of Commissioners on**  
: **Grievances and Discipline of**  
: **the Supreme Court of Ohio**

**Respondent** : **Akron Bar Association**



INTRODUCTION

1. This matter was heard on October 30, 2008, in Akron, Ohio, upon the Complaint of the Akron Bar Association, Relator, against Harry J. Wittbrod, Attorney Registration No. 0066021, Respondent. Mr. Wittbrod was admitted to practice in 1996.
2. The hearing panel members are Judge Thomas F. Bryant, Jean M. McQuillan, and Sandra J. Anderson, Chair, none of whom resides in the district from which the Complaint arose or served on the Probable Cause Panel in this matter.
3. At the hearing, Relator was represented by Joseph S. Kodish and Kathryn A. Belfrance. Respondent appeared and was represented by Mathew W. Oby.<sup>1</sup> At the hearing,

---

<sup>1</sup> On July 14, 2008, Mr. Oby filed a Notice of Withdrawal of Counsel. However, on October 28, 2008 – two days before the hearing – Mr. Oby served his Notice of Appearance for Respondent. He explained at the hearing that he withdrew because he was having difficulty getting Respondent to communicate with him. He resumed the representation, he explained, after developing an understanding of “the depression that [Mr. Wittbrod] was suffering then.” Tr. 11-12.

Relator's counsel read into the record certain stipulations. Respondent testified at the hearing. No other witnesses were called.

4. Previously, a Discipline by Consent was accepted by the Board on April 17, 2008, but was rejected by the Supreme Court of Ohio on May 20, 2008. This matter was remanded to the Board for further proceedings. The matter was then set for hearing on October 30, 2008. On September 29, 2008, Relator filed a Motion to Amend the Complaint.<sup>2</sup> This motion was denied without prejudice on October 23, 2008, and the hearing proceeded as scheduled.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

5. This case arises out of Respondent's defense of Mr. Feriance in a workers' compensation claim. Respondent miscalculated and missed a filing deadline. Based on the stipulations, which are accepted in part, and also on Respondent's testimony, the panel finds the following facts based on clear and convincing evidence.

6. Respondent agreed to defend Mr. Feriance (who filed the grievance in this matter) in a workers' compensation claim filed by an injured employee. Mr. Feriance paid a \$500 retainer, the only attorney fee paid to Respondent. Respondent represented him from May 26, 2005 to March 15, 2006 in the case. Tr. 15.

7. Mr. Feriance acknowledged his own failure to pay workers' compensation premiums.

8. The workers' compensation claim was filed by an employee who was injured in an accident while he was driving a company vehicle. As Respondent testified, "Mr. Feriance had not paid his Workers' Comp insurance, and he was trying to get out of paying for his injuries." Tr. 38.

---

<sup>2</sup> This would have been the Second Amended Complaint. A year earlier, on September 7, 2007, an Entry permitted the filing of Relator's Amended Complaint, upon which this hearing proceeded.

9. At the time of this representation, Respondent was a sole practitioner and had been in practice for about 12 years. Before representing Mr. Feriance, he had handled one other workers' compensation matter. He admits that he had little experience in workers' compensation law; however, Mr. Feriance's matter did not present complex issues and he felt competent to handle the defense. In fact, Mr. Feriance prevailed at the first administrative hearing. At the second level, however, the claim was allowed. Respondent appealed to the third and final administrative level, which affirmed the ruling against Mr. Feriance. Tr. 22-23.

10. When Respondent received notice of the final administrative ruling against Mr. Feriance, he miscalculated the 60-day deadline to file an appeal to the Common Pleas Court. He told Mr. Feriance to provide the \$200 filing fee before the (miscalculated) deadline of December 27, 2005. Mr. Feriance did not deliver a \$200 payment until January 2, 2006. Respondent believed that the filing deadline had passed by then; however, the actual deadline was January 19, 2006. The appeal was not filed. He admits his error.

11. Respondent kept the \$200 filing fee in his IOLTA account until it was returned to the client on August 17, 2007, after investigation of this disciplinary matter was underway.

12. Respondent did not have malpractice insurance and failed to advise Mr. Feriance in writing of that fact.

13. Contemporaneously with filing the grievance, Mr. Feriance retained new counsel and sued Respondent for malpractice in November 2006. The malpractice lawsuit was settled in May 2007 for approximately \$11,000, and the case was dismissed. The settlement agreement called for installment payments. Respondent has defaulted on the payments. He testified that he did not have much income, that his house went into foreclosure and that, under pressure from his wife, he chose to get "the house caught up" rather than pay Mr. Feriance. Tr. 24.

14. Respondent was notified by letter dated May 17, 2007 of Relator's additional allegations. He "failed to respond to a follow-up letter dated July 9, 2007" and "delayed his response" regarding the proposed Amended Complaint that was then filed on September 7, 2007. Tr. 18-19. Relator's counsel acknowledged that Respondent "is now cooperating." Tr. 20.

15. Relator alleges violations of DR 6-101(A)(1) (a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle) and DR 6-101(A)(3) (a lawyer shall not neglect a matter entrusted to him). We find that Relator failed to prove these violations by clear and convincing evidence. Respondent admits that he miscalculated and then missed a filing deadline. Such a single mistake does not amount to "neglect" pursuant to DR 6-101(A)(3) on this record. Further, he did prevail for Mr. Feriance at the first administrative hearing, which reflects a degree of competence, not incompetence. Respondent testified that he felt competent to handle this non-complex case, and Relator presented no contrary evidence. Finally, under questioning from the panel, Relator's counsel agreed that he would not take the position that the first time a lawyer does anything, that lawyer is automatically not competent to handle the matter. Tr. 50.

16. Relator likewise failed to prove by clear and convincing evidence that Respondent failed to cooperate pursuant to Gov. R. V(4)(G).

17. Relator alleged and did prove by clear and convincing evidence, a violation of DR 1-104(A) (failure to inform client that Respondent did not maintain professional liability insurance).

18. Finally, Relator alleged violations of DR 6-102 and ORPC 1.8(h), (attempting to exonerate himself or limit liability to his client for malpractice) and DR 1-102(A)(5) and ORPC 8.4(d) (conduct prejudicial to the administration of justice). The facts relating to these

alleged violations are as follows, based on a meager presentation by Relator and testimony by Respondent.

19. According to Relator's recited Stipulation, during the pendency of Mr. Feriance's malpractice case against Respondent, and during settlement negotiations, "the Respondent repeatedly demanded, both orally and in writing, that Feriance withdraw his pending grievance complaint with the Akron Bar Association as a condition of settlement of the malpractice case." Tr. 17-18. Relator did not submit the "writing" as evidence, nor did Relator present proof of the dates such demands were made.<sup>3</sup> The dates and details may be relevant because (1) the effective date of ORPC 1.8(h) is February 1, 2007, and (2) ORPC 1.8(h) is different from DR 6-102.

20. Respondent testified that he first proposed dismissal of the grievance in a letter to Mr. Feriance's attorney, Mr. Love. Tr. 31. The second and only other such proposal was made to a mediator. Tr. 32. Neither proposal was made directly to the client, who was represented by new counsel at the time. Respondent testified that he was then unaware that a request to dismiss a grievance was an ethical violation. Tr. 31. In any event, the two proposals were not accepted and the disciplinary matter proceeded.

21. DR 6-102(A) provides that "[a] lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." By its terms, this rule does not expressly bar a lawyer from proposing that a grievance be dismissed; however, in *Akron Bar Assn. v. Markovich*, 117 Ohio St. 3d 313, 2008-Ohio-862, the respondent's offer to refund a \$200 filing fee if the client would drop the grievance was found to be a violation of DR 6-102(A). See also *Disciplinary Counsel v. Clavner* (1997), 77 Ohio St. 3d 431 (act of entering negotiations directly with clients for a release without informing them of adversarial

---

<sup>3</sup> The panel is aware that these details were included in investigation materials that accompany pleadings in the case; however, Relator did not present this evidence at the hearing.

relationship and right to consult independent counsel violates DR 6-102(A)); BCGD Adv. Op. 96-9 (1996) (“A client should not be asked by an attorney to forego filing a disciplinary grievance or to dismiss or resolve a disciplinary grievance outside Rule V.” ... “The regulation and discipline of the legal profession lies within the authority of the Supreme Court of Ohio.”) Cf. *Cuyahoga Cty. Bar Assn. v. Berger* (1992), 64 Ohio St.3d 454 (although not citing DR 6-102(A), the panel found other ethical violations from respondent’s attempt to suppress the bar association’s investigation by including a provision in a settlement agreement with the client that, in the event of inquiries by any bar association, the response would be limited to “the matters have been resolved”).

22. The language of ORPC 1.8(h), effective February 1, 2007, differs from DR 6-102(A). The current rule states that a lawyer shall not settle a claim or potential claim for malpractice unless all of the following apply:

- (i) the settlement is not unconscionable, inequitable, or unfair;
- (ii) the client or former client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith;
- (iii) The client or former client gives informed consent.

The language of ORPC 1.8(h) does not expressly prohibit a lawyer from requesting that a grievance be dismissed as a condition of settling a malpractice claim. The changes between DR 6-102(A) and this current rule reflect a new focus on “the danger that a lawyer will take unfair advantage of an unrepresented client or former client” and the need for clients to have “a reasonable opportunity to find and consult independent counsel.” (Comment 15 to ORPC 1.8.) Here, Mr. Feriance had new counsel, so this danger and this need do not apply. However, we assume that, despite the changed language in ORPC 1.8(h), a lawyer’s attempt, successful or not,

to have a client dismiss a grievance as part of settling a malpractice claim is still an ethical violation, as it was under DR 6-102(A). On that assumption, if either of the Respondent's two requests occurred after February 1, 2007, it was a violation of ORPC 1.8(h), and if either occurred before February 1, 2007, it was a violation of DR 6-102(A).

23. For these reasons, the panel finds a violation of DR 6-102(A) or ORPC 1.8(h).

24. On this record, the panel does not find a violation of DR 1-102(A)(5) or ORPC 8.4(d) (conduct prejudicial to the administration of justice). The two proposals to dismiss the grievance were not made directly to the client; the client had the advice of new counsel at the time; the proposals were not accepted; and the bar association's investigation proceeded. No prejudice occurred to the administration of justice from Respondent's proposals during settlement negotiations.

25. Thus, the only violations found by the panel are DR 1-104, DR 6-102(A) and ORPC 1.8(h). The panel does not find violations of DR 6-101(A)(1), DR 6-101(A)(3), DR 1-102(A)(5) or ORPC 8.4(d).

#### AGGRAVATION AND MITIGATION

26. Respondent was licensed to practice law in 1996. For the past 9 or 10 years, he has been a sole practitioner in general practice, with about half of his work in bankruptcy matters.

27. Respondent has no history of disciplinary violations. There was no evidence of dishonesty or selfish motive or multiple offenses. Respondent has returned the \$200 filing fee to the client. The only other fees for the workers' compensation case totaled \$500. No restitution is required. Any harm to the client has been rectified by the judgment, through a settlement

agreement, for his malpractice claim. Respondent's default on the installment payments can be addressed through other enforcement or collection proceedings, not through this Board.

28. Respondent displayed significant emotions at the hearing. He has given up practicing law. Tr. 41. He described symptoms of depression and anxiety, including treatment dating back to 2002 by his family physician who prescribed anti-anxiety medications. Tr. 25. On the day before the hearing, he met with OLAP and signed a contract relating to mental health issues. He has been directed to see a psychiatrist and a new psychologist. Tr. 40-41. Shortly before the hearing, his attorney and others essentially staged an intervention at Respondent's home office, to review his remaining active client files. Tr. 13.

29. Respondent presented no medical evidence regarding his mental health. Further, he does not relate his mistake in missing the appeal deadline to his mental health. Tr. 37-38. He said that he has developed a "fear of clients, a distrust of clients" over the past two years and that his emotional symptoms "started to build, especially after this Feriance matter." Tr. 26. Based on Respondent's testimony, the malpractice action (filed by an attorney who "had actually sued me previously" and had "literally shaken me emotionally") was a tipping point in causing an exacerbation of his mental health symptoms and causing him, essentially, to shut down and withdraw. Tr. 39.

30. After an initial delay in responding to Relator's letters, Respondent has cooperated throughout this disciplinary matter.

#### RECOMMENDED SANCTION

31. In a post-hearing brief, Relator requests a sanction of a two year suspension, with one year stayed on the following conditions: "(a) Respondent enter into and comply with the conditions of an OLAP contract and obtain follow up care as may be recommended; (b) upon

reinstatement Respondent have his practice monitored by an attorney appointed by Relator, (c) that following his one (1) year suspension Respondent be under a one (1) [year] probationary period in which time he must comply with the Ohio Rules of Professional Conduct, comply with all CLE requirements, attend a course on law office management and, (d) restitution be made to Gregory Feriance.”

32. Respondent did not file a post-hearing brief nor indicate a position on the sanction.

33. The violations established by this record do not justify an actual suspension. But for Respondent’s acknowledged and unresolved mental health issues, this record would otherwise justify only a public reprimand. However, for protection of the public and to permit Respondent the opportunity to address his issues through OLAP and appropriate medical providers, the panel recommends the sanction of a six month suspension, all stayed on the conditions that Respondent comply with the conditions of his OLAP contract, including any recommendations for medical treatment made by OLAP; that Respondent attend one or more CLE courses on law office management; and that, should he resume the practice of law, his practice be monitored for one year by an attorney appointed by Relator.

#### **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 February 13, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that the Respondent, Harry J. Wittbrod, be suspended for a period of six months with the entire six months stayed upon the conditions contained in the panel’s report. 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.**

A handwritten signature in black ink, appearing to read "Jonathan W. Marshall", is written over a horizontal line.

**JONATHAN W. MARSHALL, Secretary**

**Board of Commissioners on  
Grievances and Discipline of  
The Supreme Court of Ohio**