ORIGINAL

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

In Re:	:	**09-1544**
Complaint against	:	**Case No. 09-016**
J. Michael Nicks **Attorney Reg. No. 0073608**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

FILED
AUG 26 2009
CLERK OF COURT
SUPREME COURT OF OHIO

A formal hearing was held in this matter on June 17, 2009, in Columbus, Ohio, before a panel consisting of members, Judge Thomas F. Bryant, John K. O'Toole, and Roger S. Gates, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint. Respondent, J. Michael Nicks, was present at the hearing and was not represented by counsel. Robert R. Berger, Assistant Disciplinary Counsel, represented Relator.

CHARGES

Respondent was charged in a Complaint filed on February 17, 2009, with misconduct in violation of the following provisions of the Rules of Professional Conduct.

In Count I:

a. Prof. Cond. R. 1.1 - A lawyer shall provide competent representation to a client;

b. Prof. Cond. R. 1.3 - A lawyer shall act with reasonable diligence and promptness in representing a client;

c. Prof. Cond. R. 3.4(c) - A lawyer shall not knowingly disobey an obligation under the rules of a tribunal;

d. Prof. Cond. R. 8.4(c) - Conduct involving dishonesty, fraud, deceit, or misrepresentation;

e. Prof. Cond. R. 8.4(d) - Conduct that is prejudicial to the administration of justice; and

f. Prof. Cond. R. 8.4(h) - Conduct that adversely reflects upon the lawyer's fitness to Practice law.

In Count II:

a. Prof. Cond. R. 1.1 - A lawyer shall provide competent representation to a client;

b. Prof. Cond. R. 1.3 - A lawyer shall act with reasonable diligence and promptness in representing a client;

c. Prof. Cond. R. 8.4(d) - Conduct that is prejudicial to the administration of justice; and

d. Prof. Cond. R. 8.4(h) - Conduct that adversely reflects upon the lawyer's fitness to practice law.

FINDINGS OF FACT

The parties agreed to the following Stipulated Facts prior to the hearing:

1. Respondent, J. Michael Nicks, was admitted to the practice of law in the State of Ohio on November 13, 2001. Respondent is subject to the Rules of Professional Conduct, the Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

2. Respondent failed to comply with attorney registration requirements for the 2007 biennium, and as a result, was suspended from the practice of law in Ohio on December 3, 2007. Respondent's law license was reinstated on April 29, 2008.

COUNT I

3. On November 1, 2006, Respondent was hired by Larry Seibel to act as legal counsel for the estate of Seibel's mother, Dorothy Seibel.

4. Respondent and Seibel entered into a written fee agreement under which Respondent would be paid a fee equal to three per cent of the value of the estate of Dorothy Seibel.

5. Pursuant to probate court rules, court approval is required prior to the payment of any attorney fees.

6. Respondent filed several pleadings in the Licking County Probate Court on November 13, 2006, to open and begin administration of the Dorothy Seibel estate.

7. In February 2007, Respondent requested that Seibel provide him with a check for one-half of Respondent's anticipated attorney fees. In response, Seibel provided Respondent with a check dated February 14, 2007, for $7,428.32.

8. Respondent immediately endorsed and cashed this check, without first obtaining the required court approval for this advance fee.

9. On February 15, 2007, Respondent filed an application for payment of attorney fees with the probate court. In his application, Respondent asked the court to approve the payment of $7,428.32, as a one-half payment of the fees due to him.

10. On February 26, 2007, the court declined Respondent's fee request and instead approved the payment of $5,000 in fees to Respondent.

11. Respondent did not inform Seibel that the court had not approved the full amount of fees sought and previously paid to him or make any refund to the estate.

12. Respondent met with Seibel on June 17, 2007. During this meeting, Respondent obtained Seibel's signature on the estate tax return. Seibel also gave Respondent a check for $10,531 for the payment of the estate taxes.

13. Respondent did not file the estate tax return or forward the check for payment of the taxes due.

14. As a result, the estate was assessed a $2,834.75 late payment penalty and $657.04 in interest charges by the Ohio Department of Taxation.

15. At this same June 2007 meeting, Respondent requested a second advance on his attorney fees. In response, Seibel provided Respondent with a check payable to Respondent for $3,714.16.

16. Respondent failed to file an application for payment of attorney fees and did not obtain the required prior court approval for this advance fee.

17. Instead, Respondent immediately endorsed and cashed this check for attorney fees.

18. During Respondent's representation of Seibel, Seibel attempted to reach Respondent and left several telephone messages. Respondent failed to return Seibel's telephone calls.

19. On November 1, 2007, the probate court issued a reminder to Respondent to file the first account for the Seibel estate. On December 3, 2007, a second reminder was issued by the court.

20. On December 13, 2007, the probate court issued a notice of past due account to Respondent and Seibel.

21. After the December 13, 2007, past due notice was issued, Respondent met with Seibel to discuss the matter. Respondent met with Seibel, despite the fact that Respondent's license to practice law had been suspended on December 3, 2007.

22. During this meeting, Respondent advised Seibel how to obtain an extension of time to file the overdue account. Respondent did not advise Seibel that his law license had been suspended.

23. On December 17, 2007, the probate court granted Seibel an extension until January 15, 2008, for the filing of the account in the Seibel estate.

24. To date, Respondent has not repaid the Seibel estate the $6,142.48 in improper and unapproved fee payments and/or the $657.04 in interest and the $2,834.75 penalty assessed against the estate due to the late filing of the estate tax return.

COUNT II

25. In July 2006, Respondent was hired by Donald Graham to act as legal counsel for the estate of his wife, Betty Jane Graham. Respondent was paid a $500 fee.

26. On July 6, 2006, Respondent filed the will and an application to relieve the estate from administration in the Columbiana County Probate Court.

27. On January 13, 2008, the probate court issued a citation requesting that Respondent file a report of distribution and evidence of the recording of a certificate of transfer. The court scheduled a status conference on February 20, 2008, to address this issue.

28. Respondent did not respond to the citation and failed to appear for the February 20, 2008, status conference.

29. In response to Respondent's nonappearance, the court scheduled a show cause hearing on March 19, 2008.

30. Respondent did not respond to the show cause order and failed to appear for the March 19, 2008, hearing.

31. The probate court issued an entry on March 20, 2008, finding Respondent in contempt.

32. On January 28, 2009, Respondent filed a motion to reopen the Graham estate so that the report of distribution could be filed.

33. On the same date, the probate court reopened the Graham estate, accepted Respondent's report of distribution of filing and found that Respondent's actions cured the court's prior contempt finding.

34. Based upon Respondent's testimony at the hearing, the panel accepts the stipulated facts and adopts them as the panel's findings of fact.

CONCLUSIONS OF LAW

The parties stipulated that Respondent's conduct violated each of the Rules of Professional Conduct as alleged in the Complaint. However, the Panel is not bound by the parties' stipulation of misconduct when the Panel concludes that the evidence fails to support a finding of misconduct by clear and convincing evidence. See, *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110, at ¶9.

35. "Prof. Cond. R. 1.1 requires a lawyer to 'provide competent representation to a client.' 'Competent representation' under the rule requires 'the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.'" *Cincinnati Bar Assn. v. Lawson*, 119 Ohio St.3d 58, 2008-Ohio-3340, at ¶46. The Court has also stated that "competent representation" means that "the lawyer must *apply* the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." *Disciplinary*

Counsel v. Lentes, 120 Ohio St.3d 431, 2008-Ohio-6355, at ¶13 (Emphasis added). Based upon the comments to Prof Cond. R. 1.1, the Panel concludes that this rule is focused on whether a lawyer is competently prepared to handle a legal matter in which he agrees to represent a client and whether he applies his competence to the particular matter. The evidence indicates that Respondent possessed the requisite experience to be regarded as competent to handle probate matters. (Tr. 26) Also, there is no evidence that any of the work completed by Respondent in the Seibel estate was not prepared in accordance with applicable legal standards. (Tr. 27)

As to Count I, the Panel concludes that Respondent failed to timely file the Ohio Estate Tax Return, and to pay the tax due, even though he had obtained the executor's signature on the return, and a check for the tax due, within the time allowed for filing the return. There is no evidence, however, that the tax return was not prepared in accordance with applicable legal standards. Id. Also, although Respondent collected attorney fees without first obtaining court approval, he clearly knew that prior court approval was required. Therefore, the Panel is unable to conclude by clear and convincing evidence that Respondent engaged in misconduct in violation of Prof. Cond. R. 1.1 as alleged in Count I of the Complaint.

As to Count II, the Panel is unable to conclude by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.1 simply by reason of his failure to timely file the required Report of Distribution.

36. On the other hand, Prof. Cond. Rule 1.3 requires a lawyer to act with "reasonable diligence and promptness in representing a client." Comment 3 to Rule 1.3 states:

> Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

The Panel concludes by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3 as alleged in Count I by reason of his conscious failure to act with reasonable diligence and promptness in the administration of the Seibel estate, including but not limited to his failure to obtain court approval of attorney fees before collecting fees,[1] and his conscious failure to timely file the Ohio Estate Tax Return and pay the tax due. Respondent candidly admitted that:

> I had a period of time there where I didn't open my mail for three months much less answer the telephone unless it was somebody calling that had drugs for me or to pick up some money to do that. You know, I wouldn't answer the phone if my mom called, if my wife called. So for me to answer the phone call of a client and pursue any sort of contact with an individual that wasn't involved in what I was doing was just not going to happen. (Tr. 29)

As to Count II, the Panel concludes by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3 by reason of his conscious failure to act with reasonable diligence and promptness in the administration of the Graham estate including but not limited to his failure to timely file the required Report of Distribution (See, Tr. 31, lines 4-10, where Respondent admitted that he did not respond to, nor participate in the Graham estate during the period of his registration suspension.).

37. The Panel concludes by clear and convincing evidence that the evidence supports the remaining stipulated violations.

38. In summary, the Panel concludes by clear and convincing evidence that Respondent's conduct as alleged in Count I violates Prof. Cond. R. 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client]; 3.4(c) [a lawyer shall not knowingly disobey an obligation under the rules of a tribunal]; 8.4(c) [conduct involving

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[1] Respondent received two fee payments totaling $11,142.48, in the Seibel estate. On February 15, 2007, Respondent filed with the probate court an application for payment of attorney fees in the amount of $7,428.32. On February 26, 2007, the probate court partially approved Respondent's fee application to the extent of $5,000.00. Respondent testified that he prepared a fee application relating to the second fee payment he received and had his client sign the application indicating his consent to the fee; however, Respondent indicated that he "just failed to file that with the Court." (Tr. 37)

dishonesty fraud, deceit, or misrepresentation]; 8.4(d) [conduct that is prejudicial to the administration of justice]; and 8.4(h) [conduct that adversely reflects upon the lawyer's fitness to practice law]. Also, the Panel concludes by clear and convincing evidence that Respondent's conduct as alleged in Count II violates Prof. Cond. R. 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client]; 8.4(d) [conduct that is prejudicial to the administration of justice]; and 8.4(h) [conduct that adversely reflects upon the lawyer's fitness to practice law].

AGGRAVATION AND MITIGATION

Pursuant to Section 10 of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, the Panel finds the following matters in aggravation:

1. Respondent's misconduct involved multiple offenses; BCGD Proc. Reg. 10(B)(1)(d)

2. Respondent has failed to make restitution in that he had not, as of the date of the hearing, repaid the Seibel estate the $6,142.48[2] in improper and unapproved fee payments and/or the $657.04 in interest and the $2,834.75 penalty assessed against the estate due to the late filing of the estate tax return. BCGD Proc. Reg. 10(B)(1)(1)

Pursuant to Section 10 of the Board's Rules, the parties stipulated as to the following

[2] Respondent received two fee payments totaling $11,142.48, in the Dorothy Seibel estate. The record indicates that Respondent performed some work relative to this estate. (Ex.2). However, Respondent made no further effort to obtain approval of fees in excess of the $5,000.00 approved by the Court on February 26, 2007. The unapproved amount of fees received by Respondent is $6,142.48. Given the lack of any further court approval for the fees received by Respondent, the Panel must consider the entire unapproved amount received by Respondent as being subject to restitution. Respondent testified that he has discussed restitution with his former client and advised him that he intends "to take care of that." (Tr.38)

Although substitute counsel was employed to complete the administration of this estate, and a fee agreement was filed with the Court, no evidence was submitted as to the amount of fees approved by the Probate Court for substitute counsel. (Ex. 2)

matters in mitigation:

1. Respondent has no prior disciplinary record. BCGD Proc. Reg. 10(B)(2)(a)

2. Respondent has cooperated in the disciplinary process. BCGD Proc. Reg. 10(B)(2)(d)

3. On February 12, 2008, Respondent was assessed at Talbot Hall at University Hospitals East and was diagnosed as suffering from chemical dependency. This diagnosis was based upon Respondent's addiction to marijuana, alcohol and cocaine.

4. On February 13, 2008, Respondent entered the partial hospitalization program at Talbot Hall and completed this program on February 17, 2008.

5. On February 18, 2008, Respondent entered the intensive outpatient program at Talbot Hall for the treatment of his chemical dependency. Respondent successfully completed this program on March 31, 2008.

6. Respondent entered into a five-year contract with the Ohio Lawyers Assistance Program (OLAP) on February 26, 2008. Respondent is currently in compliance with his OLAP contract.

7. In March 2008, Respondent began receiving treatment from Psychologist John A. Tarpey and is currently participating in weekly individual counseling sessions with Dr. Tarpey.

8. On April 3, 2008, Respondent entered the one-year Talbot Hall aftercare program. Respondent is in compliance with the attendance and participation requirements of this program.

9. Respondent had a relapse in December 2008, but has maintained a sustained, uninterrupted period of sobriety from December 12, 2008 to the present.

10. It is the opinion of Dr. Tarpey and Carolyn Sellers, MSW, LISW, LICDC that Respondent's chemical dependency contributed to cause the misconduct set forth above.

11. According to Ms. Sellers and Dr. Tarpey, Respondent's prognosis is positive and he can return to the competent ethical practice of law so long as he continues his participation in treatment, OLAP and maintains his sobriety.

In addition to the stipulations concerning mitigation and the exhibits submitted therewith, Relator submitted the mitigation testimony of OLAP's Stephanie Krznarich, LSW, concerning Respondent's compliance with his OLAP contract. Ms. Krznarich testified that she had met with Respondent individually "probably three or four times" and that she was personally familiar with Respondent's progress. (Tr. 50) Ms. Krznarich testified that Respondent's "compliance to date is going very, very well." (Tr. 44) She further testified that, although Respondent had suffered a relapse for about three weeks in December 2008, his response to the relapse was that he got "more honest and that's the foundation of where we work." (Tr. 51) She agreed that, in response to the relapse, Respondent "knew he had problems and recognized and took appropriate steps." (Tr. 51)

Ms. Krznarich testified that, in her opinion, Respondent's chemical dependency contributed to cause his misconduct. (Tr. 45-46) She further stated her opinion regarding Respondent's ability to return to competent practice of law as:

> As long as he stays connected with his sponsor, with his 12-step meetings, that he remains compliant with his recovery contract with us, that he take his medications as prescribed, and that he implement the tools that he's gained and the skills that he's acquired, then I don't see any reason why he wouldn't fare well in his practice and succeed and be available to his client. (Tr. 46-47)

Ms. Krznarich also testified that she recommends that Respondent have a practice monitor for a couple of years. (Tr. 47)

Ms. Krznarich finally indicated that her opinion was that an actual suspension of six months would assist Respondent's recovery; she stated:

> I think two things are helpful. I think it's helpful to him to do outside work,

so that when he comes back to practice full-time, he'll have an increased appreciation for the gravity of his actions, for the purpose that he serves others.

It's important and unfortunate that we have consequences for the choices we make, whether we make positive choices and have positive consequences, or whether we make negative choices or not choices in our best interest or in the interest of people that we love and care about, those have consequences. It's unfortunate, but it's also necessary for us to, again, truly appreciate and gain insight and increase our judgment about the outcome. (Tr. 50)

. . .

And I know that in the practice of 17 years, again, sometimes people get well as a result of their consequences. And we want them to get well before they, what we call, hit bottom, which is lose absolutely everything, and oftentimes their life.

So if this can be a way to give him a higher bottom that doesn't lead to death or suicide or harm to someone else, then it may be of great benefit. (Tr. 52)

. . .

And I think it adds an extra piece of assurance for his clients. Because the longer he stays away from the practice of law, can focus solely on his recovery and building in those organizational skills, the structure in his day, the contact with the sober support system that would be a benefit. We want to solidify his recovery as much as possible. (Tr. 53)

Based upon the stipulations as to mitigation, and Ms. Krznarich's testimony, the Panel concludes that Respondent's chemical dependency is a mitigating factor to his misconduct because the evidence supports the following conclusions pursuant to BCGD Proc. Reg. 10(B)(2)(g):

1. A diagnosis of a chemical dependency by a qualified health care professional or alcohol/substance abuse counselors;
2. A determination that the chemical dependency contributed to cause the misconduct;
3. A certification of successful ongoing compliance with an approved treatment program;[3] and
4. A prognosis from a qualified alcohol/substance abuse counselor that Respondent will be able to return to competent, ethical professional practice under specified conditions.

[3] Section 10(B)(2)(g)(iii) of the Board's Rules requires, for chemical dependency, a certification of *successful completion* of an approved treatment program. The evidence in this matter supports a conclusion that Respondent has completed an "intensive outpatient program at Talbot Hall for the treatment of his chemical dependency." However, the Panel also concludes that a chemically dependent person will always be in need of support in his/her ongoing battle with his/her illness. For this reason, the Panel would emphasize its conclusion that Respondent has maintained a sustained period of successful treatment, and that he must maintain that success to return to competent, ethical practice.

The Panel further concludes that Respondent fully acknowledges the wrongful nature of his conduct and fully accepts responsibility for the consequences of his misconduct.

SANCTION

The parties agreed to a stipulated sanction of a twenty-four month suspension with eighteen months stayed. The parties further agreed as a condition of Respondent's reinstatement to the practice of law that Respondent would pay $9,634.27 in restitution to the Seibel estate.

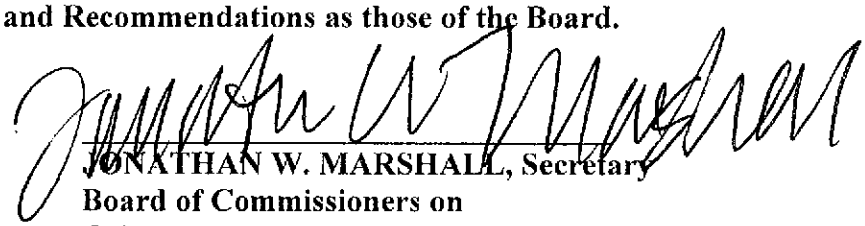
Based upon Respondent's demeanor at the hearing, the Panel concludes that Respondent has made substantial progress toward dealing with his chemical dependency. Although members of the Panel initially had some reservation concerning the severity of the stipulated sanction, the Panel is ultimately persuaded (largely by Ms. Krznarich's testimony) that the stipulated sanction, as modified below, is appropriate in this matter. For this reason, the Panel recommends that Respondent's license to practice law be suspended for a period of twenty-four months, with the last eighteen months stayed on the following conditions:

1. Respondent remain in compliance with his five year OLAP contract;
2. Respondent's payment of $9,634.27 in restitution to the Estate of Dorothy Seibel, or the beneficiaries thereof, as ordered by the Probate Court of Licking County;
3. Respondent's practice shall be monitored by an attorney designated by Relator for the period of Respondent's stayed suspension;
4. Respondent does not engage in any further misconduct during the entire twenty-four month period of the sanction imposed in this matter; and
5. Respondent shall pay the costs of prosecution of this action.

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 August 14, 2009. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, J. Michael Nicks, be suspended for twenty-four months, with eighteen months stayed on conditions contained in the panel report in the State of Ohio. The Board further recommends that the cost of these proceedings be taxed to 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