

ORIGINAL

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

In Re:	:	10-0668
Complaint against	:	Case No. 09-009
Harry Wittbrod Attorney Reg. No. 0066021	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
<u>Respondent,</u>		
Akron Bar Association		
<u>Relator.</u>		

FILED
APR 18 2011
CLERK OF COURT
SUPREME COURT OF OHIO

This Motion for Default was referred to Master Commissioner, Harry White, by the Secretary of the Board on December 24, 2009, pursuant to Gov. Bar R. V(6)(F)(2) for a ruling on the Relator's motion for default judgment. Master Commissioner White then proceeded to prepare a report pursuant to Gov. Bar R. V(6)(J).

PROCEDURAL HISTORY

Relator submitted its Complaint on February 4, 2009, alleging two counts of violating the Rules of Professional Conduct and/or the Code of Professional Responsibility and the Rules for the Government of the Bar of Ohio.

On February 17, 2009, a probable cause panel of the Board found that probable cause existed for the filing of a formal complaint and certified the same to the Board. Notice of the filing of the Complaint was served upon the Respondent by certified mail, return receipt requested, at his residence address. No answer or other responsive pleading to the Complaint was forthcoming from the Respondent. On May 20, 2009, the Board

accepted an Amended Complaint from the Relator that added an additional count of violating the Rules of Professional Conduct and/or the Code of Professional Responsibility and the Rules for the Government of the Bar.

Service of the Amended Complaint was attempted by certified mail upon Respondent at his business and residence addresses but the mail was unclaimed by Respondent. The Secretary of the Board then filed service of the Amended Complaint upon Respondent through the Clerk of the Supreme Court on August 7, 2009. No answer or other responsive pleading was filed by or on behalf of the Respondent to the Amended Complaint.

On December 14, 2009, Relator filed its Motion for Default Judgment and served a copy of the same upon the Respondent by regular US mail at his last known business address. No response to the Motion for Default has been filed by or on behalf of the Respondent.

FINDINGS OF FACT

The Soles Grievance

Duncan R. Soles retained Respondent in December 2005, to represent him in an automobile accident. In December, 2006, a settlement agreement was reached and \$4,044.47 in subrogation fees were kept in escrow by Respondent to pay Soles's medical bills. To the date of the filing of the Motion for Default, these medical bills had not been paid by Respondent. Soles made several attempts to reach Respondent by telephone, but none of the calls was returned. On April 29, 2008, Soles learned that Respondent had closed his office without advising him of a forwarding address. At all times relevant,

Respondent did not maintain malpractice insurance and failed to advise Soles of that fact in writing and failed to obtain Soles signed acknowledgment of that advice.

The Dekany Grievance

In June 2004, Karen Dekany retained Respondent through the payment of a \$1,000.00 retainer fee to represent her and her husband in a bankruptcy matter. Respondent did, in fact, file a Chapter 13 bankruptcy petition in the United States Bankruptcy Court for the Northern District of Ohio.

During the course of the bankruptcy proceedings, Mr. Dekany lost his employment and arrearages developed in the Chapter 13 proceedings. Additionally, there was a dispute over mortgage payments which the Dekanys had paid.

In June, 2008, Respondent advised the Dekanys that the mortgage company had returned all of their payments. Thereafter, Ms. Dekany requested a return of the checks but they have never been received. She was also not advised as to whether the checks were deposited in the Respondent's IOLTA account or if the funds are otherwise still in his possession.

Thereafter, Respondent failed to communicate with the Dekanys and their house was foreclosed upon as a result of Respondent's inaction.

The Poor Grievance

In October 2007, Sara Poor paid Respondent a \$1,000.00 retainer to file a Chapter 7 bankruptcy proceeding. Ms. Poor advised Respondent that she needed to reaffirm her debt on her motor vehicle lease because her father had co-signed on the lease and she wished to protect her father's credit rating. Respondent assured Poor that he would act accordingly.

After her discharge in bankruptcy, Poor discovered that the lease debt had been charged off and not reaffirmed. Upon reporting this fact to Respondent, he advised that he would correct the error. Since the debt had been discharged, it could not be reaffirmed as was represented by Respondent.

Thereafter, the motor vehicle was repossessed and Poor's father's credit rating was adversely affected.

Poor attempted to contact Respondent on these matters on numerous occasions but no response was forthcoming. Respondent later closed his office.

Failure to Cooperate in Disciplinary Investigation

Relator notified Respondent each of the above captioned complaints by certified mail or regular mail following certified mail being returned as "unclaimed." In each of those communications, Relator invited a written response and established a meeting date with Respondent to further discuss the complaint. Respondent did not respond in any manner and did not attend the scheduled meeting dates.

Substantiation of Allegations

The foregoing allegations were supported by the affidavits of each of the grievants; the grievance director and custodian of the records of Relator; and specific exhibits referenced therein.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, Respondent violated the following provisions of the Code of Professional Responsibility and the Rules of Professional Conduct as each may apply during the relevant time period stated:

A. Soles Grievance

DR 1-104(A) and (B)
Prof. Cond. R. 1.4(c)

Disclosure of information regarding
professional liability insurance.

DR 6-101(A)(3)
Prof. Cond. R. 1.3

Neglect of an entrusted legal matter.

Gov. Bar R. V(4)(G)
Prof. Cond. R. 8.1(b)

Failure to cooperate in a disciplinary
investigation.

B. Dekany Grievance

DR 1-104(A) and (B)
Prof. Cond. R. 1.4(c)

Disclosure of information regarding
professional liability insurance.

DR 6-101(A)(1)

Failing to act competently.

DR 6-101(A)(3)
Prof. Cond. R. 1.3

Neglect of an entrusted legal matter.

Gov. Bar R. V(4)(G)
Prof. Cond. R. 8.1(b)

Failure to cooperate in a disciplinary
investigation.

C. Poor Grievance

Prof. Cond. R. 1.1

Failure to competently represent a client.

Prof. Cond. R. 1.3

Failure to act with reasonable diligence.

Prof. Cond. R. 1.4(c)

Disclosure of information regarding
professional liability insurance.

Gov. Bar R. V(4)(G)
Prof. Cond. R. 8.1(b)

Failure to cooperate in a disciplinary
investigation.

In each of the grievances, Relator alleges that the Respondent conduct violated DR 9-102(A)(B)(3) and Prof. Cond. R. 1.15 (mistakenly designated as Prof. Cond. R. 1.5) by failing to preserve the identity of funds and property of clients. There is no evidence that the Respondent failed to maintain funds in a properly designated IOLTA account or that the claims of medical care providers in the Soles matter were valid claims

subject to negotiation by Respondent with creditors. Therefore, clear and convincing evidence of a violation of these rules is absent in the record and they are dismissed.

MITIGATING FACTORS

Respondent was admitted to the practice of law in Ohio in 1996. He was previously sanctioned by the Supreme Court of Ohio on July 28, 2009, in *Akron Bar Association vs. Wittbrod*, 122 Ohio St. 3d 394, 2009-Ohio-3549, on a stipulated finding that Respondent had violated DR 6-102 and Prof. Cond. R. 1.8 for failure to advise a client in a worker's compensation case of his lack of professional liability insurance and for making a proposal of settlement in a subsequent malpractice action that his client dismissed the disciplinary grievance filed against Respondent. At that time, the Court accepted the Board's recommendation that Respondent be suspended from the practice of law for six months, but with a stay of suspension on condition that he comply with the conditions of his OLAP contract, including any recommendations for medical treatment made by OLAP; that he attend one or more CLE courses on law-office management; and that his practice be monitored for one year by an attorney appointed by Relator. The Court specifically stated that if Respondent failed to comply with the terms of the stay, it would be lifted and Respondent would serve the entire six month suspension.

The grievances in the instant case either pre-dated or overlapped the conduct alleged in the prior disciplinary case. Relator attempted to amend its previous complaint to include these grievances, but its request for an amendment was denied by the Board due to the late status of the proceedings then pending before the Board on the original Complaint.

AGGRAVATING FACTORS

There are multiple offenses which demonstrate a pattern of misconduct through neglect of matters entrusted to the Respondent resulting in harm and a lack of cooperation in the disciplinary process. Furthermore, there is no evidence of any financial restitution to the clients harmed by the Respondent's conduct.

Additionally, on December 4, 2009, the Supreme Court of Ohio issued an order for the Respondent to appear and show cause as to why he should not be found in contempt for his failure to abide by the Court's July 28, 2009, disciplinary order with respect to the conditions necessary to continue the stay of the six month suspension ordered therein. By an order issued February 3, 2010, the Court found that the Respondent was in contempt of such order, vacated the stay of the six month suspension, and ordered it to immediately take effect.

RECOMMENDED SANCTION OF RELATOR

Relator recommends that the Respondent be indefinitely suspended from the practice of law.

RECOMMENDATION OF MASTER COMMISSIONER

Substantially all the misconduct of the Respondent herein preceded or overlapped the misconduct for which the prior sanction of the Supreme Court of Ohio was imposed in July 2009. While there is some question as to whether the Board would have recommended or the Court would have imposed a different sanction had these matters been heard and determined in that first disciplinary proceeding, the Board must also consider two other factors. First, the Respondent was not entirely candid with this Board or the Supreme Court in submitting stipulated misconduct and a recommended sanction

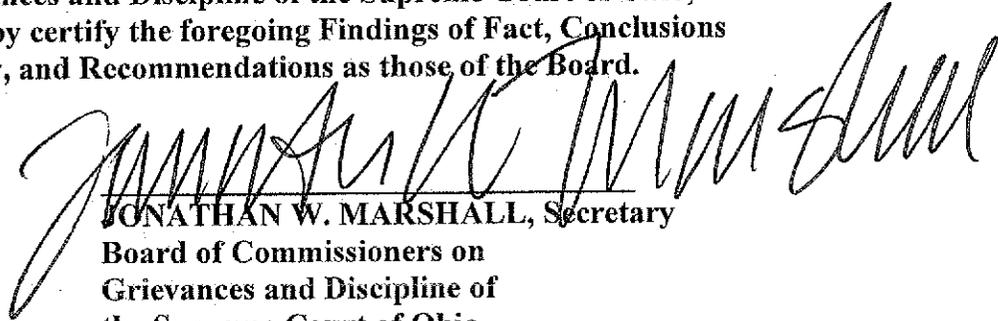
of leniency in the first disciplinary matter when he had knowledge of the transactions which are the subject of the present Complaint. Secondly, it is apparent from the February 2010 order from the Court finding Respondent in contempt that he has disregarded any part of the sanction which would assist him in recovering from the problems which he alleges led or significantly contributed to the misconduct in the first matter. This demonstrates a complete lack of remorse or acceptance of responsibility by the Respondent for his conduct and, coupled with his failure to cooperate in the investigation of these complaints, reflects a complete disregard for the disciplinary system and the profession.

Nevertheless, the Master Commissioner believes that the sanction of indefinite suspension is too severe. The Master Commissioner therefore recommends a sanction of a six month suspension to be served consecutively to that imposed by the Court through its finding of contempt in February 2010.

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 9, 2010. The Board adopted the Findings of Fact and Conclusions of Law of the Master Commissioner. However, it recommends that the Respondent, Harry Wittbrod, be indefinitely suspended with credit for time served on his first disciplinary case from the practice of law in the State of Ohio based on his prior disciplinary record, his indifference to the disciplinary sanctions and failure to cooperate. 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 large, stylized handwritten signature in black ink, appearing to read 'Jonathan W. Marshall', is written over a horizontal line. The signature is fluid and cursive, with a large initial 'J' and 'M'.

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