ORIGINAL

10-2254

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

FILED
DEC 23 2010
CLERK OF COURT
SUPREME COURT OF OHIO

In Re:	:	
Complaint against	:	**Case No. 10-036**
G. Timothy Dearfield **Attorney Reg. 0039684**	:	**Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio**
Respondent	:	
Cincinnati Bar Association	:	
Relator	:	

¶1. The panel heard this matter in Columbus, Ohio, on October 7, 2010. The panel from consisted of Sharon L. Harwood of Norwalk, Alvin R. Bell of Findlay, and panel chair, Keith A. Sommer, of Martins Ferry.

¶2. The hearing on the merits was conducted pursuant to Gov. Bar R. V(6)(G). None of the panel members resides in the appellate district from which the complaint originated or served as a member on the probable cause panel that certified this matter to the Board.

¶3. Representing Relator were G. Mitchel Lippert and Arthur E. Phelps, Jr. Respondent proceeded pro se.

¶4. Respondent, G. Timothy Dearfield, was admitted to the practice of law in the State of Ohio in 1988 and is a partner at Dearfield, Kruer & Company, LLC.

RELATOR'S COMPLAINT

¶5. The pertinent allegations of the complaint alleged as follows:

- On June 30, 2009, Respondent undertook to represent Jeffery M. Hallet in a Chapter 13 bankruptcy proceeding and accepted a $700 retainer, but failed to provide Mr. Hallet a copy of his standard retainer agreement (Para. 2 and 3).

- Mr. Hallet requested Respondent to file a Chapter 7 bankruptcy, and Respondent accepted a $399 additional retainer (Para. 4, Exhibit A).

- Mr. Hallet paid Respondent $399 by check on July 30, 2009, and Respondent deposited this check into his business operating account and not his IOLTA account (Para. 5 and 6).

- On August 15, 2009, Mr. Hallet dismissed Respondent and decided not to file bankruptcy. Respondent had prepared a Chapter 13 bankruptcy (Para. 7).

- Mr. Hallet requested an itemized billing statement and a refund of his court costs, his file and a copy of the retainer agreement (Para. 8).

- Respondent's office informed Mr. Hallet that they would keep the court costs as additional fees and failed to provide Mr. Hallet with a copy of his standard retainer agreement until after he had been dismissed. He provided the agreement to Mr. Hallet but did not return court costs. (Para. 9 and 10).

- Respondent's standard retainer agreement stated a Chapter 7 bankruptcy fee was an additional $800 retainer, plus court costs of $299. Mr. Hallet was under the impression that the entire $399 was for court costs (Para. 11).

- Respondent's standard retainer agreement stated "All retainer payments are good for one year from the date made and will be credited to the attorney fees and court costs then applicable for the filing. Any monies paid on retainer are non-refundable except in unusual circumstances and only at the discretion of an attorney employed by the Law Firm." (Para. 12, Exhibit A).

- On February 5, 2010, and February 11, 2010, Respondent told Relator's investigator that he would be refunding Mr. Hallet's court costs within the next few days but failed to do so (Para. 13 and 14). On February 26, 2010, Respondent refunded the court costs to Mr. Hallet in cash (Para. 15).

- Respondent required Mr. Hallet to sign a letter stating the $299 in cash was "in full and complete satisfaction of any claims you may have against same and or any of its attorney, paralegals, etc. Said claims include any and all claims such as legal malpractice, ethical violations, or other complaints to overseeing bodies including the Ohio Supreme Court, the Ohio State Bar Association, the Cincinnati Bar Association or any other applicable entities." (Para. 16, Exhibit B).

RELATOR'S ALLEGED VIOLATIONS

¶6. Relator's complaint asserted that Respondent violated his oath of office and the Rules of Professional Conduct, specifically:

- Prof. Cond. R. 1.5(b), for failing to provide Mr. Hallet with his standard retainer agreement within a reasonable time after beginning representation.
- Prof. Cond. R. 1.5(d)(3), for treating all monies paid to the lawyer as non-refundable.
- Prof. Cond. R. 1.15(c), for failing to keep the unused court costs in his IOLTA account.
- Prof. Cond. R. 8.4(d), prohibiting conduct that is prejudicial to the administration of justice, for using the refund of the court costs as leverage to obtain a release of all grievance claims made by Mr. Hallet.
- Gov. Bar R. V(4)(G), for failing to cooperate with the disciplinary process by requiring Mr. Hallet to sign a release before refunding the unused court costs.

RESPONDENT'S ANSWER

¶7. In answer to the complaint, Respondent disagreed that he failed to provide Mr. Hallet with a copy of his standard retainer agreement and stated that the agreement clearly discloses the Chapter 13 fees as $3,000 which are pursuant to the Southern District of Ohio "no look" fees allowed per Local Bankruptcy Rule 2016(b)(2)(A) which recognizes the nearly impossible task of segregating time entries for consumer bankruptcy attorneys (Para. 3).

¶8. Respondent disagreed that Hallet requested him to file a Chapter 7 bankruptcy and stated there were multiple post-engagement discussions as to the propriety of filing Chapter 13 versus Chapter 7 (Para. 4).

¶9. Respondent agreed that he accepted $399 in addition to the $700 by check, and that the check was deposited in Respondent's business account. He stated the deposit of the check in his business checking account was proper as the fees had been earned up to $3,000. He quoted

US Bankruptcy Judge Barbara Sellers as stating in open court in the middle 1990's that this was appropriate. Respondent asserted that it was an administrative burden to deposit all checks in the IOLTA account and then transfer the same to his regular operating account, and the likelihood of bounced consumer checks could result in disciplinary actions for bounced IOLTA checks (Para. 6).

¶10. Respondent agreed that Hallet dismissed his firm and decided not to file bankruptcy. He further agreed that Hallet requested an itemized billing statement, a refund of court costs, his case file, and a copy of the retainer agreement. Respondent stated that Hallet was told by telephone he could pick up his property, but that the monies paid were not refundable per the retainer agreement as the same were earned because substantially more fees were earned given the preparation of the case and the more than normal amount of counseling with Hallet (Para. 8). Respondent further agreed that Hallet contacted him by telephone about the refund of court costs, and he was told the money would be kept as earned fees as the agreement was to pay $3,000 in attorney fees. Respondent disagreed that he failed to provide Hallet with a copy of the standard retainer agreement until after he had been dismissed (Para. 9 and 10). Respondent agreed that the standard retainer agreement stated a Chapter 7 bankruptcy fee was $800 plus court costs of $299 (Para. 11).

¶11. Respondent agreed that the standard retainer agreement stated "All retainer payments are good from the date made and will be credited to the attorney fees and court costs then applicable for the filing. Any monies paid on retainer are non-refundable except in unusual circumstances and only at the discretion of an attorney employed by the law firm." (Para. 12).

¶12. Respondent agreed that he told the investigator he would be paying Hallet $299 but this was to settle any/all claims and stated that no specific date for payment was given as his checkbook was in his Covington, Kentucky office and it would take a few weeks (Para. 13). Respondent stated the $299 was paid and Respondent did not commit a definite date given the logistics of getting a check from his Covington, Kentucky, office (Para. 14).

¶13. Respondent's answer then stated that the $299 in cash was to settle a fee dispute and was "in full and complete satisfaction of any claims you may have against same and of any of its attorneys, paralegals, etc. Said claims include any and all claims such as legal malpractice, ethical violations, or other complaints to overseeing bodies including the Ohio Supreme Court, the Ohio State Bar Association, the Cincinnati Bar Association or any other applicable entities" and referred to Exhibit B. (Para. 15 and 16).

¶14. Respondent's answer stated that Hallet's original intake sheet acknowledges his receipt of the standard fee agreement (Exhibit 1) and that Congress has preempted Ohio and "occupied the field" as to bankruptcy attorney fee agreements and cited *Milavetz, Gallop & Milavetz, P.A., v. U.S.* (March 2010). Respondent asserted that the standard fee agreement states that refunds are made at the discretion of an attorney.

¶15. In response to Prof. Cond. R. 1.5(b), Respondent stated that he provided the retainer agreement on two separate occasions, the first upon the initial consultation when Mr. Hallet executed the consultation form acknowledging receipt of the retainer agreement (Exhibit 1).

¶16. In response to Prof. Cond. R. 1.5(d)(3), Respondent stated he agreed to represent Hallet for $3,000 attorney fees and earned fees substantially in excess of the $1,099 paid by Hallet, plus the $299 paid to settle the claim.

¶17. Respondent disagrees that he violated Prof. Cond. R. 1.15(c) for failing to keep the unused court costs in his IOLTA account.

FINDINGS OF FACT

¶18. Exhibit F is the background information sheet signed by Mr. Hallet on 5/8/09. The last paragraph states that "it is necessary to pay Law Firm a retainer in the amount required under the Law Firm's Standard Retainer Agreement, a copy of which you acknowledge receiving also by signing below." Hallet testified that he did not know if this was included in the packet that he received at the outset. Respondent testified the retainer agreement was included in the packet given to Hallet at the outset.

¶19. Respondent testified that he did not keep the court costs in his IOLTA account and deposited the same into his business operating account.

¶20. Respondent admitted to the preparation and execution of Exhibit B which is the letter addressed to Hallet dated February 26, 2010, wherein Hallet acknowledged receipt of the $299 in cash from his office which states "in full and complete satisfaction of any claims you may have against same and or any of its attorney, paralegals etc. Said claims include any and all claims such as legal malpractice, ethical violations, or other complaints to overseeing bodies including the Ohio Supreme Court, the Ohio State Bar Association, the Cincinnati Bar Association or any other applicable entities."

CONCLUSIONS OF LAW

¶21. The Relator charged Respondent with violating the Ohio Rules of Professional Conduct and the Panel finds by clear and convincing evidence that the Relator has proven the following violations:

- Prof. Cond. R. 1.15(c)—Respondent failed to keep the unused court costs in his IOLTA account.

- Prof. Cond. R. 1.5(d)(3)—Treating all monies paid to the lawyer as non-refundable. Rule 1.5(d)(3) provides a lawyer shall not enter into an arrangement for a fee denominated as "earned upon receipt," "non-refundable," or in any similar terms, unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation.

- Prof. Cond. R. 8.4(d)—Prohibiting conduct that is prejudicial to the administration of justice, for using the refund of the court costs as leverage to obtain a release of all grievance claims. See *Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 2010-3* (June 11, 2010) which states attempts by a lawyer to avoid discipline by asking the client to withdraw a disciplinary grievance or to refrain from filing a disciplinary grievance is improper.

¶22. The panel does not find by clear and convincing evidence that the Relator has proven the following violations:

- Prof. Cond. R. 1.5(b)—Failing to provide Mr. Hallet with his standard retainer agreement within a reasonable time after beginning representation.

- Gov. Bar R. V(4)(G)—Failing to cooperate with the disciplinary process by requiring Mr. Hallet to sign a release before refunding the unused court costs. Gov. Bar R. V(4)(G) states that the certified grievance committee may call upon an attorney to assist in an investigation or testify in a hearing before the board or a panel and that no attorney shall neglect or refuse to assist or testify in an investigation or hearing.

MITIGATION AND AGGRAVATION

¶23. Concerning aggravating factors as set out in BCGD Proc. Reg. 10(B)(1), the panel finds the following:

- Dishonest or selfish motive;

- Lack of cooperation in the disciplinary process;

- Deceptive practices during the disciplinary process; and

- Refusal to acknowledge wrongful nature of conduct.

¶24. In mitigation, there is an absence of a prior disciplinary record.

¶25. In *Cuyahoga Cty. Bar Assn. v. Berger* (1992), 64 Ohio St. 3d 454, the hearing panel concluded that respondents charged an excessive fee, denied a client access to settlement proceeds, and attempted to suppress the bar association's investigation, and recommended that the respondents be suspended from the practice of law for one year. The hearing panel noted that the respondents refused to accept any ethical responsibility for their conduct. The Supreme Court of Ohio upheld their suspension from the practice of law in Ohio for one year.

RECOMMENDED SANCTION

¶26. Relator cited several Supreme Court cases where a respondent committed violations similar to the violations by Respondent Dearfield that resulted in stayed suspensions. Relator then stated Respondent's aggravating actions can be used to urge an actual suspension, and the release language used by Respondent warrants a stricter sanction of a one year suspension with part or all stayed on conditions.

¶27. Respondent states the sanction, "if any," should be small and in the nature of merely a reprimand, preferably private.

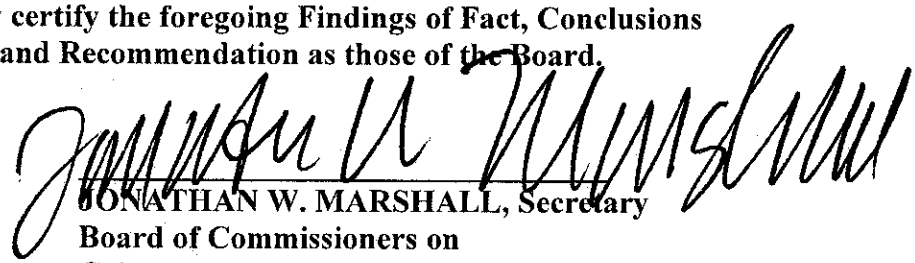
¶28. The panel recommends a one-year suspension with six months stayed.

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 December 2, 2010. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, G. Timothy Dearfield, suspended for one year with six months of

the sanction stayed. 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 Recommendation as those of the Board.



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