

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

ORIGINAL

In Re:

:

12-1003

Complaint against

Case No. 11-063

James W. Westfall, Jr.
Attorney Reg. No. 0029420

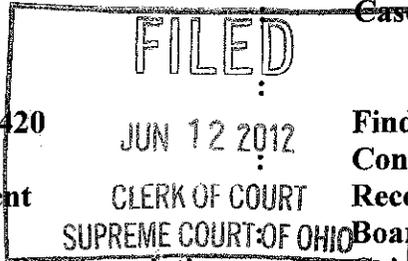
Respondent

Cleveland Metropolitan Bar Association

Relator

:

:



Findings of Fact,
Conclusions of Law and
Recommendation of the
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio

OVERVIEW

{¶1} This matter was heard on January 5 and 6, 2012 in Cleveland, Ohio and on March 23, 2012 in Mt. Vernon, Ohio, before a panel consisting of members Lynn B. Jacobs, Judge Otho S. Eyster and John H. Siegenthaler, chair. None of the panel members resides in the district from which the complaint arose and none was a member of the probable cause panel that certified the matter to the Board.

{¶2} Relator was represented by Gregory J. Phillips and Erika Imre Schindler.

Respondent was represented by Laurence A. Turbow.

{¶3} Relator's complaint was certified June 13, 2011. An amended complaint was filed November 10, 2011.

{¶4} The case involves a seven count complaint against Respondent, James W. Westfall, Jr. dba Westfall Legal Services, LPA, (WLS), four counts of which allege specific acts of misconduct respecting individual clients. The fifth count alleges Respondent's failure to

supervise nonlawyer assistants and the improper delegation of duties to these people resulting in the unauthorized practice of law. The sixth count alleges Respondent's failure to pay to the IRS nearly two years of withheld employee payroll taxes. The seventh count claims that Respondent made a false statement to Relator respecting the unpaid withholding taxes, and later refused to cooperate in Relator's investigation. Nothing of substance was stipulated as to any of the counts.

{¶5} For the reasons set forth in this report, the panel finds by clear and convincing evidence that Respondent violated numerous Rules of Professional Conduct and recommends that he be suspended from the practice of law for two years, with six months stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Count I—McCafferty

{¶6} In this count, Diana McCafferty and her husband Michael McCafferty executed a retainer agreement with Respondent for a Chapter 7 bankruptcy filing for both husband and wife. In early 2009, Diana wrote three separate checks to WLS totaling \$700 on the parties' joint account toward fees and costs. Relator's Ex. 11-14.

{¶7} Respondent sent five letters to Michael and Diana in 2009, and advised that he required full payment of the remaining fees and costs totaling \$699 before he would proceed with the bankruptcy. Relator's Ex. 15-20.

{¶8} In July 2009, Michael and Diana separated in anticipation of a divorce. In October 2009, Respondent sent Michael and Diana a letter stating that their file had been closed for failure to make agreed payments. Relator's Ex. 21.

{¶9} In December 2009, Diana authorized payment to Respondent of \$500 from the joint account with Michael which at that time was the balance of the amount owed.

{¶10} During early 2010, Respondent withdrew from his representation of Diana without advising her and continued his representation of Michael for an individual bankruptcy. Respondent did not inform Diana that this would leave her responsible for the parties' joint debts nor did he obtain her informed consent to continue his representation of Michael.

{¶11} In April 2010, Diana was divorced from Michael and wrote to Respondent requesting a refund of her \$700 share of the money paid to him. Relator's Ex. 21. Respondent did not reply and has not refunded any money to Diana.

{¶12} Ironically, although she never received a response from Respondent regarding her refund request, Diana did subsequently receive a solicitation letter addressed to her promoting Respondent's bankruptcy services.

{¶13} In January 2012, Michael signed his individual bankruptcy petition which failed to show Diana as a co-debtor on several obligations, which she was. On the first day of the grievance hearing, WLS filed Michael's petition with the bankruptcy court.

{¶14} In the McCafferty grievance, the panel finds the following violations: Prof. Cond. R. 1.16(d) requiring due notice to the client and delivery of the client's property upon termination, and Prof. Cond. R. 1.16(e) requiring prompt refund of any unearned fee. Respondent gave no notice to Diana of his termination of representation of her and failed to refund to her any portion of the \$1,200 payments made for fees and costs from the McCafferty's joint account.

{¶15} The panel also finds that Respondent violated Prof. Cond. R. 1.9(a) by failing to obtain Diana's informed consent for the continued representation of Michael in his individual bankruptcy. Therefore Michael, but not Diana, would be released from the parties' joint debts thereby making Michael's interests materially adverse to the former client, Diana.

{¶16} The panel finds no merit in Respondent’s explanation that he could represent Michael without the consent of Diana because she was “judgment proof.”

{¶17} The panel does not find that Respondent charged a clearly excessive fee under Prof. Cond. R. 1.5(a) and therefore recommends that this claimed violation be dismissed.

Count II—Gresham

{¶18} In this count, the Charles and Setsuko Gresham grievance, Setsuko received a letter from Westfall Legal Services in early 2010, soliciting her as a bankruptcy client. The letterhead listed ten separate offices for WLS in the Cleveland area and used the phrase “attorneys at law.” The words “we” and “our” were used in the text of the letter referring to the provider of legal services. Relator’s Ex. 24.

{¶19} At that time, and as of the date of the hearing, Respondent was the only lawyer affiliated with WLS.

{¶20} The phrase “advertisement only” was on the face of the solicitation letter and envelope in small printed type but in contrasting red ink. Id.

{¶21} In February 2010, the Greshams met with Respondent, signed a retainer agreement for a joint Chapter 7 bankruptcy and paid the full amount of fees and costs totaling \$1319. Of this, \$900 was fees, \$299 court costs, and \$120 was for nonrefundable credit counseling. Relator’s Ex. 25.

{¶22} In March 2010, the Greshams met with Respondent’s son Jay Westfall, a nonlawyer employee who, at the time of the hearing, was a third-year law student. Jay Westfall discussed with them a possible delay in filing the bankruptcy until receipt of an expected tax refund. He also explained how to spend the refund to minimize the risk that the refund would be

included for creditors as a bankruptcy asset. General written information on these subjects is provided to all WLS bankruptcy clients. March 2012 Hearing Tr. 185-189.

{¶23} In July 2010, because of lack of information from the Greshams regarding their tax refund, WLS sent them a letter advising that their case had been deactivated and that there would be additional fees to reactivate. Relator's Ex. 29. The internal file notes of WLS shows that the case was closed. Respondent used the words "deactivate," "activate," "close," and "reopen" interchangeably in his client letters but without differentiation or explanation to the client.

{¶24} In August 2010, after a conversation between Jay Westfall and Charles Gresham, the Greshams provided supplemental information that was incomplete. No one at WLS informed the Greshams as to the deficiency.

{¶25} Hearing nothing further from Respondent or WLS, Charles called Respondent's office on five separate days in September and early October 2010. Respondent refused to talk to him. On October 7, Setsuko wrote to Respondent requesting either a full refund of the \$1,319 payment so she and Charles could hire another lawyer or alternatively that Respondent proceed with their case. Relator's Ex. 30.

{¶26} On October 18, Respondent wrote to the Grishams informing them that their case had been closed since July 28 and that it would take additional fees and costs of \$300 to reopen the case. Relator's Ex. 31. Respondent has made no refund of unearned fees of \$100 or the \$299 in unspent costs.

{¶27} The panel finds several violations in the Gresham matter. Respondent violated Prof. Cond. R. 7.1 that prohibits a false or misleading communication about the lawyer or the lawyer's services. In the WLS solicitation letter there was a false representation that there was

more than one lawyer in the firm by use of the words “attorneys at law,” “we,” and “our.”

Respondent has now revised the WLS material to refer to the singular.

{¶28} The panel does not find that the solicitation letter was misleading as to the number of WLS offices maintained by Respondent, which were many, or that the “advertisement only” slogan used was insufficient and therefore a violation of the conspicuous display required by Prof. Cond. R. 7.3(c)(3). The panel recommends that this alleged violation be dismissed.

{¶29} Likewise, the statement in the WLS letter as to full payment not being required before starting the case was not untrue. Full payment was not required before starting work on the case. It was required before the completed petition was filed in the bankruptcy court, which was shown to be customary in this type of practice.

{¶30} The panel finds that the failure of Respondent to respond to Charles Gresham’s multiple telephone calls concerning case status violates Prof. Cond. R. 1.4(a)(2),(3), and (4) requiring reasonable consultation with the client, keeping the client reasonably informed and complying with reasonable requests for information.

{¶31} The panel finds that Respondent violated Prof. Cond. R. 1.16(d) and (e) by failing to return to his clients \$299 in unspent cost deposit and \$100 in unearned fees held by him when the case had not been reopened.

{¶32} The panel notes the testimony of Virgil Brown, Jr., a bankruptcy court trustee and Loren Helbling, an experienced bankruptcy practitioner, both of whom were called as witnesses by Respondent. Each testified on cross-examination to the effect that any prepaid court filing costs should be returned by the attorney to the client when the petition is not filed as these funds are not the attorney’s money. January 2012 Hearing Tr. 529-530; 554-556.

{¶33} While the panel has found that Respondent's failure to return the unearned fee and unspent cost deposit and to return the client's property and unearned fees upon termination of representation are violations of Prof. Cond. R. 1.16(d) and (e), it does not find a violation of Prof. Cond. R. 8.4(c) respecting dishonesty, fraud, deceit, or misrepresentation and recommends dismissal of this charge.

{¶34} The few cases in which a violation of Prof. Cond. R. 8.4(c) or corresponding DR 1-102(A)(4) violation is found for failure to return unearned fees or costs invariably involve one or more factors, such as the lawyer lying to the client about the status of the refund or the case, concealing other client funds or property, or taking the fee or costs from the client under a misrepresentation that the lawyer made in order to collect money from the client with no intention of doing any work. See e.g. *Butler Cty. Bar Assn. v. Portman*, 121 Ohio St.3d 518, 2009-Ohio-1705 and *Cleveland Metro. Bar Assn. v. Spector*, 121 Ohio St.3d 271, 2009-Ohio-1155.

{¶35} The panel does not find that Respondent charged a clearly excessive fee under Prof. Cond. R. 1.5(a) and recommends that this claimed violation in Count II be dismissed.

Count III—Pestyk

{¶36} In this count, the John Pestyk grievance, Pestyk prepaid Respondent's full fees and costs of \$1,299 for a Chapter 7 bankruptcy. The court costs included were \$299. Relator's Ex. 34.

{¶37} In May 2009, Respondent wrote to Pestyk to deactivate the case in 30 days if Pestyk failed to provide additional information. Relator's Ex. 37. Pestyk replied by calling Respondent to tell him that Pestyk's wife was terminally ill, with two months to live. January 2012 Hearing Tr. 224-225.

{¶38} In December 2009, Respondent sent Pestyk another 30-day deactivation letter. Relator's Ex. 38. Pestyk's wife had died earlier that month. In January 2010, Pestyk informed WLS of his wife's death but said he still wanted to file the bankruptcy.

{¶39} On March 29, Respondent sent Pestyk a letter stating that the case was deactivated. Relator's Ex. 39. The WLS internal file noted for that day shows that the case was closed.

{¶40} On September 14, 2010, Pestyk called WLS to demand full refund of his payment. Not receiving a response, he filed his grievance with the bar association on October 14, 2010. He then complained to the Better Business Bureau (BBB) on November 2, 2010.

{¶41} Respondent offered a refund of \$499 through the BBB on November 15, 2010. Relator's Ex. 6. Pestyk refused to accept the offer.

{¶42} In the Pestyk grievance, Relator has charged Respondent with only a single violation, that being Prof. Cond. R. 1.16(e) requiring a prompt refund of an unearned fee when the lawyer withdraws from representation. Respondent only offered any refund after Pestyk filed a complaint with the BBB. The belated refund offer reflected the total payments made by Pestyk of \$1,299, including \$299 of unspent court deposit less \$800 earned fees as shown by Respondent's account of work done. Respondent felt he was entitled to use the BBB as a forum to negotiate the refund issue with this client. The panel does not agree.

{¶43} Relator did not specifically charge Respondent with a violation of Prof. Cond. R. 1.16(d) for failing to return Pestyk's court deposit promptly to him. Nevertheless, the panel equates the failure to return the deposit with the failure to return the unearned fee found in the Prof. Cond. R. 1.16(e) violation.

Count IV—Mosier

{¶44} In this count, Reba Mosier and her husband, Charles Mosier, retained Respondent in November 2009 to file a joint Chapter 7 bankruptcy. Relator's Ex. 43. Respondent was paid a total of \$1,399 in fees and expenses in two payments, including \$299 in court deposit.

{¶45} After a missed telephone appointment with WLS staff in January 2010 and confusion over a February appointment, Respondent sent the Mosiers two deactivation letters requesting additional information and stating additional fees would be required for activation. Relator's Ex. 47-48. After no response, WLS noted in its internal file records that the case was closed; however, Respondent continued to write the Mosiers requesting information.

{¶46} Reba Mosier had symptoms of Alzheimer's disease. Charles Mosier was bedridden and in home hospice care. Because of these facts, Reba had authorized her son, William Mosier, to communicate with Respondent about their bankruptcy case. Relator's Ex. 50.

{¶47} Over the next several months, William Mosier sent additional requested materials to WLS.

{¶48} In July 2010, William Mosier and Jay Westfall had an argumentative phone conversation about the failure to answer in a pending foreclosure action against Reba and Charles. Jay recorded the conversation unknown to William Mosier. January 2012 Hearing Tr. at 269. No copy of the conversation was preserved nor was copies preserved of recorded phone conversations with other WLS clients.

{¶49} Respondent was aware that phone conversations between WLS nonlawyer employees and clients were being recorded at the discretion of the employees and without the retention of copies. January 2012 Hearing Tr. at 372-376.

{¶50} The panel finds the following violations respecting the Mosier matter.

Respondent failed to return to the Mosier's the sum of \$599 being unearned fees of \$300 and unspent court costs of \$299, thereby violating the prompt return of property and refund of unearned fees requirements of Prof. Cond. R. 1.16(d) and (e). The payment should have been made when it was apparent that the attorney-client relationship had ended.

{¶51} The above was evidenced by Respondent's internal file records which showed that the Mosier bankruptcy was closed in March 2010 and also by the telephone confrontation between William Mosier and Jay Westfall in July 2010, when William threatened to file a grievance with the bar association.

{¶52} Respondent violated Prof. Cond. R. 5.3(b) requiring a lawyer with direct supervisory authority over employees to make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. Respondent knew about the recorded calls but failed to make reasonable efforts to ensure that the employee had the knowledge and consent of the client when the recording took place.

{¶53} These recordings, if made directly by the lawyer, could constitute acts of professional misconduct under Prof. Cond. R. 8.4(c) involving dishonesty, fraud, deceit, or misrepresentation. See generally, *Ohio State Bar Assn. v. Stern*, 103 Ohio St.3d 491, 2004-Ohio-5464 and Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline Op. 2012-1 (June 8, 2012).¹ The panel did not find credible the testimony from Jay Westfall that the client was informed of the recording at the outset primarily because William Mosier denied this and there were no preserved records to support Jay Westfall's testimony.

¹ Ohio Sup. Ct. Bd. of Comm'rs on Grievances and Discipline 97-3 (June 13, 1997) concluded that the surreptitious recording of telephone conversations was unethical, except in three specific circumstances, none of which is applicable in this case. The Board's 2012 opinion withdraws the 1997 opinion, although the 2012 opinion adheres to the view that the surreptitious recording of conversations with clients and prospective clients is inconsistent with a lawyer's duties of loyalty and confidentiality.

{¶54} For the same reasons stated in reference to the Gresham matter, the panel does not find a Prof. Cond. R. 8.4(c) violation on failure to return unearned fees and unspent costs and therefore recommends dismissal of that charge respecting the Mosier claim.

{¶55} Neither is the panel able to find a violation of Prof. Cond. R. 7.1 concerning false communications as to a lawyer's services or Prof. Cond. R. 1.5(a) prohibiting an excessive fee and recommends dismissal of those alleged violations in this count.

Count V—Failure to Supervise

{¶56} This count alleges the failure of Respondent to supervise his nonlawyer staff members resulting in their unauthorized practice of law.

{¶57} Jay Westfall and other nonlawyer WLS employees provide general information to clients on the subject of wage garnishments, the treatment of income tax refunds, and creditor's claims in the bankruptcy process.

{¶58} WLS employees prepare suggestions of stay for filing in various Northeast Ohio courts and sign Respondent's name to these papers. Some but not all of the forms show the employee's initials next to Respondent's facsimile signature.

{¶59} Nonlawyer staff members also prepare answers to these state court complaints against WLS clients and send them to the clients for review and filing in the courts. Respondent advises nonlawyer staff on the suitability and use of the state court forms based on specific fact patterns.

{¶60} The suggestions of stay and answers (usually general denials) are basic one-page generic documents. Respondent authorizes WLS employees to sign his name to the suggestions of stay where needed.

{¶61} Relator claims that nonlawyer employees regularly dispense legal advice to clients with the assistance of Respondent in violation of Prof. Cond. R. 5.5(a), prohibiting the unauthorized practice of law. At the hearing, Respondent presented 14 published articles, readily available to the public, which are intended to be used by persons contemplating bankruptcy or interested in the subject. Much of the information in these articles directly addresses the same general information provided to Respondent's clients by his nonlawyer employees as to wage garnishments, tax refunds and creditor's rights.

{¶62} The panel is unable to find that the furnishing of such information by nonlawyers is the unauthorized practice of law and recommends dismissal of the Prof. Cond. R. 5.5(a) charge as it relates to this activity.

{¶63} The evidence is conflicting as to the extent to which Respondent fails to supervise his nonlawyer employees or makes reasonable efforts to do so as required by Prof. Cond. R. 5.3(b) thereby enabling the unauthorized practice prohibited by Prof. Cond. R. 5.5(a).

{¶64} Relator's only witness on this issue was a former employee of WLS who worked for the office for a few months, was terminated, and then filed an unsuccessful unemployment compensation claim. She states that WLS employees prepared suggestions of stay and answers for filing in the state courts without Respondent's review and signed the suggestions of stay for him without his authorization. January 2012 Hearing Tr. at 174-182.

{¶65} Several WLS employees testified that while the state court papers were prepared by nonlawyer employees that they were reviewed by Respondent, who signed the suggestions of stay, or authorized the nonlawyer employees to sign his name before filing. Their testimony also was that the state court answers were reviewed by Respondent, but required only the signature of

the clients and so the forms were mailed to the clients for them to sign and file. January 2012 Hearing Tr. 408-412; March 2012 Hearing Tr. 54-57, 150-151.

{¶66} The panel is unable to find that Respondent failed to supervise or use best efforts to supervise his nonlawyer employees as required by Prof. Cond. R. 5.3(b) and the related Prof. Cond. R. 5.5(a) and recommends dismissal of those claimed violations.

Count VI—Failure to Pay Withheld Taxes

{¶67} This count involves Respondent's failure to remit withheld employee payroll taxes to the government, as well as the employer share, for the tax periods ending June 30, 2009 through March 31, 2011. The unremitted taxes were used for Respondent's WLS operations. The exact amount of taxes owed is not established; however, the tax liens against Respondent total some \$48,000. Relator's Ex. 53, 58, and 59.

{¶68} Taxes withheld and not remitted from employees' wages for the second quarter of 2011, for which no lien has been yet filed, are an additional \$8,000. January 2012 Hearing Tr. at 473-474. Penalties and interest would add approximately \$10,000 to the total. January 2012 Hearing Tr. at 468.

{¶69} Of the \$56,000 in unpaid withholding taxes, approximately two-thirds were deducted from the employee wages with the balance owed by Respondent for the employer share.

{¶70} Although the employees will receive credit even though remittance of those taxes has not been made, the government will have to pursue and collect from Respondent to avoid the loss.

{¶71} The panel finds that the withholding of payroll taxes from employees by Respondent and WLS without remitting those taxes to the IRS and Respondent's failure to remit

the employee's share are violation of Prof. Cond. R. 8.4(c) and 8.4(h). This misconduct involves dishonesty, fraud, deceit, or misrepresentation and adversely reflects on Respondent's fitness to practice law. Respondent used the withheld taxes and the unpaid employer share to pay operating expenses of WLS thereby converting the funds to his own use.

Count VII—False Information to Investigators; Failure to Cooperate

{¶72} In this count, Relator alleges that Respondent made a false statement during the investigation that all Form 941 withholding tax returns had been timely filed and also that he failed to provide requested information to investigators regarding the withholding tax issue.

{¶73} Respondent told Relator in his letters of October and June 2011, that the Forms 941 had been timely filed; in fact, while the six quarterly returns at issue had all been filed at the time of the investigation, the one due December 31, 2009 had been filed about five months late.

{¶74} Respondent twice failed to respond to Relator's request for additional information regarding the tax issue.

{¶75} In this count, the panel finds that Respondent failed in his duty to cooperate and assist in the investigation as required in Gov. Bar R. V, Section 4(G) and knowingly failed to respond in a disciplinary matter as required by Prof. Cond. R. 8.1(b).

{¶76} The production of documents requested by Relator was basically ignored by Respondent until Relator served a subpoena on Respondent's accountant. Even then the production was incomplete and without explanation.

{¶77} The panel cannot find that Respondent violated Prof. Cond. R. 8.1(a), prohibiting a knowingly false statement of a material fact. Relator requested an explanation from Respondent in its May and September 2011 letters as to why withholding taxes had not been paid and what steps were being taken to address the situation. Respondent's nonresponsive answers

in his June and October 2011 letters to Relator said that the tax returns had been timely filed. These were not false statements of a material fact.

{¶78} Here, where the issue is whether Respondent withheld payroll taxes for employees and failed to remit those taxes as well as the employer share, the panel does not believe that the late filing of a single Form 941 is a material fact. The panel recommends dismissal of the alleged violation of Prof. Cond.R. 8.1(a).

AGGRAVATION AND MITIGATION

{¶79} Aggravating factors found by the panel from Respondent's misconduct are a selfish motive; a pattern of misconduct, multiple offenses, some lack of cooperation during the disciplinary process, refusal to acknowledge the wrongful nature of his conduct, vulnerability and harm to victims of the misconduct, and failure to make restitution.

{¶80} Mitigating factors found are the absence of a prior disciplinary history, a cooperative attitude during the actual panel proceedings, evidence of good character and reputation, and imposition of other penalties in connection with Respondent's withholding tax issue.

RECOMMENDED SANCTION

{¶81} The panel has reviewed case law applicable to what it considers the most serious of the violations, these being (a) Respondent's failure to return to clients the unearned fees as well as the unused or unspent court deposits, and (b) Respondent's withholding of employee payroll taxes and failing to remit these to the IRS.

{¶82} *Cleveland Metro. Bar Assn. v. Gresley*, 127 Ohio St.3d 430, 2010-Ohio-6208, involved eight counts of misconduct, five of which were Prof. Cond. R. 1.16(d) and (e) violations for failing to return unearned fees and unspent court deposits. In three of the cases,

the respondent provided some services, in two there was nothing done. Other violations in the five counts included lying to the clients, failure to appear at hearings, failure to cooperate and lack of client communication. The Court ordered a two-year suspension with six months stayed.

{¶83} In *Disciplinary Counsel v. Davis*, 130 Ohio St.3d 440, 2011-Ohio-6016, the respondent took fee deposits in two cases and client documents for review in a third case. Respondent did no work in the fee deposit cases and in the client documents case and failed to return the clients money or papers upon the clients' termination of her representation. She also had a previous two-year suspension that had expired but from which she had not applied for reinstatement. The Court found violations of Prof. Cond. R. 1.16(d) and (e) and ordered an indefinite suspension.

{¶84} Inasmuch as the panel concludes that Respondent did substantial work on the Gresham, Pestyk, and Mosier cases before termination, the panel considers the misconduct in *Gresley* and *Davis* to be more extreme than that of Respondent.

{¶85} Respondent's misconduct is compounded by what the panel feels is his most serious violation, that of withholding of payroll taxes from employee wages over a nearly two-year period and converting the funds for his own benefit.

{¶86} In *Northwest Ohio Bar Assn. v. Archer*, 129 Ohio St.3d 204, 2011-Ohio-3142, the respondent withheld federal, state and local taxes from his secretary's wages for three years but failed both to submit the requisite forms or pay the withheld amounts to the proper governmental authorities. The Court, finding violations of Prof. Cond. R. 8.4(c) and 8.4(h), adopted the Board's recommendation of a one-year suspension, noting that Archer had a prior public reprimand and had allowed his malpractice insurance to lapse. The suspension was ordered

although Archer had made full payment of all taxes and penalties and the necessary paperwork had been filed prior to the hearing.

{¶87} In the case of *Geauga Cty. Bar Assn. v. Bruner*, 98 Ohio St.3d 312, 2003-Ohio-736, the Court indefinitely suspended the respondent for his failure to remit approximately \$43,000 in withheld taxes continuing for more than ten years, his not making any restitution and his failure to appreciate the gravity of his misconduct. The respondent had also failed to file any of the required payroll reports during the ten-year period and provided false W-2 forms to his secretary.

{¶88} The panel finds that Respondent's misconduct is closer to that in *Archer* than the more flagrant misconduct in *Bruner*.

{¶89} Relator recommends that Respondent be suspended for not less than two years. Respondent wants all of the charges dismissed.

{¶90} The panel recommends that Respondent, James W. Westfall, Jr., be suspended from the practice of law for two years, with six months stayed on the conditions that: (a) he make restitution to the individual grievants Diana McCafferty, \$700; Charles and Setsuko Gresham, \$399; John Pestyk, \$499; and Reba L. Mosier, \$599; (b) he remits to the IRS all unpaid payroll taxes, interest and penalty obligations from the tax period ending June 30, 2009 to the date of reinstatement for both the employee and employer shares relating to his law practice or that alternatively he enter into an agreement for payment with the IRS prior to reinstatement that is then current and remains current throughout the remainder of the stay; (c) he provides evidence satisfactory to Relator of his compliance with conditions (a) and (b) above; (d) he commits no further violations; and (e) he pays the costs of these proceedings.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on June 8, 2012. The Board amended the Findings of Fact and Conclusions of Law to dismiss the alleged violation of Prof. Cond. R. 1.9 set forth in ¶15 of the report based on the lack of clear and convincing evidence to establish that the interests of Michael and Diana McCafferty were materially adverse as required by that rule. The Board also amended the Recommendation of the panel and recommends that Respondent, James W. Westfall, Jr., be suspended from the practice of law for two years with reinstatement conditioned on compliance with the conditions set forth in ¶90 of the report. 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.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**