

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

12-1011

In Re:	:	
Complaint against	:	Case No. 11-088
Eva Catherine Gildee	:	Findings of Fact,
Attorney Reg. No. 0072685	:	Conclusions of Law and
	:	Recommendation of the
Respondent	:	Board of Commissioners on
	:	Grievances and Discipline of
Disciplinary Counsel	:	the Supreme Court of Ohio
	:	
Relator	:	

FILED
JUN 13 2012
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} A formal hearing was held in this matter on April 6, 2012 in Columbus, Ohio before a panel consisting of Keith Sommer, Alvin Bell and Stephen C. Rodeheffer, chair. None of the panel members reside in the district from which the complaint originated, nor did any of the panel members serve on the probable cause panel that certified this grievance. Relator, Disciplinary Counsel, was represented by Joseph Caligiuri and Respondent appeared pro se.

{¶2} Respondent in this case is charged with two counts of misconduct in a complaint filed by Relator on September 23, 2011. Of the counts alleged, the parties' stipulated to Respondent having violated the following provisions, and the panel finds the violations by clear and convincing evidence and recommends that the Board adopt those stipulations:

Count One

Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients in connection with a representation separate from the lawyer's own property];

Prof. Cond. R. 1.15(d) [a lawyer shall promptly deliver to the client any funds the client is entitled to receive];

Prof. Cond. R. 8.1 [in connection with a disciplinary matter, a lawyer shall not make a false statement of material fact];

Prof. Cond. R. 8.4(c) [conduct involving fraud, dishonesty, deceit or misrepresentation];
and

Prof. Cond. R. 8.4(h) [conduct that adversely reflects upon the lawyer's fitness to practice law].

Count Two

Prof. Cond. R. 8.1;

Prof. Cond. R. 8.4(c); and

Prof. Cond. R. 8.4(h).

{¶3} For the reasons stated below, the panel adopts the parties' stipulated sanction that Respondent be suspended from the practice of law two years, with one year stayed based on the conditions set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶4} The proceeding was instituted by Relator on September 23, 2011, with the filing of a two count complaint with the Board. The complaint chronicles Respondent's representation of a single client, Hossam Abdelfattah (Sam Fattah), and that client's company, Eagliz Acquatic, Inc. Although a joint request for an extension of the time to file a consent to discipline was submitted and granted, no consent was entered. However, on March 27, 2012, approximately ten days prior to the hearing of April 6, 2012, the parties' submitted stipulations of fact and rule violations, together with a stipulated sanction of a two-year suspension with one year stayed on conditions.

{¶5} The stipulations submitted by the parties are fairly comprehensive; however, Respondent's testimony at the hearing provided additional information that supplemented the stipulations. Therefore, a brief summary of that testimony is set forth below.

{¶6} Respondent is a 47-year-old, solo practitioner who practices law in Columbus, Ohio. Respondent was admitted to the practice of law on November 20, 2000. Respondent's practice consists mainly of business litigation. In general, the stipulations and testimony reveal a very competent attorney who obtained an excellent result for her client, but ran afoul of the disciplinary rules when it came to her handling her client's funds. The client, Sam Fattah, came to the United States from Egypt where he had been involved in training swimmers. After coming to this country, he developed a business in central Ohio training children swimmers.

{¶7} According to Respondent's testimony, Fattah was able to obtain what Respondent described as a favorable lease or license to use the swimming pool at the Columbus North Sports Club for his students, which lease became a matter of contention between Fattah and the club in 2005. A lawsuit ensued in 2005, in which Respondent represented Fattah. That litigation ended with a settlement that involved a renegotiated lease¹. The settlement was short-lived, and Fattah hired another lawyer to file a second lawsuit against the landlord in late 2006². Respondent was asked by Fattah to take over the litigation in April 2007, and she agreed to the request. The pair agreed that Respondent would be compensated based upon a written contingent fee agreement that they signed on May 17, 2007. The agreement provided that Respondent would receive one-third of the gross amount recovered unless trial was commenced, in which event Respondent would receive forty-five percent of the gross amount recovered. Stipulated Ex. 1.

¹ *Eaglez Acquatics, Inc. v. Columbus North Sports Club*, Franklin County Court of Common Pleas, Case No. 05 CV 010825.

² *Eaglez Acquatics, Inc. v. Jui Jer Lin et al*, Franklin County Court of Common Pleas, Case No. 06 CV 013350.

{¶8} Before the written fee agreement was signed, Respondent filed contempt against the landlord for violating the terms of an agreed preliminary injunction that had been negotiated by Fattah's first lawyer in this case. The motion for contempt requested both damages and attorney fees. Following a hearing a month later, Judge Sheeran of the Franklin County Court of Common Pleas issued an order finding the landlord in contempt. As punishment for its conduct, the landlord was ordered to pay a \$1,000 fine and pay Fattah \$7,500 in attorney fees. The landlord appealed the contempt, and Respondent represented Fattah in that appeal. In the end, the Franklin County Court of Appeals determined that there was no final appealable order and the case was remanded to the common pleas court for further proceedings in late 2007. At this point, a settlement was reached in which Fattah agreed to surrender his lease in consideration for the landlord paying a lump sum to Fattah in the amount of \$32,500 plus a percentage of any rents the landlord would collect over the next four years for the space that Fattah had previously been renting. As a result of the settlement, the payment was made and the case was dismissed. With the dismissal, the common pleas court clerk paid over to the Respondent the \$7,500 in attorney fees that the landlord had been required to escrow during the appeal. The settlement funds were paid on January 3, 2008, and Respondent received one-third of the \$32,500 and kept the escrowed \$7,500, apparently with the consent of Fattah.

{¶9} Unfortunately, the parties to the litigation were not done fighting. Payments by the landlord for Fattah's percentage of rentals were slow in coming, and when they did come they were in amounts much less than what Fattah thought they should be despite the fact that both Fattah and Respondent assisted the landlord in finding suitable tenants. The first lease payment came in July of 2008 in the amount of \$2,083.80. Although Respondent failed to

deposit these funds in her IOLTA account³, she apparently accounted to Fattah for the money inasmuch as the client agreed on July 24, 2008, that Respondent could keep his two-thirds of the funds as a retainer for future legal work involving a third lawsuit that was being contemplated.

{¶10} As 2008 wound down, time and an increase in the amount of the rentals being paid convinced Fattah to reconsider his desire to file a third lawsuit. On February 2, 2009, Respondent and Fattah formally reached this conclusion, and Respondent made a full accounting to Fattah for the money she had collected, and the cost of the legal work she had performed. ¶ 18 of the stipulations outlines the accounting that resulted in the client receiving a check for \$3,221.20 from Respondent. Respondent testified that at this meeting she agreed to voice her bill to Fattah for the work she had done to defend the appeal the landlord had prosecuted from the contempt order, plus she voided his bill for additional hourly work that she had performed in working on finding a suitable tenant for the landlord. This would be the last occasion that Respondent and Fattah would meet on amicable terms.

{¶11} Respondent's misconduct that brings her before the Board involves her collection of the rental monies paid by the landlord to her between April 2009 and June 2011, together with her dishonesty in dealing with Relator during its investigation. Respondent's actions can be summarized as follows:

Count One

- a. Starting in April of 2009, Respondent retained all of the payments she received from the landlord, a partial list of which is contained in ¶20 of the stipulations. Fattah would have been entitled to two-thirds of this amount. In addition to the payments listed in ¶20, Respondent kept a rental payment in the amount of \$715

³ Respondent testified that she could not remember whether she deposited the check in either her business account or her personal account.

she received in October of 2011, of which Fattah would have been entitled to \$476.67⁴.

- b. Three of the rent payments received by Respondent were never deposited in her IOLTA account.
- c. When confronted by Relator in 2011 about Fattah's share of the rent money, Respondent claimed that she had sent Fattah a letter in January 2010, telling him that she had decided to retract the fee discount she had previously given him and informing him that she expected payment on the invoices included in the letter. Respondent told Relator that she had elected to retain Fattah's share of the payments to satisfy these invoices. Upon request, Respondent produced a document which she asserted was a copy of this letter⁵. Later, Respondent voluntarily admitted that the document that she produced for Relator was a fabrication and that she had never told Fattah that she was expecting payment on the invoices.

Count Two

- a. In his initial grievance filed August 10, 2009, Fattah, among other things, complained about the fact that Respondent had retained all of the \$7,500 awarded as attorney fees in the contempt proceeding. This allegation on Fattah's part was of questionable merit given the fact that he was aware that Respondent retained these funds and he continued to use Respondent as his attorney subsequent to her

⁴ For a complete calculation of the rentals due Fattah see footnote 4 of the stipulations on p. 6.
⁵ Exhibit 19 to the stipulations.

receiving the money.⁶ During discussions with Relator, following the filing of the grievance, Respondent agreed as an act of good faith to remit half of the \$7,500 to Fattah. To date, Respondent has paid Fattah only \$1,000 of the \$3,750 he was entitled to under this agreement leaving a balance of \$2,750.

- b. When Fattah complained to Relator that he was not receiving payments from Respondent for his share of these fees, Relator contacted Respondent about the payment. In an attempt to buy time and put off Relator, Respondent on two occasions (December 20, 2010 and May 3, 2011) created documents purporting to be letters of transmittal of checks to Fattah and faxed those to Relator. The letters and checks were never sent and Respondent never informed Relator of this fact, causing Relator to believe that Respondent was living up to her agreement with her former client.

AGGRAVATION, MITIGATION, AND SANCTION

{¶12} The parties have stipulated to a sanction that consists of a two-year suspension, with one year stayed on condition that Respondent commit no further rule violations and that she make restitution in the amount of \$11,290.98 before she is reinstated following her serving the actual suspension. The restitution is calculated as follows: \$8,540.98 representing Fattah's two-thirds of the rents collected by Respondent and retained by her, and \$2,750 representing the remaining reimbursement due Fattah from the \$7,500 attorney fees paid for the contempt finding.

⁶ Respondent told the panel that before the contempt was filed, she and her associate discussed the potential attorney fee award and that Fattah had agreed that any award would be retained by the lawyers. The contingency fee agreement, executed after the contempt was filed, but before the award was made, makes no mention of how any award would be distributed.

{¶13} The parties have stipulated to four of the aggravating factors listed in BCDG Proc. Reg. 10(B)(1): a dishonest and selfish motive; multiple offenses; resulting harm to the victim; and failure to make restitution.

{¶14} The parties have also stipulated to a number of mitigating factors listed in BCGD Proc. Reg. 10(B)(2): lack of any prior disciplinary action; full and free disclosure during the disciplinary process; and positive character evidence.

{¶15} The panel was impressed by the remorse that Respondent manifested during the hearing. At no time did she attempt to minimize or justify what she had done. When questioned about the fabricated letters she had sent to Relator, she told the panel that within days of giving the January 3, 2010 letter to Relator's counsel, she called him and revealed her dishonesty. As to the two letters that were faxed to Relator purporting to evidence payments to Fattah for the contempt attorney fees, Respondent explained that she had hoped to be able to put money in the account to cover the checks, but in the end she knew that if the checks were mailed they would simply bounce. Respondent acknowledged that it was a shortcoming on her part not to have clarified the situation for Relator. Hearing Tr. at 19-24; 54-62.

{¶16} The panel has reviewed a number of cases dealing with the misappropriation of client funds by an attorney. As an initial proposition, it must be pointed out that the presumptive sanction for the conversion of client funds is disbarment. *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110. This having been said, the Supreme Court has often considered a lesser sanction where the attorney's misconduct "is an isolated incident and not a course of conduct in an otherwise unblemished legal career." *Toledo Bar Assn. v. Kramer*, 89 Ohio St.3d 321, 323, 2000-Ohio-163. Applying these principals, the Supreme Court imposed a two-year suspension with one year stayed in *Disciplinary Counsel v. Clafin*, 107 Ohio St.3d 31, 2005-

Ohio-5827 [retaining minor client's personal injury settlement funds for almost three years and failure to obtain a release for the tortfeasor's insurance company]; and in *Toledo Bar Assn. v. Scott*, 129 Ohio St.3d 479, 2011-Ohio-4185 [misuse of incarcerated client's power of attorney to take possession and title to client's property to satisfy undocumented attorney fees]. Of the two cases, the one closest to this case in facts is *Clafin*. However, a distinguishing feature between the two cases is that in *Clafin* restitution was made to the client before the disciplinary complaint was filed. Here, Respondent has paid only a small amount of the money due her former client and from the testimony elicited at the hearing it is clear that restitution will not be forthcoming in the immediate future.

{¶17} Notwithstanding the lack of restitution, the panel still recommends adopting the parties' stipulated sanction, inasmuch as that sanction has a built-in safeguard that will ensure that Respondent will not be able to return to the practice of law unless she repays Fattah. The panel's recommendation is influenced by a number of factors. First, and foremost, is the genuine remorse expressed by Respondent during the hearing, together with her unqualified acknowledgment of her wrongdoing. Second, is the fact that Respondent's career to date has been exemplary as evidenced by the letters of recommendation submitted on her behalf and her lack of a prior disciplinary record. Finally, the panel finds that the lack of restitution is a consequence of the Respondent's dire financial condition. Respondent has closed her law office and is currently operating from her home without a support staff. Clearly, Respondent's conduct in this case is one of those "isolated instances of misconduct" recognized by the Supreme Court in *Kramer, supra* that would lend itself to lenient treatment.

{¶18} The panel therefore recommends that Respondent be suspended from the practice of law two years and that one year of that suspension be stayed on the following conditions: (a)

that Respondent commits no further violations of the disciplinary rules; and (b) that Respondent not be readmitted to the practice of law until she has made full restitution to Hossam Abdelfattah in the amount of \$11,290.98.

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 7, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Eva Catherine Gildee, be suspended from the practice of law for two years with one year stayed on the following conditions contained in ¶18 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**