

ORIGINAL

IN THE SUPREME COURT OF OHIO

In Re:

Case 11-063

Complaint against

12-1003

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

Respondent

Cleveland Metropolitan Bar Association

Relator

RESPONDENT JAMES W. WESTFALL, JR.'S OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

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COUNSEL FOR RELATOR, CLEVELAND METROPOLITAN BAR ASSOCIATION

Respondent James W. Westfall hereby objects to the Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline for the reasons stated below.

Respondent respectfully submits that the majority of the allegations should have been submitted to, and finally resolved by, the Fee Arbitration Panel procedures adopted by Relator. Respondent respectfully submits that the remaining allegations and documents could have been addressed by stipulation but Relator refused to make good faith effort to stipulate.

BRIEF IN SUPPORT

Count 1 - McCafferty

Respondent objects to the finding, in Paragraph 6, that "Diana McCafferty and her husband Michael McCafferty executed a retainer agreement with Respondent for a Chapter 7 bankruptcy, filing for both husband and wife." Relator's Exhibit 11 is the written fee agreement entitled "Contract for Bankruptcy Services" which clearly shows that the agreement was only between Michael McCafferty and Westfall Legal Services (hereinafter referred to as "WLS"). Respondent objects to the finding of Paragraph 10 that he "withdrew from his representation of Diana without advising her...." The panel fails to report that Respondent testified that he had two telephone conversations with Diana's divorce attorney, Martin Baker, concerning Respondent's continued representation of Diana. In the first conversation with Baker, Respondent expressed his concern that Diana would not cooperate in filing a joint bankruptcy with Michael due to the hostile nature of the pending divorce proceedings. Baker assured Respondent that Diana would cooperate and Respondent indicated he would proceed with a joint bankruptcy filing.

The panel fails to report: that Diana would not provide any required information to

Respondent and his staff, refusing to even provide her telephone number and current address; and that Diana was belligerent, rude and profane in dealing with Respondent's staff.

The panel fails to report that Respondent then telephoned Attorney Baker to inform him that he could not continue to represent Diana due to her refusal to cooperate and to behave in a civil manner. The panel also fails to report that Attorney Baker, an experienced bankruptcy attorney, stated to Respondent that he would represent Diana in an individual bankruptcy filing; that he would "take care of it."

Diana breached the terms of representation by completely refusing to participate in the information gathering process, leaving Respondent with no choice but to withdraw. Diana's attorney was informed of this fact and stated he would advise and represent her in filing an individual bankruptcy. The parties' Judgment Certificate of Divorce (Relator's Exhibit 22) clearly expresses the parties' intention to file individual bankruptcies after the divorce was granted.

Respondent objects to the panel's finding that Diana was entitled to "a refund of her \$700.00 share of the money paid to him." The panel fails to report that Michael McCafferty was the only wage earner in the family and that his earnings were the source of the funds in the parties' joint account. The burden was on Relator to prove that the \$700.00, representing slightly more than half of the total amount paid to Respondent, was Diana McCafferty's property and Respondent failed to return said property. The fact that Diana McCafferty's name is on the account with Michael McCafferty is not proof that the funds were Diana's. Respondent contends that because the source of the funds in the account was Michael McCafferty's wages, the funds in the account belong to Michael McCafferty and Relator did nothing to prove otherwise. The burden to prove that the funds belonged to Diana McCafferty and Respondent knowingly failed

to return her property was on the Relator. As Respondent contended throughout the process, this was a fee dispute. The dispute being that Diana McCafferty paid any of the fees to Respondent.

Respondent objects to the panel's conclusions that he violated Prof. Cond. R 1.16(d) and Prof. Cond. R.1.16(e). Respondent gave due notice to Diana via her attorney (his only means of communication with her). Since Diana had not provided a single document to Respondent, there was none of Diana's property to deliver to her. There was a legitimate fee dispute as to whether or not "any portion" of the payments to Respondent belonged to Diana. Respondent filed an individual bankruptcy for Michael and there were no unearned fees to refund to Diana.

Respondent objects to the panel's conclusion that he violated Prof. Cond. R.1.9(a). Respondent had a duty to represent Michael, whose position was not in conflict with that of Diana. Diana's interests were not in jeopardy. She was represented by an experienced bankruptcy attorney, she planned to file a bankruptcy after the divorce, and she was also "judgment proof." Her Social Security payments are exempt from garnishment (42 U.S.C. §407). Pursuant to Federal Banking Regulations, any bank account in her name is exempt from attachment since her only source of funds is Social Security. She doesn't own any real estate so the filing of a judgment lien would have no effect on her. Being "judgment proof," Diana's interests could not be adversely affected by any creditor actions. Relator provided no proof that the testimony of Respondent was factually incorrect despite having the burden to prove otherwise. The Panel erred in finding that Respondent's testimony had "no merit" as there was no evidence provided otherwise.

Count II - Gresham

Respondent objects to the panel's finding at Paragraph 19 that "Respondent was the only

lawyer affiliated with WLS." The panel fails to report that: Attorney Hermine G. Eisen is affiliated with WLS as "of-counsel;" that Mrs. Eisen is carried on Respondent's malpractice insurance as an "employee;" and that Respondent has an on-going relationship with several other attorneys who are employed by Respondent on an as-needed basis to assist him in his practice. Again the burden falls onto Relator to prove that these facts are untrue and it failed to do so. Relator also failed to provide any evidence that there was confusion as to the size of the office or number of attorneys. During trial, the hearing panel refused to allow testimony or admit into evidence that other sole practitioners use the term "we", not as an attempt to mislead, but to refer to themselves and their staff.

Respondent objects to the panel's omission of the salient features of Respondent's retainer agreement where the "client's obligations" are specified, including the obligation "to provide accurately and honestly all the information necessary to prepare and file the bankruptcy." Respondent corresponded with the Greshams on March 26th, 2010 (Respondent Ex 24F), specifying documents that were to be provided. On June 18th, 2010 Respondent again requested the same documentation from the Greshams (Respondent's Ex 24G). On July 28th, 2010 Respondent wrote to the Greshams because they had failed to provide the twice requested information needed to process their case. (Relator's Ex. 29).

Respondent objects to the panel's failure to report in Paragraph 23 that the terms "open" and "closed" were the categories provide by the Respondent's bankruptcy software program. More recent versions of the software provide additional categories such as "inactive" which term more accurately describes the status of a case such as the Greshams where Respondent could not actively proceed due to their failure to provide all the information necessary to prepare and file

the bankruptcy.

Respondent objects to the panel's failure to report that when a case such as the Gresham's was categorized as "closed," it was Respondent's software shorthand for an "inactive" case where processing could not be completed even after several attempts to obtain necessary information. Respondent testified that he did not consider the representation to be terminated but merely in limbo, awaiting the provision of documents by the client. By continuing to provide documentation to WLS, the actions of the Greshams demonstrate that they were not under the impression that their case was terminated despite any testimony to the contrary. However, Respondent did acknowledge that there is a potential for confusion and modified his procedures and correspondence to eliminate that confusion.

Respondent objects to the panel's failure to report that every client is given the WLS Procedures and Processes pamphlet, which details all the documents and details that will be needed to complete the bankruptcy process.

Respondent objects to panel's finding at Paragraph 24 that no one informed the Greshams as to the deficiency. The Greshams were quite capable of determining what documents they still needed to provide, having been given reminders, pamphlets, checklists and detailed listings. The Greshams received correspondence from Respondent on March 24, 2010 detailing the information needed. The Greshams were verbally told on March 24, 2010 the information that was needed, and had conversations with WLS staff members on August 3, 2010, August 5, 2010 and September 6, 2010 advising them of the missing documentation. During none of these conversations did Respondent or his staff tell the Greshams that the representation was terminated.

Respondent objects to the panel's finding at Paragraph 25 that Respondent refused to talk to Mr. Gresham. Respondent and his staff corresponded/communicated with the Greshams. (Relators Exhibit 31) The Greshams never asked to speak to Respondent directly otherwise a telephone, or in-person, appointment would have been scheduled.

Respondent objects to the complaint that he has made no refund to the Greshams. In his original response to the grievance filed by the Greshams, Respondent proposed the refund of unearned fees of \$100.00 and \$299.00 in unspent costs. On the alternative, Respondent at that time proposed that the Greshams proceed with the bankruptcy after paying a nominal fee, as provided for in the retainer agreement, to re-review and update their case information. The Greshams never terminated Respondent's representation. If the panel and Relator propose that the filing of the grievance itself is grounds for termination, then the question to be asked is why did Attorney Phillips ask Respondent if he would be willing to continue representing the Greshams during Respondent's sworn statement?

Respondent objects to the panel's conclusion at Paragraph 30 in that there were several letters and instruction sheets given to the Greshams which kept them reasonably informed and complied with requests for information.

Respondent objects to the panel's conclusions in Paragraph 31. The Gresham case was in an "inactive" state due to their failure to provide documents in a timely manner. It was anticipated that the Greshams would finally comply with document requirements so that their bankruptcy case could be filed.

Count III - Pestyk

Respondent objects to the panel's finding of violations at Paragraph 42 and Paragraph 43.

As stated in Paragraph 41, Respondent offered from the onset a refund of \$499.00 which Pestyk refused to accept.

Count IV - Mosier

In regard to the Mosier grievance; Respondent objects in several respects: to the panel's findings and conclusions; and to the panel's failure to report salient, uncontroverted facts.

The Mosiers did not cooperate in providing the required information and documentation, as required by the retainer agreement (Relator's Exhibit 43) and the information packets given to them (Respondent's Exhibits 23b, and 23c). The Mosiers did not timely complete the WLS worksheets nor did they provide required documentation (Respondents Exhibits 23e and 23f; Relator's Exhibit 46). When the Mosiers failed to respond to that correspondence, Respondent followed up with another letter to the Mosiers (Respondent's Exhibit 23f) and scheduled a telephone appointment with the Mosiers to review their file. The Mosiers did not call for the scheduled telephone appointment and Respondent wrote them to reschedule the appointment (Respondents Exhibit 23g; Relators Exhibit 47). Respondent wrote to the Mosiers on February 4, 2010, and again on March 8, 2010, detailing the information and documentation needed, to which there was no response (Respondent's Exhibit 23h and 23i; Relator's Exhibit 48).

On March 23, 2010, Respondent wrote to the Mosiers advising that their case had been "deactivated" awaiting their submission of necessary information (Respondent's Exhibit 23j; Relator's Exhibit 49).

Respondent objects to the panel's finding that Respondent had "closed" the Mosiers case. There was ample, uncontroverted testimony throughout the hearing that Respondent used the internal terminology provided by his software package ("closed") to identify cases such as the

Mosiers where clients were not cooperating in providing information, as opposed to "active" cases where clients were cooperating with the process. Respondent did not consider the attorney-client relationship to be terminated. In fact, Respondent continued to communicate with both Reba & Charles Mosier and their son William Mosier. Respondent sent a letter to both Reba & Charles Mosier and William Mosier in May 2010 detailing the information that was still needed. Respondent was never informed that Reba Mosier suffered from Alzheimer's. William Mosier sent some, but not all, of the needed information.

William Mosier's wife had called the office on May 24, 2010, screaming and acting in a very rude manner. Jay Westfall testified that William Mosier called on May 25, 2010 and apologized for his wife's behavior, and expressed his appreciation for the work done on the case. Jay Westfall testified that he reviewed the documents and information with William Mosier on May 25, 2010 and told him what documents the Mosiers still needed to provide to complete the case.

Respondent objects to the finding at paragraphs 49 and 50 that Jay Westfall surreptitiously recorded his telephone conversation with William Mosier and that copies were not preserved. Jay Westfall testified that William Mosier called on July 1, 2010 and became extremely argumentative, insisting that Respondent should represent his parents in a pending foreclosure action. Jay testified that Mosier continued his tirade and "kept talking over him." Jay testified that he then told Mosier that he was going to tape record the conversation so that Respondent could hear how Mosier was behaving. Mosier voiced no objection to the recording and remained on the telephone. Mosier testified that he was not so advised. It would not be surprising if Mosier did not hear Jay what told him since Mosier did not stop talking and arguing

during the entire "conversation."

Respondent objects to the panel's failure to report the uncontroverted testimony that the WLS telephone system later completely "crashed." The system's computer motherboard (which contained all of the telephone programming, data, and recordings) was "fried" and a new system was installed. All data and programming from the old system was irretrievably lost.

Respondent objects to the findings at paragraphs 50 and 51 that "it was apparent that the attorney-client relationships had ended." The only thing that was apparent was that Reba Mosier (with the "help" of her argumentative son) was not cooperating in providing necessary information.

Respondent objects to the findings at paragraphs 52 and 53. The panel fails to report that both Jay Westfall and Melissa Westfall testified that the standard office procedure is to advise all clients that conversations are being recorded. The panel fails to report that both Jay Westfall and Melissa Westfall testified that Respondent had instructed them, that in the event a client was being uncooperative/argumentative/hostile, the client should be advised that the conversation was going to be recorded. Melissa Westfall testified that the sole reason for recording the conversations was for Respondent to hear conversations with belligerent clients so that he was apprised of the situation.

Respondent also objects to paragraph 52 due to the issuance of Opinion 2012-1. This opinion states that the surreptitious recording of a client is not a violation per se. There was no evidence provided by Relator that the recording involved the extenuating circumstances mentioned in the advisory opinion. As the recording itself is not a violation, it follows logically that the alleged failure to supervise an employee making the recording is also not a violation.

Respondent further objects to the finding that Jay Westfall's testimony was not credible "primarily because William Mosier denied this and there was no preserved records to support Jay Westfall's testimony." The panel fails to report that William Mosier was talking over Jay during the entire conversation and that the WLS telephone system had crashed, causing the loss of all data, including the recorded telephone conversation with Mosier. Respondent testified that he provided to Relator the notes from that conversation and that he wished he still had the recording, which would have established the belligerent, hostile nature of Mosier's call.

Count VI - Failure to pay Withheld Taxes

Respondent objects to the findings at paragraphs 67 through 71. The findings that the subject taxes were "withheld" falsely suggests that Respondent took money from his employees for selfish motives. The panel fails to report that, due to the poor economic conditions of the subject times, Respondent was barely able to "make payroll" and fell behind in paying the "941" payroll taxes. The panel fails to report that Respondent's accountant testified that he has a number of small business clients who have fallen behind in the payment of the 941 taxes, which he considered a "bad business decision."

The panel fails to report that Respondent met with Internal Revenue Service (IRS) agents, well before any disciplinary action was even at issue, in an attempt to reach a payment agreement. The panel fails to report that Respondent had enlisted the services of his accountant to reach an agreement with the IRS. The panel fails to report that Respondent testified that he has laid off staff, closed an unproductive office, and has not received a salary in over two years, in order to remain in business.

Respondent objects to the findings at paragraph 71 that failure to pay the 941 taxes is a

per se violation. That finding is not supported by the facts of this case nor by the case law cited by the panel.

In the case of Northwest Ohio Bar Association vs. Archer, 129 Ohio St.3d 204, Attorney Archer failed to file the appropriate forms for three years, had received a prior public reprimand, had allowed his malpractice insurance to lapse, and caused financial harm to his secretary by his failure to pay taxes resulting in a denial of unemployment benefits. In contrast to that Archer case, Respondent here has filed the requisite returns, on an ongoing basis, has never been disciplined, maintained his malpractice insurance, and no one has been adversely affected except Respondent, who is personally liable for the unpaid taxes. Respondent currently has two employees, Patricia O'Keefe and his daughter, Melissa Westfall, laid off for lack of work and are both receiving unemployment benefits.

In the case of Geauga County Bar Association v. Bruner, 98 Ohio St. 3d, 312, Attorney Bruner had failed to file any of the required payroll reports for ten years, provided false W-2 forms to his secretary, failed to appreciate the gravity of his conduct, and purchased luxury items for his personal use during the same time periods. In contrast to the Bruner case, Respondent here has been filing the requisite payroll returns on an on-going basis for over twenty years and providing accurate and complete forms to his employees. Respondent here appreciated the gravity of the situation as demonstrated by his meetings with IRS agents with a goal of reaching payment arrangement, and his retention of his accountant to assist in that endeavor.

Count VII - False Information to Investigators; Failure to Cooperate

Respondent objects to the findings in paragraphs 74 through 76 as not being supported by the record. Respondent testified that his record keeping relating to the tax issue was not very

organized and that he either discarded or misplaced some of the requested documents.

Respondent did locate some of the requested documents and produced all of the documents that were in his possession via his attorney. Respondent's attorney informed Relator on several occasions that Respondent had submitted all documents that were in his possession. Relator acknowledged receipt of said records, requested supplementation, and one week after such request subpoenaed Respondent's accountant. Respondent's accountant promptly provided the requested documents and even met with Relator's investigator to provide further explanation. There is no support in the record for finding that "the production was incomplete and without explanation."

AGGRAVATION AND MITIGATION

Respondent objects to the findings of aggravating factors in paragraph 79. There is no evidence that Respondent acted as a result of selfish motives. Respondent testified that he has not received a salary in two years and there was no evidence that either the fees or the withheld taxes were converted to Respondent's personal use.

The only "pattern of conduct" is that four different clients failed to cooperate with Respondent in the preparation of their bankruptcy case, causing what amounted to legitimate fee disputes.

These fee disputes could have, and should have, been referred to the Fee Arbitration Panel of the Relator Cleveland Metropolitan Bar Association. The Fee Arbitration Panel is a binding alternative dispute resolution procedure designed for such purposes.

Respondent had, from the onset, proposed to refund to Pestyk, Mosier, and the Greshams the exact same amounts that the panel found to be due. Respondent had offered to file the

Greshams' Bankruptcy if they would merely cooperate in providing missing information and pay the additional fees needed to re-order their credit counseling (it had expired). There was, and still is a legitimate issue as to whether or not Mrs. McCafferty is due any refund. Mr. McCafferty's income was the source of the fees paid from a joint bank account. Mr. McCafferty's bankruptcy petition was filed by Respondent. Respondent fulfilled his duty to Mr. McCafferty. Mrs. McCafferty's complete lack of cooperation prevented Respondent from filing on her behalf.

All of these fee disputes could have been quickly and finally determined in a matter of a few months, at minimal cost, via the existing fee arbitration procedures. Respondent had sought guidance from Relator's attorney/investigator, Gregory Phillips, as to an amicable, expeditious resolution of these disputes. The only response from Phillips was the filing of the instant complaint almost a year after the first grievances were filed. Instead of working to resolve the grievances, Phillips attempted to bury Respondent in paperwork by filing a complaint of twenty violations, some of which were dismissed by the panel. Some of these alleged violations were pursued despite Respondent providing evidence that there were no violations. The clearest example of this was the proof provided that Respondent maintained several offices which Relator ignored.

Respondent objects to the finding at paragraph 79 that Respondent showed "some lack of cooperation during the disciplinary process...." Respondent: filed timely responses to the grievances; provided Relator with his complete files, including all work product and internal notes; and attended two depositions of himself and the depositions of four of his staff members. Respondent could not produce some of the documents requested by Relator due to the fact that

he had either not retained the records or could not locate them. Respondent's accountant provided all of the requested documents and also met privately with Phillips.

Respondent objects to the finding at paragraph 79 that Respondent refused to "acknowledge the wrongful nature of his conduct." Respondent does not believe that mounting a vigorous defense against the allegations should be an aggravating factor in these proceedings. Respondent testified that he was willing to resolve the issues of refunding the fees from the time of the initial grievances filed by his clients.

Respondent objects to the finding at paragraph 79 that there was a "failure to make restitution". Again, Respondent proposed restitution in his initial responses, in the depositions and in trial. The panel found that the restitution Respondent proposed to Pestyk, Gresham and Mosier was properly calculated. Respondent was expecting the Relator to facilitate restitution through either Fee Arbitration or direct settlement. However, the proceedings went directly from deposition to litigation without any attempt of Relator to work with Respondent. Respondent had no contact from Relator between the time of deposition until the Notice of Complaint was issued.

RECOMMENDED SANCTION

Respondent objects to paragraphs 85 through 88. As previously indicated, the facts in both the Archer and Bruner case are substantially different than the facts in the instant case. Furthermore, Respondent objects to the panel's failure to find that the uncontroverted evidence demonstrated: that Respondent Westfall had not drawn a salary for over two years since he first fell behind on payment of the 941 taxes; the returns were filed with the IRS; and that Respondent was current in making his 941 tax payments on an on-going basis while attempting to resolve the arrearages with the IRS.

Respondent objects to the recommendation of the panel at paragraph 90 that he be suspended from the practice of law for two years for the reason that such sanction is much too harsh when all of the facts of the case are considered. Respondent objects to the condition of a six month stay requiring entering a payment agreement with the IRS at the same time that he would be suspended from law practice. How can Respondent enter a good faith payment agreement when his ability to practice law is suspended?

Respondent further objects to the panel's finding that he pay the costs of these proceedings, which are exorbitant considering the facts, for the reasons; that many of the alleged violations were dismissed; that fee arbitration/alternative dispute resolution procedures could have been utilized to expeditiously, economically and finally resolve the fee dispute issues; that due to overzealous prosecution of the allegations, Relator made no effort to even attempt an amicable resolution; and that Relator refused to consider any stipulations of the facts, prior to trial, insisting that Respondent "plead to the indictment" by stipulating to all of the allegations of the complaint (many of which were dismissed). Relator made only a superficial attempt to investigate these claims thoroughly as evidenced by the fact that he did not interview three members of Respondent's staff until November of 2011 (just six weeks before trial) despite the fact that the actions of the staff were being alleged to be a violation.

Respondent further objects to the Recommendation of the Board for the reasons stated above.

Respondent respectfully submits: that he be publicly reprimanded for his failure to pay 941 taxes; that he make restitution to Pestyk, Mosier, and the Greshams in the recommended amounts; and that he continue to use his best efforts to enter an agreement for payment of the 941

taxes (for which he readily acknowledged responsibility); and that he attend CLE courses on the subject of law office management.

Respectfully submitted,



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CERTIFICATE OF SERVICE

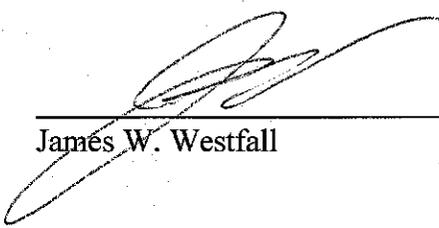
The undersigned hereby certifies that the foregoing was served this 7th day of July, 2012,

upon:

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