

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

12-1693

In re:	:	
Complaint against	:	Case No. 12-029
Kenneth Jeff Freeman Attorney Reg. No. 0018940	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Cleveland Metropolitan Bar Association	:	
Relator	:	

FILED
OCT 08 2012
CLERK OF COURT SUPREME COURT OF OHIO

MOTION FOR DEFAULT JUDGMENT

{¶1} This matter was referred to Master Commissioner Judge W. Scott Gwin on September 7, 2012 by the secretary of the Board pursuant to Gov. Bar R. V, Section 6(F)(2) for ruling on Relator's motion for default judgment. Master Commissioner Gwin then proceeded to prepare a report pursuant to Gov. Bar R. V, Section 6(J).¹ Based on the evidence presented, the master commissioner recommends that Respondent be permanently disbarred from the practice of law in Ohio.

{¶2} Respondent was admitted to the practice of law in Ohio on November 6, 1981.

{¶3} On April 24, 2002, Respondent was publicly reprimanded. The adjudged misconduct consisted of neglect of a client's bankruptcy case, handling an adversarial proceeding in another client's bankruptcy case without adequate preparation, and initially failing

¹ The formal complaint in this matter was certified prior to August 1, 2012, thus the provisions of former Gov. Bar R. V, Section 6 are applicable to this proceeding. See Gov. Bar R. XX, Section 2(LLLL).

to cooperate in the resulting disciplinary investigation. *Cleveland Bar Assn. v. Freeman*, 95 Ohio St.3d 117, 2002-Ohio-1944.

{¶4} On March 31, 2011, Respondent received a one-year suspension from the practice of law in Ohio for adjudged misconduct which consisted of neglect in representing a client in a foreclosure action, proceeding in representing the client without adequate preparation, and failing to effectively communicate with the client. In addition, the misconduct included neglect in representing another client in a bankruptcy filing, proceeding in representing the client without adequate preparation, and failing to communicate effectively with the client.

Respondent's disciplinary sanction was stayed on the condition that Respondent complete at least 12 hours of CLE in law-office management, in addition to the CLE requirement of Gov. Bar R. X, submit proof that he completed at least six hours of that CLE within the first six months of his stayed suspension, and commit no further misconduct. If Respondent failed to comply with the conditions, he would be notified that the stay would be lifted and Respondent would be ordered to serve the entire one-year suspension. *Cleveland Metro. Bar Assn. v. Freeman*, 128 Ohio St.3d 416, 2011-Ohio-1447.

{¶5} On July 28, 2011, Disciplinary Counsel received a notice from Respondent's bank that his IOLTA account had become overdrawn. A review of the account statement indicated that approximately three months after Respondent was suspended from the practice of law, he overdrew his IOLTA account by making two separate CredAbility payments. CredAbility is a nonprofit organization that provides various financial services and advice. Due to Respondent's prior disciplinary history, including his stayed suspension, the matter was referred to Relator on August 8, 2011 for further investigation.

{¶6} Relator's investigation began with a certified letter to Respondent on August 10, 2011, requesting a written response to the overdraft notice by August 24, 2011. Respondent sent a fax to Relator, requesting an extension to respond until September 23, 2011. Respondent's request was granted. When Respondent failed to respond or otherwise contact Relator, he was contacted by telephone on October 3, 2011. Relator was told that the Respondent was unavailable but that he would return the call. Respondent never returned the call or otherwise contacted Relator.

{¶7} A second letter was sent to Respondent by fax on October 17, 2011, providing an opportunity for Respondent to address his overdrawn IOLTA account. Respondent failed to respond. Weiser Affidavit. Relator then left Respondent a detailed message on February 1, 2012, providing Respondent with another opportunity to otherwise explain the circumstances surrounding his overdrawn IOLTA account. Respondent has failed to respond or otherwise contact the Relator. *Id.*

{¶8} With regard to the Lewis grievance detailed in Count I, Respondent was notified of Mr. Lewis' grievance on May 4, 2011, by certified letter and was given until May 18, 2011, to provide a written response. Zirke Affidavit. Respondent requested an extension to respond to the grievance until June 16, 2011, due to several litigation matters in which he was involved. Respondent's request was granted. On June 16, 2011, Respondent requested another extension, claiming to have been out sick all week and requesting until July 5, 2011 to provide a response. *Id.* Respondent's request for an extension was once again granted. When Respondent failed to provide a response or otherwise contact Relator, a voicemail message was left for Respondent on July 6, 2011. Respondent never responded or otherwise contacted Relator to request additional time. *Id.*

{¶9} On July 20, 2011, Relator sent Respondent a certified letter, providing another opportunity to respond to the grievance. Weiser Affidavit. On August 6, 2011, Respondent confirmed that he had met with Lewis in January 2010, and that he never filed a voluntary petition for bankruptcy on behalf of Lewis. Respondent also confirmed that he received a fax from Lewis regarding the Chase lawsuit on August 6, 2010 and that he waited until August 17, 2010 to obtain a copy of the complaint from the court. Respondent provided no response to the January 2011 proceedings or the fee garnishment. *Id.* In total, Lewis paid Respondent a sum of \$3002. None of these funds have been returned or refunded. Lewis Affidavit.

{¶10} With regard to the Wilder grievance detailed in Count II, Respondent was notified of the grievance by certified letter on September 8, 2011. Zirke Affidavit. When no response was received, a second letter was sent to Respondent on September 16, 2011, requesting contact no later than October 3, 2011, to schedule a telephone interview. Respondent failed to respond or otherwise make contact with Relator. Weiser Affidavit.

{¶11} Relator contacted Respondent by telephone on October 3, 2011. While Respondent was in the office, Respondent's secretary told Relator that Respondent was unavailable and that he would return the call. Respondent never did. *Id.*

{¶12} A third letter was sent by fax on October 17, 2011, providing Respondent with additional time to submit a written response, he never did. *Id.*

{¶13} On February 1, 2012, Relator left Respondent a detailed message, granting until February 3, 2012, to respond or otherwise make contact. *Id.* Relator requested that Respondent, at least, respond to the status of Wilder's funds. No response was received. *Id.*

{¶14} Based on the investigation detailed above, Respondent was notified on February 14, 2012, that Relator had found probable cause to believe Respondent's conduct amounted to

violations of the Rules of Professional Conduct. Zirke Affidavit. Respondent was sent a notice of intent to file a formal complaint with the Board on March 16, 2012, along with a draft copy of the complaint and a request for a written response by March 26, 2012. When no response was received, Relator instituted the current disciplinary action. *Id.*

{¶15} On April 13, 2012, a probable cause panel certified the complaint to the Board. Respondent was notified by letter on April 16, 2012, was served with a copy of the complaint by certified mail on April 23, 2012, and was directed to file an answer. *Id.* When Respondent failed to reply, Relator sent a May 25, 2012, letter informing Respondent that he was in default and providing two weeks for Respondent to file a late answer or otherwise respond to the complaint. Respondent never provided a response. *Id.*

{¶16} Prima facie documentary evidence in support of the allegations made regarding the misconduct of Respondent is set forth in the following:

- *Cleveland Bar Assn. v. Freeman*, 95 Ohio St.3d 117, 2002-Ohio-1944; *Cleveland Metro. Bar Assn. v. Freeman*, 128 Ohio St.3d 416, 2011-Ohio-1447.
- Affidavit of Heather Zirke, Esq., Assistant Counsel, Cleveland Metropolitan Bar Assoc.
- Notice of overdraft from Charter One Bank on Respondent's IOLTA account.
- Certified letter on August 10, 2011, requesting the reason for the IOLTA overdraft and requesting additional documentation; Respondent's facsimile letter sent to Relator on August 24, 2011, requesting an extension to respond to the August 10, 2011 letter.
- Joel K. Lewis' grievance against Respondent with Relator on April 27, 2011, with supporting documentation.
- Letter from Respondent to Rachel May Weiser, Esq. with supporting documentation regarding Respondent's representation of Lewis.

- Respondent was notified of the grievance filed by Lewis on May 4, 2011, by certified letter and was given until May 18, 2011, to provide a written response.
- Respondent contacted Relator on May 18, 2011, and requested an extension until June 16, 2011, due to several litigation matters in which he was involved. Respondent's request was granted.
- Respondent contacted Relator on June 16, 2011, requesting another extension, claiming to have been out sick all week and requesting until July 5, 2011, to provide a response. Respondent's request was granted.
- Jamere Wilder grievance with Relator in September 2011 with supporting documentation.
- Respondent was notified on February 14, 2012 that Relator had found probable cause to believe Respondent's conduct amounted to violations of the Rules of Professional Conduct.
- Notice of intent to file a formal complaint with the Board mailed to Respondent on March 16, 2012, along with a draft copy of the complaint.
- Respondent was further notified by letter dated May 25, 2012, of Relator's intent to file a motion for default.
- Notice to Relator by David O. Simon, the trustee of Wilder's bankruptcy case pending in the United States Bankruptcy Court for the Northern District of Ohio, Case No.: 11-13230, that Wilder failed to disclose the funds maintained in Respondent's IOLTA account, in an amount of not less than \$14,894.23. The trustee obtained a default judgment against Respondent on June 6, 2012, in the amount of \$14,894.23 and recommends that any amount awarded to Wilder from the Clients' Security Fund, as a result of Respondent's alleged misdeeds, become the property of her bankruptcy estate pursuant to the provisions of Section 541 of the Bankruptcy Code and properly payable to her trustee pursuant to the provisions of Section 542 of the Bankruptcy Code.
- Affidavit of Rachel Weiser, Esq., Investigator for the Cleveland Metropolitan Bar Association.
- Notice of overdraft from Charter One Bank on Respondent's IOLTA account.
- October 17, 2011 letter from Attorney Weiser to Respondent. Second request for information regarding the Jamere Wilder grievance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Count I-Joel K. Lewis Matter

{¶17} On January 19, 2010, Joel K. Lewis retained Respondent to file a personal bankruptcy and to obtain discharge from Lewis' financial obligations. Lewis paid Respondent a total of \$2,177 for attorney fees and filing fees associated with a Chapter 7 bankruptcy action.

{¶18} Respondent never filed a voluntary petition for a Chapter 7 bankruptcy on behalf of Respondent, nor did Respondent return Lewis' attorney fees or filing fees.

{¶19} Beginning in February 2010, Respondent failed to return Lewis' phone calls, emails and faxes, or to keep him apprised of the status of his case. Lewis contacted Respondent requesting the return of his attorney and filing fees. Respondent failed to respond. Lewis terminated his relationship with Respondent on April 4, 2011, and hired a new law firm, which filed a Chapter 13 bankruptcy on his behalf.

{¶20} Lewis also retained Respondent to handle an action filed against him by Chase Bank USA. The action was captioned *Chase Bank USA, N.A. vs. Joel K. Lewis*, designated case number CV-10-729418, assigned to Judge Nancy A. Fuerst. Lewis paid Respondent a total of \$825 to represent him in this action.

{¶21} Based on Respondent's own admission, he was aware of the lawsuit on or before August 6, 2010; however, he failed to obtain a copy of the complaint until August 17, 2010, at which point Respondent discovered that a motion for default judgment had been filed against Lewis.

{¶22} Respondent failed to file a motion for leave to file an answer to the Chase complaint until August 19, 2010, a full two weeks after being told about the case, knowing the answer was due July 25, 2010. Respondent's motion was granted and a consent order was

entered in October 2011. The order stated that execution upon the judgment would be stayed for 60 days.

{¶23} Respondent failed to respond to Lewis' emails or phone calls inquiring about the status of the action.

{¶24} In January 2011, Lewis received a notice of court proceedings to collect upon the Chase Bank USA Debt, which he forwarded to Respondent.

{¶25} Respondent provided no response to the January 2011, notice of court proceedings to collect debt, leading Lewis' wages to become subject to garnishment.

{¶26} Lewis hired another law firm to address the wage garnishment. Lewis contacted Respondent, requesting that he return his fees. Respondent never responded or returned any of Lewis' fees.

{¶27} Lewis filed a grievance with Relator on April 27, 2011.

{¶28} None of Lewis' funds have been returned or refunded.

{¶29} Respondent's conduct with regard to Count I violated the following: Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4(a)(2) [reasonably consult with the client about the means by which the client's objectives are to be accomplished]; Prof. Cond. R. 1.4(a)(3) [requiring a lawyer to keep the client reasonably informed about the status of a matter]; Prof. Cond. R. 1.4(a)(4) [requiring a lawyer to comply as soon as practicable with reasonable requests for information from the client]; Prof. Cond. R. 1.16(e) [requiring a prompt refund of unearned fees at the termination of the representation]; and Prof. Cond. R. 8.1(b) and Gov. Bar R. V, Section 4(G) [requiring cooperation in an investigation].

Count II-Jamere Wilder Matter

{¶30} Jamere Wilder retained Respondent on May 27, 2010, to file an emergency Chapter 13 bankruptcy.

{¶31} When Wilder was unable to make her payments, her Chapter 13 plan was dismissed in August 2010.

{¶32} Wilder then retained Respondent to file another Chapter 13 bankruptcy on August 26, 2010, paying Respondent \$1,200. Wilder's plan was once again dismissed on December 17, 2010, for failure to make payments in October and November 2010.

{¶33} Wilder retained Respondent a third time to file a Chapter 13 bankruptcy on her behalf. In January 2011, Wilder gave Respondent the missing payments from October and November 2010, along with a payment for January to April 2011. The total amount provided to Respondent was \$16,393.23. Instead of filing for Chapter 13 bankruptcy, Respondent filed for Chapter 7. Respondent deducted the \$1,200 fee and \$426 in filing fees from Wilder's balance, leaving a balance of \$14,767.23.

{¶34} Respondent agreed to contact an attorney for HSBC Mortgage to request a loan modification and to reduce interest and payments for Wilder. Respondent never did.

{¶35} Respondent consistently failed to return Wilder's phone calls until August 2011, at which point Wilder terminated Respondent's representation. Wilder requested the balance of her money be returned; however, Wilder never received her money nor has she heard from Respondent. Respondent has retained over \$14,000 of Wilder's money.

{¶36} Wilder filed a police report with the First District in Cleveland (#11-356783) against Respondent. She also filled out an application for reimbursement with the Clients' Security Fund of the Supreme Court of Ohio.

{¶37} Respondent's conduct with regard to Count II violated the following: Prof. Cond. R. 1.4(a)(2); Prof. Cond. R. 1.4(a)(3); Prof. Cond. R. 1.4(a)(4); Prof. Cond. R. 1.16(d); Prof. Cond. R. 8.1(b); Prof. Cond. R. 8.4(b) [illegal conduct that reflects on the lawyer's honesty or trustworthiness]; and Gov. Bar R. V, Section 4(G).

Count III-Violation of Disciplinary Rules related to Overdraft of IOLTA Account

{¶38} On July 28, 2011, Disciplinary Counsel received a notice from Respondent's bank that his IOLTA account had become overdrawn. A review of the account statement indicated that approximately three months after Respondent was suspended from the practice of law, he overdrew his IOLTA account by making two separate CredAbility payments. CredAbility is a nonprofit organization that provides various financial services and advice. Due to Respondent's prior disciplinary history, including his stayed suspension, the matter was referred to Relator on August 8, 2011, for further investigation.

{¶39} Relator's investigation began with a certified letter to Respondent on August 10, 2011, requesting a written response to the overdraft notice by August 24, 2011. Respondent sent a fax to Relator, requesting an extension to respond until September 23, 2011. Respondent's request was granted. When Respondent failed to respond or otherwise contact Relator, he was contacted by telephone on October 3, 2011. Relator was told that Respondent was unavailable but that he would return the call, Respondent never returned the call or otherwise contacted Relator.

{¶40} A second letter was sent to Respondent by fax on October 17, 2011, providing an opportunity for Respondent to address his overdrawn IOLTA account. Respondent failed to respond. Relator then left Respondent a detailed message on February 1, 2012, providing Respondent with another opportunity to respond or otherwise explain the circumstances

surrounding his overdrawn IOLTA account. Respondent has failed to respond or otherwise contact Relator.

{¶41} Respondent's conduct with regard to Count III violated the following: Prof. Cond. R. 1.15(a) [governing the safekeeping of client funds and property]; Prof. Cond. R. 8.4(h) [conduct that adversely reflects on a lawyer's fitness to practice law]; Prof. Cond. R. 8.1(b); and Gov. Bar R. V, Section 4(G).

MITIGATION, AGGRAVATION, AND SANCTION

{¶42} None of the mitigating factors found under BCGD Proc. Reg. 10(B)(2) is applicable.

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

{¶44} Seven of the nine aggravating factors set forth in BCGD Proc. Reg. 10(B)(1) are present here: prior disciplinary offense; pattern of misconduct; multiple offenses; lack of cooperation in the disciplinary process; refusal to acknowledge the wrongful nature of conduct; vulnerability of and resulting harm to victim; and failure to make restitution.

{¶45} On April 24, 2002, Respondent was publicly reprimanded. The adjudged misconduct consisted of neglect of a client's bankruptcy case, handling an adversarial proceeding in another client's bankruptcy case without adequate preparation, and initially failing to cooperate in the resulting disciplinary investigation. *Cleveland Bar Assn. v. Freeman*, 95 Ohio St.3d 117, 2002-Ohio-1944.

{¶46} On March 31, 2011, Respondent received a one-year suspension from the practice of law in Ohio for adjudged misconduct which consisted of neglect in representing a client in a foreclosure action, proceeding in representing the client without adequate preparation, and failing to effectively communicate with the client. In addition, the misconduct included neglect in representing another client in a bankruptcy filing, proceeding in representing the client without adequate preparation, and failing to communicate effectively with the client. Respondent's disciplinary sanction was stayed on conditions. *Cleveland Metro Bar Assn. v. Freeman*, 128 Ohio St.3d 416, 2011-Ohio-1447.

{¶47} Relator recommends that Respondent be permanently disbarred from the practice of law.

{¶48} The master commissioner concurs with the recommendation of Relator and recommends a sanction of permanent disbarment. Based on Respondent's persistent breach of his duty to clients, the public, and the legal profession, coupled with the aggravating effect of his disciplinary record, permanent disbarment is the only appropriate sanction. See *Columbus Bar Assn. v. Moushey*, 104 Ohio St.3d 427, 2004- Ohio-6897 [accepting legal fees and then failing to carry out contracts for employment is theft of client funds and cause for disbarment when coupled with neglect, a history of misconduct, and other disciplinary infractions]; *Medina Cty. Bar Assn. v. Wootton*, 110 Ohio St.3d 179, 2006-Ohio-4094 [attorney disbarred for repeated theft of client funds, dishonesty, financial harm to clients, and failure to cooperate].

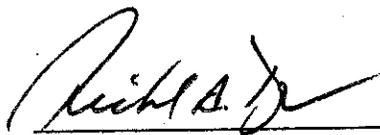
{¶49} The presumptive disciplinary sanction for a pattern of misconduct involving dishonesty, misappropriation, and lack of cooperation in disciplinary proceedings is disbarment. *Disciplinary Counsel v. Jones*, 112 Ohio St.3d 46, 2006-Ohio-6367. See also *Lorain Cty. Bar Assn. v. Fernandez*, 99 Ohio St.3d 426, 2003-Ohio-4078, [the presumptive sanction for

misappropriation of client funds is disbarment]; *Cincinnati Bar Assn. v. Weaver*, 102 Ohio St.3d 264, 2004-Ohio-2683 [an attorney's persistent neglect of his clients' interests, failure to perform as promised, failures to account for his clients' money, and lack of any participation in the disciplinary proceedings warrants disbarment]; *Cincinnati Bar Assn. v. Komarek*, 84 Ohio St.3d 90, 1998-Ohio-312; *Cleveland Bar Assn. v. Glatki*, 88 Ohio St.3d 381, 2000-Ohio-354; and *Disciplinary Counsel v. Lord*, 114 Ohio St.3d 466, 2007-Ohio-4260. That sanction is appropriate here.

BOARD RECOMMENDATION

Pursuant to Gov. Bar Rule V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on October 5, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the Master Commissioner and recommends that Respondent, Kenneth Jeff Freeman, be permanently disbarred from the practice of law in Ohio. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.



RICHARD A. DOVE, Secretary