

ORIGINAL

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

In re: : 12-1713

Complaint against : Case No. 11-104

Dale Elmer Bricker : Findings of Fact,
Attorney Reg. No. 0004922 : Conclusions of Law and
Respondent : Recommendation of the
Disciplinary Counsel : Board of Commissioners on
Relator : Grievances and Discipline of
the Supreme Court of Ohio

FILED
OCT 09 2012
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} This matter was heard on June 5, 2012 in Toledo, Ohio, before a panel consisting of members Patrick Sink, William Novak and Judge Arlene Singer, chair. None of the panel members resides in the district from which the complaint neither arose nor served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1). John B. Juhasz represented Respondent and Philip A. King represented Relator.

{¶2} Respondent was admitted to the practice of law in Ohio in May 1961 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. The Supreme Court of Ohio suspended Respondent's license to practice law on December 3, 2007, for failure to pay his attorney registration fee. However, Respondent was reinstated four days later on December 7, 2007.

{¶3} Relator charged Respondent with violating Prof. Cond. R. 1.5(c)(2), Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), Prof. Cond. R. 1.15(a)(5), and Prof. Cond. R. 8.4(h).

{¶4} The parties have submitted stipulations to certain facts and violations of Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), and Prof. Cond. R. 1.15(a)(5) as alleged in the complaint. For the reasons set forth below, the panel recommends that Respondent be publicly reprimanded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} The panel accepts the stipulations of fact submitted by the parties. Based on these stipulations and the testimony adduced at the hearing, the panel finds by clear and convincing evidence the following facts.

{¶6} Respondent is a self-employed solo practitioner and has been from approximately 1995. Prior to that, from 1961 until he became a solo practitioner, Respondent was in house counsel for the Edward J. DeBartolo Corporation. Respondent's practice is primarily in the area of commercial and residential landlord/tenant litigation, real estate, general civil and collection work. Respondent occasionally handles personal injury cases, representing plaintiffs. Respondent has maintained an IOLTA account at PNC since August 25, 2010. Previous to that, Respondent did not have an IOLTA account, but had kept client funds in a checking account titled "Trust account" at Farmer's National Bank, in which Respondent kept both client funds and personal funds. However, Respondent closed that account in 2009. Since February 2007, Respondent has maintained his law office business account at Farmers National Bank, has had a savings account at Huntington Bank, and has had no personal checking account.

Collection Cases

{¶7} Since Respondent opened the IOLTA account, Respondent has deposited funds he had collected from debtors on behalf of his clients for his collection type cases in that account. For these collection cases, Respondent executes letters of representation indicating a fee of one-

third collected. No closing statements were executed by his clients when Respondent disbursed the funds from the debtors. Most recently, Respondent sends the entire amounts he has collected on behalf of his clients to the client, who then sends him a fee for his work. Respondent's collection cases at the present time are almost exclusively on behalf of the Ohio Attorney General. Respondent sends the entire monies collected to the attorney general, and Respondent is then sent his fee later.

Personal Injury Case

{¶18} In 2011, Respondent represented Gary Manchester in a personal injury case for one-third contingent fee. Respondent settled the case for \$7,158, but when Respondent disbursed the settlement, Respondent did not present a closing statement to his client.

{¶19} Respondent did, however, send a letter to Manchester with a check from Respondent's IOLTA explaining the disbursements and distribution of the settlement check. Similar letters were sent to his collection clients. However, Respondent did not require or obtain a signature from his clients.

IOLTA

{¶10} During 2010 and 2011, Respondent kept earned contingent fees in his IOLTA beyond the time permitted in Prof. Cond. R. 1.15(b). Relator did not charge Respondent with violating Prof. Cond. R. 1.15(b).

{¶11} On September 7, 2010, less than two weeks after Respondent opened the account, Respondent wrote a check for a personal expense for \$30 from his IOLTA. Respondent continued to withdraw funds from his IOLTA for personal expenses from that time until August 2011. During that period of time, Relator began an investigation of this matter. On December 17, 2010, Respondent wrote a letter to Relator explaining his IOLTA overdrafts. Respondent

promised to use this account only for client funds. Despite his promise, Respondent continued to withdraw funds for his personal expenses.

{¶12} Prior to August 2011, Respondent did not maintain ledgers of his clients' funds in his IOLTA account and did not, as required, reconcile his IOLTA account, as there were no ledgers to reconcile with the account.

{¶13} In August 2011, Relator deposed Respondent. In preparation for the deposition, Respondent thoroughly read the rules, particularly, Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), and Prof. Cond. R. 1.15(a)(5). During the deposition, Respondent and Relator discussed the proper use of an IOLTA account. Respondent claims that this was the first time Respondent understood what is required under the rules. Respondent changed his office procedures accordingly.

{¶14} The parties have stipulated and the panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), and Prof. Cond. R. 1.15(a)(5).

{¶15} The panel finds that Relator has not presented clear and convincing evidence that Respondent violated Prof. Cond. R. 8.4(h) and dismisses this violation.

{¶16} As to Prof. Cond. R. 1.5(c)(2), it is the opinion of one panel member that this rule applies only to tort cases. This opinion is based on the reference to R.C. 4705.15 in the Comparison to Former Code of Responsibility and Comparison to ABA Model Rules of Professional Conduct cited after the rule.

{¶17} R.C. 4705.15(B) and (C) read as follows:

(B) If an attorney and a client contract for the provision of legal services in connection with a claim that is or may become the basis of a tort action and if the contract includes a contingent fee agreement, that agreement

shall be reduced to writing and signed by the attorney and the client. The attorney shall provide a copy of the signed writing to the client.

(C) If an attorney represents a client in connection with a claim as described in division (B) of this section, if their contract for the provision of legal services includes a contingent fee agreement, and if the attorney becomes entitled to compensation under that agreement, the attorney shall prepare a signed closing statement and shall provide the client with that statement at the time of or prior to the receipt of compensation under that agreement. The closing statement shall specify the manner in which the compensation of the attorney was determined under that agreement, any costs and expenses deducted by the attorney from the judgment or settlement involved, any proposed division of the attorney's fees, costs, and expenses with referring or associated counsel, and any other information that the attorney considers appropriate.

{¶18} At the hearing, Respondent's testimony included references to the impracticality of applying this rule to collection cases.

{¶19} In addition to R.C. 4705.15, Ethical Considerations 2-18 and 2-19 contained in the Ohio Code of Professional Responsibility, superseded on February 1, 2007 by the Rules of Professional Conduct, address contingent fees.

{¶20} EC 2-18 reads, in part, as follows:

As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made... It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent * * *

{¶21} EC 2-19 reads as follows:

Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil

case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same considerations as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee.

{¶22} Finally, the Comparison to Former Ohio Code of Professional Responsibility section of the Code of Professional Conduct following Prof. Cond. R. 1.5 states: “Prof. Cond. R. 1.5 replaces DR 2-106 and DR 2-107; makes provisions of EC 2-18 and EC 2-19 mandatory, as opposed to aspirational, with substantive modifications; and makes the provisions of R.C. 4705.15 mandatory, with technical modifications;” and “Prof. Cond. R. 1.5(c)(1) also expands on EC 2-18 and R.C. 4705.15(B) by requiring that *all* contingent fee agreements shall be reduced to a writing signed by the client and the lawyer. Prof. Cond. R. 1.5(c)(2) directs that a closing statement shall be prepared and signed by both the lawyer and the client in matters involving contingent fees. It closely parallels the current R.C. 4705.15(C).” [Emphasis added.]

{¶23} A majority of the panel finds that Prof. Cond. R. 1.5(c)(2) applies in all contingent fee cases, and thus the panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.5(c)(2).¹

MITIGATION, AGGRAVATION, AND SANCTION

{¶24} Relator has asked the panel to consider Respondent’s prior disciplinary offense as the only aggravating factor pursuant to BCGD Proc. Reg. 10(B)(1). The prior disciplinary offense was a four-day license suspension in December 2007 for failure to pay registration fees.

¹ Although a majority of the panel finds that Prof. Cond. R. 1.5(c)(2) applies to all contingent fee cases and that Respondent violated this rule in relation to his collections work, the Supreme Court may wish to reconsider application of the closing statement requirement to collections matters and, in particular, to those situations involving sophisticated clients or clients with whom the lawyer has a continuing relationship.

When notified of the suspension, Respondent promptly submitted his fees. Relator submitted no evidence that Respondent practiced law during this period of time. Respondent stipulated to this aggravating factor. The panel views this as more of an oversight than a deliberate violation of Respondent's duty and has weighed this factor accordingly. Relator, in closing argument at the final hearing, while discussing this factor stated: "But we don't believe – it was a very short period of time- that it warrants an increase in the sanction." Hearing Tr. 96.

{¶25} The parties stipulated and the panel finds as mitigation a full and free disclosure to disciplinary board, a cooperative attitude toward the proceedings, and good character and reputation. Further the panel finds as a mitigating factor the absence of a dishonest or selfish motive.

{¶26} Respondent's clients suffered no harm. Respondent used his earned fees left in the IOLTA. Further, Respondent has shown remorse and has fully acknowledged the wrongful nature of his conduct.

{¶27} Respondent kept scrupulous records for his collection accounts, although not in the format as required by the Rules of Professional Conduct. Respondent did not have a clear understanding of what the rules required for such record keeping before the investigation of this case, but has learned the proper and required recordkeeping and has modified his office records accordingly. In a letter to Relator during its investigation, Respondent stated that "You can be assured that I will never use the IOLTA account for anything other than depositing client funds and making disbursements to such clients." Stipulations, Ex. J-14. Respondent, however, continued to make disbursements from the IOLTA account for his personal and business expenses. Respondent assumed that because Respondent had earned attorney fees in the account, he would be using those funds to pay his non-client related expenses. It was not until

Respondent was deposed by Relator that he understood the proper use of an IOLTA account and the proper record-keeping required under the rules. Respondent states that he had not really read the new rules until he was preparing for the deposition. Respondent is now in compliance and has taken steps to assure that he will remain so. Respondent also has reviewed all of the rules.

{¶28} The panel was impressed by Respondent's long and distinguished career, both in the private sector and as an assistant attorney general. Respondent submitted several letters attesting to his good character from attorneys, judges, and clergy. Respondent has been an active member of his church and his community, committing many hours of service through a service organization "Ruritan" as well as being a member of local and state bar associations.

{¶29} Relator recommends that Respondent should be given a one-year suspension of his license to practice law, fully stayed upon the following conditions: that Respondent's IOLTA be monitored for a one year probationary period by a lawyer appointed by Relator who is experienced in handling client funds; that Respondent complete a six hour CLE in trust accounts and/or office management during the probationary period, and that he commit no further misconduct. Respondent recommends a public reprimand.

{¶30} The panel has reviewed similar cases including those cited by the parties.

{¶31} See *Toledo Bar Assn. v. Gregory*, 132 Ohio St.3d 110, 2012-Ohio-2365, a six-month stayed suspension for violation of Prof. Cond. R. 1.15(a)(2)(4)(5)(c); *Disciplinary Counsel v. Doellman*, 127 Ohio St.3d 411, 2010-Ohio-5990, a one-year stayed suspension for violations of DR 1-102(A)(5)(6) and DR 9-102(A)(B)(1)(3)(4); *Columbus Bar Assn. v. Peden*, 118 Ohio St.3d 244, 2008-Ohio-2237, a six-month stayed suspension for violating DR 9-102(A)(B)(E), DR 1-102(A)(6) and Gov. Bar R. V, Section 4(G); *Disciplinary Counsel v. Murraine*, 130 Ohio St.3d 397, 2011-Ohio-5795, a one-year stayed suspension for violating Prof.

Cond. R. 1.15(a) , Prof. Cond. R.1.15(b) and Prof. Cond. R. 8.4(h) in a consent-to-discipline. In *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009-Ohio-3480, respondent did not have an operating account from 2002-2007, paid his personal and business expenses from the IOLTA account, wrote at least 150 checks from 2005-2007 and received a six month stayed suspension.²

{¶32} We have also reviewed *Columbus Bar Assn. v. Craig*, 131 Ohio St.3d 364, 2012-Ohio-1083, respondent received a public reprimand for violating Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 4.1(a), and Prof. Cond. R.8.4(c) where respondent had no prior, no selfish motive, a good faith and timely effort to rectify consequences, full and free disclosure, cooperative attitude and evidence of good character and reputation; *Toledo Bar Assn. v. Sawers*, 121 Ohio St.3d 229, 2009-Ohio-778, respondent received a public reprimand for violating DR 2-106(A), DR 6-101(A)(1) and DR 9-102(A); *Cincinnati Bar Assn. v. Seibel*, 132 Ohio St.3d 411, 2012-Ohio-3234, respondent received a public reprimand for violating Prof. Cond. R. 1.5(c)(1), Prof. Cond. R. 1.5(d)(3), Prof. Cond. R. 1.15(a), and Prof. Cond. R. 1.15(d) with no aggravating factors, no priors, no dishonesty or selfish motive, respondent accepted moral and legal responsibility, apologized to client and made belated restitution to client, absence of injury to client, absence of malpractice, effective performance of attorney functions and unique circumstances; *Butler Cty. Bar Assn. v. Matejkovic*, 121 Ohio St.3d 266, 2009-Ohio-776, respondent received a public reprimand for violating DR 9-102 and DR 1-104, where respondent was in practice for 17 years without prior, no dishonesty or self-interest, cooperation refunded funds to client; and *Medina Cty. Bar Assn. v. Piszczek*, 115 Ohio St.3d 228, 2007-Ohio-4946, where respondent received a public reprimand for violating DR 9-102. He did not oversee his IOLTA account properly and

² The panel also reviewed *Disciplinary Counsel v. Johnston*, 121 Ohio St.3d 403, 2009-Ohio-1432; *Cuyahoga Cty. Bar Assn. v. Cook*, 121 Ohio St.3d 9, 2009-Ohio-259; *Cuyahoga Cty. Bar Assn. v. Nance*, 119 Ohio St.3d 55, 2008-Ohio-3333; and *Disciplinary Counsel v. Newcomer*, 119 Ohio St.3d 351, 2008-Ohio-4492.

as a result, his law firm mishandled the account and client funds. Respondent was cooperative, restitution was timely and he took steps to remedy the situation.

{¶33} The panel is mindful that each disciplinary case is unique. The panel also feel that the cases cited for a public reprimand are more appropriate because of the substantial mitigation and unique circumstances. After over 30 years of practicing as in house counsel, Respondent may have had some problems recognizing all of the technical ethical responsibilities of a lawyer in private practice, especially as a solo practitioner. However, Respondent has not violated the spirit of these responsibilities, always being meticulous in his own record keeping and providing honest and competent service to his clients. Respondent has practiced law for over 50 years without a blemish. The panel feels that facing this disciplinary procedure has been a sufficient “wake-up call” to Respondent and is a regrettable blot on his otherwise sterling reputation. At the formal hearing, Respondent stated “This is one of the saddest days in my life, to be in this situation. I feel I’ve let a lot of people down.” Hearing Tr. 70. The panel see no reason to believe that Respondent cannot continue to practice law in a highly ethical and competent manner. No one was harmed, and we believe that the public will continue to be protected without further incident.

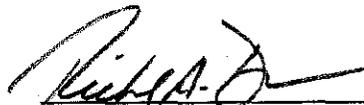
{¶34} The panel recommends that Respondent receive a public reprimand.

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 October 5, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Dale Elmer Bricker, be publicly reprimanded. The Board further

recommends that the costs 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