

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

11-2028

In re:	:	
Complaint against	:	Case No. 11-056
Kim Gerette Martorana Attorney Reg. No. 0060109	:	Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Geauga County Bar Association	:	
Relator	:	

FILED
DEC 10 2012
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} This matter was heard on May 14, 2012 in Columbus, Ohio before a panel consisting of members Sanford Watson and Janica Pierce Tucker, chair¹. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1). Respondent, Kim Martorana, was present at the hearing and represented by Monica Sanealone and Jamie Price. Ted Peterson, represented Relator.

{¶2} Relator's complaint alleges Respondent violated the following: Prof. Cond. R. 1.5(a) [charging an excessive fee]; Prof. Cond. R. 1.5(d) [charging a nonrefundable fee]; Prof. Cond. R. 1.5(e) [failing to divide fees in proportion to the services performed]; Prof. Cond. R. 5.3 [failure to supervise nonlawyer assistants]; Prof. Cond. R. 5.4 [failing to maintain professional independence]; Prof. Cond. R. 5.5 [engaging in the unauthorized and multi-

¹ McKenzie Davis also served as member of the panel, but was not present at the hearing.

jurisdictional practice of law]; and Prof. Cond. R. 5.7 [failing to disclose relationships with of-counsel lawyers].

{¶3} For the reasons set forth below, the panel finds a violation of Prof. Cond. R. 1.5(a), dismisses the remaining alleged violations, and recommends imposition of a six-month suspension fully stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶4} Respondent was admitted to the practice of law in the State of Ohio on November 20, 1992. Respondent is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶5} As outlined in the agreed stipulations, on May 13, 2011, Relator filed a complaint with the Board charging Respondent with misconduct within the meaning of Gov. Bar R. V, Section 6(A)(1).

{¶6} Respondent engaged in the private practice of law, doing business as Martorana Legal Services LL (“MLS”).

{¶7} Respondent’s office was located at 8251 Mayfield Road, Suite 100 in Chesterland, Ohio. Respondent’s office was shared with a company known as Performing Investment Corp. (“PIC”), which was owned and operated by Robert Ruckstuhl. Timothy H. Snyder, an Ohio attorney, also had an office at the same address. As of March 25, 2011, Respondent moved her office to 11289 Stafford Road in Auburn Township, Ohio, and no longer shares office space with PIC.

{¶8} PIC was a business involved in providing paralegal and support services. Respondent contracted with PIC for paralegal and support staff services, and during their business relationship, asserts that she only notarized support and paralegal services provided by

PIC, but Relator disagrees. PIC employees provided paralegal and support services for Respondent, which included interacting with clients on the phone, compiling information, and contacting lenders for mitigation options. Both Respondent and PIC supervised and/or trained the PIC staff that was assisting Respondent. Jonathan Evans, a disbarred Ohio attorney, was a paralegal employed by PIC and held a supervisory role with PIC. Respondent asserts that she retained full supervision and dominion over Evans as to all paralegal and support services provided to Respondent, but Relator disagrees. Respondent terminated her relationship with PIC on March 25, 2011.

{¶9} PIC subcontracted with a marketing firm that assisted Respondent in attracting potential clients. The marketing firm(s) utilized advertisements to reach the general public and from in-bound only calls offered the services of Respondent to homeowners with a foreclosure or nearing foreclosure. As of March 25, 2011, Respondent no longer receives assistance from the marketing firm.

{¶10} Respondent had clients enter into an attorney-client, fixed fee & services agreement (“agreement”) that required an up-front, flat fee deemed earned in full by MLS and that no refund will be paid to the client unless no legal work is performed beyond an initial review. The agreement further stated that upon termination of the attorney-client relationship by the client, the client will be charged at an hourly rate of \$225 per hour for attorney services and \$125 per hour for paralegal services. After March 25, 2011, Respondent changed her agreement so that it no longer requires an up-front, flat fee that is deemed earned upon receipt that will not be returned to the client. Instead, Respondent now charges an hourly fee and requires a retainer from which the hourly fee is deducted as it is earned.

{¶11} Respondent had of-counsel relationships with out-of-state attorneys. The of-counsel attorneys received a portion of the fees she received from the clients if she was hired in a given case. Other than listing certain of-counsel attorneys on her letterhead, Respondent did not disclose such relationships to her clients. After March 25, 2011, Respondent ended all of her of-counsel relationships with out-of-state attorneys. Respondent now only takes Ohio cases and handles them herself.

{¶12} Client fees obtained by Respondent were either placed in MLS' merchant account or business operating account. Any fees owed to PIC were paid from MLS' operating accounts. After March 25, 2011, Respondent began properly using her IOLTA for client fees.

Count One—Thomas J. O'Connor

{¶13} Thomas J. O'Connor contacted MLS for mortgage related services and entered into an agreement on January 29, 2010. He signed a fix fee invoice and authorization for payment of a \$1,695 up-front, flat fee the same day.

{¶14} O'Connor spoke with MLS representatives on at least two occasions about obtaining an interest rate adjustment, but never spoke with Respondent or any other affiliated attorney. After obtaining and reviewing necessary financial documents from O'Connor, a MLS representative informed O'Connor that MLS could not negotiate an interest rate adjustment with his lender.

{¶15} O'Connor expressed that he wanted to terminate his relationship with MLS and requested a full refund. Respondent sent O'Connor a letter on February 10, 2011 stating that the attorney-client relationship was terminated and declined to provide a full refund. Respondent did, however, provide a refund of \$495 to O'Connor on February 11, 2010.

{¶16} Respondent has since made full restitution to O'Connor. Respondent sent a check for the remaining \$1,200 to Relator on September 7, 2011 to distribute to O'Connor.

Count Two—Dennis Sedivy

{¶17} Dennis Sedivy contacted MLS about his mortgage in 2009. Sedivy entered into an agreement on October 31, 2009 and executed a fixed fee invoice and authorization on November 18, 2009. Sedivy paid an up-front, flat fee of \$1,795 to Respondent in two installments: \$1,100 and \$695.

{¶18} Sedivy provided certain financial documents to MLS, but MLS was unable to negotiate with Sedivy's lenders with the documents received.

{¶19} After Sedivy expressed his dissatisfaction with the result, Respondent terminated the attorney-client relationship with Sedivy on March 23, 2010. Respondent did not provide Sedivy with a refund. However, Sedivy filed a chargeback with his credit card company for \$695 and was successful. Respondent therefore only received \$1,100.

{¶20} Respondent has since made full restitution to Sedivy. Respondent sent a check for the remaining \$1,100 to Relator on September 7, 2011 to distribute to Sedivy.

Count Three—Sharon Hicks

{¶21} Sharon Hicks contacted MLS for mortgage assistance in 2010. She entered into an agreement on August 16, 2010, and paid MLS a flat fee of \$2,300 in two installments of \$1,150.

{¶22} On September 3, 2010, a MLS representative called Hicks and left a message on her answering machine that MLS had spoken with Apex Mortgage, the holder of Hicks' mortgage, and Apex Mortgage expressed that Hicks was not working with Apex Mortgage in good faith, she was not living in the property at issue, and she had defaulted on a previous

forbearance agreement with Apex Mortgage. The representative asked that Hicks call MLS back.

{¶23} On September 13, 2010, Hicks spoke to the receptionist at MLS and said that she wanted a refund since MLS could not help her. Hicks also spoke with another MLS representative on September 21, 2010, wherein she indicated that she did not want to pay for attorneys' fees. Hicks was informed that no additional fees beyond the initial flat fee were required.

{¶24} On September 21, 2010, a MLS representative informed Hicks that she would not be receiving a full refund and confirmed that Hicks wished to terminate the attorney-client relationship with MLS. MLS did, however, provide a refund of \$500 to Hicks.

{¶25} Respondent has since made full restitution to Hicks. Respondent sent a check for the remaining \$1,800 to Relator on September 8, 2011 to distribute to Hicks.

Count Four—David and Dawn Hanson

{¶26} David and Dawn Hanson, Minnesota residents, contacted MLS in November 2009, seeking assistance with a loan modification. The Hansons executed an agreement on December 4, 2009. They also executed a fixed fee invoice and authorization and paid \$1,835.38 to MLS.

{¶27} Mr. Hanson spoke with MLS representatives about obtaining a loan modification, and provided certain financial records to MLS for its review. After Respondent and an of-counsel attorney in Minnesota reviewed the file, a MLS representative informed Mr. Hanson that MLS could not obtain a loan modification for him and his wife.

{¶28} On January 24, 2010, Mr. Hanson sent an e-mail to MLS stating that he and his wife no longer wanted MLS' services and requesting a refund. MLS responded on or about

February 6, 2010, stating that it would not be issuing a refund to the Hansons because MLS had already performed work on the file. The letters also confirmed the termination of MLS' attorney-client relationship with the Hansons.

{¶29} Respondent has since made full restitution to the Hansons. Respondent sent a check for \$1,835.38 to Relator on September 7, 2011 to distribute to the Hansons.

Count Five—James Mattox

{¶30} James Mattox contacted MLS for mortgage-related assistance, and entered into an agreement on January 30, 2010. Mattox entered a fixed fee and authorization the same day. Mattox paid Respondent an up-front, flat fee of \$1,695 on or about February 10, 2010.

{¶31} Mattox informed MLS that he was not going to file for bankruptcy and would therefore no longer need MLS' services. Respondent sent a letter to Mattox on January 23, 2011 acknowledging that the attorney-client relationship had been terminated.

{¶32} Respondent did not initially provide a refund to Mattox, but has since made full restitution to Mattox. Respondent sent a check for \$1,733.14 (which included the flat fee of \$1,695 plus credit card payment fees paid by Mattox) to Relator on September 12, 2011 to distribute to Mattox.

{¶33} By clear and convincing evidence, the panel finds that Respondent violated Prof. Cond. R.1.5(a) by charging an excessive fee by requiring each of the five clients to pay an up front flat fee that was nonrefundable, regardless of the services Respondent performed in the case. On page 8 of the stipulations, Respondent stipulated that her fees were excessive.

{¶34} Relator failed to prove by clear and convincing evidence that Respondent's conduct violated the following rules, and the panel dismisses the following alleged violations.

{¶35} *Prof. Cond. R. 1.5(d)*—Respondent’s agreement did require an upfront, nonrefundable fee, but the agreement also complied with the exception in Prof. Cond. R. 1.5(d). Respondent advised the client in writing that if “MLS declined representation and no legal work beyond such initial review has been done, Client shall be entitled to a full refund of legal fees paid.”

{¶36} *Prof. Cond. R. 1.5(e)*—There was no evidence presented to support the factual stipulation that Respondent engaged in fee sharing with lawyers in other firms.

{¶37} *Prof. Cond. R. 5.3*—Respondent supervised the nonlawyers assistants of PIC, and Relator did not present any evidence to refute Respondent’s testimony.

{¶38} *Prof. Cond. R. 5.4*—Respondent subcontracted the services of PIC to provide marketing services, not a lawyer function.

{¶39} *Prof. Cond. R. 5.5*—Respondent received referrals from other lawyers in other states, and she referred cases to other lawyers in other states. However, the evidence does not show that Respondent engaged in the practice of law in other jurisdictions.

{¶40} *Prof. Cond. R. 5.7*—This rule is not applicable to Respondent’s alleged failure to disclose to her clients her relationships with out-of state-attorneys.

AGGRAVATION, MITIGATION, AND SANCTION

{¶41} The panel considered the following mitigating factors as outlined in BGCD Proc. Reg. 10(B)(2):

- Full and complete cooperation in the disciplinary process;
- Absence of prior disciplinary record;
- Respondent made significant changes to her practices and procedures upon receiving notice from Relator that she may be engaging in unethical conduct; and
- Respondent has made full restitution to each party who filed a grievance.

{¶42} The panel considered the following aggravating factors as outlined in BCGD Proc. Reg. 10(B)(1):

- Respondent has engaged in multiple acts of misconduct.

{¶43} Relator and Respondent propose the following sanction: six-month suspension stayed on the conditions that Respondent (1) completes three hours of law firm management CLE; and (2) meets monthly with a mentor agreed to by the parties for one year.

{¶44} The panel relies upon *Cincinnati Bar Assn. v. Harwood*, 125 Ohio St.3d 31, 2010-Ohio-1466, in which the Supreme Court imposed a six-month, fully stayed suspension against an attorney who violated multiple Rules of Professional Conduct in connection with his representation of clients who were facing foreclosure.

{¶45} There are other cases involving multiple violations of the rules where the respondent has received a sanction of a short-term stayed suspension. In these cases, the respondent has generally paid or agreed to pay restitution, has complied with the investigation and disciplinary proceedings, has shown remorse or a change in practice, and has no prior disciplinary record. See *Disciplinary Counsel v. Doellman*, 127 Ohio St.3d 411, 2010-Ohio-5990 (ordering a 12-month stayed suspension for the respondent's failure to maintain an IOLTA account in a debt collection practice and failure to properly deposit client funds); *Disciplinary Counsel v. Fletcher*, 122 Ohio St.3d 390, 2009-Ohio-3480 (ordering a six-month stayed suspension conditioned on a monitored probation due to the respondent's failure to maintain an office operating account separate from his IOLTA and his loan of funds to a client).

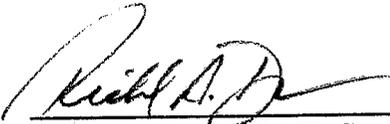
{¶46} Based upon the evidence presented, the agreed stipulation of the parties, and the relevant case law, the panel recommends a six-month stayed suspension on the condition that

Respondent: (1) completes three hours of law firm management CLE; and (2) meets monthly with a mentor agreed by the parties for a period of one year.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 6, 2012. The Board adopted the Findings of Fact and Conclusions of Law of the panel. However, the Board concludes the more appropriate sanction for the Respondent's misconduct is a public reprimand and recommends imposition of that sanction to the Court. 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