

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

13-0223

In re:	:	
Complaint against	:	Case No. 10-076
Robert F. Alsfield, Jr. Attorney Reg. No. 0014829	:	Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Cincinnati Bar Association	:	
Relator	:	

FILED
FEB 04 2013
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} Relator accused Respondent of two counts of misconduct related to his representation of the owner of a dry cleaning business, one count related to filing his federal tax return, and one count for failing to cooperate. The evidence presented at the hearing did not establish by clear and convincing evidence that Respondent had violated the specific rules of professional conduct alleged in the complaint, except for the allegations in Count Four concerning his failure to cooperate in Relator's investigation. Because of his failure to cooperate, the panel recommends that Respondent be indefinitely suspended from the practice of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prehearing Proceedings

{¶2} On August 16, 2010, a probable cause panel found probable cause for the filing of a complaint against Respondent, and the original complaint was accepted for filing. The original

complaint contained two counts against Respondent. The first count concerned Eastern Hills Dry Cleaners, and the second count concerned Colonial Dry Cleaners. Both counts were based on Respondent's representation of Joseph Witschger, the owner of Eastern Hills Dry Cleaner.

{¶3} Notice was sent to Respondent of the filing of the complaint on August 16, 2010.

{¶4} The Board was not able to secure service of the complaint on Respondent, and on October 6, 2010, filed the complaint with the Clerk of Court of the Supreme Court of Ohio pursuant to Gov. Bar R. V, Section 11(B). On October 19, 2010, the Board advised Relator that Respondent was in default for not filing an answer.

{¶5} In the meantime, Relator was attempting to take the deposition of Respondent. Respondent attended two depositions, but failed to attend a third scheduled on December 1, 2010. Respondent also failed to produce certain documents at that deposition pursuant to a subpoena duces tecum.

{¶6} On December 21, 2010, Relator filed a motion to compel discovery and hold Respondent in contempt for not attending the deposition and for not producing documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents forthwith.

{¶7} On January 19, 2011, Respondent filed an answer to the complaint, and on January 24, 2011, a hearing panel was assigned.

{¶8} On March 15, 2011, Relator filed a motion to hold Respondent in contempt for failing to produce the documents requested in the earlier subpoena duces tecum. On March 22, 2011, the panel ordered Respondent to provide the requested documents.

{¶9} On April 18, 2011, based on Respondent's failure to comply with the discovery orders, Relator filed a motion to hold Respondent in contempt in the Supreme Court of Ohio. Supreme Court Case No. 2011-0625. This contempt proceeding was handled by the Court

outside of the proceedings before the Board. On May 19, 2011, the Court found Respondent in contempt and ordered him to comply with the subpoena duces tecum. On September 22, 2011, the Court suspended Respondent from the practice of law for not complying with its order. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of \$500.

{¶10} In the disciplinary case before the Board, at a telephone conference on June 3, 2011, and memorialized by journal entry dated June 7, 2011, Respondent was ordered to review, sign, and return a standard IRS waiver form to Relator. The waiver form would allow Relator to obtain copies of Respondent's tax returns. Respondent did not complete the form and, on June 16, 2011, Relator filed a motion for Respondent to be held in contempt. By entry dated June 17, 2011, Respondent was given until June 27, 2011 to complete and return the form.

{¶11} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with the previous order of the panel.

{¶12} While the contempt matter was pending before the Court, Relator filed a request for admissions in the Court case. Respondent failed to respond to the request for admissions. Consequently, in the disciplinary case, Relator filed a motion to deem the admissions to be admitted. On July 24, 2012, the panel ordered that the request for admissions would be deemed admitted.

{¶13} On July 30, 2012, Relator filed an amended complaint that included the two original counts and two additional counts. The two additional counts alleged misconduct on the part of Respondent for tax evasion and for noncooperation in the disciplinary proceeding.

{¶14} Respondent filed an answer to the amended complaint on August 28, 2012.

{¶15} The matter was heard on October 29 and 30, 2012 in Cincinnati before a panel consisting of Sharon Harwood, Alvin Bell, and Judge John Street, chair. None of the panel members is from the district in which the complaint arose, and none was a member of the probable cause panel that certified the matter to the Board. Michael P. Foley and Stephen M. Nechemias appeared as counsel for Relator. Respondent was present for the hearing and represented himself.

Count One—Witschger Matter

{¶16} In 2000, Respondent had performed legal work for Joseph Witschger. Witschger owned Eastern Hills Dry Cleaners. During and after his representation in 2000, Respondent became a regular customer of the dry cleaning business. By 2004, Witschger's business was struggling, and he needed help in managing it. On or about November 1, 2004, Respondent and Witschger entered into an agreement for Respondent and his wife, an attorney and certified public accountant, to "take over the business aspect of the cleaners." Exhibit 7. The agreement called for Respondent to bill for legal services at the hourly rate of \$225 and for his wife to charge \$65 per hour for her business related services.

{¶17} Typically each day, Respondent would visit Witschger at his business early in the morning to discuss business problems. Respondent would obtain the mail that Witschger had received and would take documents to his wife who would organize them and prepare checks to pay bills. Later that afternoon or the next day, Respondent would return to the business to have Witschger sign the checks and make payments. Respondent would also return the documents for Witschger to keep.

{¶18} Witschger was responsible for signing the checks.

{¶19} From 2005 to 2008, Respondent or his wife wrote a total of 311 checks on the Eastern Hills Dry Cleaners account to himself. These checks totaled over \$152,000. Two hundred and seventy-two of the checks, totaling over \$141,000, contained no notation on the memo line and no description as to the reason for the check. Most of these checks were cashed by Respondent, not deposited, at various banking institutions in Cincinnati.

{¶20} Respondent did not keep a record of his billings for services to Witschger nor did he keep any record of payments received. Respondent testified that the 311 checks were for services rendered and for reimbursement of costs and expenses, and that they were fully explained to Witschger. Witschger testified that Respondent brought him the checks stacked one on top of the other so that he could not see the payee line. He would then simply sign his name when Respondent asked him to do so. Respondent testified that he spent a minimum of six or seven hours a week working on Witschger's business and that his wife performed a minimum of 17 to 18 hours per week working on the business. Respondent claimed that he was not nearly paid in full for the time he spent working on the business.

{¶21} Witschger testified that he asked Respondent to return records for the business, but that Respondent has not returned them. Respondent testified that he did not keep the business records. Instead his practice was to take documents home, give them to his wife, and then return them as soon as she was through with them. In addition, Witschger testified that he expected Respondent to prepare profit and loss statements, do the tax returns, and other items. Respondent testified that he had never prepared those documents and was not retained to do so. In fact, there was another entity that had prepared some tax returns and another entity that did the payroll accounting for the business.

{¶22} Witschger at no time asked Respondent to give him an accounting for the time or money performed by or paid to Respondent.

{¶23} As a result of his representation, in Count One of the amended complaint, Relator accused Respondent of violating the following: Prof. Cond. R. 1.15(a) by failing to maintain records of a client's funds and property; Prof. Cond. R. 1.15(b) for failing to promptly render a full accounting of a client's funds and property; and Prof. Cond. R. 8.4(c) for converting Witschger's funds for his own use and for misleading Witschger as to the payees of the checks.

{¶24} The panel does not find by clear and convincing evidence that Respondent has violated Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(d), or Prof. Cond. R. 8.4(c).

{¶25} Prof. Cond. R. 1.15(a) states in part:

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. The account shall be designated as a "client trust account," "IOLTA account," or with a clearly identifiable fiduciary title. Other property shall be identified as such and appropriately safeguarded. Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. For other property, the lawyer shall maintain a record that identifies the property, the date received, the person on whose behalf the property was held, and the date of distribution.

{¶26} Although Witschger claimed that Respondent kept property belonging to Witschger, the panel is not convinced that Respondent did. The panel finds Respondent's testimony more believable than Witschger's on this point. Respondent testified that he returned the property to Witschger soon after he and/or his wife had recorded or made use of it, and that Witschger was responsible for maintaining it. There was no testimony that Respondent had ever held any funds belonging to Witschger.

{¶27} Prof. Cond. R. 1.15(d) states:

Upon receiving funds or other property in which a client or a third person has a lawful interest, a lawyer shall promptly notify the client or third person. For purposes of this rule, the third's person's interest shall be one of which the lawyer has actual knowledge and shall be limited to a statutory lien, a final judgment addressing disposition of the funds or property, or a written agreement by the client or the lawyer on behalf of the client guaranteeing payment from the specific funds or property. Except as stated in this rule or otherwise permitted by law or by agreement with the client or a third person, confirmed in writing, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive. Upon request by the client or third person, the lawyer shall promptly render a full accounting regarding such funds or other property.

{¶28} Although the panel is troubled by the large number of checks written to Respondent and the lack of accounting for them, it does not appear that Respondent was ever asked to account for them. At the hearing, Witschger was asked if he had ever asked for an accounting or a billing by Respondent, and Witschger said he had not. None of the written communication on behalf of Witschger to Respondent requested an accounting. Relator never requested an accounting of the funds. The panel, therefore, cannot find that Respondent violated Prof. Cond. R. 1.15(d).

{¶29} Prof. Cond. R. 8.4(c) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. Although Witschger claimed that Respondent stacked the checks so that he could not see who the payee was when he signed the checks, the panel does not find his testimony to be credible. Respondent testified that he explained everything to Witschger and that Witschger signed the checks. Witschger received the mail and had access to the cancelled checks and bank account records. The panel is not convinced there has been sufficient evidence to prove a violation of Prof. Cond. R. 8.4(c).

{¶30} Therefore, the panel recommends that the allegations in Count One of the complaint be dismissed.

Count Two—Colonial Dry Cleaners

{¶31} The allegations in Count Two concerned a second dry cleaning business, the Colonial Dry Cleaners. The owners of Colonial Dry Cleaners were looking to sell the business. Ultimately, Respondent became the owner of Colonial Dry Cleaners. Relator alleged that Respondent had taken advantage of Witschger in order to purchase the Colonial Dry Cleaners and charged Respondent with violations of Prof. Cond. R. 1.8(a), 1.8(b), and 8.4(c). The panel found that these allegations had not been proven by clear and convincing evidence. At the conclusion of Relator's case, the panel dismissed Count Two in its entirety.

Count Three—Income Tax Returns

{¶32} The allegations in Count Three revolved around the request for admissions filed in the contempt action before the Supreme Court of Ohio. Respondent did not respond to the request, and the following facts were deemed admitted and conclusively established:

- Respondent filed federal and State of Ohio income tax returns in 2004;
- Respondent filed federal and State of Ohio income tax returns in 2005;
- Respondent filed federal and State of Ohio income tax returns in 2006;
- Respondent filed federal and State of Ohio income tax returns in 2007;
- Respondent filed federal and State of Ohio income tax returns in 2008;
- Respondent received checks from Joseph Witschger and/or Eastern Hills Dry Cleaners made payable to Robert F. Alsfelder and/or Robert Alsfelder for legal and business services; and
- Checks were made payable to Robert Alsfelder from Eastern Hills Dry Cleaners and/or Joseph Witschger which were cashed but the money was not reported as gross income either on Respondent's Ohio and/or federal income tax returns from the years 2004 through 2009.

{¶33} At the hearing, Relator offered no additional evidence beyond these admissions. Respondent identified at least one check that was written to him that was a reimbursement from the dry cleaning business for damage to his clothing.

{¶34} Relator alleged that Respondent had violated the following: Prof. Cond. R. 8.4(b) by committing tax evasion, an illegal act that reflects adversely on Respondent's honesty or

trustworthiness; and Prof. Cond. R. 8.4(c) by engaging in conduct involving dishonesty and fraud.

{¶35} The allegations contained in Count Three concern the matters deemed to be admitted by Respondent as a result of his not responding to the request for admissions.

{¶36} The deemed admissions, by themselves, are not sufficient to establish by clear and convincing evidence of a violation of either Prof. Cond. R. 8.4(b) or Prof. Cond. R. 8.4(c).

{¶37} Prof. Cond. R. 8.4(b) prohibits an attorney from committing an illegal act that reflects adversely on the lawyer's honesty or trustworthiness. Relator argues that Respondent has committed tax evasion based on the admissions. The admissions, however, do not prove tax evasion. Through the admissions, Relator established that Respondent received checks for legal and business services and that Respondent received checks that were cashed but not reported as gross income. The admissions do not establish that the checks received for legal and business services were the same checks that were cashed and not reported as gross income. In fact, Respondent identified at least one check that was cashed but that was not payment for legal or business services and that would not necessarily be included in gross income.

{¶38} Prof. Cond. R. 8.4(c) prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The deemed admissions do not prove, by clear and convincing evidence, that Respondent violated this rule.

{¶39} The panel, therefore, recommends that the allegations in Count Three be dismissed.

Count Four—Failure to Cooperate

{¶40} Respondent failed to respond to a November 18, 2010, subpoena for a deposition and production of documents. On January 19, 2011, the Board's chair ordered Respondent to produce the documents in compliance with the subpoena. Respondent failed to do so.

{¶41} On May 19, 2011, the Court found the Respondent in contempt and ordered him to comply with the subpoena duces tecum.

{¶42} Respondent failed to comply with the Court's May 19, 2011 order and on September 22, 2011 the Court suspended Respondent from the practice of law until proof was filed that he had obeyed the May 19, 2011 order and had complied with the subpoena duces tecum.

{¶43} On July 8, 2011, the panel recommended that Respondent be found in contempt for not complying with an order of the panel to review and sign a standard IRS waiver to allow Relator to obtain Respondent's tax returns. On March 30, 2012, the Court found Respondent in contempt for failing to immediately file an affidavit of compliance and ordered him to pay a fine of \$500.

{¶44} Relator alleged Respondent had violated Gov. Bar R. V, Section 4(G) by failing to cooperate in the disciplinary process.

{¶45} The panel finds, by clear and convincing evidence, that Respondent has failed to cooperate in Relator's investigation and in the disciplinary proceedings.

AGGRAVATION, MITIGATION, AND SANCTION

{¶46} The panel finds that the following aggravating factors are present:

- *Prior disciplinary offense.* Respondent was previously suspended for one year, stayed on the condition that he pay restitution in the amount of \$30,000. See *Cincinnati Bar Assn. v. Alsfelder*, 103 Ohio St.3d 375, 2004-Ohio-5216. The

defendant has also been suspended by the Court for being in contempt of the Court's order to comply with a subpoena duces tecum in this case.

- *Pattern of misconduct.* Respondent has failed to comply with the Court's order to turn over certain documents pursuant to a subpoena duces tecum. Respondent has failed to comply with the panel's order to sign a standard IRS waiver form. Respondent failed to attend a deposition.
- *Lack of cooperation in the disciplinary process.* Respondent refused and still refuses to provide his tax returns. On occasions, Respondent agreed to provide tax returns and other documents, but never did so.
- *Submission of false evidence, false statements, or other deceptive practices during the disciplinary process.* At the hearing, Respondent was very guarded in his testimony. Respondent has not been forthcoming.

{¶47} None of the factors to be considered in favor of mitigation has been shown.

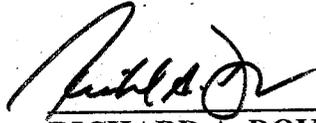
{¶48} Relator recommends that Respondent be permanently disbarred. Respondent asks that there be no finding of misconduct and that the matter be dismissed. Respondent argues that the failure to cooperate has already been dealt with by the Court in the contempt proceeding.

{¶49} The panel recommends that Respondent be indefinitely suspended from the practice of law. The panel further recommends that no reinstatement be considered unless proof is filed that Respondent has obeyed the May 19, 2011 order of the Court and that he has complied with the subpoena duces tecum issued by the Board.

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 February 1, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Robert F. Alsfield, Jr., be indefinitely suspended from the practice of law in Ohio with reinstatement subject to the conditions set forth in ¶49 of this report. 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