

ORIGINAL

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

In re: : 13-0571
Complaint against : Case No. 12-030
Charles Walter Fonda : Findings of Fact,
Attorney Reg. No. 0022753 : Conclusions of Law, and
Respondent : Recommendation of the
Board of Commissioners on
Cleveland Metropolitan Bar Association : Grievances and Discipline of
the Supreme Court of Ohio
Relator :
:

OVERVIEW

{¶1} This matter was heard December 10, 2012, in Columbus before a panel consisting of Teresa Sherald, Charles Coulson, and Judge Otho Eyster, chair. None of the panel members is from the appellate district in which the complaint arose, and none served on the probable cause panel that certified the matter to the Board.

{¶2} Relator was represented by Joseph E. Huigens and Robert S. Faxon. Respondent was present, represented by Lester S. Potash.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶3} The parties have entered into 61 written stipulations of fact and 48 exhibits were admitted into evidence at the hearing. The parties did not stipulate rule violations or aggravating factors, but did stipulate two mitigating factors. In making its findings of fact, conclusions of law, and its recommendation, the panel also considered the testimony of Respondent and of the

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other witnesses offered at the hearing, both live and by deposition. The panel finds the following facts to have been proven by clear and convincing evidence.

{¶4} Respondent, Charles W. Fonda, was admitted to the practice of law in Ohio on November 6, 1981, and is thus subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶5} Respondent is a solo practitioner. Respondent employs a parttime assistant who works approximately four hours per week; coming to the office only after 4:00 p.m. Respondent is the only point of contact for his clients other than the hours worked by his assistant.

Count One – Janice Schub

{¶6} On June 29, 2007, Ms. Schub, a California resident, hired Respondent and entered into a representation agreement with him whereby Respondent agreed to “prepare and file the Initial Application to Administer Estate and to Probate Will, Appointment of Appraiser form, all documents necessary to transfer real estate and other documents, and the filing of accounts and closing the estate” on behalf of Schub in handling the probate of the estate of Leslie E. Hevland. Relator’s Ex. 1, ¶2. Hevland was Schub’s brother.

{¶7} Schub’s understanding was that Respondent was to handle all phases of closing the estate including the filing of Ohio estate tax returns and any federal returns. Schub “entrusted him to do it all for her.” Hearing Tr. 65.

{¶8} Respondent filed the Ohio estate tax return 20 months late and never requested an extension of time to file the return. The estate ultimately paid \$1,080.66 in accrued interest because of the late filing.

{¶9} Respondent filed the 2007 federal income tax return for Hevland 39 months late. Due to the late filing, penalties and interest were assessed, however, the penalty was eventually waived and the interest was reduced to \$180.65.

{¶10} Respondent filed the federal estate tax return 42 months late. As a result, the estate paid \$436.95 in penalties and interest.

{¶11} The penalties and interest waived were done so as a direct result of Schub's efforts with no help from Respondent.

{¶12} By March 2010, Respondent had stopped returning Schub's calls to his office and cell phone. After attempting to contact Respondent by letters and email with little success, she resorted to sending letters via certified mail. Relator's Ex. 8 & 9.

{¶13} Respondent entered into evidence a report of his psychologist, Dr. Medling. As it relates to Schub, the report states:

He stated that his work with Ms. Schub covered four years over several different periods of time. She was the friend of his paralegal who was assisting him with bankruptcies and state filings. Difficulties began around the two year mark with communication difficulties that lead [sic] to problems filing necessary forms, around May 2010. That is also when some of the avoidance on his part began to arise. He would rationalize, "I can do that later." He denied disliking her but there was frustration that surfaced. His position was that he would call her if there was something new to report. He grew weary of her repeated calls asking "Are we there yet?" He also noted miscommunication between him and his paralegal about what to say to her. He was aware that he was not as direct and straightforward with his paralegal as he could have been and that he was avoiding Ms. Schub's calls.

Respondent's Ex. A, p. 5

{¶14} In January 2012, approximately four and one-half years after Respondent was retained, Schub terminated Respondent's services and requested her file. Respondent did not return Schub's file until after the complaint was filed in this matter in July 2012.

{¶15} The representation agreement entered into by the parties set attorney fees at \$125 per hour. The amount paid to Respondent was approximately \$12,000.

{¶16} Relator alleges the actions and omissions of Respondent's representation of Schub as contained in Count One violate the following: Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4(a)(3) [a lawyer shall keep the client informed about the status of the matter]; Prof. Cond. R. 1.4(a)(4) [a lawyer shall comply as soon as practicable with reasonable requests for information from the client]; Prof. Cond. R. 1.5(a) [a lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee]; Prof. Cond. R. 1.5(b) [a lawyer shall communicate to the client the nature and scope of representation and the basis or rate of the fee and expenses]; Prof. Cond. R. 1.16(d) [a lawyer shall take steps to protect a client's interest as part of termination or representation]; and Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice.]

{¶17} The panel concludes by clear and convincing evidence that Respondent's conduct in his dealings with Schub violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), and Prof. Cond. R. 1.16(d).

{¶18} By filing estate and income tax returns 20, 39, and 42 months late, and not closing Hevland's estate after four and one-half years, Respondent did not act with reasonable diligence and promptness in representing Schub.

{¶19} Respondent has admitted avoiding Schub's calls and putting off her work, failing to keep her reasonably informed about the status of her case, and not promptly complying with her reasonable request for information in violation of Prof. Cond. R. 1.4(a)(3) and Prof. Cond. R. 1.4(a)(4).

{¶20} Relator offered no evidence that Respondent charged an illegal or clearly excessive fee other than the fact that Respondent has been paid approximately \$12,000 by Schub. The panel finds Relator has not proven by clear and convincing evidence that Respondent charged a clearly excessive fee or that he did not communicate to Schub what fees and expenses he was charging and recommends dismissal of the alleged violations of Prof. Cond. R. 1.5(a) and Prof. Cond. R. 1.5(b).

{¶21} By not promptly returning Schub's files when requested, Respondent violated Prof. Cond. R. 1.6(d).

{¶22} The panel finds Relator failed to prove by clear and convincing evidence that the course of conduct followed by Respondent as it relates to Ms. Schub constitutes conduct prejudicial to the administration of justice and recommends dismissal of the alleged violation of Rule 8.4(d).

Count Two – Damon Walton

{¶23} Mr. Walton purchased a truck from an Auto Rite dealership in February 2009. After paying the down payment in installments, he was told the financing bank required additional money down. When Walton refused to pay additional money, the truck was repossessed with paperwork and personal items in the truck.

{¶24} On May 13, 2009, Walton retained and entered into a representation agreement with Respondent. The agreement called for Respondent to prepare a demand letter to Auto Rite and pursue follow-up negotiations. Walton paid Respondent \$250. Relator's Ex. 24.

{¶25} Following their second meeting on May 15, 2009, Walton could not get Respondent to take or return his calls.

{¶26} In late July or early August 2009, Walton went to Respondent's office, without an appointment, and had a discussion about his case. At this meeting, Respondent provided a copy of a demand letter dated July 23, 2009 that he had sent to Auto Rite. Relator's Ex. 25.

{¶27} From the date of the third meeting, Walton called Respondent quite frequently with his calls often unanswered or unreturned. When Walton would get Respondent's assistant on the phone, he often became verbally abusive to the point where she refused to take his calls.

{¶28} In July 2010, Walton made contact with Respondent and they scheduled a meeting for July 27, 2010. Before the meeting could take place, Walton was assaulted and severely injured and as a result missed the scheduled meeting.

{¶29} Between October 2010 and March 2011, Walton made numerous attempts to contact Respondent. In early March 2011, Respondent communicated with Walton that if he wanted him to file suit he would need an additional \$100. It was clearly spelled out in the original representation agreement that should a lawsuit be required the parties would have to enter into an additional representation agreement.

{¶30} On March 7, 2011, Walton met with Respondent and gave him a check for \$100 drawn on this mother's account. The check was not negotiated, no lawsuit was filed, and Respondent did not communicate with Walton after this date.

{¶31} Walton filed a grievance against Respondent on November 23, 2011. On January 11, 2012, Walton terminated Respondent's representation and requested the return of his file (by certified mail). Relator's Ex. 27. Respondent did not respond to Walton's request.

{¶32} On July 25, 2012, Respondent's counsel sent copies of Walton's documents and the original check for \$100 to Relator's counsel who subsequently returned them to Walton.

{¶33} Relator alleges the actions and omissions of Respondent's representation of Walton as contained in Count Two violate the following: Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), Prof. Cond. R. 1.16(d), and Prof. Cond. R. 8.4(d).

{¶34} The panel concludes by clear and convincing evidence that Respondent's conduct in his dealings with Walton violates Prof. Cond. R. 1.3, Prof. Cond. R.1.4(a)(3), Prof. Cond. R. 1.4(a)(4), and Prof. Cond. R. 1.16(d).

{¶35} Respondent represented Walton for more than two and one-half years without getting any of his legal issues resolved, constituting a violation of Prof. Cond. R. 1.3.

{¶36} Respondent's failure to return phone calls or to attempt any other means of communicating with Walton for months at a time constitutes violations of Prof. Cond. R. 1.4(a)(3) and Prof. Cond. R. 1.4(a)(4).

{¶37} Walton's request for his file on January 11, 2012, was ignored by Respondent. The file was returned to Walton on July 25, 2012, by Respondent's counsel. Respondent's failure to promptly return Walton's file constitutes a violation of Prof. Cond. R. 1.16(d).

{¶38} The panel finds Relator failed to prove by clear and convincing evidence that the course of conduct followed by Respondent as it relates to Walton constitutes conduct prejudicial to the administration of justice and recommends the alleged violation of Prof. Cond. R. 8.4(d) be dismissed.

MITIGATION AND AGGRAVATION, AND SANCTION

{¶39} The panel finds several aggravating factors, specifically; (1) multiple offenses (only two clients); (2) pattern of misconduct (only two clients); (3) vulnerable clients; and (4) harm to his clients as a result of misconduct.

{¶40} The parties stipulated to the following mitigating factors: (1) no history of disciplinary actions; and (2) absence of a selfish or dishonest motive.

{¶41} The original complaint in this matter was filed April 16, 2012. A hearing was scheduled for August 27, 2012. On August 13, Respondent requested a 60-day continuance of the hearing to allow Respondent to submit to a mental health examination ordered by the OLAP contract entered into on August 1, 2012. Respondent's Ex. J.

{¶42} On August 29, 2012, Respondent was evaluated by James M. Medling, PhD, Clinical Psychologist, separate from his OLAP contract. The report of Dr. Medling admitted into evidence diagnosed Respondent with Generalized Anxiety Disorder and Dysthymic Disorder contributing to cause Respondent's "deficiencies" in dealing with Schub and Walton. Dr. Medling opines "currently and with continued psychological treatment, Mr. Fonda is able to provide competent, ethical, professional service to his clients." Respondent's Ex. A.

{¶43} Respondent testified he is still counseling with Dr. Medling and is compliant with the terms of his OLAP contract.

{¶44} Relator recommends Respondent be suspended from the practice of law for a minimum of one year, with no more than six months stayed on conditions.

{¶45} Respondent denies violations of any of the cited rules, but should the panel disagree, he contends the evidence warrants a sanction of not more than a public reprimand.

{¶46} The panel, having considered the case law cited, the rule violations, and the aggravating factors versus the mitigating factors, recommends a sanction of a one-year suspension from the practice of law, all stayed on the condition Respondent pay Schub \$707.33 as restitution¹ and comply with the terms of the OLAP contract entered into August 1, 2012.

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 April 4, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Charles Walter Fonda, be suspended from the practice of law for one year, with the suspension stayed in its entirety upon the conditions set forth in ¶46 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

¹ By way of explanation, Hevland's estate was assessed a late-filing penalty in the amount of \$6980.25 on March 8, 2012 because the Ohio estate tax return was then 18 months overdue. Stipulation 15. The Ohio Department of Taxation eventually waived the penalty, but not the interest. Stipulation 33. Due to the 39-month late filing of the federal income tax return, the estate incurred \$479.02 in penalties and \$216.53 in interest, but the penalty was ultimately waived and interest reduced by \$35.88, leaving a \$180.65 balance. Stipulation 37. Due to the 42-month late filing of the federal estate tax return, the estate incurred \$314.40 in penalties and \$122.55 in interest, totaling \$436.95, none of which was waived or reduced. Stipulation 40. On November 30, 2011, Schub paid the accrued Ohio interest, totaling \$1,080.66, using estate funds. Stipulation 42. Schub also paid the \$436.95 owed on the federal estate tax return and the \$180.65 owed on the federal income tax return, using estate funds. Stipulations 37, 40. Therefore, Schub paid a total of \$1,698.26 in combined state and federal interest and penalties, using estate funds. Stipulation 45. After accounting for Respondent's duplicate payment of the accrued Ohio interest on December 30, 2011 in the amount of \$990.93, Hevland's estate incurred a net uncompensated loss of \$707.33 as a result of Respondent's misconduct.