

ORIGINAL

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

In re: : 13-1260
Complaint against : Case No. 13-004
Judge David Bryan Bender : Findings of Fact,
Attorney Reg. No. 0037249 : Conclusions of Law, and
: Recommendation of the
Respondent : Board of Commissioners on
Disciplinary Counsel : Grievances and Discipline of
Relator : the Supreme Court of Ohio

FILED
AUG 06 2013
CLERK OF COURT
SUPREME COURT OF OHIO

OVERVIEW

{¶1} This matter was heard on June 21, 2013 in Columbus before a panel consisting of Judge Matthew W. McFarland, Alvin R. Bell, and Lawrence R. Elleman, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Relator was represented by Heather Hissom Coglianese. Respondent was represented by Geoffrey Stern.

{¶3} At the hearing, Relator offered agreed stipulations, including stipulations as to facts, violations, mitigation and aggravation, exhibits, and sanction. The stipulations were supplemented by eleven stipulated exhibits which were admitted into evidence without objection.

{¶4} Respondent testified on cross and direct examination, and offered character testimony from Judge Steven P. Beathard, from the Fayette County Court of Common Pleas and Tracy L. Smith, a former client and an employee of the Fayette County Engineering Department.

Respondent offered twelve character letters that were received as stipulated Joint Exhibit I. These included communications from clients, friends, colleagues in various community activities, his pastor, a chief deputy sheriff, a county commissioner, a superintendent of schools, and other attorneys attesting to Respondent's good character and/or reputation for honesty, diligence, professionalism, and/or community involvement.

{¶5} Relator dismissed certain claimed violations as set forth at the top of page 7 of the agreed stipulations. Respondent stipulated to all of the remaining violations claimed in the complaint as set forth below.

{¶6} This case involves a respected sitting common pleas judge who ran into difficulties in connection with his transition from practicing lawyer to judge. In the course of the transition, he neglected a personal injury case for a client and allowed the statute of limitations to run. After he became a judge, he attempted to obtain the resolution of the potential malpractice claim without specifically advising the client in person that he had missed the statute of limitations and without advising the client to seek independent counsel in connection with the matter. Respondent also violated the rules regarding his IOLTA account; but no client was harmed by his handling of the account.

{¶7} The panel finds that Respondent possesses an excellent reputation for honesty, professionalism, diligence, and community involvement and that he has made a full and free disclosure of his misconduct for which he is genuinely remorseful. The panel recommends he be suspended from the practice of law for one year, with the entire suspension stayed on condition that he commit no further violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶8} At the time of the alleged violations, Respondent was subject to the Ohio Code of Judicial Conduct, the Ohio Rules of Professional Conduct, the Supreme Court Rules for the Government of the Judiciary of Ohio, and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶9} Respondent was admitted to the practice of law on November 12, 1986. Respondent engaged in the full-time practice of law in Washington Court House from February 1, 1987 through May 17, 2011, including as an elected part-time Fayette County Prosecuting Attorney from January 1, 2005 through May 17, 2011. Respondent has been a judge in the Fayette County Court of Common Pleas, Probate and Juvenile Division since May 18, 2011.

{¶10} Respondent has, over the years, engaged in significant volunteer community activities including leadership positions in the local Kiwanis Club, Rotary International, YMCA, volunteer coach in the Washington Court House City School District, United Way, and many other organizations and activities. Respondent has also been active in numerous professional organizations in various capacities including twice serving as president of the Fayette County Bar Association and serving as an acting judge in municipal court. Respondent is married, has two children, and attends the Grace Community Baptist Church. Joint Ex. K; Hearing Tr. 41-44.

Count I—Kelly Matter

{¶11} The stipulated facts regarding Count I are contained in paragraphs 2 through 25 of the agreed stipulations which the panel unanimous adopts and incorporates into these findings of fact.

{¶12} Respondent's judicial appointment was announced in April 2011 and he assumed his judicial duties on May 18, 2011. Respondent, therefore, had approximately three to four

weeks to wind up his private practice, his work at the prosecutor's office, and his IOLTA account. Respondent had no partners to assist or to whom he could assign his outstanding client matters. Also during that period of time, Respondent was familiarizing himself with his duties as common pleas court judge. *Id.* 63-66, 70; Stipulation 10.

{¶13} One of Respondent's outstanding matters at the time he was appointed judge, was the personal injury claim of Brenda Kelly as guardian for Carl Everetts. On January 18, 2011, Respondent had made a \$60,000 demand against the insurer for the alleged tortfeasor. Joint Ex. C. On or about March 3, 2011, the insurance company had made a counteroffer of \$14,000. In March 2011, Respondent had an office conference with Kelly to discuss the financial ramifications of the insurance company's offer. At that time, Respondent determined that the client's goal was to get sufficient money from the settlement to pay all outstanding subrogation claims and Everett's projected funeral expenses. It was decided that Respondent should attempt to negotiate with the insurance company for more money in order to accomplish Kelly's objectives. However, Respondent did not, before taking his judicial office, respond to the insurance company's offer. *Id.* 22-23, 46-50; Stipulations 2-9.

{¶14} After his judicial appointment, but before assuming the duties of office, Respondent told Kelly that Respondent would need to find a successor attorney to handle her case. Respondent had already approached another attorney, Dan Drake, about taking over approximately six pending cases. Respondent told Kelly that he had someone in mind for the case and that he would get back in touch with her about the matter. However, Respondent did not do so before assuming the bench. *Id.* 22-24, 49-51.

{¶15} The statute of limitations on Kelly's potential claim was August 31, 2011. Respondent did, at some point, talk with Drake about handling Kelly's claim, but did not discuss

the statute of limitations. Respondent had kept a paper desk calendar with dates and deadlines on it, as well as a computer calendar. However, when Respondent closed his office practice, the hard copy ended up stored in his garage, and the computer was not hooked up. Respondent missed the statute of limitations. *Id.* 30, 34, 50.

{¶16} On or about November 21, 2011, Respondent learned of a grievance by Kelly filed against Respondent, the gist of which was that Respondent had not been returning her telephone calls about the status of the claim. Respondent then reviewed his file and learned for the first time that the statute of limitations had already run. *Id.* 25-27.

{¶17} Respondent then called Kelly to confirm that her objective was still to obtain enough money in settlement to pay the subrogation expenses and funeral costs. Respondent did not in that call tell her that he had missed the statute of limitations. Respondent did not specifically discuss the merits of the case against the tortfeasor, nor did he specifically discuss the grievance that had been filed. Having determined, at least in his own mind, that Kelly would be satisfied with a \$14,000 settlement plus the purchase of a prepaid funeral plan, Respondent, on December 19, 2011, purchased the prepaid funeral plan for Everett for the sum of \$2,266.10. Respondent paid that amount from his IOLTA. *Id.* 26-32, 50-53, 72-73; Joint Ex. E; Stipulations 12, 23, 24.

{¶18} At around the same time, Respondent spoke with Drake about representing Kelly. Drake said he would be available to meet with Kelly. Respondent then called Kelly to arrange for her to meet with Drake in his judicial chambers at the courthouse. Respondent did not mention the statute of limitations problem to either Drake or Kelly. Respondent arranged with Kelly for the meeting to occur on December 22, 2011, subject to Drake's availability. In the meantime, Respondent learned that Drake could not attend. Respondent attempted to reach

Kelly to reschedule, but was unable to reach her. Kelly came to Respondent's chambers on December 22, 2011. Kelly met at that time with Respondent's assistant. Neither Respondent nor Drake was present at this meeting. Respondent was, on that date, in Columbus with his wife, who was having a medical procedure. *Id.* 33-35, 54-55; Stipulations 13, 14.

{¶19} At the December 22, 2011 meeting, Respondent's assistant (at Respondent's direction) presented to Kelly a document entitled "Statement of Resolution," which Respondent had drafted, and asked Kelly to sign the document. This document disclosed to Kelly for the first time, that the claim had not been "timely filed," but did not explain the legal ramifications of that fact. Respondent intended this document to confirm that the claim of Kelly against Respondent for missing the statute of limitations was resolved and that the prepaid funeral plan had been paid for Everetts as settlement of the matter. Respondent did not inform Kelly that he had already personally paid for the prepaid funeral plan. Respondent did not advise Kelly to seek independent counsel regarding the statement of resolution. Joint Ex. F; *Id.* 30-36, 54-58; Stipulations 13-21.

{¶20} Kelly did not sign the statement of resolution. In December 2011, Respondent approached Drake about being successor counsel in the matter, but Drake declined. On or about October 24, 2012, Respondent's liability insurer settled the matter prior to litigation and paid \$14,000 to Kelly in exchange for releasing Respondent from all financial liability arising from the attorney/client relationship. Stipulations 19, 22, 25.

{¶21} The panel concludes that Relator has proven by clear and convincing evidence that Respondent's conduct regarding Count I violated the following: Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4(a)(3) [a lawyer shall keep the client reasonably informed about the status of the matter]; Prof. Cond. R. 1.7(a)(2) [a lawyer's current or continued representation

of a client creates a conflict of interest if the representation is materially limited by the lawyer's own interests]; Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]; and Jud. Cond. R. 3.10 [a judge shall not practice law].

Count II—IOLTA Violations

{¶22} The stipulated facts regarding Count II are contained in paragraphs 26 through 48 of the agreed stipulations which the panel unanimously adopts and incorporates into these findings of fact.

{¶23} Respondent maintained an IOLTA entitled "David B. Bender, Attorney at Law Acct IOLTA." Respondent's checks written on that account were entitled "David B. Bender, Attorney at Law Trust." Joint Ex. E, G.

{¶24} Respondent did not immediately withdraw his earned fees from his IOLTA. Respondent, therefore, comingled client funds with his own funds. However, there is no evidence that any client was harmed, or lost any money. Hearing Tr. 58-63; Stipulations 32-45. The clients received "every penny to which they were entitled." Hearing Tr. 59.

{¶25} Respondent did not reconcile the IOLTA until at least December 31, 2011, at which time all client or other funds and Respondent's earned fees had been properly disbursed. Stipulations 45-48. The cause for this eight-month delay from the time that Respondent assumed his judicial duties was a combination of factors including Respondent's admitted failure to recognize the "enormity of the task." Hearing Tr. 66. Other complications that contributed to the delay were the need to sort out the amount of earned fees for various clients, determine if the clerk of court had any record of fees allowed, but not paid or of unpaid court costs, and locating the clients who had partially paid for legal services. *Id.* 36-38, 58-63.

{¶26} On at least two occasions after Respondent became a judge, Respondent deposited former client funds in his IOLTA. On September 11, 2011, settlement funds on behalf of Lauren and Shawn Valentine in the amount of \$84,000 were deposited in Respondent's IOLTA. On November 11, 2011, settlement funds on behalf of Patricia and Scott Teeters in the amount of \$62,500 were deposited into Respondent's IOLTA. Respondent had represented both of these clients before becoming a judge, but did no legal work for them after becoming a judge. In each case, Respondent issued checks to the former clients representing the client's portion of settlement, leaving the balance in the account for fees and expenses, which he did not immediately disburse. Stipulations 31-38; Hearing Tr. 36-39; 58-63.

{¶27} Drake was successor counsel in the Valentine and Teeters cases. Drake requested that the settlement funds be processed and disbursed through Respondent's IOLTA, because Drake did not want an IRS Form 1099 coming to him from the insurance company. Hearing Tr. 38.

{¶28} Respondent did not practice law after he became a judge except to the extent that his communications with Kelly (Count I) or his handling of the IOLTA (Count II) could be deemed the practice of law. *Id.* 74-75.

{¶29} The panel concludes that Relator has proven by clear and convincing evidence that Respondent's conduct regarding Count II violated the following: Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients or third parties separate from the lawyer's own funds].

{¶30} The parties also stipulated that Respondent's conduct violated: Jud. Cond. R. 3.10. The panel accepts the stipulated violation because Relator proved by clear and convincing evidence that Respondent deposited funds from the Valentine and Teeters settlements in his "Attorney at Law Trust" many months after he became a judge. At the time of the settlements,

the clients were represented by another attorney. The receipt and disbursements of the settlement funds should have been handled by that attorney instead of Respondent assuming a fiduciary duty as a practicing attorney to properly disburse the funds.¹

AGGRAVATION, MITIGATION, AND SANCTION

{¶31} The panel finds as an aggravating factor that Respondent acted with a selfish motive in attempting to exonerate himself from his malpractice without full disclosure to the client and without advising the client to seek independent counsel.

{¶32} The panel finds as mitigating factors that Respondent is remorseful about his misconduct. Respondent testified that he should have communicated promptly with Kelley so that she could explore trying to get an attorney on her own; that he owed Kelly more than he gave her; that he intends to apologize to Kelly at the appropriate time; that he should have paid more attention to the details about the wind-up of his IOLTA; that he should not have deposited client funds in his IOLTA while serving in a judicial capacity; and that he “let down my family, the friends I’ve associated with, the people that I’ve worked with on all these boards. Most importantly I let Mr. Everetts and Brenda Kelly down. I should have done better than I did.” Hearing Tr. 38, 63-66, 68-69, 70-71.

{¶33} Respondent made full and free disclosure to the disciplinary authorities and demonstrated a cooperative attitude throughout the proceedings. Stipulation 7.

{¶34} Respondent has no prior disciplinary record. Hearing Tr. 45.

{¶35} Respondent possesses an excellent character and reputation for truth, honesty, diligence, and professionalism. *Id.* 78-91; Joint Ex. I. Judge Beathard, a Common Pleas Judge

¹ Jud. Cond. R. 3.10 is one of the rules under Canon 3: “A judge shall conduct the judge’s personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.” Rules 3.1 through 3.15 relate in general to extrajudicial activities which may have a tendency to compromise the judge’s ability to function as an impartial judge. For example, Rule 3.8 while not completely comparable with the facts of this case, deals with the situation of a sitting judge accepting appointment to serve in a fiduciary capacity such as an executor of an estate, a trustee, a guardian, or an attorney in fact.

in Fayette County and is the only judge, other than Respondent, serving on that bench. Judge Beathard has known and worked with Respondent while Respondent was a solo practitioner, a prosecuting attorney, and fellow judge. Judge Beathard testified, pursuant to subpoena, that “without reservation, he (Respondent) is the most honest and dependable attorney and judge that I’ve encountered in my career,” and “I rely heavily on him to cover my docket. There isn’t a case that I wouldn’t assign to him and I reciprocated with him. Without reservation, ah, he is a straight shooter. That’s his reputation in the community and in the legal community.” *Id.* 78-86. Tracy L. Smith, who is supervisor for the Fayette County Engineer, has had a 16-year attorney/client and professional colleague relationship with Respondent. Smith testified convincingly that Respondent is “honest,” “very trustworthy,” “very dependable” and a “very good man.” *Id.* 88-91.

{¶36} Respondent is dedicated to his community and to the legal system. *Id.* 44, Joint Ex. I.

{¶37} The parties have jointly recommended that the Supreme Court of Ohio impose a one-year suspension, with the entire suspension stayed.

{¶38} The parties filed a joint memorandum in support of the stipulated sanction that was received in evidence as Joint Exhibit J. All the cases cited imposed a six-month or one-year stayed suspension. The panel finds the facts of *Cleveland Bar Assn. v. Berk*, 114 Ohio St.3d 478, 2007-Ohio-4264, to be the most comparable to this case. In that case, the attorney neglected personal injury matters with respect to two related clients and gave his clients money to pay bills and personal expenses. In addition, he paid each of the clients \$500 after they had signed a settlement agreement that included a waiver of any right the clients may have had to pursue a malpractice action against the attorney. Aggravating factors included a pattern of misconduct in

failing to attend court hearings and meet court deadlines. Mitigating factors were the absence of any prior disciplinary record, the absence of a dishonest or selfish motive, a cooperative attitude during the disciplinary process and Respondent's good character and reputation. In the *Berk* case, the court issued a one-year, fully stayed suspension with conditions. See also *Toledo Bar Assn v. Westmeyer* (1988), 35 Ohio St.3d 261 (one-year stayed suspension for an attorney who neglected a client matter and tried to exonerate himself from liability for malpractice).

{¶39} After considering the ethical duties violated, the sanctions imposed in similar cases, and the aggravating and mitigating factors, the panel recommends that Respondent be suspended from the practice of law for a period of one year, with the entire suspension stayed on the condition that Respondent does not engage in further misconduct.

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 August 2, 2013. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, Judge David Bryan Bender, be suspended from the practice of law for one year, with the entire suspension stayed on the condition that Respondent does not engage in further misconduct. 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