

ORIGINAL

IN THE SUPREME COURT OF OHIO

Toledo Bar Association

Relator,

vs.

Beauregard M. Harvey

Respondent.

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: No. 2013-1995
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:

RELATOR'S ANSWER BRIEF

TO RESPONDENT'S OBJECTION TO THE BOARD OF COMMISSIONERS' FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

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STATEMENT OF FACTS

A panel hearing on Relator Toledo Bar Association's ("Relator") five count complaint against Respondent Beauregard Harvey ("Respondent") was held on May 30, 2013. The panel found by clear and convincing evidence that Respondent had committed 25 disciplinary rule violations. The panel also found that the following aggravating factors were present: Respondent had a prior disciplinary case; Respondent acted with dishonest or selfish motive in not promptly returning fees to a client and in attempting to use an alleged friendship to secure a settlement for another client; Respondent committed multiple offenses; Respondent showed a lack of cooperation in the disciplinary process by indicating he would provide documents requested by Relator but then failed to do so; Respondent did not acknowledge the wrongful nature of his conduct as it relates to Counts One, Two, and Four; and Respondent did not make or offer to make restitution to a client for the additional attorney fees she incurred in retaining another attorney to file the bankruptcy she had retained Respondent to file.

The panel found that Respondent did not offer any evidence in mitigation.

The panel recommended that Respondent be suspended from the practice of law for two years with six months to be stayed upon conditions.

On January 13, 2014, the Board of Commissioners on Grievances and Discipline filed its Amended Findings of Fact, Conclusions of law, and Recommendation, and adopted the findings of fact and conclusions of law of the panel. The Board voted to amend the panel's recommended sanction and recommended that Respondent be suspended from the practice of law for two years, with reinstatement thereafter subject to the conditions set forth by the panel.

On January 21, 2014, Respondent filed his Objection to Findings of Fact, Conclusions of Law and Recommendations (“Objection”). Notably, Respondent made no objection to the 25 disciplinary violations found by the panel and Board. Respondent’s objection is that he believes there are factors that the panel should have considered in mitigation and he requests that this Court impose a less severe sanction

Respondent’s objection is without merit and, for the reasons stated below; this Court should affirm the two-year suspension recommended by the Board.

ARGUMENT

I. THE CONDUCT OF GRIEVANT HASSALL’S FATHER IS NOT ONE OF THE BCGD PROC REG 10 FACTORS THAT MAY BE CONSIDERED IN FAVOR OF RECOMMENDING A LESS SEVER SANCTION, AND WAS APPROPRIATELY NOT CONSIDERED AS MITIGATION BY THE PANEL

Respondent argues that the Board erred when it failed to consider in mitigation the fact that Ms. Hassall’s father paid off one of her creditors without consulting with Respondent. Relator disagrees.

While Respondent acknowledges that “an error occurred during the representation of Ms. Hassall at inception”, Respondent maintains that Ms. Hassall was properly advised and that his conduct did not foreclose Ms. Hassall from ultimately achieving bankruptcy relief. The clear and convincing evidence presented during the panel hearing revealed that the Respondent lacked a basic understanding of bankruptcy law. Hearing Tr. 280. Respondent did not understand how to calculate when Ms. Hassall was eligible for bankruptcy protection. Hearing Tr. 49-51. When the bankruptcy trustee took adverse action (motion to dismiss)

against Ms. Hassall's interest, Respondent failed to respond or even advise Ms. Hassall about the importance of the trustee's motion to dismiss. Hearing Tr. 182-83.

The conduct of Ms. Hassall's father does constitute any of the factors listed in BCGD Proc Reg 10 which may be considered as mitigation, and Respondent provides no supporting legal authority and fails to show or even suggest how Ms. Hassall's father's conduct mitigates Respondent's lack of competence, failure to promptly and reasonably inform his client about the status of the matter, and failure to achieve her required consent.

II. THE PARTIAL PAYMENT TO GRIEVANT DEGENS IS NOT ONE OF THE BCGD PROC REG 10 FACTORS THAT MAY BE CONSIDERED IN FAVOR OF RECOMMENDING A LESS SEVER SANCTION, AND WAS APPROPRIATELY NOT CONSIDERED AS MITIGATION BY THE PANEL

Respondent argues that the Board erred when it failed to consider in mitigation the fact that Respondent paid to Mr. Degens "the full amount of the refund due him pursuant to the fee agreement between the parties". Objection, p. 2. Relator disagrees.

Relator's fee arbitration committee ordered Respondent to pay Mr. Degens \$2,500.00 within sixty days of January 26, 2012. Respondent failed to pay Mr. Degens. Mr. Degens was forced to file a lawsuit. On May 7, 2012, Mr. Degens was awarded judgment in the amount of \$2,512.00 plus costs against Respondent.

Apparently some time after the May 30, 2013, hearing Respondent paid \$2,500 to Mr. Degens, however no evidence of such payment was ever before the panel or the Board, and Respondent has not provided any evidence of such a payment. Rather than accept his responsibility for failing to timely and fully comply with the order of Relator's fee arbitration panel, Respondent attempts to argue that it was the panel's responsibility to "verify" whether any payment was made AFTER the hearing. (Objection, p. 2)

Even if the Court accepts that at some time after the panel hearing Respondent made a payment to Mr. Degens, Respondent still has not satisfied the judgment, and never made a “timely good faith effort to make restitution”, as required under BCGD Proc Reg 10. This Court should not consider Respondent’s long overdue partial payment in mitigation.

III. ANY DELAY DUE TO THE FACT THAT GREIVANT DEBAGIO HAD NOT “PROPERLY DISPOSED” HER TAX REFUND IS NOT ONE OF THE BCGD PROC REG 10 FACTORS THAT MAY BE CONSIDERED IN FAVOR OF RECOMMENDING A LESS SEVER SANCTION, AND WAS APPROPRIATELY NOT CONSIDERED AS MITIGATION BY THE PANEL

Respondent argues that the Board erred when it failed to consider in mitigation the fact that he could not file the bankruptcy petition until Ms. DeBagio had “properly disposed” her federal tax refund. Objection, p.2. Relator disagrees.

In Count Three, Respondent was not charged with neglect—Respondent was charged with failing to comply with reasonable requests for information from his client, failing to advise the client in writing that she may be entitled to a refund based upon the value of representation, and failing to properly manage/maintain his client trust account.

Ms. DeBagio’s conduct that allegedly contributed to a delay in the filing of her bankruptcy petition should not be considered in mitigation where Relator asserted no complaint for delay. Whether Ms. DeBagio timely “disposed” her tax refund is neither relevant nor is it one of the factors which may be considered as mitigation pursuant to BCGD Proc Reg 10.

IV. THE SCOPE OF THE REQUEST FOR INFORMATION FROM RELATOR'S INVESTIGATOR IS NOT ONE OF THE BCGD PROC REG 10 FACTORS THAT MAY BE CONSIDERED IN FAVOR OF RECOMMENDING A LESS SEVER SANCTION, AND WAS APPROPRIATELY NOT CONSIDERED AS MITIGATION BY THE PANEL

Respondent argues that the Board erred when it failed to consider in mitigation the fact that Relator's expert, Ms. Vaughn, sought privileged information. Relator disagrees.

The clear and convincing evidence presented during the panel hearing revealed that despite Relator seeking records specific to Ms. DeBagio, including a client information sheet, and despite Respondent acknowledging that Relator was entitled to Ms. DeBagio's client information sheet, Respondent refused to produce the document. Hearing Tr. 114-15.

CONCLUSION

Relator agrees with the Board recommendation that Respondent Harvey be suspended from the practice of law for two years, with reinstatement thereafter subject to the conditions set forth in the Board report. The Board's recommendation is more severe than that originally sought by Relator. However, Respondent's conduct during the panel hearing, his lack of cooperation with the grievance process, and his lack of candor and remorse account for Relator's change in recommendation.

This Court has repeatedly held that an attorney's neglect of an entrusted legal matter and failure to cooperate in the ensuing disciplinary investigation generally warrant an indefinite suspension. See *Cleveland Metropolitan Bar Association v Kelly* (2012), 132 Ohio St. 3d 292; *Cincinnati Bar Association v Emerson* (2009), 122 Ohio St. 3d 176; *Disciplinary Counsel v Mathewson* (2007), 113 Ohio St. 3d 365; *Cleveland Bar Association v Verbiski* (1999), 86 Ohio St. 3d 627.

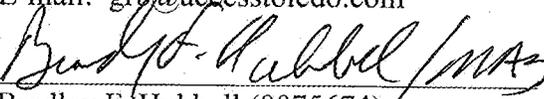
Recently, in *Cleveland Metropolitan Bar Association v Gruttadaurio* (2013), 136 Ohio St. 3d. 283, this Court noted that the respondent's "self-serving statements and misrepresentations in the course of the disciplinary proceedings are indicative of a calculated attempt to avoid accepting responsibility for his deficient representation". The Court ordered an indefinite suspension and held that because the respondent "had engaged in dishonesty not only in his handling of his client matters but also in the disciplinary proceedings...we find that his conduct is most analogous to those attorneys who have taken their clients money, failed to perform the promised legal work, and then failed to cooperate in the resulting disciplinary investigation."

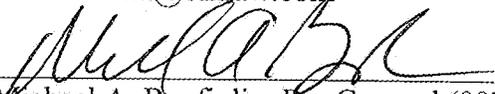
Support for the sanction of a two-year suspension may also be found in *Columbus Bar Association v Beatty* (2001), 93 Ohio St. 3d 404. In *Beatty*, the Court found that the respondent had neglected three legal matters and failed to respond to the relator's initial inquires, and ordered a two-year suspension. The Board in the present case found that Respondent Harvey had neglected legal matters and failed to cooperate in the disciplinary investigation.

Accordingly, the recommended two-year suspension is not unreasonable in this case where the Board found 25 ethical violations, including one violation of Rule 8.4(c) (Dishonesty), two violations of Rule 1.3 (Diligence) and two violations of Rule 8.1(b) and Gov. Bar R. V(4)(G) (Duty to Cooperate). Relator asks that the Court adopt the January 13, 2014, Amended Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio.

Respectfully submitted,


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CERTIFICATE

I hereby certify that a copy of the foregoing Relator's Answer Brief was sent by ordinary U.S. Mail to Beauregard M. Harvey, Esq., 425 Jefferson Avenue, Suite 905, Toledo, OH 43604, this 3RD day of February, 2014.



Counsel for Relator