

ORIGINAL

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

In re:	:	14-0541
Complaint against	:	Case No. 13-043
Jennifer Ann Gorby Attorney Reg. No. 0073833	:	Findings of Fact, Conclusions of Law, and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on January 21, 2014, in Columbus before a panel consisting of David L. Dingwell, Teresa Sherald, and William J. Novak, 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} Respondent appeared pro se. Bruce T. Davis appeared on behalf of Relator.

{¶3} Respondent's misconduct can be summarized as engaging in misappropriation of client funds while acting as an attorney for her sister. Unfortunately, this misunderstanding between siblings resulted in the filing of a grievance and ultimately concluded with a complaint and hearing. There was full and timely restitution of the misappropriated funds and the misconduct of Respondent did not result in any harm whatsoever to her grievant sister.

{¶4} Following the filing of the complaint, Respondent filed an answer on August 28, 2013.

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SUPREME COURT OF OHIO

{¶5} Evidence was presented by way of stipulations, exhibits, deposition testimony, and the testimony of Respondent. Relator did not call Respondent's sister as a witness. Respondent stipulated to the following rule violations as charged in the complaint: Prof. Cond. R. 1.4(c) [a lawyer shall not fail to inform a client on a separate form if the lawyer does not maintain professional liability insurance in the required amounts]; Prof. Cond. R. 1.15(a) [a lawyer shall not fail to keep client funds in the lawyer's possession separate from the lawyer's funds]; Prof. Cond. R. 1.15(a) [a lawyer shall not fail to keep client funds in a client trust account or IOLTA account]; Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]. However at the hearing, Respondent withdrew her original stipulation to the violation of Prof. Cond. R. 8.4(c).

{¶6} Respondent stipulated to mitigation evidence which included the following: no previous discipline; disclosure to disciplinary board; cooperative attitude toward proceedings; and timely good faith effort to make restitution.

{¶7} Respondent also stipulated to aggravation evidence which included the following: dishonest or selfish motive; and a pattern of misconduct.

{¶8} At the conclusion of the hearing, Relator and Respondent were asked to provide the panel with briefs outlining their respective positions on sanctions. Relator recommended that Respondent be suspended from the practice of law for one year. Respondent, on the other hand, requested that any suspension be stayed. This panel is of the opinion that Respondent should be suspended from the practice of law for one year, all stayed, that she be monitored in the area of law office management with an emphasis on IOLTA account responsibility, and that Respondent commit no further ethical violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶9} Respondent was admitted to the practice of law in the state of Ohio on November 13, 2001 following her graduation from University of Akron School of Law. Respondent is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶10} Respondent is a parttime, solo practitioner in Columbiana County and maintains a private practice that focuses on court-appointed client representation in the court of common pleas in Columbiana County. Respondent wanted to become a lawyer from her early childhood. Respondent testified that her mother wanted to become a lawyer, but after marriage and raising two children she gave up. As Respondent got older, she went to college and then law school to become a lawyer because that was exactly what her mother wanted to do. Respondent fell in love with the law and wants to continue to be a lawyer because she enjoys helping people who normally would not have the resources to hire competent counsel. Respondent has represented individuals from misdemeanor court all the way up to felony murder trials. Hearing Tr. 51-53.

{¶11} Respondent has two small children, twins born in 2007. When they were born, her entire life changed. Respondent became a part-time lawyer and as a result hasn't handled client funds or personal clients since 2010. In fact, the testimony appeared to substantiate the notion that the only retainer client that she had from that time up until the time of this grievance was her sister. It should be emphasized that at no time did Respondent charge her sister a fee which is the subject matter of this complaint. Respondent has lived in Columbiana County, Salem, Ohio in almost the exact same house throughout her entire life. Respondent is actively involved in raising her children while at the same time working to represent indigents in the Columbiana County justice system. *Id.* at 48-50.

{¶12} The grievant in this case was Donna Adams, Respondent's sister. Throughout their lives they had a tumultuous and contentious relationship. The uncontroverted testimony at the hearing as well as the deposition testimony of Respondent which was offered into evidence by Relator confirmed that once Respondent became a practicing attorney, her sister viewed this as an opportunity to use her services for whatever and whenever she wanted. Respondent could never say no because she was concerned that her sister would call her mother on her and start family drama. Anytime the sister would have a legal issue, such as a speeding ticket, Respondent was required to drop everything, no matter what, to take care of her sister's legal matter. If not, the sister would call and harass Respondent's mother. As a result, Respondent would capitulate. There was even a matter involving the grandmother's estate that created intense disagreements between Respondent and her sister. While not condoning the conduct of Respondent in this matter, unfortunately the relationship between the sister and Respondent started as a family dispute and then resulted in a grievance, complaint, and a full blown hearing in front of this Board. *Id.* at 37-42.

{¶13} In 2010, Respondent reduced her weekly work load to approximately 25 hours and began accepting only criminal defense and guardian ad litem (GAL) court appointments in Columbiana County.

{¶14} In April 2011, Respondent's sister contacted Respondent regarding a foreclosure action filed against Mrs. Adams and her husband, Troy Adams, in the Mahoning County Court of Common Pleas, Case No. 2011 CV 1155. In addition to the foreclosure action, there were issues relating to the sister's bankruptcy and divorce which further complicated the representation.

{¶15} Respondent agreed to represent the Adamases in their foreclosure case at no charge.

{¶16} There was no written fee agreement.

{¶17} Respondent did not have professional liability insurance at any time during the representation and did not advise the Adamses of that fact.

{¶18} On May 19, 2011, Respondent filed an answer and a counterclaim against the lender in the foreclosure case on behalf of the Adamses and continued to actively represent them in the matter until the lender was granted a judgment against the Adamses in May 2012. It should be noted that Respondent was not engaged in the civil practice of law nor did she practice in Mahoning County. These pleadings involved a civil matter and took place in Mahoning County. Any court costs relating to this representation were paid out of Respondent's pocket as distinct from the funds given to Respondent to hold on behalf of her sister.

{¶19} In connection with her representation in the foreclosure case, Respondent agreed to receive payments from the Adamses and to hold those funds in trust so that they could save enough money to stop the foreclosure. The Adamses did not give Respondent permission to use their funds for any purpose other than payment of the mortgage.

{¶20} Respondent had neither an Interest on Lawyer's Trust Account (IOLTA) nor a client trust account to safeguard the funds belonging to the Adamses. Respondent used her business checking account at Summit Federal Credit Union, account #XXXX43-29, to deposit and disburse the funds belonging to the Adamses. It should be noted that Respondent did not represent private clients.

{¶21} On June 26, 2011, Respondent's business checking account had a zero balance.

{¶22} On June 27, 2011, Respondent deposited \$800 belonging to the Adamses, plus \$2,625.78 in personal funds into her business checking account increasing the account balance to \$3,425.78.

{¶23} On July 5, 2011, Respondent deposited \$2,800 in total belonging to the Adamses into Respondent's business checking account increasing the amount entrusted to Respondent to \$3,600.

{¶24} Between July 11, 2011 and July 26, 2011, Respondent wrote nine checks from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$2,637.99 for July 2011, \$962.31 less than the \$3,600 entrusted to Respondent at that time.

{¶25} On August 2, 2011, Respondent wrote three checks totaling \$112 from her business checking account for personal and business expenses unrelated to the Adamses resulting in a balance of \$2,525.69, \$1,074.31 less than the \$3,600 entrusted to Respondent at the time.

{¶26} On August 25, 2011, Respondent deposited \$287.50 in personal funds into her business checking account increasing the balance to \$2,813.19.

{¶27} On August 26, 2011, Respondent deposited \$1,000 belonging to the Adamses in Respondent's business checking account increasing the amount entrusted to Respondent to \$4,600.

{¶28} Between August 26 and 28, 2011, Respondent withdrew funds from her business checking account for her personal use unrelated to the Adamses resulting in an ending balance of \$3,663.19 for August 2011, \$963.81 less than the \$4,600 entrusted to Respondent at that time.

{¶29} On September 1, 2011, Respondent disbursed \$400 in cash to Mrs. Adams from Respondent's business checking account reducing the amount entrusted to Respondent to \$4,200.

{¶30} During September and October 2011, Respondent continued to withdraw funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$1,507.50 for October 2011, \$2,692.50 less than the \$4,200 entrusted to Respondent at that time.

{¶31} On November 23, 2011, Respondent deposited \$900 belonging to the Adamses in Respondent's business checking account increasing the amount entrusted to Respondent to \$5,100.

{¶32} During November 2011, Respondent continued to withdraw funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$1,952 for November 2011, \$3,148 less than the \$5,100 entrusted to Respondent at that time.

{¶33} On December 2, 2011, Respondent deposited \$127.50 in personal funds into her business checking account increasing the account balance to \$1,979.50.

{¶34} During December 2011, Respondent continued to withdraw funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$806.37 for December 2011, \$4,293.63 less than the \$5,100 entrusted to Respondent at that time.

{¶35} On January 18, 2012, Respondent deposited \$500 belonging to the Adamses in Respondent's business checking account increasing the amount entrusted to Respondent to \$5,600.

{¶36} That same day, Respondent deposited \$960 in personal funds into her business checking account increasing the account balance to \$2,260.37.

{¶37} During January 2012, Respondent continued to withdraw funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$2,260.37 for January 2012, \$3,339.63 less than the \$5,600 entrusted to Respondent at that time.

{¶38} On February 1, 2012, Respondent deposited \$400 belonging to the Adamses in Respondent's business checking account increasing the amount entrusted to Respondent to \$6,000.

{¶39} During February 2012, Respondent continued to withdraw funds from her business checking account to pay a personal expense unrelated to the Adamses resulting in an ending balance of \$2,628.37, \$3,371.63 less than the \$6,000 entrusted to Respondent at that time.

{¶40} On March 2, 2012, Respondent withdrew \$6 from her business checking account for a business expense unrelated to the Adamses resulting in a \$2,622.37 balance, \$3,377.63 less than the \$6,000 entrusted to Respondent at that time.

{¶41} On March 7, 2012, Respondent deposited \$600 in personal funds into her business checking account increasing the account balance to \$3,222.37.

{¶42} On March 20, 2012, Respondent disbursed \$450 by check #1331 to Mrs. Adams from Respondent's business checking account reducing the amount entrusted to Respondent to \$4,550.

{¶43} Between March 2012 and October 2012, Respondent continued to withdraw funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$96.49 for October 2012, \$5,453.51 less than the \$5,550 entrusted to Respondent at that time.

{¶44} On November 2, 2012, Respondent deposited \$5,500 in personal funds obtained from the retirement account of Respondent's husband, Gary Gorby, into Respondent's business checking account increasing the account balance to \$5,596.49.

{¶45} That same month, Respondent withdrew funds from her business checking account for personal and business expenses unrelated to the Adamses resulting in an ending balance of \$5,484.49 for November 2012, \$15.51 less than the \$5,550 entrusted to Respondent at that time.

{¶46} By this time, the Adamses had divorced each other and Mr. Adams had filed for bankruptcy.

{¶47} On or about November 28, 2012, Respondent received a letter from Mr. Adams' bankruptcy attorney, Richard Zellers, requesting the disbursement of half of the entrusted \$5,550 on Mr. Adams' behalf.

{¶48} On December 4, 2012, Respondent deposited \$100 in personal funds into her business checking account increasing the account balance to \$5,584.49.

{¶49} On December 7 and 13, 2012, Respondent disbursed two checks for \$2,775; check #1355 to the bankruptcy in Mr. Adams' case and check #1356 to Mrs. Adams. The checks totaling \$5,550 reduced the amount entrusted to Respondent to zero and left an account balance of \$34.49.

{¶50} It is undisputed that Respondent misappropriated funds.

{¶51} It is undisputed and admitted by Relator that there was no harm caused whatsoever to Respondent's sister as a result of Respondent's misconduct.

{¶52} Respondent made full restitution to her sister.

{¶53} Respondent was not entirely forthcoming in her letter to Relator in response to its investigation, specifically when she advised Relator's office that she was holding \$5,500 that belonged to Donna Adams and her husband on October 28, 2012, when in fact the transfer from her husband's retirement fund did not hit her general account until November 2, 2012.

{¶54} The panel finds by clear and convincing evidence through exhibits, stipulations, and testimony that Respondent violated the following: Prof. Cond. R. 1.4(c), Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a), and Prof. Cond. R. 8.4 (c).

{¶55} Relator did not prove by clear and convincing evidence that Respondent's conduct was so egregious resulting in a violation of Prof. Cond. R. 8.4(h). See *Disciplinary Counsel v. Bricker*, 137 Ohio St.3d 35, 2013-Ohio-3998. The panel dismisses that alleged violation.

AGGRAVATION, MITIGATION, AND SANCTION

{¶56} Based upon the stipulations, exhibits, and testimony adduced at the hearing, the panel finds the following aggravating factors:

- Respondent acted with a dishonest or selfish motive; and
- Respondent had a pattern of misconduct.

{¶57} Based upon the stipulations, exhibits, and testimony adduced at the hearing, the panel finds the following mitigating factors:

- Absence of a prior disciplinary record;
- Full and free disclosure;
- Cooperative attitude toward proceedings; and
- Timely good-faith effort to make restitution and restitution was made in full.

{¶58} There was no question that Respondent misappropriated funds during the representation of her sister. In addition, her conduct resulted in a misrepresentation to Relator during the investigation process regarding the availability of the funds that were paid by her sister. However, Respondent is one of the few lawyers in Columbiana County who does court appointed work, she provides a valuable service to the public, and she rarely if ever represents personal or retainer clients. Therefore, the question for this panel and the Board to determine is the appropriate sanction for a lawyer whose misconduct arose out of a contentious relationship with her sister, causing no harm, and who poses little, if any, threat to the public.

{¶59} In determining whether or not a sanction is appropriate for Respondent's misconduct, all relevant factors must be considered including the duties of Respondent, the violations incurred, and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*,

96 Ohio St.3d 424, 2002-Ohio-4743. It is well settled that the presumptive sanction for misappropriation is disbarment. *Disciplinary Counsel v. Burchinal*, 133 Ohio St.3d 38, 2012-Ohio-3882 at ¶17. On the other hand, the primary purpose of sanctions is not to punish the offender but to protect the public. *Disciplinary Counsel v. Hoppel*, 129 Ohio St.3d 53, 2011-Ohio-2672.

{¶60} Relator relies on *Disciplinary Counsel v. Burchinal*, 133 Ohio St.3d 38, 2012-Ohio-3882. However, while Relator attempts to justify that in that case there was an actual suspension of six months for a two-year suspension, and that Burchinal self-reported to Relator, that self-reporting occurred after the misconduct was discovered by a partner in Burchinal's office. More importantly, there were multiple acts of misappropriation and a neglect of a client matter and concealment which resulted in the actual suspension. Such is not the case here.

{¶61} While this panel certainly does not condone the actions of Respondent, it is somewhat concerning that Respondent's otherwise unblemished record should become the target of a disciplinary investigation because of the acrimonious relationship with her sister. The panel does not excuse her for the violation of these rules, yet we must recognize that this family feud boiled over into this process. Attention is therefore directed to the case of *Disciplinary Counsel v. Fumich*, 116 Ohio St.3d 257, 2007-Ohio-6040. That case involved a family matter where the respondent was suspended for one year with the entire suspension stayed on the condition that he commit no further misconduct. Fumich, a probate lawyer, was retained to represent a relative in the probate of a will. Fumich was then asked to explore the likelihood of a medical malpractice action on behalf of the estate. Fumich agreed to do so, filed the case, and when required to submit a report from a medical expert, Fumich failed. Summary judgment was granted on behalf of the defendants and the respondent took no further action, nor did he advise his clients, who were relatives, that the case had been dismissed. When his relatives inquired as to the possibility of settlement, he withdrew money

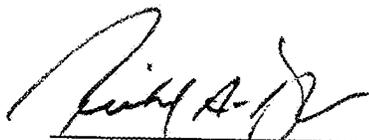
from his IRA and paid them \$16,000 telling them he had settled their case when, in fact, he did not. When the clients found out about his actions, they filed a grievance. The *Fumich* case also involved a second count involving relatives wherein the relatives requested their file despite Fumich's protestations. For multiple violations of the disciplinary rules, Fumich received a one-year suspension all stayed. There is only one count in this case.

{¶62} For the foregoing reasons, specifically recognizing that this was a family matter gone bad, and taking into account the aggravating and mitigating factors, this panel concludes that Respondent's license to practice law be suspended for one year, all stayed, that Respondent submit to a one-year monitored probation in the area of law office management specifically focusing on IOLTA management, and that Respondent commits no further ethical violations.

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, 2014. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Jennifer Ann Gorby, be suspended from the practice of law in Ohio for one year with the suspension stayed in its entirety on the conditions contained in ¶62 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