

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT  
OF THE SUPREME COURT OF OHIO**

**In re:**

**Case No. 2014-068**

**Complaint against**

**David Franklin Robertson, Jr.  
Attorney Reg. No. 0074030**

**Findings of Fact,  
Conclusions of Law, and  
Recommendation of the  
Board of Professional Conduct  
of the Supreme Court of Ohio**

**Respondent**

**Cincinnati Bar Association**

**Relator**

**OVERVIEW**

{¶1} This matter was heard on May 4, 2015 in Columbus before a panel consisting of Sharon Harwood, Judge William A. Klatt, and McKenzie Davis, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11(A).

{¶2} Respondent was represented by Jonathan Coughlan. Vincent Salinas and Howard Schwartz appeared on behalf of Relator.

{¶3} Respondent represented Frank Mayborg on various matters, including developing his estate, prior to his death. After Mayborg passed away, one of his daughters (Lewallen) requested that Respondent represent her as the fiduciary of the estate. Respondent agreed.

{¶4} Shortly thereafter, other family members filed objections to both Lewallen serving as fiduciary and the inventory of the estate. Lewallen requested Respondent to represent her and her husband against these claims.

{¶5} Respondent believed these were baseless claims and believed he could disprove them. Respondent did not indicate to Lewallen that the representation would create a conflict of

interest. Respondent worked numerous hours to disprove those claims. After a number of months, the family members withdrew their objections.

{¶6} Respondent submitted various request for attorney fees for the work completed in defending the family objections. The judge denied all of his requests. Respondent thereafter requested partial attorney fees directly from his client, with the understanding the estate would reimburse Lewallen. Respondent made this request without court approval as required by the local rule. When filing the final fiduciary account with the court, Respondent failed to indicate that he had received any attorney fees from Lewallen.

{¶7} The parties filed joint stipulated rule violations setting forth three rule violations.

{¶8} The panel recommends Respondent be suspended from the practice of law for six months, all stayed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶9} Based on the agreed stipulations filed on April 30, 2015 and the evidence presented during the hearing, the panel makes the following findings of fact.

{¶10} Respondent was admitted to the practice of law in the state of Ohio on November 13, 2001. Respondent is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar.

{¶11} Respondent began working for the law firm Dinsmore and Shohl briefly before moving his practice to the north side of Cincinnati with Mitch Lippert and Dick Finan. Respondent has handled approximately sixty estates.

{¶12} Respondent was retained to represent Deborah Lewallen, the daughter of Frank Mayborg, who was a client that had passed away just prior to the representation. Lewallen was the fiduciary of the estate of Frank Mayborg.

{¶13} On July 6, 2012, Respondent entered into a written fee agreement with Lewallen. The fee agreement allowed for attorney fees to be paid pursuant to the guidelines of the Hamilton County Probate Court, specifically, Rule 71.1(C), which reads as follows:

Attorney fees for the administration of a decedent's probate estate ordinarily shall be paid at the time the fiduciary's final account or certification of termination is prepared for filing with the Court, and such fee shall not be paid to two weeks before the filing of the fiduciary's final account or certification of termination.

{¶14} On August 6, 2012, Lewallen's sister, Karen Scherpenberg, filed an application to have her removed as the fiduciary. Shortly after, Lewallen's other siblings and seven of Mayborg's grandchildren joined the effort to have Lewallen removed as fiduciary.

{¶15} In addition to the application of removal, the other family members filed objections to the inventory filed by Lewallen. The family members alleged that various items were removed from the estate. In particular, the family members alleged Lewallen was involved in causing Frank Mayborg to take a mortgage on his home in the amount of \$85,000 approximately three weeks prior to his death and that Mayborg gave Lewallen's husband the sum of \$110,000 twelve days prior to his death. The family members assert the \$110,000 paid to Lewallen's husband should be included in the estate inventory.

{¶16} Respondent was asked by Lewallen to defend her from these allegations. Respondent was Mayborg's attorney prior to death and was aware of his desires, including the circumstances surrounding the \$110,000. Respondent agreed, but did not seek any consent from any beneficiary nor obtain a separate fee agreement.

{¶17} Respondent also did not inform Lewallen that a conflict was created between Respondent's representation of Lewallen as fiduciary of the estate, and Respondent's representation of Lewallen individually and her husband as to the allegations that they had engaged in misconduct.

{¶18} Respondent believed that the allegations were false and were intended to harass Lewallen. Additionally, Respondent believed it was incumbent upon him as attorney for the fiduciary to ensure an accurate accounting of the estate. Respondent spent a significant amount of time working to resolve the allegations on behalf of Lewallen.

{¶19} On February 5, 2013, six months after the initial filing, the family members voluntarily withdrew the application for removal.

{¶20} On February 25, 2013, Respondent filed, with Lewallen's signature, an application for partial payment of attorney fees. On March 13, 2013, Respondent filed an application for extraordinary attorney fees.

{¶21} On March 7, 2013, the court denied interim attorney fees at that point in the case.

{¶22} On March 13, 2013, Respondent filed an application for extraordinary attorney fees.

{¶23} On March 20, 2013, the judge presiding over the matter stated the following on the record to both counsel and parties:

Okay folks, now let me tell you. I don't know what your arrangements are for paying your respective attorneys, but don't presume that your – the hourly rate that they're charging is going to be covered out of this estate. It's going to be pro – most likely out of your pockets on this stuff of -- of things of this nature. So my suggestion to you is you make a proper economic decision over how you're going to handle this stuff.

\* \* \*

Let me repeat for your benefit, and for her benefit, for Mr. Robertson's benefit. I have final authority of what's being paid for attorney's fees out of this estate. And if it's my finding that there was wasted time and I don't grant it all, then I presume—I don't know what his arrangement is. But whatever I don't grant, she's going to have to pay out of her own pocket, okay? And you folks are in the same situation as far as for your attorneys.

Stipulated Ex. 48 at 19-20 and 31-32.

{¶24} On March 21, 2013, the probate judge issued a court order that the two applications for payment of attorney fees would be held in abeyance until the estate was ready to be closed. The probate judge issued the order after the in court discussion between the parties about any “other matters.”

{¶25} On or about March 21, 2013, Respondent emailed Lewallen, without court approval, requesting \$5,000 payment from her personal account for outstanding attorney fees. Respondent indicated that he was suffering a cash flow problem. Respondent also insinuates he could and would give more attention and work harder if Lewallen would pay partial attorney fees immediately. Below is an excerpt of a March 21, 2013 email from Respondent to Lewallen:

After you left I reviewed my finances with the file and it has proved very challenging to finance the litigation in this case. Attached is the last printed statement of legal fees. I understand that you are not in a position to pay all of the fees due at the current time. The guideline fee on this case is approximately \$11,000. I could hold off on that guideline fee amount for at least three more months, if the remaining balance could be paid over the next 6-8 weeks. The immediate influx of the \$5,000 discussed today will be a significant help. Please look into what you can do to bring the remainder of the bill in place over the next several weeks.

Stipulated Ex. 38.

{¶26} Lewallen inquired whether the amount would be reimbursed plus interest from the estate. Respondent, via email on March 22, 2013, answered in the following manner:

Yes, at the Judge’s discretion – You are paying for a benefit to the estate and have the right to be reimbursed for estate expenses. If the Judge was to find that you had acted or that I had acted in a way to harm the estate, then he would not award for that. If what the siblings were saying was true, there would be an argument. The interest expense would be his judgment as to reasonableness – was this done in a way to maximize the benefit/minimize the harm to the estate.

Stipulated Ex. 40.

{¶27} Respondent followed up with another email on May 30, 2013 again suggesting his abilities to perform in this matter would be greatly enhanced if Lewallen would provide

additional funding. Below is an excerpt of the May 30, 2013 email from Respondent to Lewallen:

I have, and managed to continue work but the pace has slowed over the last week and a half. The payment of that invoice would relieve other pressures that would allow me to turn the heat back up on your case.

Stipulated Ex. 43.

{¶28} Respondent continued to push the importance of the payment of attorney fees and the effect on performance later in the email:

I want to move heaven and earth to go after them with all we have, your lack of cash flow on this case is now undermining my ability to do that. As I committed to Debbie, I will do my best regardless, but I will be capable of much more if the cash flow issue is resolved.

*Id.*

{¶29} On March 23, 2013 pursuant to the request, Lewallen paid Respondent \$5,000. On April 1, 2013 pursuant to the request, Lewallen paid Respondent \$5,000. On May 31, 2013 pursuant to the request, Lewallen paid Respondent \$7,820. On July 19, 2013 pursuant to a request from Respondent, Lewallen paid attorney Jeremy Evans \$5,500 (Respondent brought in Evans to assist in the litigation).

{¶30} Respondent never divided any of his billing of this estate between regular estate administration and defense of Lewallen from the family members' claims. Additionally, Respondent did not obtain court approval to take these fees.

{¶31} On September 16, 2013, the probate court awarded Respondent a total of \$14,000 in fees and ordered that such fees should not be paid prior to two weeks before the filing of the fiduciary's final account.

{¶32} On September 30, 2013, Respondent filed a second extraordinary fee application asking the court to approve the sum of \$29,480 as fees from the estate for the work performed between March 8, 2013 and September 17, 2013.

{¶33} On October 17, 2013, Respondent, Evans, and Robert Smith (now representing Lewallen in the fee dispute) appeared before the probate judge to determine what, if anything should be reimbursed out of the estate. The judge, in the hearing, made it clear he was not interested in awarding any more than the \$14,000 for matters associated with the estate as set forth in the earlier ruling.

{¶34} The next day, October 18, 2013 the court issued an order that “the award of \$14,000 represents the full amount of attorney fees from all sources approved for activities conducted on behalf of the estate.”

{¶35} On November 12, 2013, Respondent filed a fiduciary account for the time period from March 9, 2013 to October 28, 2013. That account, signed by both Respondent and Lewallen, reported \$0 attorney fees paid during that time period even though Lewallen had paid a total of \$23,230 to Respondent and attorney Jeremy Evans.

{¶36} On May 16, 2014, Respondent filed a final fiduciary account for the period of October 29, 2013 to May 16, 2014 which accurately stated that for the prior accounting period of July 9, 2012 to March 8, 2013 there were \$0 in attorney fees paid but which inaccurately stated that for the prior accounting period of March 9, 2013 to October 28, 2013 \$0 attorney fees were paid.

{¶37} The final fiduciary account dated May 16, 2014 stated that the attorney fees paid were \$14,000 out of the estate, but did not indicate the \$23,320 Lewallen paid to both Respondent and attorney Jeremy Evans.

{¶38} Respondent received the \$14,000 check drawn from the estate at the final accounting. Respondent immediately endorsed the check over to Lewallen and delivered it to her.

{¶39} On March 28, 2014, Lewallen filed a grievance against Respondent.

{¶40} On November 14, 2014, Respondent reimbursed Lewallen \$9,320.

{¶41} Respondent stipulated to and the panel finds the following violations by clear and convincing evidence:

- Prof. Cond. R. 1.7(b) [conflict of interest: current clients];
- Prof. Cond. R. 3.4(c) [knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists]; and
- Prof. Cond. R. 8.4(d) [conduct that is prejudicial to the administration of justice].

{¶42} Respondent violated Prof. Cond. R. 1.7(b) by agreeing to represent Lewallen in the defense of the claims brought forth by the other family members while representing her as the fiduciary of the estate. Respondent believed that the claims were designed to harass Lewallen, and he knew they were without merit given the fact that he created many of the documents they claimed were inappropriate. Hearing Tr. 96. Additionally, Respondent claimed he had a duty as the lawyer for the fiduciary to provide an accurate account of the estate. Hearing Tr. 100. However, Respondent's obligations as counsel ran not only to Lewallen as the executrix of her father's estate but to the estate itself, inasmuch as it was the embodiment of the will, literally and figuratively, of Frank Mayborg, now deceased. To the extent the claims of the Lewallen's other family members implicate potential wrongdoing that would diminish the estate, Respondent cannot simultaneously discharge his duty of undivided loyalty to the estate while undertaking a similar duty to the alleged wrongdoer. Although Respondent ultimately was able

to achieve a dismissal of the other family members' claims and thus avoid prolonged litigation involving the estate, that does not eliminate the conflict of interest his dual representation created in the first place.

{¶43} Respondent violated Prof. Cond. R. 3.4(c) by receiving fees, at his own request to the client, that had not been authorized by the court as required by Local Rule 71.1. Respondent was aware any attorney fees paid required court approval. Hearing Tr. 78. Although the judge's comments were somewhat confusing and ambiguous related to any other matters between the family members, Respondent conceded the estate was a single matter. Hearing Tr. 31. Additionally, the probate judge issued the court order on fees after the in-court discussion that Respondent is suggesting created ambiguity. Respondent should have known the court order would supersede any discussion that occurred in court. By fighting the allegation in probate court and not in common pleas court, it remained one single matter in probate court. Therefore, Respondent could not collect any fees for work on behalf of Lewallen without court approval.

{¶44} Respondent violated Prof. Cond. R. 8.4(d) by receiving fees that had not been authorized by the court as required by Local Rule 71.1 and filing documentation with the court that indicated he had not received any attorney fees, despite receiving over \$17,000.

#### **AGGRAVATION, MITIGATION, AND SANCTION**

{¶45} The guidelines governing mitigation and aggravation in attorney disciplinary cases are found in Gov. Bar R. V, Section 13, which lists factors that may be considered in recommending either a more or less severe sanction than is recommended by either party.

{¶46} The party stipulated to the following factors in mitigation that would justify a less severe sanction:

- Respondent has no prior discipline;
- Respondent made restitution;

- Respondent has fully cooperated with Relator during the course of the investigation as well as the Board of Professional Conduct during these proceedings.

{¶47} Respondent also offered, not as part of the stipulations, but rather during the hearing, as mitigation his various attempts to “do the right thing” during the estate matter. While not blaming the judge, Respondent suggested the courtroom discussions with the judge created such ambiguity on whether Respondent could bill for two separate matters. Hearing Tr. 67. The panel acknowledges the difficult circumstance and ambiguity the judge created.

{¶48} The parties did not stipulate, nor did Relator offer at the hearing, any aggravation that would justify a more severe sanction.

{¶49} The parties stipulated to the alleged rule violations, however the parties did not stipulate on a recommended sanction. Relator recommended that Respondent receives a six-month, fully stayed suspension. Respondent recommended a public reprimand.

{¶50} Relator cites *Disciplinary Counsel v. Shaw*, 138 Ohio St.3d 522, 2014-Ohio-1025, as justification for its recommended sanction. In *Shaw*, the attorney named his own five children as beneficiaries in a trust he prepared for a client, borrowed \$13,000 from the same client without advising the client of the inherent conflict of interest and then failed to repay the loan as agreed, and accepted attorney fees for a guardianship without obtaining prior approval from the probate court. The Court concluded a two-year suspension, with one year stayed, was appropriate.

{¶51} Relator also cited *Dayton Bar Assn. v. Parisi*, 131 Ohio St.3d 345, 2012-Ohio-879, as justification for their recommended sanction. In *Parisi*, the attorney represented both the proposed guardian and the ward in a guardianship proceeding, collecting legal fees from the client’s account without court approval while the application for guardianship was pending and

collecting a clearly excessive fee from an elderly client with diminished mental capacity. The Court in *Parisi* concluded a six-month suspension, all stayed was warranted.

{¶52} Respondent contends and the panel agrees the facts in *Shaw* are too different to the present case. In the first matter, Shaw included his own children as beneficiaries and took a loan that was not repaid. Secondly, Shaw actually took money from the estate without court approval. One could argue Respondent did the same by requesting money directly from Lewallen, but it's clearly a completely different circumstance, notwithstanding the belief that part of the work he did could have been interpreted as a different matter (as alluded to by the probate judge). Also, the sanction in the first *Shaw* matter was much more significant than what is even being requested by Relator. For these reasons, the panel finds *Shaw* of little benefit.

{¶53} The second *Shaw* matter includes practice while under suspension and other violations that are not present here.

{¶54} Respondent also contends *Parisi* is not instructive here. The panel, however, disagrees. Respondent suggests that because *Parisi* was representing the ward as well as the niece applying for guardianship during the proceeding, it makes the matter inapplicable to the present case. Although willing to acknowledge *Parisi* is a different forum and a more cut and dry conflict than what Respondent created, the panel believes it provides guidance.

{¶55} As the Court stated in *Parisi*, no matter how well-intended, a lawyer cannot represent both parties in a proceeding. Respondent, in this matter, represented Lewallen in her individual capacity and her capacity as fiduciary. Respondent spent significant time fighting the allegations, despite the fact the allegations were being asserted by beneficiaries. The fiduciary has an obligation to the beneficiaries and the beneficiaries were the ones making the complaints.

Respondent thought that because he knew Mayborg's intentions, he could resolve this on behalf of Lewallen.

{¶56} This issue represented much of the concern the panel had in this matter. Even during the hearing, Respondent continued to assert his ability to differentiate between his two roles. While he admitted wrongdoing, Respondent continued to assert his duty, as attorney to the fiduciary, to fight the beneficiaries who asserted claims against the estate. Respondent additionally claimed he had a duty of candor to the court that required him to fight claims against the estate. Hearing Tr. 100.

{¶57} Finally, the last issue to give the panel pause is the request for attorney fees from the client. In addition to the obvious Prof. Cond. R. 3.4(c) violation in taking a fee not authorized by the court, the panel was particularly disturbed by the email requesting funds. Specifically, Respondent insinuates the amount of money he received would impact his overall performance in the matter. The panel believes attorneys should be compensated for work completed however, the notion that an attorney will perform better if money is provided immediately is not something that should be encouraged.

{¶58} For these reasons, the panel concludes a sanction more than a public reprimand is warranted. Therefore, the appropriate sanction for Respondent is six-month suspension from the practice of law, all stayed.

**BOARD RECOMMENDATION**

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on August 7, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, David Franklin Robertson, Jr., be suspended from the practice of law for six months, stayed in its entirety, and ordered to pay the costs of these proceedings.

**Pursuant to the order of the Board of Professional Conduct of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendation as those of the Board.**

A handwritten signature in black ink, appearing to read "Richard A. Dove", written over a horizontal line.

**RICHARD A. DOVE, Director**