

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

In re:

Case No. 2015-012

Complaint against

**Charles Ross Smith III
Attorney Reg. No. 0020187**

Respondent

Erie-Huron County Bar Association

Relator

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

OVERVIEW

{¶1} This matter was heard on August 27, 2015 in Columbus before a panel consisting of Jeff M. Davis, Lawrence A. Sutter III, and David L. Dingwell, 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 11.

{¶2} Nicholas J. Smith appeared on behalf of Relator. Respondent participated in the hearing by telephone and did so with consent of Relator and the panel.

{¶3} The parties entered into 25 written stipulations of fact. Five exhibits were admitted into evidence at the hearing. Respondent (via telephone), Jennifer Shoewe, and David Howat testified at the hearing. The panel finds the underlying facts to have been proven, by clear and convincing evidence, and recommends the sanction of an indefinite suspension with reinstatement subject to conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶4} Respondent was admitted to the practice of law in the state of Ohio on April 28, 1978 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶5} Respondent did not maintain professional liability insurance after July 2, 2013. Respondent did not notify any clients that retained him after July 2, 2013 that he did not maintain professional liability insurance.

{¶6} Respondent's primary practice area was individual bankruptcy law.

{¶7} On February 11, 2014, Respondent sent a self-reporting letter to the Office of Disciplinary Counsel ("ODC") that was subsequently referred to Relator for investigation.

{¶8} Respondent's letter to ODC explained that he "had to close down [his] practice due to medical problems" and that he "may not be able to meet all of [his] obligations to clients before the practice closes."

{¶9} The letter further indicates with some confusion that while there was no problem with funds held in trust for clients in Respondent's IOLTA, Respondent "may not be able to complete [clients'] cases or refund their money immediately." The letter goes on to state that Respondent knew that he "should have kept in reserve funds advanced by clients to pay their court costs." The letter also references clients "who are owed refunds of court costs and unearned fees."

{¶10} The letter also states that Respondent "found another attorney to take over most of the practice, and she will waive attorney fees for existing clients, so that clients will not have to pay a second set of attorney fees." This was false. The attorney that took over many of Respondent's clients did charge clients additional fees for her work.

{¶11} Upon investigation, Relator was provided with a list of 43 clients' files. For each file, Respondent had been retained to file a bankruptcy petition on behalf of the client, had been paid legal fees and/or court costs by each client, but did not file a bankruptcy petition on behalf of the client, and did not refund all of the client's money.

{¶12} Respondent testified that when clients would pay him retainers that represented fees and court costs, he did not deposit those retainers into his IOLTA. Instead, Respondent deposited those funds into what he referred to as a “fees account” which he explained was not an IOLTA account and was separate from his attorney operating account. Hearing Tr. 36.

{¶13} Respondent testified that he would draw client funds from the “fees account” to pay various law office operating expenses even if he had not yet earned fees and was not using those funds for client’s court costs. Hearing Tr. 36-37.

{¶14} Joint Stipulated Exhibit 1 sets forth a list of the clients that had advanced fees and/or costs to Respondent and for which Respondent failed to file a bankruptcy petition.

{¶15} The total amount of fees and costs that Respondent received and refused to refund to these clients totals \$36,799.69. None of these funds was deposited into an IOLTA.

{¶16} In addition to Relator’s investigation of the self-reporting letter sent by Respondent to ODC, several other clients of Respondent filed separate grievances against Respondent to complain of similar conduct. These clients included William and Rebecca Jones, Nathan and Jennifer Schoewe, David Howat, John and Patricia Heilman, and Sharon Carroll.

{¶17} Respondent did not advise any of these clients that he did not maintain professional liability insurance.

{¶18} Jennifer Schoewe and David Howat both appeared at the hearing and gave testimony that they hired Respondent to file bankruptcy petitions on their behalf, gave Respondent retainers, but that Respondent did not file the petitions and did not refund their retainers.

{¶19} Jennifer Schoewe and David Howat further testified that they had to retain new counsel and pay additional fees and costs in order to file the bankruptcy petitions that Respondent was hired to file. While Mrs. Schoewe and her husband were able to secure the funds necessary

to hire new counsel and obtain a discharge from bankruptcy court, Mr. Howat testified that he is still trying to obtain sufficient funds to hire new counsel to file his petition for bankruptcy. Meanwhile, creditors continue to pursue Mr. Howat, causing him significant distress when he should have otherwise had his debts discharged by the bankruptcy court.

{¶20} Respondent testified that following the death of his wife, who helped him keep his finances organized, his physical health declined dramatically. He blames much of the problems associated with the grievances to his decline in health and inability to manage his law office properly. Hearing Tr. 14-15, 39-40.

{¶21} No medical evidence was admitted that would confirm that Respondent's problems were in fact caused by his declining health. In fact, it is apparent that Respondent's standard practice was to never deposit client retainers into an IOLTA.

{¶22} The panel is persuaded that Respondent's declining physical condition likely caused his decision to close his practice, self-report to ODC, and attempt to transition his clients to another attorney.

{¶23} The parties stipulated to, and the panel concludes by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following Rules of Professional Conduct:

- Prof. Cond. R. 1.3 [diligence];
- Prof. Cond. R. 1.4(c) [notice of lack of malpractice insurance];
- Prof. Cond. R. 1.5(d)(3) [a lawyer shall not enter into an arrangement for, charge, or collect a fee denominated as "nonrefundable" unless the client is simultaneously advised in writing that if the lawyer does not complete the representation for any reason, the client may be entitled to a refund of all or part of the fee based upon the value of the representation];

- Prof. Cond. R. 1.15(a) [a lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property];
- Prof. Cond. R. 1.15(c) [a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred]; and
- Prof. Cond. R. 1.16(e) [a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned].

{¶24} At the conclusion of Relator's case, Relator withdrew the charge contained in Count Seven of its complaint alleging violations of Prof. Cond. R. 8.1(b) and former Gov. Bar R. V, Section 4(G) relative to an attorney's duty to cooperate in the investigation of a grievance. The panel agrees that there is no clear and convincing evidence to support a finding of a violation of these provisions and therefore recommends the dismissal of that charge.

MITIGATION, AGGRAVATION, AND SANCTION

{¶25} The parties stipulated to, and the panel finds, the following aggravating factors:

- Respondent has exhibited a pattern of misconduct;
- Respondent has committed multiple offenses;
- Respondent's misconduct caused the vulnerability of and resulting harm to his clients in that the clients were in desperate financial straits, relying upon Respondent to take swift action to safeguard their funds and protect them from creditors; and
- Respondent has failed to make full restitution to the victims of his misconduct

{¶26} The parties stipulated to, and the panel finds, the following mitigating factors:

- Respondent has no prior disciplinary record; and
- Respondent has made full and free disclosure of his actions herein and has displayed a cooperative attitude in these proceedings.

{¶27} Although Respondent testified regarding the impact he believes that his deteriorating physical condition had upon him, no medical evidence of any kind was admitted at the hearing in order to substantiate this as a mitigating circumstance. Therefore, Respondent's physical condition is not a mitigating factor.

{¶28} Relator and Respondent stipulate to a recommended sanction of an indefinite suspension from the practice of law.

{¶29} The Supreme Court of Ohio has held on multiple occasions that the presumptive sanction for misappropriation of client funds is disbarment. *Dayton Bar Assn. v. Gerren*, 103 Ohio St.3d 21, 2004-Ohio-4110 at ¶14.

{¶30} However, evidence that constitutes mitigating circumstances, such as that presented in this matter, may be sufficient to overcome that presumption.

{¶31} In support of the recommended sanction, the parties cited the Court's decision in *Cincinnati Bar Assn. v. Britt*, 133 Ohio St.3d 217, 2012-Ohio-4541.

{¶32} Britt accepted client retainers, neglected the matters, failed to keep clients informed, and misappropriated the clients' funds to his own use. That is precisely what occurred in this matter.

{¶33} Also similar to this case, Britt had practiced for a long period of time with no disciplinary record.

{¶34} Unlike *Britt*, Respondent actually self-reported his misconduct to ODC. Respondent's self-disclosure, albeit somewhat incomplete, should be considered as sufficient mitigating circumstances to warrant a sanction less severe than permanent disbarment.

{¶35} However, the panel is also mindful of the need to protect the public. Respondent's candid admission that he believes his physical condition poses a significant challenge to his ability to ethically and responsibly practice law leads the panel to conclude that a mere term suspension would be wholly inadequate to protect the public.

{¶36} The panel, having considered the case law cited, the violations, and the aggravating factors versus the mitigating factors, recommends that Respondent be indefinitely suspended from the practice of law.

¶37 The panel further recommends that reinstatement should be conditioned upon the following:

- Respondent must make full restitution to all affected clients in the total amount of \$36,799.69;
- Respondent must pay the costs associated with this matter;
- Respondent must commit no further violations;
- Respondent must obtain a passing score on the multistate professional responsibility examination;
- In addition to biennial continuing legal education requirements, Respondent must complete an additional twelve hours of continuing legal education with an emphasis on law office management and IOLTA management; and
- Upon reinstatement, Respondent must serve a two-year period of monitored probation.

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 October 2, 2015. After discussion, the Board amended the findings of fact and conclusions of law to dismiss the alleged violation of Prof. Cond. R. 1.5(d)(3). The Board adopted the sanction recommended by the panel and recommends that Respondent, Charles Ross Smith III, be indefinitely suspended from the practice of law, with reinstatement subject to the conditions contained in ¶37 of this report, 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.



RICHARD A. DOVE, Director