IN THE SUPREME COURT OF OHIO

ORIGINAL

IN RE:	:	
	:	
Complaint Against:	:	
	:	**Case No.** 15-2001
Justin Fernandez (#0062974)	:	
	:	
RESPONDENT	:	
	:	**RELATOR'S OBJECTIONS**
CINCINNATI BAR ASSOCIATION,	:	
	:	
RELATOR	:	

RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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IN THE SUPREME COURT OF OHIO

IN RE:	:	
	:	
Complaint Against:	:	
	:	Case No. 2015-039
Justin Fernandez (#0062974)	:	
	:	
RESPONDENT	:	
	:	RELATOR'S OBJECTIONS
CINCINNATI BAR ASSOCIATION,	:	
	:	
RELATOR	:	

RELATOR'S OBJECTIONS TO THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Relator hereby objects to the following findings by the Board:

1. The finding that Respondent did not violate Prof. Cond. R. 1.3.

2. The finding that Respondent did not violate Prof. Cond. R. 2.1

3. The finding that Respondent did not violate Prof. Cond. R. 5.3(b).

4. The finding that Respondent did not violate Prof. Cond. R. 5.5(a).

Relator hereby agrees to the following findings by the Board:

1. The finding that Respondent violated Prof. Cond. R. 1.4(a)(2) by failing to reasonably consult with Harvey about the means by which Harvey's objectives were to be accomplished.

2. The finding that Respondent violated Prof. Cond. R. 1.4(b) by failing to explain the matters surrounding his representation of Harvey to an extent reasonably necessary to permit Harvey to make informed decisions regarding the representation.

Relator submits the following brief in support of these objections.

STATEMENT OF FACTS

Respondent, Justin Fernandez, was admitted to the practice of law in 1994.

Respondent has a business relationship with Morgan Drexen Inc. ("MD"). MD is a California company that describes itself as providing integrated support systems to attorneys with a focus on back-office paralegal and paraprofessional services. MD also assisted Respondent with what MD has classified as "non-formal debt resolution." (Stipulations of Fact between Respondent and Relator ¶1-3). MD worked with Respondent from July 2008 to mid-2015. (Answer of Respondent Justin Fernandez, Esq. to Amended Complaint of Relator Cincinnati Bar Association "Answer to Amended Complaint" ¶4). MD maintains a software system for the purposes of tracking the clients of Respondent. (Hearing Transcript p. 0030 ll. 14-18). Respondent admits that as of March 30, 2015, he had 485 clients for whom MD provided support services. (Answer to Amended Complaint ¶6).

In February 2014, Respondent undertook representation of Madelyn Harvey to assist Ms. Harvey in settlement of her outstanding debts. In February 2014, Ms. Harvey received a packet of materials bearing Respondent's name, titled "Non-Formal Debt Resolution Instructions." The second page of this packet was a letter to Ms. Harvey on Respondent's letterhead, over Respondent's typewritten signature. Although the letterhead included Respondent's former home address and telephone number in Cincinnati, it also directed Ms. Harvey to reply to an

address belonging to MD in Costa Mesa, California. The telephone number for MD was also provided on this letter. (Stipulations of Fact between Respondent and Relator ¶4-5).

At the time that packet of "Instructions" was sent to Ms. Harvey, Respondent had not even spoken to his client. (Hearing Transcript p. 0064 ll. 1-4).

Ms. Harvey signed an "Attorney/Client Fee Agreement Debt Resolution Representation" agreement sent to her by MD with the other materials referenced in paragraph 8 of the Complaint. In a section set apart by a text box, the agreement states: "Debt Resolution is an alternative to Bankruptcy which does not include the filing of any bankruptcy petition in a Bankruptcy Court and does not provide the same protections set forth in the Bankruptcy Code." The agreement also provides that Ms. Harvey is required to arbitrate any claims she may have against Respondent or MD, though MD is not a party to the agreement. (Stipulations of Fact between Respondent and Relator ¶6).

The representation agreement bore the electronic signature of Respondent, which was affixed to the agreement by an MD employee. (Answer to Amended Complaint ¶10). Respondent had authorized MD to use his electronic signature. (Hearing Transcript p. 0059 ll. 15-19).

Ms. Harvey also completed a "Disclosure Statement" that was among the documents sent to her by MD. One of these required disclosures stated as follows: "I/We understand the difference between secured and unsecured debts. . . ." (Stipulations of Fact between Respondent and Relator ¶7).

The support staff at MD were the only parties that communicated with Ms. Harvey for the purposes of ensuring that Ms. Harvey actually had such an understanding about the different types of debt. (Stipulations of Fact between Respondent and Relator ¶8).

After Ms. Harvey returned the paperwork, MD sent letters to Ms. Harvey's creditors on Respondent's letterhead, over Respondent's electronic signature. These letters advised the creditors that Ms. Harvey was represented "with respect to the attempted negotiation and resolution of his/her/their unsecured debts" and requested that no further direct communications be made to Ms. Harvey. (Stipulations of Fact between Respondent and Relator ¶9).

The letters directed that all communications be sent to "Justin Fernandez Attorney at Law; c/o MORGAN DREXEN: Integrated Legal Systems; 675 Anton Blvd.; Costa Mesa, CA 92626." The letters also provided a contact telephone number of 1-800-868-1581, which is a telephone number for MD's Costa Mesa, California office. The letters to Ms. Harvey's creditors raised the possibility of a bankruptcy petition by Ms. Harvey. (Stipulations of Fact between Respondent and Relator ¶10-12).

With authorization from Respondent, non-lawyer support staff at MD solicited creditors for the settlement of Ms. Harvey's debts. (Hearing Transcript p. 0064 ll. 13-15). When MD staff sent out a letter of May 8, 2014, [See Exhibit 10] to GE Capital Retail Bank over Respondent's electronic signature, Respondent still had not spoken with Mrs. Harvey (Hearing Transcript p. 0064 ll. 13-15), even though Respondent had been representing her since February 15, 2014. (Hearing Transcript p. 0075 ll. 10-17).

When Respondent was asked what actions he had personally taken with Mrs. Harvey, Respondent admitted that the only work he did was to determine if there were any conflicts of interest:

"A. Oh, I'm sorry. So my -- my custom involvement occurred for Madelyn Harvey initially on February 15th, 2014, when I ascertained no conflicts existed. But my general contribution to the Madelyn Harvey work was -- was always there from the time I designed the

forms, even before Madelyn Harvey became a client of mine, right through the time she was no longer my client.

..."

(Hearing Transcript p. 0075 ll. 10-17).

Respondent acknowledged that he was unaware if any bankruptcy petition had actually been prepared on Ms. Harvey's behalf, although if a bankruptcy petition would have been prepared, it would be a work in progress. (Stipulations of Fact between Respondent and Relator ¶13).

MD's actions with regard to Ms. Harvey are actions that were authorized by Respondent to be taken by MD for any and all of Respondent's clients that were supported by MD. (Hearing Transcript p. 0060 ll. 6-21). Respondent did not personally do any work for his client Ms. Harvey:

"Q. How far do we have to go into this log to find something where you have actually taken any steps on behalf of your client, Madelyn Harvey?

A. Well, again, the context is I - - I took pre-steps for all clients. So that when clients received documents going through the intake process, I not only knew - - pre-knew, let's use that term - - I pre-knew what the client was going to get and look at, but because I had 24/7 access to the software, I was always able to see for clients like Madelyn Harvey where we were in the process."

(Hearing Transcript p. 0072 ll. 6-17).

Ms. Harvey became unhappy with her attorney-client relationship with Respondent when she contacted several of her creditors directly and was told that no further communication had been made since the letters described above. (See: Hearing Transcript p. 0086 ll. 22-25). Ms.

Harvey did not first speak to Respondent until several months after his representation of Ms. Harvey began, when she became dissatisfied with the services being provided to her regarding her debts. (Hearing Transcript p. 0085 ll. 11-25, p.0086 ll. 1-8).

Ms. Harvey contacted "Call for Action," an international nonprofit network of consumer hotlines working in partnership with The Cincinnati Enquirer, to attempt to resolve issues that Ms. Harvey perceived to exist between her and Respondent. Following Ms. Harvey's contact to "Call for Action",," Respondent contacted Ms. Harvey and offered to refund 90% of the fees she had paid to date. (Stipulations of Fact between Respondent and Relator ¶14-15).

Respondent testified that, despite being Ms. Harvey's lawyer for several months, he never spoke with her and never gave her any advice for addressing the debts that had prompted Ms. Harvey to seek legal representation in the first place:

"Q. But you never provided Madelyn Harvey with any advice as to her best course of action given the debts that she was paying?

A. I did not have the chance to talk to Madelyn Harvey for the reasons we've reviewed here by phone, until -- until -- until the refund was question [sic] was answered by phone, that is."

(Hearing Transcript p. 0225 ll. 16-22). On several other occasions at hearing, Respondent repeated his claim he never had the "chance" to speak with his client Ms. Harvey during the months he represented her. (Hearing Transcript p. 0106 l. 25; p. 0260 l. 6; p. 0261 l. 10).

A Legal Assistant at MD sent Ms. Harvey a letter (on MD letterhead) dated July 7, 2014 enclosing a check from Howard Law PC to Ms. Harvey in the amount of $1,342.80, which is 90% of the $1,492.00 that Ms. Harvey paid for Respondent's representation. At the time of the

refund, Respondent had performed no work on behalf of Ms. Harvey that Respondent would classify as "billable." The address listed on the check from Howard Law referenced in paragraph 27 of the Complaint is the same 675 Anton Blvd. address listed for MD itself. (Stipulations of Fact between Respondent and Relator ¶16-17). Respondent explains that he directed a refund to be made by Howard Law, which, at that juncture, had performed all the billable work on the account. (Answer to Amended Complaint ¶27).

At no point did Ms. Harvey meet with Respondent in person. Respondent has been physically present at MD's California office only three times and none of these visits occurred at any time during the representation of Ms. Harvey. (Stipulations of Fact between Respondent and Relator ¶18-19).

ARGUMENT

PROPOSITION OF LAW I

Respondent, Justin Fernandez, failed to properly counsel his client Madelyn Harvey.

In support of this proposition, Relator relies upon *Office of Disciplinary Counsel v. Hardesty*, 80 Ohio St.3d 444, 1997-Ohio-329, 687 N.E.2d 417 (1997) and *Columbus Bar Assn. v. Foster,* 92 Ohio St.3d 411, 2001-Ohio-199, 750 N.E.2d 1112 (2001). In *Hardesty*, the attorney in question violated numerous Disciplinary Rules. In representing clients he breached an agreement with opposing counsel, failed to file necessary schedules in bankruptcy court, failed to take action after having a case reopened which was previously dismissed because he failed to

serve a party, failed to reveal that his client had made preferential payments to a relative before they filed for bankruptcy, and a bankruptcy judge filed sanctions against him because he attempted to withdraw a Chapter 7 bankruptcy in order to re-litigate decided issues.

Pertinent to the present issues in this matter, the Supreme Court stated:

> All too often we have observed members of the profession, not only solo practitioners, but also salaried corporate counsel, members of small and large firms, and government attorneys, operating as 'hired guns,' acting solely at the direction of their employers or clients and neglecting their duty to counsel their clients. Neither the position of an attorney as an employee, nor the pressure to retain a client in a competitive legal environment, can justify an attorney's abdication of the duty of counseling.

Hardesty, 80 Ohio St.3d at 447, 419.

In *Foster*, the attorney in question violated several Disciplinary Rules, mainly while representing clients in bankruptcy proceedings. During the investigation, Respondent failed to answer Relator's complaint and Relator filed for default judgment. The Board of Commissioners found that Respondent demonstrated "a pattern and practice of carelessness, inattention to detail, procrastination, and failure to communicate with clients and court officials and indicated that he was not competent to practice bankruptcy law." *Foster*, at 412, 1113. The Supreme Court adopted the Board's findings of fact and conclusions of law and ultimately placed Respondent on indefinite suspension from the practice of law in Ohio. In its conclusion the Court stated that "...the counseling of a client in financial matters is a serious matter that deserves the attention of a qualified attorney. If the attorney cannot or will not give this matter his necessary attention, or is not qualified to handle the matter he undertakes, he violates our Disciplinary Rules." *Id. at* 412, 1113-14, citing *Dayton Bar Assn. v. Andrews*, 79 Ohio St.3d 109, 1997-Ohio-54, 679 N.E.2d 1093 (1997) [Additional citations omitted].

Here, Respondent Fernandez failed to properly counsel clients such as Ms. Harvey and only did so in the most dire of circumstances, such as when Ms. Harvey demanded a refund

because of her lack of satisfaction with the work conducted by the non-attorneys at MD. The record shows that Respondent abdicated his responsibility to counsel Ms. Harvey.

PROPOSITION OF LAW II

Respondent failed to supervise the conduct of Morgan Drexen Inc.'s nonattorney employees.

In support of this proposition, Relator relies upon *Cincinnati Bar Assn. v. Kathman*, 92 Ohio St.3d 92, 2001-Ohio-157, 748 N.E.2d 1091 (2001). In *Kathman*, Respondent was affiliated with a group of non-attorneys that marketed and sold trusts to the public. The attorney's primary function was to approve of the product that the non-attorneys were selling. "By working for nonattorneys who market and sell trusts to review the documents the nonattorney has created, the attorney is acting with a conflict of interest, places his or her independent professional judgment at risk, and 'rubber stamps' the unauthorized practice of law engaged in by nonattorneys." *Id.* at 97-98. [Cites omitted]. The Supreme Court said that the "responsibilities to a client go beyond the preliminary clarification of his goals and include helping him to make a deliberately wise choice among them.' [Cites omitted]. When an attorney abandons these responsibilities in favor of assisting nonattorneys to market and sell legal documents, the attorney compromises the best interests of the client." *Id.* at 98.

Like *Kathman*, Respondent Fernandez allowed the non-attorneys at MD to market and sell debt settlement products to the public and then essentially rubber-stamped the representation of that client by doing nothing more than performing a background check to identify conflicts.

All communications with Ms. Harvey happened through the non-attorneys at MD until such time that Ms. Harvey wished to terminate representation. There is no evidence of any supervision that occurred of these non-attorneys other than through the ability to review an electronic notes log through MD's electronic portal.

Respondent Fernandez seemed to fail to perform even this basic perfunctory task, based upon his lack of familiarity with the actions of MD's employees. For example, according to the electronic log entered as Exhibit L, on May 19, 2014, Ruby Woolum (an employee of MD) communicated to Ms. Harvey that there were no offers to settle the debts in question despite the fact that this same log reflected a series of debt settlement offers that were "on the table" at that time. (Hearing Transcript pp. 105-108). Mr. Fernandez stated that it "looks like Ruby Woolum didn't know what she was talking about." (Hearing Transcript pp. 108 ll. 15-16). If she didn't know what she was talking about, it begs the question as to why Respondent Fernandez didn't correct this mistake when it happened if he was in fact supervising non-attorneys such as Ms. Woolum.

PROPOSITION OF LAW III

The combination of failing to properly counsel his clients and failing to properly supervise Morgan Drexen Inc. resulted in Respondent aiding in the unauthorized practice of law.

In support of this proposition, Relator relies upon *Cincinnati Bar Assn. v. Jansen*, 138 Ohio St.3d 212, 2014-Ohio-512, 5 N.E.3d 627 (2014). In *Jansen*, the Supreme Court stated that

"[w]e have held that the practice of law includes 'making representations to creditors on behalf of third parties, and advising persons of their rights, and the terms and conditions of settlement.'" [Cites omitted]. *Jansen,* Ohio St.3d at 216-17, 631, ¶ 8. "It is no defense that respondents disclosed to their customers that they were not attorneys and could not give legal advice, or that they obtained powers of attorney executed by their customers." *Id.* at 217. Conversely, here, the actions of the non-attorneys of MD as outlined above constitutes the practice of law because the non-attorneys advised Ms. Harvey and other similar clients of her rights and they engaged in negotiations and communications with creditors. Respondent failed to properly supervise these non-lawyers and failed to properly counsel his clients.

CONCLUSION

Respondent failed to properly counsel his client and failed to make reasonable efforts to ensure the supervision of Morgan Drexen Inc., a non-attorney entity, which, in combination, resulted in aiding in the unauthorized practice of law.

Respondent represented his client, Mrs. Harvey, from February 2014 until July 2014. During this time he never met with Ms. Harvey in person, and, even by the time she requested and received a refund, he had performed no work on her behalf that he would classify as "billable." He admits his failure to advise Ms. Harvey on the best course of action regarding her debts – which debts were the reason she needed counsel.

During his representation of Mrs. Harvey, Respondent failed to make reasonable efforts to ensure the supervision of Morgan Drexen Inc., a non-attorney entity. Instead, Respondent

allowed MD's non-attorney personnel to choose and send form letters over his electronic signature. Respondent asserts that by using form letters, he took "pre-steps" and "pre-knew" whatever issues would arise for his client. To the contrary, by managing his practice in this way, he permitted the non-attorney staff at Morgan Drexen Inc. to determine what letters should on behalf of his clients, to determine what should be communicated to the creditors as Morgan Drexen Inc. solicited the settlement of Ms. Harvey's debts, and to determine the needs of his clients. Respondent thus aided and enabled the unauthorized practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Relator's Objections was mailed by first class United States mail, postage prepaid, to James J. Brudny, Jr., 2075 Marble Cliff Office Park, Columbus, OH 43215, this 15th day of January, 2016.

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