Supreme Court of Ohio Clerk of Court - Filed February 02, 2016 - Case No. 2015-2001

IN THE SUPREME COURT OF OHIO

IN RE: **Complaint Against:** **Justin Fernandez (#0062974)** **RESPONDENT** **CINCINNATI BAR ASSOCIATION** **RELATOR**	**Case No. 2015-2001** **RESPONDENT'S ANSWER BRIEF**

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

Justin D. Flamm (0071575)
425 Walnut St., Suite 1800
Cincinnati, OH 45202
(513) 357-9667

COUNSEL OF RECORD FOR RELATOR

Nicholas A. Zingarelli (0079110)
810 Sycamore St., 3rd Floor
Cincinnati, OH 45202
(513) 381-2047

CO-COUNSEL FOR RELATOR

Edwin W. Patterson III, Esq. (0019701)
General Counsel
Cincinnati Bar Association
225 East Sixth St., 2nd Floor
Cincinnati, OH 45202
(513) 699-1403

CO-COUNSEL FOR RELATOR

James J. Brudny, Jr. (0007458)
2075 Marble Cliff Office Park
Columbus, OH 43215
(614) 485-1800

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 2

RELATOR'S PROPOSITION OF LAW I 2

RESPONDENT, JUSTIN FERNANDEZ, FAILED TO PROPERLY COUNSEL HIS CLIENT MADELYN HARVEY.

RELATOR'S PROPOSITION OF LAW II 3

RESPONDENT FAILED TO SUPERVISE THE CONDUCT OF MORGAN DREXEN, INC.'S NONATTORNEY EMPLOYEES.

RELATOR'S PROPOSITION OF LAW III 8

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.

CONCLUSION 11

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

CASES

Cincinnati Bar Assn. v. Foreclosure Solutions, 123 Ohio St.3d 107, 2009-Ohio-4174 ..... 10, 11

Cincinnati Bar Assn. v. Jansen, 138 Ohio St.3d 212, 2014-Ohio-512 9

Cincinnati Bar Assn. v. Kathman, 92 Ohio St.3d 92, 2001-Ohio-157 ..... 3, 6

Cleveland Bar Assn. v. Comp. Management, Inc., 111 Ohio St.3d 444 2006-Ohio-6108 ..... 9, 10

Columbus Bar Assn. v. Foster, 92 Ohio St.3d 411, 2001-Ohio-199 (2001) 2, 3

Disciplinary Counsel v. Palmer (2001), 155 Ohio Misc.2d 70, 2001-Ohio-4108 9

Office of Disciplinary Counsel v. Hardesty, 80 Ohio St.3d 444 1997-Ohio-329 (1997) 2, 3

Ohio State Bar Assn. v. Kolodner, 103 Ohio St.3d 504, 2004-Ohio-5581 10

OHIO RULES OF PROFESSIONAL CONDUCT

Prof. Cond. R. 1.1 ..... 5, 11

Prof. Cond. R. 1.3 ..... 1, 3, 11

Prof. Cond. R. 1.4(a)(2) 11

Prof. Cond. R. 1.4(b) 11

Prof. Cond. R. 2.1 ..... 1, 3, 11

Prof. Cond. R. 5.3 ..... 5, 6

Prof. Cond. R. 5.3(b) 1, 8, 11

Prof. Cond. R. 5.5 ..... 5, 6

Prof. Cond. R. 5.5(a) 1, 11

Prof. Cond. R. 5.5(b) 1

COURT DOCUMENTS

ABA Model R. 5.3 (comment).....5

Hearing Transcript.....6, 7

Respondent's Hearing Ex. A.....3

Respondent's Hearing Ex. L.....7, 9

Respondent's Hearing Ex. R.....5

STATEMENT OF FACTS

This matter started with a simple complaint by Madelyn Harvey requesting a refund. Prior to the Complaint filed against the Respondent, a 90% refund was issued to Harvey. This was never an Ohio Gov. Bar Rule 7 unauthorized practice of law investigation, and there was never an investigation or complaint filed by the Board on the Unauthorized Practice of Law. In fact, the Board found no UPL of Morgan Drexen (MD) when it was investigated in 2010.

Justin Fernandez is the sole Respondent. MD is not. Less than one month before the Panel Hearing on November 4, 2015, Relator amended its Complaint to add an alleged violation of R. 5.5(b), which states, in essence, that a lawyer shall not assist another in the unauthorized practice of law, despite the comment to R. 5.5(a) which states that a lawyer is not prohibited from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for the work.

Relator's Statement of Facts is nothing more than a re-hash of Admissions to the Amended Complaint, Stipulations of Fact, and findings by the Board. It is clear that Relator does not dispute the Findings of Fact by the Board; rather, Relator objects to the Conclusions of Law by the Board that Respondent did not violate R. 1.3, 2.1, 5.3(b), or 5.5(a) as applied to the facts. Respondent hereby accepts and concurs with the Findings of Facts, Conclusions of Law and Recommendations of the Board of Commissioners on Grievances and Discipline and accepts a public reprimand discipline.

ARGUMENT

RELATOR'S PROPOSITION OF LAW I

RESPONDENT, JUSTIN FERNANDEZ, FAILED TO PROPERLY COUNSEL HIS CLIENT MADELYN HARVEY.

Respondent did properly counsel his client, Madelyn Harvey.

Relator claims that Respondent failed to properly counsel his client. In support of this proposition, Relator relies on the cases *Office of Disciplinary Counsel v. Hardesty*, 80 Ohio St.3d 444, 1997-Ohio-329 (1997) and *Columbus Bar Assn. v. Foster*, 92 Ohio St.3d 411, 2001-Ohio-199 (2001). Respondent submits that reliance on *Hardesty* and *Foster* is misplaced.

Hardesty involved multiple disciplinary rule violations. There was a breach of an agreement with opposing counsel. A failure to file necessary schedules in bankruptcy court occurred. Hardesty failed to take action after having a case re-opened. Hardesty failed to reveal that his client made preferential payments to a relative prior to bankruptcy. In addition, the bankruptcy judge filed sanctions against Hardesty in an attempt to withdraw a Chapter 7 bankruptcy in order to re-litigate decided decisions. These facts are inapposite to those herein.

Foster involved client representation in bankruptcy proceedings. There was no answer to Relator's Complaint, and a default judgment was filed. There was a finding of a pattern of practice in carelessness and a lack of competency to practice bankruptcy law. The Court found the violation of disciplinary rules because *Foster* could not or would not give the matter his necessary attention and that he was unqualified to handle the matter he undertook.

The evidence introduced at the hearing and the Findings of Fact by the Board do not comport with those found in *Hardesty* and *Foster*. Relator has objected to the finding that it failed to prove, by clear and convincing evidence, that Respondent violated R. 1.3 and R. 2.1. Respondent submits that the findings by the Board were clear and conclusive.

Relator's Proposition of Law I must be overruled.

RELATOR'S PROPOSITION OF LAW II

RESPONDENT FAILED TO SUPERVISE THE CONDUCT OF MORGAN DREXEN, INC.'S NON-ATTORNEY EMPLOYEES.

Respondent reasonably supervised the conduct of Morgan Drexen, Inc.'s non-attorney employees in accord with R. 5.3(b).

Arguing that Respondent facilitated MD's unauthorized practice of law, Relator relies on *Cincinnati Bar Assn. v. Kathman*, 92 Ohio St.3d 92, 2001-Ohio-157. This reliance is entirely misplaced. *Kathman's* ruling is premised upon a non-attorney's sale of its own product (a living trust document prepared by the non-attorney) and the non-attorney's payment to an attorney to support the non-attorney's business (the review of the trust document). The facts herein are completely the opposite:

In February 2014, Respondent undertook representation of Madelyn Harvey to assist Harvey in settlement of her outstanding debts. (Board Findings at ¶10.)

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. (¶8.)

Respondent paid MD for the non-attorney's services. (Respondent's Ex. A.)

A brief survey of today's legal environment puts into context Respondent's use of MD's services.

Background

America is facing a very serious and worsening access-to-justice problem for both the poor and the working and middle classes. America relies on courts and court-like processes to handle an ever-growing number of governmental and societal problems. These issues often require expert assistance from lawyers who are knowledgeable in law and procedure. At the same time that Americans need more legal help, hiring a lawyer has become prohibitively expensive for the vast majority of Americans.[1] At these prices, it is very difficult for most Americans to afford a lawyer for any legal work, and especially for commercial litigation. There are a plethora of studies demonstrating that the legal needs of the lower and middle-income sector are going unmet.[2]

The long-standing solutions have not adequately addressed the problem. This problem will not and cannot be solved by hiring more lawyers for Legal Aid or by encouraging pro bono work. The problem is so large that hiring more lawyers to do more individualized work by the hour cannot address it. As a country and profession, we have had to rethink the delivery of legal services.

---

[1] **In 2005, Altman-Weil estimated that the average hourly rate for a small firm lawyer was $180. More recent state bar surveys put that number above $200 in many states. Based on these surveys I conclude that even the least expensive American lawyers - solo and small firm practitioners - charge around $200 an hour.**

[2] **In an article entitled *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans* ("Higher Demand, Lower Supply"), Professor Gillian Hadfield ("Hadfield") compared the ABA study to studies of legal needs around the world. Americans were about as likely to have a legal need and about as likely to use a lawyer to solve those problems as citizens of other countries, but were far more likely to "lump it," (i.e., living with the problem or attempting to solve it without legal help). Citizens in England, Wales, Scotland, and Slovakia got advice from non-lawyers much more often, filling the gap. Almost a third of Americans "lumped" a legal problem in the 1994 survey, compared with under five percent (5%) in the United Kingdom and 18 percent (18%) in Slovakia.**

Outsourcing & Technology

We are in a time of unprecedented change in the market for legal services. Legal experts have opined that using technology, outsourcing, and using non-lawyers to handle the non-legal work once done by lawyers has made it possible to streamline and standardize some legal services. This has allowed the price of some legal services to fall substantially, making it possible for the poor and the working and middle class to have greater access to these services.

The ABA's policy-making House of Delegates recognized two key trends in the legal marketplace. First, "*** technology has irrevocably changed and continues to alter the practice of law in fundamental ways ***. Lawyers must understand technology in order to provide clients with the competent and cost-effective services that they expect and deserve."

Second, and coupled with technology, "*** globalization continues to transform the legal marketplace *** with more clients confronting legal problems that cross jurisdictional lines and more lawyers needing to respond to those client needs by crossing borders (including virtually) and relocating to new jurisdictions."

Outsourcing has become so common that the ABA amended its comments to the Rules of Professional Conduct Rules 1.1, 5.3, and 5.5 to directly approve some of the most common practices. The comments to Model Rule 5.3 provide:

> A lawyer may use non-lawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or **paraprofessional service**, hiring a **document management** company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and **using an Internet-based service to store client information**. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. (Respondent's Ex. R.)

Respondent's Use of MD

Unlike the business model in *Kathman*, Respondent integrated the non-attorney services into his law practice to assist him with his provision of legal services to *his* clients. MD was not in the business of selling debt settlement products. Rather, the evidence substantiated that MD offered its services to attorneys as an outsourcing option of paralegal and paraprofessional services. (¶10.)

In determining whether there was a violation of Rules 5.3 and 5.5, the Board had to determine if the outsourcing of services was done in an ethical and responsible manner. Relator offers ***one***, and only one, fact to support his objection to the Board Conclusions of Law: on one phone call, an MD employee provided an inaccurate status report to the client.

However, Respondent provided overwhelming evidence that his arrangement with MD was coordinated with the tremendous attention to the lawyer's obligations under R. 5.3 and 5.5.

The following lists the evidence supporting the Board's Findings and Conclusions:

- Respondent had complete control over the staff at MD. (¶41.)
- Respondent could discipline and train staff. (¶41.)
- Respondent could direct MD not to have a particular staff member handle his files. (¶41.)
- Respondent could terminate his contract with MD. (¶41.)
- Respondent periodically paid a site visit to MD's office so that he can audit its performance in person. (Katz, Hearing Testimony.)
- During the site audits, Respondent personally met, interviewed and checked the backgrounds of each MD department manager. (Katz, Hearing Testimony.)

- Respondent maintained a binder with the curriculum vitae of all MD department managers which includes their pictures and direct contact information to ensure he maintained a personal relationship with them and appropriate screening. (Katz, Hearing Testimony.)

- Respondent met with the MD Human Resources Department in order to satisfy himself that adequate background checks were being performed on each MD employee. (Katz, Hearing Testimony.)

- Respondent evaluated the hiring standards of each department manager who is responsible for staffing his/her department. (Katz, Hearing Testimony.)

- Respondent's clients provided written and verbal (recorded) consent to interacting with non-attorney assistants. Regardless, each of Respondent's clients had his phone number and physical address and they were assured that Respondent was always available if they had any concerns. (Katz, Hearing Testimony.)

- Respondent trained, in person, each MD department manager on the relevant rules from the Ohio Rules of Professional Conduct. (Katz, Hearing Testimony.)

- Respondent interviewed MD's Director of Information Technology regarding protocols implemented to ensure there are adequate protocols in place to protect my clients' confidential information. (Katz, Hearing Testimony.)

- MD paraprofessional staff were required to document in real time their interactions with clients and creditors. Through the use of the platform, Respondent reviewed this documentation and recordings to ensure that professional standard are being observed, client confidentiality is being preserved, and that non-lawyers assistants are not engaging in the unauthorized practice of law. (Katz, Hearing Testimony.)

Relator's focus on a single only log entry ignores examples of proper conduct reflecting that Respondent's training was effective:

> *"May 23: (MTG CO CU) Client is returning a missed call from Legal dept. regarding their SUMMONS they forwarded to MD. Informed Client will transfer to Legal for further assistance and advised that the [Law Firm Liaison Department of MD] are NOT attorneys and will not give legal advice. Client understood will have file# and MDIS pwd ready."* (Respondent's Ex. L, p. 9.)

Respondent had the ability, through the case management portal, to keep track of every client file, every document and payment that came in or went out, every communication with the creditors and every discussion that occurs with his clients.

The Board's finding that Relator failed to prove a violation of R. 5.3(b) affirms that Respondent made "***reasonable efforts to ensure that the conduct of nonlawyers employed by, restrained by, and/or associated with Respondent are compatible with the professional obligation of Respondent.***" (¶ 50.)

Relator's Proposition of Law II must be overruled.

RELATOR'S PROPOSITION OF LAW NO 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.

Respondent did properly counsel Madelyn Harvey, properly made reasonable efforts to supervise MD and did not "aid" in the unauthorized practice of law.

Respondent never admitted to any acts of assisting or aiding and abetting the unauthorized practice of law. Relator's burden was **clear and convincing evidence**. Relator needed to identify the client, the timeframe, and the specific act or acts of conduct alleged to be improper. There must be a description of an actual incident before an allegation of unauthorized practice can be supported.

Relator identifies no specific evidence that the non-attorneys, acting under the supervision under Respondent, engaged in the practice of law. To the contrary, the evidence reflects that Respondent, during the entire course of his engagement of MD to provide administrative support services, made extensive efforts – well beyond what the efforts of an attorney in a traditional outsourcing arrangement – and those efforts were

successful, as illustrated by log note cited above wherein a non-attorney specifically cautioned Ms. Harvey:

> *"Informed Client *** and advised that the [Law Firm Liaison Department of MD] are* ***NOT attorneys*** *and* ***will not give legal advice****."* (Respondent Ex. L, p. 9)

In *Cleveland Bar Assn. v. Comp. Management, Inc.*, 111 Ohio St.3d, 444, 2006-Ohio-6108 (Comp. Management II), the Court, in citing *Disciplinary Counsel v. Palmer* (2001), 155 Ohio Misc.2d 70, 2001-Ohio-4108, agreed with the assessor that **"a finding of unauthorized practice in a contested proceeding must rest upon some evidence of specific conduct."** Relator could rely on nothing but generalized allegations and contentions that the entire administrative services support provided to Respondent globally constituted aiding and abetting the unauthorized practice of law. Relator was unable to present any legal principle, citation or argument that contradicts the basic principle that an allegation must be supported by either an admission or specific evidence of an act constituting the infraction; herein, aiding in the unauthorized practice of law.

Rather, Relator relies on *Cincinnati Bar Assn. v. Jansen*, 138 Ohio St.3d 212, 2014-Ohio-512 (2014). Respondent submits that *Jansen* is not dispositive. *Jansen* involved the violation of a prior consent decree by a non-lawyer continuing to solicit debtors as clients and to negotiate resolution of their debts. At all times relevant herein, Respondent was admitted to the practice of law in Ohio and had been so since May 16, 1994. Relator's reliance on the *Jansen* case is nothing more than overreaching.

Respondent submits that *Comp. Management II* is controlling in determining "unauthorized practice of law." The non-lawyer third party administrator (CMI) did not conduct classic negotiations in the legal sense. It simply took a figure approved by an

employer and presented it to the claimant. CMI did not conduct any back-and-forth negotiations and made no legal determinations in presenting the number to the claimant. The Court found that CMI operated as a messenger, something that hardly requires a legal skill.

That is the identical situation herein. Paraprofessionals at MD would elicit a figure that the creditor would be willing to take. Acceptance, rejection or counter-proposal to that figure would have to come from Respondent with approval from the client. The recommended settlement figures in *Comp. Management II* were based on the actuarial value of the claim, where the claim had already been allowed and no legal issues remained. Negotiations premised upon a mathematical formula which does not involve an analysis of a client's rights, privileges or obligations is not the practice of law. Herein, the non-attorneys who acted under the control and direction of Respondent never engaged in a legal assessment of the unsecured debt and the client's potential defenses; these were analyses performed only by Respondent.

"The unauthorized practice of law consists of rendering legal services for another by any person not admitted to practice law in Ohio and includes representation by non-attorneys who advises, counsels, or negotiates on behalf of an individual or business in the attempt to resolve a collection claim between debtors and creditors." *Ohio State Bar Assn. v. Kolodner*, 103 Ohio St.3d 504, 2004-Ohio-5581.

In clarifying that "negotiation on behalf of another" **does *not*** always constitute the unauthorized practice of law, this Court in *Cincinnati Bar Assn. v. Foreclosure Solutions*, distinguished between negotiations that require legal judgment as to the rights of a debtor and negotiations based solely upon non-legal factors, which do not require the exercise

of legal judgment. Where legal knowledge is required, only a duly licensed attorney may negotiate on behalf of a client; however, where no legal issues exist and the negotiations are based solely upon financial factors, then non-attorneys or attorneys may negotiate on behalf of another. 123 Ohio St.3d 107, 2009-Ohio-4174, footnote 1.

Here, it was Respondent, not MD that would evaluate a creditor's offer and determine if Harvey had a legal argument to not pay or to pay less, etc. The outsourced paraprofessionals of MD engaged in activities limited to clerical tasks such as initial intake of prospective clients, facilitating communication between attorneys and the debtor/client and/or creditor. This does not require an understanding of the legal system. Asking a potential debtor client simple questions for intake purposes does not require a specific understanding of the legal system. In addition, legal knowledge is not necessary to inform a creditor of an attorney representation or to mail trust accounting statements and status updates to debtors/clients on a monthly basis.

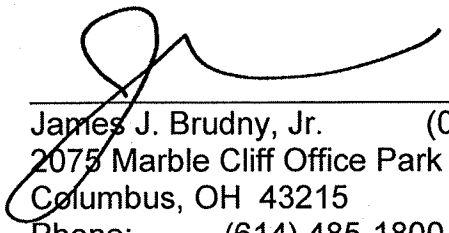
Relator's Proposition of Law III must be overruled.

CONCLUSION

Based on the foregoing, Respondent submits that the Findings of Fact, Conclusions of Law and Recommendation of the Board were correct in all respects. Relator failed to prove, by clear and convincing evidence, that Respondent violated Rules 1.3, 2.1, 5.3(b), and 5.5(a).

Respondent does not object and accepts the Findings of violations of Rule 1.1, 1.4(a)(2) and 1.4(b), to wit: failing to reasonably consult with Harvey to accomplish her objectives and failing to explain certain matters regarding the representation to permit Harvey to make an informed decision.

Respondent, Justin Enrique Fernandez, hereby accepts the Recommendation of a public reprimand.



James J. Brudny, Jr. (0007458)
2075 Marble Cliff Office Park
Columbus, OH 43215
Phone: (614) 485-1800
Fax: (614) 485-1944
jbrudny@arnoldlaw.net
Counsel for Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties or counsel of record via e-mail, this 1st day of February 2016.

Justin Flamm, Esq.
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
flamm@taftlaw.com

Nicholas A. Zingarelli, Esq.
632 Vine Street, Suite 305
Cincinnati, OH 45202
nick@zingarellilaw.com

Edwin W. Patterson, III, Esq.
General Counsel
Cincinnati Bar Association
225 East Sixth Street, 2nd Floor
Cincinnati, OH 45202
ewpatterson@cincybar.org
Counsel for Relator

James J. Brudny, Jr. (0007458)