

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

In re:	SCO Case No. 2014-0197
Scott Clifford Smith,	BPC Case No. 2011-072
Respondent	Findings of Fact,
Disciplinary Counsel,	Conclusions of Law and
Relator	Recommendation of the
	Hearing Panel

REPORT ON REMAND FROM THE SUPREME COURT OF OHIO

{¶1} A formal hearing pursuant to the Supreme Court’s remand was held in this matter on June 7, 2016 before a panel consisting of members, Judge Beth Whitmore, David E. Tschantz, and Sharon L. Harwood, chair. None of the panel members reside 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 Rule V, Section 6 (D)(1).¹ Respondent was present at the hearing represented by George D. Jonson and Kenneth R. Donchantz. Stacy Solochek Beckman represented Relator.

{¶2} This case was remanded by the Supreme Court in its opinion *Disciplinary Counsel v. Smith*, 143 Ohio St. 3d 325, 2015-Ohio 1304. The purpose of the remand was as follows:

Based upon the foregoing, we remand this cause to the board with instructions to grant Smith a reasonable time to subpoena documents and records previously identified in his January 2013 subpoenas duces tecum and discovery requests propounded on relator from the persons or entities that possess or have access to them (*e.g.*, his former firm, the clients whose matters are set forth in the complaint, the insurance companies, or third party administrators involved in these matters). We further instruct the board to conduct any additional proceedings necessary to address any discovery issues or newly discovered evidence that may arise as a result of this remand.

Id. at ¶15.

¹ Although this case was original heard pursuant to the provisions of Gov. Bar R. V that were in effect prior to January 1, 2015, these proceedings were conducted under the current provisions of Gov. Bar R. V. The citations in this opinion are to the current version of Gov. Bar R. V.

{¶3} The original Board report was filed on February 3, 2014 following a hearing conducted on February 4, 5, and 6, 2013.

{¶4} On remand, the original charges of the complaint remain for Respondent as follows: DR 1-102(A)(4) and Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; DR 1-102(A)(6) and Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law]; and DR 2-105 and Prof. Cond R. 1.5(a) [illegal or clearly excessive fee].

{¶5} At the June 7, 2016 hearing, exhibits were entered into evidence that reflected new documents in response to subpoenas issued since the remand along with information previously submitted as discovery, but now offered as exhibits over objection of Relator at the hearing related to a second production of emails by Weston Hurd.

{¶6} Upon consideration of the post-trial briefs of each party, review of the exhibits presented, and the limited testimony at hearing, the panel reaffirms the original findings, as set forth in the February 3, 2014 Board report, that Respondent engaged in professional misconduct and the recommendation that he be indefinitely suspended from the practice of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶7} On remand, Respondent issued discovery subpoenas to the grievant Weston Hurd, underlying long-term care clients, and their third party administrators.

{¶8} Respondent has consistently asserted that in the absence of access to all emails, his law firm hard drive, all proprietary programs in use by each long-term care company or third-party administrator (TPA) for those represented, he cannot adequately defend himself against the violations listed and therefore; all counts should be dismissed.

{¶9} The question over this extended period of hearing and discovery remains: that along with the evidence presented at the 2013 hearing, does the additional evidence submitted at the 2016 hearing refute or support establishment by the Relator by clear and convincing evidence that Respondent committed the alleged disciplinary violations?

{¶10} In a disciplinary proceeding, the Relator bears the burden of proving an attorney's misconduct by "clear and convincing evidence." Gov. Bar R. V, Section 12. The standard of clear and convincing evidence is an intermediate standard that requires "more than a mere preponderance" of the evidence, but not "such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal." *Cross v. Ledford*, 161 Ohio St. 469, 477, (1954), paragraph seven of the syllabus.

{¶11} Respondent has consistently stated that he did not engage in ethical misconduct because he billed his long-term care clients, Beverly/Golden Living, Altercare, and Covenant Care as directed by the clients.

{¶12} As related to Beverly/Golden Living in this hearing, Respondent's Ex. 14, the Joint GGNSC/Beverly....Outside Counsel Billing Guidelines of January 2007, and a Uniform Task-Based Management System Document were entered into evidence. The Outside Billing Guidelines of January 2007 alone had been introduced in the February 2013 hearing as Relator's Exhibit 2. The Uniform Task Based Management System Document provides a Litigation Code Set that can be used to group litigation activities and expenses into five phases of litigation with each phase including multiple tasks.

{¶13} At this hearing, Relator asked Respondent to review his previous testimony regarding the relationship between billing codes and narratives. Respondent stated, reading from February 2013 transcript of testimony:

Stacy, I have been very clear about this that my narratives and dates were not relevant. The billing codes do not have narratives and they don't have dates on the billing codes. That is correct. They were used to put a numerical letter on it and bill it against a pre-approved file. So, no, do I know that specifically—that I specifically did continue file review, witness review preparation? Absolutely not.

Hearing Tr. 36.²

{¶14} In the Litigation Code Set provided in Respondent's Ex. 14 that describes the background, definitions, principles and assumptions behind the development of the code set, Respondent's Ex. 14A, D. Assumptions states: "2. Narrative time entries will be retained. The Litigation Code Set does not envision the elimination of narrative descriptions of time entries. However the need for this level of detail may be reduced in smaller, less complex cases with successful adoption and implementation of the coding scheme."

{¶15} Realtor questioned Respondent regarding Respondent's Ex. 14A and the need for an accurate narrative as follows:

Q. * * * And it does not say anything about the narrative not being accurate?

A. It says, "...the need for this level of detail may be reduced in smaller, less complex cases with successful adoption and implementation of the coding scheme." We successfully adopted the coding system.

Q. All right. So It doesn't mention anything about inaccurate?

A. It doesn't say anything about the Ohio Resident Bill of Rights either.

Hearing Tr. 46.

{¶16} The only other billing guidelines produced at this hearing was Proclaim America, The Schroer Group, Inc. dba Consolidated Altercare Professional/General Liability Claims Procedure Manual, Respondent's Ex. 5. On page 14, it states:

2. Attorney fees and expenses will be approved by the Schroer Group and Pro Claim provided the bill follows the guidelines below: a) Invoices must be submitted at least every two (2) months and will include the date prepared; b) Invoices must be

² Unless otherwise indicated, transcript citations in this report are to the June 7, 2016 hearing transcript.

itemized on a daily basis and must be supported by time sheets for each individual billing entry to the case. Time sheets must be available upon request. c) All invoices must include an accurate description of the work performed.

{¶17} The Proclaim document supports the testimony at the previous hearing of John Goodman from Altercare who testified that Altercare expected accurate narratives and “a fair and honest rendition of the services provided”. February 2013 Hearing Tr. 164-165

{¶18} For the final long-term care client Covenant Care, Respondent is correct that no representative provided testimony at the February 2013 hearing and did not respond to the discovery subpoenas issued by respondent on June 1, 2015. At the 2013 hearing, Relator produced a letter, Relator’s Exhibit 3, from Covenant Care’s general counsel, Andrew Torok that set forth Covenant Care’s billing guidelines and included the guidelines as an attachment.

{¶19} In each of these billing descriptions, the panel found nothing to support the Respondent’s assertions, made throughout the pendency of these proceedings, that his clients approved of a narrative description that was meant to be “vague and ambiguous and repetitive * * *” and that the descriptions were never intended to be read by a human being and merely related to a pre-determined budget. February 2013 Hearing Tr. 431; Deposition of Scott C. Smith 139.

{¶20} At the June 7, 2016 hearing, Respondent’s Ex. 12 included copies of emails and redacted weekly reports provided to Beverly Enterprises by Respondent. Respondent testified at the February 2013 hearing that ditto mark billing entries may have signified his time for making weekly and monthly reports to the client on several cases on the same day. February 2013 Hearing Tr. 644. Yet no evidence or testimony was presented at the 2016 hearing that the ditto billing corresponded with the weekly reports, and Respondent’s Ex. 12 would not have explained ditto billing for non-Beverly matters.

{¶21} The remainder of exhibits and limited testimony presented at the June 2016 hearing did not change the conclusion or recommendation of the panel that based upon the exhibits, stipulations and records of both hearings that clear and convincing evidence remains that Respondent has committed the following ethical violations.

{¶22} *Respondent violated DR 1-102(a) (4) and Prof Cond. R 8.4(c) in the respective time frames.* Respondent admitted that his billing descriptions bore no relation to the work he actually performed on any given case. Relator presented evidence that Respondent routinely billed his long-term care clients for work that did not appear in their files.

{¶23} *Respondent violated DR 1-102 (A) (6) and Prof Cond. R 8.4(h) in the respective time frames.* Respondent repeatedly violated the ethical rules over a period of years with multiple clients, abused his position as a partner at his firm to do so, and attempted to hide his misconduct from his firm, all at great cost and inconvenience to his firm and his clients.

{¶24} *Respondent violated DR-2-106 and Prof. Cond. R. 1.5(a) in the respective time frames.* Relator presented evidence that Respondent repeatedly billed multiple files in the same amount on the same day although those files were at different stages of litigation. In Relator's Ex. 12, some of the weekly litigation reports submitted to Beverly Enterprises were submitted, but no testimony or evidence offered that those were related to the ditto billing placed presented at the 2013 hearing. At the 2013 hearing Respondent admitted that it was impossible to tell what any given charge related to, as his narratives bore no relation to the work he performed. At the June 2016 and February 2013 hearings, billing guidance presented did not direct that narrative descriptions would be unrelated to time entries.

AGGRAVATION, MITIGATION, AND SANCTION

{¶25} At the June 2016 hearing, Respondent presented six letters to support his character or reputation, and the panel notes the absence of any prior disciplinary record.

{¶26} The panel continues to find that the aggravating factors set forth in the February 3, 2014 report. Respondent acted with a dishonest or selfish motive, as he received a financial benefit as a result of submitting fraudulent time entries. The panel finds that Respondent has engaged in a pattern of misconduct and has committed multiple offenses given that he submitted the fraudulent time entries to three different long-term care clients over the course of several years. Respondent's conduct resulted in financial harm to both his clients and his firm, as the firm had to refund a significant amount of money to three clients and expend a significant amount of time investigating Respondent's misconduct and compensating his clients for their financial losses. To date, Respondent has not made restitution to his firm, as Respondent believes his firm acted improperly in refunding his clients. Additionally, Respondent has failed to acknowledge the wrongful nature of his conduct, in spite of the fact that the three allegedly overbilled clients have refused to corroborate his description of their billing practices.

{¶27} The panel continues to believe that the evidence and testimony presented on remand of this matter do not support Respondent's position for dismissal and that the actions of Respondent support a finding of indefinite suspension based upon factual findings and mitigating and aggravating factors.

{¶28} "A violation of Prof. Cond. R 8.4(c) generally requires an actual suspension from the practice of law." *Akron Bar Assn. v. Gibson*, 128 Ohio St. 3d 347, 2011- Ohio-628, ¶10. Indeed disbarment is the presumptive sanction for an attorney's misappropriation of client funds * * *." *Disciplinary Counsel v. McCauley*, 114 Ohio St. 3d 461, 2007-Ohio-4259, ¶22. See also

Cleveland Metro Bar Assn. v. Wrentmore, 2013-Ohio 5041, ¶20 (“When an attorney has engaged in numerous acts of misconduct in converting law firm funds and there is significant mitigation, we have held that an indefinite suspension can be appropriate.”) Mitigating factors presented are six letters of character and no prior disciplinary action. Significant mitigating circumstances do not exist in this case. Moreover, because Respondent repeatedly violated the ethical rules over a period of time with multiple clients, attempted to hide his misconduct from his firm, and cost both his firm and his clients exorbitant amounts of time and money, “the egregious nature of his misconduct also warranted the additional finding that he * * * engaged in conduct that adversely reflected on his fitness to practice law.” *Disciplinary Counsel v. Bricker*, 137 Ohio State 3d 35, 2013-Ohio-3998, ¶ 23.

{¶29} The panel considered similar cases in which attorneys have deceived either their clients or their firms over an extended period of time in order to reap a financial benefit. See, e.g. *Wrentmore, supra*; *Akron Bar Assn. v. Smithern*, 125 Ohio St.3d 72, 2010-Ohio-652; *Toledo Bar Assn. v. Crossmock*, 111 Ohio St.3d 278, 2006-Ohio-5706; and *Disciplinary Counsel v Yajko*, 77 Ohio St.3d 385, 1997-Ohio-263. It is the panel’s assessment that Respondent’s conduct, in conjunction with all of the aggravating factors weighing against him, warrants the same sanction that the Court imposed in each of the aforementioned cases. For a significant period of time, Respondent was the only attorney working on the long-term client files who had access to the billing records. The evidence was such that Respondent took advantage of that fact by changing and padding the bills to which he alone primarily had access. When Respondent’s actions finally came to light, Respondent denied any wrongdoing. Respondent repeatedly claimed that his clients requested that he bill that way due to the uniqueness of long-term care practice. Even with the introduction at the June 2016 hearing of billing guidelines attributed to two of the clients, nothing

was presented from the clients that narratives were meant to be vague and ambiguous. Clients in the prior hearing refused to corroborate Respondent's version of events. It is the panel's finding that "[Respondent's] explanation lacks credibility, and his self-serving statements and misrepresentations are indicative of a calculated attempt to avoid accepting responsibility for his misconduct." *Wrentmore*, ¶ 23.

{¶30} The panel recommends that Respondent be indefinitely suspended from the practice of law in Ohio. The panel further recommends that "any future reinstatement be conditioned upon his payment of restitution." *Disciplinary Counsel v. Weiss*, 133 Ohio St.3d 236, 2012-Ohio-4564, ¶ 15.

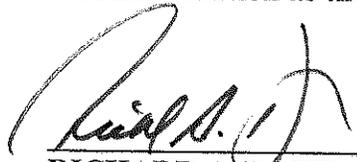
{¶31} The record reflects that Weston Hurd paid Beverly Enterprises, Altercare, and Covenant Care more than \$350,000 as remediation resulting from Respondent's misconduct. February 2013 Hearing Tr. 83-99. Respondent contests this amount, and the record reflects that the matter of any restitution owed by Respondent to his former firm has "never been resolved." *Id.* at 100-101; Respondent's Closing Argument of April 17, 2013. The record of the February 2013 hearing also contains multiple references to pending civil litigation or arbitration proceeding to resolve various monetary claims between Respondent and his former firm. See, *e.g.*, February 2013 Hearing Tr. 683-684. The respective monetary claims asserted by Respondent and his former law firm encompass matters beyond the scope of this disciplinary proceeding, such as financial obligations set forth in Respondent's partnership agreement, and the panel has not been advised of a resolution of those claims. Although the panel finds that Respondent owes some restitution to his former firm as a result of his misconduct, the panel believes the amount of restitution is more appropriately determined through the on-going civil proceeding. Thus, the panel recommends that, as a condition of reinstatement, Respondent be required to submit documentation, satisfactory

to Relator, of (1) any restitution ordered in the civil proceeding or agreed to by Respondent and Weston Hurd, and (2) proof of payment.

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 7, 2016. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Scott Clifford Smith, be suspended indefinitely from the practice of law in Ohio and that reinstatement be subject to the conditions set forth in ¶31 of this report. The Board further recommends that Respondent be 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