

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF A MEMBER
OF THE BAR OF THE SUPREME
COURT OF THE STATE OF
DELAWARE:

DAVID E. WILKS,

Respondent.

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§ No. 311, 2014

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§ Board Case No. 2012-0150-B

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Submitted: June 23, 2014

Decided: June 25, 2014

Before **STRINE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 25th day of June 2014, it appears to the Court that the Board on Professional Responsibility has filed a Report in this matter as required by Rule 9(d) of the Delaware Lawyers' Rules of Disciplinary Procedure. Neither the Office of Disciplinary Counsel (ODC) nor the Respondent has filed any objections to the Board's Report. The Court has reviewed the matter under Rule 9(e) of the Delaware Lawyers' Rules of Disciplinary Procedure and approves the Board's Report.

NOW, THEREFORE, IT IS ORDERED that the factual findings contained in the Report filed by the Board on Professional Responsibility on June 12, 2014 (copy attached) are APPROVED. The recommendation of a public reprimand is ADOPTED with the following conditions:

(i) For a period of one year beginning July 1, 2014, the Respondent shall meet regularly with a practice monitor assigned by the Professional Guidance Committee of the Delaware State Bar Association.

(ii) The Respondent shall comply with any terms and conditions established by the practice monitor during the one-year monitoring period. The practice monitor shall file a written report with the ODC each quarter reflecting the Respondent's compliance with the practice monitor's conditions. Failure to comply with the practice monitor's conditions may subject the Respondent to further disciplinary proceedings.

(iii) The ODC is directed to file within ten days of the date of this Order the costs of the disciplinary proceedings. Thereafter, the Respondent is directed to pay all costs within thirty days.

BY THE COURT:

/s/ Leo E. Strine, Jr. _____

Chief Justice

In the Matter of a
Member of the Bar of the
Supreme Court of Delaware:

Respondent.

CONFIDENTIAL

Board Case No. 2012-0150-B

This is the report on proceedings instituted by the Petition for Discipline (the "Petition") filed by the Office of Disciplinary Counsel ("ODC") on February 5, 2014. The ODC seeks sanctions against David E. Wilks ("Respondent"). A hearing was held on March 27, 2014 in the Supreme Court at 55 The Green in Dover, Delaware ("the Hearing"). The members of the panel for the Board were Deirdre McCartney, Esquire, Deborah Armistead, and D. Benjamin Snyder, Esquire as Chair (the "Panel"). Jennifer-Kate Aaronson, Esquire represented the ODC. Respondent was represented by Charles Slanina, Esquire.

Respondent was admitted to the Bar of the Supreme Court of Delaware in 1989. (SF ¶1).¹ At all times covered by the Petition, Respondent was engaged in the private practice of law. (SF ¶2). The Petition sets forth four counts alleging violations of four rules of Professional Conduct: Rule 1.1 (competent representation), Rule 1.3 (diligence

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and promptness), Rule 1.4 (keeping client reasonably informed), and Rule 8.4(c) (dishonest conduct).² Respondent admits these four violations. (SF ¶¶1-4).

II. Facts

The alleged violations arise out of Respondent's representation of Craig and Valerie Sheets. Respondent represented the Sheets in connection with personal injury and property damage claims as a result of a noxious odor in their home caused by an improper application of a mold and mildew retardant by Waterseal, Inc. to the home's basement on January 11, 2006. (SF ¶3). The Sheets moved out of their home and stayed at a nearby hotel for various times over several months, and incurred cleaning, disposal and replacement charges for rugs, furniture, and various personal items damaged by the contamination. (SF ¶4). Extensive remedial measures paid for by Waterseal's insurance carrier failed to completely alleviate the Sheets' complaints. (SF ¶16).

On May 11, 2006, the Sheets retained Respondent to represent them with respect to their potential claims. (SF ¶5). The Sheets were referred to Respondent through a mutual friend. (Tr. at p. 40; 8-11).³ Respondent concluded that the Sheets did not have a viable personal injury claim, and that the only valid claim they had was for reimbursement of their out-of-pocket expenses. (SF ¶7). Respondent, however, never advised the Sheets of this fact, and never filed suit. (SF ¶6). Respondent testified at the Hearing that the reason he avoided informing the Sheets of the status of their case is that, through the course of the representation, he developed a personal relationship with Mr. Sheets, and he did not want to burden the Sheets with bad news

² References to Rules are to the Delaware Lawyers' Rules of Professional Conduct.

³ Citations to Tr. ___ are to the transcript of the Hearing.

during an already difficult time in their life. (Tr. at pp. 47-49). The statute of limitations for a personal injury action expired on January 11, 2008. (SF ¶8).

On April 16, 2008, Mr. Sheets emailed Respondent asking if his claims had been barred by an applicable statute of limitations. (SF ¶9). Respondent told Mr. Sheets that he had an agreement tolling all statute of limitations with defense counsel. (SF ¶10). There was no such tolling agreement. (SF ¶11).

In a series of emails from February 2008 to May 2008, Mr. Sheets requested Respondent file a lawsuit against Waterseal. (SF ¶12). Respondent never filed suit. (SF ¶13). From January 25, 2009 to August 30, 2010, Mr. Sheets made at least 50 requests by email to meet with Respondent and/or obtain a copy of his file. (SF ¶14). Respondent made excuse after excuse to avoid meeting with Respondent to discuss the status of his case.

In February 2009, more than three years after the contamination, Respondent met with Mr. Sheets to review a draft complaint. (SF ¶15). Beginning in March 2009, Mr. Sheets made numerous inquiries via email as to whether the complaint had been filed. (SF ¶18). No complaint was ever filed.

On February 25, 2011, Mr. Sheets retained new legal counsel who filed a legal malpractice suit in Superior Court against Respondent. (SF ¶19). The malpractice case settled at mediation on or about August 17, 2011, and the Sheets received a substantial settlement.

III. Findings of the Board

Allegations of professional misconduct must be established by the ODC by clear and convincing evidence.⁴ As noted above, Respondent admits the four violations alleged in the Petition. The Panel finds that there is clear and convincing evidence to support the violations.

Rule 1.1 provides that “a lawyer shall provide competent representation to a client . . . [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Panel finds that Respondent violated this rule by failing to prosecute the Sheets' claims, failing to file a complaint, and failing to secure a tolling agreement to preserve the statute of limitations with respect to the Sheets' claims.

Rule 1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” The Panel finds that Respondent violated this rule by failing to diligently pursue the Sheets' claims and by failing to timely file a complaint.

Rule 1.4(a)(3) provides that “[a] lawyer shall keep the client reasonably informed about the status of a matter.” In addition, Rule 1.4(a)(4) provides that “[a] lawyer shall promptly comply with reasonable requests for information.” The Panel finds that Respondent violated these rules by failing to provide information, including the status of negotiations with defense counsel, and the client's own case file, to Mr. Sheets despite numerous and repeated requests.

Rule 8.4(c) provides that “[a] lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The Panel finds that Respondent violated this rule by falsely representing to Mr. Sheets that a complaint had been filed,

⁴ Delaware Lawyers' Rule of Disciplinary Procedure (“DLRFDP”) 15(c).

that there was a tolling agreement, and that negotiations with defense counsel were ongoing.

IV. Sanctions

The Panel is guided and bound by the precedents of the Delaware Supreme Court and the ABA Standards for Imposing Lawyer Sanctions ("ABA Standard or ABA Standards"). The objectives of the lawyer disciplinary system are "to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct."⁵ In determining the appropriate sanction for lawyer misconduct, the Delaware Supreme Court follows the ABA Standards:

The ABA framework consists of four key factors to be considered by the Court: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the actual or potential injury caused by the lawyer's misconduct; and, (d) aggravating and mitigating factors.⁶

1. The Ethical Duties Violated

Based on his own admissions, and the findings of the Panel, Respondent violated Rules 1.1, 1.3, 1.4(a)(3) and (4), and 8.4(c). Through these violations, Respondent breached duties owed his clients by failing to act with the requisite competence, diligence, responsiveness, and candor.⁷

2. The Lawyer's Mental State

Respondent acted with a knowing mental state. He was consciously aware of the inaccuracy of his representations to his clients regarding the status of matters in the case.

⁵ *In re Bailey*, 821 A.2d 851, 866 (Del. 2003).

⁶ *In re Lassen*, 672 A.2d 988, 998 (Del. 1996).

⁷ ABA Standard 4.0.

3. Actual or Potential Injury

The Panel finds that there was actual injury as a result of the Sheets' legitimate claim for out-of-pocket expenses being barred by the running of the applicable statute of limitations.

4. Aggravating and Mitigating Circumstances

After misconduct has been established, aggravating and mitigating circumstances may be considered.⁸ Aggravating or mitigating circumstances are any considerations or factors that may justify increasing or decreasing, respectively, the degree of discipline to be imposed.⁹

The Panel finds that there are two aggravating factors as set forth in ABA Standard 9.22: (1) substantial experience in the practice of law; and (2) dishonest or selfish motive.¹⁰ Respondent has been a member of the Delaware Bar for approximately 25 years. (Tr. at p. 47; 1-2). And, while Respondent contends that the motivation for his dishonesty was to avoid unnecessarily burdening his clients, his conduct was nonetheless inherently dishonest, and at least partially motivated by self-interest to conceal his neglect of their legal claims.¹¹

With regard to mitigating factors, the Panel finds that there are four mitigating factors as set forth in ABA Standard 9.32: (1) absence of a prior disciplinary record, (2) full and free disclosure to disciplinary board or cooperative attitude toward proceedings, (3) character or reputation, and (4) remorse.

⁸ *In re Bailey*, 821 A.2d at 866.

⁹ ABA Standard 9.21; ABA Standard 9.31.

¹⁰ ABA Standard 9.22(c)

¹¹ Respondent argues that he is entitled to the benefit of a mitigating factor for the lack of a dishonest or selfish motive. (Tr. at p. 76). The Panel disagrees for these reasons.

Respondent has no prior disciplinary record. There is no evidence of a pattern of misconduct or multiple offenses. Respondent's character and reputation suggest that the conduct at issue is uncharacteristic of him. Respondent also expressed sincere remorse for his misconduct, has reimbursed the Sheets' the legal fees they paid for his services, and has cooperated with the ODC. We find that these mitigating factors, including most significantly the absence of a pattern of misconduct or multiple offenses, outweigh the aggravating factors.

V. Recommended Discipline

The Panel's recommendation of an appropriate sanction assists the Court, but it is not binding.¹² The Court "has wide latitude in determining the form of discipline, and [it] will review the recommended sanction to ensure that it is appropriate, fair and consistent with . . . prior disciplinary decisions."¹³

The ODC and Respondent both argue that the appropriate sanction in this case is public reprimand. Respondent urges the application of ABA Standard 5.13, which provides that the presumptive sanction is reprimand where "a lawyer knowingly engages in other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." However, that standard applies to violations of duties owed to the public, such as abiding by the law, as distinct from duties owed to one's client. With regard to the duty of honesty owed to a client, under ABA Standard 4.22, suspension is generally the appropriate sanction "when a lawyer knowingly deceives a client, and causes injury or potential injury to the

¹² *In re Bailey*, 821 A.2d at 866.

¹³ *Id.*

client.”¹⁴ The case at hand involves dishonesty and injury to a client. Thus, ABA Standard 4.22 appears to be the more applicable standard. As a result, the presumptive sanction appears to be suspension, not public reprimand. In any event, after considering the aggravating and mitigating factors, including most significantly the lack of multiple offenses or a pattern of similar conduct, the Panel agrees with the ODC and Respondent that suspension is not the appropriate final sanction. Rather, a public reprimand and a two-year probation with conditions will better serve the goals of lawyer discipline.

Here, the Panel concludes that Respondent failed to competently and diligently protect his clients’ interests by failing to file suit prior to the applicable statute of limitations, and knowingly deceived his clients regarding the status of the matter in an effort to avoid having a difficult conversation regarding the merits and status of their claims. Respondent allowed the relationship that developed between him and his client to interfere with his professional duties. Indeed, it is difficult to understand why the Sheets did not seek new counsel sooner in light of Respondent’s blatant obfuscation, except that the personal relationship they developed with Respondent made it difficult to do so. Thus, while Respondent’s conduct is egregious and dishonest, the evidence suggests that it is isolated to one matter involving one client. Accordingly, the Panel recommends a public reprimand and a two-year probation with conditions.

The case law supports this conclusion. The Panel relies on the following case law for its decision:

¹⁴ Compare ABA Standard 4.63 (stating “Reprimand is generally appropriate when a lawyer *negligently* fails to provide a client with accurate or complete information, and causes injury or potential injury to the client”) (emphasis added).

- 1) *In re Hess*.¹⁵ The attorney admitted to improperly transferring \$8,000 in client funds to his operating account, failing to use the \$8,000 to pay the client's medical bills, failing to communicate with his client, committing books and records violations, filing false certificates of compliance, and failing to pay his income taxes. He admitted violations of Rule 1.3 (diligence), Rule 1.4(a) (keeping client informed), Rules 1.15(a), (b) and (d) (handling client property), Rule 8.4(c) (dishonesty), and Rule 8.4(d) (conduct prejudicial to the administration of justice). However, mitigating factors included no prior disciplinary record, cooperation with ODC, efforts to rectify the misconduct, and recognition of the wrongfulness of the conduct through admissions to the allegations. The sanction imposed was a public reprimand and two years of probation, with conditions.
- 2) *In re Gielata*,¹⁶ The attorney pled guilty to misdemeanor theft in connection with a conspiracy to defraud a third party in the amount of \$2,970. He accepted probation before judgment, thereby avoiding a criminal conviction, and made full restitution to the third party. The panel found that he knowingly committed a criminal act that reflects adversely on his honesty and trustworthiness in violation of Rule 8.4(b), which generally requires suspension. However, the panel adopted the position of the ODC, which argued that the mitigating circumstances, including absence of a prior disciplinary record,

¹⁵ 672 A.2d 988 (Del. 1996).

¹⁶ 2007 WL 2422148 (Del. 2007).

inexperience in the practice of law, other penalties and sanctions, and remorse and disclosure, warranted only a public reprimand, which sanction was approved by the Court.

- 3) *In re Schaeffer*.¹⁷ The respondent intentionally made a false report of a hostage situation to the police, causing seven to ten heavily armed officers to respond to the scene, and handcuff and detain another attorney. The panel found that the false report also caused a risk of serious harm to third parties. Although he was not charged with a crime, the panel determined that the attorney's misconduct constituted a criminal act in violation of Rule 8.4(b). However, the panel concluded that, even assuming the presumptive sentence was suspension, the mitigating factors justified reducing the sanction to a public reprimand. The Court accepted the panel's recommendation.
- 4) *In re Doelze*.¹⁸ The respondent falsely notarized a document prior to his client appearing before him and signing the document. The respondent had been admonished previously for similar misconduct. Mitigating factors included that respondent's conduct did not reflect a selfish motive, he fully cooperated with the ODC, and demonstrated remorse. The sanction imposed was a public reprimand.

The case is also distinguishable from other cases involving suspensions for neglect of client affairs and false statements to clients because the case at hand

¹⁷ 2012 WL 1859887 (Del. 2012).

¹⁸ 2002 WL 202439 (Del. 2002).

involves a single isolated matter, rather than a fixed pattern involving multiple clients and matters:

- 1) *In re Carmine*.¹⁹ The attorney was charged with misconduct in representing four separate clients. The respondent was found to have repeatedly neglect clients' legal affairs, including, but not limited to, failing to keep clients informed as to the status of their cases, failing to perfect an appeal, failing to pursue negotiations or file suit, and failing to respond to a lawful demand for information by the ODC. The attorney also had two prior disciplinary actions against him. The Court ordered a two-year suspension.
- 2) *In re Sullivan*.²⁰ The attorney was found guilty of misconduct involving false statements to client and supervising attorney, lack of diligence, and failure to provide competent representation. This pattern of misconduct involved 11 clients. The attorney also had three prior private sanctions for similar misconduct. The Court ordered a 18-month suspension.
- 3) *In re McCann*.²¹ The attorney missed filing deadlines, failed to respond to court orders, failed to notify a client that appeal had been dismissed until several weeks had passed, revised a client's will to include a ten percent bequest to himself, identified himself as a nephew in the will, submitted falsified evidence to tribunal, and failed to file dues collection cases. The misconduct involved three separate matters over the

¹⁹ 559 A.2d 248 (Del. 1989).

²⁰ 727 A.2d 832 (Del. 1999).

²¹ 669 A.2d 49 (Del. 1995).

course of three years, and the attorney had been sanctioned twice before. A suspension of 18 months was imposed.

Based upon the foregoing, the Panel recommends a public reprimand and probation for two years. As conditions of probation, Respondent is to have a practice monitor, satisfactory to the ODC, who shall meet with him regularly and report any problems with personal or client matters, and Respondent is to reimburse the ODC for the costs of prosecuting this matter. We believe these sanctions satisfy the stated objections of the lawyer discipline system "to protect the public, to protect the administration of justice, to preserve confidence in the legal profession, and to deter other lawyers from similar misconduct".²²

Conclusion and Signature Pages Follow

²² *In re Mekler*, 669 A.2d 655, 668 (Del. 1995).

CONCLUSION

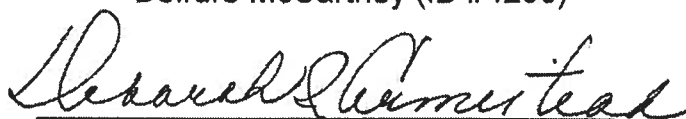
For the reasons stated herein, we recommend that the sanctions of public reprimand and two years' probation with conditions be imposed.

Respectfully submitted,

Dated: 6/2/14


D. Benjamin Snyder (ID #4038)

Deirdre McCartney (ID #4290)


Deborah I. Armistead

CONCLUSION

For the reasons stated herein, we recommend that the sanctions of public reprimand and two years' probation with conditions be imposed.

Respectfully submitted,

Dated:

D. Benjamin Snyder (ID #4038)


Deirdre McCartney (ID #4290)

Deborah I. Armistead