

STATEWIDE GRIEVANCE COMMITTEE

Robert L. Winters
Complainant

vs.

Grievance Complaint #10-0112

Jason E. Pearl
Respondent

DECISION

Pursuant to Practice Book §2-35, the undersigned, duly-appointed reviewing committee of the Statewide Grievance Committee, conducted a hearing at the Superior Court, 80 Washington Street, Hartford, Connecticut on August 5, 2010. The hearing addressed the record of the complaint filed on February 2, 2010, and the probable cause determination rendered by the New Britain Judicial District and the Judicial District of Hartford for G.A. 12 and the Towns of Avon, Bloomfield, Canton, Farmington and West Hartford Grievance Panel ("Grievance Panel") on March 23, 2010, finding that there existed probable cause that the Respondent violated Rule 1.2(c)¹ of the Rules of Professional Conduct.

Notice of the August 5, 2010 hearing was mailed to the Complainant, to the Respondent and to the Office of the Chief Disciplinary Counsel on July 13, 2010. Pursuant to Practice Book §3-14 et seq., certified legal intern Kylan Johnson assisted in the presentation of this matter under the supervision of Assistant Disciplinary Counsel Beth L. Baldwin. The Complainant and the Respondent appeared and testified. Ten exhibits were admitted into evidence.

This reviewing committee finds the following facts by clear and convincing evidence:

The Complainant was involved in a car accident in November of 2005. On March 3, 2006, he hired the Respondent to pursue a negligence claim. The Respondent agreed that he would work for the Complainant on a contingency fee basis. The Respondent's fee agreement states under the heading Contingency Fee Basis: "In the event that suit is necessary and a reasonable suit fee (non-contingent) is agreed upon, actual suit will not be initiated until court costs...and suit fees have been paid by the client." The fee agreement also included a unilateral right to withdraw from the representation if the Complainant failed to pay fees and costs that were owed.

The Respondent has been practicing law for more than fifty years. The Respondent began work on the Complainant's case. As the date for the statute of limitations drew

¹ On March 26, 2010, the Grievance Panel filed an amended finding of probable cause finding probable cause that the Respondent violated Rule 1.2(c) and not Rule 1.2(5).

near, the Respondent told the Complainant he would not file the lawsuit unless the Complainant paid the filing fee and marshal fee. The Respondent had some concerns over whether or not the Complainant would be able to reimburse him for court costs.

In October of 2007, the Respondent prepared the lawsuit and served the lawsuit on the defendant. The Respondent paid the marshal to serve the lawsuit. The Respondent failed to return the lawsuit to court and failed to pay the court filing fee by the return date, December 18, 2007. In late January of 2008 the Respondent advanced the costs of the court filing fee and returned the complaint to court late. The defendant moved to dismiss the complaint on the grounds that the complaint was not returned to court in a timely manner. The court dismissed the lawsuit. Thereafter, after the statute of limitations had run, the Respondent prepared the following papers "pro se" for the Complainant: an application for a fee waiver and a summons and complaint under an accidental failure of suit theory. The second case was dismissed on summary judgment. The Respondent testified that "I prepared the complaint and the complaint was predicated on the accidental failure of suit.... I believed that a court could easily have ruled in our favor on that allegation." Tr. at 48. We infer from the Respondent's testimony and conduct that he believed the superior court would be lenient in accepting a lawsuit returned late to court since it had been served within the statute of limitations

The Complainant has filed a lawsuit alleging the Respondent committed legal malpractice.

This reviewing committee also considered the following:

The Respondent explained to the Complainant that he would be his lawyer, but not bankroll his lawsuit. The Respondent argued that he refused to file the Complainant's lawsuit because at common law such an advance was considered champerty, notwithstanding modern rules that allow attorneys to advance the costs of litigation. See Rule 1.8 of the Rules of Professional Conduct. The Respondent stated in his opinion advancing the costs of litigation is against public policy.

Disciplinary counsel requested this reviewing committee make an additional finding of probable cause that the Respondent violated Rule 1.3 of the Rules of Professional Conduct by failing to file the lawsuit before the statute of limitations expired. After reviewing the entire record and the testimony offered at the hearing, we decline to do so.

Disciplinary counsel also requested this reviewing committee make an additional finding of probable cause that the Respondent violated Rules 3.3 and 4.1 of the Rules of Professional Conduct by failing to notify the court that he had intentionally failed to file the lawsuit within the statute of limitations. The Grievance Panel previously found no probable cause to conclude that the Respondent had violated Rules 3.3 and 4.1 of the Rules of Professional Conduct. After reviewing the entire record and the testimony offered at the hearing, we decline to do so. The local Grievance Panel already reviewed this issue and

found no probable cause to support a violation of Rules 3.3 and 4.1. Absent new evidence to support this charge, this reviewing committee declines to second-guess the decision of the local Grievance Panel.

This reviewing committee concludes by clear and convincing evidence that the Respondent violated Rule 1.2(c) of the Rules of Professional Conduct.

Rule 1.2(c) states: "A lawyer may limit the objectives of the representation if the client consents after consultation." (2006). The commentary to the Rule notes that such limitation on the objectives may not violate the Rules of Professional Conduct.

The evidence shows that the Respondent entered into a written fee agreement with the Complainant whereby he agreed to represent the Respondent. The fee agreement indicated the Respondent represented the Complainant for a contingent fee, but a lawsuit would not be filed unless the Complainant paid the Respondent an agreed upon non-contingent suit fee and court costs. The Respondent did not indicate that his representation was limited to a particular matter. The agreement did indicate that the Respondent could withdraw from representation of the Complainant, at his sole discretion, if the Complainant failed to pay fees.

The clear and convincing evidence is that the Respondent intended to represent the Complainant in his negligence case, but refused to advance the costs of the court filing fee. The Respondent believed the Complainant should provide the funds for the litigation costs and the superior court would be lenient in accepting a lawsuit returned late to court since it had been served within the statute of limitations. Such conduct violates Rule 1.2(c) of the Rules of Professional Conduct.

Based on the testimony we heard, we do not believe the Complainant gave the Respondent informed consent to limit the handling of the file in this way, nor could the Respondent ethically jeopardize a client's case because he did not wish to advance a court filing fee. We did not find the Respondent's argument regarding champerty persuasive because: 1) he did advance the cost of the marshal to serve the lawsuit in October of 2007 and he advanced the filing fee in January of 2008; 2) in his second attempt to file the lawsuit, he prepared a fee waiver application for his client; and 3) the Respondent did not withdraw properly from representation of the Complainant pursuant to Rule 1.16.

If the Respondent believed that advancing costs of the lawsuit was against public policy, he would not have advanced the costs of the marshal's fee or the filing fee. If the Respondent knew his client was impoverished and could not afford the costs of filing the lawsuit, he could have prepared a fee waiver in a timely fashion as he did after the statute of limitations had expired.

Further, if the Respondent believed that advancing the costs of the litigation was against public policy, he should have withdrawn from representation of the Complainant

and returned the Complainant's file to his client or successor counsel. It is unclear to us why he did not withdraw properly and give the Complainant a chance to hire another lawyer who would have been willing to advance the costs of litigation prior to the expiration of the return date and the application of the statute of limitations.

An attorney cannot make an agreement with a client, whereby they agree he can jeopardize the client's right to sue and still remain his counsel. Once an attorney undertakes a task for the client, he cannot engage in the task half-heartedly; the task should either be pursued and performed properly, or the attorney should withdraw from the representation in a manner that does not prejudice the client's case. In this matter, the Respondent did neither. The Respondent undertook the task of filing a lawsuit on behalf of his client and then he failed to return it to court in a timely manner. If the Respondent was uncomfortable with advancing court costs, then he had to withdraw from the representation in a manner that did not prejudice the Complainant's case. Here the Complainant's case was prejudiced by the Respondent's actions and inactions. For all of the foregoing reasons, we find clear and convincing evidence that the Respondent violated Rule 1.2(c) of the Rules of Professional Conduct (2006).

Since we conclude that the Respondent violated Rules 1.2(c) of the Rules of Professional Conduct, we reprimand the Respondent.

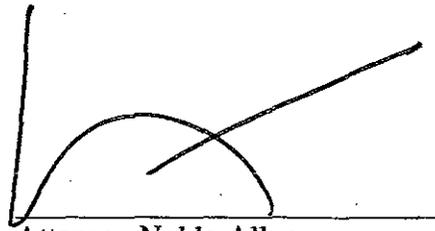
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DECISION DATE: 10/5/10

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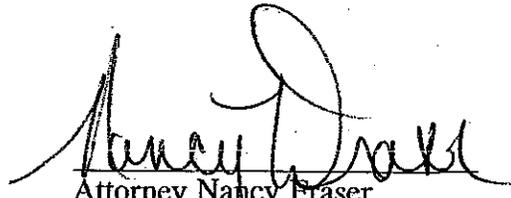
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Attorney Noble Allen

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Attorney Nancy Fraser

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Mr. John Walsh