

STATEWIDE GRIEVANCE COMMITTEE

Amethyst Kowalski
Complainant

:

vs.

:

Grievance Complaint #08-0952

Stephen M. Barber
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 July 2, 2009. The hearing addressed the record of the complaint filed on September 30, 2008, and the probable cause determination filed by the Middlesex Judicial District Grievance Panel on November 25, 2008, finding that there existed probable cause that the Respondent violated Rules 1.2, 1.4, 1.5(a) and 1.15(b) of the Rules of Professional Conduct and Practice Book §2-32(a)(1).

Prior hearing dates in this matter were continued at the Respondent's request. Notice of the July 2, 2009 hearing was mailed to the Complainant, to the Office of the Chief Disciplinary Counsel, and to the Respondent on June 9, 2009. The Respondent's motion for continuance of the July 2, 2009 hearing was denied. Pursuant to Practice Book §2-35(d), Assistant Disciplinary Counsel Beth Baldwin pursued the matter before this reviewing committee. The Complainant and the Respondent appeared at the hearing and testified. The Respondent was represented by Attorney Charles DeLuca. Darcy Trella testified as a witness. Three exhibits were admitted into evidence. Additionally, three other exhibits were incorporated into the record from the hearing in Fitzgerald v. Barber, #08-0423.

Reviewing committee member John Walsh was not available for the hearing. Since the Respondent did not waive the participation of Mr. Walsh, Mr. Walsh reviewed the record in this matter, including the transcript of the July 2, 2009 hearing, and participated in the rendering of this decision.

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

In December of 2007, the Complainant retained the Respondent regarding the legal separation of her marriage. The Complainant gave the Respondent \$5,000 as a retainer plus \$75 as an initial consultation fee and \$300 for costs. The Respondent prepared and filed a complaint and attendant motions in family court.

During January of 2008, the Complainant sent the Respondent e-mails and faxes regarding the matter, but received only a few short responses from the Respondent's associate. The Complainant was not informed about court hearing dates from the Respondent, but rather heard about them from her husband. In late January of 2008, the Complainant entered counseling with her husband. The Complainant met with the Respondent on February 11, 2008 and told the Respondent that she wanted him to take no further action on the lawsuit while she was in counseling. The Respondent told the Complainant that they did not have to take any action in the lawsuit for one year, and that they could open it up later.

The Respondent sent the Complainant an invoice dated February 25, 2008, which included a charge of 1.95 hours for the preparation of discovery requests on February 15, 2008.

On Sunday, April 27, 2008, the Complainant received a phone call from the Respondent and was told that she needed to sign some documents or the lawsuit would be dismissed. The Complainant signed the documents and, as instructed, taped them to the door of the Respondent's office. The documents included a financial affidavit and a case management agreement. Over the next several months, the Complainant called the Respondent's office on a number of occasions and left detailed messages, but the Respondent never returned the Complainant's calls.

The Complainant did not hear from the Respondent again until September 24, 2008, when he called her at work and told her that there was a court date the following day. The Respondent also told the Complainant that he had health problems. The Complainant told the Respondent she wanted the balance of her retainer back. The Respondent then sent a letter to the Complainant dated September 25, 2008, indicating that the lawsuit had been dismissed that morning and that he would go through his file and determine if any monies were due the Complainant.

The Complainant subsequently retained new counsel and her matter is currently pending. As of the date of the hearing, no refund of any balance due had been made by the Respondent, although he indicated a willingness to do so.

The Respondent did not file a timely answer to the grievance complaint. An untimely response was provided to the Disciplinary Counsel's office dated February 24, 2009.

This reviewing committee concludes by clear and convincing evidence that the Respondent engaged in unethical conduct. The Respondent has, to date, kept the entire retainer amount provided by the Complainant, even though his own invoice shows that the fees earned amount to only a portion of the retainer funds. Accordingly, the fee charged is clearly unreasonable, in violation of Rule 1.5(a) of the Rules of Professional Conduct. The Respondent's invoice dated February 25, 2009 sets forth a fee (plus costs) of \$2,328.82

leaving a balance due the Complainant of \$3,328.18. To this, the reviewing committee would subtract from the fee, and add to the balance due the Complainant, the amount of \$482.50 for the 1.95 hours charged at \$250/hour regarding the discovery materials which were prepared after the Complainant clearly directed the Respondent not to incur any further costs in the lawsuit. Accordingly, the reviewing committee finds a refund due the Complainant in the amount of \$3,533.68.

The reviewing committee notes that the probable cause finding cited Rule 1.15(b), but used the language of Rule 1.15(e) regarding lack of a refund or an accounting. The reviewing committee finds that an accounting was provided, in the form of the February 25, 2008 invoice, and subsumes the issue of any refund into its decision as to the reasonableness of the fee.

The reviewing committee also finds that the Respondent failed to communicate adequately with the Complainant both as to the status of the lawsuit from January, 2008 onward and as to the status of the unearned fees due the Complainant in violation of Rule 1.4(a) of the Rules of Professional Conduct.

The reviewing committee is unable to find, by clear and convincing evidence, a violation of Rule 1.2 of the Rules of Professional Conduct, as it is not clear from the record whether the Complainant adequately expressed her objectives for the representation once she began the counseling with her husband.

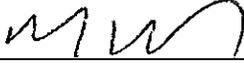
The reviewing committee finds that the Respondent's answer in this matter was untimely, but determines that the Respondent's health issues constitute good cause in this regard, as referenced in Fitzgerald v. Barber, #08-0423, and therefore finds no violation of Practice Book §2-32(a)(1).

Having found violations of Rules 1.5(a) and 1.4 of the Rules of Professional Conduct, and having found that the Complainant is owed \$3,533.68 in unearned fees, it is the order of this reviewing committee that, pursuant to Practice Book §2-37(2), the Respondent make restitution to the Complainant in this amount within thirty days of the date of this decision. The Respondent is further ordered to notify the Statewide Grievance Committee of his compliance with this condition within ten days of making restitution.

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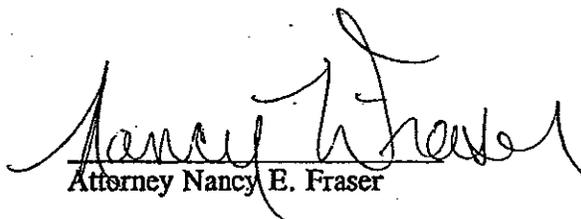


Attorney David Channing

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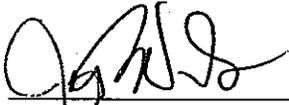
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Attorney Nancy E. Fraser

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Mr. John B. Walsh