

STATEWIDE GRIEVANCE COMMITTEE

Michael P. Bowler,
Statewide Bar Counsel
Complainant

vs. : Grievance Complaint #09-1032

Eddi Zyko
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 May 13, 2010. The hearing addressed the record of the complaint filed on November 25, 2009, and the probable cause determination filed by the Waterbury Judicial District Grievance Panel on February 11, 2010, finding that there existed probable cause that the Respondent violated Rules 1.15(b) and 8.1(2) of the Rules of Professional Conduct and Practice Book §2-27(a).

Notice of the hearing was mailed to the Complainant, to the Respondent and to the Office of the Chief Disciplinary Counsel on April 9, 2010. Pursuant to Practice Book §2-35(d), First Assistant Disciplinary Counsel Patricia King pursued the matter before this reviewing committee. The Respondent appeared at the hearing and testified. At the hearing, the parties agreed to consolidate the hearing in this matter with the hearing in connection with Grievance Complaint #09-1138, Bowler v. Zyko.

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

On September 4, 2009, TD Banknorth notified the Statewide Grievance Committee of an overdraft in the Respondent's IOLTA account that occurred on September 2, 2009. The available balance in the Respondent's IOLTA account on September 2, 2009 was \$181.91. Two checks were presented for payment on September 2nd. Check #1393 in the amount of \$109.80 was paid and check #1394 made payable to Prue, Chick, Leibowitz and Biezdard in the amount of \$230 was returned due to insufficient funds.

On September 24, 2009, Attorney Frances Mickelson-Dera of the Statewide Grievance Committee's office sent a notice of the overdraft to the Respondent and requested that he provide a written explanation of the overdraft and documentary evidence within ten days. In addition, on October 2, 2009 Attorney Mickelson-Dera sent a letter to the Respondent advising

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him that the TD Banknorth IOLTA account was not registered with the Statewide Grievance Committee. Attorney Mickelson-Dera requested that the Respondent register this account using the online registration process.

A second request for an explanation of the overdraft and documentary evidence was sent to the Respondent on October 6, 2009. The Respondent filed a response to the overdraft on October 14, 2009 and advised that the overdraft was caused due to a mathematical error. The Respondent also supplied partial bank statements covering the period of August 3, 2009 to October 2, 2009. On October 26, 2009, Attorney Mickelson-Dera requested that the Respondent provide copies of his clients' funds' account bank statements, checks, general ledger and all individual client ledgers and quarterly reconciliations for July, 2009 through September, 2009 within ten days. Attorney Mickelson-Dera also requested that the Respondent register his IOLTA account to comply with Practice Book §2-27. On November 25, 2009, failing to receive a response from the Respondent, the Complainant filed this grievance complaint.

On December 7, 2009, the Respondent filed an answer to the grievance complaint and supplied bank statements for the period of June, 2009 through November, 2009. The Respondent also submitted documentation indicating that he electronically updated his attorney registration on December 6, 2009 and registered a new IOLTA account at Naugatuck Savings Bank.

On January 10, 2010, Attorney Mickelson-Dera submitted a response to the Respondent's answer. Attorney Mickelson-Dera stated that the Respondent should provide the checks for the period of July, 2009 through December, 2009, the bank statements and checks for the Naugatuck Savings Bank IOLTA account and the general ledger for both accounts for the period of July, 2009 through December, 2009. The Respondent responded on January 21, 2010 by providing all the documents requested in Attorney Mickelson-Dera's January 10, 2010 letter, except the general ledgers. The Respondent requested advice regarding what is meant by a "general ledger." On February 4, 2010, Attorney Mickelson-Dera submitted a response to the Respondent's January 21, 2010 submission stating that the Respondent had not provided a general ledger or any client ledgers for the TD Banknorth account and had never registered the account.

This reviewing committee also considered the following:

The bank statements provided by the Respondent show three additional overdrafts in the Respondent's IOLTA account. On June 1, 2009, a check in the amount of \$76.64 was returned since the balance in the account was -\$7.27. On October 22, 2009 and October 28, 2009, check #1405, which is the subject of Grievance Complaint #09-1138, Bowler v. Zyko, was presented for payment against insufficient funds and returned.

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At the hearing before this reviewing committee, Disciplinary Counsel made an oral motion to dismiss the complaint indicating that the overdraft was due to a mathematical error on the part of the Respondent. The Respondent testified that the overdraft occurred in connection with a check written to a forensic accountant. The Respondent testified that he believed that there was enough money in the account to cover the \$230 payment. The Respondent maintained that he made a mistake in balancing his checkbook and therefore was not aware that he did not have enough funds in his IOLTA account to cover the check. The Respondent also testified that he keeps a running balance of his clients' funds in his IOLTA account checkbook, but does not keep individual client ledgers. The Respondent stated that he did not realize that the TD Banknorth IOLTA account had never been registered and that the account was closed when the Naugatuck Savings Bank IOLTA account was opened. The Respondent was unable to state why the TD Banknorth account had a -\$7.27 balance in June of 2009.

Following the hearing, this reviewing committee sent a letter to the Respondent dated May 20, 2010 asking the Respondent to consent to an order requiring him to submit to an audit and supervision of his client's trust account pursuant to Practice Book §2-37(a)(7). On June 11, 2010, the Respondent consented to the imposition of an order pursuant to Practice Book §2-37(a)(7).

This reviewing committee concludes by clear and convincing evidence that the Respondent engaged in unethical conduct. Initially, we must address Disciplinary Counsel's oral motion to dismiss. Since we conclude that the Respondent engaged in unethical conduct, we deny the motion to dismiss. The record before this reviewing committee does not support a finding that the overdraft in the Respondent's IOLTA account was caused by a simple mathematical error. The record indicates that in addition to the overdraft that is the subject of this grievance complaint, the Respondent also had a negative balance in his IOLTA account in June of 2009 and two additional overdrafts in October of 2009, one of which is the subject of Grievance Complaint #09-1138. These recurring negative balances and overdrafts over a four month period are not explained by a simple mathematical error in subtraction. Moreover, the Respondent failed to produce any documentary evidence showing this mathematical error and acknowledged that he does not keep individual client ledgers as required by Practice Book §2-27(b). We conclude that the overdraft in the Respondent's account is evidence that the Respondent did not safeguard clients' funds in violation of Practice Book §2-27(a). We further conclude that the Respondent's failure to keep individual client ledgers constitutes a violation of Rule 1.15(b) of the Rules of Professional Conduct which requires that complete records of IOLTA funds be kept and preserved for a period of seven years after termination of the representation.

This reviewing committee further concludes by clear and convincing evidence that the Respondent violated Rule 8.1(2) of the Rules of Professional Conduct by failing to respond to Attorney Mickelson-Dera's demand for additional information regarding the overdraft.

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Although the Respondent filed a written response to the overdraft, he did not respond to Attorney Mickelson-Dera's October 26, 2009 letter requesting further documentation of the overdraft. The Respondent's failure to supply this documentation resulted in the filing of this grievance complaint. We find the Respondent's failure to respond to this demand for additional information constitutes a violation of Rule 8.1(2) of the Rules of Professional Conduct.

This reviewing committee further notes the Respondent's failure to register the TD Banknorth IOLTA account with the Statewide Grievance Committee. The Respondent was unable to provide an explanation for his failure to do so. Although we find the Respondent's conduct in violation of Practice Book §2-27(d), we are prohibited from taking any disciplinary action against the Respondent since the grievance panel failed to find probable cause in connection with this conduct. In addition, the Respondent has closed this IOLTA account and opened and registered a new IOLTA account.

This reviewing committee concludes that the Respondent violated Rules 1.15(b) and 8.1(2) of the Rules of Professional Conduct and Practice Book §2-27(a). Since we conclude that the Respondent engaged in unethical conduct, we order the Respondent to take, at his own expense, a continuing legal education ("CLE") course in the management of clients' funds' accounts. The CLE course is to be attended in-person, unless the Respondent obtains pre-approval from the Statewide Grievance Committee to take the CLE course electronically or through some other means. The CLE course is to consist of a minimum of three credit hours, and is to be taken within one year of the issuance of this decision. The Respondent is further ordered to provide the Statewide Grievance Committee with written confirmation of his compliance with this condition within thirty days of completion of the CLE course. The written confirmation should be in the form of a certificate of attendance or similar documentation from the course provider.

This reviewing committee further orders the Respondent to submit to an audit and supervision of his current clients' funds' account pursuant to Practice Book §2-37(a)(7). The audit shall be conducted by the Statewide Grievance Committee and shall include a review of the records required to be maintained pursuant to Practice Book §2-27(b) for the six month period prior to the date of the final decision issued in this matter. We further order the Respondent to submit monthly written reconciliations to the Statewide Grievance Committee for a one year period thereafter.

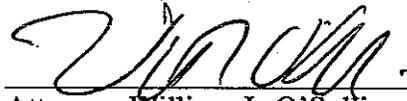
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DECISION DATE: 7.9.10

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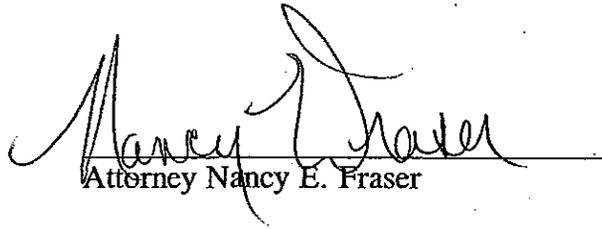
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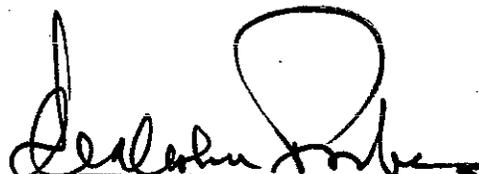
Attorney William J. O'Sullivan

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Attorney Nancy E. Fraser

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Mr. Malcolm Forbes