

FILED

**IN DISCIPLINARY DISTRICT II
OF THE BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE**

2015 JUN 11 AM 10:30

BOARD OF PROFESSIONAL
RESPONSIBILITY

**IN RE: CYNTHIA LEE COSTNER-SEXTON
BPR No. 9936, Respondent,
Attorney Licensed to
Practice Law in Tennessee
(Blount County)**

DOCKET NO. 2014-2390-2-AW

HEARING PANEL'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on the 20th day of April 2015, before Hearing Panel Members: Mark Stephens, serving as Panel Chair, and Panel Members Heidi A. Barcus and Oliver D. Adams. The Board of Professional Responsibility was represented by A. Russell Willis, Disciplinary Counsel. Respondent Cynthia Lee Costner-Sexton appeared pro se.

The Board of Professional Responsibility (Board) alleged in a Petition for Discipline filed on November 14, 2014, that Ms. Costner-Sexton committed certain violations of the Rules of Professional Responsibility relating to her representation of a client, Country Townhouse Condominiums Homeowners' Association, through their representative Robert Ortmann. Specifically, the Board alleged that Ms. Costner-Sexton was retained to file a lien against a member's condominium property for failure to pay condominium fees. The Board alleged that Ms. Costner-Sexton was paid a One Thousand Dollar (\$1,000.00) non-refundable retainer fee, and thereafter failed to perform the work and failed to respond to the many attempts Mr. Ortmann made to discuss the matter with her.

The Board alleges that Ms. Costner-Sexton's conduct in the matter violated the Rules of Professional Conduct, specifically, Rule 1.3 (Diligence), Rule 1.4 (Communication), Rule 1.16

(Declining or Terminating Representation), Rule 8.1 (Bar Admission and Disciplinary Matters) and Rule 8.4 (Misconduct).

Further, the Board maintains that certain aggravating circumstances exist: Ms. Costner-Sexton's dishonest or selfish motives; Ms. Costner-Sexton's failure to acknowledge the wrongful nature of her conduct; Ms. Costner-Sexton's bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; Ms. Costner-Sexton's substantial experience in the practice of law, having been licensed in Tennessee in 1982; and, Ms. Costner-Sexton's indifference to making restitution.

FINDINGS OF FACT

The facts of this case are not in dispute. On November 5, 2013, Mr. Ortmann retained Ms. Costner-Sexton to place a lien on a condominium property, as the owner was delinquent in paying condominium fees. Mr. Ortmann executed a retainer agreement and paid a non-refundable retainer fee of One Thousand Dollars (\$1,000.00) to Ms. Costner-Sexton for her services. Shortly after delivering the retainer, Mr. Ortmann began having problems communicating with Ms. Costner-Sexton. Mr. Ortmann sent numerous e-mails and left several telephone messages with Ms. Costner-Sexton requesting she contact him regarding the status of the case. Ms. Costner-Sexton failed to reasonably communicate with Mr. Ortmann or provide him with information about the status of the matter. Mr. Ortmann's last contact with Ms. Costner-Sexton was by e-mail, dated November 18, 2013.

On March 31, 2014, the Consumer Assistance Program (CAP) for the Board received a Request for Assistance from Robert Ortmann regarding the alleged misconduct of Ms. Costner-Sexton.

On April 1, 2014, the Consumer Assistance Program sent a copy of the Request for Assistance to Ms. Costner-Sexton, requesting a response within ten (10) days. Ms. Costner-Sexton did not respond, and on April 16, 2014, the Consumer Assistance Program made further attempts to contact Ms. Costner-Sexton. Because Ms. Costner-Sexton failed to respond to the many attempts by the Consumer Assistance Program regarding Mr. Ortmann's Request for Assistance, the matter was transferred to the Board's Investigations Department for further inquiry.

On May 27, 2014, the Board forwarded a Notice of Complaint along with a copy of Mr. Ortmann's original Request for Assistance to Ms. Costner-Sexton, asking her to respond within ten (10) days. Again, consistent with prior unsuccessful attempts to contact Ms. Costner-Sexton, the Board received no response. Finally, on June 10, 2014, the Board sent a Notice of Petition for Temporary Suspension to Ms. Costner-Sexton, requesting a response within ten (10) days. Ms. Costner-Sexton failed to respond to the Notice of Petition for Temporary Suspension.

On July 9, 2014, the Board petitioned the Supreme Court of Tennessee for an order temporarily suspending Ms. Costner-Sexton's law license for failure to respond to the Board concerning a complaint of misconduct. On July 21, 2014, the Supreme Court of Tennessee entered an Order of Temporary Suspension against Ms. Costner-Sexton for failure to respond to the Board concerning the complaint of misconduct.

The Order of Temporary Suspension remains in effect, and Ms. Costner-Sexton has not sought relief.

STATEMENT OF THE CASE

A Petition for Discipline (Docket No. 2014-2390-2-AW) was filed against Ms. Costner-Sexton on November 14, 2014. She did not file an answer or otherwise respond.

On February 9, 2015, Disciplinary Counsel filed a Motion for Default Judgment in the case. A Hearing Panel was appointed on March 10, 2015, and a Case Management Conference Call was held on April 2, 2015. All parties, including Ms. Costner-Sexton, participated in the Case Management Conference Call. During this call, Ms. Costner-Sexton acknowledged that at all times relevant to this action, the address 5043 Pea Ridge Road, Maryville, TN 37804, was her actual address. All correspondence from the Consumer Assistance Program and the Board of Professional Responsibility was sent to this address.

During the Case Management Conference Call, Ms. Costner-Sexton indicated she did not contest the Motion for Default Judgment in this case, and on April 7, 2015, the Hearing Panel entered such an Order.

On April 20, 2015, the Final Hearing in this case was held in Knoxville, Tennessee. The issue before the Panel was the appropriate punishment to be rendered for Ms. Costner-Sexton's conducts.

FINDINGS OF FACT

At the April 20, 2015 hearing, Ms. Costner-Sexton maintained that she became ill with pneumonia in December of 2013 and was hospitalized. Further, she indicated there was concern she was suffering from cancer - though she was unable to definitely advise the Panel regarding that diagnosis. By January 2014, having recovered from her bout with pneumonia,

Ms. Costner-Sexton admitted that she did not reasonably communicate with Mr. Ortmann about the status of the legal matter for which she had been retained.

During her April 2015 appearance before the Hearing Panel, Ms. Costner-Sexton maintained, for the first time, that she did perform the work she had been paid to complete, and had forwarded that work to Mr. Ortmann. However, she also acknowledged that Mr. Ortmann asserts he never received the work she claimed to have sent to him. At the hearing, Ms. Costner-Sexton was unable to produce any proof that she had either completed the work, or had delivered, or attempted to deliver, the work to Mr. Ortmann. In addition, Ms. Costner-Sexton admitted that she took no meaningful action to affect the lien on the condominium property or follow-up with Mr. Ortmann. Ultimately, Mr. Ortmann terminated Ms. Costner-Sexton and retained a new attorney.

In addition to her hospitalization in December of 2013, Ms. Costner submitted a late-filed exhibit consisting of two letters, one from Ms. Carla McCall, LCSW, BCD, and the other from William M. Hogan M.D. Ms. McCall's letter indicates that Ms. Costner-Sexton suffers from a "major depressive illness" for which she has been treating Ms. Costner-Sexton for over ten (10) years on a weekly or bi-weekly schedule. Dr. Hogan's letter indicates that he is treating Ms. Costner-Sexton for a Mood Disorder NOS and ADHD and has prescribed Adderall and Diazepam. Dr. Hogan's letter indicates that he has been treating Ms. Costner-Sexton for twelve (12) years. According to both Ms. McCall and Dr. Hogan, Ms. Costner-Sexton is a, "compliant patient who takes her medication as directed, has benefited from treatment, and has a 'good' to 'excellent' prognosis." Both opine that she is fit to practice law.

In addition, the Panel was advised that Ms. Costner-Sexton contacted the Tennessee Lawyer's Assistance Program ("TLAP") prior to the April hearing for an evaluation and the entry of a possible monitoring agreement. The Hearing Panel was advised that TLAP, with the permission of Ms. Costner-Sexton, contacted her treating physicians and ultimately concluded that Ms. Costner-Sexton is not in need of a monitoring agreement.

Finally, at the April hearing, Ms. Costner-Sexton expressed embarrassment over her misconduct and expressed a willingness - though she did not articulate a plan - to reimburse Mr. Ortmann and the Condominium Homeowners Association in full.

CONCLUSIONS OF LAW

The Petition for Discipline - based upon the complaint of Robert Ortmann on behalf of the Condominium Homeowners' Association- alleges violations of Tennessee Rules of Professional Conduct (RPC) 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admissions and Disciplinary Matters) and 8.4(d) (Misconduct).

Pursuant to Tenn. Sup. Ct. R. 9, § 8 (2014), attorneys admitted to practice law in Tennessee are subject to the disciplinary jurisdiction of the Supreme Court, the Board of Professional Responsibility, the Hearing Committee, hereinafter established, and the Circuit and Chancery Courts. Pursuant to Tenn. Sup. Ct. R. 9, § 1 (2014), a license to practice law in this state is a privilege, and it is the duty of every recipient of that privilege to conduct himself or herself at all times in conformity with the standards imposed upon members of the Bar as conditions for the privilege to practice law. Pursuant to Tenn. Sup. Ct. R. 9, § 11 (2014), acts or omissions by an attorney, individually or in concert with any other person,

which violate the Rules of Professional Conduct of the State of Tennessee shall constitute misconduct and be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

The Panel finds that Ms. Costner-Sexton failed to conduct herself in conformity with said standards, and further, the Panel finds by a preponderance of the evidence that Ms. Costner-Sexton violated Tennessee Rules of Professional Conduct (RPC) 1.3 (Diligence), 1.4 (Communication), 1.16 (Declining or Terminating Representation), 8.1 (Bar Admissions and Disciplinary Matters) and 8.4(d) (Misconduct). Specifically, the Panel finds that Ms. Costner-Sexton knowingly failed to reasonably communicate with Mr. Ortmann before and after she was hospitalized regarding the status of his legal matter and knowingly failed to comply with reasonable requests for information in violation of RPC 1.4(a)(3) and (4) and 1.4(b). In addition, Ms. Costner-Sexton knowingly failed to apprise Mr. Ortmann of her health issues which interfered with her ability to render the legal services for which she was retained in violation of RPC 1.16(a)(1) and (2). The Panel further finds that Ms. Costner-Sexton did not provide any meaningful legal services to Mr. Ortmann, did not earn the One Thousand Dollar (\$1,000.00) retainer fee she received, and knowingly failed to refund the unearned fee to Mr. Ortmann after her termination in violation of RPC 1.16(d)(6).¹

Further, the Panel finds that Ms. Costner-Sexton: knowingly failed to respond to the Board's Consumer Assistance Program's requests for information; knowingly failed to respond to the Board's request for information; knowingly failed to respond to the Petition for

¹The Hearing Panel found Ms. Costner-Sexton's assertions that she performed the work for which she was retained and somehow the transmittal of that work product to the intended recipient failed, as simply not credible. The Panel believed this assertion to be untruthful and deeply troubling. While the Panel did not base its decision on this issue, the fact that Ms. Costner-Sexton would stand before a Hearing Panel in a disciplinary proceeding and make an assertion that lacks credibility, as did this assertion, should cause significant concern for the Board.

Temporary Suspension; and, knowingly failed to respond to the Petition for Discipline in violation of RPC 8.1(b).

The Hearing Panel finds that, by her conduct, Ms. Costner-Sexton has violated RPC 1.3, 1.4, 1.16 and 8.1, and, consequently, RPC 8.4(a). Accordingly, pursuant to Tenn. Sup. Ct. R. 9, § 8.4, the Panel bases its decision upon application of the ABA Standards for Imposing Lawyer Sanctions ("ABA Standards"). The applicable ABA Standards state as follows:

4.42 Suspension is generally appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty as a professional and causes injury or potential injury to a client, the public, or the legal system.

In addition, the Panel finds that the Board has shown the existence of certain aggravating factors in this case. Pursuant to ABA Standard 9.22, the Panel finds the following aggravating factors applicable in this matter: (a) Ms. Costner-Sexton engaged in a pattern of misconduct; and (b) Ms. Costner-Sexton exhibited an indifference to making restitution to Mr. Ortman and the Condominium Homeowner's Association.

Finally, pursuant to ABA Standard 9.32, the Panel finds the following mitigating factor applicable in this matter: (a) the presence of personal or emotional problems.

JUDGMENT

Based on these findings of fact, conclusions of law, and the presence of certain aggravating and mitigating factors, the Panel finds that the appropriate punishment in this case to be that, pursuant to Tenn. Sup. Ct. R. 9, § 12.2, Ms. Costner-Sexton's license to practice law

should be suspended for eleven months and twenty-nine days, retroactive to July 21, 2014, the date of her temporary suspension, and thereafter suspended indefinitely until the following conditions are satisfied:

1. Provide proof to the Board that restitution in the amount of One Thousand (\$1,000.00) Dollars is paid in full to Mr. Ortmann and the Condominium Homeowner's Association;
2. Provide proof to the Board that all Professional Privilege Taxes currently due and owing to the State of Tennessee are paid in full;
3. Provide proof to the Board that all registration fees currently due and owing to the Board are paid in full;
4. Provide proof to the Board that all CLE requirements to date have been fulfilled and all fees currently due and owing to the Commission on Continuing Legal Education are paid in full;
5. Provide proof to the Board that all court costs in this matter are paid in full to the Clerk of the Court;
6. Pay all costs incurred by the Board in this matter as approved by this Hearing Panel.

The Hearing Panel orders that full payment of restitution, costs, and fees, shall be a condition precedent to reinstatement.

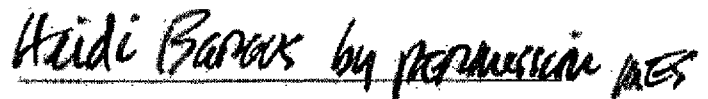
ENTERED this 11th day of June 2015.



Mark E. Stephens, Panel Chair



Oliver D. Adams, Panel Member



Heidi A. Barcus, Panel Member

NOTICE TO RESPONDENT

THIS JUDGMENT MAY BE APPEALED PURSUANT TO TENN. SUP. CT. R. 9, § 33 BY FILING A PETITION FOR REVIEW IN THE CIRCUIT OR CHANCERY COURT WITHIN SIXTY (60) DAYS OF THE DATE OF ENTRY OF THE HEARING PANEL'S JUDGMENT.