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IN THE DISCIPLINARY DISTRICT VI OF THE BOARD OF
PROFESSIONAL RESPONSIBILITY
OF THE SUPREME COURT OF TENNESSEE

BOARD OF PROFESSIONAL
RESPONSIBILITY

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IN RE: FLETCHER WHALEY LONG
BPR # 18775

Docket No. 2011-2070-6-KH

MEMORANDUM AND ORDER

Pursuant to a Petition For Discipline filed by the Board of Professional Responsibility (the "Board") on August 29, 2011, this Hearing Panel (the "Panel") conducted a contested hearing on May 22 and 23, 2012. The Panel heard testimony from Respondent, Fletcher Long, as well as from David Ferrell, Theresa Etherly, and Russell "Rusty" Leonard and received into evidence thirteen exhibits. Counsel for the parties made closing arguments and waived the option of submitting post-hearing briefs. The Panel, in closed session, has deliberated upon the entire record in this case and makes the following findings of fact, conclusions of law and recommendations:

The Charges and Defenses

The Board alleges that Fletcher Long, an attorney licensed to practice law in Tennessee, violated Rules 1.4(a), 1.5(a), 1.15, 1.16(d) and 8.4(a) of the Tennessee Rules of Professional Conduct ("RPC"), in his handling of \$7,500 paid to him in May, 2003, by David Ferrell as a fee for his representation of Mr. Ferrell's brother, Lawrence Ralph in connection with Warren County Circuit Court case number F8552. Specifically, the Board alleges the following acts of misconduct:

1. Violation of RPC 1.15(a) by failing to deposit the \$7,500 fee into an escrow account as agreed to in a written fee agreement.
2. Violation of RPC 1.4(a) by failing to communicate alleged changes in the written fee agreement.
3. Violation of RPC 1.4(a) and 1.16(d) by failing to refund or account for the fees paid when the representation was terminated in November, 2003.
4. Violation of RPC 1.16(d) by failing to return the client's file to the client when the representation was terminated in November, 2003.

The Board asks that Mr. Long be disciplined by the issuance of a public censure and an order of restitution in an amount to be determined by the Panel.

Mr. Long denies the averments of the Petition and asserts certain affirmative defenses. Specifically, Mr. Long contends as follows:

1. He was not ethically obligated to deposit the \$7,500 fee into an escrow account because he and Mr. Ferrell agreed orally to modify or amend the written fee agreement so that the \$7,500 was an earned flat fee. Mr. Long contends that to have thereafter deposited the funds into his escrow account would have been an improper comingling of personal and client funds.
2. His failure to create any written confirmation of the oral agreement to modify or amend the written fee agreement was imprudent but not misconduct.
3. He was not ethically obligated to account for or refund unearned portions of the \$7,500 fee when the representation was terminated because Mr. Ferrell waived such an accounting and acknowledged that no refund was due.

4. He delivered all file material to Mr. Ralph when the representation was terminated.
5. Supreme Court Rule 9 is facially unconstitutional as a denial of due process.
6. As applied in this particular case, Mr. Long was denied due process because the Board failed to provide to him notice of the alleged misconduct.
7. The equitable doctrine of *laches* applies to bar these proceedings because he has been prejudiced by the death of a key fact witness during the time between the alleged misconduct and the filing of the Petition.
8. The Board is collaterally estopped to seek additional discipline against him for these alleged acts of misconduct because a previous disciplinary action against Mr. Long was pending before the Board at the time the Board opened the investigation giving rise to these charges.

Mr. Long maintains that if any of his conduct with respect to the handling of the \$7,500 fee was a violation, a private reprimand would be appropriate discipline.

The Fee Agreement

The Parties agree that the current version of RPC 1.5(f) which requires that an agreement for a non-refundable fee must be in writing, is not applicable to the fee agreement at issue in this matter. The Parties agree that Exhibit 4 is the written fee agreement entered into between Mr. Long and Mr. Ferrell with respect to the representation of Mr. Ralph in case number F8552. The Parties also agree that pursuant to this fee agreement, Mr. Ferrell, paid \$7,500 in cash to Mr. Long on

May 20, 2003. The factual dispute which the Panel must resolve concerns whether the fee agreement was subsequently modified.

On May 19, 2003 Mr. Long agreed to represent Mr. Ralph at the request of Mr. Ferrell. At the time Mr. Long was retained, Mr. Ralph was confined in the Warren County jail having been sentenced on May 14, 2003 to confinement for certain misdemeanor offenses and the Circuit Court having denied a motion for release on bond pending appeal. Mr. Long and Mr. Ferrell orally agreed that Mr. Ferrell would replace Mr. Leonard as Mr. Ralph's attorney of record, undertake to obtain Mr. Ralph's release on bond pending appeal notwithstanding the earlier denial of such a motion, file and argue a motion for new trial, and, depending on the outcome of the motion for new trial, prosecute an appeal to the Tennessee Court of Criminal Appeals or represent Mr. Ralph in a new trial. After agreeing to represent Mr. Ralph, but prior to being paid any retainer or fee, Mr. Long prepared certain motions, including a motion for substitution of counsel, and sent his assistant, Ms. Etherly, to the Circuit Clerk's Office in McMinnville, Tennessee to file the motions.

Also on May 19, 2003, Mr. Leonard was notified of Mr. Ralph's decision to change lawyers, and drove from Gundy County, Tennessee to the Warren County Circuit Clerk's Office in McMinnville where he signed a draft Agreed Order of Substitution of Counsel. The next day, May 20, 2003, Mr. Long went to McMinnville together with Ms. Etherly for the purpose of obtaining Mr. Ralph's release on bond pending appeal.

Before he entered the Warren County Courthouse for the purpose of obtaining a decision on the motion for release on bond pending appeal, Mr. Long met with Mr. Ferrell outside of the Courthouse. Ms. Etherly was present. Mr. Ferrell and Mr. Long entered into a hand written fee agreement in full text as follows: "Deposit \$7,500 escrow account Draw out as earned 200/hr"¹

The agreement was signed by both Mr. Long and Mr. Ferrell. Mr. Ferrell then gave to Mr. Long \$7,500 in cash, which Mr. Long then entrusted to Ms. Etherly for safekeeping. Ms. Etherly has a clear recollection of these events because it made her very nervous to be personally responsible for safeguarding so much cash.²

Thereafter, Mr. Long and Ms. Etherly entered the Courthouse in search of a judge and an assistant district attorney general. Mr. Ferrell, remained outside.³ Mr. Long was successful in obtaining an order entering Mr. Ralph to release on bond pending appeal and he, accompanied by Ms. Etherly, exited the Courthouse to

¹ Mr. Long testified without contradiction that his customary practice in criminal cases was to obtain a non-refundable fee at the outset of an engagement. He explained the fact that he departed from his customary practice in this case because inasmuch as he was substituting in for Mr. Leonard who had taken the case through trial and sentencing, he was not sure about the procedural and substantive complexity of the case or its potential course on appeal.

² Ms. Etherly was called as a witness by Mr. Long and cross examined by Disciplinary Counsel. Disciplinary Counsel acknowledged during closing argument that Ms. Etherly's testimony had not been impeached. Counsel for Mr. Long, during closing argument agreed that Ms. Etherly's testimony had not been impeached and urged the Panel to credit Ms. Etherly's testimony in all respects. The Panel does so.

³ Mr. Ferrell testified that he accompanied Mr. Long, Ms. Etherly and Mr. Leonard, into the Courthouse and that he observed Mr. Long arguing for Mr. Ralph's release on bond. This testimony is directly contradicted by Mr. Leonard, who testified without contradiction that he was not in Warren County on May 20, 2003 and that he did not participate in any matters in case number F8552 after May 19, 2003 when he signed the agreed order of substitution of counsel. Mr. Leonard's testimony is corroborated by his contemporaneous business records in the form of an activity calendar. The Panel credits the testimony of Mr. Leonard.

report to Mr. Ferrell what had happened. Mr. Ferrell was accompanied by one or more other individuals who were related to or otherwise knew Mr. Ralph. Mr. Long described in reasonable detail what had transpired inside the courthouse with the judge and assistant district attorney and reported that Mr. Ralph would be released on bond if bond could be made. He asked Mr. Ferrell if Mr. Ferrell had sufficient funds to pay the bond premium and Mr. Ferrell assured him that he did. The mood among all of the participants in this conversation was quite elated, and Mr. Ferrell was favorably impressed with what Mr. Long had been able to accomplish.

During this conversation, Mr. Long made a statement which Ms. Etherly recalls as being to the effect of "...he had earned the money that was given to him" to which Mr. Ferrell expressed agreement. Shortly thereafter, Mr. Ralph's bond was arranged, he was released from jail and Mr. Long and Ms. Etherly departed McMinnville driving back to Nashville. During this drive, Mr. Long stated to Ms. Etherly that upon reflection he believed he should have retrieved "that piece of paper" from Mr. Ferrell. Ms. Etherly understood this to be a reference to the fee agreement. Mr. Long then said to Ms. Etherly that not retrieving the fee agreement may turn out to be irrelevant because Mr. Ferrell would "probably lose it in a week or two."

Services Performed and Representation Terminated

Having obtained Mr. Ralph's release from jail, Mr. Long thereafter drafted, filed and argued a motion for new trial in case number F8552 which the court took under advisement. Following this motion hearing, in October, 2003, Mr. Ralph and

Mr. Ferrell again approached Mr. Long with the request that he represent Mr. Ralph in place of Mr. Leonard in the defense of another criminal case pending in Warren County Circuit Court, case number F8958.⁴ Mr. Long agreed to do so but he advised Mr. Ralph and Mr. Ferrell that the circumstances of case number F8958, including the pendency of a hearing on a suppression motion on the same day as the start of a jury trial, were such that he would need the assistance of a second attorney. He recommended to them Gregory Clayton, the lawyer with whom Mr. Long shared office space. Mr. Ralph and Mr. Ferrell agreed to engage Mr. Clayton.

In connection with the engagement in case number F8958, Mr. Ferrell delivered a sum of money to Mr. Clayton. Mr. Ferrell testified that he delivered to Mr. Clayton the sum of \$5,700 which, together with \$300 that he claims to have seen Mr. Ralph hand to Mr. Long, comprised a total fee of \$6,000 for representation in case number F8958 for both Mr. Long and Mr. Clayton. Mr. Long testified that Mr. Clayton received a total of \$3,750 as a fee for participation in case number F8958 and that he represented Mr. Ralph in case number F8958 without charging any fees beyond the original \$7,500 paid to him by Mr. Ferrell on May 20, 2003.

The Panel does not credit Mr. Long's testimony on this point. If, as Mr. Long claims in his defense, the original hourly rate fee agreement had been orally modified to a flat earned fee for all services in connection with case number F8552, then Mr. Long would be undertaking Mr. Ralph's defense in F8958 without compensation. While it is impossible for the Panel to determine from the record

⁴ Evidently, following a superseding indictment, this criminal case was re-docketed under case number F9614. This fact, apart from creating some confusion in the mind of Mr. Ferrell, is irrelevant to the Panel's determination of this case.

before it exactly how the fees for case number F8958 were actually allocated, that fact is irrelevant to the charge of misconduct related to the handing of the \$7,500 fee paid in connection with case number F8552.

Case number F8958 went to trial before a jury on October 16, 2003. The jury returned a guilty verdict against Mr. Ralph in that case. Shortly thereafter, while the motion for new trial in case number F8552 remained under advisement, Mr. Long's representation of Mr. Ralph was terminated.

This termination occurred in a meeting between Mr. Ralph, Mr. Ferrell, Mr. Clayton and Mr. Long in Mr. Clayton's office located in the office suite he shared with Mr. Long at 500 Main Street, Nashville, Tennessee. Mr. Ferrell and Mr. Long agree on the fact of this meeting, its location and the participants. Their testimony is also consistent with respect to a request being made at that meeting, by Mr. Ferrell, for a refund of all unearned fees.⁵ Where their testimony diverges is on the issue of whether Mr. Ralph stated in reply to Mr. Ferrell that no such refund was owed. Mr. Long testified that Mr. Ralph made such a statement, Mr. Ferrell denies it.

The Panel credits the testimony of Mr. Ferrell. Mr. Long testified under cross examination by Disciplinary Counsel that it was Mr. Ralph who requested the refund to which Mr. Ferrell replied: "Come on Curly,⁶ you know this man don't owe you nothing." However, Exhibit 5 is a letter Mr. Long wrote to Mr. Ralph on

⁵ Coincidentally, Mr. Ferrell and Mr. Ralph also requested a refund of fees from Mr. Leonard when his representation was terminated. However, Mr. Leonard's customary practice was to document the fact that fees paid in advance for representation in a criminal matter were non-refundable. He had such a written agreement with Mr. Ralph.

⁶ Mr. Ralph was also known by the name of "Curly."

November 17, 2004 responding to a complaint filed by Mr. Ralph with the BPR Consumer Assistance Program. In Exhibit 5, Mr. Long wrote in relevant part as follows:

After you were convicted, and awaiting appeal, you presented to mine and Greg's office and fired me. You never mentioned any dissatisfaction or a refund, in fact, Mr. Ferrell inquired about a refund and you shushed him. Greg Clayton was there and witnessed the conversation; of course, he is dead now and "dead men tell no tales."

Mr. Long admits that he did not provide Mr. Ferrell or Mr. Ralph with either a refund of unused portions of the \$7,500 fee or an accounting explaining how it was earned.

Legal Conclusions

The Board has the burden to prove the charged misconduct by a preponderance of the evidence. *Flowers v. Board of Prof'l Responsibility*, 314 S.W.3d 882, 892 (Tenn. 2010) (citing Tenn. Sup. Ct. R. 9, § 8.2). This burden never shifts. *Id.*

Based upon the evidence, and the Panel's resolution of conflicting testimony the Panel concludes, with respect to the charged misconduct as follows:

1. RPC 1.4(a)(4) requires that a lawyer "promptly comply with reasonable requests for information." The evidence establishes that Mr. Ferrell and Mr. Ralph requested, on more than one occasion, information from Mr. Long regarding an accounting for how he earned the \$7,500 fee. This request is reasonable. Mr. Long failed to comply. This non compliance is a violation of RPC 1.4(a)(4).

2. RPC 1.15(a) requires that a lawyer “hold property and funds of clients or third persons that are in a lawyer’s possession in connection with a representation separate from the lawyer’s own property and funds.” The evidence establishes that Mr. Long agreed to hold the \$7,500 given to him by Mr. Ferrell in escrow and to treat it as a retainer against fees to be earned at a rate of \$200 per hour for work done on case number F8552. The evidence does not establish that this written agreement was orally modified by mutual assent of Mr. Long and Mr. Ferrell. The exchange between Mr. Long and Mr. Ferrell outside the Courthouse that he had “earned” his fee, is at best equivocal and does not establish the fact of an agreement to modify the written fee arrangement. Indeed, Mr. Long’s statements to Mr. Etherly during the return trip to Nashville on May 20, 2003, especially his speculation that Mr. Ferrell would probably lose the written fee agreement, reflect that Mr. Long did not believe that the agreement had been amended. If Mr. Long genuinely believed that the written fee agreement had been orally modified he should have confirmed that fact to Mr. Ferrell before a dispute arose. It was reasonable under the circumstances for Mr. Ferrell, a lay person, to consider the written fee agreement to be effective. Mr. Long’s failure to deposit the \$7,500 into his escrow account constitutes a violation of RPC 1.15(a).

3. RPC 1.16(d)(5) requires that a lawyer who is discharged from a representation promptly refund “any advance payment of fees that have not been earned or expenses that have not been incurred.” The evidence is undisputed that Mr. Long has not made any refund to Mr. Ferrell nor has he rendered an accounting

to Mr. Ferrell demonstrating that no refund is due. Mr. Long's failure to make a refund or render an accounting is a violation of RPC 1.16(d)(5).

5. The foregoing violations constitute professional misconduct as defined by RPC 8.4.

6. The Board has failed to carry its burden of proof with respect to its allegation that Mr. Long failed to return the case files to Mr. Ralph.

The Panel turns now to Mr. Long's affirmative defenses.

1. Having failed to give notice to the Tennessee Attorney General that he challenged the facial constitutionality of Supreme Court Rule 9, Mr. Long has failed to join an indispensable party and therefore his facial challenge to the constitutionality of Supreme Court Rule 9 is not properly before this Panel. Rule 24.04 Tenn. R. Civ. P.; Tenn. Code Annot. § 29-14-107(b); *Cummins v. Shipp*, 38 S.W.2d 1062 (Tenn. 1928).

2. The Petition for Discipline clearly identifies the misconduct alleged, including specific citations to RPC's that the Board alleges were violated. Therefore, Mr. Long was placed on reasonable notice of the charges against him such that he was not denied due process in this case.

3. The equitable doctrine of *laches* does not apply to bar these proceedings for two reasons. First, Mr. Long has not been prejudiced by the death of Mr. Clayton. The fact that Mr. Ferrell demanded a refund at the time he terminated Mr. Long's representation is undisputed. Even if Mr. Clayton were to corroborate the statement in Exhibit 5 that Mr. Ralph "shushed" Mr. Ferrell, that fact would not

relieve Mr. Long of his ethical obligation under RPC 1.16(d)(5). Second, the delay between the misconduct and the filing of the petition was not caused by the Board, which first learned of the misconduct in 2009 when the Court of Appeals decided Mr. Ferrell's appeal of an untimely civil action he had brought against Mr. Ferrell.

4. The Board is not collaterally estopped from seeking discipline against Mr. Long. The previous disciplinary action against Mr. Long related to wholly separate allegations of misconduct and the Board is not obligated to join newly discovered acts of unrelated misconduct in matters that are pending before the Board at the time the Board opens a new investigation.

Mr. Long, in closing argument, urged the Panel to apply an adverse evidentiary inference from the fact that Mr. Ralph did not testify. No such adverse inference is warranted based on the record in this case. Mr. Ferrell testified without contradiction that Mr. Ralph has suffered a stroke and is unable to communicate. Mr. Long offered no evidence that Mr. Ralph was exclusively under the control of the Board nor did Mr. Long offer any evidence that the Board had denied him the opportunity to obtain Mr. Ralph's testimony by way of deposition. Indeed, Mr. Long was completely silent with respect to Mr. Ralph's absence until closing argument. Under these circumstances no adverse inference is warranted.

Disciplinary Sanction

Having found that Mr. Long committed professional misconduct, it is incumbent on the Panel to recommend a disciplinary sanction. The Board argues that the Panel should recommend a public censure and order restitution of some

amount of the \$7,500 fee. Mr. Long argues that the Panel should recommend nothing more than a private reprimand.

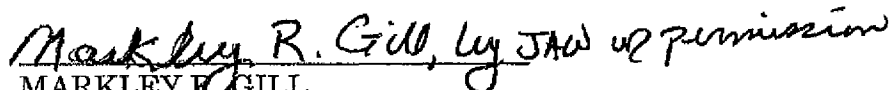
The Board has failed to offer any evidence from which the Panel may compute an amount of restitution. It is undisputed that Mr. Long performed competent and valuable services to Mr. Ralph in connection with case number F8552. The record in this case does not provide a basis for the Panel to recommend any amount of restitution⁷ and the Panel therefore does not recommend restitution.

The Panel, however, does recommend the sanction of a public censure. The Panel is aware that Mr. Long's disciplinary history contains an Order of Enforcement issued on June 22, 2009. The misconduct underlying this Order of Enforcement, however, appears to post-date the misconduct involved in the present case and for this reason, the Panel does not consider this misconduct to be a subsequent infraction that might otherwise support the imposition of a more severe disciplinary measure.

⁷ The Panel has before it, Exhibit 11 which is an order of the Chancery Court of Warrant County imposing Rule 11 sanctions against Mr. Ferrell in favor of Mr. Long in case number 10354 in the amount of \$13,700. It is undisputed that Mr. Long has made no payment of any amount of these sanctions to Mr. Long. Neither the Board nor Mr. Long have offered the Panel any authority for how the imposition of restitution in this case would intersect with or be setoff against the imposition of Rule 11 sanctions by the Warren County Chancery Court and the Panel declines the opportunity to cut a new path through that particular legal thicket.

IT IS SO ORDERED by the Hearing Panel this 30th day of May, 2012.


JOSEPH A. WOODRUFF
Panel Chair


MARKLEY R. GILL
Member


DAVID L. ALLEN
Member