

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

FILED
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BOARD OF PROFESSIONAL
RESPONSIBILITY
KW
EXEC. SEC.

IN RE: JEFFREY POWELL
 BPR No. 15629
 An Attorney Licensed to
 Practice Law in Tennessee
 (Davidson County)

DOCKET NO. 2010-1991-5-RS

JUDGMENT OF THE HEARING PANEL

This matter came before the Hearing Panel of the Board of Professional Responsibility of the Supreme Court of Tennessee on August 11, 2011. This cause is heard pursuant to Rule 9 of the Rules of the Tennessee Supreme Court. This Hearing Panel, Kenneth M. Bryant, Chair, Christopher Whitson and Cliff Wilson, make the following findings of fact and conclusion of law and submits its Judgment in this cause as follows:

I. STATEMENT OF THE CASE

1. The Board filed a Petition for Discipline on November 18, 2010 charging Respondent, Jeffrey Powell, of violation of the Disciplinary Rules in File No. 31759-5-PS.
2. Respondent was duly served with the Petition. Respondent answered the Petition on December 8, 2010.
3. The Petition contains one complaint that alleges violations of Rules of Professional Conduct 1.4 (Communication), 1.5 (Fees), and 8.4(a) (Misconduct).
4. Respondent denied the charges contained in the Petition.

II. FINDINGS

The Board and the Respondent submitted oral testimony and documentary proof at the hearing of this matter on Thursday, August 11, 2011. The Hearing Panel heard the testimony of the Complainant as well as the Respondent and reviewed the documents submitted at the hearing, as well as the pleadings in these matters.

The Hearing Panel finds as follows:

1. On September 27, 2006 the Complainant retained the Respondent to represent him in an appeal to the Sixth Circuit Court of Appeals in a wrongful termination suit against his former employer. The case had been filed *pro se* and had been dismissed on summary judgment in the trial court.

2. Complainant and the Respondent met in person to review the file in the case.

3. Complainant had filed a lawsuit against his previous employer claiming discrimination. Complainant filed a number of pleadings and lost a summary judgment motion which dismissed his case with prejudice. The trial also awarded discretionary costs to Complainant's former employer in the amount of \$7,558.02.

4. According to the testimony of the Respondent, he quoted Complainant a flat fee, non-refundable fee in the amount of \$15,000 to handle the appeal.

5. Complainant agreed to pay the flat fee in two installments which the record reflects Complainant made to Respondent.

6. At the hearing, Respondent testified that he did not provide Complainant with an hourly rate which he would bill against the retainer. In fact, Respondent testified that the flat fee was a refundable flat fee and that, if warranted, he would have refunded any amount of money left over after his representation of Complainant.

7. However, Respondent's testimony contradicts statements made in his January 20, 2009 correspondence to the Board in which he states that he told Complainant that the Respondent would charge him \$150 - \$200 an hour with a \$15,000 retainer. *See* Exhibit 4.

8. The testimony of the Respondent at the hearing revealed that the Respondent did not explain to Complainant how a refund would be calculated.

9. The proof at the hearing revealed that the Respondent did keep a contemporaneous timesheet and/or time records on a computer that malfunctioned; and was not able to provide proof of his contemporaneous written evidence of work performed on the Complainant's file. However, according to his re-creation of his timesheet, Respondent revealed that he spent 98.65 hours to review the documents in Complainant's case. *See* Exhibit 5.

10. Expert witness and attorney Donald Capparella offered by the Board (*See* Exhibit 8) testified that he reviewed the Complainant's file and that it would have taken him approximately 5 to 10 hours to determine that Complainant's appeal was not viable and that no appeal should be taken.

11. Mr. Capparella further testified that a flat fee of \$15,000.00 to review Complainant's case was unreasonable.

12. Nevertheless, Respondent successfully negotiated a settlement of the discrimination case against Complainant's former employer and recovered the payment of discretionary costs in the amount of \$7,558.02 from Complainant's former employer which Complainant had previously paid.

III. CONCLUSION

1. The Hearing Panel concludes Respondent has violated Rule 1.4, but has not violated Rule 1.5 of the Tennessee Rules of Professional Conduct.

2. The Hearing Panel relies upon the pre-trial briefs, the testimony of Respondent, the Complainant, as well as the findings of fact and conclusions of law requested by the Hearing Panel of both parties.

3. Rule 1.4 of the Tennessee Rules of Professional Conduct require that a lawyer “keep a client reasonably informed about the status of the matter and comply with reasonable requests for information within a reasonable time” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

4. The Hearing Panel finds that the Respondent failed to accurately and precisely communicate with Complainant regarding the amount he would be charging for the engagement because at different times in his testimony, the Respondent inconsistently referred to a non-refundable flat fee and a retainer to cover time billed at an hourly rate.

5. Although Respondent achieved a successful result for Complainant, the Hearing Panel finds the documents submitted at the hearing and testimony of the Respondent reflect a failure of the Respondent to communicate clearly that the \$15,000.00 amount paid was a non-refundable retainer. This fact is bolstered by the Respondent’s testimony that he would be billing out of the “retainer” and would have refunded any amounts remaining to Complainant.

6. The Hearing Panel finds that the Respondent practices primarily in the area of criminal defense where such flat fee retainers are common place. Such charges are non-refundable and cover the full representation of a client. In such situations, neither the amount of time spent on the case nor the hourly rate are relevant. In this case, the Hearing Panel finds that the Respondent did not clearly communicate to Complainant that the retainer was non-refundable.

7. Rule 1.5 of Tennessee Rules of Professional Conduct require that "a lawyer's fee and charges shall be reasonable".

8. The Hearing Panel finds that the Respondent charged a reasonable fee for his services which included the successful refund of the discretionary costs paid by the Complainant to his former employer in the pending litigation. Although the Hearing Panel found the testimony of Mr. Capparella to be helpful, it did not persuade the Hearing Panel that the payment of \$15,000.00 by Complainant to Respondent was unreasonable. The proof revealed that Respondent did more than simply review the file of the Complainant; he also negotiated a successful settlement of an unmeritorious case from the Complainant's position. Following the factors outlined in Rule 15(a), this Hearing Panel finds that the fees in this matter were not unreasonable given the totality of the work involved.

IV. AGGRAVATING FACTORS AND MITIGATING CIRCUMSTANCES

The Board alleges aggravating factors relating the pending claim. Specifically, the Board cites that the aggravating and mitigating circumstance is the fact that the Respondent refused to comply with the Board's demand that the Respondent refund a certain amount of money to the Complainant Mr. Sowell. The Hearing Panel finds that the Board has failed to show aggravating factors which should have an impact on this Hearing Panel's decision.

V. JUDGMENT

It is therefore ORDERED by the Hearing Panel as follows:

1. That the Respondent, Jeffrey Powell, be subject to a public censure due to his violation of Rule 1.4 of the Tennessee Rules of Professional Conduct in failing to “keep a client reasonably informed about the status of the matter”, specifically, the precise nature of the \$15,000.00 and whether it was non-refundable. Further, the Complainant is not entitled to reimbursement of the fee charged by the Respondent because the Hearing Panel finds that, given the totality of the representation, the fee was reasonable under the factual circumstances proven at the hearing.

Entered this 16th day of September, 2011.

Respectfully submitted,

Kenneth M. Bryant
Kenneth M. Bryant, Chair

Christopher Whitson by KMB
Christopher Whitson
with permission

Cliff Wilson by KMB
Cliff Wilson
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