SUPREME COURT OF KENTUCKY
2017-SC-000266-KB
KBA FILES 13770 & 14411

KENTUCKY BAR ASSOCIATION — APPELLANT/COMPLAINANT

NANCY OLIVER ROBERTS — APPELLEE/RESPONDENT

KBA'S BRIEF TO THE SUPREME COURT

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served by regular mail on the Appellee/Respondent on this 22nd day of May, 2017.

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SUPREME COURT OF KENTUCKY
2012-SC-000266-KB
KBA FILES 13737 & 17411

KENTUCKY BAR ASSOCIATION **APPELLANT/COMPLAINANT**

v.

NANCY OLIVER ROBERTS **APPELLEE/RESPONDENT**

KBA'S BRIEF TO THE SUPREME COURT

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed to the following counsel for the Appellee/Respondent on this 22nd day of May, 2012:

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INTRODUCTION

In these two consolidated attorney disciplinary matters, the KBA appeals the Board of Governors' nine-page (9) recommendation rejecting, without adequate reasoning provided, the thirty-three-page (33) Trial Commissioner's Report. The Trial Commissioner found Respondent guilty of all nine (9) counts in the Charges and recommended a suspension of one (1) year for her multiple instances of professional misconduct from 1998 to 2009 pertaining to a criminal defense representation and related probate matter. The Board only found Respondent guilty of two (2) counts and recommended a thirty-day (30) suspension. The KBA requests the Court to reject the Board's recommendation and to adopt the detailed Trial Commissioner's Report in its entirety.

STATEMENT CONCERNING ORAL ARGUMENT

The KBA states that the Court may wish to consider oral arguments in this matter because this case presents issues of first impression in a Kentucky lawyer disciplinary case.

STATEMENT OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

Earl Manning was killed November 23, 1997, and left a will leaving a 160-acre farm to Alan David Manning, one of his sons. Lawrence Williams was the named personal representative in the will. Trial Commissioner Report, pp. 13-14 (hereafter "TCR", attached as Appendix 1).

On January 24, 1998, Respondent signed a "Contract of Employment" with Mr. Manning for representation pertaining to "murder-1st degree-to grand jury-$2500.00 probation violation." At the end of the contract, Respondent wrote in the following: "I agree that [Respondent] can be paid $2,500.00 from my funds in any cash, bank account or any source in Lawrence Williams' possession." The monetary "source in Lawrence Williams' possession" referred to above belonged to the Earl Manning estate, as Respondent admitted at the November 2004 RCr 11.42 hearing. TCR, p. 14. Respondent testified that the language "or any source in Lawrence Williams' possession" was Mr. Manning's "suggestion" because he was aware that Mr. Williams had been named executor by Earl Manning in his will and "[h]e thought, as I understood at that point in time, that he would win his trial [and] that he would be able to inherit[.]" Thus, Mr. Manning's rights to any money in the possession of Lawrence Williams that was part of Earl Manning's estate were contingent upon Mr. Manning being found not guilty of the murder of Earl Manning. TCR, pp. 14-15. Respondent admitted that she was aware that Alan David Manning could only inherit from Earl Manning if he were acquitted of homicide. TCR, p. 15.

On January 28, 1998, Alan David Manning was indicted for the murder of Earl Manning. TCR, p. 15. Respondent represented Alan David Manning in his criminal

matter at the trial court level and on direct appeal. Respondent had experience in felony criminal prosecutions. TCR, pp. 13-14.

On January 28, 1998, Respondent signed a second "Contract of Employment "with Alan David Manning for representation "indictment to Supreme Court of Kentucky pursuant to promissory note and mortgage--$25,000.00." TCR p. 15. On February 25, 1998, as required by the January 28, 1998 Employment Contract, Mr. Manning signed a promissory note for $25,000.00. A mortgage was never drafted or signed. At the time Mr. Manning signed the promissory note, he was incarcerated. Respondent admitted she did not advise Mr. Manning to speak with other counsel prior to executing the promissory note. TCR, pp. 15.

On February 25, 1998, Respondent entered her appearance on behalf of Alan David Manning as an heir in the probate of the Estate of Earl Manning. On March 10, 1998, the Respondent signed a third "Contract of Employment" with Lunell Manning and Alan David Manning, the stated purpose of which was "EPO hearing, testimony in David Manning's case." Alan David Manning and Lunell Manning both signed this contract as "client." At the bottom of the contract, a handwritten notation provided: "I agree to pay Nancy from sale of timber as method of payment, after the payment of the retainer." Mr. Manning's signature appears below the handwritten part, as well as on the pre-printed line with "CLIENT" printed underneath. The timber was part of Earl Manning's estate. TCR, pp. 15-16. Mr. Manning's rights to any proceeds from the sale of timber belonging to the estate of Earl Manning were contingent upon Mr. Manning being found not guilty of the murder of his father, Earl Manning. At the time of the execution of the first three

representation contracts and the promissory note, Respondent believed that Alan David Manning owned some land around his trailer. TCR, p. 16.

In January 1998, Lawrence Williams declined to serve as personal representative, and Respondent represented his successor, Russell Justice. Upon Respondent's motion, Mr. Justice was appointed successor personal representative on June 5, 1998. TCR, pp. 15-17. Mr. Justice signed a "Contract of Employment" dated August 8, 1998, with Respondent for representation pertaining to "Estate of Earl Manning." Andrew Michael Manning, brother of Alan David Manning and another potential heir, also signed this contract as "client." TCR, p. 17. Mr. Justice had never been an executor or administrator prior to his service in the Earl Manning estate and relied on Respondent to guide him. The Trial Commissioner found that Respondent failed to adequately explain to Mr. Justice his duties as personal representative of the Earl Manning estate. TCR, p. 18.

Respondent sent $2,000.00 of estate funds to an expert for Alan David Manning's criminal case. The checks were dated September 4, 1998 and October 5, 1998, and were signed by Russell Justice as personal representative. Mr. Justice testified that Respondent raised the issue of needing an expert witness with him regarding the criminal case and that he was in Respondent's office when he signed the checks. TCR, p. 18.

The Commonwealth offered a sentence of five (5) years of incarceration in exchange for a plea of guilty to manslaughter second degree. Respondent admitted she did not offer advice to Mr. Manning regarding whether he should accept the plea offer, and further admitted did not advise Mr. Manning that he should speak with anyone else regarding whether he should accept the plea offer. TCR, p. 18. Mr. Manning testified at the November 2004 RCr 11.42 hearing that Respondent advised him not to take the plea

offer. John Brown, the former assistant commonwealth attorney who prosecuted the case (now Warren District Judge), testified that he believed Respondent "was not going to accept any plea offer." TE, p. 123.

Respondent knew prior to trial that statements of Lunell Manning, Mr. Manning's "wife," would be admitted and acknowledged that they were "damaging" to the case. Prior to trial, Respondent had made arrangements for her client to marry Lunell because she was trying to get the statements excluded; this did not work. TCR, p. 19.

Mr. Manning was found guilty at trial of manslaughter, first degree, and persistent felony offender, first degree and sentenced to life. TCR, p. 19. On November 16, 1998, Respondent signed a fourth "Contract of Employment" with Alan David Manning for "appeal for David Manning." TCR, p. 20.

In the estate, Respondent filed a "Motion to Claim Surviving Child's Exemption," on September 23, 1999, on behalf of Andrew Michael Manning, and tendered "Order Granting Motion to Claim Surviving Child's Exemption," which was entered July 21, 2000. Respondent had the Manning brothers execute "Waivers," dated October 4 and October 13, 1999 respectively. She filed these documents with a "Notice of Filing" as counsel for Russell Justice, the personal representative. The "Waivers" purportedly had the Mannings waiving any "right to object" to any conflict by Respondent, and declaring that "no conflict of interest exists or will exist." TCR, p. 20.

Alan David Manning testified at the RCr 11.42 hearing that Respondent did not explain the waiver to him. Russell Justice did not execute any waiver. TCR, pp. 20-21. Mr. Justice did not recall that Respondent explained how her representations of Alan David Manning and Andrew Michael Manning in the probate could impact his (Mr.

Justice) representation in the probate. TE, p. 230. Mr. Justice did not recall that Respondent asked him for his agreement to represent Alan David Manning and Andrew Michael Manning in the probate. TCR, p. 21.

Respondent represented Alan David Manning on appeal through a direct appeal to this Court, which affirmed the conviction and sentence. *Manning v. Commonwealth*, 23 S.W.3d 610 (Ky. 2000)(copy attached as Appendix 2). TCR, pp. 21-22.

Mr. Manning filed a *pro se* motion pursuant to RCr 11.42 on August 15, 2003, alleging Respondent's ineffective assistance of counsel due to a conflict of interest arising from a contingent fee arrangement. TCR, p. 23. Respondent wrote to Mr. Manning on September 3, 2003 and told him he was "jeopardizing [his chances] of a pardon" by filing the motion and called it a "way frivolous motion." TCR, p. 23.

Sarah J. Jost (now Nielsen) of the Department of Public Advocacy entered her appearance for Mr. Manning on October 16, 2003. Ms. Nielsen contacted Respondent to obtain access to the Alan David Manning criminal case file in Respondent's possession: "I don't think [Respondent] would agree to give me any of it." TCR, pp. 23-24. Ms. Nielsen offered to pay for copying the file and to go to Respondent's office to review the file. Ms. Nielsen did not recall Respondent stating concerns regarding the completeness of the file or that Respondent was too busy to address the file issue at that time. Ms. Nielsen "would have worked with [Respondent] if it had been time constraints." Respondent admitted at the evidentiary hearing that Ms. Nielsen wanted "David's entire file." TCR, pp. 24-25.

On February 18, 2004, Ms. Nielsen filed "Notice Motion-Order for Access to Trial Counsel's File." Ms. Nielsen stated in that motion that she was seeking the "entire

file" and had on January 28, 2004 sent a written authorization signed by Mr. Manning to Respondent for release of his entire file. Ms. Nielsen "would not have filed the motion "unless it was absolutely necessary" and did not like to file motions "because that meant having to take a whole day off work to just go sit on a docket in the courtroom for that one motion." TCR, pp. 24-25. Respondent filed a response on March 3, 2004 and claimed she did "not know what the Public Advocate desires from this voluminous file"; that new counsel could obtain the necessary documents from the court record; and that her former client was "not guilty, but he should not be filing a CR [sic] 11.42 Motion, when the undersigned attempted to obtain his release with many, many hours of her work." Respondent also stated in this pleading that she did not expect to be paid the fee she was owed, which by her own estimate was $100,000. TCR, p. 25.

The court granted Ms. Nielsen's motion and entered an order directing Respondent to make the file available for copying and inspection at the Warren County DPA no later than March 18, 2004. TCR, pp. 25-26. Ms. Nielsen only obtained the three contracts of employment and promissory note from Respondent's file. Mr. Manning did not provide her with a copy, and there was not a copy in the court record at that time. TCR, p. 26.

Warren Circuit Judge John R. Grise held an evidentiary hearing on the RCr 11.42 motion November 12, 2004. Mr. Manning and Respondent, among others, testified. TCR, p. 26. On September 29, 2005, The court vacated the conviction on grounds of ineffective assistance of counsel in that Respondent had a conflict of interest by entering into a contingency fee arrangement pertaining to Alan David Manning's criminal case:

> A contingency fee agreement, however, does not have to be labeled "contingency fee agreement" before it will be construed as such. If it looks

> and functions like a contingency fee agreement, it is a contingency fee agreement. Here, the evidence shows that [the Respondent] was to be paid, at least in part, from the sale of property that [Alan David Manning] would inherit from the murder victim's estate, which would only occur upon an acquittal.
>
> [T]he Commonwealth's pretrial offer of a guilty plea to [Alan David Manning] included a recommendation for a five-year prison term. No evidence suggests [Alan David Manning] objected to plea negotiations. To the contrary, [Alan David Manning] appears to have relied heavily upon the advice of his counsel. [The Respondent] claims she did not advise [Alan David Manning] whether to take the plea. [Alan David Manning] testified he was inclined at first to take the offer, then decided not to after discussions with his attorney. She told him right before trial that" We are going to beat it."[Alan David Manning] was facing an enhanced sentence of years to a life sentence, which he ultimately received. Considering the evidence against him, it is clear to the Court, and this Court FINDS, that [Respondent's] conflict of interest affected her advice to him regarding the desirability of accepting the plea offer and resulted in his failure to do so. [Respondent's] performance in advising her client regarding the guilty plea constituted ineffective assistance of counsel: considering the evidence against him and the maximum sentence facing him, the standard of performance for trial counsel would have been to advise her client to accept the plea agreement. It appears to the Court that the conflict created by the contingency fee arrangement, which violated the Code of Professional Responsibility, hindered her aggressive pursuit of her client's best interests by advising him of the only clearly reasonable course of action facing him. On this basis alone, the Court CONCLUDES that ineffective assistance of counsel occurred and [Alan David Manning] is entitled to relief under his RCr 11.42 motion.

TCR, pp. 26-27. (emphasis added; copy attached as Appendix 3) Following the granting of his RCr 11.42 motion, Mr. Manning entered a guilty plea on November 7, 2005, pursuant to a plea agreement, to manslaughter, first degree, with a sentence of ten (10) years. TCR, p. 27.

Respondent took no action of record in the estate case from July 2000 until April 2008, never filed a periodic settlement, and never moved to withdraw. Mr. Justice hired C. Michael Reynolds as his new counsel in approximately late 2007 or early 2008 because he was no longer comfortable with Respondent's representation and was

concerned that Respondent had a conflict of interest. Mr. Reynolds filed an Entry of Appearance on March 13, 2008 and was substituted as counsel for Respondent by order entered April 24, 2008. On May 16, 2008, the warning order attorney for Jonathan Michael Manning filed a "Statement of Claim" in the estate case, claiming entitlement to the entirety of the estate real estate. The farm which Earl Manning originally devised to Alan David Manning was sold in October 2008. TCR, p. 28. After Mr. Justice obtained new counsel, Respondent was paid for her work on the Earl Manning estate in approximately late 2008. In March 2009, Mr. Justice, by counsel, filed a motion to approve a final settlement and disburse funds of the estate. TCR, p. 29. On April 16, 2009, after she was no longer counsel of record for any party, Respondent filed a pleading entitled "Objections to Final Settlement." In this pleading, Respondent revealed the pending Inquiry Commission Complaint against her and alleging a conspiracy against her.[1] Respondent also revealed the pendency of the Inquiry Commission Complaint in KBA 17411 on the record in open court. TCR, p. 29. In July 2009, the Warren District Court ruled that Jonathan Michael Manning, missing son of Alan David Manning was entitled to the farm sale proceeds, not Andy. TCR, pp. 29-30.

In KBA 13737, in June 2006, the Inquiry Commission filed a complaint against Respondent pertaining to her representation of Alan David Manning in a criminal matter. Respondent filed a Response, by Counsel, in July 2006. In January 2008, the Inquiry Commission filed a four-count charge alleging violations of SCR 3.130-

[1] "A bar complaint has been filed by someone in this case claiming that the undersigned has a conflict of interest, claiming that the undersigned did not obtain a final settlement timely... The bar complaint is an effort for everyone to not pay the undersigned. .... The bar complaint stems from an effort by all involved, Andy Manning to not pay for his child support arrearage attorney fees, Alan David Manning to not pay any of his criminal attorney fees, and for Russell Justice to not pay the undersigned her estate attorney fees." KBA Exhibit 7, Bates pp. 176-177 (Respondent's 4/16/09 pleading filed in Warren District Court, attached as an exhibit to the Charge in KBA 17411)

1.4(b)(communication); SCR 3.130-1.5(d)(2)(prohibited contingent fee in criminal case); SCR 3.130-1.7(b)(conflict of interest); and SCR 3.130-1.8(a)(knowingly acquiring adverse pecuniary or security interest to client).[2] A copy of the Charge in KBA 13737 is attached as Appendix 4. On February 11, 2008, Respondent, by counsel, filed an Answer denying any of the Rule violations in KBA 13737.

In KBA 17411, in March 2009, the Inquiry Commission filed a complaint against the Respondent pertaining to her representation of Alan David Manning, Andrew Michael Manning, and Russell Justice. Respondent filed a verified Response, by counsel, on July 1, 2009. In October 2009, the Inquiry Commission filed a five-count Charge (attached as Appendix 5) against Respondent alleging violations of SCR 3.130-1.1 (competence); SCR 3.130-1.7(b)(conflict of interest); SCR 3.130-1.16(d)(failing to provide file to client successor counsel); SCR 3.130-3.2(expediting litigation); and SCR 3.130-3.4(c)(knowingly violating rules of a tribunal). On October 27, 2009, Respondent, by counsel, filed an Answer denying any of the rule violations in KBA 17411.

In November 2009, without objection, the cases were consolidated. A Trial Commissioner was appointed in December 2009. An evidentiary hearing was held in Louisville September 20-22, 2010. The Trial Commissioner filed her Report on April 13, 2011, finding Respondent guilty of all nine (9) counts and recommending a one (1) year suspension. After motions to amend were filed, the Trial Commissioner filed an Order on August 31, 2011, granting the KBA's Motion and denying Respondent's Motion. Respondent appealed to the Board of Governors. The Board heard the matter on March

[2] All Rules referenced in both KBA 13737 and 17411 refer to the Rules in effect prior to July 15, 2009.

16, 2012, took *de novo* review, and filed its Report on May 2, 2012, only finding Respondent guilty of two (2) counts and reducing the suspension from one (1) year to only thirty (30) days. The KBA files its notice of review. A copy of the Board's Report is attached as Appendix 6.

II. ARGUMENT

INTRODUCTION

The Board's Report is insufficient as a matter of law because it failed to make adequate findings to support or explain its disagreement with the detailed Trial Commissioner's Report. SCR 3.370(5)(a)(ii) requires the Board when taking *de novo* review to "state...the difference between its findings and recommendations and the report of the Trial Commissioner." The Board Report contains no adequate distinction or discussion of the findings and recommendations of the Trial Commissioner. The Board's Report only recites a general chronology, notes the parties' positions on some issues, and concludes with the votes. The reasons for the Board's rejection of the thirty-three (33)-page long Trial Commissioner's Report cannot be discerned from the Board's Report (nine pages long). This lack of detail and reasoning in the Board's Report is insufficient to support its findings and recommendation. *Hubbard v. Kentucky Bar Association*, 66 S.W.3d 684, 695 (Ky. 2001) ("The Board failed to give a reasoned and rational explanation for its rejection of the recommendation of the Character and Fitness Committee.")

The Board of Governors erred in only finding Respondent guilty of two (2) of nine counts, and reducing her sanction from a one-year suspension to only a thirty-(30) day suspension. The Trial Commissioner, who had the opportunity to assess the

credibility of witnesses at the trial level, correctly found in an exceptionally detailed report replete with multiple, specific citations to an extensive record that Respondent violated all Rules as charged. All counts are proven by a combination of Respondent's extensive, numerous admissions and the generally uncontroverted facts.

A.
RESPONDENT VIOLATED SCR 3.130-1.4(b) BY FAILING TO DISCUSS WITH HER CLIENT HOW SHE WOULD BE PAID IF HE WERE CONVICTED OR HOW THE CONTINGENT NATURE OF THE FEE PROCEEDS COULD IMPACT HER REPRESENTATION

The Trial Commissioner correctly found that Respondent violated SCR 3.130-1.4(b) by not discussing with her client how she would be paid should Mr. Manning be convicted of the charges, or how the contingent nature of the fee proceeds could impact her representation. TCR, p. 30.

Respondent admitted never advising Alan David Manning how her contingency fee agreement could impact her representation of him. TE, pp. 481; 557. She also admitted that she did not give him any advice whether he should take the favorable five years on manslaughter second degree from the Commonwealth. TE, pp. 254; 367; 578 ("And I did not advise him not to take the plea offer, and I did not encourage him not to take it either." TE, p. 367). Despite knowing a few days before trial that the "extremely damaging" statements of Lunell Manning, Mr. Manning's wife, were going to be admitted, the Respondent still did not advise her client to take the deal. TE, pp. 473; 578; KBA Exhibit 11, Bates pages 1560-1561. As this Court recounted in its opinion, those statements amounted to a confession. This devastating evidence was wholly inconsistent with Respondent's practice of the case, which was based on the belief that Mr. Manning had an alibi and was innocent of any level of criminal homicide; she did not argue for a lesser included offense based upon Mr. Manning's mental state.

A competent criminal defense attorney would have advised the client to take the Commonwealth's advantageous offer, considering the peril in which Mr. Manning found himself: facing a life sentence. As the Warren Circuit Court put it, the plea offer was the "only clearly reasonable course of action facing him." TCR, pp. 26-27.

B.
RESPONDENT VIOLATED SCR 3.130-1.5(d)(2) BY ENTERING INTO AN ARRANGEMENT FOR, TO CHARGE, OR TO COLLECT A CONTINGENT FEE FOR REPESENTING ALAN DAVID MANNING IN HIS CRIMINAL MATTER

The Trial Commissioner correctly found that Respondent violated SCR 3.130-1.5(d)(2) by entering into an arrangement for, to charge, or to collect a contingent fee for representing Alan David Manning in a criminal case. TCR, p. 31.

The September 2005 Order succinctly explains how the agreement Respondent had with Alan David Manning was, in fact, a contingent fee arrangement:

> A contingency fee agreement, however, does not have to be labeled "contingency fee agreement" before it will be construed as such. If it looks and functions like a contingency fee agreement, it is a contingency fee agreement. Here, the evidence shows that [the Respondent] was to be paid, at least in part, from the sale of property that [Alan David Manning] would inherit from the murder victim's estate, which would only occur upon an acquittal.

KBA Exhibit 10, Bates page 581. Failure of a contingency to occur (an acquittal) does not erase the contingent nature of the fee arrangement. As the Warren Circuit Court recognized, what is determinative is how the agreement was to actually function. Respondent's testimony repeatedly confirmed the contingent nature of her March 10, 1998 contract.

The Court:	So if there was no timber, then she would—you—you did not expect to get paid—
A:	No, sir.
The Court:	---is that correct?
A:	That's correct.
....	

Counsel: Okay. But, once again, [Alan] David Manning was agreeing to pay you timber that belonged to Earl Manning?
A: Only if he received it, and we didn't.

KBA Exhibit 11, Bates page 1556 (Respondent's testimony, RCr 11.42 hearing, November 12, 2004).

Q: Now, if you won, you would get the satisfaction of winning and you would get?
A: Payment.
Q: And his interest and your interest were identical? Not identical, but they were the same?
A: Yes. If we'd've won, ultimately I would have gotten paid.

TE, pp. 357; 382-383 (9/2010 disciplinary hearing; questioning by Respondent's attorney).

Warren County Commonwealth Attorney Christopher Cohron testified it was evident that the March 10, 1998 contract was contingent, and was shocked: "What she testified to appeared to be a contingency fee....I can remember during the hearing I was very taken aback by the – without calling it a contingency fee, what she testified to was a contingency fee." TE, pp. 165-166; 170-171; 184.

Respondent attempted to get paid from estate funds as early as her first "Contract of Employment" dated January 24, 1998. She handwrote "I agree that Nancy Oliver Roberts can be paid $2,500.00 from my funds in any cash, bank account or any source in Lawrence Williams' possession." KBA Exhibit 3, Bates page 40; TE, p. 190. Williams was the first executor, therefore any "source" of funds in his possession would have been the Earl Manning estate. Respondent admitted the contingent nature of this contractual attempt to obtain fees:

Q: Where did the phrase "other assets in the hands of William Lawrence [sic], any other assets," where did that come from?

A: That was David's suggestion. He thought, as I understood at that point in time, that he would win his trial, that he would be able to inherit, and therefore, if William Lawrence [sic], who was, on January the 24th [1998], at least to David's knowledge, the executor of the estate at that time—
Q: All right.
A:---of Earl Manning.

TE, p. 333 (emphasis added).

C.
RESPONDENT VIOLATED SCR 3.130-1.7(b) BY REPRESENTING ALAN DAVID MANNING DESPITE A CONFLICT OF INTEREST

The Trial Commissioner correctly found that Respondent violated SCR 3.130-1.7(b) by representing Alan David Manning when her representation was materially limited by her own financial interests, when she could not have reasonably believed her representation would not be adversely affected, and when the client consented without reasonable consultation. TCR, p. 31.

In its Order granting Mr. Manning's RCr 11.42 petition, the Warren Circuit Court accurately summarized the nature of the conflict: "[T]he conflict created by the contingency fee arrangement...hindered her aggressive pursuit of her client's best interests by advising him of the only clearly reasonable course of action facing him." TCR, pp. 26-27. Respondent has repeatedly admitted that she knew would not be paid unless her client was acquitted and had inserted a specific term into a contract with her client to secure her payment from estate funds. *See also* KBA Exhibit 11, Bates page 1556; TE, pp. 357; 382-383.

Mr. Manning testified in 2004 that Respondent advised him not to take the offer, "that we was going to beat it and I shouldn't take it." KBA Exhibit 11, Bates pages 1601-1602. He acknowledged the plea decision was his, but "I listened to the advice of my

lawyer." He confirmed that Respondent never discussed lesser included offenses with him prior to trial. KBA Exhibit 11, Bates page 1616. Mr. Cohron grudgingly admitted that Mr. Manning relied on Respondent's advice regarding whether to take the plea: "[I]t was very much apparent Mr. Manning had relied on [the Respondent's] advice to go to trial." TE, p. 152.

D.
RESPONDENT VIOLATED SCR 3.130-1.8(a) BY ACQUIRING A PECUNIARY INTEREST ADVERSE TO HER CLIENT AND NOT GIVING THE CLIENT A REASONABLE OPPORTUNITY TO SEEK THE ADVICE OF INDEPENDENT COUNSEL

The Trial Commissioner correctly found that Respondent violated SCR 3.130-1.8(a) by not giving Alan David Manning a reasonable opportunity to seek the advice of independent counsel before entering into the employment contracts and promissory note with the Respondent. TCR, p. 31.

A promissory note is a security interest adverse to the pecuniary interests of another. In her verified Response to the Inquiry Commission Complaint, Respondent admitted that she conditioned her continuing representation upon Mr. Manning's execution of the $25,000 promissory note and could file suit against him to "collect her hourly fees and the debt created by the promissory note right now." KBA Exhibit 2, Bates page 7 (emphasis in original). Respondent admitted she did not advise Mr. Manning to speak with other counsel prior to his execution of the promissory note. TE, pp. 188; 247-248. He had no reasonable opportunity to seek advice of independent counsel before executing the note. He was incarcerated and awaiting his murder trial at the time he executed this document, which was drafted by Respondent. TCR, p. 15.

Mr. Manning never consulted with a Mr. Kirwan, as Respondent has claimed through these proceedings. He testified his wife, Lunell, made some inquiries of Kirwan

regarding possible representation. Manning Deposition, 9/15/10, pp. 25-26; KBA Exhibit 11, pp. 95-96. Kirwan's affidavit confirmed that Lunell contacted him, not Alan David Manning. A cursory inquiry by a third party (a potential client's wife) regarding terms of a theoretical representation is insufficient for purposes of satisfying the protective requirements of Rule 1.8(a). Kirwan was ignorant of the existence of the promissory note; his affidavit is silent on that point. Respondent admitted that Kirwan did not have access to her employment contracts with Alan David Manning (TE, p. 573), so he never knew of or reviewed the employment contracts or the promissory note.

E.
RESPONDENT VIOLATED SCR 3.130-1.1 BY FAILING TO PROVIDE COMPETENT REPRESENTATION TO ALAN DAVID MANNING IN HIS CRIMINAL CASE

The Trial Commissioner correctly found that the Respondent violated SCR 3.130-1.1 by failing to provide Aland David Manning with competent representation in his criminal defense matter in Warren Circuit Court, as evidenced by a) the Warren Circuit Court's 2005 order setting aside Alan David Manning's conviction on the grounds that the Respondent provided ineffective assistance of counsel due to a conflict of interest; b) the Respondent's admission she did not give Alan David Manning any advice whether to accept the Commonwealth's October 1998 guilty plea offer; and c) the Respondent, as a trial strategy, making arrangements for said client to marry his paramour in the hopes of excluding her testimony and not advising him that if her incriminating testimony was not excluded, advising him to accept the plea offer. TCR, p. 31.

It has been adjudicated that Respondent provided ineffective assistance of counsel sufficient to set aside a homicide conviction and life sentence. Yet beyond that incontrovertible fact, there is additional abundant proof of Respondent's incompetence.

The Rule violation was also proven by multiple admissions that she failed to advise her client regarding the plea offer, as well as the testimony of Warren Circuit Judge Steve Wilson, Warren District Judge John Brown, and Warren Commonwealth Attorney Christopher Cohron. Judge Wilson testified:

> This was a case with overwhelming circumstantial evidence. The risk that was taken [in going to trial], given the fact that [the offer] was a 5-year sentence…[the offer] was one that needed to be seriously taken into consideration before you turned it down...

TE, pp. 84-85.

Warren District Judge John Brown, the former Assistant Commonwealth Attorney who prosecuted the case, described the case against Alan David Manning as "very strong. It was a very strong circumstantial case," including ballistics evidence and incriminating statements. Judge Brown thought "the plea offer should have been accepted. It was a fair offer, I felt…[and] should have been considered a little more strongly, because I think it was a fair offer, very fair." TE, pp. 119-120; 124.[3]

Warren County Commonwealth Attorney Christopher Cohron was initially skeptical of Manning's claims, but during the RCr 11.42 hearing, it became apparent to him there were serious problems:

> [W]hen it became, to me, very evident that this case had been done on a contingency fee, I was floored…[and] [j]ust the statements [the Respondent] made during 11.42 hearing, it was apparent to me that there were significant issues with the conviction…I didn't see how – any realistic way that on multiple prongs this conviction wasn't going to be set aside.
> …
> I didn't see any way, realistically, that the conviction was going to be upheld.

[3] Judge Brown also related the bizarre instance of how the Respondent called him as a witness during the trial, to the ultimate detriment of Alan David Manning: "I don't know what she [Respondent] was trying to do. It was – I don't think that was a very wise decision on her part….[By calling me the Respondent] also opened that door to a lot of information that eventually got out during my testimony…I recognize[d] this is a pretty good opportunity for me to tell about the things that I couldn't get out through [other witnesses'] testimony…I believed it bolstered my case, yes." TE, pp. 132-133; 138.

TE, pp. 146; 153-154; 158; *See also* pp. 166-168.

Respondent acknowledged that she knew the "extremely damaging" statements of Lunell were going to be admitted at trial. Yet the Respondent still did not advise Mr. Manning to take the plea offer. TE, p. 473; 578; TCR, p. 31; KBA Exhibit 11, Bates pages 1560-1561.

F.
RESPONDENT VIOLATED SCR 3.130-1.7(b) BY REPRESENTING THE PERSONAL REPRESENTATIVE, THE ALLEGED KILLER OF DECEDENT, AND ANOTHER POTENTIAL HEIR IN THE PROBATE OF EARL MANNING'S ESTATE

The Trial Commissioner and Board correctly found that Respondent violated SCR 3.130-1.7(b) by representing Alan David Manning, Andrew Michael Manning, and Russell Justice, the personal representative, in the Earl Manning estate. TCR, p. 31.

In the estate matter, Respondent represented: 1) the personal representative of the victim's estate; 2) the accused and subsequently convicted and admitted killer; and 3) the killer's brother, who had his own legal argument (which he did later make) that he should inherit. No competent attorney could reasonably believe that these representations were not in conflict or that the conflicts were waivable. When asked how many clients she had in the Earl Manning estate, Respondent replied: "The estate is the primary client, but the estate means that I represented David and Andy and Russell Justice in the same process." TE, p. 260.

KBA Ethics Opinion E-401 (September 1997) (Appendix 7) makes it clear that a lawyer represents the fiduciary, in this instance the personal representative, not the "estate." Respondent admitted at the RCr 11.42 hearing that there was a conflict between

the representations of Alan David Manning and Andrew Michael Manning: "[T]hat's why I had them sign waivers." KBA Exhibit 11, Bates page 1543.

Rule 1.7 does provide that despite a conflict, the representation can proceed if the "lawyer reasonably believes the representation will not be adversely affected" and if the "client consents after consultation." This exception does not apply herein. Respondent's belief under the circumstances of this matter was not reasonable. "Reasonable" is defined as the "conduct of a reasonably prudent and competent lawyer." SCR 3.130, Terminology. A disinterested lawyer could not conclude that the clients should agree to the multiple representations. Comment 4, Rule 1.7(b). The Manning brothers had irreconcilable interests pertaining to the estate—potentially wholly adverse, incompatible claims to inheritance.

Also, the "waivers" were not valid because they were untimely, executed by the Manning brothers a year after Alan David Manning was convicted. By that point, Respondent had been representing the Mannings and Mr. Justice in the probate case for over a year and a half. TE, p. 266. Mr. Justice never signed a waiver, an oversight Respondent could not explain. TE, p. 262.

Additionally, Respondent failed to adequately explain the waiver to Alan David Manning. He testified at the RCr 11.42 hearing that he "didn't know there was no conflict between me, and Andy, and the estate" and that the Respondent had advised him to sign it. KBA Exhibit 11, Bates page 1601. Respondent was asked whether she explained the impact of the purported waivers on client confidentiality:

Q: Did you discuss [confidentiality] with [your clients]?

...

A: I talked to David about confidentiality a lot. And Andy, we talked about his desire to help David in—not only in the murder trial, but in any way,

> because Andy had been through similar things with his father. And I did not breach any confidentiality that David gave me, or David said with regard to specific facts of the murder situation.
> ...
> And there—there wasn't a conflict, and any confidentiality with regard to the murder stayed with the murder case.
> ...
> Each case had its own confidentiality and it stayed in that case.

TE, pp. 264-265.

The non-waivable nature of the conflict between Respondent's criminal representation of Alan David Manning and Russell Justice as personal representative is epitomized by her use of estate funds to pay an expert witness in the criminal case, funds which were never paid back. At the disciplinary hearing, she claimed the payments were others' ideas (TE, pp. 404-405), but the only reasonable conclusion is that Respondent requested Russell Justice write those checks (as he testified). Even if using estate funds to pay an expert was not Respondent's idea, she still had the duty to advise the personal representative that such payments should not be made: these estate funds were used to defend the victim's accused murderer in the murder prosecution. She testified that she never advised that the use of estate funds for an expert was not a good idea. At the time the money came out of the estate to pay the expert, the victim's funeral bill had not even been paid. TE, pp. 206; 310.

Eventually, Mr. Justice himself saw the conflict: "I was thinking about all this stuff, and I thought...you know, this could be a conflict of interest, her handling both sides of the case, could be....I came to that conclusion myself." TE, pp. 217; 232; 233.

G.
RESPONDENT VIOLATED SCR 3.130-1.16(d) BY FAILING TAKE STEPS TO THE EXTENT REASONABLY PRACTICABLE TO MAKE THE FORMER CLIENT'S FILE AVAILABLE TO NEW COUNSEL

The Trial Commissioner and Board correctly found that Respondent violated SCR 3.130-1.16(d) by failing to take steps to the extent reasonably practicable to make Alan David Manning's file available to his new counsel, Sarah Jost (now Nielsen). TCR, p. 32.

Ms. Nielsen testified that Respondent "would not grant me access" to the file and that from her conversations with the Respondent, that Respondent believed the file was hers, not Mr. Manning's file. TE, pp. 271-272. Ms. Nielsen did not recall Respondent telling her that she had a time problem in providing the file: "That's not my recollection, because I would have worked with her if it would have been time constraints…I wouldn't have filed the motion unless I absolutely had to." TE, p. 404. Additionally, Ms. Nielsen did not recall Respondent expressing any concern to her regarding the completeness of the file or work product, and confirmed that Respondent did actually "refuse" to give her the file. TE, pp. 404-405; 607. Respondent dismissed Ms. Nielsen's file request and simply pointed her to the court record:

> I vaguely remember [the Respondent] saying I can get most of the file from the court file, and that was a big issue, because she thought I could just go ahead and get the court file and get everything I needed from there….she wanted me to pinpoint exactly what I wanted out of the file, and I couldn't because I didn't know what was in the file…I couldn't do that because I didn't know what was in the file, I just—I wanted the entire file.

TE, pp. 405-406.

Crucially, what was ***not*** in the court record were the "Contracts of Employment" and the promissory note. KBA Exhibit 3, Bates pp. 39-46. Respondent admitted that Ms. Nielsen would not have discovered these important documents in the court record; they were *only* in the file in Respondent's possession. TE, p. 414. The only way Ms. Nielsen

obtained these critical documents was by filing the motion and obtaining access to the file by court order. TE, p. 602. Alan David Manning had not given copies of these documents to Ms. Nielsen, who admitted she was initially "skeptical" of Mr. Manning's claims in the absence of these materials. TE, pp. 602-603.

The file belongs to the client, not the lawyer. KBA Ethics Opinion E-395 (March 1995) provides detailed guidance about a lawyer's duties about what materials must be returned to the client, concluding that "it [is] clear that the lawyer must turn over the file to the client or the client's attorney except for 'work product.'" After initially claiming she had never seen KBA E-395, Respondent later admitted that she was aware of it prior to Ms. Nielsen's file access request. TE, pp. 550-553.

H.
RESPONDENT VIOLATED SCR 3.130-3.2 BY FAILING TO MAKE REASONABLE EFFORTS TO EXPEDITE THE SETTLEMENT OF THE EARL MANNING ESTATE

The Trial Commissioner correctly found that Respondent violated SCR 3.130-3.2 by failing to make reasonable efforts to expedite the settlement of the Earl Manning Estate. TCR, p. 32.

There was no action of record in the Earl Manning estate case between July 21, 2000 and October 18, 2007, when the court *sua sponte* set a scheduling date. The next substantive action of record was when Mr. Reynolds entered his appearance on March 13, 2008. Respondent claimed at the evidentiary hearing that there were important items missing from the probate record which should have been filed during this lengthy period of time. Her explanation for why they were not filed was because the clerk did not file them, but admitted that the first time she became aware items were allegedly missing from the record was during this disciplinary proceeding. TE, pp. 560; 561; 564.

Respondent alleged that Russell Justice would not communicate with her regarding the Earl Manning estate, and that is why she could not settle the estate. Yet the Respondent's last letter to Mr. Justice was in 2003. Also, by Respondent's own claim, her last contact with him—an alleged attempt to get him to come to her office to wrap up the estate—was in June 2005, over *two years* before Mr. Justice obtained new counsel. TE, p. 567. Under these circumstances, Respondent had a simple solution to dealing with Mr. Justice's purported intransigence: withdrawal. Yet Respondent never moved to withdraw, and allowed the estate to languish for years. A reasonable inference from her dilatory conduct is that the Respondent stayed in the case to recover fees she believed she was owed for her multiple, conflicting representations from the only plausible source—the Earl Manning estate.

I.
RESPONDENT VIOLATED SCR 3.130-3.4(c) BY REVEALING THE PENDENCY OF A PENDING BAR COMPAINT IN A PLEADING FILED IN THE EARL MANNING ESTATE

The Trial Commissioner correctly found the Respondent violated SCR 3.130-3.4(c) by filing the April 16, 2009 pleading in which she revealed the existence of a pending bar complaint against her.

The structure of SCR 3.150(3) is such that disciplinary proceedings are confidential until the Inquiry Commission takes action on a complaint. Until that point in the complaint process, confidentiality applies. Respondent's revelation of the pendency of the Inquiry Commission Complaint violated SCR 3.150(3) and thus Rule 3.4(c). The Charge specifically cites both subsections of SCR 3.150. SCR 3.150(3) provides:

> Duty of Participants. All Participants in a proceeding under these Rules shall conduct themselves so as to maintain the confidentiality requirement of this Rule. Nothing in the rule shall prohibit the Respondent from discussing the disciplinary

> matter with any potential witness or entity in order to respond in a disciplinary proceeding, or to disclose to any tribunal, or to disclose any information for the purpose of conducting a defense. This provision shall not apply to the Complainant or the Respondent after the Inquiry Commission or its Chair has taken action on a Complaint including the issuance of a charge, the issuance of a private admonition, or a dismissal, including those pursuant to SCR 3.160(3).

The Inquiry Commission Complaint in KBA 17411 was issued March 23, 2009. The Commission did not issue a Charge in that matter until October 7, 2009. Thus, at the time Respondent field the "Objections to Final Settlement," in April 2009, the Inquiry Commission Complaint was indeed pending and the Inquiry Commission had not taken action on it; the issuance of the Charge did not occur until approximately six months after Respondent filed her "Objections to Final Settlement."

The Rule provides that the pendency of a disciplinary proceeding can be disclosed to a "tribunal," but that provision logically relates to the situation where a court inquires why counsel is withdrawing. To contort that provision to include this Respondent's unnecessary revelations in the instant matter destroys the confidentiality rule. The Rule also provides that the existence of a pending complaint can be disclosed by a respondent "for the purpose of conducting a defense." However, that excuse was not in Respondent's Answer to the Charge, and only made its first appearance in this case on Day 3 of the three-day September 2010 evidentiary hearing in these matters, only after the Respondent was thoroughly questioned regarding why she continued to insert herself in the Earl Manning probate proceedings. Respondent provided no comprehensible explanation how revealing the existence of the Inquiry Commission Complaint assisted her in her defense to the allegations. A cursory review of the "Objections," corroborated by the Respondent's own testimony, reveals that the Respondent was venting her ire at having

been removed as counsel and not getting the money she continues to claim she is owed by various former clients.

The Rule does not provide that a respondent may unilaterally waive confidentiality and reveal information about the disciplinary proceedings. In this proceeding, Respondent has repeatedly cited the wrong Rule, SCR 3.150(2)(a)(i), to claim that attorneys can unilaterally waive confidentiality because it is designed to protect them. A careful reading of that Rule reveals that "the pendency, subject matter and status [of a disciplinary matter] may be disclosed by Bar Counsel if: the Respondent has waived confidentiality." This portion of the Rule provides that it is only Bar Counsel that has the ability to reveal such case status if a respondent has waived confidentiality. Respondent's assertions are policy arguments explicating her disagreement with the Rule and outlining her alleged justification for violating it. Regardless whether she agrees with the Rule, the Respondent had a duty to obey it. *Kentucky Bar Association v. Mills*, 808 S.W.2d 804, 805 (Ky. 1991) (where a disciplinary rule "has been adopted by this court to govern the conduct of Kentucky lawyers[,] [a] respondent is obliged to observe it.") If the confidentiality rule is not applied under these circumstances, it will become impossible to enforce it.

Respondent has attacked the Inquiry Commission Complaint as a conspiracy to not pay her. When repeatedly asked for the factual basis of this peculiar claim, she failed to provide a clear response, yet confirmed her persistent concern she was never going to get paid what she felt she was still owed. TE, p. 319. Respondent was also examined about why she continued to insert herself into the probate proceedings after being fired:

Q: So who is the client you're representing here when you're filing [the April 15, 2009] objections to final settlement?

A: Mr. Reynolds indicated that there was an order to substitute. That was not correct.[4] I hadn't been told that I couldn't file anything and that I was not a—that I did not still have a client at that time.

Q: So you're saying you were still—you still had a client, that the estate was still your client as of April of '09?

A: Nobody had told me any differently. Again, I was extremely upset that in something that I had worked so hard on, that it would come back on me so hard. There was [sic] numerous things wrong [in the settlement]...

...

Q: Why [was] it important that there are errors in [the settlement], according to you? Weren't you a stranger to these [probate] proceedings by April 15, 2009?

A: They were asking me for my opinion and information in court.

Q: That's because you showed up, isn't it?

A: Well, [Warren District Judge] Sam Potter and various ones asked me about how to track down David Manning's son, and it was me that told them.

Q: Hadn't Mr. Reynolds been substituted as counsel for Mr. Justice almost a year by the time you filed [the April 15, 2009 objections]?

A: I'm not sure when he substituted, but he had entered into the case.

Q: Why did you continue to insert yourself into these probate proceedings after you did not have any more clients in the case and after you had been paid your fee?

...

A: I saw things wrong in the final settlement. I had received a copy of the final settlement from Mr. Reynolds, and I saw things wrong in it, and I pointed those out to the Court.

Q: So you just didn't like what you saw?

A: I saw things wrong in the final settlement, and I pointed those out to the Court.

TE, pp. 321-325.

J.

THE TRIAL COMMISSIONER CORRECTLY FOUND THAT THE APPROPRIATE DISCIPLINE IS A ONE-YEAR SUSPENSION

There is scant case law which is factually on point to Respondent's bizarre course of misconduct. The dearth of specific authority on contingent fees in criminal cases

[4] Actually, Mr. Reynolds had been substituted as counsel for the Respondent for almost a year by the time the Respondent filed her April 16, 2009 pleading. KBA Exhibit 9, Bates page 391.

indicates most attorneys understand their obligation and do not engage in this level of misconduct. Both Judge Wilson and Commonwealth Attorney Cohron testified that they had never seen a contingency fee in criminal case. Judge Wilson testified: "I never thought I'd ever see one." TE, p. 108. The ABA thought the nature of the prohibition was obvious: the Comment to Rule 1.5(d)(2) is silent on contingency fees in criminal cases.

The *ABA Standards for Imposing Lawyer Sanctions* by the American Bar Association provides a model system of sanctions to "promote thorough, rational consideration of all factors relevant to imposing sanctions." *ABA Standards*, Preface. Kentucky case law and the *ABA Standards*, favorably cited by the Supreme Court in *Anderson v. Kentucky Bar Association*, 262 S.W.3d 636 (Ky. 2008), permit consideration of relevant aggravating and mitigating circumstances in determining appropriate sanctions. The KBA submits that consideration of case law and these factors indicate that an appropriate sanction is a suspension from practice for a minimum of one year.

1. *ABA STANDARDS*: AGGRAVATING FACTORS ARE PRESENT

At least six aggravating factors are present. They include: 1) a history of prior discipline[5]; 2) a pattern of misconduct;); 3) multiple disciplinary offenses; 4) substantial experience in the practice of law; 5) refusal to acknowledge wrongful nature of conduct; and 6) vulnerability of victim. *ABA Standards* Sections 9.22(a), (c), (d), (*i*), (g), and (h).

2. *ABA STANDARDS*: APPROPRIATE SANCTION-GENERALLY

The *ABA Standards* describe generally when certain sanctions are appropriate to certain types of professional misconduct. These are the sanctions which are appropriate in

[5] Respondent has received two private admonitions from the Inquiry Commission She was sanctioned in 1992 for failing to reduce a contingency fee agreement to writing in violation of Rule 1.5. Regarding the second private admonition, she justified her *ex parte* contact with a circuit judge because the opposing party and attorney "were looking for a way to get revenge." Respondent's Board Brief, p. 89.

absent any aggravating or mitigating factors. The Trial Commissioner correctly assessed that the aggravators in this case outnumber and far outweigh one weak mitigating factor. The Trial Commissioner was correct in recommending a one-year suspension.

Respondent engaged in multiple conflicts of interest. She was aware of the conflicts, because that is why she had the Manning brothers sign the defective waivers. She failed to explain the impact of the multiple conflicts and caused harm to her clients, particularly to Alan David Manning in his criminal case, as evidenced by his conviction, life sentence, and subsequent successful RCr 11.42 motion. *ABA Standards* Section 4.32.

Respondent knowingly failed to perform services for a client by failing to take reasonable action to complete the Earl Manning estate. Her dilatory conduct caused the estate to be open for a wholly unreasonable length of time—over ten years, which is harmful to the client and the judicial system. *ABA Standards* Section 4.42

Respondent failed to understand relevant legal doctrines or procedures in both the criminal and probate matters. Her misconduct in the criminal matter was adjudged ineffective assistance of counsel as a matter of law. *ABA Standards* Section 4.53.

Respondent knowingly violated a Supreme Court rule by revealing in the probate matter the pendency of the Inquiry Commission Complaint in KBA 17411. She thus interfered with that legal proceeding, although a stranger to the proceedings. *ABA* Standards Section 6.22.

3. CASE LAW

The Court often suspends lawyer for dilatory conduct, inadequate communication with clients, and failure to return file materials. *Kentucky Bar Association v. Gabbard*, 172 S.W.3d 395 (Ky. 2005)(two year suspension). Kentucky attorneys have also been

suspended for engaging in conflicts of interest. If there are multiple and egregious conflicts of interest, coupled with other rule violations, the Court will suspend for a much lengthier period. *Profumo v. Kentucky Bar Association*, 931 S.W.2d 149 (Ky. 1996)(attorney suspended for three years for multiple conflicts of interest and unreasonable fees pertaining to probate matter; no history of prior discipline).

In *Kentucky Bar Association v. Hibberd*, 753 S.W.2d 547 (Ky. 1988), an attorney was found guilty of knowingly filing a false divorce petition, failing to make disclosures to clients of actual conflicts of interest, and having a personal and monetary interest in the outcome of divorce proceedings. The opinion does not indicate that the attorney had any prior disciplinary history. The attorney was suspended for one year.

The attorney in *Kentucky Bar Association v. Roberts*, 579 S.W.2d 107 (Ky. 1979), was suspended for ninety (90) days for a "potential" conflict of interest. The opinion does not indicate that the attorney had any history of prior discipline. The attorney represented Client 1 in a matter against Client 2; the attorney represented Client 2 in another (but apparently somewhat related) matter. While this conduct now would be clearly prohibited by Rule 1.7, the Court held that since the conflict did not cause "harm" to either client it still:

> [H]ad the potential to affect the exercise of [the attorney's] independent professional judgment on behalf of his two clients. [The attorney] erred in failing to advise both [clients] of those circumstances and in failing to obtain the consent of each to the multiple representations prior to accepting employment by [Client 2].

Roberts at 109.

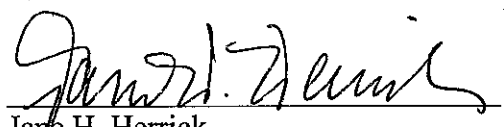
There does not appear to be any Kentucky attorney discipline case law pertaining to a contingent fee in a criminal case. Helpful case law is found in federal cases involving

habeas corpus petitions. In *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818 (E.D. Pa. 1972), attached as Appendix 8, the fee agreement provided that the fee would be paid from the husband's life insurance policy (the method of payment), which the wife could not recover unless she was acquitted of the husband's homicide. The case proceeded to trial; the client was convicted of first degree murder and sentenced to life imprisonment. The court found the attorney had a personal reason to advise the wife not to accept the plea bargain and described the ethical problems: "It is hard to imagine a more striking example of blatant conflict between personal interest and professional duty. The conflict infected [the defendant's] trial from beginning to end." *Murphy* at 823. The opinion concludes that if the client had been provided "proper counseling"—legal advice not "infected" by a conflict of interest--the client would have accepted the plea offer.

CONCLUSION

The Trial Commissioner's Report is detailed and well-reasoned, with extensive and precise citations to the record. The Board of Governors erred in failing to adopt it in its entirety, and failed to provide a reasonable explanation for its rejection of the Trial Commissioner's Report.

Respectfully submitted,



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