

BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF
THE SUPREME COURT OF OHIO

FILED

NOV 25 2015

In re:

BOARD OF PROFESSIONAL CONDUCT

Complaint against

Richard Barbera, Esq.
144-H Royal Crest Drive
Seville, OH 44273

No. 15 - 070

Attorney Registration No. (0064044)

COMPLAINT AND CERTIFICATE

Respondent,

(Rule V of the Supreme Court Rules for
the Government of the Bar of Ohio.)

Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411

Relator.

Now comes the relator and alleges that Richard Barbera, an Attorney at Law, duly admitted to the practice of law in the state of Ohio, is guilty of the following misconduct:

1. Respondent, Richard Barbera, was admitted to the practice of law in the state of Ohio on November 14, 1994. Respondent is subject to the Code of Professional Responsibility, the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

COUNT I

2. On February 28, 2014, relator received a copy of an NSF Notification that was sent to respondent by Key Bank National Association ("Key Bank") informing him of an overdraft on his IOLTA.

3. This was the second time that relator had been informed of an overdraft on respondent's IOLTA. Relator received a similar letter from Key Bank in 2011. Following its investigation of the earlier overdraft, relator dismissed the matter with a warning to respondent to comply with the IOLTA rules going forward, and to avoid failure to cooperate in any future disciplinary investigation.
4. The February 2014 overdraft notice indicated that respondent had written check number 1053 in the amount of \$1,254.29 and presented it for payment, but that there were insufficient funds in his IOLTA to cover the check.
5. Although respondent never answered relator's letters or telephone communications with a substantive explanation of the circumstances surrounding the overdraft, respondent did appear under subpoena for a deposition on October 22, 2015 where he testified with respect to the overdraft.
6. Respondent admitted at his deposition that the overdraft occurred as the result of his deposit of \$5,054.29 of his own money into his IOLTA on February 19, 2014, and his attempt to withdraw \$1,254.29 by check 1053 that same day.
7. Because the deposited \$5,054.29 had not yet posted to his account, there were insufficient funds in the account to cover check 1053.
8. Respondent further testified that the reason for improperly using his IOLTA for the deposit of his own money was his anticipation that two clients who had expressed dissatisfaction with his work were likely to request refunds of fees.
9. The clients at issue were Vernon Gilbert and a business known as Tin Shed.

10. Respondent testified that he ultimately did not refund any of the money to either Gilbert or Tin Shed. He did refund \$350.00 of the deposit to a client whose name he did not recall and for whom he provided no records.
11. The rest of the money, \$4,704.29, respondent paid back to himself through a series of checks drawn over the course of the next month and payable either to cash or to Richard Barbera.
12. At his deposition, respondent provided no coherent explanation for his deposit of \$5,054.29 of his own money into his IOLTA and the immediate drawing back out of \$1,254.29 by check 1053 payable to cash.
13. Respondent admitted that his accounting practices and record keeping, both before and after the first IOLTA investigation in 2011, were poor and disorganized. He admitted that he often withdrew money by check written to cash or to himself without writing any information in the memo line of the check to identify the funds, their purpose, or the client representation to which they applied.
14. Despite relator's many letters of inquiry and specific requests for individual client ledgers, bank statements, deposit receipts, and monthly IOLTA reconciliation ledgers, respondent provided none of those documents over a 16-month period of requests. Even when ordered to produce those documents pursuant to subpoena, respondent was unable to provide them.
15. Respondent admitted that despite his role as a member of the certified grievance committee of his local bar association, and despite his duty to know and follow the IOLTA rules, he does not know or understand those rules.

16. Respondent testified that he routinely deposited earned fees into his IOLTA account, and comingled them with client funds, because he did not understand what money was required to go into the IOLTA and what was not.
17. Respondent testified that he believed that all money coming into his practice “had to be washed through the IOLTA” and that that was his normal practice.
18. Respondent does not maintain a business operating account.
19. Respondent’s conduct with respect to Count I of the Complaint constitutes a violation of the Ohio Rules of Professional Conduct, specifically: Rule 1.15(a) [a lawyer shall hold property of clients or third persons that is in the lawyer’s possession in connection with a representation separate from the lawyer’s own property]; Rule 1.15(a)(2) [a lawyer shall maintain a record for each client on whose behalf funds are held]; Rule 1.15(a)(3) [a lawyer shall maintain a record for each trust account]; Rule 1.15(a)(4) [a lawyer shall maintain all bank statements, deposit slips, and cancelled checks for each trust account]; Rule 1.15(a)(5) [a lawyer shall perform and retain a monthly reconciliation of the funds in his trust account].

COUNT II

20. Relator sent respondent its first letter of inquiry regarding his IOLTA overdraft on April 7, 2014 citing the overdraft notice from Key Bank, ORC Section 4705.09, Gov. Bar R. V, and the Ohio Rules of Professional Conduct. The letter required a written response including a description of the transaction that caused the overdraft with relevant dates, check numbers and contact information for persons with relevant information. It also required respondent to provide, at a minimum, copies of his official monthly IOLTA

statements for the month of the overdraft and the months before and after, as well as the individual client ledgers for each of those months. The letter required that the response be postmarked no later than April 21, 2014.

21. The letter was sent by certified mail to respondent's business post office box. Respondent admitted at his deposition that he did not pick up the certified mail despite receiving the notice slip in his PO box. He did not provide the required response.
22. Relator received its first letter of inquiry returned "unclaimed, unable to forward" from the post office on May 2, 2014.
23. On May 6, 2014, relator sent another certified letter of inquiry containing the same request for information to respondent at his home address. The letter required a response postmarked by May 20, 2014.
24. Respondent signed for the May 6 letter and testified at his deposition that he read and understood it. Respondent failed to provide the written response or requested information. Respondent did not contact relator to request an extension, or for any other reason, in response to the May 6 letter.
25. Relator also sent a copy of the May 6 letter by regular mail. Respondent testified that he received that letter as well, but that he did not respond.
26. On June 6, 2014, relator sent another letter to respondent at his home address. The letter informed respondent that relator had received the signed return receipt from its May 6 letter, but that respondent had not timely answered. The letter requested an immediate call to relator's intake department and warned of assignment to an investigating attorney and a likely notice of deposition if no response was received.
27. Respondent received and read the June 6 letter, but did not respond to relator.

28. On June 20, 2014, relator sent respondent a letter of inquiry citing his failure to provide required responses, noting that this was not the first time that respondent had failed to cooperate with a disciplinary investigation of an IOLTA violation, requiring an immediate response to all previous requests for information and specifically demanding the general ledger for the IOLTA over the three months at issue and the individual ledgers for the same time period.
29. Respondent received the June 20 letter and read and understood it. He did not provide any response.
30. On July 10, 2014, relator sent letters to respondent by certified and by regular mail, to his business address and his home address, with all previous letters of inquiry attached, citing his failure to cooperate and offering a last chance to respond prior to issuing a subpoena for his appearance at a deposition.
31. Respondent received and understood the letters sent by regular mail. He did not sign for the certified mail letters and they were returned to relator. Respondent provided no response to the letters.
32. Because respondent had failed to respond, or to provide requested documents or information, relator was required to subpoena respondent's bank records from Key Bank. Respondent sent the subpoena to Key Bank on July 14, 2014 and subsequently received respondent's records from Key.
33. On August 18, 2014, relator sent respondent letters of inquiry via hand delivery to both addresses citing his failure to cooperate, requiring an immediate response, and warning of a deposition if a response was not received.

34. On August 20, 2014 respondent made his first contact with relator regarding the investigation. The response was a one-page fax coversheet containing only the sentence, "Will fax you my response this evening." No document or other information was attached.
35. Respondent failed to send the promised fax that evening, or at any other time.
36. Relator then obtained and properly served on respondent a subpoena duces tecum for his appearance and testimony at a deposition scheduled for September 17, 2014.
37. Respondent received the subpoena and in response he sent a fax to relator on September 15, two days before the scheduled deposition.
38. The four-page fax included a cover sheet, a one-and-a-half-page response to a contemporaneous investigation of allegations of neglect of an entrusted matter, and a four-line response to the IOLTA allegations. This was the first response to questions in either investigation. Both investigations had been open for at least five months. The response to the neglect investigation was substantive. The response to the IOLTA investigation was not.
39. The response to the IOLTA allegations consisted only of the following language: "The reason for the shortage was, I placed a check in key bank and was told it would clear in one day. I wrote a check believing it would clear in one day. It took two days. I had a negative balance for one day because of the check not clearing in time. It eas [sic] onlt [sic] a paper deficit, the money was always in the account."
40. None of the supporting information, bank records or other documents required by relator's several letters of inquiry was provided with respondent's September 15 fax.

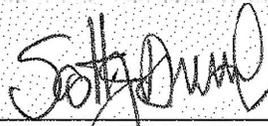
41. Nevertheless, based on respondent's apparent resolve to participate and cooperate with the investigation, relator agreed, at respondent's request, to cancel the deposition upon the representation by respondent that he would promptly provide all the other requested documents and information.
42. Despite his representation, respondent did not provide any further required documents or information.
43. On July 15, 2015 relator sent respondent a letter reciting the history of failure to cooperate and asking additional specific questions regarding the IOLTA in nine separate paragraphs and referencing a table containing 25 checks written either to "cash" or to "Richard Barbera".
44. Also on July 15, relator telephoned respondent and left a voice mail regarding the new letter of inquiry. Respondent returned the call the same day and spoke with relator. In the conversation, respondent admitted that he had failed to cooperate with the investigation over many months, that he understood his duty to cooperate, that he understood failure to cooperate could result in a formal complaint for discipline and that the reason for his failure to cooperate was extreme fear of disciplinary investigations. He promised to cooperate going forward. Respondent requested that a copy of the July 15 letter to be faxed to him. Relator complied and the fax was received by respondent July 15.
45. Despite several follow up voice mails left by relator on respondent's cell phone, all of which he has admitted he received, respondent did not provide the required documents and information, nor answers to the new questions contained in relator's July 15 letter of inquiry.

46. On August 7, 2015, respondent sent relator a one-page fax cover sheet containing only the statement: "I hope to have it faxed to you Monday. Will call then. Rich Barbera."
47. Respondent did not send a fax the following Monday, nor did he telephone relator.
48. On August 20, 2015, respondent sent relator a fax cover sheet containing only the statement: "I have been having computer issues and want to set up a time to meet."
49. Respondent admitted at his deposition that relator had telephoned him on at least July 29th, August 3rd, 5th, 6th, 7th, 18th and September 1st, leaving contact information including email addresses, telephone numbers, and the mailing address, and requesting respondent's voluntary appearance at a meeting to discuss the allegations.
50. Respondent did not respond to any attempt to schedule a voluntary meeting.
51. Relator then obtained and properly served a second subpoena duces tecum on respondent for a deposition scheduled September 24, 2015.
52. Respondent received the subpoena properly served on September 9, 2015, but did not attempt to contact relator until September 22, 2014 when he sent another fax.
53. Respondent's September 22 fax for the first time mentioned trials he had scheduled that would prevent his appearance at the deposition two days later on the 24th. The fax also stated that respondent would be available all day October 22, 2015 and was willing to appear then.
54. The following day, September 23, respondent sent another fax repeating his unavailability for September 24 and requesting that the deposition be postponed to October 22.
55. Relator telephoned respondent on September 23, but respondent did not answer. Relator left a voice mail agreeing to respondent's requested postponement of the deposition to

- October 22, 2015. Relator also reminded respondent that he was still required to provide the requested documents and information and instructed him to provide them prior to the deposition.
56. Respondent did not provide the required response and documents prior to the deposition date.
 57. On October 21, 2015, respondent telephoned relator and again requested an email address, stated he had the requested documents and information, promised to email them that evening, or the following morning at the latest, and requested that relator cancel the deposition. Relator declined to cancel the deposition.
 58. Respondent failed to send the promised response email either on the evening of October 21, or prior to the deposition on the morning of October 22. Respondent did request to delay the beginning of the deposition to send an email response from his ipad while at relator's offices. The response did not contain the documents and information repeatedly requested by relator.
 59. Respondent did not bring with him to the deposition the documents required pursuant to the subpoena duces tecum.
 60. Respondent's conduct with respect to Count II of the Complaint constitutes a violation of the Ohio Rules of Professional Conduct, specifically: Rule 8.1(b) [a lawyer shall not knowingly fail to respond to a demand for information from an investigator in a disciplinary matter]; and a violation of the Supreme Court Rules for the Government of the Bar, specifically: *former* Gov. Bar R. V, section 4(G) [failure to cooperate with a disciplinary investigation].

CONCLUSION

Wherefore, pursuant to Gov. Bar R. V, the Code of Professional Responsibility and the Ohio Rules of Professional Conduct, relator alleges that respondent is chargeable with misconduct; therefore, relator requests that respondent be disciplined pursuant to Rule V of the Rules of the Government of the Bar of Ohio.



Scott J. Drexel (0091467)
Disciplinary Counsel

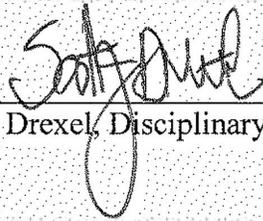


Kevin L. Williams (0061656)
Assistant Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411
614.461.0256
614.461.7205 – fax
kevin.williams@sc.ohio.gov

CERTIFICATE

The undersigned, Scott J. Drexel, Disciplinary Counsel, of the Office of Disciplinary Counsel of the Supreme Court of Ohio hereby certifies that Kevin L. Williams is duly authorized to represent relator in the premises and has accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated: November 25, 2015



Scott J. Drexel, Disciplinary Counsel

Nov. 18. 2015 4:14PM

No. 2990 P. 2

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OF
THE SUPREME COURT OF OHIO**

In re:

Complaint against

**Richard Barbera, Esq.
144-H Royal Crest Dr.
Seville, OH 44273**

Case No. B4-0455

Attorney Reg. No. 0064044

Respondent,

**WAIVER OF DETERMINATION
OF PROBABLE CAUSE**

**(Rule V(11)(B) of the Supreme Court
Rules for the Government of the Bar
of Ohio)**

**Disciplinary Counsel
250 Civic Center Drive, Suite 325
Columbus, Ohio 43215-7411**

Relator.

Pursuant to the provisions of Rule V(11)(B) of the Supreme Court Rules for the Government of the Bar of Ohio, respondent, **Richard Barbera**, stipulates that there is probable cause for the filing of a Complaint in the above-referenced proceeding and hereby waives the determination of probable cause by a Probable Cause Panel of the Board of Professional Conduct.

Dated: November 25, 2015

By: 
Richard Barbera, Esq. (0064044)
Respondent, *Pro Se*