

CAUSE 2011-555754

COMMISSION FOR LAWYER
DISCIPLINE,
Petitioner

v.

KEVIN T. GLASHEEN,
Respondent

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IN THE DISTRICT COURT

99TH JUDICIAL DISTRICT

LUBBOCK COUNTY, TEXAS

FILED
2011 DEC 12
11:20
LUBBOCK COUNTY
CLERK

FIRST AMENDED ORIGINAL DISCIPLINARY PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Commission for Lawyer Discipline, Petitioner, and would respectfully show the following:

I.

DISCOVERY CONTROL PLAN

Discovery proceedings in this cause should be conducted pursuant to schedule order entered by the Court after consultation between counsel pursuant to Tex.R.Civ.P. Rule 190.4.

II.

PARTIES

Petitioner is the Commission for Lawyer Discipline, a committee of the State Bar of Texas. Respondent, KEVIN T. GLASHEEN, State Bar Number 08001510, is an attorney presently licensed to practice law in the State of Texas and is a member of the State Bar of Texas. Respondent maintains his residence or principal place of practice in Lubbock County, Texas. Respondent has

been served, answered and has appeared herein for all purposes so that no further service of process is necessary.

III.

JURISDICTION, VENUE AND CONDITIONS PRECEDENT

The cause of action and the relief sought in this case are within the jurisdictional requirements of this Honorable Court. Venue of this case is proper in Lubbock County, Texas pursuant to Texas Rules of Disciplinary Procedure Rule 3.03, because Lubbock County is the county of the Respondent's residence or principal place of practice. All conditions precedent to proceeding with this cause have been performed or fulfilled.

IV.

PROFESSIONAL MISCONDUCT

Petitioner brings this disciplinary action pursuant to the State Bar Act, Tex.Govt.Code §81.001 *et seq.*, the Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedure. The complaints which initiated these proceedings were filed by Steven C. Phillips and Patrick Waller. The acts and omissions of Respondent, as hereinafter alleged, constitute professional misconduct.

V.

FACTUAL BACKGROUND

PHILLIPS COMPLAINT

Steven C. Phillips spent more than 25 years in prison in Texas for crimes he did not commit. After DNA testing proved he was not the perpetrator of the crimes, Phillips was declared innocent of the crimes. After his release from prison, Phillips hired Respondent Kevin T. Glasheen. A

contingent fee contract was signed on December 10, 2008 in which Respondent undertook to "investigate, evaluate and pursue to settlement or judgment all claims for damages" Phillips had against the City of Dallas and the State of Texas. The details of the six-page contract prepared by Respondent, and the application of the contract, constitute an arrangement for or resulted in a charge of an illegal fee or a fee prohibited by law or an unconscionable fee.

Under the contingent fee contract, Phillips was obligated to pay his lawyer 40 per cent of any recovery obtained through litigation of Phillip's civil rights case. The contingency rose to 45 percent if recovered after appeal. This aspect of the contract necessarily contemplated the legal work and expenses involved in prosecution of a lawsuit to settlement or to judgment and beyond. No lawsuit was ever initiated by Respondent on Phillips' behalf. The contract also, however, awarded to Respondent 25 per cent of the money Phillips was entitled by state law to receive as a result of an administrative procedure wherein the State of Texas compensated persons who had been declared innocent of the charges for which they were imprisoned. At the administrative level, this process consists of filling out a one-page form which simply lists the documents attached to it and which contains a blank in which the amount of money sought was to be stated. It is possible to determine from the four corners of the records available at the time of the signing of the contract, whether or not compensation would be due to Phillips. The amount of compensation is calculated based on the number of years in prison multiplied by the statutory entitlement. Because of the long years in prison, Phillips' eventual entitlement was in the millions of dollars. The one-page form, with the copies of the pertinent records attached, is then submitted to the Texas Comptroller of Public Accounts where, in a purely ministerial act, the administrative process is completed. There is no legal analysis or argument required at this point, yet under the Respondent's contract, Phillips would have been

obligated to pay 25 per cent of his administrative recovery to Respondent. Under §305.022 (b) of the Texas Government Code, a person may not accept any employment to influence administrative action for compensation contingent upon the outcome of any administrative action.

The contract also constituted a conveyance or absolute assignment of a 25 per cent undivided interest in Phillips' cause of action or claim and a lien on any proceeds obtained on Phillips' behalf in this administrative process. Part of the benefits Phillips became entitled to receive included an annuity which would pay a monthly compensation to Phillips for as long as he lives, providing he is not convicted of any felony crime. The compensation statute, Texas Civil Practice & Remedies Code § 103 *et seq.*, prohibits the assignment, encumbrance or anticipation of the future rights to payments under the statute, yet Respondent calculated his projected fee and charged in anticipation of Phillips' recovery of the future payments.

Respondent did not explain sufficiently to allow his client to make informed decisions regarding the representation that portions of the compensation charged by the contract were prohibited by law, that the 25 per cent contingency fee would be charged for the lawyer's involvement in a purely administrative process which required no legal skill or advocacy beyond filling out a form, that at the administrative, ministerial level, Phillips did not need the attorney's services and that the contingency fee would be charged on amounts of money that the client might never be entitled to recover.

Phillips eventually terminated Respondent's contract and completed the administrative process to recover his compensation successfully, without being represented by an attorney.

VI.

WALLER COMPLAINT

Patrick Waller was released from Texas prison after being declared innocent of the crime for which he was incarcerated. On July 14, 2008, Waller hired Respondent and signed a contingent fee agreement. The contract, with particular exceptions, was the same as the contract described in connection with the Phillips complaint and it was similarly possible to review the records then available to determine whether or not compensation would be due to Waller. The contract awarded to Respondent 33 per cent of the money Waller was entitled by state law to receive as a result of the administrative proceeding to compensate persons who had been declared innocent of the charges for which they were imprisoned. The contract also constituted a conveyance or absolute assignment of a 33 per cent undivided interest in Waller's cause of action or claim and a lien on any proceeds obtained on Waller's behalf in this administrative process. Thus, the Waller contract was similarly illegal or in violation of law or unconscionable in its terms or application.

Respondent charged and collected fees from Waller that included a 25 per cent fee based on amounts that Waller might never be entitled to receive and calculated based on double the amount of money that Waller actually received at the time of the charge. The charge and collection were thus unconscionable. The charge and collection also constituted an encumbrance or anticipation of Waller's potential future rights to payments, which encumbrance or anticipation was illegal or prohibited under the terms of the compensation statute.

An important difference in the two contracts is that the Waller contract included a provision wherein Respondent would be paying 40 per cent of the legal fees collected from Waller to two attorneys not in his firm. The contract did not include a consent in writing from the client prior to the

time of the referral or association that included whether the fees would be divided based on the proportion of legal services performed or by the lawyers agreeing to assume joint responsibility for the representation, or, if the division was to be based on the proportion of services performed, the basis on which the division would be made. The fee division was, according to the contract, based solely on the fact that a referral had been made from the two attorneys named in the contract to the Respondent's firm. There was no other writing, amendment or addendum to the contract which obtained the necessary agreement of the client to the division of the fees. The referral fees were apparently paid to the attorneys listed for their referral.

Respondent did not explain sufficiently to allow his client to make informed decisions regarding the representation that portions of the compensation charged by the contract were prohibited by law, that the contingency fee would be charged for the lawyer's involvement in a purely administrative process which required no legal skill or advocacy beyond filling out a form, that at the administrative, ministerial level, the client did not need the attorney's services and that the contingency fee would be charged on amounts of money that the client might never be entitled to recover.

VII.

DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

The factual circumstances exemplified above constitute violations of the following Texas Disciplinary Rules of Professional Conduct:

In the Phillips Complaint:

Rule 1.03(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

Rule 1.04(a): A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee;

Rule 1.04(d): A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law.

In the Waller Complaint:

Rule 1.03(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation;

Rule 1.04(a): A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee;

Rule 1.04(d): A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (e) or other law;

Rule 1.04 (f): A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

(i) in proportion to the professional services performed by each lawyer; or

(ii) made between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including

(i) the identity of all lawyers or law firms who will participate in the fee-sharing arrangement, and

(ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and

(iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a).

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that a judgment of professional misconduct be entered against Respondent and that this Honorable Court impose an appropriate

sanction against Respondent, as the facts proved shall warrant. Petitioner further prays to recover costs of court and all expenses associated with these proceedings and attorney fees as a sanction for Respondent's misconduct. Petitioner further prays for such other and additional relief, general or specific, at law or in equity, to which it may show itself entitled.

Respectfully submitted,

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By: 

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of December, 2011, a true and correct copy of the foregoing document was served upon counsel for Respondent.


Paul H. Homburg III