# BEFORE THE DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSOCIATION

**In Re Tom Youngjohn**

**Respondent (#24170)**

**Proceeding No ~~123000~~** 12#00068 A.S.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS

## FORMAL COMPLAINT

On September 11, 2012, Respondent was charged by formal complaint with four counts of violating the Washington Rules of Professional Conduct. On January 11, 2013, an Amended Complaint was filed adding an additional count.

Prior to the hearing, Respondent moved to dismiss, in part, on the grounds that Congress had preempted the field of disciplining and sanctioning immigration lawyers. The motion was denied and the disciplinary hearing was held on February 19, 2013.



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

031

# FINDINGS AND CONCLUSIONS

## COUNTS 1 AND 2

On August 17, 2009, Steven Hewett executed a fee agreement prepared by Respondent which is Exhibit A-1. The agreement was to represent Mr. Hewett in a removal proceeding before the U S Immigration Court in Seattle. The agreement was labeled in part as a "Flat Fee Retainer Agreement." It provided for an attorney's fee of $3,500 which was defined as a "nonrefundable attorney's fee." The agreement also provided that if there was a dispute about the fee, it would be resolved by the courts or appropriate administrative bodies. The agreement noted that it was a legally enforceable contract which Mr. Hewett could "have reviewed by independent legal counsel of my choice prior to signing."

The fee was to be paid in installments. Respondent did not deposit any of the payments in his trust account. Respondent violated RPC 1.15A(c)(2) as alleged in Count 1 by failing to deposit in his trust account legal fees that were paid in advance.

Respondent violated RPC 1.5(f)(2) as alleged in Count 2. RPC1.5(f)(2) requires that certain information must be included in a flat fee agreement which was not included in Exhibit A1 including (a) notification that the fee is the lawyers immediately on receipt and will not be placed in the lawyer's trust account, (b) that the client retains the right to terminate the client-lawyer relationship and (c) that the



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

client may be entitled to a refund if the agreed upon services are not completed. This rule contains a suggested, but not mandatory, form to use for a written flat fee agreement which includes the statement that the client "may or may not" have the right to a refund if the services are not completed. At the times noted later when there was a likelihood that Respondent would withdraw before the services for Mr. Hewett were concluded, Respondent understood that Mr. Hewett would be entitled to a refund if his services were not completed.

Respondent ultimately favorably completed the agreed upon services which resulted in Mr.Hewett's removal proceedings being terminated.

**COUNT 3 AND 4**

In September 2009, Respondent appeared on behalf of Mr. Hewett in an immigration proceeding. He filed a number of motions on his behalf which were denied, including two motions to terminate the removal proceeding. The second motion was denied on February 23, 2010. Thereafter, Mr. Hewett asked Respondent to file a third motion to terminate the removal proceedings. Respondent was opposed to filing the third motion. Mr. Hewett offered to pay Respondent an additional $500 if he would file the motion. Respondent declined the additional payment , but did file and present the third motion. The motion was denied on November 10, 2010.

The Immigration Court scheduled the next hearing in Mr. Hewett's case for January 12, 2012, fourteen months after the third motion was denied.



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

Mr. Hewett's work permit expired in November, 2010 and he was unable to work thereafter until his immigration matter was successfully completed.

On November 19, 2010, Mr. Hewett's fiancée, Rebecca Taylor, sent an email to Respondent asserting that the third motion to terminate had been denied because Mr. Hewett missed a court date and that Respondent failed to notify Mr. Hewett of that hearing date. This was incorrect. A court date had not been missed. Respondent became angry about the accusation and lost his professional demeanor which adversely influenced his behavior from this point forward. Respondent emailed Mr. Hewett stating that he would like to immediately withdraw from the case and inviting Mr. Hewett to obtain another attorney.

Under Immigration Court rules, an attorney may only withdraw with permission of the Immigration Court.

On November 23, 2010, Respondent and Mr. Hewett exchanged emails. Mr. Hewett asserted that Respondent's early withdrawal was "reneging on our agreement and therefore I would be interested in how and in what format you intend to compensate me." Respondent replied that "If you sign off on a request to the Immigration Judge to discharge me, and if the judge grants the request, I'd be willing to give you $500....You are not satisfied with my representation, and I would be happy to pay you $500 to withdraw from your case. I am very tired of having you tell me how to run your case."



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

On December 2, 2010 Mr. Hewett wrote Respondent that "without prejudice" he had his permission to move to withdraw and "Time is of the essence" so Respondent should "address this matter in a timely fashion." Mr. Hewett also asked for a copy of his file. Mr. Hewett used the words "without prejudice" to indicate he would have no "hard feelings" towards Respondent.

On December 17, Respondent wrote to Mr. Hewett asserting that it would be a mistake to fire him without having another attorney appear on his behalf. He enclosed a copy of his file and reiterated his $500 offer. The letter concluded with the following: "If you do fire me, you would be firing me with prejudice. I wouldn't be entering any new Notices of Appearance." Respondent also advised Mr. Hewett "I would not fire me until you have at least been able to show the file to another immigration attorney." It is not clear whether the "prejudice" Respondent referred to was that Respondent would not reappear if Mr. Hewett asked him to at a later date or that Mr. Hewett would be precluded from contesting the amount of the fee refund. Mr. Hewett did not believe that "with prejudice" would mean he was giving up any rights.

On December 28, Mr. Hewett replied and again asked Respondent to file a motion to withdraw. He stated that he had contacted another attorney who could not be retained until Respondent withdraws. The letter stated that Mr. Hewett had been advised that a "withdrawal with or without prejudice is irrelevant and has no bearing on a motion to the court." Mr. Hewett did not and does not now have a clear understanding of what was meant by "with prejudice" or "without prejudice."



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

On January 4, 2011, Respondent wrote to Mr. Hewett. The last portion of the letter included what Respondent captioned a "REFUND IN FULL." which was to be signed by Mr. Hewett. The proposed agreement included the language "I, Steve Hewett, would rather receive $500 from Tom Youngjohn as a 'refund in full' than to have him continue to represent me before the Immigration Judge." The proposed agreement went on to provide that Respondent would make two future payments to Mr. Hewett totaling $500, less the $36 cost of copying the file. The first payment was to be made after Respondent was allowed to withdraw and the second after proof Mr. Hewett had a new attorney. The second check was to be marked "refund in full." Mr. Hewett did not sign the proposed agreement.

Mr. Hewett filed this grievance on February 28, 2011.

Respondent filed his motion to withdraw on March 6, 2011, a week after this grievance was filed. The hearing on the motion to withdraw was held on June 11, 2011. At the hearing, the judge advised Respondent and Mr. Hewett to go back out and discuss the matter of withdrawal. Respondent then offered to represent Respondent if Mr. Hewett would apologize. Mr. Hewett did not believe he had anything to apologize for but said "I apologize." Respondent then agreed to continue the representation. The hearing resumed, and the Immigration Judge agreed to adjust Mr. Hewett's status if certain documents were provided. The next and final hearing was then scheduled for September 28, 2011.

Count 3 alleges a violation of RPC 1.16(a)(3) which, except as stated in RPC 1.16(c), obligates a lawyer to withdraw from a matter if a lawyer is discharged by the client.



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

Part (c) provides that "A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation." The only way for Respondent to withdraw from the immigration proceeding was to move to do so and obtain permission from the court to withdraw.

Mr. Hewitt unequivocally asked Respondent to withdraw on December 2. Respondent did not file the motion to withdraw for approximately 3 months. Respondent's delay may have been occasioned, in part, by his belief that it would be in Mr. Hewett's best interests to get an immigration lawyer to substitute rather than having Respondent move to withdraw. However, that decision was properly Mr. Hewett's to make. RPC1.2(a) Respondent was also going through personal bankruptcy at this time. Respondent testified that he may have delayed his withdrawal because he did not have money for Mr. Hewett's fee refund.

The delay in filing the motion to withdraw violated RPC1.16 (a)(3). Respondent's conduct of coupling his withdrawal with an agreement on the amount of his fee refund also violated RPC 8.4 (d) as conduct prejudicial to the administration of justice. Respondent was under an obligation to promptly move to withdraw whether or not Mr. Hewett agreed to the amount of his fee refund.

Respondent violated RPC1.8 (h)(2) as alleged in Count 4 by asking Mr. Hewett to sign and agree to the "REFUND IN FULL" included in Respondent's letter of January 4, 2011. This rule requires that where there is a proposed agreement between a lawyer and his client that either (1) the client must consult another lawyer about the matter or (2) the lawyer, in writing, must advise the client of the desirability of seeking,



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

and be given a reasonable opportunity to seek, the advice of another lawyer. Respondent did not include this cautionary advice verbally or in writing. Respondent testified that, while ordinarily he abides by this rule, he may not have done so here as he knew Mr. Hewett had consulted another lawyer. However, if Mr. Hewett already had representation on the matter, there should have been no direct communication with Mr. Hewett. See RPC 4.2.

**COUNT 5**

Respondent, while waiting with Mr. Hewett for the September 28, 2011 hearing to commence, asked Mr. Hewett to sign Exhibit A28. This document had been previously prepared by Respondent. The document was addressed to the Office of Disciplinary Counsel and asked for withdrawal of Mr. Hewett's grievance against Mr. Youngjohn. The document included the following language: "Because I want to withdraw this grievance voluntarily, I am signing and dating this letter, asking that you allow me to withdraw the grievance which I earlier filed against Tom Youngjohn. I want Tom Youngjohn to continue to be my attorney. Tom wrote this letter for me to sign and date, and I do so voluntarily."

Mr. Hewett refused to sign the document. Mr. Hewett then went into the hearing where he was represented by Respondent. The Immigration Court ruled in favor of Mr. Hewett that the removal proceeding should be dismissed. After the successful hearing, Mr. Hewett signed Exhibit A 28 which Respondent then sent to the Office of Disciplinary Counsel.



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

There is nothing in the many detailed provisions of the Code of Professional Responsibility or in the Rules for Enforcement of Lawyer Conduct that state that a lawyer who is the subject of a grievance should not ask the grievant to withdraw the grievance. If the intent of the rules was to block the lawyer from asking the grievant to withdraw a grievance, the rules should have so provided. Thus, the request to withdraw the grievance and the obtaining of the written withdrawal, standing alone, is not a violation of any of the Rules of Professional Conduct.

The WSBA argues that, in this case, Respondent's actions in seeking and obtaining a written request for withdrawal of the grievance violated RPC 8.4 (d) as conduct prejudicial to the administration of justice. The WSBA asserts that the request immediately before the hearing was prejudicial because it implied to Mr. Hewett that Respondent would not fully advocate for Mr. Hewett at the hearing. I find that there is no credible proof, let alone proof by the propnderance of the evidence, that Respondent so intended or that Mr. Hewett believed he had to sign the waiver in order to get Mr. Lovejohns full assistance at the hearing. There is also no evidence that Respondent failed to provide his best efforts at the hearing.

The WSBA also argues that Respondent's asking for and obtaining a withdrawal of the grievance violated RPC 8.4(d) as it was an attempt to interfere with the Association's disciplinary process. I do not find this to be persuasive. A respondent has the right to defend against a disciplinary complaint. That right should include the right to contact the grievant and seek the grievant's assistance in defending against the complaint. If asking for a withdrawal of a grievance is prohibited, the rules should so state. While Respondent's seeking and obtaining a withdrawal of the grievance was foolish, it did



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

not constitute conduct prejudicial to the administration of justice. I note also that the withdrawal of a complaint is not an aggravating or a mitigating factor under the ABA Standards. Standard 9.4 (c).

## SANCTION RECOMMENDATIONS

The American Bar Association Standards for Imposing Lawyer Sanctions governs my recommendations. The purpose of a disciplinary proceeding is to protect the public and the administration of justice from lawyers who have not, will not or are unlikely to properly discharge their professional duties. ABA Standard 1.1

Generally, the factors to be considered in imposing sanctions are the duty violated, the lawyer's mental state and the potential or actual harm caused by the misconduct. The existence of aggravating or mitigating factors should also be considered.

**Counts 1and 2:** These Counts are factually connected. Respondent failed to include in his flat fee agreement the language required by RPC 1.5 (f) (2) which, if included, would have allowed him to personally take the advance fee deposits. As a result, the flat fee payments should have been deposited in Respondent's trust account as required by RPC 1.15A(c)(2). Respondent failed to do so.

ABA standard 4.1, Failure to Preserve the Client's Property, is most applicable. Suspension is generally appropriate if a lawyer "knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client." Reprimand is generally appropriate when a lawyer is negligent in dealing with client



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

property and causes actual or potential injury to a client. On the other hand, Admonition is appropriate under the same circumstances as defined for Reprimand where the conduct causes little or no actual or potential injury to the client. Respondent's error here was in failing to include the necessary language in his flat fee agreement. This did not cause any actual injury to Mr. Hewett as the services were completed successfully for the agreed upon fee. However, the fact that the fee payments were not placed in Respondent's trust account and, therefore, not available for a refund likely contributed to Respondent's delay in moving to withdraw. Taking all these factors and the purpose of disciplinary proceedings into account, an appropriate sanction for Count 1 is a Reprimand and for Count 2 is a Reprimand.

**Count 3:** Standard 7.0 applies to Respondent's violation of his duty to promptly withdraw and to coupling his withdrawal with agreement on the amount of the fee to be refunded to Mr. Hewett. Standard 7.0 provides that suspension is normally appropriate when a lawyer knowingly engages in conduct which is a violation of a duty owed as a professional and causes actual or potential injury to a client. Respondent knew he had a duty to withdraw and failed to take steps to do so while insisting that Mr. Hewett agree to the amount of the refund Respondent would pay Mr. Hewett. The motion to withdraw was not filed until Respondent filed his Bar complaint. This caused Mr. Hewett injury by delaying or potentially delaying the time for disposition of his immigration matter and by lengthening the period of time his status was in limbo. This was aggravated by the fact Mr. Hewett was legally unable to work and earn an income until his immigration matter was concluded. An appropriate sanction under ABA Standard 7.0 is suspension.



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

**Count 4:** Respondent acted negligently in presenting Mr. Hewett with a "refund in full agreement" without giving him the cautionary warning to seek independent counsel. This did not cause any injury or potential injury to Mr. Hewett as he was, in any event, unwilling to sign the proposed agreement. Under Standard 7.3, reprimand is an appropriate sanction.

**Aggravating and Mitigating Factors:** ABA Standard 9.22 and 9.32 set forth certain aggravating and mitigating factors to be considered in determining what sanctions to impose.

I find that the only aggravating factors that have been proven by a preponderance of the evidence are refusal to acknowledge the wrongful nature of Respondent's conduct and substantial experience in the practice of law. Respondent has been in practice since 1994.

The only mitigating factors proven by a preponderance of the evidence is the absence of a prior disciplinary record and personal financial problems.

**Conclusion**: The aggravating and mitigating factors are balanced and do not affect my recommendations. Respondent should be suspended for six months for violation of Count 3. He should be reprimanded for violation of each of Counts 1, 2 and 4.

Entered on March 11 2013



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395

Malcolm L. Edwards

Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FDF, COL & Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Tom Young/John, Respondent/Respondent's Counsel at 1618 S. 310th St #2 Federal Way, WA 98003, by Certified/~~first class mail~~, postage prepaid on the 17th day of March, 2013

Clerk/Counsel to the Disciplinary Board



MALCOLM L. EDWARDS
Attorney at Law
214 1ST AVE SO., STE B12
SEATTLE, WASHINGTON 98104-2558
(206) 340-9395