

**TAKE NOTHING JUDGMENT REVERSED; JUDGMENT OF PRIVATE REPRIMAND
RENDERED**

Opinion and Judgment Signed and Delivered August 27, 2015.



**BEFORE THE BOARD OF DISCIPLINARY APPEALS
APPOINTED BY
THE SUPREME COURT OF TEXAS**

No. 55619

**COMMISSION FOR LAWYER DISCIPLINE
OF THE STATE BAR OF TEXAS, APPELLANT**

v.

A TEXAS ATTORNEY, APPELLEE

On Appeal from the Evidentiary Panel 1-2 (Sherman) for the
State Bar of Texas District 1 Grievance Committee

SBOT Case No. 201301240

Order and Opinion on Appeal

Decided En Banc July 24, 2015

COUNSEL:

Linda A. Acevedo, Chief Disciplinary Counsel; Laura Bayouth Popp, Deputy Counsel for Administration; Julie U. Liddell, Appellate Disciplinary Counsel, Office of the Chief Disciplinary Counsel, State Bar of Texas, for Appellant, Commission for Lawyer Discipline of the State Bar of Texas.

Texas Attorney, Appellee, did not file a brief.

OPINION AND ORDER:

This attorney discipline case concerns an attorney's refusal to obtain a final judgment for his client in a child custody case for almost two years after the final custody hearing. The judgment was obtained six months after this disciplinary proceeding was filed.

The Commission for Lawyer Discipline¹ ("Commission") appeals to the Board of Disciplinary Appeals ("BODA") from a Take-Nothing Judgment signed October 15, 2014 by an Evidentiary Panel for the State Bar of Texas District 1 Grievance Committee (Sherman).² The Commission argues that there was substantial evidence to find that the attorney neglected a legal matter entrusted to him by a client in violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2013), and that the panel abused its discretion by issuing a take-nothing judgment. The Commission did not request oral argument. The attorney did not file a brief or otherwise participate in the appeal.

We agree with the Commission that, based on the attorney's testimony that the only reason he did not obtain the final judgment and did not complete the work for 20 months was because he believed the client still owed him for his legal services, there was substantial evidence to find a violation of Rule 1.01(b)(1) as a matter of law. Therefore, we reverse the take-nothing judgment and render a judgment of private reprimand against Texas Attorney for a violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1).

¹ The Commission for Lawyer Discipline is a permanent committee of the State Bar of Texas that exercises all rights characteristically reposed in a client in lawyer disciplinary and disability proceedings. Tex. R. Disciplinary P. R. 1.06D and 4.06A, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013).

² Because an appeal to the Board of Disciplinary Appeals from a dismissal by an Evidentiary Panel is confidential unless and until public discipline is imposed, we do not disclose the attorney's name or State Bar of Texas card number. BODA Internal Procedural Rule 2.02(b) (Supreme Court Misc. Docket No. 15-9040; February 19, 2015).

Underlying Grievance

This Texas Attorney was hired by a client on July 14, 2010 to defend her after the father of her children filed suit in Texas seeking appointment as managing conservator. An engagement agreement³ was signed and the client paid the attorney a \$1,000 retainer fee and subsequently, additional payments for a total of approximately \$2,440. She believed that the contract was for a flat fee of \$2,500, which the attorney disputed.

The trial court entered temporary orders. Nearly two years after the client hired the attorney, she attended a final hearing where the court rendered judgment in her favor. The attorney did not present a final order to the court at that time.

The client requested the final order from the attorney several times over the ensuing 20 months but did not receive it. In March 2013 the client filed a grievance against the attorney with the State Bar of Texas which resulted in this disciplinary proceeding. In his response to the grievance, the attorney stated that the client owed him \$1,800, a claim that she denied.

At the hearing before the evidentiary panel, the attorney admitted that he intentionally did not complete the work by obtaining the final judgment solely because the client had not paid him in full. The client contested that she owed him more money but eventually paid him an additional \$1,500. A year after the grievance was filed the attorney finally obtained the signed order. This was six months after the Commission filed its evidentiary petition and 20 months after the final hearing in the child custody case.

Standard of Review

The record does not disclose why the panel dismissed the grievance against the attorney. The issue in this appeal is whether there is any reasonable basis for the panel's dismissal of the

³ The agreement required the client to pay \$300 a month "until told by the attorney to no longer submit the fee deposit."

grievance supported by more than a mere scintilla⁴ of evidence in the record from the hearing. Neither party requested findings of fact or conclusions of law and none were filed. “If the trial court files no findings of fact and conclusions of law, all findings necessary to the court’s judgment, if supported by the record, will be implied.” *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 251 (Tex. App. —Houston [14th Dist.] 1999, pet. denied).⁵ When, as here, an appellant files a reporter’s record, however, the appellant may challenge the sufficiency of implied findings. *Id.* at 258. “In reviewing the legal sufficiency of evidence to support a specific finding of fact, we consider all the evidence in the light most favorable to the finding and disregard all contrary evidence and inferences.” *Id.*

BODA reviews the evidence supporting the findings of fact implied to support the judgment under a substantial evidence standard. Tex. Gov’t Code § 81.072(b)(7); Tex. Rules Disciplinary P. R. 2.24, *reprinted* in Tex. Gov’t Code, tit.2, subtit. G, app A-1 (West 2013); *Wilson v. Comm’n for Lawyer Discipline*, 2011 WL 683809 *2 (Tex. Bd. Disp. App. 46432, January 30, 2011; affirmed March 3, 2012). “At its core, the substantial evidence rule is a reasonableness test or a rational basis test.” *City of El Paso v. Pub. Util. Comm’n of Tex.*, 883 S.W.2d 179, 185 (Tex. 1994). Therefore, BODA must affirm the judgment “if it may be upheld on any basis that has support in the evidence under any theory of law applicable to the case.” *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d at 252.

⁴ The Texas Supreme Court defined “scintilla of evidence” in *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). “Less than a scintilla of evidence exists when the evidence is ‘so weak as to do no more than create a mere surmise or suspicion’ of a fact. [citing *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983)]. More than a scintilla of evidence exists when the evidence ‘rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.’ ” [citing *Merrell Dow Pharms., Inc v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)].

⁵ *Vickery* is a civil appellate case, and the opinion discusses factual and legal sufficiency. BODA reviews sufficiency under substantial evidence but the principles articulated apply, because substantial evidence is anything “more than a mere scintilla.”

BODA reviews legal conclusions, including interpretation of the disciplinary rules, *de novo*. *Comm'n for Lawyer Discipline v. Schaefer*, 364 S.W.3d 831, 835 (Tex. 2012); *Weir v. Comm'n for Lawyer Discipline*, 2005 WL 6283558 *2 (Tex. Bd. Disp. App. 32082, June 30, 2005; no appeal).

Neglect under TDRPC 1.01(b)(1) and (c)

“Perhaps no professional shortcoming is more widely resented than procrastination.” Tex. Disciplinary Rules Prof’l Conduct R. 1.01 cmt. 7. Rule 1.01(b) requires that “In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or, (2) frequently fail to carry out completely the obligations that a lawyer owes to a client or clients.” “Neglect” is “inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients.” Tex. Disciplinary Rules Prof’l Conduct R. 1.01(c). Rule 1.01(b) imposes a duty to carry matters undertaken through to a conclusion unless the lawyer withdraws or the client terminates the representation.⁶

“[H]aving accepted employment, a lawyer should act with competence, commitment, and dedication to the interest of the client and with zeal in advocacy upon the client's behalf.” *Eureste v. Comm'n For Lawyer Discipline*, 76 S.W.3d 184, 199 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing Tex. Disciplinary Rules Prof’l Conduct R. 1.01 cmt. 6). A lawyer “should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction, or personal inconvenience to the lawyer.” Tex. Disciplinary Rules Prof’l Conduct R. 1.01 cmt. 6; *Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, 525 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (even though the client was difficult to reach, attorney had an obligation to continue the

⁶ The attorney in this case eventually obtained a final order but had not done so when the grievance was filed or by the time the formal disciplinary proceeding was filed against him.

representation); *Hawkins v. Comm'n for Lawyer Discipline*, 988 S.W.2d 927, 931 (Tex. App.—El Paso 1999, pet. denied), *cert. denied*, 529 U.S. 1022 (2000) (lawyer violated Rule 1.01(b)(1) where he refused to continue to represent criminal defendant because he feared exposure to HIV).

A lengthy delay finalizing a matter can be particularly egregious in a child custody case. The client hired this attorney to confirm her authority to establish her children's care and conservatorship. Without a signed judgment, her case was not final and the children's custody status was at risk. *See, Ex parte Godeke*, 163 Tex. 387, 355 S.W.2d 701, 704 (Tex. 1962) (orig. proceeding) (holding that a case remains pending after oral ruling until entry of written judgment). The oral ruling by the court was subject to being set aside and would have been difficult to enforce. *Ex parte Chunn*, 881 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1994, no pet.) (orig. proceeding) (trial court had plenary jurisdiction to set aside oral pronouncement of divorce because no decree signed).

The attorney defended his failure to complete the client's work timely on the grounds that she failed to pay him the amount he claimed was due and that she suffered no harm. These reasons do not excuse his intentional delay completing the client's work. Harm to the client (other than that inherent in neglectful delay) is not a consideration in determination of a violation of the Disciplinary Rules of Professional Conduct.⁷ "The predicate for a disciplinary sanction does not require a showing of intentional wrongdoing, a fraudulent breach of fiduciary duty, or ***injury to a client***; it requires only 'Professional Misconduct.'" *Acevedo v. Comm'n for Lawyer Discipline*, 131 S.W.3d 99, 107 (Tex. App.—San Antonio 2004, pet. denied) (emphasis added); *Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d at 526 ("Evidence that Allison's

⁷ Harm to the client or to the profession goes to the appropriate sanction after the panel finds that the attorney committed misconduct. Tex. Rules Disciplinary P. R. 2.18C and D.

representation did not have a materially adverse affect [sic] on the ultimate disposition of the case is immaterial to the determination of whether Allison took reasonable steps to protect the client's interest. . . .”).

Moreover, while neglect that results in irreparable damage to the client's legal position (such as missing limitations or a discovery deadline) may be obvious, delay alone can be harmful: “delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. . . .” Tex. Disciplinary Rules Prof'l Conduct R. 1.01 cmt. 7; *see, also, Hawkins v. Comm'n for Lawyer Discipline*, 988 S.W.2d at 938 (fact that attorney's conduct caused worry and stress for the client was relevant for determining sanction).

If a lawyer is unwilling to complete the client's work due to the client's failure to pay the lawyer's fee, the lawyer should terminate the representation, moving to withdraw when necessary and as allowed by the rules of professional conduct. *See*, Tex. Disciplinary Rules Prof'l Conduct R. 1.15(b)(1) (allowing the attorney to withdraw whenever no adverse effect on the client's interest will result); 1.15(b)(5) (allowing withdrawal if the client refuses to pay fees or expenses after the lawyer has reasonably requested payment and warned the client); and 1.15(b)(6) (allowing withdrawal when continued representation would place an unreasonable financial burden on the lawyer); *see also, State of Texas v. Malone*, 692 S.W.2d 888, 892-893 (Tex. App.—Beaumont, 1985, writ ref'd n.r.e.) (court reversed take-nothing judgment and found attorney willfully neglected several matters as a matter of law under predecessor rule to 1.01(b)(1) including failure to have divorce decree reduced to writing and failure to withdraw; court also rejected attorney's defense to having neglected to file a deed in a second matter because the client had paid only a minimum fee).

An attorney cannot, as was done here, hold the client's final order hostage for almost two years until she pays his fee, thereby putting his interest ahead of the client's best interest. *See, Skelton v. Comm'n for Lawyer Discipline*, 56 S.W.3d 687, 689 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (attorney violated Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1) when he refused to continue working on a case representing an indigent criminal defense client until paid \$500).⁸

Lawyers are, of course, entitled to be compensated for their services, but they cannot refuse to complete the scope of work previously undertaken pending payment of a fee, without first providing the warning required under Rule 1.15(b)(5) or, if necessary, upon entry of an Order of Withdrawal. For example, in *Atilus v. United States*, 406 F.2d 694, 696 (5th Cir. 1969), the Court found that an attorney retained in a criminal case, although unpaid, still owed his client a duty of representation. The attorney had failed to timely file an appeal because he was waiting for the client to sign a power of attorney so that he could collect his fee. He did not tell his client that he would not file the appeal without first being paid nor did he withdraw. "Counsel, of course, is entitled to charge for his services, but if, for whatever reason, he permits his services to be used without compensation or security for compensation from his client until a critical stage of the proceedings arrives, he can't be permitted simply to bow out without notice either to court or client and frustrate forever the right of the client to protect his vital interests." *Id.*⁹

⁸ We note that the attorney here failed to obtain the final order for several more months even after the client paid him the disputed fee. He had no explanation for the additional delay.

⁹ See also *Florida Bar v. King*, 664 So.2d 925, 926-927 (Fla. 1995) *reinstatement granted* 729 So.2d 918 (Fla. 1999) (court affirmed a finding that the attorney failed to provide diligent representation, rejecting his argument that there could be no finding of misconduct because the client had not paid a retainer; attorney admitted that he had taken some actions on behalf of the client); *Matter of Finn*, 223 A.D.2d 333, 647 N.Y.S.2d 39, 41 (2d Dept. 1996) (New York court affirmed the grievance committee's finding that a lawyer's refusal to record or release a deed and deed of trust to the client until he received payment of his fees reflected adversely on his fitness to practice law in violation of the Code of Professional Responsibility); *In re Thomsen*, 262 Or. 496, 499 P.2d 815, 816 (1972) (per curiam) (Oregon court sanctioned the attorney for refusing to appear for the client at the final divorce

Conclusion

The Board has determined that, based on the evidence presented at the evidentiary hearing, the attorney consciously disregarded concluding the client's case for almost two years until after the evidentiary proceeding was filed without valid excuse. Therefore, the attorney violated Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1), and the panel's decision to dismiss the complaint was not supported by the law or the evidence. The Board reverses the Take-Nothing Judgment signed October 15, 2014 and renders judgment that Texas Attorney violated Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1).

Sanction

Having concluded that the attorney violated Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1) and that the take-nothing judgment should be reversed, BODA has authority to render the appropriate sanction in this appeal. Tex. Gov't Code § 81.0751(b)(3); BODA Internal Procedural Rule 4.07(a)(3); *Derkunt v. Comm'n for Lawyer Discipline*, ___ WL _____ (Tex. Bd. Disp. App. 48512, 2011; affirmed August 31, 2012). Appellate courts must render judgment unless remand is necessary. The Commission has not requested a remand. Tex. R. App. P. 43.3; *Lone Star Gas Co. v. R.R. Comm'n of Texas*, 767 S.W.2d 709, 710 (Tex. 1989) (per curiam) (where no purpose for remand appeared and neither party had requested remand or suggested that the evidence was not fully developed below, the court of appeals erred in remanding).

To determine the appropriate sanction, the tribunal in a disciplinary proceeding must consider the factors in Tex. Rules Disciplinary P. R. 2.18. *Derkunt v. Comm'n for Lawyer Discipline*, *___; *Molina v. Comm'n for Lawyer Discipline*, 2006 WL 6242393 *3 (Tex. Bd.

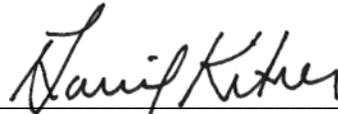
hearing because she refused to pay an additional disputed fee; court noted that the attorney had no basis for refusing to appear for his client and that the conduct was "unethical, contrary to the circuit court rule" "and of the kind that causes public resentment toward the legal profession..."). *Id. See also*, OR Ethics Op. 2005-1 (2005) ("If the court refuses to permit Lawyer to withdraw, Lawyer must continue with the matter and provide competent representation, notwithstanding nonpayment.").

Disp. App. 35426, March 31, 2006; not appealed). Based on the facts in the record and having considered the relevant factors the Board finds, in the exercise of its discretion, that the appropriate sanction in this case is a private reprimand.

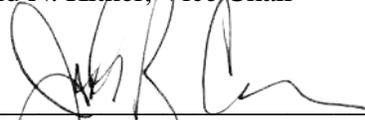
Disposition

Accordingly, without hearing oral argument, *see* Tex. Rules Disciplinary P. R. 7.08(D), we reverse the take-nothing judgment of the grievance committee and render judgment holding that the attorney committed professional misconduct in violation of Tex. Disciplinary Rules Prof'l Conduct R. 1.01(b)(1). We impose a private reprimand against Texas Attorney. Tex. Gov't Code, § 81.0751(b)(3); BODA Internal Procedural Rule 4.07(a)(3).

IT IS SO ORDERED.



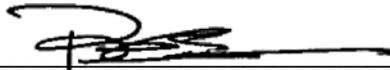
David N. Kitner, Vice Chair



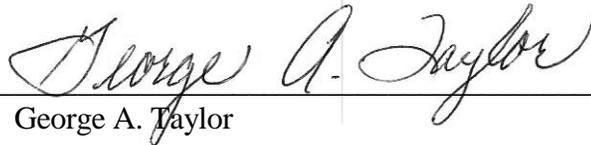
Jack R. Crews



Gary R. Gurwitz



Ramon Luis Echevarria II



George A. Taylor



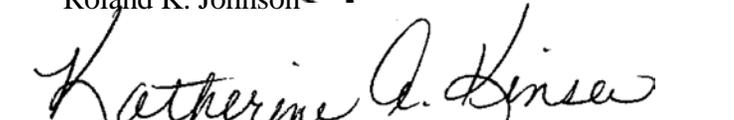
Robert A. Black



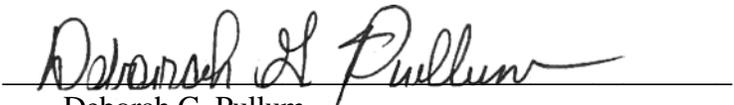
Jeanne C. "Cezy" Collins



Roland K. Johnson



Katherine A. Kinser



Deborah G. Pullum

Board Members Marvin W. Jones and John J. McKetta III not participating.