

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand with Consent

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Attorney at Law

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In 2007, a woman (“Client”) was convicted of numerous counts of theft in a business setting and sentenced to a significant prison sentence followed by probation. After sentencing, Client was transferred to Taycheedah Correctional Institution (TCI) in Fond du Lac to begin serving her confinement period.

At trial and at the sentencing hearing, Client was represented by privately-hired counsel (“Trial Counsel”). After sentencing, Client hired another attorney to handle post-conviction proceedings (“Post-Conviction Counsel”). Post-Conviction Counsel believed there was not a strong legal basis to challenge the jury verdict. Rather, he advised Client that the “strongest, most cost-effective” route for her was to try to get re-sentenced. Post-Conviction Counsel filed a post-conviction motion in the circuit court, requesting re-sentencing. The motion was based on a constitutional claim of ineffective assistance of counsel on the part of Trial Counsel.

While the motion was pending, Attorney Peter D. Bear met Client through a mutual acquaintance who was also incarcerated at TCI. Bear practices law in Monona, Wisconsin. Although Bear graduated from the University of Wisconsin Law School in

1979, he had never practiced law until 2009. Client's case was his first case. According to Client, Bear informed her that, as a former legislator, he knew there was pending legislation that would affect her sentence and that he would be uniquely qualified to handle her case and obtain a reduced sentence. Client, therefore, hired Bear. Bear denied having made such statements.

On February 12, 2009, Bear sent Client's husband a letter in which he explained that he would file a motion for a mistrial based upon an "egregious" and "clear" denial of Client's right to a fair trial, even though Bear knew nothing more about the trial than what Client had told him. Further, the appropriate type of motion, after sentencing, would be a motion for a new trial pursuant to Wis. Stat. § 974.06, not a motion for a mistrial. In his letter, Bear requested an advanced fee of \$2,500 for 25 hours of legal services at \$100 per hour. In his letter, Bear stated that if more hours of work should prove necessary "client shall be advised beforehand." He further stated that the Client would be billed monthly and should co-counsel become necessary, Bear "would consult with you" prior to taking action. Client's husband paid the \$2,500.

At that time, Bear was unaware that Client was already represented by Post-Conviction Counsel. After communicating with Client, Post-Conviction Counsel handled the motion for re-sentencing, which was denied on the grounds that there was not sufficient evidence of ineffectiveness on the part of Trial Counsel. Thereafter, Bear represented Client in the appeal of the motion denying re-sentencing. On March 6, 2009, Bear sent Client and Client's husband a letter in which he stated that he had been hired to represent the couple "in all your legal affairs," including the appeal of the motion denying re-sentencing. With this letter, Bear included an invoice indicating that he had

completed 21.5 hours of work by March 6, 2009. In this letter, Bear requested \$2,000 more. Client's husband signed the fee agreement and sent Bear a check in the amount of \$2,000.

Client also hired Bear for representation in a possible malpractice suit against Trial Counsel. Bear believed that if Trial Counsel was found to be ineffective on appeal, then that would be a basis for a legal malpractice claim. However, Bear was incorrect in his belief that there would be a basis for a malpractice claim if Trial Counsel were found to have provided constitutionally ineffective assistance of counsel. Minimal research would have revealed that in order to prove malpractice in a criminal case, the defendant must prove, by a preponderance of the evidence, his or her absolute innocence of the crime. *Hicks v. Nunnery*, 2002 WI App 87, 253 Wis. 2d 721, 643 N.W.2d 809. In this matter, the Client did not challenge the jury verdict, so there was no claim of innocence. Therefore, despite Bear's representations to Client, there was never a legal basis for a malpractice claim against Trial Counsel.

According to Client, a malpractice suit was all Bear could talk about, premised on absolutely winning the appeal and then working on the malpractice suit and winning against Trial Counsel. Bear wrote two letters to Client in which he outlined this strategy. Bear led Client on to believe she would be successful by articulating a strategy that had no basis in Wisconsin law.

On April 7, 2009, Bear filed a notice of appeal from the order denying the motion for re-sentencing. Bear prepared an invoice dated April 27, 2009 for "services necessary for the appeal, which will also serve to prepare us for litigation against [Trial Counsel] following the appeal." This invoice listed 27.5 hours of work completed between March

7, 2009 and April 27, 2009. The invoice did not list the specific work performed. Client denies that she received such invoice until after she filed a grievance with the Office of Lawyer Regulation.

On June 29, 2009, Bear filed Client's brief-in-chief and appendix with the Wisconsin Court of Appeals. The brief filed by Bear did not minimally conform to the rules of appellate procedure as laid out in Wis. Stat. § 809.19. Further, the brief showed no understanding of basic concepts, such as the standard of review on appeal. On September 2, 2009, the State moved to strike Client's brief and appendix, based on numerous failures to conform to the rules of appellate procedure.

On September 9, 2009, at Bear's request, Client's husband issued a money order for \$1,500 to a paralegal service for assistance in drafting a brief that would conform to the rules of appellate procedure. Client and her husband first learned about the paralegal service when Bear telephoned the Client's husband and told him that he needed to write a \$1,500 money order to the paralegal service right away. At that point in the proceedings, the Client and her husband had little choice but to allow Bear to use the paralegal service; it was too late for them to hire other counsel by that time.

On September 16, 2009, the Court of Appeals granted the State's motion to strike Client's brief and appendix, and ordered Client to file a conforming brief and appendix by October 6, 2009. Employees of the paralegal service spent 18.2 hours working on the brief, conducting substantive and procedural research, communicating with Bear, and revising the brief to conform to Wis. Stat. § 809.19.

On October 6, 2009, Bear filed the amended brief and appendix. The brief argued that Client was denied her due process right to review her pre-sentence investigation

report because Trial Counsel had read it to Client rather than giving her a copy; that Trial Counsel provided ineffective assistance by failing to specifically advise Client that her giving a lengthy statement at sentencing would be harmful to her best interests; and that Trial Counsel had a duty to withdraw as counsel due to the deterioration of his relationship with Client.

The State filed a response brief. On January 19, 2010, pursuant to Bear's request, Client's husband wrote a money order for \$600 to the paralegal service for work on the reply brief. The paralegal service spent 4.7 hours working on the reply brief. At some point, Bear issued a third invoice dated January 26, 2010, showing 14.75 hours of work completed between January 5, 2010 and January 21, 2010. On February 19, 2010, Bear filed the reply brief.

On June 30, 2010, the Court of Appeals affirmed the circuit court's decision denying the post-conviction motion. In its decision, the Court of Appeals outlined the legal test for an ineffective assistance of counsel claim: to prove that counsel was constitutionally ineffective, the defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defense. The Court of Appeals further noted that it would uphold the trial court's findings of fact unless they were clearly erroneous, but would review *de novo* whether counsel's performance was deficient and prejudicial. The Court of Appeals ruled that the trial court's factual findings were not clearly erroneous. The Court of Appeals agreed with the trial court that Trial Counsel's performance was not deficient, and therefore declined to examine whether it was prejudicial.

On June 30, 2010, Bear sent Client a letter informing her of the decision. Noting that the Court of Appeals had ruled the trial court's findings were not clearly erroneous, Bear stated, "I read that as saying that they might be erroneous, but not so clearly erroneous as to justify overturning" the trial court. Bear did not advise Client that she had the right to file a petition for review to the Wisconsin Supreme Court within thirty days. During OLR's investigation, Bear was unable to articulate the standard of review on appeal of a circuit court's factual or legal findings regarding an ineffective assistance claim, that such findings will be upheld on appeal unless they are clearly erroneous. Because Bear did not understand that the appellate court would reverse the trial court's findings only if they were clearly erroneous, throughout the representation Bear consistently overstated the likelihood of success on appeal.

During the period that Attorney Bear was representing Client, he sent her several letters that were on letterhead labeled "Bear [Doe] Law Office." On these letters, Mr. Doe's title or role was not identified. Mr. Doe worked part-time as an assistant in Attorney Bear's law office for 7-8 months, between late 2009 to July or August 2010. Mr. Doe was not a lawyer and had no legal training.

During the representation, Client was upset that Bear repeatedly contacted her or her husband to request additional fees and/or payment of personal expenses and that Bear was providing only incomplete and untimely invoices. Taken together, Bear's February 12, 2009 retainer letter and his March 6, 2009 letter stated that Bear would work at a rate of \$100 per hour; that filing fees would be taken out of the initial advanced payment; that, if it became necessary to consult with co-counsel, Bear would obtain prior authorization; and that Client would be billed on a monthly basis.

At the time he represented Client, Bear did not have a trust account and, therefore, did not deposit any of her payments for advanced fees and costs into a trust account.

During the representation, Bear generated three invoices, dated March 6, 2009, April 27, 2009, and January 26, 2010. These invoices show a total of 75.25 hours spent on legal work for Client. At a rate of \$100 per hour, this would be \$7,525.00 in fees. These invoices, however, failed to document work performed between April 28, 2009 and January 4, 2010. Contrary to his initial retainer letters, Bear did not provide regular monthly invoices. Bear indicated that he sent the three invoices on or about the date shown on the invoice. Client and her husband dispute that they timely received the April 27, 2009 and January 26, 2010 invoices. On January 25, 2010, Client sent Bear a letter expressing concerns about Bear's billing practices.

Bear did not keep contemporaneous time records of his work on Client's case. On February 9, 2011, Bear sent Client a letter in which he briefly summarized 122 hours of work on Client's behalf, but he did not give a full accounting of his work on the case.

Client's husband created a detailed accounting of all the fees and costs that he and Client paid to Bear, along with copies of checks, money orders and credit card receipts, which total \$13,655 as follows: \$10,058 in fees; \$210 in filing fees; \$2,100 to the paralegal service that worked on the appellate briefs; \$399 to the State Bar of Wisconsin for Bear's attendance at a CLE conference; \$456 to the State Bar of Wisconsin for Bear's annual State Bar dues; \$42 for Bear's legal research on the Lexis Legal Database; and \$400 to Bear for the purchase of a laptop computer. The paralegal service later refunded to the Client's husband an unearned balance of \$242.80. In addition, Client paid costs of \$336.17 for miscellaneous costs that they had agreed to pay, including transcript, mailing,

and other costs. The \$13,665 Client paid was \$6,965 more than Bear's records show that he received. Bear acknowledged that his invoices were incomplete, missing in particular the period between April 2009 and January 2010, when Bear and the paralegal service prepared the appellate brief.

In sum, Client paid \$13,665 for a relatively simple appeal of an order denying a post-conviction motion in a criminal case. The issue on appeal was straightforward: given the record created at the hearing, should the Court of Appeals reverse the trial court's order denying the motion? The record had already been developed, and the legal standards governing ineffective assistance claims are settled in Wisconsin. Excluding the table of contents and certification, Bear's amended brief-in-chief was 17 pages long, and the reply brief was 10 pages long. Bear asserted that he spent up to 122 hours working primarily on the appeal (plus 23 hours of work by the paralegal service), which was more time than necessary.

By filing a brief that did not even minimally conform to the rules of appellate procedure, causing a three-month delay in the Client's case, by failing to learn and understand the factual and legal substance of the Client's criminal appeal, by failing to understand the appellate process, by failing to learn and understand the correct standard for a legal malpractice claim in a criminal case, and by misstating the law governing legal malpractice and, thereby, creating an unjustified expectation in the Client's mind that she would be successful in a malpractice suit against her trial attorney, Bear violated SCR 20:1.1, which states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

By charging Ms. Gaszak a total of \$13,665, including payments for fees and costs, payment of his State Bar dues, payment for a continuing legal education conference registration fee, the purchase of a new laptop computer, the use Ms Gaszak's credit card to pay his Lexis fees, and payments to an independent paralegal company to complete appellate briefs; and by charging the client for 122 hours of work to prepare her criminal appeal when it was a relatively simple appeal of an order denying a post-conviction motion, the issue on appeal was straightforward, the record had already been developed, and the legal standards governing ineffective assistance claims are well-settled in Wisconsin, and given the lack of positive results obtained, Bear violated SCR 20:1.5(a), which states in part, "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; ... (4) the amount involved and the results obtained..."

By failing to respond to the client's requests for an accounting of his fees and costs, Bear violated SCR 20:1.5(b)(3), which states, "A lawyer shall promptly respond to a client's request for information concerning fees and expenses."

By failing to deposit into a client trust account advanced fees and costs paid by the client, instead depositing the money into his law office operating account (with no evidence he intended to utilize the alternative fee placement permitted by SCR 20:1.15(b)(4m)), Bear violated former SCR 20:1.15(b)(4), which states in relevant part, "[U]nearned fees and advanced payments of fees shall be held in trust until earned by the

