

IN THE MATTER OF  
DISCIPLINARY PROCEEDINGS  
AGAINST KATHLEEN ANNA  
WAGNER, ATTORNEY AT LAW.

CASE CODE 30912

OFFICE OF LAWYER REGULATION,  
Complainant;

CASE NO. 2014AP 2528 -D

KATHLEEN ANNA WAGNER

Respondent.

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COMPLAINT

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RECEIVED  
OCT 31 2014  
CLERK OF SUPREME COURT  
OF WISCONSIN

**NOW COMES** the Supreme Court of Wisconsin - Office of Lawyer Regulation (OLR), by Assistant Litigation Counsel, Sheryl St. Ores, and alleges as follows:

1. OLR was established by the Wisconsin Supreme Court and operates pursuant to Supreme Court rules. This *Complaint* is filed pursuant to SCR 22.11.

2. Respondent, Attorney Kathleen Anna Wagner (Wagner), is a Wisconsin attorney (State Bar No. 1006832) admitted to practice law in 1983 and whose office address is currently listed with the Wisconsin State Bar as Wagner Law Offices, S.C., 4513 Vernon Blvd., Suite 10, Madison WI 53705-4964.

**Regarding Graves  
Counts 1 - 3  
OLR Matter No. 2010MA744**

3. On September 7, 2000, John E. Graves (John Graves) and his wife, Wandalee Graves, signed a trust document creating the Graves Living Trust (Living Trust).

4. Wandalee Graves was designated the initial sole trustee of the Living Trust.

5. John Graves died in November 2006.

6. The Trustee powers included authority to, "reasonably compensate those persons employed by our Trustee, including ... attorneys."

7. The death of John Graves triggered the creation of two new trusts, the Marital Trust and the Family Trust, with Wandalee Graves continuing in the position of sole Living Trust Trustee and the sole initial Trustee of the Marital Trust and the Family Trust.

**Representation Agreement  
And Invoice**

8. On or about April 8, 2008, Wagner and her client Wandalee Graves, who was then 87 years old, signed a "Representation Agreement" (April 8, 2008 fee agreement).

9. The April 8, 2008 fee agreement was on a standardized form created by Wagner including, in part, the following provisions regarding billing:

**WAGNER LAW OFFICES, S.C.** usually bills its services upon completion of a case unless the fees exceed the amount of the initial payment in which event the firm, at its discretion, may elect to bill on a more frequent basis. In determining its fees, the firm may consider such relevant circumstances as the extent of the responsibility given to the firm, the results obtained, as well as, its regular hourly rates in effect at any point during its representation...

10. The April 8, 2008 fee agreement was modified by the addition of Wagner's handwritten notes describing the representation and her fee for services, said modification reading as follows:

Filing of necessary taxes, etc. Complete transfer of assets...\$250/hr. bill straight time + expenses

11. On or about April 8, 2008, at the time of the signing of the fee agreement, Wandalee Graves paid Wagner a \$500 advanced fee check.

12. On July 31, 2008, Wandalee Graves' and Wagner's second meeting, Wagner attempted to return Wandalee Graves' uncashed \$500 advance fee check, advising she would not provide legal representation.

13. On September 19, 2008, Wandalee Graves and Wagner met again.

14. In a September 19, 2008 letter to Wandalee Graves, sent after their meeting that day, Wagner did not refer to fees.

15. On or about October 10, 2008, Wandalee Graves paid Wagner an additional advanced fee of \$6500.

16. On October 10, 2008, Wagner deposited both the \$6500 advance fee payment and the \$500 advance fee payment into her IOLTA trust account.

17. Throughout her representation in the Graves matter, Wagner kept no time sheets/time records or contemporaneous billing records related to billable hours spent on the Graves client matter.

18. In a January 17, 2009 letter to Wandalee Graves, Wagner wrote, "As I indicated on September 19, my hourly rate increased to \$350/hr. on July 1, 2009 [sic] for all probate work."

19. Wagner's letter dated January 17, 2009 is the earliest written communication from Wagner to Wandalee Graves concerning any rate increase.

20. As of January 31, 2009, Wagner's work concerning the transfer of assets was completed, but Wagner had not prepared a billing statement/invoice for her work regarding her client Wandalee Graves.

21. Wandalee Graves died on February 22, 2009.

22. Pursuant to the terms of the trust, Jonathan D. Graves (Trustee Graves) became the successor Trustee and sole Trustee of both the Marital Trust and the Family Trust.

23. Trustee Graves never signed a fee agreement with Wagner.

24. On November 30, 2009, Trustee Graves sent an e-mail to Wagner stating:

As you are well aware tomorrow is the 1<sup>st</sup> of December and I have yet to receive your bill. I wish you would extend some common courtesy and get the bill to me. I have been more than patient in this matter.

25. Despite repeated requests, Wagner failed to provide an invoice for her services and had not provided an invoice by December 31, 2009.

26. On December 31, 2009, Trustee Graves and Wagner agreed (Agreement) to set aside \$167,000 for disputed attorney fees.

27. Wagner received a check from Trustee Graves for \$47,000 payable to Wagner's trust account.

28. Trustee Graves arranged for an additional \$113,000 of Marital Trust assets to be paid to the Wagner Law Offices SC Trust Account. The \$113,000 check included a memo line reading, "disputed fee for court to decide outcome."

29. On January 8, 2010, Timothy Graves submitted a request for arbitration of fee dispute (arbitration) to the State Bar of Wisconsin, on behalf of himself, Jonathan D. Graves, Linda J. Shaughness, and Katie J. Boelter.

30. The fee dispute was assigned State Bar Case #10-26-2, Wagner was notified of the filing, and Wagner was asked to respond in writing within 30 days.

31. Wagner did not provide a written response to the Wisconsin State Bar fee dispute notice nor did she file a written response to a subsequent State Bar fee dispute letter sent to her seven weeks later.

32. On January 11 and 14, 2010, respectively, Wagner deposited the \$47,000 check and \$113,000 check received from Trustee Graves into a then-empty checking account she had previously opened at Blackhawk State Bank, said account numbered -----152 was named "Wagner Law Offices SC Trust Account."

33. On January 14, 2010, Wagner also deposited into the Blackhawk account the \$7,000 she had previously received from Wandalee Graves as advanced fees (\$6,500 and \$500).

34. On January 15, 2010, the Agreement as to disputed fees was signed.

35. The Agreement stated Trustee Graves and Wagner wanted to "resolve their legal fee dispute by holding the disputed fees in the amount of \$167,000.00 in interest bearing money market Wagner Law Offices, S.C. Trust Account [-----]152 at Blackhawk Bank."

36. The Agreement stated the money was to be held "while resolving the fee dispute between the parties and/or with the assistance of the Wisconsin State Bar Arbitration Committee."

37. Pursuant to the Agreement, Wagner was to submit a detailed billing to Jonathan Graves on or before February 15, 2010.

38. On or about January 17, 2010, Wagner sent an eight-page letter to Trustee Graves via e-mail, said email stating, in part, that Jonathan Graves was her client "as the Successor Death Trustee."

39. Two weeks later, in a February 2, 2010 email to Timothy Graves, Wagner identified her client (following Wandalee Graves' death) by stating, "With respect to the Trust work, the Wisconsin State Bar considers Jonathan D. Graves as the Successor Death Trustee; he is my client by nature of taking over the matter after your mother's death."

40. In a July 2, 2010 letter to OLR, copied to Trustee Graves and Timothy Graves, Wagner stated:

- (a) she told Mrs. Graves during the September 19, 2008 meeting that her hourly rate increased to \$350 per hour effective the previous July 1, 2008
- (b) she offered to return Mrs. Graves' initial \$500, but also told her that if she wanted Attorney Wagner to continue, then, "I also would require an additional \$6,500 retainer to compensate me for all of the extensive work that I had done to review the files, and discussions with professionals to evaluate and prepare a plan to get this matter back on track
- (c) the rate increase and additional "retainer" were only discussed orally."

41. Timothy Graves responded to Wagner's July 2, 2010 letter to OLR referring to Wagner having time to produce multipage letters, but, "Despite ongoing requests for her invoice since August 2009, Ms. Wagner continues to fail to provide the invoice."

42. By letter faxed to OLR on July 14, 2010, Wagner stated she could not meet her previous commitment to complete work on all the "Graves materials," which included presenting the detailed billing by July 15, 2010 with Wagner informing OLR she would respond by July 28, 2010.



43. On July 28, 2010, Wagner faxed another letter to OLR stating she would respond by "the week of August 9, 2010."

44. In September 2010, in the course of the grievance investigation, OLR asked Wagner to produce either a copy of her "detailed billing for services rendered, and expenses, or if you still have not prepared such a billing, a copy of all the records and documentation that you would consult or rely upon to prepare such a billing."

45. Wagner's "Response to Grievance" failed to provide the detailed billing or the underlying records and documents relied upon for billing, instead, Wagner stated: "A detailed bill will be provided under separate cover."

46. On November 4, 2010, Attorney Graves filed an action on behalf of Graves' family members against the Wagner Law Offices, S.C., and Wagner, (Dane County Case). *Timothy W. Graves, et al., v. Wagner Law Offices, S.C., et al.*, Dane County Case Number 2010-CV-5854.

47. In Wagner's November 24, 2010 Answer filed in the Dane County Case, Wagner described the \$167,000 on deposit at Blackhawk State Bank as "disputed fees."

48. In January 2011, the State Bar of Wisconsin Fee Arbitration Program closed its file in the fee dispute matter due to Wagner's failure to agree to arbitration.

49. In her February 17, 2011 response to OLR, in reference to the alleged fee increase from \$250 to \$350 per hour, Wagner stated, "There is no written documentation of the rate increase."

50. In her February 17, 2011 response to OLR regarding the grievance, Wagner acknowledged, "that she and Jonathan Graves have had numerous conversations regarding the preparation for an invoice for her services" which she "has been delayed in preparing."

51. During the course of the Dane County Case, Attorney Graves served three sets of requests for admissions upon Wagner with Wagner responding on March 7, 2011, in part, as follows:

- (a) Wagner asserted that the written fee agreement with Wandalee Graves, together with her letter of September 19, 2008, described the scope of her contracted services.
- (b) Wagner admitted that she had received requests for an invoice or bill from Jonathon Graves, but had not yet provided any detailed billing to him.

52. In the course of a May 5, 2011 hearing in the Dane County Case in which Wagner sought to delay her

deposition, Wagner represented she could produce her invoice in the Graves matter by June 14, 2011 and the court ordered her to do so.

53. Subsequent to the May 5, 2011 Dane County Case hearing, Wagner asked Judge Niess for more time to produce her invoice with her request ultimately being granted with a case suspension for 30 days.

54. In a June 15, 2011 affidavit, Wagner described the agreement with Trustee Graves as follows:

We further agreed that my fees would be placed in a Segregated Trust Account and that if any funds were to be refunded, the money market interest would be prorated; Jonathan D. Graves and I would arbitrate any changes not agreed upon.

55. In a July 8, 2011 affidavit, Jonathan Graves stated he had made multiple requests that Wagner Law Offices, S.C., "provide its invoice and back-up documentation", and added, "Despite multiple reminders ... I have still not received either."

56. In an August 1, 2011 affidavit in the Dane Count Case, Wagner stated, "I anticipate being able to provide an annotated billing in three weeks."

57. On September 9, 2011, Timothy Graves filed a third action on behalf of three Graves siblings and a niece against the Wagner Law Offices, S.C., Attorney

Wagner and the Blackhawk Bank, said case later dismissed on May 2, 2012 with Judge Frank D. Remington's "Final Order" prohibiting withdrawal of any of the \$167,000 in the Blackhawk Bank account without prior court authorization. *Timothy W. Graves, et al., v. Wagner Law Offices, S.C., et al.*, Dane County Case Number 2011-CV-4069.

58. In her November 15, 2011 deposition, Wagner testified that, in addition to an e-mail dated November 30, 2009, Jonathan Graves had requested her invoice on several other occasions, although she could not remember the dates.

59. In her November 15, 2011 deposition, Wagner testified she had not yet prepared any bill for her services in the Graves matter.

60. In her November 15, 2011 deposition, Wagner testified the retainer agreement gave her law firm discretion to provide a bill at the completion of the representation.

61. In her November 15, 2011 deposition, Wagner testified she had nothing in writing advising Mrs. Graves that the hourly rate had increased from \$250 to \$350 per hour.

62. In her November 15, 2011 deposition, regarding rate increases, Wagner testified, "you don't have to have it in writing in Wisconsin."

63. In her November 15, 2011 deposition, Wagner testified that during the September 19, 2008 meeting with Mrs. Graves, she told Mrs. Graves that that unless Mrs. Graves agreed to the plan described in the September 19, 2008, letter, Wagner would no longer represent her.

64. In her November 15, 2011 deposition, Wagner testified she told Mrs. Graves on September 19, 2008, that she was increasing her rate to \$350 per hour, retroactive to July 1, 2008, and further, required another \$6,500 "retainer" if Mrs. Graves wanted Wagner to continue in the matter.

65. On or about January 3, 2012, Wagner first provided her bill for services to Jonathan Graves.

66. Wagner's January 3, 2012 invoice totaled \$86,877.30; including the following:

- 237 hours between April 10, 2008, and July 1, 2010, at \$350 per hour.
- unexplained daily surcharges of \$100 each (\$600 total) for January 14 and 17, February 28, April 17, May 11 and 13, 2009.
- ten 45-minute round trips of 18.6 miles each. Wagner added \$2,625 to her bill for

this 7.5 hours of travel time (at \$350 per hour) and mileage of \$102.30 (at \$0.55 per mile).

67. Wagner's invoice incorrectly added up her charge, as  $237 \times \$350 = \$82,950$  and  $\$82,950 + \$600 + \$2,625 + \$102.30 = \$86,277.30$ . Wagner's invoice therefore showed an incorrect total, overcharging \$600.

68. In a January 5, 2012 letter to Timothy Graves (erroneously dated January 5, 2011), Wagner proposed they settle their disputes as follows:

- Wagner offered to adjust her hourly rate to \$250 per hour, but only for services prior to September 19, 2008.
- Wagner proposed, in exchange for the adjustment of her hourly rate to \$250, that (a) the Graves would promptly pay her bill for \$86,877.30, (b) she would keep 100% of the accumulated interest on the trust account at the Blackhawk State Bank (which she stated as \$1,504.96), (c) all plaintiffs would agree to the dismissal with prejudice of both Dane County Case Numbers 2010-CV-5854 and 2011-CV-0469, and (d) Timothy Graves and Jonathan Graves would withdraw their complaint to the Office of Lawyer Regulation.

69. In his April 24, 2013 oral ruling in the Dane County Case, Judge Niess stated:

Originally, up until my questioning on the fifth day of trial of Ms. Wagner, I thought she was seeking compensation of the entire \$167,000 held in Blackhawk Bank. But then we finally, finally got her invoice, ... and subsequently, I gave her all the time in the world, it seemed

like, to come up with any additional charges that were not contained within the invoice, and she ultimately testified that the invoice captures accurately the work that she did. And so even under her theory the maximum recoverable setting aside her claim for interest, attorney's fees, et cetera, is \$86,877.30.

70. In Judge Niess' April 24, 2013 oral ruling, he stated this "...will serve as the Court's findings of fact, conclusion of law, and order for judgment...", commenting, "I will concede to the plaintiffs that they could not for many, many months get an appropriate accounting out of Ms. Wagner..."

71. Judge Niess considered the "Representation Agreement" and stated and/or found:

- "This representation agreement was about as bad as I've seen."
- It was sufficient to establish a contract with Wandalee Graves at \$250 per hour until her death.
- "The contract is deficient enough that it cannot be used to bind Mr. Jonathan Graves on a contractual basis."
- There was a basis for a *quantum meruit* determination regarding the services to Trustee Jonathan Graves.
- It was "bothersome" and "very poor practice" that neither periodic bills nor contemporary time records had been produced stating, "[I]t's largely the reason we got into this mess...", and added, "I don't criticize the Graves family for wanting an accounting and

for wanting to really get to the bottom of this."

72. In the Dane County case, the court determined the reasonable fee for Attorney Wagner's services and expenses was \$65,029.80, calculated as follows:

- Judge Niess used a rate of \$250 per hour for the 84.9 hours prior to Mrs. Graves' death, or \$21,225 for that period.
- For services after February 23, 2009, the court determined the reasonable value of Attorney Wagner's services to Trustee Jonathan Graves by granting a 10% fee increase to \$275 per hour. The total for that period was therefore \$41,827.50 (i.e.,  $237 - 84.9 = 152.1$  and  $152.1 \times \$275 = \$41,827.50$ ).
- Judge Niess reduced the claimed hourly rate for the 7.5 hours of travel time to \$250 per hour ( $7.5 \times \$250 = \$1,875$ ) and accepted the mileage claim of \$102.30.
- The total award for Attorney Wagner's hourly services was therefore \$64,927.50 ( $\$21,225 + \$41,827.50 + \$1,875 = \$64,927.50$ ) plus a mileage expense of \$102.30.

73. In his ruling on the fee award in the Dane County Case, Judge Niess expressly noted the Supreme Court Rule regarding factors used for determining the reasonableness of a fee and their incorporation into case law through *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 275 Wis. 2d 1, 683 N.W.2d 58 (2004), with the judge considering each of the factors on the record.



**COUNT 1**

74. By failing to deposit Wandalee Graves' \$500 check for advanced fees into her IOLTA trust account for six months, **Wagner violated SCR 20:1.15(b) (4)**<sup>1</sup>.

**COUNT 2**

75. By failing to respond to her client's request for her billing invoice for at least 25 months, **Wagner violated SCR 20:1.5(b) (3)**<sup>2</sup>.

**COUNT 3**

76. By initially asserting that she was entitled to legal fees of \$167,000 for her services without providing any invoice, then by billing \$85,575 for her services, all at \$350 per hour despite a fee agreement to the contrary, when the reasonable fee for her services was \$64,927.50 plus \$102.30 for mileage, **Wagner charged an excessive fee in violation of SCR 20:1.5(a)**<sup>3</sup>.

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<sup>1</sup> SCR 20:1.15(b)(4) provides: "Except as provided in par. (4m), unearned fees and advanced payments of fees shall be held in trust until earned by the lawyer, and withdrawn pursuant to sub. (g). Funds advanced by a client or 3rd party for payment of costs shall be held in trust until the costs are incurred."

<sup>2</sup> SCR 20:1.5(b)(3) provides: "A lawyer shall promptly respond to a client's request for information concerning fees and expenses."

<sup>3</sup> SCR 20:1.5(a) provides: "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; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent."

**WHEREFORE**, the Office of Lawyer Regulation asks that Attorney Kathleen Anna Wagner be found in violation of the Supreme Court rules as alleged in Counts One through Three of the *Complaint*, that the Court suspend Attorney Wagner's Wisconsin law license for a period of sixty days, and for such other and further relief as may be just and equitable, including an award of costs.

Dated this 31 day of October 2014.

OFFICE OF LAWYER REGULATION



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