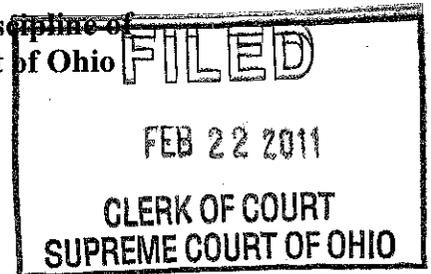


**BEFORE THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO**

ORIGINAL

In Re: :
Complaint against : **Case No. 10-074**
James Vivo : **Findings of Fact,**
Attorney Reg. No. 0071891 : **Conclusions of Law and**
: **Recommendation of the**
Respondent : **Board of Commissioners on**
: **Grievances and Discipline of**
Mahoning County Bar Association : **the Supreme Court of Ohio**
: **Relator** :
:

11-0299



This matter was referred to Master Commissioner Judge W. Scott Gwin on December 1, 2010 by the Secretary of the Board pursuant to Gov. Bar R. V(6)(F)(2) for ruling on Relator's motion for default judgment. Master Commissioner Gwin then proceeded to prepare a report pursuant to Gov. Bar R.V(6)(J).

PROCEDURAL HISTORY

Respondent James Vivo, Ohio Supreme Court Attorney Registration No. 0071891, was admitted to the practice of law in Ohio on May 22, 2000.

Linda Pregi, Executive Secretary, Mahoning County Bar Association, mailed a letter for Relator to Respondent on September 21, 2009. The letter explained that Esther Hayes had filed a grievance against Respondent. The letter explained that Respondent was required to submit a written statement setting forth his position with regard to the complaint within fifteen (15) days.

The letter also explained that his failure to respond could be deemed a failure to cooperate and might be considered an admission. Relator has never received a response.

Attorney Mary Ellen Brannigan was appointed as the investigator for the grievance filed by Esther Hayes. On October 21, 2009, Attorney Brannigan wrote a letter to Respondent. Brannigan asked Respondent to provide a complete copy of his file with regard to Esther Hayes. To date, Respondent has never replied.

Brannigan, again, on November 13, 2009, wrote to Respondent. In her letter, Brannigan reminded him that she was the investigator in this matter and indicated to Respondent that she had tried to contact him but that he failed to respond. She reminded him of his duty to cooperate under Gov. Bar R.V(4)(G). Brannigan also reminded Respondent that a failure to cooperate could result in sanctions and cited in her letter two decisions of the Supreme Court supporting her position. She asked for a response within fourteen (14) days. To date, no response has ever been received.

On December 8, 2009, Brannigan again wrote to Respondent. She explained that none of her prior correspondence was returned. However, since she had obtained a different address for Respondent, she was contacting him again. In her letter, she explained that she was assigned to investigate this matter and that she had attempted to contact him without success. Brannigan again explained the importance of producing a copy of the Hayes file and to respond as soon as possible. She provided Respondent with another copy of the grievance and asked him to respond by January 7, 2010. To date, Respondent has failed to reply.

On February 16, 2010, Brannigan attempted to contact Respondent via e-mail. She again explained the importance of a reply. She explained she had previously sent letters to his office

asking for a response. She noted that she had personally hand delivered her last letter to his office, which asked him to respond by January 7, 2010.

Brannigan explained that if she did not receive a response by February 17, 2010, she would have no choice but to recommend that this matter be forwarded to bar counsel, both as to the merits of the complaint as well as Respondent's failure to cooperate.

On February 18, 2010, Brannigan received an e-mail from Respondent claiming he had just received her e-mail of February 16, 2010. Vivo represented to her that he had been "under the weather." He acknowledged receipt of the prior correspondence and apologized for his failure to reply. He indicated that a response would be forwarded by the following Monday. To date, Respondent has never replied to any of Brannigan's inquiries other than the e-mail.

Prima facie documentary evidence in support of the allegations made regarding the misconduct of Respondent is set forth in the following:

- 1). Affidavit of Esther Hayes-Patiero;
- 2). Affidavit of Relator's Investigator Attorney Mary Ellen Brannigan;
- 3). October 21, 2009 letter from Respondent's Investigator to Respondent;
- 4). November 13, 2009 letter from Respondent's Investigator to Respondent;
- 5). December 8, 2009 letter from Respondent's Investigator to Respondent;
- 6). February 16, 2010 E-mail from Respondent's Investigator to Respondent;
- 7). Affidavit of Cherie H. Howard, attorney for the plaintiff Larry M. Wylie in *Larry M. Wylie v. Michael Hayes and Esther Hayes, Individually and d/b/a Star Motors*, Mahoning County Court of Common Pleas, Case No. 07CV1206;
- 8). Affidavit of Linda Pregi, Executive Secretary of the Mahoning County Bar Association;

- 9). September 21, 2009 letter from Linda Pregi to Respondent;
- 10). Affidavit of attorney Kathi McNabb Welsh, Chief Deputy Clerk of the Mahoning County Clerk of Court's Office;
- 11). Copy of complete file in *Larry M. Wylie v. Michael Hayes and Esther Hayes, Individually and d/b/a Star Motors*, Mahoning County Court of Common Pleas, Case No. 07CV1206;

FINDINGS OF FACT

Grievant Esther Hayes and her former husband, Michael Hayes owned an unincorporated used car lot, "Star Motors," in Struthers, Ohio. In January 2007, they sold a Chevy Blazer to Larry Wylie. Shortly after taking possession of the vehicle, Wylie found several problems with it. In February 2007, he had the vehicle towed to Star Motors and requested that Star Motors either repair the vehicle or return his money. This demand was refused.

On April 3, 2007, Larry M. Wylie filed a complaint in the Court of Common Pleas of Mahoning County against defendants Michael Hayes and Esther Hayes (individually and d/b/a "Star Motors"). The allegations arose out of the sale of the automobile by the defendants to Wylie. In his complaint, Wylie alleged violations of the Consumer Sales Practices Act, breach of warranty, breach of merchantability, material misrepresentation of facts and fraud. He sought compensatory damages, punitive damages, and attorney fees. The summons and complaint were issued on April 16, 2007, and were served upon the defendants by certified mail on April 18, 2007.

In late April or early May 2007, along with her former husband, Michael Hayes, the grievant, Esther Hayes, met with Respondent, retained him to represent the defendants in the Wylie matter, and paid him \$300.

On May 21, 2007, the plaintiff filed a motion for default judgment as the defendants had failed to answer or otherwise plead.

Esther Hayes, not understanding the motion for default that she received, placed a phone call to Respondent. Respondent did not return her call.

On May 29, 2007, the court granted judgment in favor of the plaintiff against the defendants, individually and d/b/a as Star Motors, jointly and severally, in the sum of \$4,945 to the plaintiff and \$1,260 to the Northeast Ohio Legal Services program as attorney fees for a total judgment of \$6,205. The Clerk on or about June 5, 2007 forwarded this entry to all parties.

On July 10, 2007, the court set a hearing on the motion for default for August 16, 2007 at 8:30 a.m. On August 16, 2007, the court, without a motion having been filed, vacated its judgment entry of May 29, 2007, and scheduled a status hearing for August 30, 2007.

On August 23, 2007, Respondent entered an appearance by filing a motion to continue the status hearing scheduled for August 30, 2007. Thereafter, the court continued the status hearing until September 14, 2007.

On August 28, 2007, plaintiff, Larry Wylie, filed a motion for a continuance due to the fact that his counsel would be unavailable. The status hearing was then rescheduled for October 17, 2007 at 10:00 a.m.

On August 30, 2007, grievant appeared at the court. Not finding anyone there, she returned to work. Upon returning to work, she placed a call to Respondent. Respondent never returned her calls.

Subsequently, Hayes left a number of messages with Respondent's office. Respondent never returned her calls.

A status conference apparently was held before Magistrate DeLaurentis. The defendants were not present for the status conference, however, Respondent appeared. According to counsel for the plaintiff, a settlement of the case was reached. The oral settlement agreement provided that the defendants would pay the total amount of \$2,260, plus costs to the plaintiff, which included a payment of \$1,260 to plaintiff's counsel, Northeast Ohio Legal Services.

On October 22, 2007, the court filed a judgment entry noting that the case had been settled and dismissed, with a formal judgment entry to follow.

On November 30, 2007, the plaintiff filed a motion to enforce the settlement agreement. In his motion, the plaintiff noted that he had filed a complaint against the defendants, that no answer or response had been filed to the complaint, nor had the defendants sought an extension of time. The plaintiff summarized the terms of the settlement allegedly reached at the October 17, 2007 status conference conducted by Magistrate DeLaurentis, and noted that the defendants' counsel had failed to provide the paperwork memorializing the agreement.

On December 5, 2007, the trial court considered the motion of the plaintiff to enforce the settlement agreement filed five days before. After considering the motion, and without a response having been filed by the defendants, the court granted judgment in favor of the plaintiff against the defendants in the amount of \$2,260. Costs were assessed to the defendants. This judgment entry was signed on November 29, 2007 and filed in the Clerk's office on December 5, 2007. (The Clerk was instructed to serve a copy of the entry on all parties within three (3) days per Civ. R. 5.) The judgment entry was not mailed to the parties until January 8, 2008, more than thirty (30) days after the judgment entry had been entered.

On January 9, 2008, the court set the matter for a status hearing on February 12, 2008. It is unclear from the docket whether the status hearing occurred.

On April 1, 2008, the plaintiff filed a motion for a debtor's examination. The court granted this motion and required the defendants to appear for an examination on May 30, 2008. The grievant appeared but Respondent was not present.

On September 2, 2009, the plaintiff filed a motion to hold a garnishment hearing. The plaintiff sought to garnish money, property, or credits from all checking, savings, certificate of deposits, or money market accounts in the name of the defendants held at Huntington Bank. Thereafter, the court scheduled a garnishment hearing for October 5, 2009. Huntington Bank filed its answer on October 7, 2009 indicating that it did not possess any funds responsive to the plaintiff's request.

Prior to the time plaintiff could garnish any assets of the grievant, she filed Chapter 7 bankruptcy. This bankruptcy was filed on February 15, 2010.

On September 16, 2009, Hayes filed a grievance alleging that the Respondent did not return her calls, did not appear in court with her, and that she had not been able to sell the Blazer, which had been "rotting" on the used car lot.

Thereafter, the Mahoning County Bar Association's certified grievance committee initiated an investigation into the facts and circumstances of the grievance.

In September, October, November and December 2009 the grievance committee or its investigator wrote letters to Respondent as set forth on pages 2 and 3 of this report.

On February 16, 2010, Brannigan again wrote to Respondent by email at this address: *jjvivoesq@aol.com*. Brannigan noted that she had written letters to Respondent on three occasions requesting a response to the grievance. In her last letter, which was personally delivered to Respondent's office, Respondent was notified that he had to respond to the grievance no later than February 17, 2010 at 4:00 p.m. as the grievance committee was scheduled to meet

to review the grievance. To date, Respondent has not provided the documents requested by the investigator nor has he provided a response to the grievance.

Through the investigator, the Mahoning County Bar Association was able to determine that Respondent did, in his representation of the Hayes, attend two meetings; negotiated a settlement on behalf of the Hayes; and was present for the debtor's examination. He did not file an answer on behalf of Hayes.

In addition, Respondent also settled the case without the authority of his clients and failed to return numerous calls made by the grievant.

CONCLUSIONS OF LAW

Relator contends that Respondent's conduct with regard to this matter violated the following provisions of the Rules of Professional Conduct:

Prof. Cond. R. 1.1 [Failure to provide competent representation of a client];

Prof. Cond. R. 1.3 [Requiring a lawyer to act with reasonable diligence and promptness in representing a client];

Prof. Cond. R. 1.4(a)(4) [A lawyer shall...comply as soon as practicable with reasonable requests for information from the client];

Prof. Cond. R. 1.4(a)(3) [A lawyer shall keep the client reasonably informed about the status of the matter];

Prof. Cond. R. 1.2 [Failure of a lawyer to abide by the client's decisions concerning the objects of representation];

Prof. Cond. R. 4.1 [In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person]; and

Gov. R. V(4)(G) [Duty to cooperate in a disciplinary investigation].

MITIGATING FACTORS

Respondent has no prior disciplinary record.

AGGRAVATING FACTORS

At least four of the nine aggravating factors set forth in BCGD Proc. Reg. 10(B)(1) are present here:

- (e) Lack of Cooperation in the Disciplinary Process;
- (g) Refusal to acknowledge the Wrongful Nature of Conduct;
- (h) Vulnerability of and Resulting Harm to Victims; and
- (i) Failure to make Restitution.

RECOMMENDED SANCTION OF RELATOR

Relator recommends that Respondent be suspended from the practice of law for two (2) years, with one (1) year stayed. Relator recommends that, after the expiration of the one (1) year actual suspension, Respondent be placed on probation for two (2) years, and be required to complete eight (8) hours of continuing legal education ("CLE") in law office management in addition to the usual CLE requirements.

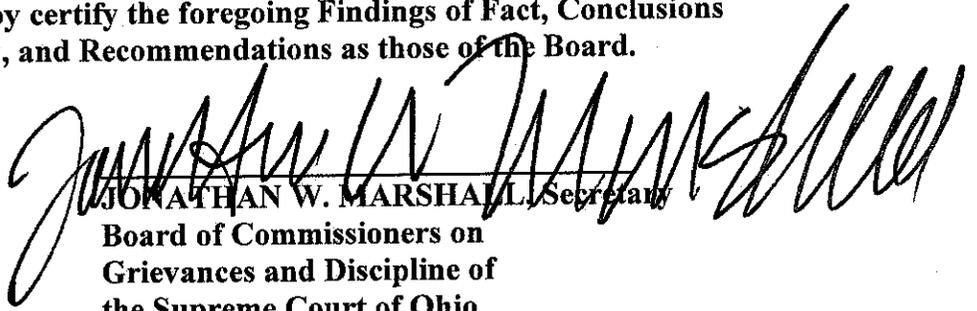
RECOMMENDATION OF MASTER COMMISSIONER

In light of the offenses resulting in actual prejudice to the clients and to the administration of justice, and Respondent's failure to cooperate with the disciplinary investigation, the Master Commissioner concurs in the recommendation of Relator and recommend a sanction of suspension from the practice of law for two (2) years, with one (1) year stayed. Further, after the of one (1) year suspension, Respondent be placed on probation for two (2) years, and be required to complete eight (8) hours of continuing legal education ("CLE") in law office management during the year of suspension in addition to the usual CLE requirements.

RECOMMENDATION

Pursuant to Gov. Bar Rule V(6)(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter February 11, 2011. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Master Commissioner and recommends that Respondent, James Vivo, be suspended from the practice of law in the State of Ohio for two years with one year stayed in favor of two years of probation and CLE conditions. The Board further recommends that the cost of these proceedings be taxed to Respondent in any disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.


JONATHAN W. MARSHALL, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio