

ORIGINAL

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

In Re:	:	11-1428
Complaint against	:	Case No. 09-012
Steven R. Malynn Attorney Reg. No. 0067339	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
<u>Respondent,</u> Medina County Bar Association		
<u>Relator.</u>		

FILED
AUG 19 2011
CLERK OF COURT
SUPREME COURT OF OHIO

INTRODUCTION

This matter was heard on June 6, 2011 at the Ohio Judicial Center in Columbus, Ohio. The hearing panel consisted of Commissioners Lynn B. Jacobs, Martha Butler Clark, and McKenzie Davis, chair. None of the panel members resides in the appellate district from which the complaint originated or served on the probable cause panel that certified the complaint.

Stephen Brown represented Respondent, Steven R. Malynn. Steve C. Bailey and Beau A. Schultz represented Relator, Medina County Bar Association.

BACKGROUND

On February 17, 2009, a complaint was filed against Respondent alleging the following violations of Disciplinary Rule and Rules of Professional Conduct:

- DR 9-102 –[preserve the identity of funds and property of clients];
- Prof. Cond. R. 1.15 –[hold property of clients or third person separate from the lawyer’s own property];

- Prof. Cond. R. 8.4(c) – [conduct involving dishonesty, fraud, deceit or misrepresentation]; and
- Gov. Bar R. V, Section 4(G) – [duty to cooperate].

On June 30, 2009, Relator filed a motion for default judgment, based on Respondent's failure to answer the complaint filed on February 17, 2009. Relator subsequently notified the Board of its intent to file an amended complaint and, on December 1, 2009, filed a first amended complaint alleging the following additional rule violations:

- Prof. Cond. R. 1.1 – [competent representation to a client];
- Prof. Cond. R. 1.3 – [act with reasonable diligence and promptness in representing a client];
- Prof. Cond. R. 1.4(a)(1) to (4) – [communication and consultation with the client]; and
- Gov. Bar R. V, Section 4(G) – [duty to cooperate].

In March, April, and September 2010, the Board secretary mailed correspondence to Relator indicating Respondent was in default and asking Relator to file a motion for default judgment.

On October 27, 2010, Stephen Brown filed an entry of appearance indicating his representation of Respondent and a motion for leave to respond.

On November 1, 2010, the secretary of the Board sent a letter to Relator indicating the notice of appearance filed by Respondent and that Relator may file another amended complaint.

On November 5, 2010, Relator filed a second amended complaint and certification adding new counts to the above referenced rule violations.

On November 9, 2010, Respondent filed an answer to the second amended complaint.

A hearing was set for March 28, 2011. However, at Relator's request, the hearing was postponed until June 6, 2010.

FINDINGS OF FACT

Respondent, Steven R. Malynn was admitted into the practice of law in Ohio on November 12, 1996. Respondent is subject to the Ohio Code of Professional Responsibility, Rules of Professional Conduct, and the Rules for the Government of the Bar of Ohio. Respondent worked for a number of large- to mid-sized firms upon graduation. In 2006, Respondent started his own firm, Malynn Law Firm, LLC, where he has been ever since.

Count One – Imburgia Matter

In 2005, while Respondent was working for another law firm, Anthony Imburgia hired Respondent to handle some business litigation. When Respondent left his previous firm to start his own firm, Respondent maintained the representation of Imburgia. Respondent executed a new client agreement with a \$5,000 retainer and requirements to provide monthly statement of account. Imburgia gave a \$5,000 check to Respondent. Respondent deposited the check into his office general operating account and not his IOLTA account. (June 6, 2011 Hearing Tr. p. 60, line 19.)

In March 2007, Imburgia became dissatisfied with Respondent's lack of communication and terminated the agreement. Imburgia requested an accounting of the retainer and a refund of unused fees. In April 2007, Imburgia's new counsel sent a letter to Respondent requesting an invoice of fees and the return of unused fees. On June 1, 2007, Respondent sent a check to Imburgia in the amount of \$345 and included an accounting of his time dated June 1, 2007. Respondent admits the accounting of his time in the matter was created after Imburgia requested the accounting of the time. Imburgia disputed the accounting of the fee and held the check until

September 5, 2007. Imburgia attempted to negotiate the check in September 2007, but the check bounced because of insufficient funds in Respondent's general operating account. Under cross-examination, Respondent attempted to justify the bounced check by indicating that he had changed banks. However, later, while still under cross-examination, Respondent admitted that the money was Imburgia's, it should have been deposited into an IOLTA account and thus there was no reason for it to have insufficient funds. (June 6, 2011 Hearing Tr. pp. 71-72.) Respondent deposited \$2,000 into the general operating account and issued a check in the amount of \$345 to Imburgia that was promptly negotiated.

Relator's investigator requested numerous documents relating to the IOLTA account, operating account, and other information regarding the Imburgia matter. Respondent failed to appear at a prior scheduled deposition. Respondent did attend and was deposed at a later date; however, he failed to provide the requested documentation. After six months, Respondent provided some of the requested documents.

In the complaint, Relator asserted violations of DR 9-102, Prof. Cond. R. 1.15, Prof. Cond. R. 8.4(c), and Gov. Bar R. V, Section 4(G). However, in the written closing argument, Relator submitted that the evidence supports a finding of a violation of a failure to hold property of clients that is in a lawyer's possession separate from the lawyer's own property. To be clear, Relator states in the written closing argument: "The Relator submits that the evidence supports a finding of the respondent's violation of Ohio Code of Professional Responsibility DR 9-102 (Preserving Identity of Funds and Property of a Client) which is now Prof. Cond. Rule 1.15 (Safekeeping of funds and property)." Given the retainer was obtained from Imburgia in March 2007, after Respondent started his own law firm, the Ohio Rules of Professional Conduct and not

the Ohio Code of Professional Responsibility must govern the misconduct. Thus, the panel will treat Relator's allegation of misconduct to be that of Prof. Cond. R. 1.15.

Relator did not provide sufficient evidence to find a violation of Prof. Cond. R. 8.4(c), and the panel recommends dismissal of this alleged violation. The panel will address separately Respondent's lack of cooperation.

The panel finds clear and convincing evidence to conclude Respondent violated Prof. Cond. R. 1.15. Respondent testified at the hearing that client funds were comingled with general office funds and inappropriately spent. (June 6, 2011 Hearing Tr. p. 60, lines 17-23.)

COUNT TWO – Rabb

On March 29, 2008, Traci Rabb retained Respondent to assist her in an employment discrimination matter. Rabb agreed to a \$3,000 retainer and a 30 percent contingency fee. Rabb issued Respondent a \$3,000 check. On April 15, 2008, Respondent filed a suit on behalf of Rabb in the Summit County Court of Common Pleas. After the initial filing, Respondent did very little in the matter. Respondent failed to comply with appropriate discovery request. On July 30, 2008, defendant in the matter filed a motion to compel. On September 5, 2008, the judge ordered Respondent to comply with the discovery request on or before September 30, 2008. On October 3, 2008, Respondent, having not complied with the judge's order, filed a motion to dismiss plaintiff's complaint with prejudice in an effort to maintain the ability to refile. However, on October 22, 2008, Respondent filed a Civ. R. 41 dismissal of his client's complaint without prejudice. Rabb admits knowledge of the dismissal with prejudice motion, but contends the Civ. R. 41 motion filing was done without her consent. Respondent asserts the Civ. R. 41 motion was filed after meeting with the Rabbs and that they were aware of it.

Relator submitted nine emails from Rabb to Respondent from June 9, 2008 to May 11, 2009. Most of the emails were requests for a status update on the matter. On November 7, 2008, after the Civ. R. 41 dismissal, Rabb emailed Respondent requesting a status update and whether the case would be going to mediation. On March 23, 2009, Rabb emailed Respondent about finalizing a time for his wife's deposition. On April 22, 2009, Rabb emailed Respondent requesting information about depositions, case management conferences, pretrials, or trial. On May 11, 2009, six months after the Civ. R. 41 dismissal, Rabb emailed Respondent indicating they learned from a search on the internet that the case had been dismissed and they had never authorized a Civ. R. 41 dismissal.

Respondent, when asked about the May 11, 2009 email, testified that he did not know whether he had received the email. In response to questioning about the March 23, 2009 email about firming up a time for the deposition of Rabb's wife, Respondent testified he was firming up dates to refile on the matter. In response to additional questions about the emails, Respondent's answers were vague and confusing.

Rabb filed a grievance with the Medina County Bar Association. Rabb also sued Respondent in small claims court for the amount of the retainer. Rabb obtained a default judgment against Respondent in the amount of \$3,000. It should be noted, that before the issue of the small claims case was presented to the panel, the panel chair asked Respondent whether he returned the retainer in the Rabb matter, to which Respondent simply stated yes and nothing else. (June 6, 2011 Hearing Tr. p. 166, line 13.) Only later, did Respondent concede that he returned the retainer based on a court order. (June 6, 2011 Hearing Tr. p. 167, lines 14-22.)

Relator asserted violations of Prof. Cond. R. 1.1, Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(1) to (4), Prof. Cond. R. 8.4(c), and Gov. Bar R. V, Section 4(G). Relator, in the written

closing argument, asserted additional violation of Prof. Cond. R. 1.16(d). The panel dismisses Prof. Cond. R. 1.16(d) for lack of clear and convincing evidence and because Relator did not charge the alleged violation in advance of the hearing. *Disciplinary Counsel v. Simecek* (1998), 83 Ohio St.3d 320. Relator further failed to establish a violation of Prof. Cond. R. 1.1, and the panel recommends dismissal of that alleged violation. The panel will address separately Respondent's lack of cooperation.

The panel finds clear and convincing evidence to conclude Respondent violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(1) to (4), and Prof. Cond. R. 8.4(c). Clearly there was a significant lack of appropriate communication between Respondent and Rabb. (Malynn Depo. Tr. p. 23 line 19-20). With regard to the issue of whether Rabb consented to the Civ. R. 41 dismissal, the panel concludes Respondent's answers were quite simply not believable. Furthermore, such misrepresentation to Relator and the panel regarding Respondent's eight-month charade in the Rabb matter, combined with the deceitful answer regarding the repayment of the retainer, meet the high standard necessary for a violation of Prof. Cond. R. 8.4(c).

COUNT THREE – Komm

In May 2009, Komm filed a grievance with the Medina County Bar Association. An investigator was assigned to review the matter. Respondent failed to answer letters from the investigator. Finally, the investigator was able to speak with Respondent by telephone. The investigator found no ethical violation after a long conversation with Respondent. Relator asserted the claim to underscore Respondent's failure to cooperate with the investigation. Relator submitted nine letters from the investigator. While the panel acknowledges Respondent's failure to respond to nine inquires by the investigator, we conclude that it would be inappropriate to find a rule violation of Gov. Bar R. V, Section 4(G) in this specific count when

Respondent spoke with the investigator and no rule violation was found. The panel recommends dismissal of the alleged violation of Gov. Bar R. V, Section 4(G) in this count. As stated above, the panel will address separately Respondent's lack of cooperation.

COUNT FOUR – Estes

Robert Estes and Estes Hauling Services had been a client of Respondent's for a period of time prior to any alleged violations. Respondent had handled a number of matters for Mr. Estes and the associated company. Relator alleged rule violations from two separate matters. However, Respondent's testimony regarding his representation of Estes is ambiguous at best.

In the first matter, Relator contends that Respondent represented Mr. Estes as a plaintiff in a breach of contract matter. After the defendant in the matter filed an answer, the defendant filed for bankruptcy. Respondent told Mr. Estes he would "file fraud charges" against the defendant in the bankruptcy court. However, nothing was ever filed in an effort to protect Mr. Estes' interest in the bankruptcy court or any other venue. Respondent contended Mr. Estes was told an "objection to discharge on the grounds of fraud" would be filed. Respondent admitted that such an objection could not be filed and also admitted he failed to inform Mr. Estes that he could not file such an objection and thus did not.

In the second matter, Relator alleged that Respondent was counsel for Estes Hauling Service in a matter where the business was named as a defendant. Respondent never filed an answer on behalf of Estes Hauling in the matter. Consequently, a default motion was filed and granted. A judgment of \$31,000 was taken against Estes Hauling Services. Relator alleged that Mr. Estes attempted to contact Respondent numerous times, but calls were never returned. Relator alleged Mr. Estes requested an accounting of time, bills, and his file back. Respondent failed to provide any of the requested information.

Respondent, on the other hand, asserted he articulated to Mr. Estes that there was no defense in the matter and Estes should attempt to set up a payment schedule. According to Respondent, Mr. Estes wanted Respondent to contact the "principal" and figure this out. Respondent contacted the "principal's" counsel, and they would not agree upon a solution. Shortly after that, Respondent admitted he stopped communicating with Mr. Estes because of his mental health condition. (June 6, 2011 Hearing Tr. p. 126, line 22). Both Relator and Respondent agreed no response was ever filed in the matter. Respondent denied that Mr. Estes ever requested an accounting of his time and the file back. In fact, in the written closing argument, Respondent stated, "The remaining files are available for client's pick up at any time."

Relator asserted violations of Prof. Cond. R. 1.1, Prof. Cond. R. 1.3, and Gov. Bar R. V, Section 4(G). However, Relator, in the written closing argument, asserted additional violations of Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), Prof. Cond. R. 1.16, and Prof. Cond. R. 8.4(c). The panel recommends dismissal of the alleged violations of Prof. Cond. R. 1.4(a)(3), Prof. Cond. R. 1.4(a)(4), Prof. Cond. R. 1.16, and Prof. Cond. R. 8.4(c) as they were not charged in this count in advance of the proceeding. *Simecek*, supra. Relator did not provide evidence sufficient to support a finding of a violation of Prof. Cond. R. 1.1, and the panel recommends dismissal of that alleged violation. The panel will address separately Respondent's lack of cooperation. The panel, however, finds clear and convincing evidence of a violation of Prof. Cond. R. 1.3.

In the first matter, Respondent admitted that he told Mr. Estes that he would file an objection to discharge and did not file the objection. Additionally, Respondent admits he never told Mr. Estes that he would not be filing. Therefore, the matter went unresolved without any communication with the client. Such inaction justifies a finding of a violation of Prof. Cond. R.

1.3. The violation of Prof. Cond. R. 1.3 is only heightened by Respondent's inaction in the second matter. Regardless of what version is accurate, it is undisputed that Respondent allowed a lawsuit to conclude with a default motion because of inaction in the matter. The fact that Respondent believed Mr. Estes did not have any defense does not dictate that a default motion is the only course of action. In addition, Mr. Estes admits he stopped communicating with Mr. Estes prior to the filing of the default motion because of his mental health condition. (June 6, 2011 Hearing Tr. p. 126, lines 20-23 and p. 127, lines 9-12.) Also present was additional conflicting or unclear testimony regarding payment or shared payment that was difficult to decipher, which, in the panel's view, underscores Respondent's mishandling of these matters.

Respondent's inability to provide Mr. Estes the file in both matters up to the date of Respondent's written closing argument would have justified a Prof. Cond. R. 1.16 violation. Whether Respondent believed at the time of the complaint that Mr. Estes did in fact request the file or not, Respondent is certainly aware of the request by now. The panel is not permitted to consider the Prof. Cond. R. 1.16 violation (*Simecek*, supra), but will consider the behavior in aggravation.

COUNT FIVE – Constantino

In May 2008, Lisa Constantino retained Respondent in a lawsuit against her financial broker for "churning" her mutual funds in order to create a commission for the broker. Constantino paid Respondent a \$3,000 retainer. Constantino later sent Respondent a check for \$1,425 for the FINRA (a quasi-governmental, quasi-private agency that manages and regulates the securities industry) filing fee. Constantino had to provide Respondent with three separate checks of \$1,425 because he either lost the check or was not able to get the check to FINRA (\$1,425 was made out to FINRA and thus never allegedly converted by Respondent). There is

conflicting testimony regarding what Respondent told Constantino the statute of limitations was in the matter. However, it is undisputed that Respondent failed to handle the matter in a timely manner. (June 6, 2011 Hearing Tr. p. 130, line 22-24).

In June 2010, Constantino sought other counsel in the matter, who indicated the FINRA statute had run. Respondent contends other legal solutions remained. Constantino, after learning the statute had run from other counsel, requested her file in order to pursue her claim with the new counsel. Respondent indicated he would put it together and get it to her in one week. At the end of the week, Constantino went to Respondent's office to retrieve the file. Respondent instructed his secretary to inform Constantino that he was not in the building. Constantino announced that she could hear his conversation and that she would not leave until he gave her the file. Respondent allowed Constantino to sit in the lobby for more than three hours before he turned over the files. Additionally, Respondent reimbursed Constantino's retainer out of his general firm operating account and reimbursed her the cost for the fee to cancel the FINRA check out of his personal account. Respondent initially indicated the retainer was refunded from his IOLTA account and only acknowledged the check was issued out of his general operating account under cross-examination. (*Cf.* June 6, 2011 Hearing Tr. p. 164 and p. 168-170.) Also under cross-examination, Respondent acknowledged his malpractice insurance had lapsed during his representation and did not inform Constantino. (June 6, 2011 Hearing Tr. p. 133, line 4-11).

Constantino testified at the hearing and is currently pursuing a malpractice claim against Respondent.

Relator asserted violations of Prof. Cond. R. 1.1, Prof. Cond. R. 1.3, and Gov. Bar R. V, Section 4(G) in the complaint. Relator asserted the additional violations of Prof. Cond. R. 1.4(c),

Prof. Cond. R. 1.15, Prof. Cond. R. 1.16(d), and Prof. Cond. R. 8.1(a) in the written closing argument.

The panel concludes the alleged violations of Prof. Cond. R. 1.4(c), Prof. Cond. R. 1.15, Prof. Cond. R. 1.16(d), Prof. Cond. R. 8.1(a), and Gov. Bar R. V, Section 4(G) were not charged in advance and recommends dismissal. *Simecek*, supra.¹ As stated previously, the panel will address separately Respondent's lack of cooperation. The panel will again treat Relator's failure to assert the allegation of Prof. Cond. R. 1.1 violation in the written closing arguments as an admission of insufficient evidence. The panel finds clear and convincing evidence to conclude that Respondent violated Prof. Cond. R. 1.3. Respondent's misplacing of checks for the FINRA filing fee, neglect resulting in actual loss to the client because of the statute of limitations running in one cause of action, apparent mishandling of retainer into the IOLTA account, and clear failure to communicate with Constantino justify a finding of Prof. Cond. R. 1.3 violation.

FAILURE TO COOPERATE

Relator asserts five separate allegations of Gov. Bar R. V, Section 4(G) violations. Rather than discuss each alleged violation in each count, the panel consolidates them into one allegation. Although Respondent cooperated in the investigation at a later point, Relator asserted a struggle to obtain the appropriate information and documents from Respondent in connection. The mere fact that Respondent's unwillingness to respond to the charges presented against him led the secretary of the Board to send letters to Relator requesting a default motion justifies a finding, by clear and convincing evidence, of a Gov. Bar R. V, Section 4(G) violation.

¹ Given Respondent's own admission at the hearing, there is clear and convincing evidence to support a finding that Respondent violated Prof. Cond. R. 1.4(c). However, *Simecek*, supra, precludes the panel from finding this violation because it was not charged in advance.

AGGRAVATION AND MITIGATION

The guidelines governing mitigation and aggravation in attorney disciplinary cases are found in BCGD Proc. Reg. 10(B)(1) and (2).

MITIGATION

Respondent submitted the following factors in mitigation at various points during the hearing [BCGD Proc. Reg. 10(B)(2)(a), (e), and (g)], and the panel finds the record supports a finding as to the first two factors.

Absence of a prior disciplinary record. Respondent has not been disciplined previously.

Character and reputation. Respondent submitted information regarding his military service. Respondent served in the United State Marine Corps for twenty-three years, including time in a combat zone in Somalia. Respondent retired as a lieutenant colonel with distinction.

Mental disability. Respondent asserts much of the alleged misconduct was a result of suffering from panic disorders. Respondent contends that panic disorders kept him from adequately representing his clients and allowing him to participate in the disciplinary process. In Count One (Imburgia), Two (Rabb), and Three (Komm), Respondent states panic disorders kept him from participating in the investigation. In Count Four (Estes), Respondent asserts panic disorder prevented communications with Mr. Estes. In fact, Respondent finally broke down and told Mr. Estes, "I'm not capable of doing your work, Bob. I'm falling apart." Respondent suggest any rule violation relating to Count Four should be viewed in light of the panic disorder. In Count Five (Constantino), Respondent contends panic disorder prevented him from executing the FINRA filing and thus the running of the statute of limitations. Similar to Count Four, Respondent suggests any rule violation in Count Five be viewed in light of the mental illness.

Respondent, however, was not able to meet all the criteria set forth in BCGD Proc. Reg. 10(B)(2)(g), in order for the Board to consider recommending a less severe sanction. Specifically, Respondent did not demonstrate “a determination that the mental disability contributed to the cause of misconduct” [BCGD Proc. Reg. 10(B)(2)(g)(ii)] and “a sustained period of successful treatment and a prognosis from a qualified health care professional that the attorney will be able to return to the competent, ethical professional practice under specific conditions.” [BCGD Proc. Reg. 10(B)(2)(g)(iii) and (iv)].

Respondent submitted a letter from his treating psychologist. (Letter of May 24, 2011 from Dr. Paul Monkowski, Respondent’s Exhibit 2.) The letter stated the dates of treatment, diagnosis, medication prescribed, and treatment goals. Additionally, the letter stated that Respondent “gives no evidence of any thought disorder that would interfere with his professional judgment” and “prognosis of his depression and anxiety is good.” The panel concludes the letter does not provide enough information to meet the criteria required under BCGD Proc. Reg. 10.

In addition to the letter, Stephanie Krznarich testified at the hearing. Ms. Krznarich testified that Respondent was in partial compliance with the OLAP contract and that Respondent had failed to contact representatives from OLAP for a period of five to six weeks. Respondent’s failure to meet those OLAP obligations caused Ms. Krznarich “great concern.” (June 6, 2011 Hearing Tr. p. 180, line 13.) It should also be noted that the panel chair provided Respondent’s counsel a copy of Section 10 of the Board’s Rules and Regulations during the hearing to ensure Respondent was fully aware of the requisite criteria for mental disability mitigation.

AGGRAVATION

The panel found the four aggravating factors that should be considered in recommending a more severe sanction [BCGC Proc. Reg. 10(B)(1)(d), (e), (f), and (h)].

Multiple offenses. Relator met the burden of finding rule violations in five separate counts. The violations were all of similar nature.

Lack of cooperation in the disciplinary process. The panel found a violation of Gov. Bar R. V, Section 4(G). Respondent narrowly avoided a default motion.

Submission of false evidence, false statements, or other deceptive practices during the disciplinary process. Clearly, Respondent was attempting to deceive the panel when he indicated that he had returned the retainer in Rabb and did not state it was based on the court order. Similarly, Respondent testified inaccurately regarding what IOLTA account deposits and payments made from the general operating accounts in both Imburgia and Rabb. Although the panel was not persuaded that the statements met the necessary standard of a rule violation, we conclude it is appropriate to consider them in aggravation. In addition, the panel did not feel Respondent was forthright, and he continually attempted to elude the truth during his testimony.

Vulnerability of and resulting harm to victims of the misconduct. Respondent's inactivity on client matters prevented clients from legal opportunities and resulted in default judgments. In Count Two (Rabb), Respondent's filing of Civ. R. 41 motion without their consent prevented them from moving forward with their claim (irrespective of the validity). The Rabbs were also forced to seek a small claims matter against Respondent. In Count Four (Estes), Respondent's inaction resulted in a \$31,000 default judgment against Estes. In Count Five (Constantino), Respondent's inaction prevented Constantino from pursuing her FINRA claim.

RECOMMENDED SANCTION

Respondent recommends a six-month suspension all stayed with conditions, although conditions were not stated. Relator recommends a two-year suspension with the last year stayed

on conditions that Respondent continue treatment, be monitored, and be permitted to practice only after satisfactory diagnosis by a qualified professional.

Respondent cited *Disciplinary Counsel v. Brueggeman*, 128 Ohio St.3d 206, 2010-Ohio-6149, as justification for a six months stayed sanction. In *Brueggeman*, the Supreme Court held a one-year suspension, all stayed was warranted for violations of engaging in conduct that adversely reflects on the fitness to practice law, failing to act with reasonable diligence and promptness, failing to keep client reasonably informed about the status of the case, and failing to respond to client's request for information.

Much of the Court's conclusion in *Brueggeman* was based on mitigating evidence weighed against the rule violations. *Brueggeman* was able to meet all of the necessary criteria in BCGD Proc. Reg. 10 of chemical dependency or mental disability. In fact, the Court cites Ms. Krznarich's testimony that *Brueggeman* "made unusually strong progress and that his prognosis is good." In addition to Ms. Krznarich's testimony, the Court cites *Brueggeman*'s therapist stating a causal connection and his opinion that *Brueggeman* will be able to return to the competent, ethical, and professional practice of law.

The panel finds Respondent's reliance on *Brueggeman* puzzling at best. Although there are fewer rule violations here than in *Brueggeman*, the lack of mitigating evidence in the case before us offers a clear distinction in the two matters. Respondent's failure to recognize the significant difference in Ms. Krznarich's testimony here and her testimony in *Brueggeman* and the Court's justifiable reliance on it is, again, puzzling. The panel is not persuaded by Respondent's argument.

Relator, on the other hand, relied on *Erie-Huron Counties Joint Certified Grievance Comt. v. Miles*, (1996), 76 Ohio St.3d 574, (failure to segregate funds warrants one year

suspension), *Cincinnati Bar Assn. v. Baas* (1997), 79 Ohio St.3d 293, (neglecting an entrusted legal matter, failure to cooperate in the ensuing investigation, and failure to deposit to an identifiable account or account for same warrant two year suspension with eighteen months stayed), and *Stark Cty. Bar Assn. v. Marosan*, 106 Ohio St.3d 430, 2005-Ohio-5412 (failure to account for unearned fees, neglecting entrusted legal matter, refusal to return unearned fee, and failure to cooperate in the ensuing disciplinary investigation warrant two-year suspension with eighteen months stayed) as justification for a recommended sanction of two years, with one year stayed. Relator acknowledges some different rule violations but suggests the irreparable harm caused in Counts Two, Four and Five should justify a more severe sanction.

The panel, however, views the Court's decision in *Akron Bar Assn. v. Dismuke*, 128 Ohio St.3d 408, 2011-Ohio-1444 as more appropriate guidance. In *Dismuke*, the attorney violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4, Prof. Cond. R. 1.15, Gov. Bar R. V, Section 4(G), and Gov. Bar R. VI, Section 1(D). The Court held, based on the panel and Board's recommendation, that a suspension of two years with one year stayed was appropriate. The Court noted the attorney's mental health condition did meet the necessary criteria for mitigation.

Similar to *Dismuke*, Respondent in the present matter violated Prof. Cond. R. 1.3 (three separate counts), Prof. Cond. R. 1.4, Prof. Cond. R. 1.15, and Gov. Bar R. V, Section 4(G). The attorney in *Dismuke* also violated Gov. Bar R. VI, Section 1(D) and had a prior suspension for failing to register. While those factors are not present here, Respondent violated multiple counts of Prof. Cond. R. 1.3. In addition, Respondent also violated Prof. Cond. R. 8.4(c). The panel believes the Prof. Cond. R. 8.4(c) finding heightens the level of misconduct enough to distinguish the sanction applied in *Dismuke*. The Court's holding in *Dismuke* provided appropriate guidance in the underlying counts and how to treat the suggested mitigation without

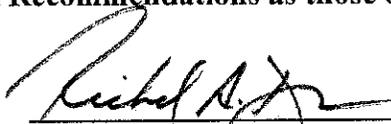
the necessary criteria, but the additional aggravating factors and Respondent's violation of Prof. Cond. R. 8.4(c) dictate a more severe sanction.

Therefore, the panel concludes a sanction of a two-year suspension from the practice of law with six months stayed is appropriate.

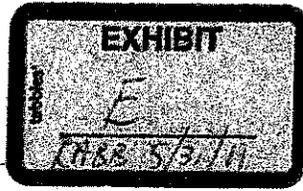
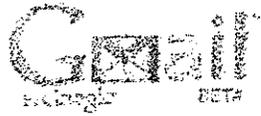
BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6(L), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on August 12, 2011. The Board adopted the Findings of Fact, Conclusions of Law and Recommendation of the Panel and recommends that Respondent, Steven R. Malynn, be suspended for two years, with six months stayed in the State of Ohio. 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.



**RICHARD A. DOVE, Secretary
Board of Commissioners on
Grievances and Discipline of
the Supreme Court of Ohio**



Joshua Rabb <joshuajrabb@gmail.com>

Status Check

Joshua Rabb <joshuajrabb@gmail.com>

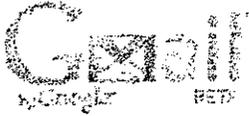
Mon, Jun 9, 2008 at 3:03 PM

To: Malynn <malynn6@zoominternet.net>

Hi Steven,

We haven't heard from you in a bit, so I wanted to reach out to you and see if there's been any developments or any news. Let me know.

-Joshua Rabb



Joshua Rabb <joshuajrabb@gmail.com>

Status Check - Rabb

Joshua Rabb <joshuajrabb@gmail.com>
To: Malynn <malynn6@zoominternet.net>
Cc: Traci Rabb <tracirabb@gmail.com>

Thu, Sep 4, 2008 at 8:37 AM

Hi Steve,

I haven't heard anything from you in a while. Would you give me status update?

-Josh Rabb

Gmail - Still waiting to hear a status update.

Attachment "F" Page 1 of 1



Joshua Rabb <joshuajrabb@gmail.com>

Still waiting to hear a status update.

Joshua Rabb <joshuajrabb@gmail.com>
To: Malynn <malynn6@zoominternet.net>

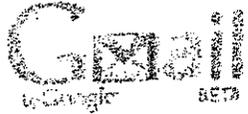
Wed, Sep 10, 2008 at 8:02 AM

Steven,

I haven't heard back from you, and I'm growing concerned. I'm hoping we can improve our communication in this process from here on out. Neither Traci, nor I have heard from you in over a month, perhaps two. Please reply with the status of our case.

Best regards,

-Josh Rabb



Joshua Rabb <joshuajrabb@gmail.com>

Status Check

Joshua Rabb <joshuajrabb@gmail.com>
To: Malynn <malynn6@zoominternet.net>

Fri, Nov 7, 2008 at 11:30 AM

Hi Steven,

I wanted to check in for a status update. When we last spoke I recall you said the case would be going into mediation. Just want to see if this is still the case and when that was set for. Let me know. Thanks.

- Josh Rabb

Gmail - 6:30 at Barnes & Noble in Montrose

Attachment "H" Page 1 of 1



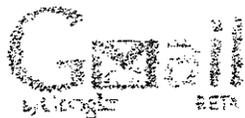
Joshua Rabb <joshuajrabb@gmail.com>

6:30 at Barnes & Noble in Montrose

Joshua Rabb <joshuajrabb@gmail.com>
To: Steve Malynn <malyynn6@zoominternet.net>

Mon, Dec 15, 2008 at 4:59 PM

Just wanted to confirm.



Joshua Rabb <joshuajrabb@gmail.com>

Follow up on deposition dates

Joshua Rabb <joshuajrabb@gmail.com>
To: Steve Malynn <malynn6@zoominternet.net>
Cc: Traci Rabb <tracirabb@gmail.com>

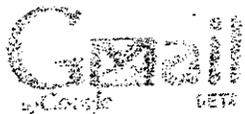
Mon, Mar 23, 2009 at 2:38 PM

Hi Steven,

I just wanted to follow up and see if we had firmed up a time for Traci's deposition. Let us know. Hope all is well with you and yours.

Regards,

Josh Rabb



Joshua Rabb <joshuajrabb@gmail.com>

Another Status Check...

Joshua Rabb <joshuajrabb@gmail.com>
To: Steve Malynn <malynn6@zoominternet.net>
Cc: Traci Rabb <tracirabb@gmail.com>

Wed, Apr 22, 2009 at 4:50 PM

Steve,

I'm growing concerned regarding my last couple emails, to which I've received no reply. While I understand that the legal process doesn't happen overnight, but we've heard no word as to any depositions, case managements conferences, pretrials, or trials. Please let us know where things are at on this case. Thank you in advance.

Regards,

Joshua Rabb

Gmail - Trying to follow up again...

Attachment "K" Page 1 of 1



Joshua Rabb <joshuajrabb@gmail.com>

Trying to follow up again...

Mon, May 11, 2009 at 8:19 AM

Joshua Rabb <joshuajrabb@gmail.com>
To: Steve Malynn <malynn6@zoominternet.net>
Cc: Traci Rabb <tracirabb@gmail.com>

Steve,

My past several emails have not been responded to. Traci and I have no way of knowing what is going on with this case or if this is even being worked on. Please let us know if you are willing and/or able to handle this matter.

Regards,

Joshua Rabb



Joshua Rabb <joshuajrabb@gmail.com>

CV-2008-04-3034

Joshua Rabb <joshuajrabb@gmail.com>
To: Steve Malynn <malynn6@zoominternet.net>
Cc: Traci Rabb <tracirabb@gmail.com>

Mon, May 11, 2009 at 10:34 AM

Steve,

I have just found access online to Summit County's Clerk of Courts website. It has just come to my attention that this case has been dismissed since October of last year. It's my further understanding that you never responded to any of the Defendant's discovery, even after being ordered by the court. I see that you voluntarily dismissed the case and mediation was subsequently canceled. Neither Traci, nor I ever authorized you to dismiss this case or were even consulted for that matter. Likewise, you never made us aware of your failure to respond to the Defendant's discovery. Also, when we retained your services, nor at any point did you make us aware that you may not be able to perform your duties. Furthermore, why would you ask us what date was good for a deposition in March, when the case had been dismissed for 5 months? If I am misunderstanding the court docket on this, I expect to be contacted today. If I am understanding the docket correctly, I likewise expect to be contacted today.

Regards,

Joshua Rabb

ATTACHMENT NOT SCANNED