

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

11-0299

In Re:	:	SCO Case No. 2011-0299
Complaint against	:	Case No. 10-074
James Vivo Attorney Reg. No. 0071891	:	Findings of Fact, Conclusions of Law and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Mahoning County Bar Association	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on November 7, 2011 at the Cleveland Metropolitan Bar Association. The hearing panel consisted of Sanford Watson, John Siegenthaler, and McKenzie Davis, chair. None of the panel members reside in the appellate district from which the complaint originated or served on the probable cause panel that certified the grievance.

{¶2} John Juhasz and Lynn Maro represented Respondent. David Comstock and Ronald Slipski represented Relator.

{¶3} Based on consideration of the evidence presented by the parties following a remand from the Supreme Court, the hearing panel recommends that Respondent be suspended from the practice of law for one year with the suspension stayed in its entirety on the condition set forth below.

FILED
APR 18 2012
CLERK OF COURT SUPREME COURT OF OHIO

## BACKGROUND

{¶4} On August 16, 2010, Relator filed a complaint against Respondent alleging the following violations: Prof. Cond. R. 1.1 [competence]; Prof. Cond. R. 1.2 [failure of a lawyer to abide by the client's decisions concerning the objects of representation]; Prof. Cond. R. 1.3 [diligence]; Prof. Cond. R. 1.4 [failure to comply as soon as reasonably practicable with reasonable requests for information from the client and failure to keep the client reasonably informed about the status of the matter]; Prof. Cond. R. 4.1 [a lawyer shall not knowingly make false statements of material fact to a third person]; and Gov. Bar R. V, Section 4(G) [failure to cooperate with the grievance committee in its investigation].

{¶5} On November 28, 2010, after numerous unsuccessful attempts to obtain pertinent information from Respondent, Relator filed a motion for default judgment and memorandum in support.

{¶6} On February 22, 2011, the Board's report and recommendation were certified to the Supreme Court of Ohio. The Board recommended that Respondent be suspended from the practice of law for two years, with one year stayed on the conditions that Respondent be placed on probation for two years and be required to complete eight hours of continuing legal education related to law office management.

{¶7} On March 4, 2011, the Supreme Court of Ohio issued an order to show cause.

{¶8} On March 24, 2011, Respondent filed Respondent's objection to the Board's report and recommendation.

{¶9} On April 8, 2011, Relator filed answer brief requesting the Court remand the matter for a full hearing.

{¶10} On April 12, 2011, the Supreme Court of Ohio remanded the matter to the Board “for consideration of whether respondent, James Vivo, suffers from a medical condition that disabled him from responding to the allegations made against him before the Board of Commissioners on Grievances and Discipline and for further action that the board deems necessary and appropriate.”

{¶11} On August 19, 2011, Relator filed a motion for leave to file an amended complaint and memorandum in support. Relator further alleged the following violations: DR 6-101(A)(1) [competency]; DR 6-101(A)(2) [handle a legal matter without preparation adequate in the circumstances]; DR 6-101(A)(3) [neglect]; DR 7-101(A)(1) [failing to seek the lawful objectives of his client through reasonably available means permitted by law and the law disciplinary rules]; DR 7-101(A)(2) [failing to carry out a contract of employment entered into with a client for professional services]; DR 7-101(A)(3) [prejudice or damages client during the course of the professional relationship]; DR 1-101(A)(4) [conduct involving dishonesty, fraud, deceit, or misrepresentation]; and DR 1-102(A)(6) [conduct that adversely reflects on the lawyer’s fitness to practice law].

{¶12} On August 29, 2011, in an effort to provide additional guidance to the parties on how the hearing would proceed, given the Supreme Court’s order on the motion to remand and the additional counts brought forth in the amended complaint, the chair issued an entry.

{¶13} On September 19, 2011, Respondent filed Respondent’s motion to deny leave to file amended complaint. Specifically, Respondent contested the inclusion of the additional counts for not having been reviewed and passed upon by a probable cause panel of the Board and not having been given to Respondent for an opportunity to answer. On September 30, 2011,

Respondent's Motion was overruled on the basis of Board Advisory Op. No. 90-18, and Relator's motion for leave to file the amended complaint was granted.

{¶14} On November 3, 2011, the parties filed joint stipulations including a recommended sanction. The November 7, 2011 hearing was held to consider Respondent's mitigating evidence.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

{¶15} Respondent, James Vivo, was admitted to the practice of law in the State of Ohio on May 22, 2000. Respondent was subject to the Ohio Code of Professional Responsibility and is subject to the Ohio Rules of Professional Conduct and the Supreme Court Rules for the Government of the Bar of Ohio.

{¶16} At the outset of the hearing, Relator admitted that had Respondent met with and complied with the investigator's request, Relator doubts they would have filed the complaint. As stated above, the parties entered into agreed stipulations as to the finding of facts, conclusions of law, and recommended sanction. Below are the agreed facts based upon stipulations:

#### **Counts One – Five—Hayes Matter**

{¶17} Esther and Michael Hayes (now divorced) engaged Respondent to assist them with a lawsuit filed against the car lot they owned (Star Motors). Respondent was retained shortly after the suit was filed on April 16, 2007. The plaintiff in the matter filed a motion for default as the defendant (Star Motors) had not filed an answer to the complaint. The court granted judgment in favor of the plaintiff on May 29, 2007 and an entry was forwarded to all parties. A hearing on the motion for default was held on August 16, 2007, in which the court vacated the judgment entry.

{¶18} A status hearing in the matter was set for August 30, 2007. After a number of continuances were issued, a hearing was held without Respondent's attendance on October 17, 2007.

{¶19} However, Michael Hayes gave certain authority to settle the matter. Negotiations to settle the matter occurred and on October 22, 2007, the court filed a judgment entry noting that the matter had been settled and dismissed with a formal judgment to follow.

{¶20} On December 5, 2007, the court considered the motion of the plaintiff to enforce the settlement agreement and granted judgment on the settlement in favor of the plaintiff against the defendants in the amount of \$2,260. However, the judgment entry was not mailed to the parties until January 8, 2008, more than thirty days after the judgment entry had been entered.

{¶21} On April 1, 2008, the plaintiff filed a motion for a debtor's examination. The court granted the motion and requested the defendant appear for an examination on May 30, 2008. The record is unclear how the matter was concluded after debtor's examination, except that Esther Hayes was discharged of any judgment as to her through a Chapter 7 bankruptcy filed on February 15, 2010.

{¶22} Esther Hayes filed a grievance alleging Respondent did not return her calls and did not appear in court with her.

{¶23} Based on the grievance filed and Respondent's failure to cooperate in the investigation, Relator alleged violations of Prof. Cond. R. 1.1, Prof. Cond. R. 1.2, Prof. Cond. R. 1.3, Prof. Cond. R. 1.4, and Prof. Cond. R. 4.1.

{¶24} However, after the submission of the Board's initial report and the Supreme Court's remand order, Respondent began to cooperate in the investigation. Through Respondent's cooperation, Relator was able to obtain sworn testimony of Michael Hayes. Mr.

Hayes testified that Respondent regularly communicated with him and that he gave Respondent authority to settle the matter. Based on the sworn testimony of Michael Hayes, Relator and Respondent agreed that there is not clear and convincing evidence of violations of the rule violations listed in the preceding paragraph and did not present evidence regarding these alleged violations. Thus, the parties jointly stipulate to dismiss the alleged violations in Counts 1-5 of the amended complaint. No evidence was presented on any of these alleged violations either. The panel finds these alleged violations are not supported by clear and convincing evidence and dismisses the same.

#### **Count Six—Failure to Cooperate**

{¶25} The failure to cooperate allegation is limited to the Hayes matter as the allegations related to the Jupp matter were first presented as part of the amended complaint after the Court remanded this case to the Board. Additionally, the failure to cooperate was the focus of the Supreme Court order remanding the matter. As stated above, the original purpose of the remand was to determine whether there was a mental health condition present that would have prevented Respondent from responding to the allegations.

{¶26} Although the parties agree a mental health condition was present and that did in fact prevent Respondent from engaging in the disciplinary process, the parties disagree whether the mental health condition should be treated as mitigation or as a defense to the allegation.

{¶27} The panel does not believe the mental health condition should serve as a defense to the failure to cooperate. Respondent should not be treated differently than an attorney who begins cooperating late in an investigation or prosecution, but before the matter is considered by the Board. In the latter circumstance, the Board considers the mental health condition in mitigation pursuant to BCGD Proc. Reg. 10(B)(2)(g). Respondent in this matter should not

benefit from an even longer delay in cooperating with regard to a determination of whether he violated Gov. Bar R. V, Section 4(G).

{¶28} Relator cited *Butler Cty. Bar Assn. v. Minamyers*, 129 Ohio St.3d 344, 2011-Ohio-3642 to demonstrate a mental health condition as mitigation. In *Minamyers*, the Court remanded the matter to consider evidence regarding Respondent's health condition. Although the Court's remand order in that case does not specifically address whether Minamyers's mental health should be considered a defense or mitigation evidence, we agree with Relator that upon remand the Board treated the mental health condition as mitigation, and the Court adopted the board's report. Additionally, the Court in both its majority and concurring opinions had an opportunity to distinguish the mental health condition as a defense, and it did not do so. The logical conclusion must be that the Court intends mental health to be considered as mitigation and not as a defense.

{¶29} Accordingly, the panel finds that Respondent's mental health condition did not prevent him from responding to the misconduct allegations and should not be a defense to those allegations or a charge of failure to cooperate. However, the panel will consider and address the impact of Respondent's mental health condition in mitigation.

{¶30} The mere fact that Respondent failed to cooperate with the investigation to the extent that a motion for default judgment was filed and assigned to a master commissioner, and the Board filed a report with the Court, constitutes sufficient evidence to demonstrate Respondent violated Gov. Bar R. V, Section 4(G). The panel finds by clear and convincing evidence that Respondent violated Gov. Bar R. V, Section 4(G).

### Counts Seven – Fourteen—Jupp Complaint

{¶31} Cathy Jupp hired Respondent in May of 2002, to assist her in a medical malpractice matter arising from an accident in August of 2000. In reviewing the matter, Respondent determined which doctors should and should not be pursued in litigation and sent letters to them placing them on notice in August of 2002. In January of 2003, Respondent filed suit against the physicians. The defense filed an answer and filed affirmative defenses. Shortly after, the defense filed a motion for summary judgment. Respondent did not inform Jupp of the motion for summary judgment. Respondent did not answer the motion for summary judgment. The court granted the unopposed motion in July of 2003.

{¶32} Despite having multiple contacts with Jupp, Respondent did not inform Jupp of the conclusion of the matter until July of 2005. At this time, Respondent suggested that Jupp seek out a more experienced attorney to pursue her claim and also seek an attorney to sue him for legal malpractice.

{¶33} Jupp followed Respondent's advice and sued him for legal malpractice. Jupp's injuries and the missed diagnosis were disclosed to the insurer for the tortfeasor in the original personal injury claim that Respondent did not handle for Jupp. In January of 2008, the two parties in the legal malpractice claim consented to a judgment of \$40,000 to Jupp. Respondent and his law firm satisfied the judgment. Jupp filed the grievance after she was paid.

{¶34} Relator and Respondent stipulate to violations of DR 6-101(A)(1), DR 6-101(A)(3), and the panel finds these violations have been established by clear and convincing evidence. However, Relator and Respondent also stipulate to the dismissal of the alleged violations of DR 6-101(A)(2), DR 7-101(A)(1), DR 7-101(A)(2), DR 7-101(A)(3), DR 1-

101(A)(4), and DR 1-102(A)(6). The panel accepts the stipulation and dismisses these alleged rule violations.

### AGGRAVATION AND MITIGATION

{¶35} Respondent and Relator stipulated to lack of cooperation in the disciplinary process as the only aggravating factor (relating only to the Hayes matter).

{¶36} Respondent and Relator stipulated to the following factors in mitigation: absence of prior disciplinary record; absence of a dishonest or selfish motive; full and free disclosure to the disciplinary Board after obtaining counsel and treatment; timely good faith effort to make restitution; character or reputation (through letters of reference and testimony); and the existence of mental disability that satisfies the requirements of BCGD Proc. Reg. 10(B)(2)(g).

{¶37} The panel agrees with the stipulated aggravation and mitigation, but feels the issue of mental disability bears further discussion because Respondent's assertion of the existence of a mental disability forms the basis for the Court's order remanding this matter to the Board.

{¶38} The panel concluded treating Respondent's mental condition in mitigation is consistent with the spirit of the Supreme Court's April 12, 2011 order to remand.

{¶39} Relator and Respondent agree all of the necessary prerequisites for mental health mitigation have been met.

{¶40} Respondent was diagnosed with depression by both Thomas Kupec and Dr. Vincent Paolone. Mr. Kupec is a clinical counselor. Dr. Paolone is a psychiatrist. The basis of this diagnosis was Respondent handling of his failing marriage. Respondent got married in 2003. Respondent indicated that the basis of their marriage was the desire of his then-wife to purchase a particular home. His then-wife could not afford the home herself, so she suggested

they get married so they could buy the house. The wife's spending habits after the marriage led to considerable stress to Respondent. Respondent testified that he had no voice in the relationship and that he had lost his self-identity. Additionally, Respondent suggested his then-wife was not always completely faithful.

{¶41} It should be noted, that Respondent received treatment for his depression well after the time periods of the alleged violations. However, the Jupp matter occurred during the period when Respondent and his then-wife were experiencing problems. Both Kupec and Paolone acknowledge the time period and both are comfortable concluding the depression significantly contributed to Respondent misconduct in the Jupp matter as well as his failure to cooperate. Paolone Depo. 14.

{¶42} Respondent was placed on the medication Lexipro. Respondent continues to meet with Dr. Paolone on a consistent basis. Respondent testified that he feels much better than before. Respondent has reintegrated himself with his own family. Respondent has developed a support network to assist in his development. Hearing Tr. 134.

{¶43} Finally, both Kupec and Dr. Paolone stated in depositions that Respondent will be able to return to competent, ethical practice of law. Kupec Depo. 35; Paolone Depo. 18-19.

{¶44} Therefore, the panel concludes Respondent met the necessary requirements set forth in BCGD Proc. Reg. 10(B)(2)(g) for his mental health condition to be considered in mitigation.

### **RECOMMENDED SANCTION**

{¶45} The primary goal of the disciplinary process is to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship.

*Disciplinary Counsel v. Agopian*, 112 Ohio St.3d 103, 2006-Ohio-6510.

{¶46} Relator and Respondent jointly recommend a one-year suspension, all stayed with the condition that Respondent continues to follow the advice of his treating mental health professional.

{¶47} In justifying the recommended sanction, Respondent cites, *Butler Cty. Bar Assn. v. Minamyer*, supra, *Toledo Bar Assn. v. Lowden*, 105 Ohio St.3d 377, 2005-Ohio-2162, *Akron Bar Assn. v. Holda*, 125 Ohio St.3d 140, 2010-Ohio-1469, and *Columbus Bar Assn. v. Watson*, 106 Ohio St.3d 298, 2005-Ohio-4983. The panel is not persuaded, as none of the case law appears to be on point. In addition, a review of recent case law does not provide the panel with any direction given the unique nature of the facts.

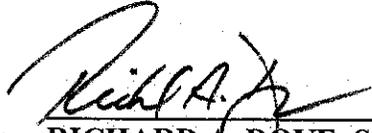
{¶48} However, given sufficient evidence was provided to justify a finding of DR 6-101(A)(1), DR 6-101(A)(3), and Gov. Bar R. V, Section 4(G), combined with the significance of the mental health mitigation, the panel finds appropriate the recommended sanction of one-year suspension, stayed in its entirety with the condition that Respondent continue to follow the advice of his treating mental health professional, and so recommends.

#### **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 April 13, 2012. The Board adopted the Findings of Fact, Conclusions of Law, and Recommendation of the panel and recommends that Respondent, James Vivo, be suspended for one year, stayed in its entirety on the condition that Respondent continue to follow the advice of his treating mental health professional. 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 Recommendation as those of the Board.**

A handwritten signature in black ink, appearing to read "Richard A. Dove", written over a horizontal line.

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