ORIGINAL

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

12-0692

In Re:	:	
Complaint against	:	**Case No. 11-059**
Thomas E. Zena **Attorney Reg. No. 0007375**	:	**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 December 20, 2011, in Columbus, Ohio, before a panel composed of William Novak, McKenzie K. Davis, and Judge Otho Eyster, chair. None of the panel members resides in the appellate district in which the complaint arose and none was a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Bar Counsel, David C. Comstock, Jr., appeared as counsel for Relator; Respondent, Thomas E. Zena, was present and represented by John B. Juhasz.

{¶3} Relator and Respondent filed agreed stipulations that included facts, violations, aggravating and mitigating factors, and recommended sanctions. The parties agreed to the

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admission of the stipulations as well as 34 exhibits introduced by Relator and 61 exhibits introduced by Respondent.[1] Respondent's exhibits include 49 character letters.

FINDINGS OF FACT

{¶4} Respondent, Thomas Zena, was admitted to the practice of law in November 1972. Respondent is subject to the Ohio Rules of Professional Conduct, the former Ohio Code of Professional Responsibility, and the Rules for the Government of the Bar of Ohio.

BARBARA MCOWEN

{¶5} Grievant, Barbara McOwen, ("McOwen") spoke to Respondent sometime prior to October 14, 2003, about a gas well issue, and Respondent referred her to another lawyer.

{¶6} In October 2003, McOwen spoke with Respondent about representing her in a civil action against a contractor, Dragan Milentijevic, dba Dragan Home Improvement, who was the general contractor whom McOwen chose to build her home.

{¶7} On October 14, 2003, McOwen wrote to Respondent regarding difficulties she was having with the contractor.

{¶8} McOwen's letter discussed her search for and selection of a builder, likely cost estimates, and her concerns about cost overruns.

{¶9} A week after that letter, and still before she had retained Respondent, McOwen wrote a note to Respondent on October 21, 2003.

{¶10} In that note, McOwen informed Respondent that a lien had been placed on her home by a plumbing subcontractor and she again raised concerns that the contractor she had selected was improperly "marking up" the construction job.

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[1] There are two erroneous references in the hearing transcript to the parties' exhibits. First, the transcript states that "Relator's Exhibit No. 1 through 61 were received into evidence." (Tr.14.) Relator's exhibits are actually labeled A through FF. (Index to Exhibits.) Second, the transcript states that "Respondent's Exhibits A through FF were received into evidence." (Tr. 108.) Respondent's exhibits are instead numbered 1 through 61. (Index to Exhibits.) The exhibits are properly marked, and transcript index contains the correct exhibit references.

{¶11} McOwen's note was followed by a letter dated that same day detailing discrepancies between various billing amounts presented to her by the contractor.

{¶12} McOwen wrote to Respondent again on November 17, 2003, and December 8, 2003.

{¶13} In a letter dated January 11, 2004, Respondent wrote to McOwen, enclosing therewith a draft copy of the complaint against the contractor for McOwen's review.

{¶14} In that letter, Respondent indicated that he would charge a $500 retainer (actually an advance on fees) and then charge McOwen, at a rate that Respondent did not specify, as the case progressed. Respondent indicated that the rate would be far below what other lawyers would charge, not only because of what McOwen had been through but because Respondent regarded McOwen and her daughter as ongoing clients. Respondent also requested $200 to defray the cost of the filing fee.

{¶15} The correspondence, however, contains no mention of professional liability insurance.

{¶16} McOwen wrote back to Respondent on January 13, 2004, and enclosed a check in the amount of $700.

{¶17} On February 10, 2004, Respondent filed a lawsuit on McOwen's behalf against Milentijevic.

{¶18} Attorney Matthew DeVicchio, who represented Milentijevic, filed an answer and counterclaim on May 27, 2004.

{¶19} Respondent informed McOwen of the counterclaim by letter dated June 2, 2004.

{¶20} DeVicchio forwarded a request for the production of documents on June 29, 2004, and filed a notice with the court the next day that a request for production of documents had been sent.

{¶21} On August 3, 2004, McOwen wrote to Respondent. In that letter, McOwen mentioned seeing Respondent at a social event, and she brought up additional concerns about the health department.

The letter also mentions that Respondent had informed McOwen that the contractor might be effectively judgment-proof.

{¶22} Not receiving a reply to the August 3, 2004 letter within three weeks, on August 25, 2004, McOwen wrote to Respondent and expressed displeasure with Respondent, asking that "[i]f you [Respondent] can't or won't pursue this for me, please let me know if I should seek other legal counsel."

{¶23} McOwen again wrote to Respondent, this time on September 8, 2004. The letter spoke of a meeting that Respondent had scheduled between himself, McOwen, the contractor, and the contractor's lawyer and the letter addressed the fact that the contractor had cancelled the meeting. In that letter, McOwen indicated that she "absolutely will not agree to another cancellation" of a meeting by the contractor, and that if the contractor cancelled another meeting, the next person McOwen would speak to would be the prosecutor.

{¶24} McOwen also informed Respondent of a new development at her home on Cedar Park Drive that related to the improper installation of her septic system.

{¶25} On September 14, 2004, the court held a preliminary conference for which it waived appearance of the parties and counsel. The court scheduled the case for jury trial before Judge John M. Durkin and ordered a first pretrial to be held November 19, 2004.

{¶26} A pretrial conference was held on or about November 19, 2004. The trial court set a discovery schedule. The court's order, inter alia, required Respondent and McOwen to respond to the contractor's requests for production on or before December 3, 2004. The documents sought by the contractor were ones he had once possessed, but apparently had given to McOwen without first making copies.

{¶27} On March 7, 2005, the contractor, through DeVicchio, filed a series of discovery-related motions that included a notice of interrogatories and a second request for production of documents; a

motion for discovery sanctions; a motion to compel; and a motion for default judgment on the counterclaim as there had been no answer filed and no motion to extend the time in which to answer or otherwise plead.

{¶28} On March 25, 2005, the court sustained the motion to compel and ordered compliance with discovery within 30 days. Respondent filed a leave to plead on March 30, 2005, and leave was granted until April 15, 2005.

{¶29} The court issued an order dated April 8, 2005, that set a hearing date on May 17, 2005, on the defendant's motion for discovery sanctions.

{¶30} McOwen and Respondent met on Sunday, May 1, 2005, to discuss her case, and McOwen then wrote to Respondent on May 2, 2005, thanking him for their meeting and enclosing several photographs.

{¶31} Neither Respondent nor McOwen appeared for the sanctions hearing on May 17, 2005, and McOwen maintains that she was not informed of the hearing.

{¶32} The trial court issued an order to appear and show cause against Respondent for failure to appear at the hearing. The order was served on Respondent on June 7, 2005.

{¶33} On June 19, 2005, Respondent wrote to counsel for the defendant regarding the lawsuit. In that letter, Respondent referred to the fact that a number of "experts" had viewed the McOwen property, but could not agree about the cause of the problem. Still, Respondent pressed McOwen's position that the general contractor was responsible for hiring a subcontractor who installed a substandard septic system. A copy of that letter was sent to the trial judge.

{¶34} Nevertheless, the trial court entered a default judgment against McOwen on the counterclaim just a few days later, on June 23, 2005. The court also sanctioned McOwen by prohibiting her from introducing certain evidence at the trial of the case.

{¶35} On that same day, Respondent filed a notice of voluntary dismissal of McOwen's complaint. The dismissal was granted by the trial court on July 14, 2005, although the counterclaim remained pending at that time.

{¶36} On July 2, 2005, McOwen faxed a letter that she received from the Mahoning County health commissioner, referencing problems with her septic tank. This fax was forwarded to Respondent approximately ten days after he filed the voluntary dismissal of the case.

{¶37} On August 19, 2005, counsel for the contractor wrote to Respondent via fax, advising him that the trial court had granted his motions for default judgment and for sanctions. Counsel demanded $5,000 to settle the case and referenced an upcoming trial date of August 22, 2005.

{¶38} McOwen wrote to Respondent on March 6, 2006. In that letter, McOwen requested that Respondent provide information about her case.

{¶39} Respondent did not advise McOwen of the status of the case or that it had been voluntarily dismissed.

{¶40} On April 5, 2007, McOwen wrote to Respondent by fax. She informed Respondent that she would be out of town from June 30, 2007, through July 15, 2007, and that if there were any court dates, depositions, etc. during that time, they would have to be rescheduled or go forward without McOwen. She also referenced looking forward to receiving a schedule about which she said Respondent's secretary had spoken with her a few weeks earlier.

{¶41} McOwen discharged Respondent in July 2007, and took steps to secure her file and to obtain new legal counsel.

{¶42} McOwen consulted with new counsel, and learned that her case had been dismissed in June 2006, and that a judgment on the counterclaim had been entered against her.

{¶43} On August 4, 2008, after McOwen had discharged him, Respondent filed a separate lawsuit against the plumbing subcontractor for the improper installation of the septic system at McOwen's home.

{¶44} On April 2, 2009, a status hearing was held on that case, at which McOwen appeared by telephone. Respondent was granted leave to withdraw as McOwen's counsel, and McOwen was granted leave to secure new counsel.

{¶45} On August 7, 2009, McOwen, through attorney Matthew Gambrel, was granted leave to file an amended complaint against the plumbing subcontractor.

{¶46} On August 27, 2009, McOwen filed an amended complaint against the plumbing subcontractor.

{¶47} On March 3, 2010, McOwen and the plumbing contractor settled their claims against each other.

{¶48} On August 10, 2009, McOwen instituted a legal malpractice case against Respondent (Mahoning County Common Pleas Case No. 2009 CV 3019).

{¶49} On August 5, 2010, a magistrate recommended that McOwen's malpractice action against Respondent be dismissed based upon the failure of McOwen to comply with the statute of limitations in R.C. 2305.11.

{¶50} The trial judge upheld the magistrate's decision over McOwen's objections, and the matter is now pending before the Court of Appeals for Mahoning County, Seventh Appellate District.

{¶51} On October 3, 2009, McOwen filed a motion in the original case that Respondent had filed for her against the contractor, asking the trial court to vacate the default judgment as to the contractor's counterclaim.

{¶52} On January 4, 2010, the trial court vacated the default judgment entered against McOwen on the counterclaim, and the trial court returned the case to the court's active docket.

{¶53} On June 25, 2010, the counterclaim was voluntarily dismissed by the contractor pursuant to Civ. R. 41(A), leaving McOwen free to pursue her claims against the contractor.

JOSEPH AND LAURIE TAYLOR

{¶54} Sometime in 1995 the grievant, Joseph Taylor, and his wife, Laurie Taylor, hired Respondent with regard to problems that they were having with a 1994 Chevrolet Cavalier.

{¶55} The 1994 Chevrolet Cavalier was purchased by the Taylors from Terry Harmon Motors, Inc.

{¶56} On or about December 14, 1998, Respondent filed a lawsuit in the Mahoning County Common Pleas Court captioned as *Joseph Taylor, et al. v. Terry Harmon Motors, Inc., et al.*, Mahoning County Common Pleas Court Case No. 1998 CV 2860.

{¶57} On or about February 16, 1999, defendant, Terry Harmon Motors, Inc., filed an answer.

{¶58} On or about April 1, 1999, the court assigned the matter for trial on November 17, 1999, and ordered arbitration on June 30, 1999.

{¶59} During 1999 through 2000, the arbitration was continued several times.

{¶60} On April 14, 1999, defendant, Terry Harmon Motors, Inc., filed a request for production of documents, first set of interrogatories, and request for admissions.

{¶61} On or about May 18, 1999, defendant, General Motors Corp., filed a motion for leave to file an answer out of time. The motion was granted and defendant, General Motors Corp., filed its answer on May 25, 1999.

{¶62} On or about March 8, 2000, Attorney Timothy Sullivan, representing General Motors Corp., mailed a letter addressed to Respondent, making a settlement offer of $1,500.

{¶63} On or about April 6, 2000, Attorney Daniel Daniluk, representing Terry Harmon Motors, Inc., filed a motion for summary judgment, after the arbitration had been continued a number of times by the defendants.

{¶64} Respondent obtained leave to respond to the motion for summary judgment on or before July 15, 2000.

{¶65} Respondent never responded to the motion for summary judgment.

{¶66} The trial of this matter was rescheduled for July 31, 2000.

{¶67} On June 20, 2000, defendant, Terry Harmon Motors, Inc., filed a motion to have its request for admissions directed to the Taylors, which had been served upon the Taylors by mailing the same to Respondent on or about April 14, 1999, deemed admitted.

{¶68} Respondent informed his clients that a motion for summary judgment had been filed and Laurie Taylor acknowledged that the Taylors were informed by Respondent that Terry Harmon Motors would no longer be part of the lawsuit, but that General Motors would remain in the case.

{¶69} On October 5, 2000, retired Judge Mary Cacioppo from the Ninth District Court of Appeals was assigned, effective September 26, 2000, to preside in the Mahoning County Common Pleas Court for the months of October 1, 2000 through December 31, 2000.

{¶70} On or about October 13, 2000, R. Scott Krichbaum, Administrative Judge, assigned the matter of *Joseph Taylor et al. v. Terry Harmon Motors, Inc. et al.* to Judge Cacioppo.

{¶71} On or about October 17, 2000, summary judgment was granted to Terry Harmon Motors, Inc.

{¶72} On or about November 29, 2000, the court filed a judgment entry indicating that Respondent stated that the Taylors' case against General Motors will be dismissed, but that Respondent wanted both his clients to sign the dismissal entry.

{¶73} The court granted the Taylors leave to provide a proper entry of dismissal on or before December 5, 2000, and said that if they failed to do so, the court will put on a dismissal with prejudice on December 7, 2000.

{¶74} On December 18, 2000, the court dismissed the case.

{¶75} However, that dismissal entry was never sent to counsel by the court's clerk pursuant to Civ. R. 58.

{¶76} On or about March 30, 2010, a status hearing was scheduled at the request of Respondent.

{¶77} The Taylors attempted to contact Respondent on numerous occasions and claimed to have difficulty contacting him.

{¶78} The Taylors said that Respondent did not respond to their inquiries and that they would wait outside of Respondent's office or wait in the courthouse in an effort to communicate with him.

{¶79} Respondent did, however, contact the Taylors in writing and by mail on April 19, 1999, August 13, 1999, August 31, 1999, September 8, 1999, December 1, 1999, December 23, 1999, April 5, 2000, April 11, 2000, and June 9, 2000. The Taylors deny receiving many of these letters, though they did acknowledge the receipt of some, and Mrs. Taylor concedes that the Taylors did sometimes meet with Respondent about the case, and the Taylors did receive copies of the discovery requests that Respondent forwarded to them.

{¶80} Respondent failed to secure a signed dismissal from the Taylors and failed to advise the Taylors in writing that their case had been dismissed.

{¶81} The Taylors did have occasion to see Respondent at the courthouse on a number of occasions. The Taylors did not learn of the dismissal of their case until March or April of 2010, when advised of the same by the investigator for Relator.

{¶82} Respondent admits, and the parties stipulate, that Respondent's conduct in failing to follow up more diligently on the numerous requests of the Taylors to know the status of their case was at first negligent and then, after the passage of time when Respondent did not furnish proper information, became misleading.

J. MURPHY CRUM, D.C.

{¶83} Respondent agreed to represent Dorothy Rousher in a personal injury case. Rousher's chiropractic physician was J. Murphy Crum, D.C.

{¶84} Eventually, Respondent was able to settle Rousher's personal injury case.

{¶85} In order to facilitate settlement of the case, J. Murphy Crum, D.C. agreed to reduce his bill to $1,200.

{¶86} Respondent failed to account for Dr. Crum's fee when settling the personal injury claim and making distribution.

{¶87} In return, Respondent promised to pay Dr. Crum $1,200 for the full and final payment of all outstanding medical bills.

{¶88} When the settlement proceeds were distributed, Respondent failed to pay Dr. Crum.

{¶89} Between 2004 and 2010, Dr. Crum made repeated requests for the fee.

{¶90} Dr. Crum filed a lawsuit against Respondent, known as *J. Murphy Crum v. Thomas Zena*, Mahoning County Court Area No. 2, Case No. 2008 CV 101521 BDM, on or about February 24, 2010.

{¶91} Dr. Crum also filed a complaint with Relator, which referred the matter to its certified grievance committee.

{¶92} Respondent admitted to Relator's investigator that he was obligated to pay $1,200 to Dr. Crum.

{¶93} Respondent never denied owing the money to Dr. Crum, and promised to pay Crum. However, Respondent did not pay Dr. Crum until recently, due to financial hardship.

{¶94} Sometime after a grievance was filed by Dr. Crum, Respondent paid him the monies owed.

STIPULATED DISCIPLINARY VIOLATIONS

{¶95} The conduct of Respondent as set forth in paragraphs 4 through 53 above constitutes a violation of DR 6-101(A)(2) [neglect].

{¶96} The conduct of Respondent as set forth in paragraphs 4 through 53 above constitutes a violation of DR 7-101(A)(2) [failure to carry out a contract for professional services].

{¶97} The conduct of Respondent as set forth in paragraphs 4 through 53 above constitutes a violation of DR 1-104(A) [failure to disclose the lack of professional liability insurance].

{¶98} The conduct of Respondent as set forth in paragraphs 4 through 53 constitutes a violation of Prof. Cond. R. 1.3 [diligence].

{¶99} The conduct of Respondent as set forth in paragraphs 4 through 53 above constitutes a violation of DR 7-101(A)(3) [prejudicing or damaging the client].

{¶100} The conduct of Respondent as set forth in paragraphs 54 through 82 above constitutes a violation of DR 7-101(A)(3).

{¶101} The conduct of Respondent as set forth in paragraphs 54 through 82 above constitutes a violation of DR 7-101(A)(2).

{¶102} The conduct of Respondent as set forth in paragraphs 54 through 82 above constitutes a violation of Prof. Cond. R. 1.3.

{¶103} The conduct of Respondent as set forth in paragraphs 54 through 82 above constitutes a violation of DR 6-101(A)(2).

{¶104} The conduct of Respondent as set forth in paragraphs 83 through 93 above constitutes a violation of Prof. Cond. R. 1.15(d) [prompt notification and delivery upon receiving funds in which a third person has an interest].

{¶105} The parties jointly recommend dismissal of the following counts in the complaint:

- Count One: The conduct of Respondent as set forth in paragraphs 1 through 54 of the complaint constitutes a violation of DR 1-102(A)(4) [conduct involving dishonesty, fraud, deceit or misrepresentation].
- Count Two: The conduct of Respondent as set forth in paragraphs 1 through 54 of the complaint constitutes a violation of DR 1-102(A)(6) [conduct that adversely reflects on the lawyer's fitness to practice law].
- Count Seven: The conduct of Respondent as set forth in paragraphs 1through 54 of the complaint constitutes a violation of Prof. Cond. R. 8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation].
- Count Eight: The conduct of Respondent as set forth in paragraphs 1 through 54 of the complaint constitutes a violation of Prof. Cond. R. 8.4(h) [conduct that adversely reflects on the lawyer's fitness to practice law].

{¶106} The panel finds the stipulated violations in ¶¶95-104 of this report by clear and convincing evidence and accepts the stipulated dismissal of the violations set forth in ¶105 of this report.

STIPULATED AGGRAVATING AND MITIGATING FACTORS

{¶107} Aggravation: a pattern of misconduct and multiple offenses

{¶108} Mitigation: absence of a prior disciplinary record; full and free disclosure to disciplinary Board or cooperative attitude toward proceedings; and character or reputation (as demonstrated by character letters and testimony)

PANEL FINDING

{¶109} At the hearing on this matter, Respondent presented a court of appeals judge, two common pleas court judges, and a juvenile court magistrate as character witnesses. (Tr. 16-47.) The testimony of these witnesses and the character letters presented are overwhelming in their praise for Respondent's ability as an attorney and his reputation for honesty and integrity. The legal community's feelings about Respondent are best summed up in Mahoning County Common Pleas Court Judge John M. Durkin's reference letter. (Resp. Ex. 13.)

{¶110} The panel can only conclude that Respondent is a first-rate attorney, a reputation earned during almost 40 years of practice. The violations stipulated to are not in keeping with his reputation and resulted from distractions in his personal life. (Tr. 78-84.) The panel has been assured the issues involved have been resolved and are no longer a factor. (Tr. 98, 100-102.) Respondent has indicated he is limiting his practice to what he does best, criminal law. (Tr. 85-86, 128.) The panel does not feel Respondent is a danger to any potential clients and agrees that an actual suspension from the practice of law is not warranted in this case.

{¶111} The panel further notes that in the McOwen matter, the grievant still has a cause of action against the contractor who has probably been uncollectible from the start. (Tr. 86, 91.)

{¶112} In the Taylor matter, Respondent negotiated a $1,500 settlement that was rejected by Mr. Taylor. (Tr. 76.) Respondent stands ready to offer the Taylors $3,000, but Mr. Taylor has refused to communicate with Respondent. (Tr. 86-87, 104-105.) It should be noted the Taylor grievance was filed more than ten years after the initial representation.

{¶113} At this time, Dr. Crum has been paid in full. (Tr. 77-78, 87, 95.)

RECOMMENDED SANCTION OF PARTIES

{¶114} The parties agree to jointly recommend a two-year suspension with the entire two years stayed, with the following conditions:

A. Three years of probation during which:

1. Respondent will commit no further misconduct; and

2. During each year of the three years of probation, Respondent shall attend a class of not less than three hours concerning law office management.

B. Respondent shall be monitored by a law office/practice monitor selected by Relator, who shall report quarterly to Relator concerning Respondent's compliance.

C. Respondent shall not represent clients in civil matters without properly qualified co-counsel to assist him.

PANEL'S RECOMMENDED SANCTION

{¶115} The panel, having considered the specific professional misconduct of Respondent, and the aggravating and mitigating factors present, rejects the parties' jointly recommended sanction.

{¶116} It is the panel's recommendation that Respondent be suspended from the practice of law for one year, all stayed with the following conditions:

A. Respondent shall attend a class of not less than three hours on law office management, and

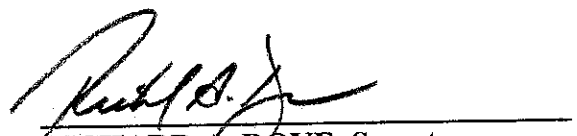
B. Respondent shall be monitored by a law office/practice monitor selected by Relator, for a period of 12 months.

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, Thomas R. Zena, be suspended from the practice of law for one year, all stayed in its entirety on the conditions contained in ¶116. 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.



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