

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

14-2155

In Re:	:	
Complaint against	:	Case No. 2014-013
Thomas John Simon Attorney Reg. No. 0009725	:	Findings of Fact, Conclusions of Law, and Recommendation to the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio
Respondent	:	
Disciplinary Counsel	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on July 25 and August 20, 2014, in Columbus before a panel consisting of Judge Matthew W. McFarland, Teresa Sherald, and Sanford E. Watson, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 6(D)(1).

{¶2} Respondent was present and represented by Richard C. Alkire. Stacy Solochek Beckman appeared on behalf of Relator.

{¶3} The alleged misconduct in this proceeding involved Respondent's failure to keep two separate clients reasonably informed in their respective wrongful discharge cases. In both cases, Respondent neglected the matters, and the clients were surprised to learn that their cases were dismissed. The underlying facts regarding Respondent's conduct in court is not in dispute. Rather the factual disputes in this case revolve around whether Respondent kept his clients reasonably informed of decisions he made on their behalf.

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SUPREME COURT OF OHIO

{¶4} Based upon the evidence presented at the hearing of this matter and for the reasons set forth below, the panel recommends the Board find violations of Count I and II and recommend a two-year suspension, with eighteen months stayed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶5} Respondent was admitted to practice law in the state of Ohio on May 11, 1981 and subject to the Ohio Rules of Professional Conduct and the Government of the Bar of Ohio.

{¶6} On February 16, 2011, the Supreme Court of Ohio suspended Respondent from the practice of law for one year, with the entire suspension stayed. *Disciplinary Counsel v. Simon*, 128 Ohio St.3d 359, 2011-Ohio-627. Respondent's previous disciplinary case arose out of his commingling funds and failure to cooperate with Relator.

{¶7} On July 22, 2014, the parties entered into stipulations of fact, stipulated to Respondent's violation of Prof. Cond. R. 1.4(c), and agreed upon stipulated exhibits. The panel accepted the stipulations of fact and stipulated violation, and convened a hearing to consider the facts and violations that remained in dispute. The parties' factual stipulations are set forth below, interspersed with the testimony and evidence from the hearing that provide further context for the panel's recommendation.

Count I-Danny Hubbard

{¶8} In Count I of the amended complaint, Respondent is charged with the following violations:

- Prof. Cond. R. 1.4(a)(1) [a lawyer shall promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the rules];
- Prof. Cond. R. 1.4(a)(3) [a lawyer shall keep the client reasonably informed about the status of the matter];
- Prof. Cond. R. 1.4(c) [a lawyer shall inform a client at the time of the client's engagement of the lawyer if the lawyer does not maintain professional liability insurance];

- Prof. Cond. R. 8.1(a) [knowingly make a false statement of material fact in connection with a disciplinary matter]; and
- Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice].

{¶9} Respondent admits to a violation of Prof. Cond. R. 1.4(c), but denies all other alleged violations in Count I of the amended complaint.

{¶10} The factual disputes in this count involve whether Respondent kept his client reasonably informed and three letters addressed from Respondent that Danny Hubbard claims were never sent to him. The first disputed letter, dated July 16, 2010 in pertinent part, indicates that Respondent will require a \$3,750 retainer to represent him. Stipulated Ex. 15. Hubbard denies receiving the letter from Respondent. Hubbard testified that he did not see the letter until his deposition was taken in connection with this disciplinary proceeding.

{¶11} On or about February 11, 2011, Hubbard retained Respondent in connection with a wrongful termination claim against his former employer, the Village of Jefferson, Ohio. Hubbard's employment was terminated in 2009. At the time Respondent was hired, the two-year statute of limitations was about to run on Hubbard's claim.

{¶12} The second disputed letter from Respondent to Hubbard was dated February 14, 2011. Stipulated Ex. 16. In this letter, Hubbard indicates that he cannot continue to represent Hubbard beyond the filing of the complaint unless he pays him a retainer of \$3,750. The letter further indicates that if he cannot pay the retainer, the case could be voluntarily dismissed, which would extend the statute of limitations for an additional year. Hubbard denies receiving the letter or ever being informed by Respondent that he required a retainer.

{¶13} To meet the two-year deadline, Respondent filed a complaint on Hubbard's behalf with the Ashtabula County Court of Common Pleas, Civil Division on February 22, 2011. Hubbard did not pay a retainer in connection with the case.

{¶14} On April 6, 2011, the court scheduled a pretrial for July 18, 2011 and notified Respondent. Hubbard also received notice of the pretrial from the court. Hubbard showed and waited in the hallway outside the courtroom, but Respondent failed to appear. As a result of Respondent's failure to appear, the court issued an entry granting defendant reasonable attorney fees in the amount of \$150 from Hubbard, and scheduled a show cause hearing for September 26, 2011, and directed Hubbard to show cause as to why his complaint should not be dismissed. Hubbard received a copy of the entry from the court and contacted Respondent. Respondent's only explanation was that he forgot to appear. Respondent did appear at the show cause hearing and the court determined that the matter would not be dismissed, noted that mediation was scheduled to proceed on December 14, 2011 and scheduled a jury trial for February 15, 2012.

{¶15} On or about July 1, 2011, the defendants served their first set of interrogatories and request for production of documents upon Respondent. Respondent failed to reply to the discovery requests. On September 28, 2011, counsel for the defendants renewed its discovery requests to no avail. On October 13, 2011, the defendants filed a motion to compel discovery. Respondent did not file an opposition brief, and the court granted the motion. Hubbard testified that Respondent never discussed any of the discovery requests with him.

{¶16} On November 15, 2011, the defendants filed a motion for summary judgment in the matter and served Respondent with a copy of the motion. Rather than oppose the motion, Respondent filed a notice of dismissal on Hubbard's behalf. Hubbard testified that Respondent never discussed with him the motion for summary judgment or the notice of dismissal in advance of filing.

{¶17} The third disputed letter from Respondent to Hubbard was dated November 23, 2011. Stipulated Ex. 19. Hubbard denies receiving the letter from Respondent. Hubbard

testifies that he learned that his case had been dismissed by going to the courthouse and inquiring about the status from the judge's secretary.

{¶18} After learning of the dismissal, Hubbard sought new counsel but was unsuccessful in finding anyone willing to take the case. Consequently, Hubbard did not refile his case within a year following the dismissal.

{¶19} During the representation, Respondent did not advise Hubbard that he did not have professional liability insurance.

{¶20} On July 25, 2012, Hubbard filed a grievance against Respondent with the Ashtabula County Bar Association Certified Grievance Committee. The grievance was dismissed. Hubbard subsequently brought his complaint to Relator.

{¶21} Overall, Hubbard admitted to receiving three or four letters from Respondent, but could not recall the contents of those letters. During the hearing, it was also revealed that Hubbard is dyslexic and would have a friend, Richard Downing, read correspondence to him so that he would fully comprehend it. Under intense cross-examination, Hubbard maintained that he did not receive Respondent's letters dated July 16, 2010, February 14, 2011, and November 23, 2011, nor was he ever informed that unless Respondent received a retainer, the case would be voluntarily dismissed.

{¶22} Respondent testified that he kept Hubbard informed through the letters as well as through telephone conversations. During Relator's investigation, Respondent was asked to produce telephone records and his computer hard drive. Respondent indicated that he did not keep records of local telephone calls and he only used his computer as a word processor and so there were no records to produce. Respondent also offered the testimony of Bradley Thomas Wight who provided computer maintenance services to Respondent. Wight testified that

Respondent's computer from which any metadata would have been retrieved had been replaced because it had crashed.

{¶23} In reconciling the conflicting testimony and weighing the credibility of the witnesses, the panel believes that Respondent failed to inform Hubbard that he would require a retainer or else the case would be voluntarily dismissed. Even if Respondent sent the disputed letters, it is not clear whether Hubbard received them. Furthermore, Respondent failed to inform Hubbard regarding discovery requirements, the motion for summary judgment, or seek Hubbard's consent before filing the notice of dismissal. For these reasons, the panel finds clear and convincing evidence that Respondent violated Prof. Cond. R. 1.4(a)(1) and Prof. Cond. R. 1.4(a)(3).

{¶24} Relator takes the failure to inform argument a step further and alleges that Respondent created July 16, 2010, February 14, 2011, and November 23, 2011 letters after the fact and by doing so, knowingly made false statements in connection with a disciplinary matter. In considering this argument, it should first be noted that the fact that Hubbard did not receive the letters does not mean that they were fabricated. Secondly, the absence of computer files or metadata does not prove the allegation. To do so, would shift the burden to Respondent to prove that the letters were not fabrications. For these reasons, we find Relator failed to produce clear and convincing evidence that Respondent produced false evidence in violation of Prof, Cond. R. 8.1(a) and we recommend dismissal of the violation. For the same reasons, we also find Relator failed to prove by clear and convincing evidence that Respondent engaged in conduct that is prejudicial to the administration of justice and accordingly, recommend dismissal of the alleged violation of Prof. Cond. R. 8.4(d).

{¶25} Finally, Respondent has stipulated that he failed to ever inform Hubbard that he lacked professional liability insurance and therefore, we find a violation of Prof. Cond. R. 1.4(c).

Count II-Louis Grippi

{¶26} In Count II of the amended complaint, Respondent was charged with the following violations:

- Prof. Cond. R. 1.3 [diligence];
- Prof. Cond. R. 1.4(a)(1);
- Prof. Cond. R. 1.4(a)(3); and
- Prof. Cond. R. 8.4(d).

{¶27} Respondent denies all of the alleged violations in Count II of the amended complaint.

{¶28} On or about April 2010, Louis Grippi retained Respondent in connection with a wrongful termination claim involving the City of Ashtabula, Ohio and his union, American Federation of State, County and Municipal Employees (AFSCME) Local 1197.

{¶29} On April 28, 2010, Respondent submitted a letter to AFSCME challenging the union's determination that it would not pursue arbitration on Grippi's behalf against the City of Ashtabula. When Respondent did not receive a satisfactory response to his letter, he initiated an unfair labor practice charge with the State Employment Relations Board (SERB) on Grippi's behalf. SERB dismissed this charge on July 22, 2010.

{¶30} On November 15, 2010, Respondent filed a complaint on Grippi's behalf with the Ashtabula County Court of Common Pleas, Civil Division, against Anthony Cantagallo, city manager of the City of Ashtabula, and John A. Lyell, president of AFSCME Local 1197.

{¶31} On December 15, 2010, Cantagallo filed a motion for judgment on the pleadings and an answer; AFSCME Local 1197 filed a motion to dismiss on December 14, 2010.

Notwithstanding being given ample time, through April 15, 2011 Respondent did oppose not

either motion. As a result, on August 10, 2011 Judge Mackey dismissed the case with prejudice, stating that “[n]o response has been filed to the Motions by the Plaintiff.”

{¶32} On August 10, 2011, Grippi sent Respondent a letter by certified mail requesting an update on his case. Grippi testified that after Respondent filed the complaint, Respondent did not keep him informed of the status of his case and that is why he sent the letter. Respondent received the letter, but did not respond. In the hearing, Respondent testified that Grippi frequently stopped by the office and during those visits he updated him on the matter.

{¶33} On August 18, 2011, Grippi learned that his case had been dismissed with prejudice when he was reading the local newspaper. Grippi contacted Respondent about the dismissal and Respondent agreed to appeal the dismissal. Respondent timely filed a notice of appeal and informed Grippi of the same.

{¶34} On February 16, 2012, Grippi retained Attorney Martin S. Hume to handle the appeal. The appeal ended with the Eleventh District Court of Appeals affirming the decision of the trial court.

{¶35} Grippi subsequently pursued his unfair labor practice claims in federal court with other counsel.

{¶36} As in Count I, Count II comes down to a question of credibility. Whether Respondent kept Grippi informed required the panel to reconcile the conflicting testimony and weigh the credibility of the witnesses. The panel believes that Respondent failed to keep Grippi informed of the status of his case and allowed the case to be dismissed with prejudice without notifying Grippi of the pending motion. For these reasons, the panel finds clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(1), and Prof. Cond. R. 1.4(a)(3).

{¶37} Notwithstanding Respondent's neglect of Grippi's case, we find Relator failed to prove by clear and convincing evidence that Respondent engaged in conduct that is prejudicial to the administration of justice. Accordingly, we recommend dismissal of the alleged violation of Prof. Cond. R. 8.4(d).

AGGRAVATION, MITIGATION, AND SANCTION

{¶38} Based upon all of the evidence presented, the panel finds the following aggravating factors:

- Respondent stipulated to his prior disciplinary offense;
- Respondent had multiple offenses to the extent he failed to communicate with his clients numerous times in two cases; and
- Respondent refused to acknowledge the wrongful nature of his conduct. While his clients were arguably not harmed by his inaction in their cases, he never acknowledged that it was wrong to neglect a case, then dismiss the case, or let the case be dismissed without consulting the client.

{¶39} Based upon all of the evidence presented, the panel also finds the following mitigating factors:

- The absence of a dishonest or selfish motive; and
- The evidence of character or reputation was plentiful; Respondent offered 13 character witnesses including testimony from three judges, six current or former law enforcement officers, and four letters of reference, one from a judge.

{¶40} Relator recommends a sanction of an indefinite suspension largely premised upon the belief that Respondent provided false evidence to Relator in the form of letters to Hubbard. Because we believe Relator failed to prove by clear and convincing evidence that the letters in question were fabricated, Relator's recommendation should be rejected.

{¶41} Respondent recommends dismissal or at least a reprimand. To dismiss the matter in its entirety would be to ignore Respondent's stipulation to a violation of Prof. Cond. R. 1.4(c). It also would be inconsistent with this panel's findings that Respondent violated Prof. Cond. R.

1.3, Prof. Cond. R. 1.4(a)(1), and Prof. Cond. R. 1.4 (a)(3). Therefore, Respondent's recommendation should be rejected as well.

{¶42} The panel reviews sanctions in light of the findings of fact, conclusions of law, factors in aggravation and mitigation, and precedent established by the Supreme Court of Ohio. In taking all of these factors, the panel found one case where the facts were strikingly similar, except for the presence of prior discipline. *Lorain Cty. Bar Assn. v. Godles*, 128 Ohio St.3d 279, 2010-Ohio-6274. In *Godles*, the respondent filed a personal injury suit and failed to respond to discovery, failed to respond to a motion to compel, but instead voluntarily dismissed the case. *Id.* at ¶6. The respondent claims to have called the client and sent him a letter explaining the voluntary dismissal, but the client testified that this conversation never occurred and that he never received the letter. *Id.* at ¶7. The panel found neither side credible but concluded that the respondent did very little work in the case and failed to communicate fully with the client. *Id.* at ¶12. Ultimately, the Court "considering respondent's long career with no previous disciplinary action" decided to publicly reprimand the respondent. *Id.* at ¶18. Thus, the major difference in Respondent's case is that he does have a prior disciplinary record.

{¶43} The panel also considered three cases offered by Respondent for the proposition that cases where prior discipline is an aggravating factor do not require an actual term of suspension. See *Disciplinary Counsel v. Siewert*, 130 Ohio St.3d 402, 2011-Ohio-5935 (six-month suspension, all stayed where the respondent with prior discipline engaged in a romantic relationship with his domestic relations client); *Cleveland Metro. Bar Assn. v. Berk*, 132 Ohio St.3d 82, 2012-Ohio-2167 (18-month suspension, all stayed where the respondent with prior discipline neglected client matters); *Disciplinary Counsel v. Turner*, 140 Ohio St.3d 109, 2014-

Ohio-3158 (two-year suspension, all stayed where the respondent with prior discipline placed personal funds in client trust account and failed to cooperate with disciplinary process).

{¶44} Respondent's conduct is most consistent with the factors considered in *Turner* in that the Court in *Turner* imposed a longer stayed suspension because of the aggravating factor of prior discipline and the respondent's initial failure to cooperate. See *Turner* at ¶¶17-18. There is some irony in the fact that the case distinguished by the Court in *Turner* was the matter involving Respondent's prior discipline. *Id.*, citing *Disciplinary Counsel v. Simon*, 128 Ohio St.3d 359, 2011-Ohio-627. In considering Respondent's current matter, the panel must consider Respondent's failure to acknowledge the wrongful nature of his conduct as well as the prior discipline. Credibility considerations aside, neglecting a client's case, allowing it to be dismissed, and not notifying a client of the dismissal is wrong.

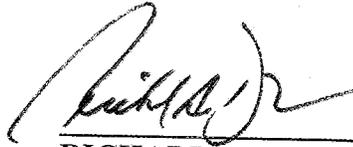
{¶45} There are cases involving the neglect of clients' matters that have resulted in an actual suspension, but those cases involved dishonest conduct that has not been proven here. *Medina Cty. Bar Assn. v. Malynn*, 131 Ohio St.3d 377, 2012-Ohio-1293 (two-year suspension, with six month stayed where misconduct included neglecting client matters and engaging in conduct involving dishonesty); and *Toledo Bar Assn. v. Harvey*, Slip Opinion No. 2014-Ohio-3675 (two-year suspension, with six months stayed where misconduct included failing to provide competent representation, failing to consult with client, and engaging in conduct prejudicial to the administration of justice).

{¶46} Having considered the findings of fact and conclusions of law, weighed the aggravating and mitigating factors, and reviewed Supreme Court of Ohio precedent, the panel respectfully recommends a sanction of a two-year suspension, with eighteen months stayed on the condition that Respondent commit no further misconduct.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 6, the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considered this matter on December 12, 2014. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Thomas John Simon, be suspended from the practice of law for two years, with eighteen months stayed on condition that Respondent commit no further misconduct. The Board further recommends that the costs 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