

**BEFORE THE BOARD OF PROFESSIONAL CONDUCT
OF THE SUPREME COURT OF OHIO**

In Re:	:	Case No. 2014-044
Complaint against	:	
William Richard Biviano	:	Findings of Fact,
Attorney Reg. No. 0017984	:	Conclusions of Law, and
	:	Recommendation of the
Respondent	:	Board of Professional Conduct of
	:	the Supreme Court of Ohio
Trumbull County Bar Association	:	
	:	
Relator	:	

OVERVIEW

{¶1} This matter was heard on December 1, 2014, in Columbus before a panel consisting of Sharon Harwood, Teresa Sherald, and Robert B. Fitzgerald, 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 former Gov. Bar R. V, Section 6(D)(1).¹

{¶2} Jonathan Coughlan represented Respondent. William Flevares appeared on behalf of Relator.

{¶3} Respondent represented Jamie Smith in a custody and child support matter involving her infant child. This representation began September 10, 2010 and ended in January 2012. Communication between Respondent and Smith broke down, and Respondent failed to return the unused portion of his retainer. On September 24, 2012, Smith filed a grievance

¹ Effective January 1, 2015, the Supreme Court amended Gov. Bar R. V and the Board's Procedural Regulations. This report distinguishes between the former and current versions of Gov. Bar R. V and the Procedural Regulations, as appropriate.

against Respondent with Relator. Thereafter on October 5, 2012, Respondent provided Smith with an itemized account of his billing and returned the unearned portion of his retainer from his trust account.

{¶4} On June 9, 2014, Relator filed a one-count complaint against Respondent alleging the following violations: Prof. Cond. R. 1.16(a), Prof. Cond. R. 1.16(e), and Prof. Cond. R. 1.4(a)(2), (3), and (4). All the alleged violations arose from Respondent's representation of Smith. Before the hearing, the parties agreed to dismiss the following violations: Prof. Cond. R. 1.16(a) and Prof. Cond. R. 1.4(a)(2), (3), and (4). The panel finds that the dismissal was appropriate and unanimously dismisses those alleged rule violations pursuant to Gov. Bar R. V, Section 12(G).

{¶5} On November 17, 2014, the parties filed agreed stipulations. The agreed stipulations included stipulated facts, rule violations, mitigating factors, aggravating factors, exhibits, and sanction. At the hearing, only Respondent provided testimony. The panel recommends a public reprimand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶6} Respondent was admitted to the practice of law in the state of Ohio on November 9, 1974 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶7} Respondent violated Prof. Cond. R. 1.16(e) due to his failure to promptly refund the portion of his retainer that was not earned. On January 10, 2012, Respondent sent Smith a letter in which he indicated that he understood that she had reconciled with the child's father and requested documentation from her so that he could close the file. On January 20, 2012, Smith

emailed Respondent to request that he close his file and return the unearned portion of her retainer.

{¶8} On March 22, 2012, Smith again requested that her file be closed. Respondent emailed Smith on that same day and stated that he would close his file and that she would be contacted. Smith heard nothing further. Smith again emailed Respondent on July 24, 2012 and August 20, 2012, but did not receive a response to either email. On September 24, 2012, Smith filed a grievance with Relator and October 5, 2012, Respondent provided an itemized account of his billing on the Smith matter and returned the unearned portion of the retainer.

{¶9} Respondent through his agreed stipulations and by his own testimony on the witness stand admitted that he failed to timely respond to the client's request for a refund of the money and to close his file. It is clear that the public is not at risk from similar conduct by Respondent. Respondent testified at great length and explained how the Smith grievance occurred; why this would not occur again and what actions he has taken to correct the problem.

{¶10} Based upon the parties' stipulations and the evidence presented at the hearing, the panel concludes that Relator proved by clear and convincing evidence that Respondent's conduct as alleged in the complaint violated Prof. Cond. R. 1.16(e) [a lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned].

AGGRAVATION, MITIGATION, AND SANCTION

{¶11} The parties stipulated that there were no aggravating factors.

{¶12} The parties agreed and stipulated to the following mitigating factors: absence of a prior disciplinary record; absence of dishonest or selfish motive; time in good faith effort to rectify the consequences; full and free disclosure to the disciplinary board; cooperative attitude in the proceedings; and good character and reputation.

{¶13} Given the inordinate amount of time that Smith waited to receive the unearned portion of her retainer, Respondent clearly violated the rule at issue.

{¶14} However, this was the sole rule violated. No aggravating factors were present. The parties stipulated several mitigating factors. Additionally, the parties stipulated that the appropriate sanction for Respondent for his violation of Prof. Cond. R. 1.16(e) should be a public reprimand

{¶15} The reported case most similar to this case is *Lake Cty. Bar Assn. v. Kubyn*, 121 Ohio St.3d 321, 2009-Ohio-1154. In *Kubyn*, the respondent admitted to having violated Prof. Cond. R. 1.16(d) and Prof. Cond. R. 1.16(e). The respondent's violation also involved a domestic relations matter in which he failed to promptly refund the unearned portion of his retainer. Unlike the present case, the parties in *Kubyn* were able to enter into a consent to discipline agreement in which they recommended a public reprimand. Though this case is not technically a consent to discipline case, by agreeing to a public reprimand and the stipulations, Respondent has shown full cooperation with this process and a willingness to be accountable for his violation of the rule at issue.

{¶16} Relator was involved in another public reprimand case within the last two years. That case also supports a sanction of a public reprimand in the present case. See *Trumbull Cty. Bar Assn. v. Rucker*, 134 Ohio St.3d 282, 2012-Ohio-5642. Although the respondent's case involved a few different rules than the one at issue in the case at bar, Respondent has similar mitigating factors to those that were present in the *Rucker* case, including, but not limited to, Respondent's good faith effort to remedy the problem once the rule violation had been brought to his attention. Relator recommended a public reprimand in *Rucker*, and said recommendation was accepted by both the Board and the Supreme Court. The panel acknowledges that the

purpose of the disciplinary process is to protect the public and not to punish the offender. In determining whether or not a sanction is appropriate for Respondent's misconduct, all relevant factors must be considered, including the duties of Respondent, the violations incurred, and the sanction imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743.

{¶17} Therefore, this panel finds and recommends that Respondent be publicly reprimanded. The costs of the proceedings should be taxed to Respondent.

BOARD RECOMMENDATION

Pursuant to Gov. Bar R. V, Section 12, the Board of Professional Conduct of the Supreme Court of Ohio considered this matter on February 13, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, William Richard Biviano, be publicly reprimanded and ordered to pay the costs of these proceedings.

Pursuant to the order of the Board of Professional Conduct 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, Director