

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

In re:	:	Case No. 2014-026
Complaint against	:	
Francis Edward Sweeney, Jr.	:	Findings of Fact,
Attorney Reg. No. 0058723	:	Conclusions of Law, and
Respondent	:	Recommendation of the
	:	Board of Professional Conduct of
Cleveland Metropolitan Bar Association	:	the Supreme Court of Ohio
Relator	:	

OVERVIEW

{¶1} This matter was heard on November 19, 2014 in Columbus before a panel consisting of Teresa Sherald, Robert Fitzgerald, and Paul De Marco, chair. None of the panel members resides in the district from which the complaint arose or served as a member of the probable cause panel that reviewed the complaint pursuant to former Gov. Bar R. V, Section 6(D)(1).¹

{¶2} Respondent was present and represented by Jonathan Coughlan. Matthew Moriarty and Paul Smith appeared on behalf of Relator.

{¶3} In 2005, Respondent was retained to represent two clients, a mother and her minor daughter, regarding injuries they suffered in a rear-end automobile accident in Florida. The liability of the other driver was clear; the only issue was the extent of the clients'—chiefly the mother's—injuries. After his unsuccessful attempts to settle their claim without filing a lawsuit, Respondent referred them to Florida counsel for litigation. Respondent is not licensed to practice in Florida and did not seek admission there *pro hac vice*. Two law firms represented the

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.

clients in the Florida litigation. The first withdrew due to a conflict of interest, the second due to the mother's failure to cooperate.

{¶4} After the second firm withdrew more than six years post-accident, Respondent attempted to fill the void, personally resuming his efforts to settle the case. Although he was notified that the defendant had filed a motion to dismiss the case for failure to prosecute, he advised the mother that she did not have to attend the hearing on that motion, suggesting in a text message, "Got it covered." Respondent did not attend the hearing, however, nor did he arrange for a Florida lawyer to attend it on the clients' behalf. Consequently, the court dismissed the case.

{¶5} Two days later, Respondent, apparently upset after learning that the mother had not cooperated with her Florida lawyers and not followed his own prior advice, sent her the following text message: "I just found out you ignored several motions to compel answers to interrogatories [*sic*] over 2 years ago. Not only have you not been listening to me and Magazine [the first Florida lawyer.] U screwed yourself by no [*sic*] listening to anyone. I can't help u anymore. Call walker [the second Florida lawyer] if u have questions. Sorry[.]" Relator's Ex. 9. Respondent thus ended their attorney-client relationship, almost seven years after it began, without advising his client to seek new counsel, to appeal the dismissal, or to seek relief from the dismissal.

{¶6} The panel finds by clear and convincing evidence that Respondent violated the following disciplinary rules: Prof. Cond. R. 1.3 [dilligence]; Prof. Cond. R. 1.4(a) [failure to communicate adequately with the client]; Prof. Cond. R. 1.16(b)(1) [failure to withdraw from the representation with minimal adverse impact on the interests of the client]; and Prof. Cond. R. 1.16(d) [failure to take reasonably practicable steps to protect the client's interest when

terminating the relationship]. The panel recommends a six-month stayed suspension as the appropriate sanction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶7} Respondent was admitted to the practice of law in the state of Ohio on May 18, 1992 and is subject to the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

Heidi DeCaprio's Retention of Respondent

{¶8} On April 13, 2005, Heidi DeCaprio entered into a fee agreement with Respondent to represent her and her minor daughter (also named Heidi) in an action for injuries they had sustained two weeks earlier in a rear-end car accident in Florida. Relator's Ex. 1. Respondent is a cousin of DeCaprio's former husband. Hearing Tr. 95. The undated fee agreement, signed by Respondent and DeCaprio, provided for a one-third contingent fee if the claim was settled without a lawsuit, escalating to 40 percent of the recovery if a lawsuit was filed. Relator's Ex. 1. The agreement further stated that Respondent's "services" could include, *inter alia*, "interviewing witnesses, preparing and filing pleadings, court appearances, taking depositions, meeting with medical professionals, negotiating with opposing counsel, meetings and telephone conversations with Clients." *Id.* It also stated "that this Fee Agreement does not include taking an appeal of a judgment denying your claim" and that, "[s]hould it become necessary or appropriate to take such action, you will be consulted." *Id.*

{¶9} Following his retention, Respondent gathered the police report from the accident and his clients' medical records, notified their physician that he had been retained to represent them and would "protect what is owed to your office" out of any recovery, investigated the facts, and attempted to resolve the claim with the insurance carrier of the other driver (O'Brien).

Hearing Tr. 193-195; Relator's Ex. 10.

{¶10} When his efforts to resolve it proved unsuccessful, Respondent contacted a Florida attorney, friend, and law school classmate, James Magazine, to handle the lawsuit in Florida. Hearing Tr. 195-196. Respondent followed up with a letter to Magazine dated May 13, 2006, enclosing "copies of my entire office files for" DeCaprio and her daughter and inviting Magazine "to contact me should you have any questions or concerns." Respondent's Ex. 1. Despite referring the case to Magazine for the filing of a lawsuit, Respondent did not communicate to DeCaprio that he was terminating their attorney-client relationship. Hearing Tr. 196.²

{¶11} DeCaprio retained Magazine in or about June 2006. *Id.* at 32-33; Respondent's Ex. 2. Magazine's fee agreement, signed by DeCaprio, contained terms similar to Respondent's, except that it also recited, "THE CLIENTS CLARIFY that they have not employed any other law firms and/or attorneys or counsel in this matter. However, the undersigned [DeCaprio] does hereby authorize [Magazine's firm] to employ additional counsel of his choice when necessary. The hiring of additional counsel requires the prior approval of the client(s) and additional counsel shall abide by the same terms of this agreement and to assume [*sic*] the same level of responsibility to the client for the performance of the services in question." *Id.*

Respondent's Involvement While the Lawsuit was Pending in Florida

{¶12} On January 8, 2009, Magazine filed suit on behalf of DeCaprio and her daughter in the Circuit Court for the Sixth Judicial Circuit, Pinellas County, Florida. Relator's Ex. 4. Because of a conflict of interest, Magazine was forced to withdraw as their counsel in early 2011. Hearing Tr. 200.

² Although Respondent's specific mention of the fact that he could not practice in Florida and that DeCaprio would need Florida counsel arguably would be enough to notify the client that the scope of his representation would be limited going forward, *see* Prof. Cond. R. 1.2(c), DeCaprio seems not to have interpreted it as such.

{¶13} Magazine referred DeCaprio to another Florida attorney, Michael Walker of the Walker Law Group. Respondent's Ex. 8. DeCaprio subsequently retained Walker on terms similar to Magazine's agreement. Respondent's Ex. 9. An order substituting Walker for Magazine was entered on May 9, 2011. Hearing Tr. 199; Relator's Ex. 12.

{¶14} On August 4, 2011, Walker filed a motion to withdraw due to DeCaprio's non-cooperation with her attorneys, which the court granted on September 9, 2011. Relator's Ex. 6 and 14.

{¶15} On January 10, 2012, the court held a hearing on the defendant's motion to dismiss for failure to prosecute, but neither DeCaprio nor any attorney representing her attended that hearing. The court therefore dismissed the lawsuit that day for failure to prosecute. *See* Relator's Ex. 7 and 14.

{¶16} During the slightly more than three years the lawsuit was pending in Florida, Respondent's involvement in the matter consisted of the following activities.

{¶17} Respondent occasionally spoke with DeCaprio and Magazine about the case. Hearing Tr. 196. Respondent testified that DeCaprio called him every three to four months, and that he spoke with Magazine "a couple of times." *Id.*; *see also id.* at 199, 225. At one point in his testimony at the panel hearing, Respondent insisted that when DeCaprio called, he told to her, "I'm not your lawyer, I can't practice law in Florida, I don't have a license to practice law in Florida" *Id.* at 225. At a different point during his testimony, however, Respondent denied telling DeCaprio, "Do not call me, I am not your lawyer." *Id.* at 199.

{¶18} On April 22, 2009, Magazine's paralegal faxed DeCaprio's medical records to Respondent. Relator's Ex. 13; Hearing Tr. 197. When asked at the hearing if these medical records constituted health information protected under HIPAA that could be disclosed only to a

lawyer of the patient or the lawyer's agent or employee, Respondent replied, "I suppose." *Id.* at 197-199.

{¶19} On July 30, 2011, DeCaprio faxed to Respondent a copy of a letter she had received from Attorney Robin Nightingale of the Walker Law Group concerning her firm's representation of DeCaprio. Enclosed with the letter was Nightingale's draft motion to withdraw as counsel for DeCaprio and her daughter. Relator's Ex. 5; Hearing Tr. 200-201.

{¶20} On August 10, 2011, DeCaprio faxed to Respondent a copy of the Walker firm's motion to withdraw as filed, along with two proposals for settlement from O'Brien's insurance company (comparable to an offer of judgment under Fed. R. Civ. P. R. 68) offering to settle DeCaprio's claim and that of her daughter for \$35,000 and \$3,000 respectively, a motion filed by Nightingale for additional time to respond to these proposals, and two letters from Nightingale to DeCaprio regarding them. Relator's Ex. 6; Hearing Tr. 202-203.

{¶21} On December 1, 2011, DeCaprio faxed to Respondent a copy of Defendant's motion to dismiss and to strike Plaintiff's pleadings ("the motion to dismiss") and a letter from DeCaprio requesting that he sign a letter of protection so that she could continue to receive medical treatment. Relator's Ex. 7; Hearing Tr. 205. It appears her physician—the same one to whom Respondent had sent letters of protection prior to referring the case to Magazine—was balking at continuing to treat her in the wake of the Walker firm's withdrawal. Relator's Ex. 7, at 4; Relator's Ex. 17.

{¶22} On December 20, 2011, Nightingale's paralegal Pamela Seligman sent a letter to Respondent, enclosing "copies of medical bills from Ms. DeCaprio's files," apparently at Respondent's request. Relator's Ex. 8. Seligman's letter also stated, "If you decide you want a copy of the file, you may want to send someone to copy it soon." *Id.*

{¶23} A document entitled “Case Notes Report,” which includes notes on the case from the Magazine and Walker firms, was admitted into evidence without objection at the hearing and was designated as Relator’s Exhibit 17. Throughout the case notes report are references to Respondent, occasionally characterizing him as DeCaprio’s Ohio attorney. Relator’s Ex. 17 at 1, 16, 24, 28, 29, 30, and 32.

{¶24} The Case Notes Report reveals the problems the Walker firm had securing DeCaprio’s cooperation. For example, one entry describes DeCaprio as becoming “verbally abusive” when one of the Walker attorneys told her she would have to return to Florida for a deposition. *Id.* at 235 Another entry, this one from Nightingale dated June 3, 2011, explains the same incident in greater detail:

I spoke to client last week Client was irate on the phone to both myself and Jessica. She used a great deal of profanity and literally yelled at me for well over half of the conversation. What got her so worked up was that she did not want to have to come down here for her deposition. She lives in Ohio. I explained that she must come down here. That Florida law requires plaintiffs to be deposed in the jurisdiction in which they brought suit. I also informed her of the potential consequences of not appearing (case thrown out). She was extremely unhappy and rude. The rudest client I have ever dealt with. Not only does she not want to go to the deposition, she doesn’t think she should [*sic*] have to and that the insurance company should offer her money before she goes. She also said she signed a paper with Jim Magazine that she wanted \$250,000 for the suit. That Jim said they offered \$100,000 (no evidence of this in the file) and she will not take it. She says this [motor vehicle accident] has totally changed her life and she will never be the same. She has pain 24/7. Crying, yelling. F’word used too many times to count.

Id. at15.

{¶25} An entry from Nightingale dated a week later recounts a similar conversation with DeCaprio, during which the client was “extremely upset calling me stupid” and “yelling into the phone,” while Nightingale attempted to explain again the need for DeCaprio to travel to Florida for her deposition as well as the Walker firm’s valuation of her case. *Id.* at16. “After 30

minutes on the phone go[ing] over and over these issues,” reported Nightingale, “she decided she ‘can’t talk to me anymore’ and will talk to Mr. Sweeney about my letter and get back to me with a decision of which path she chooses.” *Id.*

{¶26} Other entries in the same case notes report shed some light on actions Respondent apparently began taking later in 2011 to assist DeCaprio in the wake of the Walker firm’s withdrawal. For example, a note from one of the assistants in the Walker office to Nightingale, dated September 20, 2011, recounts a phone call from DeCaprio eleven days after the court approved the firm’s withdrawal:

* * *She said she is getting calls from her healthcare providers saying that since we no longer represent her, she is responsible for the bills. She at first claimed that she didn’t receive anything saying we were going to drop her, but then I told her about the certified letters that were sent and signed for. She then acknowledged receiving those and giving them to an attorney up there – Francis Sweeney – who she says told her he would “take care of everything.” I advised that if she had spoken with another attorney, that she call that attorney’s office to see what action he has taken. She then said that we couldn’t drop her because she never signed off on it, never signed “the papers.” I told her there were no papers for her to sign, that we had sent her all the notices that we were requesting to withdraw, including the hearing notice certified mail which she signed for. She then said again that she had given all these to this Francis Sweeney, and I again answered with she could contact his office to see what action they have taken, if any. She wanted to go into how long her case has been, how nothing has been done, etc so forth but I repeated that I would take a message * * *. Basically, I did not get into a protracted discussion with her, although I could tell from her tone and what she was saying that she wanted to pick a fight.

Id. at 25.

{¶27} Then on January 11, 2012, immediately after the Walker firm learned the case had been dismissed, there were successive notes between two individuals in that firm, specifically mentioning Respondent:

I know Francis Sweeney was looking into taking the case back on possibly but wanted to get a copy of the file. Did you ever send a request in for that file? Also, what would be the cost to him for it? Has he paid the \$24.00 invoice for the docs I already sent to him?

* * *

I was never requested to get the file. Don't you have it? It should still be in house. It was closed on 9/13/11. Why does she keep calling us? We can't help her. We withdrew from the case and have a signed Court Order. We will be happy to send a copy of her entire case file to her or her new attorney if that is what she is requesting. Otherwise, we need to cut ties with her and tell her we cannot do anything more to help her except give her a copy of her file. It amazes me that we withdrew because we could not get her to cooperate with us and now she is bugging the crap out of us to help her????? Actually, the invoice for Mr. Sweeney in Cleveland, OH was for \$7.48 (for 24 copies plus postage) and no he has not paid the invoice.

Id. at 29.

{¶28} These entries from the case notes report strongly suggest that Respondent became, or was considering becoming, actively involved in DeCaprio's case again during the latter part of 2011 and early 2012.

{¶29} A series of text messages during that timeframe from Respondent to DeCaprio confirm that fact. On December 30, 2011, after DeCaprio notified him that the court in Florida had set a hearing for January 10, 2012 on the defendant's motion to dismiss for failure to prosecute,³ Respondent texted the following to DeCaprio: "Got it covered. *U don't have to be there.* I am coordinating it thru Magazine. No worries. Happy new year." Relator's Ex. 9 at 3 (emphasis added).

{¶30} Respondent sent another reassuring text message to her the same day: "I [*sic*] trying to settle it but insurance adjustor is out til 2nd. Things will happen quickly after that." *Id.*

{¶31} Respondent's next series of text messages did not take place until January 10, 2012, the scheduled date for the hearing in Florida. Respondent's six text messages that day began with Respondent chastising DeCaprio for deciding to "take a loan our on your case. Not good. I said NOT to!" *Id.* The next text message was intended for Magazine but inadvertently

³ The court issued an amended notice of hearing on December 12, 2011. Relator's Ex. 14.

sent to DeCaprio: "Talk to me brother. If heidi's case gets dismissed we will both be sued!" *Id.* No doubt recognizing the need to immediately smooth over his errant text message, he sent another reassuring one to DeCaprio: "That last text was me working on your case." *Id.* Another reassuring text message followed: "We will work it out. No worries." *Id.*

{¶32} The following day, January 11, 2012, the day after the dismissal, Respondent sent DeCaprio a one-word reassuring text message: "Patience." *Id.* at 2. Yet another reassuring text message followed: "[Magazine] will be calling u and explaining what we are going to do. I'm pretty sure we are going to be ok. Just don't freak out yet." *Id.* at 1.

{¶33} By the next day, however, Respondent's willingness to help DeCaprio had come to an abrupt end. His final text message to her read: "I just found out you ignored several motions to compel answers to interroigatories [*sic*] over 2 years ago. Not only have you not been listening to me and Magazine[, you] screwed yourself by no [*sic*] listening to anyone. I can't help u anymore. Call walker if u have questions. Sorry[.]" *Id.*

{¶34} On January 20, 2012, ten days after the dismissal, DeCaprio sent the following letter to Respondent:

Dear, Mr. Skip Sweeney,

It is my understanding that you are no longer providing me with your legal services's [*sic*] if this is correct I will need for you to provide to have sccess [*sic*] to all my case file and information and I should be advised of all legal rightat [*sic*] this time please advise as soon as possible, thank you for your consideration in this regard.

Sincerely,

Heidi DeCaprio

Relator's Ex. 15.

{¶35} DeCaprio also sent a letter to the judge in Florida signed by her and her daughter, stating as follows:

This letter is to inform you that I was under the impression from my lawyers Francis Sweeney and James Magazine that I was under legal representation at the time of the last hearing on January 10, 2012. My lawyer Francis Sweeney here in Cleveland told me not to worry he had it all handled. That I did not need to appear in your court room. When I called the 11th of January they told me at the Clerks of Courts that my case had been heard and dismissed. I am making a plea to your courts to reinstate my case, for I was misrepresented at the time and unaware of the circumstances from what I was told by my Lawyers. I am not done fighting this case and would like it reopened. I am now seeking other legal counsel to help me plead my case.

Relator's Ex. 16.

{¶36} The court in Florida took no action after receiving this letter.

{¶37} DeCaprio testified that until January 12 she believed Respondent was still her attorney and that she depended upon him for legal guidance. Hearing Tr. 100-102. As evidence of her reliance on Respondent for legal guidance, DeCaprio pointed out that she informed Respondent of the January 10 hearing.

{¶38} Indeed, Respondent took several concrete actions in December 2011 and January 2012 that validated DeCaprio's reliance on him for legal guidance. First, he requested from the Walker firm and received on December 20, 2011 her medical bills. Relator's Ex. 8; Hearing Tr. 208-209. Second, he contacted O'Brien's insurance adjuster in an attempt to settle DeCaprio's case. Hearing Tr. 213. Third, on December 30, 2011, Respondent sent DeCaprio a text message regarding the hearing, reassuring her, "Got it covered. [You] don't have to be there. I am coordinating it thru [Magazine]. No worries. Happy New Year." Relator's Ex. 9; *see also* Hearing Tr. 214-218. Fourth, he continued reassuring her in January that he was "working on your case" and would "work it out." Relator's Ex. 9 at 2. These actions gave DeCaprio every

reason to believe that Respondent was not merely involved in her case again, but was actually on top of what needed to be done to protect her interests.

{¶39} From and after his text message of January 12, however, Respondent took no further action to assist or protect DeCaprio, including failing to consult with her regarding her right to appeal the dismissal—as his fee agreement suggested he would in the event an appeal became “necessary or appropriate” (Relator’s Ex. 1)—and failing to apprise her that she could move for relief from the judgment of dismissal.

{¶40} On December 14, 2012, DeCaprio filed a grievance against Respondent with Relator.

{¶41} In its complaint, Relator alleges that Respondent violated the following disciplinary rules: Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a), Prof. Cond. R. 1.16(b)(1), and Prof. Cond. R. 1.16(d).

{¶42} There can be no doubt that a lawyer-client relationship between Respondent and DeCaprio and her daughter was formed when she signed his fee agreement in April 2005, shortly after the accident. Although Respondent had made it clear enough to DeCaprio that he was not licensed to practice in Florida, nothing prevented him from seeking *pro hac vice* status in Florida, if need be. Yet there is no evidence he ever offered to seek *pro hac vice* status in Florida, whether during the pendency of the case and in the aftermath of the dismissal, when DeCaprio had no other lawyer to help her. Hearing Tr. 201, 203, 211-212.

{¶43} In their arguments at the hearing and in their post-hearing briefs, the parties focused on the following questions:

- Did Respondent terminate the attorney-client relationship formed in April 2005 by *referring* DeCaprio to Florida counsel in 2006?

- Was that relationship terminated by virtue of DeCaprio's *retention* of Florida counsel to handle the litigation?
- Even if Respondent's attorney-client relationship with DeCaprio terminated before the second half of 2011, was it revived between August 2011 and January 2012, as a result of Respondent's various undertakings on behalf of, and his reassuring representations to, DeCaprio?
 - And, finally, when and by whom was the relationship terminated?

{¶44} Prof. Cond. R. 1.16 covers withdrawal from representation, but does not define what constitutes the termination of an attorney-client relationship. The issue of when an attorney-client relationship has ended generally is a question of fact. *Trickett v. Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.*, 8th Dist. No. 2000-P-0105, 2001 WL 1301557 (Oct. 26, 2001). But one party to the relationship may take affirmative actions so inconsistent with a continued relationship that the question of when the relationship ended may be decided as a matter of law. *Ruf v. Belfance*, 9th Dist. No. 26297, 2013-Ohio-160, ¶ 12 (citing cases). Either way, the termination of an attorney-client relationship is determined by the actions of the parties. *McGlothin v. Schad*, 194 Ohio App.3d 669, 2011-Ohio-3011, ¶ 14, citing *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶ 12; *see also Vassil v. Gross & Gross, L.L.C.*, 8th Dist. No. 94919, 2011-Ohio-1920, ¶ 30, citing *Brown v. Johnstone*, 5 Ohio App.3d 165, 167, 450 N.E.2d 693 (9th Dist. 1982).

{¶45} To terminate an attorney-client relationship, the conduct of one or more of the parties must be "clear and unambiguous, so that reasonable minds can come to but one conclusion from it." *Brautigam v. Damon*, No. 1:11-CV-551, 2013 WL 4481636, at *6 (S.D. Ohio Aug. 20, 2013) (citing *Mastran v. Marks*, No. 14270, 1990 WL 34845 (Ohio App. 9 Dist. Mar. 28, 1990)). Conduct that dissolves the essential mutual confidence between an attorney and a client can signify the end of the attorney-client relationship. Although written termination

is not required, an attorney should clarify any doubt about whether a relationship exists, “preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs when the lawyer has ceased to do so.” Comment 4 to Prof. Cond. R. 1.3.

{¶46} So while an attorney notifying the client in writing that their attorney-client relationship has terminated clearly and unambiguously signals an end to the relationship, in this instance there was no written evidence of even an arguable termination of the attorney-client relationship until after DeCaprio’s case was dismissed.

{¶47} The relevant question here is whether, prior to the dismissal, while the clients’ claims were still alive, either party engaged in conduct so inconsistent with a subsisting attorney-client relationship that it must be deemed to have ended.

{¶48} Ohio courts have found that an attorney-client relationship may end simply because the client retains another attorney to file a suit regarding the same subject matter for which the client had retained the previous attorney. *Brown*, 5 Ohio App.3d at 166-167; *DiSabato v. Thomas M Tyack & Associates Co., L.P.A.*, 10th Dist. Franklin No. 98AP-1282, 1999 WL 715901 (Sept. 14, 1999); *Ruf*, 2013-Ohio-160, at ¶ 14; *see also Accelerated Sys. Integration, Inc. v. Ritzler, Coughlin & Swansiger, Ltd.*, 8th Dist. No. 97481, 2012-Ohio-3803, ¶ 47. Indeed, recently in *Waite, Schneider, Bayless & Chesley Co., L.P.A. v. Davis*, No. 1:11CV851, 2015 WL 1321744, *12 (S.D. Ohio Mar. 24, 2015), the district court ruled that the client’s retention of another attorney to handle a lawsuit in Sarasota, Florida, after the original Ohio law firm declined to file any Florida action, served to terminate the parties’ relationship with respect to the Sarasota transaction.

{¶49} Although the instant case mirrors the *Waite, Schneider* facts to some extent, there are two reasons why, even if the panel were disposed to follow that decision’s reasoning, we

need not do so in this case: it does not matter if DeCaprio's retention of one or both of the Florida firms served to terminate Respondent's involvement in the matter because (1) Relator has not shown that Respondent committed any misconduct *during* the Florida firms' involvement in the case (in other words, up until September 9, 2011), and (2) Relator contends that Respondent committed misconduct after he voluntarily resumed his involvement in this matter.

{¶50} There can be no doubt that, prior to referring DeCaprio to Florida counsel, Respondent provided substantial legal services to her regarding this matter: as noted above, following his own retention in April 2005, Respondent gathered the police report from the accident and his clients' medical records, issued letters of protection to their physician, investigated the facts, and attempted to resolve the claim with O'Brien's insurance carrier. Hearing Tr. 193-195; Relator's Ex. 10.

{¶51} There also can be no doubt that Respondent again began providing substantial legal services to DeCaprio regarding this matter in December 2011 and early January 2012: as noted above, he sought and received from the Walker firm "copies of medical bills from Ms. DeCaprio's files," Relator's Ex. 8; by his own account, he made contact with O'Brien's adjuster in an effort to "settle" it, Relator's Ex. 9 ("I [*sic*] trying to settle it but insurance adjustor is out til 2nd. Things will happen quickly after that."); and he consistently advised and reassured DeCaprio regarding the case. *Id.*

{¶52} The question we must confront, therefore, is not whether Respondent resumed his involvement in this case. The panel finds by clear and convincing evidence that he did. Rather, the question we actually must decide is whether Respondent committed any of the misconduct alleged by Relator *after* he resumed his involvement in this case late in 2011.

{¶53} In other words, during that period of about two months, did Respondent violate Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a), Prof Cond. R. 1.16(b)(1), and Prof. Cond. R. 1.16(d)?

{¶54} An attorney-client relationship and the obligations that attend it exist “when an attorney advises others as to their legal rights, a method to be pursued, the forum to be selected, and the practice to be followed for the enforcement of their rights.” *Landis v. Hunt*, 80 Ohio App.3d 662, 669, 610 N.E.2d 554, 558 (10th Dist. 1992). Benchmarks of an attorney-client relationship include the “rendering of legal advice and legal services by an attorney and the client’s reliance on the advice and services.” *Collett v. Steigerwald*, 2d Dist. No. 22028, 2007-Ohio-6261, ¶ 32.

{¶55} Therefore, the panel has no trouble finding by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.3 and Prof. Cond. R. 1.4(a) when he gave DeCaprio the fatally flawed legal advice that she did not have to appear at the January 10 motion to dismiss hearing and failed to make arrangements to have an attorney cover the hearing. *See* Relator’s Ex. 9. Indeed, as a result of her absence and that of an attorney representing her, the court predictably dismissed her action.

{¶56} Whether Respondent violated Prof. Cond. R. 1.16(b)(1) and/or Prof. Cond. R. 1.16(d) presents a more complicated question because, as a threshold matter, it requires us to determine when and by whom the attorney-client relationship was terminated. Was it terminated by Respondent when he texted DeCaprio on January 12, 2012, “I can’t help u anymore. Call walker if u have questions. Sorry”? Or was it terminated by DeCaprio’s letter to Respondent of January 20, 2012, in which she stated, “It is my understanding that you are no longer providing me with your legal services’s [*sic*] if this is correct I will need for you to provide to have sccess [*sic*] to all my case file and information and I should be advised of all

legal right at [sic] this time please advise as soon as possible?” A termination by Respondent on January 12 would naturally implicate the provisions of Prof. Cond. R. 1.16 governing an attorney’s voluntary withdrawal; a termination by DeCaprio on January 20 would not.

{¶57} Based on the authorities discussed above, the panel believes Respondent’s January 12 text message—in which Respondent told DeCaprio he could not help her anymore and advised her to call a lawyer who had withdrawn from her case with court approval five months earlier—was so inconsistent with a continued attorney-client relationship that it must be deemed to have clearly signaled the relationship’s end. If anything, DeCaprio’s January 20 letter, while not artfully worded, should have served as a reminder to Respondent that in terminating their relationship he at least owed DeCaprio the obligation under Prof. Cond. R. 1.16 to minimize the adverse effect on her legal interests. As Respondent’s counsel acknowledged at the hearing when referring to Respondent’s January 12 text message, “He’s not doing everything he could, I grant it.” Hearing Tr. 292.

{¶58} The panel finds by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.16(b)(1) and Prof. Cond. R. 1.16(d) by withdrawing from the representation at such a point and in such a manner as to add to the harm he already had done to DeCaprio’s legal interests by virtue of his flawed advice not to attend the hearing and his failure to arrange for an attorney to attend. By forcing DeCaprio to fend for herself in a precarious legal situation which his flawed advice had exacerbated—*i.e.*, in the aftermath of the dismissal—and by arming his client with nothing more than the useless suggestion to “call walker,” Respondent failed to do what was reasonably practicable to minimize the damage he had caused and to which he was then adding. He easily could have given her a reasonable amount of time to seek other counsel (*see* Prof. Cond. R. 1.16(d)) or, if not, at least advised her to appeal, to move for relief from the

dismissal order, and to seek new counsel to pursue both courses.

The Duties Violated and the Injuries Caused

{¶59} Respondent violated duties he owed to DeCaprio and her minor child by dint of his advice not to attend the January 10 hearing, his failure to arrange for another attorney to attend, and his failure to take steps to protect their interests upon terminating the attorney-client relationship on January 12, 2012. By violating these duties, Respondent exacerbated their already precarious legal position.

AGGRAVATION, MITIGATION, AND SANCTION

{¶60} As aggravating factors, the panel finds that Respondent committed multiple offenses—one essentially involving his advice not to appear, the other his later failure to give proper advice upon withdrawing—which caused harm to multiple victims who were vulnerable.

{¶61} Lest we forget, the harm caused by this advice and non-advice was not to DeCaprio's case alone; it affected her minor daughter's case as well. Respondent helped turn his clients' already precarious legal position—*i.e.*, the impending dismissal of their case for failure to prosecute—into an utterly hopeless situation by advising DeCaprio not to attend the January 10 hearing and then by not advising her to seek new counsel, to appeal, and to seek relief from the dismissal.

{¶62} There is no gainsaying DeCaprio's well-documented record as an intractable, unreasonable, and often verbally abusive client who did not follow her lawyers' reasonable advice and requests and who thus had only herself to blame for the impending dismissal of her case. It may be that she was so predisposed not to heed advice from lawyers that neither Respondent's advice to find a replacement lawyer, file an appeal, and file a motion for relief from the dismissal, nor receiving such advice or assistance from a hypothetical replacement

lawyer, would have made any difference in the outcome of the case. It also may be that—as her former lawyer Robin Nightingale suggested in one case file note—DeCaprio was the “rudest” of clients, a trait that could very well have made her far less likely than most clients to find a willing replacement attorney. And, given her proclivity for not heeding lawyers’ advice and her unreasonable refusal to return to Florida for a deposition, there might have been little chance that DeCaprio would attend the January 10 hearing anyway, even if Respondent had advised her to do so. These realistic factors tend to mitigate the harm that Respondent caused. Still, however, these factors cannot excuse or erase his failure to advise DeCaprio to attend the crucial hearing, his failure to arrange for another attorney to attend it, and, following the predictable dismissal, his failure to advise her to seek a replacement lawyer and take the other practicable steps mentioned above.

{¶63} The panel finds as mitigating factors that Respondent displayed a cooperative attitude toward these proceedings, had no prior disciplinary record, and has presented abundant evidence of his good character and of his reputation for and record of professionalism and service to his clients and the greater community.

{¶64} Respondent offered no reliable evidence that he suffered from any mental disability or chemical dependency at the time of the alleged violations. Thus, there is a presumption that he was healthy and unhindered at that time. *Disciplinary Counsel v. McCord*, 121 Ohio St.3d 497, 2009-Ohio-1517, ¶ 45.

{¶65} Respondent’s text messages to DeCaprio show that he was extremely frustrated and upset with her on January 12, 2012, when he abruptly terminated their attorney-client relationship and refused to provide any further help to her and her daughter. These text messages suggest that the source of his frustration and anger was her failure to listen to his

advice and to abide by the reasonable requests of her other lawyers. This history, which the prior lawyers recounted to him (see Relator's Ex. 9), and no doubt his own experience with DeCaprio not following his advice (*Id.*), appears to have clouded Respondent's judgment at this critical time.

{¶66} Relator recommends that Respondent receive a fully stayed six-month suspension from the practice of law. Respondent recommends a public reprimand, if the panel finds a violation.

{¶67} Arriving at the appropriate sanction requires consideration of the duties violated, the injuries caused, the attorney's mental state, and the sanctions imposed in similar cases. *Cleveland Bar Assn. v. McMahon*, 114 Ohio St.3d 331, 2007-Ohio-3673, ¶ 24. Before recommending a sanction, we also weigh the aggravating and mitigating factors in the case, including not only those set forth in BCGD Proc. Reg. 10,⁴ but all factors relevant to the case. *Cincinnati Bar Assn. v. Mullaney*, 119 Ohio St.3d 412, 2008-Ohio-4541, ¶ 40.

{¶68} The Supreme Court consistently has reminded us "that the primary purpose of the disciplinary process is not to punish the offender but to protect the public from lawyers who are unworthy of the trust and confidence essential to the attorney-client relationship." *Cleveland Metro. Bar Assn. v. Lockshin*, 125 Ohio St.3d 529, 2010-Ohio-2207, ¶ 42.

{¶69} As noted above, Relator recommends that Respondent receive a fully stayed six-month suspension from the practice of law. Relator has cited a number of decision in which the Supreme Court imposed a comparable sanction under comparable circumstances. *See e.g., Cleveland Metro. Bar Assn. v. Fonda*, 138 Ohio St.3d 399, 2014-Ohio-850 (where the attorney neglected the cases of two clients and failed to take reasonable steps to protect a client's interests when he withdrew as counsel, the Court imposed a one-year stayed suspension for violating Prof.

⁴ Redesignated as Gov. Bar R. V, Section 13, effective January 1, 2015.

Cond. R. 1.16(d), Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(3), and Prof. Cond. R. 1.4(a)(4)); *Disciplinary Counsel v. Bender*, 139 Ohio St.3d 332, 2014-Ohio-2118 (where the attorney failed to act with reasonable diligence in the representation of his client, missed filing deadlines, and practiced law after becoming a judge, the Court imposed a one-year stayed suspension for violating several Professional Conduct Rules, including Prof. Cond. R. 1.3 and Prof. Cond. R. 1.4(a)(3)); *Dayton Bar Assn. v. Hooks*, 139 Ohio St.3d 462, 2014-Ohio-2596 (where the attorney failed to act with reasonable diligence in the representation of a client because he failed to file documents regarding modification of the client's child-support obligation and also failed to keep the client reasonably informed as to the status of his case, the Court imposed a six-month stayed suspension and twelve hours of continuing legal education for violating Prof. Cond. R. 1.3 and Prof. Cond. R. 1.4); *Dayton Bar Assn. v. Nowicki*, 133 Ohio St.3d 74, 2012-Ohio-3912 (where the attorney failed to enter an appearance, prepare the case for trial, file objections to a magistrate's decision, or appeal a judgment against his client, the Court imposed a six-month stayed suspension for violating Prof. Cond. R. 1.3).

{¶70} While Respondent recommends a public reprimand if the panel finds a violation, Respondent has not provided us any precedents supporting such a sanction in comparable cases.

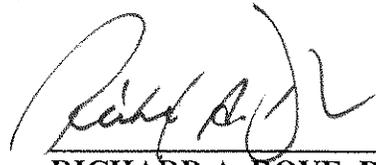
{¶71} After weighing all of the factors and case law mentioned above, the panel concludes that a six-month stayed suspension will suffice to protect the public from further ethical lapses by Respondent.

{¶72} In light of Respondent's misconduct, the duties violated and the harm caused, the aggravating and mitigating factors, and the sanctions imposed in similar cases, the panel recommends that Respondent receive a six-month suspension from the practice of law, with all six months stayed so long as Respondent commits no further misconduct during the stay period.

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 April 10, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Francis Edward Sweeney, Jr., be suspended from the practice of law for six months, stayed in its entirety, on condition that Respondent commit no further misconduct 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