

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

In re:

Complaint against

Case No. 2015-006

**John Joseph Scaccia
Attorney Reg. No. 0022217**

**Findings of Fact,
Conclusions of Law, and
Recommendation of the
Board of Professional Conduct
of the Supreme Court of Ohio**

Respondent

Dayton Bar Association

Relator

OVERVIEW

{¶1} This matter was heard on August 20, 2015 in Columbus before a panel consisting of Sharon Harwood, Paul De Marco, and Roger S. Gates, 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 Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing, represented by David P. Williamson. Brian D. Weaver appeared on behalf of Relator.

{¶3} While representing Marco Smith in an action concerning denial of Workers' Compensation benefits in the court of common pleas of Van Wert County, Respondent failed to timely respond to discovery requests from the employer's attorney and failed to attend a hearing on the defendant's motion to compel and for sanctions. As a result, the court dismissed the complaint and ordered Smith or Respondent to pay \$2,669.04 to the employer for its reasonable expenses in connection with the motion. The court of appeals dismissed the appeal finding that Respondent's notice of appeal was not timely filed.

{¶4} Despite the trial court's order to pay the monetary sanction by October 15, 2012, Respondent failed to pay the sanction until after the employer's counsel filed a request for additional sanctions. Notwithstanding Respondent's payment of the original sanction in June 2013, the trial court ordered Respondent to pay an additional sanction of \$5,980. This amount remains unpaid.

{¶5} Relator has proven by clear and convincing evidence that Respondent violated Prof. Cond. R. 1.1 [competence], Prof. Cond. R. 1.3 [diligence], Prof. Cond. R. 3.4(c) [knowingly failing to comply with rules of tribunal], and Prof. Cond. R. 3.4(d) [failing to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party]. The panel recommends dismissal of the charged violation of Prof. Cond. R. 8.4(d) [conduct prejudicial to the administration of justice]. By separate entry issued on August 28, 2015, the panel dismissed charged violations of Prof. Cond. R. 1.4(a) [communication] and Prof. Cond. R. 1.4(c) [insurance].

{¶6} Respondent was disciplined by the Court on October 2, 2014 and June 25, 2015. In each case, Respondent was suspended for one year, with six months stayed; the second suspension was to run concurrently with the first suspension.

{¶7} The panel recommends that Respondent be suspended for eighteen months, with six months stayed on conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶8} Respondent was admitted to the practice of law in the state of Ohio on November 13, 1983 and is subject to the Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio.

{¶9} Respondent was suspended by the Supreme Court of Ohio on October 2, 2014 for one year, with six months of the suspension stayed. *Dayton Bar Assn. v. Scaccia*, 141 Ohio St.3d 35, 2014-Ohio-4278.

{¶10} On June 25, 2015, Respondent was again suspended for one year, with six months stayed, provided that the second suspension would run concurrently with the first suspension. *Dayton Bar Assn. v. Scaccia*, 143 Ohio St.3d 144, 2015-Ohio-2487.

{¶11} On March 24, 2010, Respondent and his associate Jeffrey Wilson commenced an action in the Van Wert County Court of Common Pleas on behalf of Marco Smith. This action was an appeal from an adverse ruling by the Industrial Commission of Ohio denying Smith's claim for Workers' Compensation benefits. Although Respondent was a named counsel for Smith, Wilson assumed primary responsibility for the case.

{¶12} Sara Rose, an attorney from Pickerington timely filed an answer on behalf of Smith's employer V.A. Cooper & Co. Inc. Rose also served Respondent with discovery requests consisting of interrogatories, requests for admissions, and requests for production of documents.

{¶13} When Wilson failed to timely respond to the discovery requests, Rose filed a motion to compel under Civ. R. 37 and requested sanctions. Before the court decided this motion, Wilson responded to the discovery requests, and Rose withdrew the motion to compel.

{¶14} On June 6, 2011, three days before the scheduled trial date, Wilson filed a voluntary dismissal of the case under Civ. R. 41(D).

{¶15} On June 6, 2012, the last day of the one-year period under the Ohio Savings Statute, Respondent refiled the same complaint on Smith's behalf in the Van Wert County Court of Common Pleas.

{¶16} Rose promptly filed an answer on behalf of Smith's employer. At the same time, Rose served on Respondent discovery requests that were essentially identical to the discovery requests to which Wilson had eventually responded in the 2010 case.

{¶17} After receiving Rose's discovery requests, Respondent attempted to get Smith to come to his office in Dayton to assist with preparing a response. Even though Respondent had difficulty getting Smith's cooperation, Respondent took no further action because he believed it was still very early in the case, and he was waiting for the court to issue a scheduling order. Respondent also believed that some of the requested documents and information had been provided to Rose during the first case.

{¶18} Although Smith's response to Rose's discovery requests was due by July 11, 2012, Respondent failed to timely respond to the discovery requests and also failed to seek an extension or other accommodation from either Rose or the court. Rose attempted without success to contact Respondent (twice by phone and once in writing) to determine the status of the past due response.

{¶19} On August 13, 2012, Rose filed a motion to compel and a request for sanctions under Civ. R. 37 due to Respondent's failure to timely respond to her discovery requests. Respondent failed to contact Rose to discuss her motion or failed to file any response to the motion.

{¶20} On August 21, 2012, the court set Rose's motion for oral hearing on September 20, 2012 at 10:30 a.m. In accordance with the court's usual practice, the clerk of courts provided notice of the hearing to all counsel of record by facsimile transmission.

{¶21} On September 19, 2012, the day before the scheduled hearing, Rose attempted to phone Respondent since she still had received nothing in response to either her discovery requests or the motion to compel.

{¶22} Although Rose's first attempt to contact Respondent was unsuccessful, she spoke with Respondent's assistant Brittany early in the afternoon of September 19. During this phone conversation, Rose asked whether Respondent was going to attend the hearing the next day since she did not want to travel from Pickerington to Van Wert if there was not going to be a hearing. When Brittany indicated that their office had not received notice of the hearing, Rose faxed her a copy of the notice.

{¶23} Respondent called Rose late in the afternoon on September 19 to inform her that he could not attend the hearing. Respondent indicated that he had to be in the federal court in Cincinnati in the early afternoon on September 20 and that he could not be in Van Wert for a late morning hearing and still make it to Cincinnati in time for his hearing there. Rose responded that although she was not opposed to rescheduling the hearing in Van Wert, she needed to know before she left home the next morning if the judge was willing to do that.

{¶24} In an attempt to resolve his schedule conflict, Respondent phoned the judge's chambers at the federal court in Cincinnati to explain the situation and ask whether the start of the hearing could be pushed back a couple of hours to allow him to handle the matter in Van Wert. Respondent claims he was informed that the judge would not change the schedule for the hearing, and that if Respondent failed to show up on time, the judge would send the federal marshals to look for him.

{¶25} By the time Respondent attempted to contact the court in Van Wert to discuss his schedule conflict, the court was closed for the day. At approximately 8:13 p.m. on the evening of September 19, Respondent faxed to the clerk a motion to continue the hearing concerning the motion to compel.

{¶26} On the morning of September 20, Respondent began to drive to Van Wert to attend the hearing, but turned around after he concluded that he could not attend the hearing in Van Wert and still be on time for his hearing in Cincinnati. Respondent concluded that the Supremacy Clause of the U.S. Constitution justified his decision to attend the federal court hearing rather than a conflicting state court hearing. Respondent telephoned Rose who was in the process of driving to Van Wert and told her that he would not be attending the hearing.

{¶27} Although Respondent failed to appear in Van Wert for the hearing, Rose continued to Van Wert and informed Judge Steele of her communications with Respondent.

{¶28} By entry filed on September 21, 2012, Judge Steele sustained Rose's motion to compel and ordered that the requests for admission were deemed admitted; that plaintiff had until September 26, 2012 to answer the interrogatories and provide the requested documents; and that plaintiff's failure to do so would result in dismissal of the complaint. The court further ordered that the plaintiff and/or his counsel pay sanctions to Rose in the amount of \$2,669.04 by October 15, 2012, but provided plaintiff until September 26, 2012 to object to the sanction amount.

{¶29} After receiving Judge Steele's order, Respondent decided to get Smith into his office to work on responding to the interrogatories and the requests for production of documents. Although Respondent met with Smith, they failed to compile a complete response.

{¶30} Between 3:47 p.m. and 4:28 p.m. on September 26, 2012, Respondent sent Rose a series of five e-mail messages with multiple documents attached. In the first e-mail, Respondent informed Rose that the attached documents were the discovery responses. Respondent further stated:

The hard copies are on the way by runner however, the original documents with my client's signature are in the mail to me and I will forward as soon as I receive. In the meantime, you have the copies with signature [sic]. I will send the documents

in separate emails in addition to this one. Further, Mr. Smith has not filed taxes in 2010 or 2011. Respondent's Ex. D, ex. A.

{¶31} On September 27, 2012, Rose filed a motion to dismiss the complaint asserting that the plaintiff had failed to comply with the court's order filed September 21, 2012. In a memorandum attached to the motion, Rose detailed her position that the plaintiff's response was untimely and incomplete. Rose supported her arguments with her affidavit incorporating copies of Respondent's emails and his written responses to the interrogatories and the requests for production of documents.

{¶32} At 8:26 a.m. on September 28, 2012, Judge Steele signed and filed the order prepared by Rose which dismissed the complaint "[b]ecause Plaintiff has failed to comply with this Court's Entry." Relator's Ex. 3.

{¶33} On October 30, 2012, Respondent, on the plaintiff's behalf, filed a notice of appeal with the court of appeals for the Third Appellate District. The court of appeals dismissed the appeal by entry filed on November 9, 2012 finding that the court lacked jurisdiction over the appeal because the notice of appeal had been filed out of time. Relator's Ex. 4.

{¶34} After receiving the decision from the court of appeals, Respondent decided that it would be less costly to just pay the Civ. R. 37 financial sanction imposed by Judge Steele than to continue to fight the dismissal of the case and the sanction. Therefore, although Respondent considered filing a Civ. R. 60(B) motion to vacate the trial court's judgment, Respondent took no further action to contest the dismissal of Smith's case.

{¶35} After making several unsuccessful attempts to get Respondent to pay the sanction ordered by Judge Steele, Rose filed a motion to show cause why the plaintiff should not be held in contempt for failure to pay the sanctions ordered. Although the court initially set the motion for hearing on December 9, 2012, the hearing was continued multiple times at Respondent's request.

{¶36} Respondent finally agreed in March 2013 to make biweekly payments of \$200 each to Rose until the court-ordered sanction was paid. After making two tardy payments, Respondent ceased making payments. At Rose's request, the court scheduled a hearing for May 14, 2013 on her pending motion to show cause.

{¶37} On May 13, 2013, Respondent filed another motion requesting a continuance of this hearing. The court immediately denied the requested continuance, ordered Respondent to appear for the hearing on May 14, and ordered that if Respondent failed to appear, he would be found in contempt and that a warrant would be issued for his arrest.

{¶38} On May 14, 2013, Respondent presented attorney Rose with a check drawn on Respondent's law office account for the remaining balance of the court-ordered sanction. After Respondent informed the court that he had paid the sanction, the hearing was continued.

{¶39} Rose forwarded the check to her client which deposited the check on May 31, 2013. On June 5, 2013, Respondent's check was dishonored for insufficient funds. Respondent testified that the account contained sufficient funds to cover the check when issued and that the check was dishonored because of Cooper's delay in depositing the check coupled with his bank wrongfully placing a hold on a large fee check he deposited following the settlement of another case.

{¶40} On June 11, 2013, Rose filed a motion for additional fees and expenses, and the court scheduled this motion for hearing on July 10, 2013. On June 13, Respondent provided Rose with a cashier's check for the full amount of the sanctions ordered more than eight months earlier and the court agreed to continue the July 10 hearing until August 21, 2013.

{¶41} Following the August 21 hearing, the court ordered that Respondent pay \$5,980 to reimburse Cooper for its additional fees and expenses incurred as a result of Respondent's failure to timely pay the original court-ordered sanction.

{¶42} Although Respondent filed a notice of appeal to attempt to appeal the award of additional fees and expenses, the Van Wert County Court of Appeals dismissed the appeal because the notice of appeal stated it was taken by Smith but the trial court's judgment was against Respondent alone.

{¶43} The panel concludes that Relator has proven, by clear and convincing evidence, that Respondent's representation of his client Marco Smith failed to meet Respondent's obligations under the Rules of Professional Conduct and that this failure prejudiced Smith.

{¶44} Specifically, although the record is silent as to the reason(s) the 2010 case was voluntarily dismissed, Respondent refiled the case a year later without taking any action to rectify whatever deficiencies caused the dismissal. Even though competent counsel would have reasonably anticipated that defense counsel would likely request the same discovery in the refiled case which had been requested in the original case, Respondent failed to assess what discovery had been provided in the 2010 case prior to its dismissal or to assure that he had access to the information which the defendant would be seeking.

{¶45} Respondent testified without dispute that he possessed the legal knowledge and skill reasonably necessary to represent Smith in the matter. Respondent also testified that he had experience in handling complex litigation. Respondent was clearly aware that Rose served her interrogatories and her requests for production of documents shortly after the complaint was filed. In fact, Respondent noted in his testimony that the discovery requests were served before the complaint was even served on Cooper.

{¶46} However, Civ. R. 33(A)(2) clearly provides that, "Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action * * *." Civ. R. 33(A)(3) further provides in part that:

The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than twenty-eight days after the service of the interrogatories or within such shorter or longer time as the court may allow.

{¶47} Similar provisions are contained in Civ. R. 34(B) in regard to requests for production of documents. Although Respondent testified that Rose's timing of her discovery requests was "unusual" in a civil case, Respondent cannot dispute that Rose's discovery requests were served in accordance with the Civil Rules and that he had knowledge that he was obligated to respond to those requests on or before July 11, 2012.

{¶48} While Respondent blames his failure to respond on Smith's lack of cooperation, the evidence clearly establishes that Respondent simply ignored his obligation to either provide a timely response or to seek additional time to respond from either the court or Rose.¹ Even though Respondent claims he was expecting the court to schedule an initial status conference, he provided no explanation as to why this was justification for his failure to properly deal with the defendant's discovery requests. Additionally, despite his belief that some of the requested discovery had been provided in the 2010 case, Respondent made no effort to speak with Rose to determine what information or documents she still needed, or to request that the court restrict the scope of Rose's discovery requests under Civ. R. 26(C).

{¶49} Respondent made no attempt to file a response to Rose's motion to compel. Despite what Respondent might have expected concerning his need to respond to the discovery requests as required by the Civil Rules, the receipt of Rose's motion would have prompted reasonably competent counsel to realize that Rose was serious about obtaining a timely response to the

¹ Although Civ. R. 37(A) authorizes a party to move for an order compelling discovery, Civ. R. 37(E) requires that before filing such a motion the party seeking discovery must "make a reasonable effort to resolve the matter through discussion with the attorney . . . from whom discovery is sought." The evidence establishes that Rose unsuccessfully made attempts to contact Respondent prior to filing her motion to compel.

discovery. Respondent, however, made no attempt to file a response with the court or to even determine when his response was due² or whether a hearing would be scheduled. Respondent also failed to contact Rose in an attempt to explain why he had failed to provide a timely discovery response and to establish an alternative schedule for his response.

{¶50} Respondent failed to attend the hearing scheduled by the court on the motion to compel or to arrange for substitute counsel to attend on his behalf. As a result, the court issued a financial sanction against Smith and ordered that the complaint would be dismissed if the discovery response was not provided within five days.

{¶51} Respondent provided incomplete responses within the time frame of the court's order and made no effort to inform Judge Steele of the reason(s) why his responses were incomplete or to seek additional time to complete his responses. As a result, the court immediately dismissed the complaint.

{¶52} Respondent filed nothing with the court after the dismissal in an attempt to protect his client's interests. Although Respondent filed a notice of appeal from the dismissal, the appeal was dismissed solely because the notice of appeal was filed late. While he believed that he could have filed a motion to vacate the trial court's judgment under Civ. R. 60(B),³ Respondent testified

² Although Relator failed to provide any evidence as to the requirements of the local rules of the Van Wert County Court of Common Pleas, the court's Local Rule 8 currently provides:

All motions filed in any civil cases shall be submitted to the Court on brief or memoranda. When oral argument or testimony is desired, the motion shall contain a request for assignment for hearing.

In all motions directed to the Court, unless otherwise provided in the Rules of Civil Procedure, the failure of the party against whom a motion is directed to file a brief or memorandum in opposition within fourteen (14) days from the date of service of such motion, may be construed by the Court as an admission that the motion may be granted.

The Clerk shall not accept for filing any motion not accompanied by a brief or memorandum.

The Court, on its own motion, may set any motion for oral argument or testimony.

See <http://www.vwcommonpleas.org/adobe/vwcprules.pdf>. Even though Respondent professed to be familiar with the court's local rules, he made no effort to file a memorandum opposing Rose's motion to compel.

³ Despite Respondent's testimony concerning the availability of a Civ. R. 60(B) motion to vacate the trial court's

that he made a decision to refrain from filing such a motion because it would be cheaper for him to simply pay the financial sanction rather than to continue to invest his time to try to protect Smith's interests.

{¶53} Prof. Cond. R. 1.1 requires a lawyer to provide competent representation to his client, and states "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Although Relator provided no evidence that Respondent lacked the requisite legal knowledge or skill reasonably necessary to represent Smith in the matter, the panel is convinced that Respondent's thoroughness and preparation in handling this matter, particularly the botched appeal, was less than what was reasonably necessary. Therefore, the panel concludes that Relator has proven, by clear and convincing evidence, that Respondent violated his obligations under Prof. Cond. R. 1.1.

{¶54} Prof. Cond. R. 1.3 requires a lawyer to "act with reasonable diligence and promptness in representing a client." Comment [1] to the rule states that "A lawyer also must act with commitment and dedication to the interests of the client." Comment [3] states:

Delay and neglect are inconsistent with a lawyer's duty of diligence, undermine public confidence, and may prejudice a client's cause. Reasonable diligence and promptness are expected of a lawyer in handling all client matters and will be evaluated in light of all relevant circumstances. The lawyer disciplinary process is particularly concerned with lawyers who consistently fail to carry out obligations to clients or consciously disregard a duty owed to a client.

judgment, the panel concludes that Respondent's failure to perfect a timely direct appeal from the judgment barred the filing of a motion to vacate. *See, e.g., Key v. Mitchell*, 81 Ohio St.3d 89, 90-91, 1998-Ohio-643 [any claims or arguments that were not raised in a timely appeal, but that could have been raised, are precluded from being raised in a subsequent Civ. R. 60(B) motion]; and *State ex rel. Durkin v. Ungaro* (1988), 39 Ohio St.3d 191, 193 [judgments would never be final if a party could indirectly gain review of a judgment from which no timely appeal was taken by filing a motion to vacate judgment].

{¶55} Respondent failed to act reasonably to protect the interests of his client. Relator has proven, by clear and convincing evidence, that Respondent violated his obligations under Prof. Cond. R. 1.3.

{¶56} Prof. Cond. R. 3.4(c) provides that a lawyer shall not “knowingly disobey an obligation under the rules of a tribunal.” Prof. Cond. R. 1.0(g) provides that to act “knowingly” a lawyer must possess “actual knowledge of the fact in question,” but that knowledge “may be inferred from circumstances.”

{¶57} The Court has apparently decided only two cases involving violations of Prof. Cond. R. 3.4(c). In *Akron Bar Assn. v. Shenise*, 143 Ohio St.3d 134, 2015-Ohio-1548, Shenise was found to have violated Prof. Cond. R. 3.4(c) by consciously choosing not to attend a court hearing on a motion for contempt filed against his clients. In *Disciplinary Counsel v. Stafford*, 128 Ohio St.3d 446, 2011-Ohio-1484, Stafford was found to have violated Prof. Cond. R. 3.4(a), Prof. Cond. R. 3.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) by obstructing opposing counsels’ discovery efforts in one case.

{¶58} The Court has also found violations of DR 7-106(A) [a lawyer shall not disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding], which is similar to Prof. Cond. R. 3.4(c). In *Ohio State Bar Assn. v. Trivers*, 134 Ohio St.3d 139, 2012-Ohio-5389, the Court concluded that Trivers had violated DR 7-106(A) by repeatedly failing to comply with filing requirements in bankruptcy court, to appear as ordered, and to comply with orders to disgorge unearned fees and pay assessed fines. In *Disciplinary Counsel v. Pullins*, 127 Ohio St.3d 436, 2010-Ohio-6241, the Court concluded that Pullins violated DR 7-106(A) by intentionally failing to serve on opposing counsel copies of two subpoenas issue in an inactive case. In *Cincinnati Bar Assn. v. Emerson*, 122 Ohio St.3d 176, 2009-Ohio-2883, Emerson was

found to have violated DR 7-106(A) by failing to respond to requests for discovery, to appear as scheduled at two depositions, and to comply with a court's order to file a notice of withdrawal immediately or continue as counsel.

{¶59} The panel concludes that Relator has proven, by clear and convincing evidence, that Respondent engaged in misconduct in violation of Prof. Cond. R. 3.4(c) by knowingly disobeying the following obligations:

- Respondent knowingly failed to comply with Judge Steele's order fixing a deadline to provide a response to Rose's discovery requests.
- Respondent knowingly failed for eight months to comply with Judge Steele's order that the plaintiff and/or his counsel pay \$2,669.04 as a sanction under Civ. R. 37 to reimburse Cooper for its reasonable expenses incurred as a result of the failure to timely comply with the discovery requests.
- Respondent has continued for almost two years to knowingly disobey Judge Steele's order that he pay \$5,980 to Cooper for additional attorney fees for Respondent's actions or lack thereof.

{¶60} Prof. Cond. R. 3.4(d) provides that a lawyer shall not “[i]n pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” Relator does not allege that Respondent made a frivolous motion or discovery request, only that he failed to make reasonably diligent effort to comply with Rose's discovery requests.

{¶61} Although the Court does not appear to have decided any cases involving Prof. Cond. R. 3.4(d), misconduct involving a failure to timely respond to discovery requests was typically categorized as neglect in cases under the Code of Professional Responsibility. See, e.g., *Akron Bar Assn. v. Maher*, 121 Ohio St.3d 45, 48, 2009-Ohio-356, ¶29 [Respondent violated DR 6-101(A)(1) and (3) with his neglect and professional incompetence because he did not sufficiently investigate, comply with discovery requests, or look for a needed expert].

{¶62} Model Rule 3.4(d) provides that a lawyer shall not “in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” In adopting the Rules of Professional Conduct in 2007, the Supreme Court added the words “intentionally or habitually” to Prof. Cond. R. 3.4(d). Some argument could be made that these words were added to ensure that the enforcement of discovery rules would be left to the trial court before which a matter was pending and that only intentional or repeated failures to comply with legally proper discovery requests should rise to the level of professional misconduct. However, neither Prof. Cond. R. 3.4(d) nor the comments to the rule provide guidance as to the significance of these added words *or* their applicability to a failure to respond to discovery requests (as opposed to just the filing of a frivolous motion or discovery request).

{¶63} The panel has no trouble concluding that Respondent “fail[ed] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.” The question becomes, *if* such a failure must be *habitual* or *intentional* to constitute a violation of Prof. Cond. R. 3.4(d), did Respondent’s conduct rise to that level in this case? Given that these were the only discovery requests served prior to the dismissal of the case and that Respondent had played no role in the prior voluntarily dismissed case, Respondent’s failure would not in the panel’s view qualify as habitual. But would it qualify as intentional, if indeed that is required to find a Prof. Cond. R. 3.4(d) violation? Although the relatively short time between the service of the discovery requests and the dismissal of the case—just three months—and Respondent’s professed expectation that the trial judge would hold a preliminary status conference before discovery began in earnest suggest that Respondent’s behavior might have been merely neglectful, the added factors that Respondent failed to respond to Rose’s inquiries as to the reason for his failure to respond to

the discovery requests, deliberately ignored Rose's motion to compel, and did not come close to complying with the trial court's unequivocal order granting him additional time to provide discovery even more strongly suggest intentionality. Even though Respondent's behavior was not as severe as the obstructive behavior described by the Court in the *Stafford* decision, Respondent's conduct did obstruct Rose's legally proper attempts to obtain timely discovery concerning Smith's claims. Weighing these countervailing sets of factors against one another, the panel is left with the firm conclusion that Respondent's failure to comply with Rose's discovery requests became intentional—even if it did not start as such—by the time the case was dismissed.

{¶64} So if an attorney's failure to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party must be shown to be intentional or habitual in order to constitute a Prof. Cond. R. 3.4(d) violation, we find that Respondent's in this case was intentional. If, on the other hand, an attorney's failure to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party need not be shown to be intentional or habitual in order to constitute a Prof. Cond. R. 3.4(d) violation, we find such a violation here as well. Based on the above reasoning, the panel concludes that Relator has proven, by clear and convincing evidence, that Respondent engaged in misconduct in violation of Prof. Cond. R. 3.4(d).

{¶65} Prof. Cond. R. 8.4(d) provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. Although ¶41 of the complaint fails to specify how Respondent's conduct violated this rule, Relator stated in closing argument that Respondent's "bouncing" of a check given to Rose in payment of the original court-ordered sanction and Respondent's failure to pay the supplemental sanction form the basis for this charge. Hearing Tr. 234. The panel concludes that Relator has failed to prove this charge since both of

these actions or nonactions occurred after termination of the Smith litigation. For this reason, the panel recommends dismissal of the charged violation of Prof. Cond. R. 8.4(d).

AGGRAVATION, MITIGATION, AND SANCTION

{¶66} When recommending sanctions for attorney misconduct, the panel must consider all relevant factors, including the ethical duties the Respondent violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002-Ohio-4743, ¶16. The panel must also weigh evidence of the aggravating and mitigating factors now listed in Gov. Bar R. V, Section 13(B). *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, ¶21. However, because each disciplinary case is unique, the panel is not limited to the factors specified in the rule but may consider any factor relevant to determination of the sanction to be imposed. *Disciplinary Counsel v. Zapor*, 127 Ohio St.3d 372, 2010-Ohio-5769, ¶6.

Aggravating Factors

{¶67} *Multiple offenses:* The panel concludes that Respondent's actions resulted in multiple violations of the Rules of Professional Conduct.

{¶68} *Prior Disciplinary Offenses:* As of the date of the hearing, Respondent had been disciplined by the Court twice during the preceding eleven months. In the first decision, even though all three of the client matters involved violations relating to the handling of client funds and fee issues, the Mound matter also involved Respondent's neglect of a legal matter entrusted to him primarily due to his failure to comply with the trial court's deadline to file an amended complaint resulting in the termination of his clients' case. The second decision involved Respondent's improper handling of client funds in two matters and his failure to communicate effectively with his client about the nature and scope of his representation in one of those matters. Although the Court and Board recognized Respondent's prior discipline in the second decision,

both concluded that the violations in the two cases were caused by the same inattention to detail and cover overlapping timeframes, that none of the misconduct involved a selfish or dishonest motive, and that Respondent had taken corrective measures to reduce the likelihood of repeating his misconduct. *Dayton Bar Assn. v. Scaccia*, 143 Ohio St.3d 144, 2015-Ohio-2487, ¶¶14, 16-17. Although the Court has held that “relatively contemporaneous ethical infractions prosecuted separately do not necessarily justify a harsher sanction,” that is not always the case. See, e.g., *Akron Bar Assn. v. DeLoach*, 143 Ohio St.3d 39, 2015-Ohio-494, ¶13. The instant case does not involve the lack of attention to detail in administrative functions (*i.e.*, mishandling client funds and failure to effectively communicate concerning the scope of the relationship) that predominate in the two earlier cases. The instant case instead involves Respondent’s ethical failures in the prosecution of his client’s matter which resulted in the case being dismissed, and Respondent’s failure to timely comply with the trial court’s sanctions imposed on account of those failures. Respondent’s misconduct relating to the prosecution of his client’s case is most similar to his neglect in the Mound matter involved in his first suspension, which is by no means contemporaneous with his misconduct in the instant case. For these reasons, the panel must consider Respondent’s prior discipline as an aggravating factor in the instant matter.

{¶69} *Refusal to acknowledge wrongful nature of conduct:* Throughout the hearing, Respondent denied that he had engaged in misconduct. He variously attributed his ethical failures to his client’s lack of cooperation; his expectation that the trial court would schedule an initial status conference before he needed to respond to discovery requests; his failure to receive a fax of a hearing notice; the Supremacy Clause of the U.S. Constitution; refusal of judges to reschedule hearings on short notice; failure of the court of appeals to abide by the facsimile filing rule of the Van Wert County Clerk of Courts; the payee’s delay in depositing the check he wrote on May 14,

2013 to pay the initial sanction; his bank placing a hold on money he received as his fee for settling a large case against Verizon; his and his family's health issues; and his financial difficulties.

Comment 1 to Prof. Cond. R. 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

{¶70} Whatever difficulties might have come his way, Respondent simply failed to demonstrate his commitment and dedication to protecting the interests of his client, and he refused to acknowledge his default in his obligations to his client.

{¶71} *Vulnerability of and resulting harm to victims of the misconduct:* Respondent obviously caused harm to his client. However, he also caused harm to the defendant in the lawsuit as reflected by the sanctions imposed upon him by Judge Steele.

{¶72} *Failure to make restitution:* Although he ultimately paid the initial sanctions imposed by Judge Steele, an unreasonable delay in making restitution is an aggravating factor. *Akron Bar Assn. v. DeLoach, supra*, ¶12. Respondent has not paid the sanction in the amount of \$5,980 that was ordered by Judge Steele on September 27, 2013.

Mitigating Factors

{¶73} The panel finds the following mitigating factors: the absence of a dishonest or selfish motive; full and free disclosure to the Board or cooperative attitude toward proceedings; evidence of good character and reputation; and imposition of other penalties or sanctions.

{¶74} Respondent testified that he had been suffering from a Vitamin D deficiency since at least mid-2012 but that this was not diagnosed until March 2015. He stated that this deficiency caused him a lot of pain. He also stated that he suffered from absentmindedness and inattention to detail, and that at times he would "literally fall asleep." Respondent testified that this condition

also coincided with health conditions suffered by his daughter and his mother, respectively, during the period from spring 2012 through fall 2013. Although he testified that all of these issues somewhat interfered with his ability during that time to “stay on top” of things in his practice, he did not actually claim that the particular misconduct in the instant case was contributed to by his Vitamin D deficiency. Furthermore, Respondent presented no medical testimony concerning his medical condition, the treatment he testified he received, or a prognosis concerning his ability to return to competent, ethical professional practice. For these reasons, the panel is unable to recognize Respondent’s health as a significant mitigating factor.

{¶75} Several recent decisions by the Court have imposed a public reprimand sanction for misconduct involving a lawyer’s lack of competence, failure to act with reasonable diligence or promptness in the representation of a client, and lack of communication. See, e.g., *Akron Bar Assn. v. Shenise*, *supra*, *Akron Bar Assn. v. Harsey*, 142 Ohio St.3d 97, 2015-Ohio-965, and *Columbus Bar Assn. v. Smith*, 2015-Ohio-2000. A more severe sanction (one-year stayed suspension) was imposed in *Trumbull Cty. Bar Assn. v. Yakubek*, 142 Ohio St.3d 455, 2015-Ohio-1570, primarily because the lawyer’s neglect involved multiple clients. Each of these decisions involved mitigating factors including no prior discipline, lack of a dishonest or selfish motive, cooperation throughout the disciplinary process, and evidence of good character or reputation. Other mitigating factors were cited by the Court including: Harsey had taken interim corrective action to reduce the likelihood of the reoccurrence of his misconduct; Smith had accepted full responsibility for her misconduct, and no client had been harmed; and Yakubek had made efforts to rectify the consequences of her misconduct and to reimburse her clients for unearned fees and for expenses.

{¶76} However, the Court imposed a more severe sanction for a violation of Prof. Cond. R. 1.3 in *Akron Bar Assn. v. DeLoach, supra*. DeLoach was retained by Turner’s mother to file a motion for resentencing for her son who was incarcerated. DeLoach admitted that she did not act with diligence in filing the motion for resentencing and that some of her preliminary work, such as a public-records requests, was not necessary. The Board concluded that DeLoach “made several bad tactical decisions concerning how to proceed with Turner’s claim” and she “failed to appropriately manage her caseload so that she could handle Turner’s case competently.” Based on this conduct, the Court found that DeLoach violated Prof. Cond. R. 1.3. DeLoach was also found to have violated Prof. Cond. R. 1.5 by failing to refund the unearned portion of the retainer and Prof. Cond. R. 1.15 for failing to deposit the retainer in an IOLTA account and to maintain records concerning the retainer. Although the Board found that DeLoach’s two prior disciplinary actions should be treated as multiple offenses and recommended a two-year stayed suspension, the Court concluded that the prior discipline was an aggravating factor requiring an actual suspension. The Court imposed a sanction of a two-year suspension, with the second year stayed.

{¶77} A few cases have involved violations of either Prof. Cond. R. 3.4(c) or the similar DR 7-106(A). In *Akron Bar Assn. v. Shenise, supra*. Shenise consciously chose not to attend a court hearing on a motion for contempt filed against his clients. Although the Court concluded Shenise had violated Prof. Cond. R. 3.4(c),⁴ the Court issued a public reprimand because Shenise’s pattern of misconduct occurred in a single case and arose from his erroneous belief that his clients’ bankruptcy filings were imminent and that the anticipated bankruptcy stay would obviate the need for him to take further action.

⁴ Shenise’s other conduct was also found to have violated Prof. Cond. R. 1.1, Prof. Cond. R. 1.2, Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(1), Prof. Cond. R. 1.4(a)(3), and Prof. Cond. R. 1.4(b).

{¶78} In *Disciplinary Counsel v. Stafford, supra*, Stafford was found to have violated Prof. Cond. R. 3.4(a), Prof. Cond. R. 3.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) by obstructing opposing counsels' discovery efforts in one case, and DR 1-102(A)(5) and DR 1-102(A)(6) by making misrepresentations to opposing counsel and by violating his duty of candor to the courts in another case. In determining the appropriate sanction, the Court agreed with the Board's conclusion that Stafford's "obstructive behavior and lack of candor * * * were just as disruptive to the administration of justice as outright misrepresentations would have been." *Id.* at ¶82. The Court imposed a suspension of eighteen months, with six months stayed.

{¶79} In *Ohio State Bar Assn. v. Trivers, supra*, the bankruptcy court had ordered Trivers to disgorge all or a portion of fees he received from clients because of his failure to perform various required functions in connection with their bankruptcy proceedings. The Court concluded that Trivers had violated DR 7-106(A)⁵ by repeatedly failing to comply with filing requirements in bankruptcy court, to appear as ordered, and to comply with orders to disgorge fees and pay assessed fines. Although Trivers acknowledged his wrongdoing, he continued to place a majority of blame on his failure to receive notices rather than to stay current on court procedures. The Court also noted that Trivers' misconduct was due to carelessness and lack of attention similar to his previous disciplinary action. The Court imposed a sanction of a two-year suspension, with one-year stayed on conditions.

{¶80} Finally, in its decision in *Disciplinary Counsel v. Dann*, 134 Ohio St. 3d 68, 73, 2012-Ohio-5337, ¶20, the Court explained that if a prior attempt at discipline has been ineffective to provide the protection intended for the public, such further safeguards should be imposed as

⁵ The Court also concluded that Trivers had violated multiple provisions of the Code of Professional Responsibility and the Rules of Professional Conduct including Prof. Cond. R. 1.1 and Prof. Cond. R. 1.3.

will either tend to effect the reformation of the offender or remove him entirely from the practice. Therefore, it is “reasonable and proper” to consider an attorney’s disciplinary record and “to impose a harsher sanction than we might otherwise impose for an attorney who committed comparable conduct but had no prior discipline.” *Id.* See also, *Cincinnati Bar Assn. v. Trainor*, 129 Ohio St.3d 100, 2011-Ohio-2645 (a history of similar disciplinary violations warrants a more severe sanction than might otherwise be appropriate for the same misconduct.)

{¶81} Relater recommended a sanction of an indefinite suspension. Although denying that Relator had proven any misconduct, Respondent recommended that any discipline not exceed a one-year suspension, with six months stayed, and that any such sanction should run concurrently with the sanction in his two prior cases.

{¶82} The panel concludes that Respondent’s misconduct in the instant case warrants a more severe sanction than the prior two cases. Respondent’s lack of competence and diligence were directly related to the prosecution of his client’s case and resulted in the dismissal of that case. Respondent also knowingly failed to comply with orders of the trial court regarding the payment of sanctions imposed on account of his misconduct. Finally, the aggravating factors, especially Respondent’s prior discipline, present in this matter support a more severe sanction. Based on the violations involved and the aggravating and mitigating factors, the panel concludes that the instant case is more similar to the *DeLoach* and *Trivers* decisions cited above than to Respondent’s prior disciplinary cases.

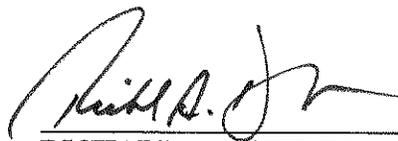
{¶83} For these reasons, the panel recommends that Respondent be suspended for a period of eighteen months, with the last six months stayed on the conditions that Respondent (1) Respondent shall make restitution to V.A. Cooper, Inc. in the amount of \$5,980, plus interest at

the statutory rate from September 27, 2013 as ordered in the September 27, 2013 judgment of the Van Wert County Court of Common Pleas, and (2) engage in no further misconduct.

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 October 2, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, John Joseph Scaccia, be suspended from the practice of law in Ohio for eighteen months, with the final six months stayed on conditions contained in ¶83 of this report, 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