

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

<b>In re:</b>	<b>SCO No. 2015-0060</b>
<b>Complaint against</b>	<b>Case No. 2014-078</b>
<b>Mark Russell Provenza Attorney Reg. No. 0022490</b>	<b>Findings of Fact, Conclusions of Law, and Recommendation of the Board of Professional Conduct of the Supreme Court of Ohio</b>
<b>Respondent</b>	
<b>Lorain County Bar Association</b>	
<b>Relator</b>	

**OVERVIEW**

{¶1} This matter was heard on July 8, 2015 in Columbus before a panel consisting of Charles J. Faruki, Judge Karen Lawson, and Judge C. Ashley Pike, 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 Daniel G. Wightman. D. Chris Cook appeared on behalf of Relator.

{¶3} Based on the parties' stipulations and evidence presented at the hearing, the panel finds, by clear and convincing evidence, that Respondent engaged in professional misconduct as outlined herein. Upon consideration of the applicable aggravating and mitigating factors and case precedent, the panel recommends that Respondent be suspended from the practice of law for one year, with six months stayed on conditions.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶4} Respondent was admitted to the practice of law in the state of Ohio on May 13, 1985 and is subject to the Rules of Professional Conduct and the Rules for Government of the Bar of Ohio. Stipulations ¶¶1 and 2.

{¶5} Respondent did not file an answer to the complaint and the Board certified Respondent's default to the Supreme Court on January 15, 2015.

{¶6} Respondent filed objections to the Supreme Court's show cause order and on February 12, 2015 the Court remanded the case to the Board for further proceedings. *Lorain Cty. Bar Assn. v. Provenza*, 141 Ohio St.3d 1469, 2015-Ohio-512.

{¶7} Respondent has no prior disciplinary record and is currently in good standing as an attorney in the state of Ohio. Stipulations ¶¶3 and 4.<sup>1</sup>

{¶8} On April 30, 2014, a grievance was filed with Relator by Robin Maxwell-Smith. On May 5, 2014, a separate grievance was filed with Relator by Susan Hughes. As a result, Relator opened an investigation. Stipulations ¶¶5-7.

{¶9} On or about May 16, 2014, Relator sent Respondent notice of the filing of both, the Smith and the Hughes' grievances, via certified mail and requested that he respond within 20 days. No response was received and on June 12, 2014 the certified mail containing both grievances was returned to Relator as "unclaimed." Stipulations ¶¶8 and 9.

{¶10} On or about June 12, Relator again attempted to contact Respondent, this time by telephone. Relator left Respondent a voicemail. The next day, Relator sent a second

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<sup>1</sup> Although Respondent was in good standing at the time the stipulations were submitted to and considered by the hearing panel, the Board notes that, as of the date of this report, Respondent is not registered for the 2015-2017 biennium. Thus, he is not currently in good standing as that term is used by the Supreme Court's Office of Attorney Services. See <http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/verification/goodstanding.asp>. This fact has no bearing on the Board's recommendation.

correspondence to Respondent resending both the Smith and the Hughes' grievances via regular mail and requested a timely response. On June 20, 2014, Relator received a voicemail message from Respondent stating that he had received the grievances by regular mail and that he would respond in a week. He failed to do so. Stipulations ¶¶10-13.

{¶11} On July 15, 2014, Relator, for the second time, left Respondent a voicemail advising him that his time to respond had expired. Respondent failed to reply in any fashion to Relator's voicemail. On July 17, 2014, Relator spoke to Respondent by telephone about his failure to provide written responses to the grievances. During that conversation, Respondent attempted to explain orally his conduct and to offer his response orally. Relator stopped Respondent from continuing to discuss the matter and advised him again that the response must be in writing. Stipulations ¶¶14-17, and 19.

{¶12} Although Respondent promised to provide Relator with a written response by July 25, 2014 he failed to do so. At a regularly scheduled meeting on July 28, 2014, Relator found probable cause to believe that Respondent had violated the Ohio Rules of Professional Conduct and the Rules for the Government of the Bar of Ohio. This finding was based on Relator's investigation, including Respondent's failure to timely and properly respond to both the Smith and Hughes' grievances. Stipulations ¶¶20-22.

{¶13} Following the meeting of July 28, Respondent called Relator's office and advised that he had sent his written response by e-mail on July 25. He claimed that he would resend it, but it was never received. On July 29, Relator contacted Respondent informing him that the e-mail had never been received and no response of any kind was ever received. Stipulations ¶¶23, 24, and 29-31.

{¶14} The above facts were found based upon the stipulations, the stipulated exhibits, and the hearing testimony of both Attorney Gentile and Respondent.

{¶15} The matters were assigned to D. Chris Cook, a member of the committee and bar counsel of Relator for prosecution. He filed a notice of intent to file with certified copy of the complaint, which was served on Respondent. On the same day, September 26, 2014, the investigative summary with exhibits in support was served on Respondent, and Respondent was given the opportunity to appear at a regularly scheduled meeting of the committee to address the complaint, investigative summary, and allegations contained therein. The meeting was held September 29, 2014. Stipulations ¶¶32-36.

{¶16} Respondent confirmed at the meeting that he did not maintain professional liability insurance for the periods of representation at issue covered by the Smith and Hughes' grievances nor did he advise his clients of this fact. He also confirmed that he never provided a written response to the grievances in this matter and that he did not deposit fees that he received from Robin Maxwell-Smith into his trust account. Stipulations ¶¶37-39.

{¶17} On October 1, 2014, Relator filed its formal complaint against Respondent with the Board. Stipulation ¶40.

#### **Maxwell-Smith Matter**

{¶18} Robin Maxwell-Smith paid Respondent \$300 for court costs on December 27, 2013 to initiate divorce paperwork. Respondent did not deposit these funds into his trust account. On February 20, 2014, Smith paid Respondent a \$500 retainer toward her divorce. These moneys likewise were not deposited into Respondent's trust account. Stipulations ¶¶59, 60, 70, and 71.

{¶19} Respondent failed to file the complaint as promised; failed to respond to multiple communications from Smith; and even told her to appear in court when he had still not filed any

divorce pleadings. He misinformed her concerning the status of her case and failed to respond to her in contravention of his promises to do so. Stipulations ¶¶61-69 and 73-85.

{¶20} On April 23, 2014, Smith sent Respondent a “Client Attorney Agreement Cancellation Notice” wherein she demanded by certified mail, return receipt requested, a full refund of \$800 (\$300 plus \$500) that she had paid to Respondent, all for Respondent’s failure to file her divorce paperwork. Respondent did not complete the work he was paid to do and did not return any of Smith’s filing fee or retainer, though Respondent did draft a complaint and separation agreement. Smith over-paid Respondent \$800 in two checks. Respondent never refunded to Smith the \$800 overpayment. Stipulations ¶¶87-90.

{¶21} In summary, despite repeated and multiple efforts to contact Respondent, he failed and refused to return Smith’s calls and text messages, meet with her, file her documents, or address her concerns. He never provided her with a written fee agreement and did not, at all times, carry professional liability insurance or advise Smith of the same in writing. He also failed to deposit the moneys she paid to him into his trust account. Stipulations ¶¶91-94.

{¶22} With respect to the Maxwell-Smith matter, the panel finds that the following stipulated violations were supported by clear and convincing evidence:

- Prof. Cond. R. 1.4(a)(2-4) [failing to properly and adequately communicate with his client about the status of her case, failing to return telephone calls, text messages or to schedule appointments and failed to comply with Smith’s requests for a receipt for her filing fee];
- Prof. Cond. R. 1.5(a) [charging an excessive fee for drafting and filing a complaint for divorce and failing to complete or file same];
- Prof. Cond. R. 1.4(c) [failing to maintain professional liability insurance or to inform his client in writing of his failure to do so];
- Prof. Cond. R. 1.3 [failing to diligently represent his client by his failure to prepare and file the divorce action as he had been hired to do];

- Prof. Cond. R. 1.15(a), Prof. Cond. R. 1.15(a)(2), Prof. Cond. R. 1.15(a)(4), and Prof. Cond. R. 1.15(c) [failing to keep Smith's funds separate from his own, failing to maintain a record of Smith's funds, and failing to deposit unearned fees into his trust account]; and
- Prof. Cond. R. 8.1(b) and former Gov. Bar R. V, Section 4(G)<sup>2</sup> [failing to cooperate in the investigation].

### **Hughes Matter**

{¶23} In March 2014, Respondent was appointed by the juvenile division of the Lorain County Court of Common Pleas to represent Susan Hughes in a case involving contributing to truancy. Hughes was scheduled for a court appearance on April 9, 2014 and attempted to contact Respondent on several occasions to discuss her case, but Respondent failed and refused to return Hughes' telephone calls or make any attempt to contact her. Stipulations ¶¶135-138.

{¶24} Hughes attempted to contact Respondent on several occasions. He did not return her calls or make any attempts to contact her. Hughes was under the impression that a new court date had been selected, but the juvenile court clerk advised otherwise and advised her to contact her lawyer. Her attempts to contact Respondent met with no response. On May 5, 2014, the Lorain County Sheriff's Department attempted to serve a warrant upon her for failure to appear on her court date. Stipulations ¶¶140-148.

{¶25} Hughes' attempts to contact Respondent were unsuccessful. She eventually learned from the juvenile court clerk that her new court date was May 15, 2014 and Respondent replied to Hughes two days before for the first time. He did not schedule a meeting with Hughes and simply advised her that he would see her in court on May 15, 2014. Respondent became aware by that time that a warrant existed for the arrest of his client. Stipulations ¶¶161-165.

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<sup>2</sup> Effective January 1, 2015, Gov. Bar R. V, Section 4(G) is now Gov. Bar R. V, Section 9(G).

{¶26} On that date, Respondent spent approximately five minutes with Hughes before advising her to take what he termed was the “deal” that he had for her. Hughes felt coerced to plead and take the deal; felt pressured; and was “in tears” about the situation. Stipulations ¶¶166-169.

{¶27} With respect to Count Two, the panel finds the following stipulated violations are supported by clear and convincing evidence:

- Prof. Cond. R. 1.4(a)(2-4) [failing to properly and adequately communicate with his client];
- Prof. Cond. R. 1.3 [failing to diligently represent his client despite being court-appointed; by contacting Hughes only once; never scheduling any appointments with her; failing to advise her of court appearances; and failing to research her defenses or reviewing her paperwork];
- Prof. Cond. R. 1.4(c) [failing to either maintain professional liability insurance during his representation of Hughes or to inform her in writing that he did not]; and
- Prof. Cond. R. 8.1(b) and former Gov. Bar R. V, Section 4(G)<sup>3</sup> [failing to cooperate in the investigation].

{¶28} The facts as to Hughes were found by the panel based upon the stipulations and upon hearing testimony of Attorney Gentile, of Hughes, and from Respondent.

### **Dismissals**

{¶29} By separate entry, the panel dismissed the following rule violations upon stipulation of the parties [Stipulations, Ex. D]: Prof. Cond. R. 1.1, Prof. Cond. R. 1.5(d)(3), and Prof. Cond. R. 8.4(c) [the Maxwell-Smith matter]; Prof. Cond. R. 8.4(c) [Hughes matter]; Prof. Cond. R. 1.3, Prof. Cond. R. 1.4(a)(2-4), and Prof. Cond. R. 1.4(c) [White matter].

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<sup>3</sup> See fn. 2, *supra*.

## MITIGATION, AGGRAVATION, AND SANCTION

{¶30} Relator and Respondent stipulated that the following aggravating and mitigating factors apply, and the panel agrees with one addition.

{¶31} Aggravating factors: (1) multiple offenses; (2) Respondent initially failed to cooperate in the investigatory process; and (3) he failed to make restitution to Smith. Beyond the foregoing facts, the panel finds that the failure to make restitution constitutes a dishonest and selfish motive.

{¶32} Mitigating factors: (1) absence of prior discipline; and (2) eventual cooperation in this matter upon obtaining representation of counsel.

{¶33} In addition to any individual research, the panel looked at several cases.

{¶34} The cases referenced by the parties were as follows:

- *Dayton Bar Assn. v. Hooks*, 139 Ohio St.3d 462, 2014-Ohio-2596.
- *Allen Cty. Bar Assn. v. Brown*, 124 Ohio St.3d 530, 2010-Ohio-580.
- *Cuyahoga Cty. Bar Assn. v. Poole*, 120 Ohio St.3d 361, 2008-Ohio-6203.
- *Cleveland Bar Assn. v. Norton*, 116 Ohio St.3d 226, 2007-Ohio-6038.
- *Cuyahoga Cty. Bar Assn. v. Sherman*, 101 Ohio St.3d 158, 2004-Ohio-340.
- *Dayton Bar Assn. v. Sebree*, 96 Ohio St.3d 50, 2002-Ohio-2987.

{¶35} The cases referenced by Relator in the supplemental filing subsequent to the formal hearing were these:

- *Mahoning Cty. Bar Assn. v. Malvasi*, 143 Ohio St.3d 140, 2015-Ohio-2361.
- *Dayton Bar Assn. v. Washington*, 143 Ohio St.3d 248, 2015-Ohio-2449.
- *Disciplinary Counsel v. Gorby*, 142 Ohio St.3d 35, 2015-Ohio-476.
- *Dayton Bar Assn. v. Scaccia*, 143 Ohio St.3d 144, 2015-Ohio-2487.
- *Stark Cty. Bar Assn. v. Marinelli*, 2015-Ohio-2570.
- *Akron Bar Assn. v. DeLoach*, 143 Ohio St.3d 39, 2015-Ohio 494.

{¶36} The panel also reviewed the following cases:

- *Akron Bar Assn. v. Harsey*, 142 Ohio St.3d 97, 2015-Ohio-965.
- *Stark Cty. Bar Assn. v. Marinelli*, 2015-Ohio-2570.
- *Dayton Bar Assn. v. Matlock*, 134 Ohio St.3d 276, 2012-Ohio-5638.

- *Cincinnati Bar Assn. v. McBeth*, 139 Ohio St.3d 175, 2014-Ohio-1611.

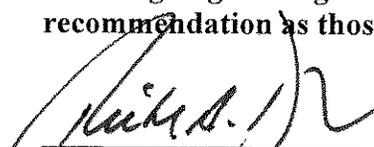
{¶37} The panel has carefully examined the cases cited. The cases involved multiple violations or at least the same violation with regard to multiple clients. None of the cases had in common with this case the elements of no prior discipline, a failure to cooperate in a disciplinary process, and failure to make restitution, leading the panel to find a selfish or dishonest motive.

{¶38} The panel concludes that close precedent in this particular case is lacking. The panel also finds that the cavalier attitude demonstrated by Respondent in the two matters at issue requires a sanction that protects the public. Thus, the panel recommends a one-year suspension from the practice of law, with six months stayed on the following conditions: (1) no further misconduct; (2) restitution within 90 days of the date of the Court's disciplinary order in the amount of \$800 to Robin Maxwell-Smith; and (3) payment of all costs associated with the prosecution of this matter within the same period, once they have been determined.

### **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, Mark Russell Provenza, be suspended from the practice of law in Ohio for one year, with six months stayed on conditions contained in ¶38 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.**

  
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**RICHARD A. DOVE, Director**