

THE SUPREME COURT OF OHIO

LORAIN COUNTY BAR ASSOCIATION,	)	Case No. 2015-0060
	)	
Relator,	)	
	)	
v.	)	
	)	
MARK RUSSELL PROVENZA,	)	
	)	
Respondent.	)	

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**OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE BOARD OF  
PROFESSIONAL CONDUCT.**

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Certificate of Service

The undersigned certifies that a copy of this Objection to the Report and Recommendation of the Board of Professional Conduct and Brief was sent by ordinary U.S. Mail to the Office of D. Chris Cook, Counsel for the Relator Lorain County Bar Association, The Commons, 520 Broadway, Third Floor, Lorain, Ohio 44052 this 17<sup>th</sup> day of November, 2015.

s/ Daniel G. Wightman  
COUNSEL FOR THE RESPONDENT  
MARK RUSSELL PROVENZA

THE SUPREME COURT OF OHIO

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**RESPONDENT'S BRIEF SETTING FORTH OBJECTIONS TO THE REPORT AND  
RECOMMENDATION OF THE BOARD OF PROFESSIONAL CONDUCT.**

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**Objections to Findings of Fact.**

This disciplinary action against the Respondent originated with two grievances filed with the Lorain County Bar Association. Robin Maxwell-Smith filed the first grievance with Relator and the second was filed by Susan Hughes. While the Respondent acknowledges that the bulk of the findings of fact set forth by the Panel and adopted by the Board of Professional Conduct (hereinafter Report) are accurate and based upon stipulations of the parties, in both matters the Respondent introduced evidence, through his testimony, that contradicted the Panel's finding of the aggravating factor of a *dishonest and selfish motive*. Report, ¶31.

In regard to the Maxwell-Smith matter, the Report does not set forth the terms of the fee agreement. Report, ¶18. Maxwell-Smith did pay Provenza \$300.00 for court costs and \$500.00 for legal fees. However, the fee agreement was not a flat fee. The agreement was that Provenza would charge an hourly rate of \$100.00 per hour, including office appointments and telephone calls. Provenza testified that he prepared a complaint and separation agreement and worked more than five (5)

hours on the matter. Provenza has stipulated to his shortcomings in representing Maxwell-Smith including excessive fees in violation of Prof. Cond. R. 1.5(a) but that violation was the result of his failure to file the complaint and refund upon demand her fees and costs. The fee charged was not excessive for the legal work contemplated by the Respondent when he undertook representation of his client.

Provenza did not receive the fee or the advanced court costs with a dishonest intent or motive. As he stated during his testimony, certain personal problems, including the medical issues of his fiancée, became a financial burden as well as an emotional drain. He assumed financial responsibility for his fiancée's long-term treatment and rehabilitation. As a result of the stress associated with his fiancée's illness, and the amount of time he devoted to her care and treatment, he neglected his obligations to Maxwell-Smith and his law practice.

Mark Provenza received payment from Maxwell-Smith of court costs and the initial fee, the sum of \$800.00, fully intending to file the divorce complaint and represent her throughout the domestic case. The subsequent medical issues of his girlfriend temporarily derailed his law practice. When Provenza received the demand from Maxwell-Smith for a refund of \$800.00 he was financially unable to make the refund. In fact, as he stated in his testimony, his income during 2014, derived primarily from a few court appointed criminal defense fees, was insufficient to meet his financial obligations. His drastic change in circumstances was also demonstrated by the fact that Provenza had legal malpractice insurance when Maxwell-Smith retained him, but shortly thereafter the policy lapsed and was not renewed.

Provenza acknowledged throughout the grievance process that some refund was owed Maxwell-Smith. He has stipulated that he violated Prof. Cond. R. 1.15(a) by failing to deposit her funds in a trust account but he did not undertake representation or receive fees or the court cost deposit with a dishonest intent.<sup>1</sup>

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<sup>1</sup> The Respondent, Mark Provenza, did make restitution in full to Robin Maxwell-Smith, the sum of \$800.00, through the Lorain County Bar Association, on or about November 16, 2015.

## **Objection to Findings Concerning Aggravating Factors and Recommended Sanctions.**

The Relator and Respondent stipulated to the following aggravating factors: multiple offenses; that Respondent initially failed to cooperate in the investigatory process, and he failed to make restitution to Maxwell-Smith. The Panel accepted those factors but added an additional aggravating factor by finding that “the failure to make restitution constitutes a dishonest and selfish motive.” Report, ¶31.

The Respondent objects to the finding of this additional aggravating factor and states it is not supported by the facts of the case. As previously stated, the Respondent was financially unable to refund fees and court costs paid by Maxwell-Smith.<sup>2</sup> While the Relator, Lorain County Bar Association Legal Ethics and Grievance Committee, considered whether ORPC 8.4 (c) applied in this case, after investigation it determined that the Rule was not applicable.<sup>3</sup> ¶ 117-122, Stipulation as to Facts and Violations.

The parties stipulated and the Panel accepted that Provenza violated ORPC 1.5 (a) for charging an excessive fee and failing to provide a refund and ORPC 1.15 for failing to deposit the funds in a trust account. There are no additional facts to support a finding of dishonesty or intent to defraud. See: *Cuyahoga County Bar Association v. Poole*, 120 Ohio St.3d 361, ¶11-15, 899 N.E.2d 950, 2008-Ohio-6203.

The Respondent objects to the sanction recommended by the Panel. The Panel recommended 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

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<sup>2</sup> Provenza has now made a complete refund to Maxwell-Smith.

<sup>3</sup> ORPC R. 8.4

It is professional misconduct for a lawyer to do any of the following:

....

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

of \$800.00 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. Report, ¶ 38.

The sanctions recommended by the Panel conflict with decisions in similar cases including *Cuyahoga County Bar Association v. Poole, supra.* and the cases referenced by the Relator and Respondent. Report, ¶34 and 35.

The Respondent moves the Court to adopt the sanctions stipulated to by Provenza and the Lorain County Bar Association Legal Ethics & Grievance Committee:

Six (6) month suspension all stayed on conditions:

1. No further rule violations;
2. Restitution within 30 days in the amount of \$800.00 to Robin Maxwell-Smith;
3. Restitution within 30 days in the amount of \$300.00 to Rodney D. White;
4. Payment of all costs associated with the prosecution of this matter.

The stipulated sanctions are supported by the facts as well as decisions in similar cases and the Respondent moves the Court to reject the recommendation sanctions of the panel and to impose the sanctions stipulated to by the Relator and Respondent.

Respectfully submitted,

s/ Daniel G. Wightman  
COUNSEL FOR THE RESPONDENT  
MARK RUSSELL PROVENZA