

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

In re:

Case No. 2015-003

Complaint against

**Darwin Richard Roseman
Attorney Reg. No. 0064756**

Respondent

Columbus Bar Association

Relator

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

OVERVIEW

{¶1} This matter was heard on October 9, 2015 in Columbus before a panel consisting of Sharon Harwood, Paul De Marco, and Patricia A. Wise, chair. None of the panel members resides in the district from which the complaint arose or served as a member of a probable cause panel that reviewed the complaint pursuant to Gov. Bar R. V, Section 11.

{¶2} Respondent was present at the hearing, represented by Alvin E. Mathews, Jr. Robert D. Erney, Michael S. Loughry, Robert W. McAdams, Jr., Bruce A. Campbell, and A. Alysha Clous appeared on behalf of Relator.

{¶3} The case arose out of a two-count complaint. The first count concerned Respondent's representation of a client in personal injury litigation and the alleged lack of due diligence, competence, truthfulness, and fairness to the opposing party and counsel in that matter. By a separate order issued on October 12, 2015, the panel dismissed the second count of the complaint.

{¶4} The parties entered into stipulations of fact.¹ Exhibits were admitted into evidence at the hearing. In addition to Respondent, Relator called the following witnesses at the hearing: Michael Williams, the client in the personal injury litigation at issue; Stanley Myers, Williams' attorney in the subsequent legal malpractice case related to Respondent's representation of Williams; another former client of Respondent; and an expert witness.

{¶5} Based upon its findings of fact, conclusions of law, and the evidence presented at the hearing, the panel finds, by clear and convincing evidence, that Respondent engaged in professional misconduct as outlined below. Upon consideration of the applicable aggravating and mitigating factors and case precedent, the panel recommends that Respondent be suspended for one year, with six months stayed under certain conditions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶6} Respondent was admitted to the practice of law in the state of Ohio on November 13, 1995 and is subject to the Rules of Professional Conduct, the Rules for the Government of the Bar of Ohio, and the Code of Professional Responsibility.

Stipulated Facts

{¶7} The following facts are contained in the stipulations introduced at the October 9, 2015 hearing. Relator's Ex. 17.

{¶8} Respondent was hired on May 17, 2007 by Michael Williams to file a personal injury case on his behalf after Williams was struck by a negligent driver while crossing a street.

{¶9} Respondent filed Williams' lawsuit on May 6, 2009.

{¶10} Respondent received a letter from Westfield Insurance Company on May 14, 2009, the insurance company for the defendant in Williams' case, which stated, in part, "[p]er our

¹ This case was initially submitted to the hearing panel upon consideration of a consent to discipline agreement filed on May 21, 2015. The panel rejected the agreement by entry dated May 26, 2015, and the case proceeded to hearing.

request, you will be submitting over an injury package for consideration in an attempt to resolve your client's injuries.”

{¶11} On May 22, 2009, Respondent replied “I will work on getting you a brochure, fully documented.”

{¶12} Respondent received the answer and discovery requests from defendant's counsel in Williams' case in July 2009.

{¶13} Respondent did not respond to defense counsel's interrogatories and requests for production of documents. In December 2009, Respondent received correspondence from defendant's counsel noting the lack of response from Respondent and threatening to file a motion to compel if Respondent did not respond to the discovery requests.

{¶14} On January 28, 2010, a motion to compel was filed by defendant's counsel in the Williams lawsuit.

{¶15} On February 10, 2010, Judge Julie W. Lynch ordered Respondent to provide, within seven days, responses to discovery in the Williams lawsuit.

{¶16} On February 18, 2010, the final day Respondent was given to respond to the discovery requests, Respondent dismissed the Williams lawsuit under Civ. R. 41(A)(1)(a). According to Respondent, he did not believe that he was prepared to resolve Williams' claim because Respondent believed Williams was continuing to treat his alleged injuries with medical providers.

{¶17} On February 19, 2010, Respondent notified defendant's counsel that he would be working with Westfield Insurance Company directly to settle Williams' lawsuit.

{¶18} On July 20, 2010, Respondent received correspondence from Westfield Insurance requesting supporting documentation for Williams' claim.

{¶19} On July 25, 2010, Respondent informed Westfield Insurance that he and his staff were putting a brochure together in Williams' claim and that it would include all the information they required.

{¶20} On September 25, 2010, Respondent was informed by Westfield Insurance Company that Williams' claim could not be evaluated without the previously requested information and supporting documents.

{¶21} Respondent did not refile Williams' lawsuit on or before the February 18, 2011 deadline.

{¶22} On February 22, 2011, Respondent wrote to Williams, indicating that "[s]everal weeks ago, you called me and indicated that you had terminated my services"

{¶23} Williams subsequently called Respondent and denied that he terminated Respondent as his lawyer.

{¶24} Included in Respondent's file is a letter to Williams dated February 1, 2011, stating in part, "This letter acknowledges your termination of my services in the above-captioned matter. Your heated telephone call surprises me because as I told you ... your case must be settled or refiled as a lawsuit no later than 2.18.2011. If your case is not settled or refiled in court as a suit no later than 2.18.2011, all of your legal rights in this matter expire on that date."

{¶25} After receiving the February 22, 2011 correspondence from Respondent, Williams contacted Respondent and was informed that Respondent did not refile Williams' lawsuit.

{¶26} On September 28, 2011, Williams, through attorney Stanley Myers, filed a legal malpractice suit against Respondent.

{¶27} In February 2013, Myers served interrogatories and requests for production of documents on Respondent, who represented himself in the legal malpractice lawsuit.

{¶28} On August 9, 2013, Judge Cain issued an order compelling Respondent to respond to the discovery requests after he failed to respond to Myers' earlier discovery requests.

{¶29} Respondent did not provide discovery according to Judge Cain's order.

{¶30} On September 10, 2013, Judge Cain issued a second order compelling Respondent to respond to the discovery requests by September 23, 2013.

{¶31} Respondent again did not provide discovery according to this order.

{¶32} Myers filed a motion for default judgment against Respondent, which was granted October 9, 2013.

{¶33} On August 11, 2014, Judge Cain granted Williams damages in the amount of \$135,000.

Rule Violations

{¶34} Beyond Count One, Relator's complaint contained numerous additional allegations under the heading "Dismissal Issues." These allegations recounted Respondent's use of Civ. R. 41(A) dismissals in cases other than the Williams case over an 11-year period, without specifically identifying any of those other cases or explaining why Respondent's use of the Rule 41(A) procedure in those cases constituted misconduct under the Code of Professional Responsibility or the Rules of Professional Conduct. Throughout the hearing, and in hearing briefs, the parties referred to these original allegations as "Count Two" — a rubric the panel adopts here for ease of reference. On Respondent's motion at the conclusion of Relator's case, the panel found that Relator did not prove a violation of Prof. Cond. R. 1.1, Prof. Cond. R. 1.3, Prof. Cond. R. 3.4(c),

Prof. Cond. R. 8.4(c), Prof. Cond. R. 8.4(d), and Prof. Cond. R. 8.4(h) as alleged in Count Two and dismissed those allegations by separate entry dated October 12, 2015.²

{¶35} The panel concludes, by clear and convincing evidence, based upon the stipulations, exhibits, and the testimony presented at the hearing, that Respondent's conduct violated the following Rules of Professional Conduct with respect to the Williams case (Count One):

- **Prof. Cond. R. 1.1 [competence] and Prof. Cond. R. 1.3 [diligence]**—As set forth in ¶¶13, 20, and 21, *supra*, Respondent did not respond to defense counsel's interrogatories and requests for production of documents, did not provide requested documentation to the insurance carrier, and most significant, failed to timely refile — or to refile at all — Williams' lawsuit.
- **Prof. Cond. R. 1.4(a)(1)-(4) [communication and consultation with the client]**—As set forth in ¶¶13 and 21, *supra*, Respondent dismissed Williams' lawsuit rather than responding to discovery or a motion to compel, and did not refile Williams' lawsuit, all without consulting Williams.
- **Prof. Cond. R. 8.4(c): [conduct involving dishonesty, fraud, deceit, or misrepresentation]**—As set forth in ¶¶22-24, *supra*, Respondent was untruthful and deceitful in his communications with Williams regarding Respondent's failure to refile his case. In the letters dated February 1 and 22, 2011, Respondent falsely asserted that Williams had discharged him prior to the refiling deadline. The panel finds that these false assertions were *post facto* attempts on Respondent's part to excuse his failure to refile Williams' case.

{¶36} The panel finds that Relator did not prove violations of Prof. Cond. R. 1.16, Prof. Cond. R. 3.4(c), Prof. Cond. R. 4.1(a), Prof. Cond. R. 8.4(d), or Prof. Cond. R. 8.4(h) by clear and convincing evidence and therefore dismisses those alleged violations.

² The formal complaint concludes with a list of charged rule violations but does not specify which of the cited rule violations attach to the two counts of misconduct alleged in the complaint. The specific violations and counts to which each applies are first set forth in Relator's October 7, 2015 hearing brief at p. 9.

MITIGATION, AGGRAVATION, AND SANCTION

{¶37} The parties stipulated to, and the panel finds the following mitigating factors: Respondent has no prior disciplinary record and Respondent cooperated during Relator's investigation.

{¶38} Relator argued that the allegations in Count Two regarding Respondent's use of the Rule 41(A) procedure in other unidentified cases, although dismissed by the panel, should be considered for the purpose of establishing an aggravating factor, presumably the "pattern of misconduct" factor spelled out in Gov. Bar R. V, Section 13(B)(3). The panel considered several issues in making the determination of whether to consider those allegations as evidence of an aggravating factor.

{¶39} First, the panel specifically considered whether evidence originally presented to support an alleged violation dismissed by the panel could establish an aggravating (or mitigating) factor. The Rules of Evidence govern the admission of evidence in disciplinary cases. There is no question that evidence admitted pursuant to the Rules of Evidence may be used by the panel for reasons other than to find a rule violation. The most common use of admitted evidence in a disciplinary proceeding, other than to find a rule violation, is to find an aggravating or mitigating factor.

{¶40} A panel's dismissal of a count does not excise from the record the evidence presented and admitted in support of that count. If the dismissal stems from the panel's conclusion that the evidence presented did not support the alleged rule violation, the evidence still may be the basis for finding an aggravating or mitigating factor with respect to a different rule violation. This is true for a simple, logical reason: the evidence required to prove aggravating or mitigating factors is not the same as the evidence required to prove rule violations. The elements are different. We

do not discount the possibility that in a given case the reasons for dismissal of a particular count as a practical matter would render the evidence offered in support of the count unreliable for purposes of finding an aggravating factor. But this case is not one of them. The testimony and other evidence admitted in support of the dismissed violations in Count Two may be cited by the panel as clear and convincing evidence of an aggravating factor.³

{¶41} Second, the panel considered the standard of proof to establish an aggravating (or mitigating) factor. Although a violation of a Rule of Professional Conduct must be found by clear and convincing evidence, neither these rules nor Gov. Bar R. V defines an exact standard of proof for finding aggravating factors. Gov. Bar R. V, Section 13, which governs aggravating and mitigating factors, is silent as to the applicable evidentiary standard; it merely states that the Board shall give consideration “to the existence of aggravating or mitigating factors.” Gov. Bar R. V, Section 13(A).

{¶42} The Supreme Court’s decisions do not specify any standard of proof to be used in making a determination regarding the presence of an aggravating or mitigating factor. Rather, the Court simply has stated that evidence of the aggravating and mitigating factors must be “weighed.” *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, *reinstatement granted*, 121 Ohio St.3d 1241, 2009-Ohio-2465, citing *Cleveland Bar Assn. v. Glatki*, 88 Ohio St.3d 381, 2000-Ohio-354; Gov. Bar R. V, Section 13 (formerly BCGD Proc. Reg. 10).

{¶43} In articulating sanction recommendations, hearing panels and the Board occasionally have specified that they found an aggravating factor was established by clear and

³ In addition to testimony presented by Relator, the evidence admitted by the panel in relation to Count Two consisted of Exhibits 11 and 15. Relator presented 88 individual case files (Ex. 18-106) that the panel chair did not admit into evidence. Hearing Tr. 181-183.

convincing evidence.⁴ See, e.g., *Columbus Bar Assn. v. Adusei*, 136 Ohio St.3d 155, 2013-Ohio-3125; *Disciplinary Counsel v. Folwell*, 129 Ohio St.3d 297, 2011-Ohio-3181. The Court's decisions in *Adusei* and *Folwell* recounted the Board's application of the clear and convincing evidence standard to an aggravating factor in those instances, but they did so without explicitly endorsing it as the applicable standard.

{¶44} We are therefore left to predict whether the Court, if directly confronted with the issue, would endorse the clear and convincing evidence standard as applicable to aggravating factors. Based on the discussion in *Adusei* and *Folwell* of the Board's use of the clear and convincing evidence standard in relation to aggravating factors, it is reasonable to conclude that the Court would hold that panels considering aggravating factors should apply the clear and convincing evidence standard. In dismissing Count Two, the panel determined that Relator did not present clear and convincing evidence of the alleged misconduct.⁵ Thus, the evidence is also insufficient to establish the existence of "a pattern of misconduct" as an aggravating factor.

⁴ This Court has defined "clear and convincing evidence as 'that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus, cited by *Cleveland Bar Assn. v. Cleary*, 193 Ohio St.3d 191, 2001-Ohio-1326.

⁵ The panel was also troubled by the allegations and presentation of evidence related to Count Two, in that there was not fair or adequate notice to Respondent of the charged misconduct. See, e.g., Hearing Tr. 192-201. This deficiency of notice was, in part, the basis for the panel's dismissal of Count Two. "The standards of due process in a disciplinary proceeding are not equal to those in a criminal matter. * * * A disciplinary proceeding is instituted to safeguard the courts and to protect the public from the misconduct of those who are licensed to practice law, and is neither a criminal nor a civil proceeding." *In re Judicial Campaign Complaint Against Carr*, 76 Ohio St.3d 320, 1996-Ohio-306. Nevertheless, because of the severity of the sanctions available for violations of the disciplinary rules, a respondent's due process rights must be carefully balanced against the importance of the public interest in expeditiously resolving complaints of misconduct. *Disciplinary Counsel v. Heiland*, 116 Ohio St.3d 521, 2008-Ohio-91, ¶32. While due process standards in a disciplinary proceeding are not equivalent to those in a criminal matter, the panel found a lack of due process even at a standard well below that, as well as a failure to demonstrate any pattern of wrongdoing.

{¶45} The panel reviewed the parties' recommendations for sanctions in light of the findings of fact, conclusions of law, factors in mitigation/aggravation, and precedent established by the Supreme Court of Ohio. In regard to case precedent, the panel considered nine cases.

{¶46} The first case cited by Relator is *Dayton Bar Assn. v. Hunt*, 127 Ohio St.3d 390, 2010-Ohio-6148. In that case, the respondent was charged with failing to adequately manage cases for and communicate with multiple clients and with refusing to cooperate with the disciplinary investigation of those matters. The parties reached agreed stipulations regarding the facts and conclusions of law. In the first client matter, the respondent timely filed the complaint on behalf of his clients, but thereafter failed to obtain an expert witness, respond to discovery, or respond to separate motions for summary judgment. As a result, the clients' case was dismissed. Hunt admitted to violations of Prof. Cond. R. 1.3 and Prof. Cond. R. 1.4(a)(3) in that matter. In the second client matter, Hunt failed to communicate with his client and filed an answer in a divorce proceeding that was out of rule. The respondent also failed to cooperate with the disciplinary investigation of that matter. The respondent admitted to a violation of former Gov. Bar R. V, Section 4(G) in connection with this matter. In mitigation, the Board found that the respondent had no prior disciplinary record. In aggravation, the Board found that the respondent had committed multiple offenses and that he failed to cooperate with the disciplinary process. The Court approved the Board's recommendation of a six-month stayed suspension.

{¶47} The second case cited by Relator is *Erie-Huron Counties Joint Certified Grievance Commt. v. Derby*, 131 Ohio St.3d 144, 2012-Ohio-78. In that case, the respondent was charged with neglect of eight client bankruptcy matters, failure to reasonably communicate with his clients, and failure to notify his clients that he did not maintain malpractice insurance. The parties reached agreed stipulations regarding the facts and conclusions of law, which the panel and Board accepted.

The panel and Board recommended that Derby be suspended for 18 months, with 12 months stayed on conditions. The Court, however, due to the aggravating factors of a pattern of misconduct involving multiple offenses, the vulnerability of clients and the harm to those clients, the failure to make restitution until ordered to do so by the bankruptcy court, and Derby's need for ongoing mental health and substance abuse treatment, increased the sanction to a two-year suspension, with 18 months stayed on conditions, followed by two years of monitored probation.

{¶48} The panel considered *Disciplinary Counsel v. Keller*, 110 Ohio St.3d 240, 2006-Ohio-4354. The respondent agreed to represent an 82-year-old woman who had been injured in an automobile accident. After a few initial efforts, he neglected the case and ignored his client's calls. He falsely advised his client that he had received a \$30,000 settlement offer, which he intended to pay with his own funds. She refused the offer, and her subsequent counsel learned that her case had never been filed and the statute of limitations had run. She was awarded a default judgment of \$102,800 in a subsequent legal malpractice action against the respondent, unsatisfied at the time of the hearing. Citing Keller's attempts to conceal his neglect and the failure to remedy the harm, the Court imposed a two-year suspension, with 18 months stayed, restitution, and conditions.

{¶49} The panel also considered *Disciplinary Counsel v. Johnson*, 122 Ohio St.3d 293, 2009-Ohio-3501. Johnson lied to a client about having settled the client's personal injury action. Johnson was retained by the client to recover damages for injuries sustained in an automobile accident. Johnson had fruitless communication with the insurer, obtained medical records, and towed away the vehicle after the accident. She assured Dowell that the case was progressing and falsely told Dowell that she expected money soon. The case never settled. The two-year statute of limitations lapsed, leaving Dowell with no remedy. The respondent refused to meet with and

stopped communicating with Dowell. Respondent testified that she intended to pay Dowell with her own funds, but never did. The Court agreed with the Board's recommended sanction and ordered a one-year suspension, with six months stayed.

{¶50} The panel also considered *Disciplinary Counsel v. Broeren*, 115 Ohio St.3d 473, 2007-Ohio-5251, *reinstatement granted*, 121 Ohio St.3d 1241, 2009-Ohio-2465. In *Broeren*, the Court found that the respondent violated duties to his corporate client by failing to conscientiously represent the corporation PMR in a dispute over the purchase of electronic components, failing to return the PMR case file, failing to cooperate in the disciplinary investigation, and failing in his duties to the public by not exhibiting the highest standards of honesty and integrity. The Court found that at a minimum, the respondent's misconduct caused his client unnecessary consternation and may have irreparably compromised PMR's legal defenses and been integral to the contempt citations against PMR. The Court stated, "we generally impose a six-month license suspension when a lawyer engages in this type of neglect and dishonesty," specifically citing the respondent's submission of false evidence and attempt to cover up his misconduct.

{¶51} The panel considered *Disciplinary Counsel v. Stollings*, 111 Ohio St.3d 155, 2006-Ohio-5345, *reinstatement granted* 114 Ohio St.3d 1208, 2007-Ohio-3395. This case too resulted in a six-month suspension imposed on an attorney who misled a client about the dismissal of the client's case and the neglect that had caused the dismissal. In *Stollings*, the parties submitted a consent to discipline which the Board adopted. The trial court wrote to Stollings regarding Stollings's client, Brian Magee, regarding a dispute with Magee's former employer. The employer had proposed a settlement which Magee declined. The trial court, however, was under the impression the case had been resolved and informed Stollings the case would be dismissed in ten days if the parties did not contact the court. Stollings neither told Magee about the letter, nor

contacted the court, and the case was dismissed. Stollings also neglected to tell Magee about the subsequent dismissal order. Stollings did send subsequent letters to Magee, falsely telling him that future settlement conferences would be scheduled by the court and that Stollings had retained local counsel to “take the lead on the case.” Mitigating factors included no prior disciplinary record, no dishonest or selfish motive, full disclosure and cooperation during the investigation, good faith efforts to make restitution, and good character and reputation. No aggravating factors were cited and the Court agreed with the parties’ and the Board’s recommendation of a six-month suspension.

{¶52} The panel considered *Cincinnati Bar Assn. v. Florez*, 98 Ohio St.3d 448, 2003-Ohio-1730. A client engaged Florez to form a not-for-profit corporation and to obtain tax-exempt status from the IRS. Florez filed the articles of incorporation but not the IRS application. In response to an inquiry about the matter resulting from a grievance filed by the client, Florez falsely stated that he had filed the IRS application and provided falsified documentation regarding the same. Florez admitted to the falsification and the fabricated evidence was an aggravating factor. Mitigating factors were no prior discipline, a good reputation, remorse, and no financial harm to the client. The Board recommended and the Court agreed to a six-month suspension.

{¶53} The panel also considered *Disciplinary Counsel v. Wallace*, 89 Ohio St.3d 113, 2000-Ohio-120. Wallace was retained by James Benedict to recover property which had been foreclosed upon by the mortgage holder. Wallace did not respond to a motion to dismiss, did not inform his client of the motion, or that the case was dismissed, and did not appeal. He continued to bill his client and to mislead his client that the case was still pending. Mitigating factors included the return of the client’s retainer and evidence of good character. Due to Wallace’s repeated attempts to mislead his client, the Board recommended and the Court imposed an actual suspension of six months.

{¶54} Finally, the panel considered *Columbus Bar Assn. v. Bowen*, 87 Ohio St.3d 126, 1999-Ohio-300. Bowen was hired by Vivian Williams in a personal injury case. Wallace filed suit on behalf of Williams, but neglected to respond to discovery requests and subsequent motions for sanctions. Williams provided medical bills and records to defendant, and because he believed that would facilitate a settlement, he did not appear for the scheduled trial date. Nor did he respond to the court's subsequent show cause order, and Williams' case was dismissed with prejudice. Bowen neglected to inform Williams of the dismissal or to respond to her repeated requests for information. The Board recommended and the Court imposed a six-month suspension, noting Bowen's good reputation in the community, his contrition and admission that he mishandled the case.

{¶55} The panel, having considered the case law cited, the rule violations, and the aggravating factors versus the mitigating factors, recommends that Respondent be suspended from the practice of law for one year, with the final six months stayed.

{¶56} The panel further recommends that reinstatement should be conditioned upon all of the following:

- Respondent must resolve the \$135,000 judgment against him resulting from the legal malpractice action.
- Respondent must commit no further violations;
- Respondent shall be placed on monitored probation for one year after reinstatement to the practice of law;
- The panel was troubled by Respondent's lack of understanding of possible alternatives to Civil Rule 41(A) dismissals. Due to this concern, the panel believes that a monitor should be assigned by Relator, and Respondent shall cooperate and work with the assigned monitor while on probation.

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 December 11, 2015. The Board adopted the findings of fact, conclusions of law, and recommendation of the panel and recommends that Respondent, Darwin Richard Roseman, be suspended from the practice of law in Ohio for one year, with six months stayed on the conditions set forth in ¶56 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