ORIGINAL

IN THE SUPREME COURT OF OHIO

Disciplinary Counsel, Relator, vs. **Thomas John Simon.** Respondent.	:	**CASE NO. 2014-2155**

RELATOR'S RESPONSE TO RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF PROFESSIONAL CONDUCT

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FILED
MAR 04 2015
CLERK OF COURT
SUPREME COURT OF OHIO

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	:	
Respondent.	:	

RELATOR'S RESPONSE TO RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF PROFESSIONAL CONDUCT

Now comes relator, Disciplinary Counsel, and submits the following answer to the objections of respondent, Thomas J. Simon, to the final report of the Board of Professional Conduct (the "Board").

STATEMENT OF THE CASE

On February 3, 2014, relator, Disciplinary Counsel, filed a two-count complaint alleging professional misconduct against respondent arising out of respondent's representation of two clients on employment matters. The Board certified relator's complaint and, on March 17, 2014, respondent filed an answer to the allegations.

A three-person panel of the Board held a hearing on this matter on July 25, 2014 and August 20, 2014. The parties entered into Agreed Stipulations of Fact and Law that resolved some, but not all, of the issues involved in relator's complaint, and relator presented two witnesses, Danny Hubbard and Louis Grippi, at the hearing.

At the conclusion of relator's case and again at the end of the hearing, respondent moved for dismissal of the case, which the panel took under advisement. On December 15, 2014, pursuant to Gov. Bar R. V (6)(G), the panel unanimously dismissed the following alleged violations in relator's complaint – in Count I, Rule 8.1 (a) [in connection with a disciplinary matter, a lawyer shall not knowingly make a false statement of material fact] and Rule 8.4 (d) [a lawyer shall not engage in conduct that is prejudicial to the administration of justice] and in Count II, Rule 8.4 (d).[1] The Board issued its findings of fact, conclusions of law and recommendations (the "Findings"), and determined that respondent had violated several disciplinary rules, specifically – in Count I, Prof. Cond. R. 1.4 (a)(1) [a lawyer shall promptly inform the client of any decision or circumstances with respect to which the client's informed consent is required by the rules], Prof. Cond. R. 1.4 (a)(3) [a lawyer shall keep the client reasonably informed about the status of the matter], Prof. Cond. R. 1.4 (c) [a lawyer shall inform a client at the time of the client's engagement if the lawyer does not maintain professional liability insurance] and, in Count II, Prof. Cond. R. 1.3 [a lawyer shall act with reasonable diligence and promptness in representing a client], Prof. Cond. R. 1.4 (a)(1) and Prof. Cond. R. 1.4 (a)(3) – and recommended that respondent be suspended from the practice of law for two years, with 18 months stayed.

On December 19, 2014, the court issued a Show Cause Order. On January 28, 2015, respondent filed objections to the findings and recommendations of the Board with the Court. Relator submits its answer to respondent's objections herein.

[1] Although relator continues to believe it proved each allegation contained within the complaint by clear and convincing evidence, because a unanimous panel dismissed the Rule 8.1 (a) and Rule 8.4 (d) alleged violations, relator is precluded from objecting to that determination.

STATEMENT OF FACTS

Respondent, a former Ashtabula City Solicitor and current solo practitioner, was admitted to the practice of law in Ohio on May 11, 1981. On February 16, 2011, the Supreme Court of Ohio suspended respondent from the practice of law for one year, with the entire suspension stayed. *Disciplinary Counsel v. Simon,* 128 Ohio St.3d 359, 2011-Ohio-627, 944 N.E. 2d 660. Stipulated Exhibit 1. Respondent's previous disciplinary case arose out of respondent's commingling of his personal funds with those of his clients in his IOLTA and his failure to fully cooperate with the disciplinary process. The allegations contained in the current matter relate to respondent's representation of two separate client, Danny Hubbard and Louis Grippi.

COUNT I

HUBBARD REPRESENTATION

In or about February 2011, Danny Hubbard retained respondent to represent him in a wrongful termination case against his former employer, the Village of Jefferson, Ohio and two of its employees. Findings, ¶11. Respondent did not provide a fee agreement to Hubbard or discuss a fee arrangement with Hubbard. Hearing Transcript ("Tr."), p. 28. Respondent also failed to advise Hubbard that he did not have professional liability insurance. Stipulations, ¶4. Respondent stipulated that, by failing to inform Hubbard of this, he violated Rule 1.4 (c) [a lawyer shall inform the client if the lawyer does not maintain professional liability insurance]. Stipulations, p. 5.

On February 22, 2011, respondent filed a Complaint on Hubbard's behalf with the Ashtabula County Court of Common Pleas, Civil Division, against the Village of Jefferson, Ohio, Terry D. Finger, village administrator, and Judy Maloney, village mayor. *Danny Hubbard* *v. Village of Jefferson, Ohio, et al.*, Case No. 2011CV0181. Stipulated Exhibit 2. On February 22, 2011, respondent sent Hubbard a letter with a copy of the complaint as well as the receipt showing the payment of the filing fee. Relator's Exhibit A. The letter also advised Hubbard that he should not speak with anyone about the complaint and that, after Hubbard provided respondent with the name of the individual that replaced Hubbard in his position, respondent would prepare interrogatories to submit to the Village. Hubbard received this letter shortly after February 22, 2011. Tr., pp. 29-30.

On April 6, 2011, the court scheduled a pretrial in the matter for July 18, 2011 and sent service of the entry to respondent on Hubbard's behalf. Stipulated Exhibit 4. Respondent received the entry scheduling the pretrial, but neither appeared for nor participated in the July 18, 2011 pretrial. Findings, ¶14. Hubbard also received notice of the pretrial and appeared at the hearing along with his friend, Richard Downing. Id. Following the pretrial, respondent did not call Hubbard to explain why he had failed to appear at the hearing. Tr., p. 35.

Because respondent had failed to appear at the pretrial, the court issued a show cause order on July 21, 2011, granting the defendant reasonable attorney fees in the amount of $150 and scheduling a hearing for September 26, 2011 to show cause as to why Hubbard's case should not be dismissed. Stipulated Exhibit 5. After the show cause order was issued, Hubbard contacted respondent regarding his failure to appear at the pretrial; respondent told Hubbard that he had forgotten about the hearing. Tr., p. 36. Eventually, respondent appeared at the show cause hearing and the matter was not dismissed. Findings, ¶14; see, also, Stipulated Exhibit 7.

On or about July 1, 2011, counsel for the defendants, Neil D. Schor, sent to respondent Defendants, Village of Jefferson, Village of Jefferson Administrator, Terry D. Finger, and Village of Jefferson Mayor, Judy Maloney's, First Set of Interrogatories and Request for

Production of Documents. Stipulated Exhibit 6. Respondent received these discovery requests but did not reply to them on Hubbard's behalf and did not inform Hubbard of the discovery requests. Findings, ¶15; Tr., p. 44. On September 28, 2011, Schor wrote to respondent, seeking a reply to the discovery requests and indicating that, if the responses were not received within ten days, he would file a Motion to Compel Discovery with the court. Stipulated Ex. 8. When respondent neither replied to Schor's letter nor responded to the discovery requests, Schor filed a motion to compel discovery, which the court granted on October 21, 2011. Stipulated Exhibits 9 and 10. Respondent never informed Hubbard of the discovery requests, the motion to compel or the court's decision granting the motion to compel. Tr., pp. 44, 99.

On November 16, 2011, the defendants filed a motion for summary judgment in the matter and served respondent with a copy of the motion. Stipulated Exhibit 11. Rather than reply to the motion for summary judgment, on November 17, 2011, respondent filed a Notice of Dismissal on Hubbard's behalf. Stipulated Exhibit 12. Respondent did not discuss the motion for summary judgment or the dismissal with Hubbard and did not obtain Hubbard's approval prior to filing the notice. Findings, ¶16; Tr., pp. 39-40.

On July 25, 2012, Hubbard filed a grievance against respondent with the Ashtabula County Bar Association's Certified Grievance Committee. Findings, ¶20. Respondent replied to Hubbard's allegations on August 26, 2012. Stipulated Exhibit 13.

On November 26, 2012, Respondent supplemented his reply, attaching four letters addressed to Hubbard. Stipulated Exhibit 14. The February 22, 2011 letter Hubbard received from respondent was not among the letters attached to the November 26, 2012 letter. Id.; see also, Relator's Exhibit A. Hubbard testified that he had not received any of the letters attached to the November 26, 2012 letter and had not, in fact, even seen the letters until after the deposition respondent's counsel conducted of him. Tr., pp. 41-44.

COUNT II

GRIPPI REPRESENTATION

In or about April 2010, Louis Grippi met with respondent regarding a wrongful termination matter involving the City of Ashtabula, Ohio and his union, American Federation of State, County and Municipal Employees (AFSCME) Local 1197. Findings, ¶28. Respondent agreed to represent Grippi at that time. Prior to that time, Grippi had spoken with respondent about his case on numerous occasions. Tr., pp. 241-242. Grippi and respondent were friends and had known each other for thirty years. Tr., p. 106.

On April 28, 2010, respondent submitted a letter to AFSCME regarding his representation of Grippi and the union's determination that it would not pursue arbitration on Grippi's behalf against the City of Ashtabula. Stipulated Exhibit 20. When respondent did not receive a satisfactory response to the April 28, 2010 letter, he initiated an unfair labor practice charge with the State Employment Relations Board ("SERB") on Grippi's behalf on May 20, 2010. Stipulated Exhibit 21. SERB dismissed this charge on July 22, 2010. Stipulated Exhibit 22.

On November 15, 2010, respondent filed a Complaint on Grippi's behalf with the Ashtabula County Court of Common Pleas, Civil Division, against Anthony Cantagallo, city manager of the City of Ashtabula, and John A. Lyell, president of AFSCME Local 1197. *Louis Grippi v. Anthony Cantagallo, et al.*, Case No. 2010CV1185. Stipulated Exhibit 23.

On December 15, 2010, counsel for Cantagallo filed a motion for judgment on the pleadings and an answer on Cantagallo's behalf; AFSCME Local 1197 filed a motion to dismiss on December 14, 2010. Stipulated Exhibit 24. Respondent did not file a response to either motion. Findings, ¶31.

On February 9, 2011, Judge Alfred W. Mackey ordered that respondent had until March 7, 2011 to respond to the defendants' outstanding motions and indicated that, if no response was submitted, the court would rule without further hearing. Stipulated Exhibit 25. On March 7, 2011, respondent filed a motion for leave to respond, which the court granted, permitting respondent to file a response to the two outstanding motions by April 15, 2011 and indicating that, if no response was received, the court would rule without further hearing. Stipulated Exhibits 26 and 27. Other than a brief conversation with respondent about the defense's motions, Grippi knew little about the motions or respondent's failure to respond to the motions. Tr., p. 111. During direct examination, Grippi explained:

> Q: Did you discuss these motions to dismiss with Mr. Simon?
>
> A. I think that we had a brief conversation, but I'm not – I'm not positive on that.
>
> Q. And what about preparing an answer to the motions? Did you discuss that with him?
>
> A. Everything was pretty vague. He didn't really keep me informed about too much stuff.
>
> Q. Did he tell you that he wasn't going to respond to the motions?
>
> A. I didn't know either way, to tell you the truth.

Id.

On August 10, 2011, when respondent failed to reply to the motions on Grippi's behalf, Judge Mackey dismissed the case with prejudice, stating that "[n]o response has been filed to the

Motions by the Plaintiff." Stipulated Exhibit 28. Respondent did not inform Grippi that the court had dismissed his case. Tr., p. 112.

On August 10, 2011, Grippi sent respondent a letter by certified mail requesting an update on his case. Stipulated Exhibit 29. Testifying as to the intent of the letter, Grippi indicated "I was trying to get Mr. Simon to move – to act in a more aggressive manner, to take charge of my case, you know, take depositions, get my case moving. I mean, you know, he – you know, it seemed like he didn't show no concern whatsoever with my case; and I was worried about it." Tr., p. 114. Although he received Grippi's letter, respondent did not reply to it. Findings, ¶32.

On August 18, 2011, Grippi was reading the local newspaper and discovered, for the first time, that his case had been dismissed with prejudice. Tr., p. 112; see also, Stipulated Exhibit 30. Grippi contacted respondent after learning that the case had been dismissed. Tr., p. 112. Respondent agreed to pursue an appeal on Grippi's behalf.

On September 9, 2011, respondent filed a notice of appeal on Grippi's behalf. Stipulated Exhibit 31. Although he filed three written motions and made one oral motion seeking an extension of time to file the appellate brief, respondent never filed the appellate brief. Stipulated Exhibits 32, 34, 35 and 37. On February 6, 2012, Attorney Martin S. Hume filed a notice of appearance in the appellate matter on Grippi's behalf; Hume filed the appellate brief on March 5, 2012. Stipulated Exhibits 39 and 41. The Eleventh District Court of Appeals affirmed the common pleas court decision on December 3, 2012. *Louis Grippi v. Anthony Cantagallo, et al.*, Case No. 2011-A-0054. Stipulated Exhibit 42.

RELATOR'S ANSWER TO RESPONDENT'S OBJECTIONS

RESPONSE TO PROPOSITION OF LAW NO. I

RELATOR ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE AND THE BOARD PROPERLY FOUND THAT RESPONDENT FAILED TO KEEP HIS CLIENTS REASONABLY INFORMED OF DECISIONS MADE ON THEIR BEHALVES AND NEGLECTED THE GRIPPI MATTER

The Board's determination that respondent failed to communicate with Hubbard and Grippi and neglected Grippi's legal matter was fully supported by clear and convincing evidence presented at the hearing.

In regards to the representation of Hubbard, respondent misconstrues the Board's determination that relator had not established by clear and convincing evidence that respondent had fabricated the letters purportedly sent to Hubbard as a failure to establish violations of Prof. Cond. R. 1.4 (a)(1) and Prof. Cond. R. 1.4 (a)(3). Separate and apart from the four letters that relator asserted respondent had fabricated and that Hubbard had not received, respondent fell short of keeping Hubbard reasonably informed of the status of his case in several respects – he did not inform Hubbard of a scheduled pretrial in the case, he did not apprise Hubbard of the defendants' discovery requests, he did not notify Hubbard that the defendant had filed the motion for summary judgment and he did not discuss dismissing Hubbard's complaint with Hubbard prior to doing so. At the hearing, Hubbard testified repeatedly as to this.

> Q: Did you receive this order from Mr. Simon?
>
> A: No.

Tr., p. 35.

> Q: Would you please look at Exhibit 5 [July 21, 2011 Judgment Entry].
>
> A: Okay.

Q: Have you seen this before?

A: Yes.

Q: And when did you first see this?

A: When it was sent to my house by the mail.

Q: Was that on or about July 21, 2011?

A: Around about, yes.

Q: And was it sent to you by Mr. Simon?

A: No.

Tr., p. 36.

Q: Did you have any discussions with Mr. Simon at any time regarding dismissing your case?

A: No.

Tr., p. 40.

Q: Okay. During the representation, did Mr. Simon discuss discovery requests with you?

A: No.

Q: Did he ever inform you that the opposing party had sent him interrogatories?

A: No.

Q: Did he ever provide those interrogatories to you?

A: No.

Q: Did he tell you that the opposing party had filed a motion to compel?

A: No.

Q: Did he tell you ever that the court had granted that motion?

A: No.

Tr., p. 44.

During cross-examination, Hubbard reiterated that he only received one letter from respondent during the representation.

> Q: And the fact of the matter is at that deposition when I asked you the question how many letters did you get from Mr. Simon, Line 8, you responded "Probably three or four," didn't you?
>
> A: Correct.
>
> Q: … and the fact of the matter, sir, is when you got those three or four letters, you put them on your table, correct?
>
> A: I got one letter from Mr. Simons and the others came from the court.

Tr., p. 53. Respondent's objections all but ignore these shortcomings in his representation of Hubbard.

As the panel aptly noted,

> Even if Respondent sent the disputed letters, it is not clear whether Hubbard received them. Furthermore, Respondent failed to inform Hubbard regarding the discovery requirements, the motion for summary judgment, or seek Hubbard's consent before filing the notice of dismissal. For these reasons, the panel finds clear and convincing evidence that Respondent violated Prof. Cond. R. 1.4(a)(1) and Prof. Cond. R. 1.4 (a)(3).

Findings, p. 6.

The Board likewise properly found that respondent violated Prof. Cond. R. 1.3, Prof. Cond. R. 1.4 (a)(1) and Prof. Cond. R. 1.4 (a)(3) during his representation of Grippi. Respondent did not effectively communicate with Grippi – often leaving him with questions about the status of his case. For example, Grippi was unaware of respondent's intent to not file a response to the defendants' motions to dismiss. Tr., p. 111. Grippi only learned that his case had been dismissed by reading it in the local newspaper.

> … I looked at the paper. And I says – you know, went through it, and I seen judge dismissed case in Ashtabula, you know. And I just went through it and seen that my name was in there and my case was dismissed.
>
> And my heart just went to the floor, and I couldn't even sleep that night. …

Tr., p. 112.

Grippi elaborated further on respondent's neglect of his case, particularly after the notice of appeal had been filed.

> Well, he went back to his old ways. He – you know, I tried to contact him; and I started to tape phone conversations because – right around the time of August of 2011 up until February 2012 because I knew from previously that things weren't getting done. But I put my faith in him so he would go forward on this, and I stayed on him. I called the court to find out if the – what was done, what was being done what was being filed.
>
> And, you know, he kept asking for continuance, continuance, continuance, and nothing was going forward. At one point in time, I couldn't get ahold of him for nothing; and it was like right around, I think, February 6th of 2012 that they had to have – the appeal, they granted him until that time to get the appeal in. And I called his house. I called his cell phone. I called his office. I couldn't get ahold of him.
>
> And on February 14th of 2012 I contacted his house. I got ahold of his girlfriend and told her that I was looking for him and I need to talk with him and it was important that he get ahold of me immediately, and never contacted me. He's never sent me a letter, nothing. And I had to get ahold of another attorney that I hired; and he filed the brief by March the 2nd of 2012.

Tr., pp. 116-117. Because of respondent's failure to file the appellate brief, at the eleventh hour, Grippi was forced to request that his federal attorney, Martin Hume, file the brief. Hume had not been retained to do so originally. Tr., p. 117; see, also, Stipulated Exhibit 47.

As the trier of fact, the panel was in the best position to consider the evidence and weigh the credibility of the witnesses. This Court has stated on multiple occasions, "[c]ontrary to respondent's arguments, it is of no consequence that the board's findings of fact are in contravention of respondent's or any other witness's testimony. 'Where the evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false.'" *Disciplinary Counsel v. Zingarelli*, 89 Ohio St.3d 210, 217, 2000-Ohio-140, 729 N.E.2d 1167 (Citations omitted.) Similarly, this Court has held that the Board is "well within its authority to credit the witnesses and exhibits it did over respondent's explanations and excuses[.]" *Stark Cty. Bar Assn. v. Watterson*, 103 Ohio St.3d 322, 331, 2004-Ohio-4776, 815 N.E.2d 386.

In *Cincinnati Bar Assn. v. Statzer*, 101 Ohio St.3d 14, 17, 2003-Ohio-6649, 800 N.E.2d 1117, 1121, the Court elaborated on this further.

> [W]e acknowledge that these inconsistencies exist; however, they do not warrant disregarding the panel's findings as adopted by the board. The panel observed the witnesses firsthand and thus possessed an enviable vantage point in assessing the credibility and weight of their testimony. For this reason, we ordinarily defer to a panel's credibility determinations in our independent review of professional discipline cases unless the record weighs heavily against those findings. *Cleveland Bar Assn. v. Cleary* (2001), 93 Ohio St.3d 191, 198, 754 N.E.2d 235.
>
> Here, the panel questioned respondent at length and unanimously dismissed Count I after finding insufficient evidence to conclude that she had acted dishonestly. Supplanting the panel's judgment on this issue would require proof of the variety in *Findlay/Hancock Cty. Bar Assn. v. Filkins* (2000), 90 Ohio St.3d 1, 734 N.E.2d 764, in which we rejected recommended findings of misconduct because the panel had relied largely on the uncorroborated testimony of a witness who had admittedly lied often, including once under oath. …

The record in this matter does not weigh heavily against the Board's findings. The panel did not disregard the inconsistencies in relator's witnesses' testimony. Quite the contrary – the panel found their testimony more credible than respondent's despite the inconsistencies. Respondent offered no testimony other than his self-serving comments as support for his position – there was no other witness contradicting relator's witnesses' testimony. As to Hubbard, the panel noted, "[i]n reconciling the conflicting testimony and weighing the credibility of the witnesses, the panel believes that Respondent failed to inform Hubbard that he would require a retainer or else the case would be voluntarily dismissed." Findings, ¶23. Similarly, in Count II, the panel indicated "[a]s in Count I, Count II comes down to a question of credibility. Whether Respondent kept Grippi informed required the panel to reconcile the conflicting testimony and weigh the credibility of the witnesses. The panel believes that Respondent failed to keep Grippi informed of the status of his case and allowed the case to be dismissed with prejudice without notifying Grippi of the pending motion." Findings, ¶36.

The Court should overrule respondent's first objection.

RESPONSE TO PROPOSITION OF LAW NO. II

NOTWITHSTANDING THE PANEL'S DISMISSAL OF CERTAIN RULE VIOLATIONS, GIVEN THE MITIGATING AND AGGRAVATING FACTORS IN THIS MATTER, AN ACTUAL SUSPENSION FROM THE PRACTICE OF LAW IS WARRANTED

In his second objection, respondent argued that, if a sanction is to be imposed, his conduct in this matter does not warrant an actual suspension. Relator disagrees and believes that a two-year suspension, with 18 months stayed, is warranted based on the aggravating and mitigating factors identified by the panel and is supported by case precedent.

A case recently decided by this Court, *Cleveland Metropolitan Bar Assn. v. Bancsi*, 2014-Ohio-5255, offers particular guidance as to the appropriate sanction in this matter.[2] Joseph Bancsi, an Avon Lake attorney, was suspended for two years, with 18 months stayed, for neglecting a client's matter, failing to inform the client about discovery requests and failing to advise the client that he lacked professional liability insurance. The aggravating factors considered by the Court included, among other things, Bancsi's prior discipline – he had been publicly reprimanded for misconduct relating to his IOLTA, subsequently suspended on multiple occasions for failing to comply with continuing legal education requirements, and once for practicing law during his CLE suspension – as well as the fact that he had engaged in multiple instances of neglect. Id. at ¶14. The Court further found, in mitigation, that Bancsi had not acted with a dishonest or selfish motive and that he had cooperated with the disciplinary process. In this matter, the panel found similar applicable aggravating and mitigating factors – a prior disciplinary offense, multiple offenses in two cases and his refusal to acknowledge the wrongful nature of his conduct as well as, in mitigation, an absence of a dishonest and selfish motive and significant evidence of his good character. Findings, ¶¶ 38 and 39.

Mentor attorney Patrick T. Ryan was suspended from the practice of law for two years, with six months stayed, after neglecting his client's personal injury case and failing to advise the client that he did not maintain malpractice insurance. *Lake Cty. Bar Assn. v. Ryan*, 123 Ohio St.3d 178, 2009-Ohio-4232, 915 N.E.2d 304. In determining the appropriate sanction, the Court considered Ryan's prior disciplinary history, a pattern of misconduct and the harm caused to his client as applicable aggravating factors. The relevant mitigating factors included a lack of a dishonest or selfish motive, attempt to rectify the consequences of his misconduct and Ryan's

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[2] *Cleveland Metropolitan Bar Assn. v. Bancsi* was issued by the Court on December 4, 2014. The panel's report was considered by the Board on or about December 12, 2014.

cooperation with the proceedings. Although Ryan's disciplinary history was more significant than respondent's, the other aggravating and mitigating factors are similar. See, also, *Dayton Bar Assn. v. Matlock*, 134 Ohio St.3d 276, 2012-Ohio-5638, 981 N.E.2d 861 [attorney, who had been previously disciplined, suspended from the practice of law for two years, with one year stayed, for neglecting client matters, failing to communicate with clients and failing to inform clients that he lacked professional liability insurance].

The panel noted that respondent's clients were not particularly harmed by respondent's inaction on their cases, however, both Hubbard and Grippi were unquestionably negatively affected by their experiences with respondent. Hubbard testified as to the impact at the hearing.

> I've been ruined. I have lost a lot. I have lost my home. I've lost a lot of faith in attorneys. I'm broken and I don't know how I'm going to come above again. I worked by butt off all these years for what I had, and I have lost it all. And I don't know how to recover.

Tr., pp. 46 and 47.

Grippi echoed these sentiments.

> Well, I thought I could trust Mr. Simons, and I thought I knew him better that I thought I did. And I thought – besides being an attorney, I thought he was a friend of mine; and he's none of that. And I just – I don't want to be associated with him anymore in my life, period.

Tr., p. 121. Furthermore, while BCGD Proc. R. 10 cites the resulting harm to the victims as an aggravating factor, it does not correspondingly reference a lack of harm as a mitigating factor. All relevant factors should be considered in determining the appropriate sanction, contrary to respondent's position, however, relator argues that a lack of harm, that which an attorney should always strive to do for his clients, should not be considered mitigation of respondent's conduct by this Court.

The *Lorain Cty. Bar Assn. v. Godles* case, 128 Ohio St.3d 279, 2010-Ohio-6274, 943 N.E.2d 988, discussed by the Panel and the *Cleveland Metro. Bar Assn. v. Berk*, 132 Ohio St.3d 82, 2012-Ohio-2167, 969 N.E.2d 256, case relied upon by respondent, are distinguishable from this matter. Although both cases involve factually similar misconduct by the attorneys, the aggravating evidence offered was not as extensive or the mitigating evidence offered was greater than that offered by respondent. In *Godles*, the respondent had not been previously disciplined. *Godles* at 282, 991. In *Berk*, although the respondent had been previously disciplined, the Court also found that the respondent had accepted responsibility for his actions and offered, not just evidence of his good character, but evidence indicating that he had provided free or low-cost legal services in his community to those who could not afford it for many years. *Berk* at 85 and 86, 259. "Recognizing Berk's dedication to his clients and his expressed remorse, the majority of the panel recommended that Berk's license be suspended for 18 months, all stayed …." Id. at 86, 260.

The Court should overrule respondent's final objection and suspend respondent from the practice of law for two years, with 18 months stayed.

CONCLUSION

Relator established by clear and convincing evidence that respondent engaged in misconduct while representing Danny Hubbard and Louis Grippi. Considering the evidence presented in this matter, the aggravating and mitigating factors, as well as the Court's prior decisions in similar cases, relator requests that this Court overrule respondent's objections and adopt the Board's recommendation, suspending respondent from the practice of law for two years, with 18 months stayed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing RELATOR'S RESPONSE TO RESPONDENT THOMAS JOHN SIMON'S OBJECTIONS TO THE FINAL REPORT OF THE BOARD OF PROFESSIONAL CONDUCT has been served upon counsel for respondent, Richard C. Alkire and Dean Neiding, Richard C. Alkire Co, LPA, 250 Spectrum Office Building, 6060 Rockside Woods Boulevard, Cleveland, Ohio 44131-2335 via regular U.S. mail, postage prepaid, and email communication this 4th day of March, 2015.

Stacy Solochek Beckman
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Counsel of Record for Relator