

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 146 DB 1995
Petitioner :
 :
v. : Attorney Registration No. []
 :
[ANONYMOUS], :
Respondent : ([] County)

OPINION

I. HISTORY OF PROCEEDINGS

On October 18, 1995, a Petition for Discipline was filed against Respondent, []. Respondent filed an Answer on December 13, 1995. A hearing was held on March 15, 1996 before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Petitioner was represented by [], Esquire. Respondent appeared pro se. The Committee filed its Report on June 19, 1996 and recommended a Private Reprimand. Petitioner filed a Brief on Exceptions on July 10, 1996 and requested oral argument. Respondent did not file a Brief on

Exceptions or a Reply Brief. Oral argument was held on September 10, 1996, before a three member panel of the Disciplinary Board.

This matter was adjudicated by the Disciplinary Board at the meeting of September 27, 1996.

II. FINDINGS OF FACT

The Board makes the findings of facts.

1. Petitioner, whose principal office is now located at Suite 400, Union Trust Building, 501 Grant Street, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa.R.D.E.), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent was born in 1951, was admitted to practice law in Pennsylvania in 1975, and is subject to the jurisdiction of the Disciplinary Board of the Supreme Court. Respondent's office address is [].

3. In about October of 1990, Respondent was retained by [A] in his capacity as administrator d.b.n, c.t.a. of the Estate of

[B] and as executor of the Estate of [C] to do what was necessary to conclude the administration of these estates, including aiding in the disposition of certain real estate in which those estates had an interest.

4. In October of 1990, agreements were reached for the sale of certain real estate in which the estates had an interest.

5. In the period from approximately June of 1991 to August 1991, each of the surviving beneficiaries of the estates, as well as personal representatives of any other estates which had an interest in the real property, consented to the sale of portions of the real property.

6. After Respondent was retained, title problems regarding the property were discovered.

7. As part of the real estate transactions, Respondent indicated to representatives of the buyers that he would not distribute any of the proceeds of those transactions until any inheritance taxes that were due and owing by any party which had an interest in the three parcels of real estate were paid either out of those proceeds or other monies on account for the estate.

8. Closings on four of the parcels were held in May through July of 1992.

9. Respondent received from these closings the proceeds to which the estates were entitled.

10. From May 28, 1992 through July 17, 1992, Respondent deposited a total of \$70,774.97 to his account entitled "[Respondent] Attorney at Law Trustee Account" which represented the proceeds due to the [B] Estate and the [C] Estate from the sale of the four parcels of real estate belonging to those estates.

11. After payment of certain estate expenses, and deducting fee advances in the amount of \$10,500 taken by Respondent, as of November 24, 1992, Respondent was entrusted with at least \$59,761.70 on behalf of the Estates.

12. On December 31, 1992, the balance in Respondent's Trustee Account was \$59,590.96, \$170.74 less than his minimum entrustment on behalf of the [B & C] Estates.

13. After payment of certain other estate expenses and deducting fee advances in the additional amount of \$3,000 as of April 22, 1993, Respondent was entrusted with at least \$56,481.70 on behalf of the Estates.

14. As of April 22, 1993, the balance in Respondent's Trustee Account was \$54,239.70, \$2,242 less than his minimum entrustment on behalf of the Estates.

15. Deducting an additional fee payment taken by Respondent in the amount of \$7,000 as of April 30, 1993, Respondent was entrusted with at least \$49,481.70 on behalf of the Estates.

16. As of April 30, 1993, the balance in Respondent's Trustee Account was \$46,687.34, \$2,794.36 less than his entrustment on behalf of the Estates.

17. From April 30, 1993, until July 19, 1993, Respondent's Trustee Account was continually deficient with regard to his minimum entrustment on behalf of the Estates, with the balance falling as low as \$17,526.98, \$31,954.72 less than the minimum entrustment.

18. Deducting an additional fee payment taken by Respondent in the amount of \$3,000, as of July 19, 1993, Respondent was entrusted with at least \$46,481.70 on behalf of the Estates.

19. From July 19, 1993 through February 1, 1994, except for brief periods of time, Respondent's Trustee Account was continually deficient with regard to his minimum entrustment on behalf of the Estates, by as much as \$25,410.21 on July 19, 1993.

20. On about May 20, 1994, Respondent paid \$19,061.94 for inheritance taxes on behalf of the Estate of [C], and \$10.00 for the filing fee for the inheritance tax return.

21. No inheritance taxes had previously been paid by Respondent.

22. As of June 2, 1994, Respondent was entrusted with at least \$27,409.76 on behalf of the Estates.

23. As of August 15, 1994, the balance in Respondent's Trustee Account was \$24,157.29, \$3,252.47 less than his minimum entrustment on behalf of the Estates.

24. From November 14, 1994, through December 14, 1994, the balance in Respondent's Trustee Account was continually deficient with respect to his minimum entrustment on behalf of the Estates, by as much as \$15,027.89 on November 14, 1994.

25. The deficiencies in Respondent's Trustee Account were caused by payments to or on behalf of himself or other clients, and which had no relationship to the Estates.

26. Respondent testified that the deficiencies in the Account were due to payments to himself and on behalf of other clients. (N.T. 71, 73)

27. Respondent eventually accounted for and distributed all funds to those entitled to receive them. The administrator and executor of the [B & C] Estates was satisfied with Respondent's work.

28. Respondent has no prior record of discipline.

29. Respondent testified that he does recognize that his office procedure was a problem relative to monies held in his Trustee Account, (N.T. p. 81) and he has taken corrective measures. (N.T. 99)

III. CONCLUSIONS OF LAW

Respondent's conduct has violated the following Rules of Professional Conduct:

1. RPC 1.15(a) - A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds

shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

2. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

IV. DISCUSSION

The matter presently before the Board involves the resolution of two issues. First, it must be determined whether Respondent's actions constitute a violation of the Rules of Professional Conduct. Second, if a violation is established the Board must determine the appropriate sanction to be imposed on Respondent as a result of his unethical behavior.

Review of the record indicates that Petitioner has met its burden of proving by clear and convincing evidence that Respondent engaged in violations of RPC 1.15(a) and 8.4(c). The parties reached a stipulation as to the facts of this case. Respondent was entrusted with funds on behalf of the [B & C] Estates and failed to hold these funds inviolate. Respondent's Trustee Account where he deposited the funds at times had a balance substantially less than his entrustment. Respondent acknowledged

that the balance in his Trustee Account was deficient on certain occasions relative to the amount of his entrustment on behalf of

the [B & C] Estates. Respondent acknowledged that the deficiencies were due to payments to himself and on behalf of other clients.

A finding of violations of the Rules triggers consideration of the appropriate sanction to be imposed. The Supreme Court of Pennsylvania has held that disciplinary sanctions are not primarily designed for their punitive effects, but for their effect of protecting the public and the integrity of the courts from unfit lawyers. Office of Disciplinary Counsel v. Kanuck, 517 Pa. 160, 535 A.2d 69 (1987). Furthermore, it is understood that while all violations of professional ethics must be seriously considered, there are gradations of seriousness that exist within the system, as a range of disciplinary sanctions are available to respond to these gradations.

The Supreme Court of Pennsylvania has held that there is no per se rule requiring a standard discipline in cases of commingling. Review of the applicable case law and all of the facts of the instant case leads the Board to conclude that a Private Reprimand is an appropriate discipline in this case.

In the case of In re Anonymous No. 81 DB 90, 14 Pa. D. & C. 4th 254 (1992), an attorney deposited personal funds into a client's trust fund. He also deposited funds belonging to

different clients into this fund. Respondent failed to maintain sufficient funds in the trust account to encompass his obligations to his client. At one point in time the attorney was approximately \$3,700 short of the amount of his entrustment. The attorney never documented his withdrawals or reconciled his trust account. The Board determined that the attorney commingled but did not blatantly convert funds. The Board considered that the attorney had practiced law for thirty years and maintained an unblemished disciplinary record. The Board imposed a private reprimand on this attorney. In the case of In re Anonymous No. 11 DB 92, 5 Pa. D. & C. 4th 399 (1987), an attorney received a fee for services rendered on behalf of his law firm but failed to deposit the funds in an account maintained for the funds and engaged in acts of misrepresentation after converting the funds to his own use received a private reprimand. In the case of In re Anonymous No. 102 DB 84, 38 Pa. D. & C. 3d 235 (1985), an attorney commingled client funds in his personal account and used them to pay personal expenses. This attorney received a private reprimand after the Board considered evidence of his good reputation and the fact that he had not prejudiced or damaged his clients' cases. In the case of In re Anonymous No. 103 DB 84, 38 Pa. D. & C. 3d 191 (1985), an attorney who deposited funds held for dispersal to a client into an account that he used for payment of personal obligations and permitted the

funds in that account to fall below the sum belonging to the client received a private reprimand.

Another case reviewed by the Board that resulted in private reprimand involved an attorney who mishandled an estate.

In re Anonymous No. 45 DB 93, 24 Pa. D. & C. 4th 347 (1994). This attorney was retained in November 1985 to handle the administration of an estate but failed to file the inheritance tax return or inventory until July 1987, after receiving a notice from the Department of Revenue and an order of court in June 1987. The attorney neglected to list as an asset of the estate a parcel of land. In January 1989 a Petition to set aside the Petition for Distribution was filed setting forth various errors in the estate.

The attorney agreed to file amended papers but never did. The attorney made misrepresentations to the client about the progress of the estate, and he was subsequently discharged by the estate representative. While this case does not involve commingling of estate assets with personal assets, it is useful to compare the type of misconduct and the effect of the lawyer's action on the client. In the cited case, the attorney clearly breached the trust to his client by neglecting the estate and being deceitful concerning the progress of the estate. The client dealt with the attorney for approximately four years and got no good result, and

consequently had to find new counsel. This type of case is probably more disheartening from a public perspective than the instant case, where Respondent admittedly engaged in commingling but was able to resolve a difficult case to the satisfaction of the client, and all funds were distributed to those entitled to them.

The Board is naturally cognizant that the end result does not justify Respondent's misconduct; however, in comparing the cases the attorney in the cited case received a private reprimand for actions that in the end were more harmful to the client than in the instant case.

There are material similarities between the instant case and the cases cited above. Respondent did commingle funds; however, he did so without prejudice to the Estates that he was handling. The Board recognizes that the Estates were complex and required a very large portion of Respondent's time and energy and it is to Respondent's credit that he completed these Estates to the satisfaction of the estate representative. Respondent recognized that office procedures he was utilizing were inadequate and he changed those procedures. Nevertheless, his actions prior to changing his procedures violated the Rules of Professional Conduct and these violations must be addressed through disciplinary sanction. Respondent has practiced for twenty-one years and has

never had a disciplinary problem. It is the Board's view that this case was an isolated incident, and Respondent is aware of what he

did to violate the Rules and what he needs to do to avoid such violations in the future.

V. DETERMINATION

The Disciplinary Board of the Supreme Court of Pennsylvania determines that the Respondent, [], shall receive a Private Reprimand.

The expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: Duke George, Jr., Member

Date: November 8, 1996

O R D E R

AND NOW, this 8th day of November, 1996, upon consideration of the Report and Recommendation of Hearing Committee [] filed June 19, 1996; it is hereby

ORDERED that the said [RESPONDENT] of [] County be subjected to a PRIVATE REPRIMAND by the Disciplinary Board of the Supreme Court of Pennsylvania as provided in Rule 204(a) (5) of the Pennsylvania Rules of Disciplinary Enforcement.

Costs are to be paid by the Respondent.

BY THE BOARD:

Chairman