

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2278 Disciplinary Docket No. 3  
: :  
Petitioner : No. 112 DB 2015  
: :  
v. : Attorney Registration No. 94493  
: :  
PERRY LYNN FLAUGH : (Blair County)  
: :  
Respondent :

ORDER

**PER CURIAM**

**AND NOW**, this 12<sup>th</sup> day of August, 2016, upon consideration of the Report and Recommendations of the Disciplinary Board, Perry Lynn Flaugh is suspended from the Bar of this Commonwealth for a period of one year and one day, and he shall comply with all the provisions of Pa.R.D.E 217. Respondent shall pay costs to the Disciplinary Board. See Pa.R.D.E. 208(g).

Justice Mundy dissents and would impose a two-year suspension.

A True Copy Patricia Nicola  
As Of 8/12/2016

Attest:   
Chief Clerk  
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 112 DB 2015
v.	:	Attorney Registration No. 94493
PERRY LYNN FLAUGH Respondent	:	(Blair County)

REPORT AND RECOMMENDATIONS OF  
THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES  
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, the Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

By Petition for Discipline filed on June 22, 2015, Office of Disciplinary Counsel charged Respondent, Perry Lynn Flaugh, with violations of the Rules of Professional Conduct arising from his representation of clients in a personal injury matter. Respondent failed to file an Answer to Petition for Discipline.

A disciplinary hearing was held on October 29, 2015, before a District IV Hearing Committee comprised of Chair Lorrie K. Albert, Esquire and Members Jason A.

Medure, Esquire and Nicola Henry-Taylor, Esquire. Petitioner introduced three exhibits into evidence and did not present any witnesses. Respondent appeared pro se and testified on his own behalf.

Following the submission of a brief by Petitioner, the Hearing Committee filed a Report on March 9, 2016, concluding that Respondent violated the Rules as charged in the Petition for Discipline and recommending that he be suspended for a period of two years.

No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on April 21, 2016.

## II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center Suite 2700, 601 Commonwealth Avenue, P.O. Box 62485, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, 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 is Perry Lynn Flaugh. He was born in 1960 and was admitted to practice law in the Commonwealth of Pennsylvania in 2005. His attorney registration mailing address is 435 Main Street, Bellwood, Blair County, PA 16617-2131. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has no record of prior discipline in Pennsylvania.
4. A Petition for Discipline was filed against Respondent by Petitioner on June 22, 2015.
5. Respondent failed to file an Answer to Petition.
6. All allegations contained in the Petition for Discipline are deemed admitted, pursuant to Rule 208(b)(3), Pa.R.D.E.. There is no factual dispute in this matter.
7. In October 2005, Angela Alley and her parents, Reynolds and Carol Alley, were in an automobile accident in Cambria County, Pennsylvania, in which they sustained personal injuries.
8. Subsequently, Angela and the Alleys retained Respondent to represent them with respect to civil claims to be made against Shawn Davis, the driver of the vehicle involved in the accident.
9. Angela and the Alleys entered into a fee agreement with Respondent regarding these matters, by which Respondent was to receive thirty percent (30%) of any recovery prior to trial. Angela and the Alleys were to receive seventy (70%) of any recovery, less documented costs/expenses advanced by Respondent, if any.
10. Respondent did not have professional liability insurance coverage of at least \$100,000 per occurrence and \$300,000 in the aggregate, per year. Respondent failed to disclose that fact to Angela and the Alleys in the fee agreement, or any time thereafter.
11. On August 2, 2007, Respondent filed a civil complaint against Mr. Davis in Cambria County on behalf of his clients.

12. Over four years later, in October 2011, the matter was settled as to Mr. and Mrs. Alley's claims only, for a total of \$15,000.00, representing an award of \$7,500 each for Mr. and Mrs. Alley.

13. Pursuant to their fee agreement, Respondent was to receive a total of \$4,500 as his fee for both cases, and the Alleys each were to receive \$5,250, less costs/expenses advanced by Respondent, if any.

14. On October 4, 2011, Respondent received from Broadspire, the third party claims administrator, two checks totaling \$15,000, in settlement of the claims of Mr. and Mrs. Alley.

15. One week later, on October 11, 2011, Respondent disbursed to Mrs. Alley \$5,075, representing Mrs. Alley's share of the recovery less Respondent's fee and a few expenses that Respondent advanced on behalf of Mrs. Alley.

16. Though Respondent disbursed to Mrs. Alley the funds to which she was entitled under the fee agreement, he failed at that time and at all times thereafter, to provide Mrs. Alley with the required written statement setting forth the outcome of the matter, the remittance to Mrs. Alley and the method of its determination.

17. With respect to Mr. Alley, it was not until the following year, almost six months after Respondent received the settlement proceeds from Broadspire, that he disbursed to Mr. Alley any portion of the funds owed to him.

18. On March 22, 2012, Respondent disbursed \$4000.00 to Mr. Alley, representing only a portion of what Respondent owed to Mr. Alley.

19. Respondent failed at that time and at all times thereafter, to provide Mr. Alley with a written statement setting forth the outcome of the matter, the remittance to Mr. Alley, and the method of its determination.

20. During the four-year period from the institution of the civil action to the settlement of the claims of Mr. and Mrs. Alley, Angela experienced significant difficulty in communicating with Respondent

21. Angela attempted to reach Respondent countless times during the four-year period, to request from Respondent information and status updates concerning her matter and that of her parents. These requests were made by telephone, by letter, and in person at Respondent's office.

22. Almost without exception, Angela's inquiries went unanswered by Respondent.

23. These same issues of delay and lack of communication from Respondent continued for years after the settlement of Mr. and Mrs. Alley's claims.

24. Though Mr. and Mrs. Alley's claims had been settled in 2011, Respondent:

- a. had not disposed of Angela's claims against Mr. Davis by either settlement or litigation;
- b. Had not made full disbursement to Mr. Alley;
- c. Had not provided Mr. and Mrs. Alley with the required accounting of the settlement of their claims.

25. From 2012 through 2014, Attorney Mark T. Caloyer, counsel for Mr. Davis, attempted to settle Angela's claims, reaching out to Respondent by email and regular mail.

26. In September 2012, Mr. Caloyer emailed Respondent proposing a lump sum settlement of \$8,500.00.

27. Respondent informed Mr. Caloyer that he would inform Angela of the offer and get back to Mr. Caloyer.

28. Respondent failed to communicate the proposed terms of settlement to Angela and he failed to respond to Mr. Caloyer.

29. In September 2013, Mr. Caloyer reached out to Respondent regarding the proposed terms of settlement and offered to transfer the matter to arbitration.

30. Respondent failed to respond.

31. Having failed to hear from Respondent as to the acceptability of these terms, in September 2013, Mr. Caloyer began sending letters to Respondent in which he advised Respondent that he required a response to the proposed terms, or he would begin moving forward in litigation.

32. Respondent failed to respond.

33. Finally, Angela was able to speak with Respondent in October 2013, regarding her case. During the call, Respondent made no mention of the proposed terms from Mr. Caloyer, and made no mention of the opposing counsel's threats to abandon settlement and move forward in litigation.

34. In November 2013, not having heard from Respondent, Mr. Caloyer began moving the case forward in litigation. He sent Respondent a notice of a Motion to Transfer to Arbitration, providing Respondent with almost three weeks of notice.

35. Respondent failed to inform Angela of the Motion.

36. Respondent failed to appear in Motions Court on behalf of Angela.

37. Mr. Caloyer's Motion was granted and he communicated to Respondent the scheduling of Angela's case for arbitration.

38. Respondent did not respond to Mr. Caloyer nor did he inform Angela of the arbitration date.

39. On April 14, 2014, the date set for Angela's arbitration, Respondent failed to appear.

40. A default judgment was entered against Angela, dismissing her claims.

41. On April 16, 2014, the adverse award was docketed and served upon Respondent.

42. Respondent failed to advise Angela of this adverse award.

43. Unable to resolve these matters with Respondent on her own, despite years of effort, Angela, on behalf of herself and her parents, turned to Office of Disciplinary Counsel for help in early April 2014.

44. In the course of the investigation of Angela's complaint, Petitioner discovered the default arbitration award against Angela.

45. When the adverse award was discovered, the time period in which to appeal that award had not yet passed and Petitioner informed Angela of that fact.

46. Angela was able to secure successor counsel and make a timely appeal of the adverse award, ultimately settling her case for \$15,000.00.

47. In the course of Petitioner's investigation of Angela's complaint, Respondent initially cooperated, providing limited documentation and information to Petitioner.



48. Respondent initially provided Petitioner with a handwritten accounting of the proceeds of the settlement of Mr. and Mrs. Alley. In addition to check number 1175 for \$5,075.00 made out to Mrs. Alley and check number 1182 for \$4,000.00 made out to Mr. Alley, both of which the Alleys acknowledged receiving, the account showed a check number 1181, written in the amount of \$1,000.00.

49. The accounting provided by Respondent misrepresented that the \$1,000.00 check was made out to Mr. Alley.

50. Respondent did not supply Petitioner with a copy of that check, despite having promised to do so.

51. Petitioner discovered that Respondent informed the Alleys that there was a lien filed by the Pennsylvania Department of Public Welfare against Mr. Alley, and Respondent could not disburse the remaining entrusted funds to Mr. Alley because of the lien.

52. By way of subpoena *duces tecum*, Petitioner obtained a true and correct copy of check number 1181, written for \$1,000.00. Upon further inspection it was discovered that the check was made out to Respondent, and that he had negotiated it.

53. The balance in Respondent's IOLTA account was \$39.57 after the clearing of check numbers 1181, written to Respondent, and 1182, written to Mr. Alley.

54. This was \$960.43 below Respondent's entrustment on behalf of Mr. Alley.

55. Respondent was not entitled to the \$1,000.00. that he disbursed to himself by check number 1181.

56. Respondent testified at the disciplinary hearing.

57. As Respondent failed to file an Answer to Petition, he was not able to contest the allegations contained in the Petition for Discipline.

58. Respondent acknowledged that he did not communicate with the Alleys during the time frame in question, and indicated that for a portion of the time, from the latter part of 2013 and continuing some six months, he was handling family issues related to his father's stroke. N.T. 16–17

59. Respondent was in his office infrequently and had someone else pick up his mail. He admitted he "missed a few things." N.T. 16, 20.

60. Respondent's practice consists of criminal, low cost services; conflicts counsel work; and, *pro bono* work. N.T. 18.

61. Respondent has not made restitution to Mr. Alley, but indicated a willingness to do so. N.T. 21.

62. Respondent did not acknowledge the harm that his conduct caused his clients, nor did he demonstrate genuine remorse.

### III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rules of Professional Conduct:

1. RPC 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.

2. RPC 1.4(a)(2) – A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.

3. RPC 1.4(a)(3) – A lawyer shall keep the client reasonably informed about the status of the matter.

4. RPC 1.4(a)(4) – A lawyer shall promptly comply with reasonable requests for information.

5. RPC 1.4(b) – A lawyer shall explain a matter to the extent reasonably necessary to permit the clients to make informed decisions regarding the representation.

6. RPC 1.4(c) – A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated.

7. RPC 1.15(c) – A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) of other law. A contingent fee shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

8. RPC 1.15(b) – A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

9. RPC 1.15(e) – A lawyer shall promptly deliver to the client or third person any property, including but not limited to Rule 1.15 Funds, that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding the property; Provided, however, that the delivery, accounting and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment.

10. RPC 1.16(d) – Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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

12. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

Disciplinary proceedings against Respondent were instituted by Office of Disciplinary Counsel by way of a Petition for Discipline filed on August 28, 2013. The Petition charged Respondent with violating multiple Rules of Professional Conduct arising out of his misconduct in his representation of Angela Alley and Reynolds and Carol Alley. Respondent, by virtue of his failure to file an Answer to the Petition for Discipline, admitted all of the factual allegations contained in the Petition for Discipline. Rule 208(b)(3), Pa.R.D.E. Those allegations clearly and convincingly support findings of each Rule violation charged in the Petition for Discipline.

Having concluded that Respondent violated the Rules, this matter is ripe for the determination of discipline. Petitioner recommended a suspension of two years. Respondent did not offer any recommendation for discipline. The Hearing Committee recommended a suspension for a period of two years.

After reviewing the record in the context of the Committee's recommendation, and after considering the nature and gravity of the misconduct as well as the presence of aggravating or mitigating factors, *Office of Disciplinary Counsel v. Gwendolyn Harmon*, 72 Pa. D. & C. 4th 115 (2004), we recommend that Respondent be suspended for a period of one year and one day.

The within matter involves Respondent's lack of diligence and communication in his representation of Angela Alley and her parents over a period of approximately eight years, culminating with Respondent's abandonment of Angela and her claims, and the mishandling of approximately \$1,000.00 of funds entrusted to him

for Mr. Alley. This is serious misconduct; yet our overall view of Respondent, based on the record, is that he was overwhelmed, unaware of how to proceed and perhaps inept, but not malicious.

There are several aggravating circumstances to consider. While Respondent was initially cooperative during Petitioner's investigation of the Alleys' complaint, he misrepresented to Petitioner that a \$1,000.00 check was made out to Mr. Alley, when in fact it was made out to Respondent and he had negotiated it. Respondent has not reimbursed his client the full amount due him, despite his indication at the disciplinary hearing that he was willing to do so.

Respondent has not apologized for his conduct or otherwise shown remorse for his actions. At the time of the disciplinary hearing, Respondent did not appear to grasp the seriousness of the proceedings and the harm that his conduct caused his clients.

While in fact Respondent has no prior discipline of record in Pennsylvania, he produced no other evidence in mitigation. At the hearing he did not offer any witnesses or exhibits regarding his character or reputation in the legal community. He presented brief testimony and attempted to explain his conduct as a product of time away from his legal office because of his father's stroke. Respondent acknowledged that he "missed a few things."

Final discipline is determined on a case-by-case basis on the totality of facts presented. Nevertheless, despite the fact-intensive nature of the endeavor, the Board must strive for consistency so that similar misconduct "is not punished in radically different ways." *Office of Disciplinary Counsel v. Lucarini*, 472 A.2d 186, 190 (Pa. 1983). Turning to the ultimate question to be resolved - the determination of discipline – we are

guided by decisional law and find that a suspension of one year and one day is appropriate. As is often the case with attorney disciplinary matters, there is no case precedent that is precisely on all fours, but a suspension of one year and one day fits into the range of discipline in prior cases.

The attorneys in the following cases received suspensions of one year and one day: *Office of Disciplinary Counsel v. Richard Patrick Reynolds*, 1895 D.D. No. 3 (Pa. 2014) (neglect of client's appeal, failure to communicate and abandonment of client after accepting representation, aggravating factors included two prior Informal Admonitions for similar misconduct); *Office of Disciplinary Counsel v. Ann-Marie McDonald Pahides*, 1546 D.D. No. 3 (Pa. 2010) (misconduct included lack of competence, neglect, lack of communication and failure to refund unearned fees and documents in five client matters, aggravating factor was a prior Informal Admonition); *Office of Disciplinary Counsel v. Marc D. Collazzo*, 1675 D.D. 3 (Pa. 2010) (lack of competence in failing to file a timely complaint, failure to communicate, misrepresentations, aggravating factors).

We are cognizant that the Hearing Committee and Petitioner have recommended a suspension of two years and have cited supporting cases. *See, Office of Disciplinary Counsel v. Frey*, 1719 D.D. No. 3 (2011) (suspension for three years following misappropriation of \$15,000.00 of entrusted funds, inappropriate use of IOLTA account, failure to return the unearned portion of a fee he was paid, lack of communication and diligence, and dishonest conduct); *Office of Disciplinary Counsel v. Gniewek*, 1462 D.D. No. 3 (2009) (suspension for three years for misuse of \$60,000.00, failure to communicate, failure to account for entrusted funds, and failure to timely disburse entrusted funds). Our careful review of these cases indicates that there is a

fine line between suspensions of one year and one day and suspensions of two years, a line which is often difficult to interpret and which is certainly fact-driven, as noted earlier. We do not find the cases cited by the Petitioner and Hearing Committee to be persuasive.

We are reminded of the guidance given by the Supreme Court that the primary function of the attorney disciplinary system is not punitive in nature, but is to determine the fitness of an attorney to continue the practice of law and to maintain the integrity of the legal system. *Lucarini*, 472 A.2d at 190. We are persuaded that the imposition of a two year suspension would be punitive in this particular matter. A one year and one day suspension appropriately fulfills the goals of the disciplinary system by removing Respondent from practice and protecting the public from substandard representation. If he desires to practice law in the future, Respondent will be required to prove his fitness by clear and convincing evidence, which will necessitate adjustments to his practice.



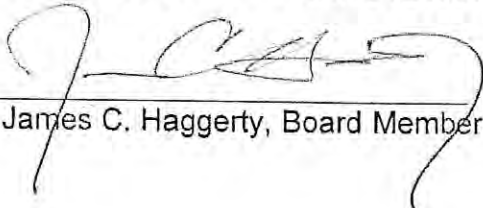
V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Perry Lynn Flaugh, be Suspended from the practice of law for a period of one year and one day.

It is further recommended that 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:   
James C. Haggerty, Board Member

Date: June 15, 2016

Board Member Cordisco did not participate in the adjudication.