

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL :
Petitioner :
: No. 24 DB 1992
v. :
: Attorney Registration No. []
[ANONYMOUS] :
Respondent : ([] County)

OPINION

I. HISTORY OF PROCEEDINGS:

On March 31, 1992, the Office of Disciplinary Counsel ("Petitioner") filed a Petition for Discipline against [] ("Respondent"). The Petition for Discipline alleged that Respondent had failed to keep his client informed about the status of a matter in violation of R.P.C. 1.4(a) and failed to take appropriate steps to protect his client's interests upon termination of representation in violation of R.P.C. 1.16(d). The alleged misconduct arose from a criminal defense representation in which Respondent was paid a retainer for professional services, but did nothing more than enter his appearance. The client subsequently incurred the costs of an additional fee when he found it necessary to retain new counsel. None of the original fee paid to Respondent was returned and no showing was made that Respondent had earned that fee.

Respondent did not file an Answer to the Petition for Discipline and on May 28, 1992, the matter was referred to Hearing

Committee [], chaired by [], Esq. and consisting of Members [], Esq. and [], Esq. Although, a Hearing was originally set for July 24, 1992, Petitioner requested that a Pre-Hearing Conference be scheduled instead for that date after a Member of the Committee indicated his unavailability for the Hearing. The Pre-Hearing Conference was held on July 24th, Attorney [] presiding. Despite proper notice, Respondent did not appear for the Pre-Hearing Conference either in person or through counsel.

The Hearing was conducted on August 5, 1992. Once again, Respondent did not appear in person or through counsel despite proper notice. In light of Respondent's continued noncooperation, the Hearing Committee dispensed with the need for filing of briefs. After reviewing the testimony of the Petitioner's single witness and considering the sparse Record which consisted of one Exhibit and one Administrative Exhibit, the Hearing Committee concluded that Respondent's "cavalier and callous attitude" demonstrated that he was "thumbing his nose" at the disciplinary process. (Hearing Committee Report at 2.) On December 8, 1992, the Hearing Committee recommended that Respondent receive a Private Reprimand with six months probation.

The matter was adjudicated by the Board at its February 25, 1993 meeting. Based on its review of the Record and the Hearing Committee Report, the Board herewith recommends that Respondent receive a Private Reprimand with Condition that he establish that the above-referenced fee has been earned.

II. FINDINGS OF FACT

The Board adopts and incorporates by reference herein the following Findings of Fact made by the Hearing Committee, which are amply supported by the evidence and testimony.

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 (hereinafter 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 1952, was admitted to practice law in the Commonwealth of Pennsylvania in 1980, and his last known address is [].

3. On January 15, 1990, [A] retained Respondent to represent him on criminal charges of simple assault and aggravated assault. (N.T. 11, P.D. 3)

4. At that time, Respondent requested a \$500.00 total fee for representation in the matter. [A] paid Respondent \$500.00 in cash and Respondent provided him with a receipt. (N.T. 11-12, P-1)

5. After the initial meeting, [A] met with Respondent once over the next three (3) month period. (N.T. 13)

6. From February, 1990 until September, 1990, [A] telephoned Respondent at least once a week regarding the status of

his case. On most occasions, [A] was unsuccessful in speaking with Respondent and left a message for him to return his calls; however, Respondent rarely returned [A's] telephone calls. (N.T. 15-19)

7. [A's] case was scheduled for a non-jury trial in July, 1990, but was rescheduled for October 11, 1990. (N.T. 17)

8. During the summer of 1990, the frequency of telephone calls from [A] to Respondent varied from at least three (3) to five (5) times per week. (N.T. 17-18)

9. Each time [A] would telephone Respondent, he would leave a message for Respondent to return his call. Respondent failed to return any of these telephone calls. (N.T. 18)

10. Near the date of trial, [A] received a telephone call from a woman identifying herself as "[B]" who indicated she was calling on behalf of Respondent. (N.T. 18-19)

11. [B] advised [A] that Respondent had been hospitalized for some period of time and that she was handling some of his cases for him. (N.T. 19)

12. [B] also stated that a postponement of the trial would be sought and, as a result, [A] did not have to appear on his scheduled trial date. (N.T. 19-20)

13. Relying on what had been told to him by [B], [A] did not appear before the Court on October 11, 1990.

14. There was no postponement of [A's] trial and, as a result, a bench warrant was issued for [A]. He and his family members eventually resolved the matter and the warrant was later lifted. (N.T. 20-21)

15. [A's] trial was rescheduled for November 20, 1990 and was subsequently scheduled for February 15, 1991. (P.D. 4)

16. [A] then retained other counsel, Attorney [C], to handle his legal matter. (N.T. 20-21)

17. Attorney [C] represented [A] at the February 15, 1991 trial at which time he entered a guilty plea to one (1) count of simple assault. (N.T. 21; P.D. 4)

18. [A] paid Attorney [C] \$300.00 for her services. (N.T. 21; P.D. 4)

19. Respondent performed no apparent legal services on behalf of [A] and despite requests made by [A], has failed to return any of the \$500.00 fee charged for his services. (N.T. 21-23)

III. CONCLUSIONS OF LAW

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

1. RPC 1.4(a) - Failing to keep his client informed about the status of an important legal matter.
2. RPC 1.16(d) - Failing to take steps to the extent reasonably practicable to protect his client's interests upon termination of representation.

IV. DISCUSSION

According to the un rebutted testimony in this case,

Respondent agreed to represent [A] in defense of criminal charges of simple and aggravated assault on January 20, 1990. At that time, [A] paid Respondent \$500 as his total fee. In return, he received a written receipt of payment. After that initial meeting, Respondent met with [A] on one more occasion during February, 1990, but the 20-minute meeting did not address the substantive issues relating to [A's] defense. During the next ten months, Respondent failed to keep his client informed about the status of his criminal case. [A] claims to have telephoned Respondent at least once each week seeking information; Respondent did not take the calls and failed to return them.

After the trial date was rescheduled from July to October, [A] tried to reach Respondent by phone even more frequently - as often as three times each week without success.

In October, 1990, [A] received a telephone call from a "[B]", who told him she was calling for Respondent. She said that Respondent had been hospitalized for four weeks and would not be available for trial. "[B]" then advised [A] that he need not show up for the scheduled trial since it would be postponed. Relying on that advice, [A] did not appear at his October trial, and a bench warrant was issued for his arrest. The warrant was later lifted, and the trial was reset first for November, 1990, and then for February, 1991.

[A] finally retained new counsel to represent him. His choice was "[C], Esq." to whom he paid a fee of \$300. Her representation consisted of entering a plea to simple assault.

There is no evidence or testimony in the Record to explain the identities of the "Mesdames [B]." It remains unclear whether "[B]" was, or is, the same person as "[C], Esq." It also remains murky whether Attorney [C] was, or is, in any way professionally affiliated with Respondent. This question of mistaken identity bears directly on the issue before the Board. If the two "[B] and [C]" are identical and are professionally related to Respondent, [A] was required to pay an extra fee contrary to his original agreement. Even if "Attorney [C]" is not the same person as "[B]", the evidence supports the conclusion that [A] paid Respondent a cash fee of \$500 "up front" for a representation that consisted of nothing more than noting his appearance. ¹

The Board finds it puzzling that the Hearing Committee did not address the identity issue in its Report and relied solely on testimony from [A]. Perhaps it considered Respondent's failure

¹The ethical propriety of nonrefundable retainers is currently at issue in New York. See Matter of Cooperman, 591 N.Y.S. 2d 855 (2d Dep't 1993) (first judicial opinion in the country to invalidate nonrefundable retainers as unethical). In that case, also a criminal matter, the attorney did nothing more than enter his appearance. Nevertheless, he retained a nonrefundable fee of \$10,000. The Cooperman case is currently on appeal before a panel of the Second Department, and many parties have expressed interest in participating amicus curiae. See also, Hegeman-Harris Co. v. Town of Greensburgh, N.Y.C.J. March 25, 1993 at 25 (Sup. Ct. Westchester County 1993). In Hegeman, citing and following Cooperman, the court "set aside as illegal and void" a nonrefundable retainer. The ABA has identified this controversial issue as an important national public policy issue. Cf. In Re: Kitchenworks Caterers, Inc. (Bankr. M.D. PA. April 15, 1993) (given level of experience, status of attorney and amount of retainer, nonrefundable agreement may be reasonable).

to present a case or to rebut the testimony as conclusive of his misconduct. It should be noted, however, that Pa.R.D.E. 203(a)(3) provides that "[w]ilfull violation of any other provision of the Enforcement Rules" constitutes independent grounds for discipline. The threshold issue of misconduct having thus been met, the Board now considers the imposition of discipline.

While the Board agrees that a Private Reprimand is appropriate, it disagrees with the Hearing Committee's recommendation of Probation, which is generally available only under limited circumstances, i.e., mental illness, alcohol or drug abuse. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa 1989). In Braun, the evidence clearly established that Respondent's mental condition was a factor in causing the misconduct. No showing has been made on this Record that any causal condition afflicted Respondent.

Instead, the Board recommends that Respondent receive a Private Reprimand with a Condition, pursuant to Pa.R.D.E. 204(b). While the Board recognizes that fee disputes do not come within its adjudicatory scope, it believes that this Respondent should be required to make a showing that the unreturned fee had been earned. Resolution of the contested amount is not presently at issue. Accordingly, the Board recommends that a Private Reprimand be delivered with the Condition that Respondent demonstrate that the unreturned fee has been earned. Failure to comply with the above condition shall be grounds for reconsideration of the matter and prosecution of formal charges against this Respondent.

V. DETERMINATION

The Disciplinary Board of the Supreme Court of Pennsylvania determines that the Respondent, [], shall receive a Private Reprimand With Condition that at least five (5) days prior to the scheduled Private Reprimand Respondent submit proof to the Secretary of the Board and Office of Disciplinary Counsel that he has returned the unearned portion of his fee to [A] or that he has earned the entire \$500.00 fee. 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: _____
Penina K. Lieber, Member

Date: July 19, 1993

Board Members Hill, Powell, McGivern, Flaherty and Leonard did not participate in the adjudication.

O R D E R

AND NOW, this 19th day of July, 1993, upon consideration of the Report and Recommendation of Hearing Committee [] filed December 8, 1992; it is hereby

ORDERED that the said [Respondent] of [] County be subjected to PRIVATE REPRIMAND WITH CONDITIONS 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.

Condition:

At least five (5) days prior to the scheduled Private Reprimand, Respondent shall submit to the Secretary of the Board and Office of Disciplinary Counsel proof that he has returned the unearned portion of his fee to [A] or that he has earned the entire \$500.00 fee.

Failure to comply with the above Condition shall be grounds for reconsideration of this matter under the specific provision of Enforcement Rule 203(b)(2) and Disciplinary Board Rule 87.53(b).

BY THE BOARD:

Chairman