

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 117, Disciplinary Docket
Petitioner : No. 3 - Supreme Court
:
:
v. : No. 29 DB 1995 - Disciplinary
Board
:
:
: Attorney Registration No. []
[ANONYMOUS] :
Respondent : ([])

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

On May 3, 1995, the Supreme Court of Pennsylvania issued a Rule upon Respondent, [], to show cause why he should

not be placed on Temporary Suspension pursuant to Rule 208(f), Pa.R.D.E. Respondent was directed to file a response within ten days of the date of the Order. Respondent did not file a response. On May 23, 1995, Respondent was placed on Temporary Suspension by Order of the Supreme Court. A Petition for Discipline was filed by Petitioner against Respondent on July 5, 1995.

Respondent did not file an Answer. A hearing on this matter was held on October 30, 1995, before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Respondent was represented by [], Esquire. Petitioner was represented by [], Esquire. The Committee filed its Report on January 29, 1996 and recommended a three year prospective suspension. No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Board at the meeting of March 7, 1996.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner (Office of Disciplinary Counsel), whose principal office is 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 1936 and was admitted to practice law in the Commonwealth of Pennsylvania on or about April 27, 1965.

3. Respondent's last registered office for the practice of law was []. Sometime in 1994, Respondent vacated his offices at this address. Respondent's residence is located at [].

4. It is stipulated by Respondent that he has violated a Rule of Professional Conduct, as a result of the activities alleged either under Charge I or under Charge II as discussed hereafter.

CHARGE I: Representation of [A]

5. Sometime in the year 1992, [A] contacted Respondent to discuss his providing her with legal services. (NT 14)

6. [A] came to Respondent because her daughter was a classmate of Respondent's wife. (NT 13)

7. It is stipulated that [A] contacted Respondent

because her husband was ill and had substantial debts with limited assets to pay them. Respondent then agreed to represent her in negotiating compromise payments with the creditors. (Stipulation 3)

8. It is further stipulated that at no time did Respondent advise [A] of the basis or rate of his fee, orally or in writing. (Stipulation 5)

9. [A] provided Respondent with a list of creditors and the amounts owed, as well as the monthly bills and statements she received from creditors. (Stipulation 6)

10. From the time that Respondent was retained, through October, 1993, whenever [A] inquired of Respondent concerning the debts, he advised her that he was handling the situation, and that she should not worry. (Stipulation 7)

11. In approximately January, 1993, [A] cashed in a retirement account belonging to her husband, and transferred the proceeds to Respondent to preserve the funds from creditors while he negotiated payment arrangements with them. (Stipulation 8)

12. The retirement account was liquidated, and a check was made payable to [A], which she in turn endorsed over to Respondent. (Stipulation 9)

13. Respondent endorsed the check and cashed it at a

check cashing agency. (Stipulation 10)

14. Thereafter, Respondent did not deposit the funds into an escrow account but rather maintained the funds in cash. (NT 64); (NT 71)

15. Respondent has no records of the funds entrusted to him. (NT 89)

16. Between January, 1993, and October, 1993, Respondent disbursed to [A], at her request, portions of the funds. (Stipulation 12)

17. Neither [A] nor Respondent can provide an accurate accounting for the funds disbursed.

18. In October, 1993, [A's] husband died. (Stipulation 13)

19. In January, 1994, [A] advised Respondent that she had a received a death benefit of approximately \$35,000 from her late husband's employer. (Stipulation 17)

20. Sometime in January, 1994, [A] sent Respondent a check in the amount of \$9,900, to be used to pay her creditors. (Exhibit P-10); (Stipulation 18)

21. The check forwarded to Respondent in January, 1994, was cashed, and Respondent did not deposit the funds into an escrow account. (Stipulation 20) (NT 64)

22. The funds entrusted to Respondent were to be used for the payment of creditors. (Stipulation 18)

23. The funds were not used for payment of creditors. (Stipulation 21)

24. During the period of time from January through April, 1994, [A], and on some occasions her daughter, called Respondent to request an update on the matter and an accounting of her funds. (Stipulation 22)

25. Respondent did not respond to these inquiries. (Stipulation 23)

26. Starting in May, 1994, new counsel retained by [A], [B], Esquire, wrote to Respondent requesting an accounting and return of the entrusted funds. (Exhibits P-11 and P-12)

27. Respondent did not respond directly to [B's] request. (Stipulation 26)

28. On May 27, 1994, counsel acting on behalf of Respondent, [C], Esquire, called [A's] new attorney, [B], and advised that he would communicate further with respect to the matter. (Stipulation 27)

29. Thereafter, [B], acting on behalf of [A], wrote to Respondent's attorney on two occasions, requesting an accounting. (Exhibits P-13 and P-14); (Stipulation 28)

30. After one reply from [C], neither [C] nor Respondent communicated further with [B] or with [A]. (Stipulation 29)

31. According to Respondent, he ignored the calls of [A] and those of her successor attorney because "I just got into a mood." (NT 74-75)

32. It was not until August, 1995, that Respondent's present counsel, [D], Esquire, issued to [A] a check in the amount of \$9,900 drawn on his law firm's escrow account, fulfilling Respondent's obligation to her. (Stipulation 30); (Exhibit P-15)

33. At no time has Respondent provided to [A] an accounting for the funds entrusted to him. (NT 40-41); (NT 64-65)

CHARGE II: Failure to Cooperate with Disciplinary Proceedings

34. The Petitioner, pursuant to the authority vested in it by Pennsylvania Rule of Disciplinary Enforcement 207(b)(1), conducted an investigation of Respondent following a complaint from [A].

35. Respondent was placed on notice by a letter request for statement of Respondent's position (Form DB-7), dated September 12, 1994, that violations of the Rules of Professional Conduct had been raised against him. (Stipulation 32)

36. The letter from the Petitioner requested that

Respondent provide financial records with respect to his handling of the funds in question, necessary for the Petitioner to determine Respondent's compliance with the Rules of Professional Conduct. (Stipulation 32)

37. Respondent did not answer the DB-7 letter or provide the requested bank records. (Stipulation 33)

38. On October 31, 1994, the Petitioner issued upon Respondent a Subpoena Duces Tecum pursuant to Pennsylvania Rule of Disciplinary Enforcement 213(b)(2), returnable November 18, 1994. (Stipulation 35)

39. The Subpoena was served upon Respondent on November 7, 1994. (Stipulation 36)

40. Respondent did not appear, respond to, or in any way comply with the Subpoena. (Stipulation 37)

41. Respondent filed attorney registration statements pursuant to Pennsylvania Rule of Disciplinary Enforcement 219 for 1992, 1993, and 1994, respectively. (Exhibits P-17, P-18, P-19)

42. When Respondent filed his attorney registration statement, he did not reveal the existence of an escrow account at [E] Federal No. [], captioned "[Respondent], Attorney-at-Law Escrow Account". (Stipulation 40)

43. In conducting its investigation, Petitioner was

unable to identify any financial institution upon which to serve a Subpoena Duces Tecum in order to produce records of accounts into which Respondent may have deposited, or otherwise transferred, funds related to the [A] transaction. (Stipulation 41)

44. Respondent's failure to comply with this Subpoena delayed and obstructed investigation of this matter by the Petitioner. (Stipulation 42)

45. On March 2, 1995, Petitioner filed before the Disciplinary Board of the Supreme Court a Petition for Issuance of a Rule to Show Cause why Respondent should not be placed on temporary suspension. (Stipulation 43)

46. Respondent was served with the petition. (Stipulation 44)

47. Respondent did not respond to the petition. (Stipulation 45)

48. By Order and Rule to Show Cause dated March 8, 1995, the Disciplinary Board issued a Rule Returnable within thirty (30) days from service of the Order. (Stipulation 46); (Exhibit P-23)

49. Respondent was served with the Order and Rule. (Stipulation 47)

50. Respondent did not respond to the Rule. (Stipula-

tion 48)

51. The Disciplinary Board transmitted the record of Respondent's non-responsiveness to the Supreme Court and recommended that the Court enter a Rule to Show Cause why he should not be placed on Temporary Suspension pursuant to Pennsylvania Rule of Disciplinary Enforcement 208(e).

52. On May 3, 1995, the Supreme Court issued such a Rule to Show Cause upon Respondent. (Stipulation 50)

53. Respondent did not respond to the Rule. (Stipulation 51)

54. By Order dated May 23, 1995, the Supreme Court made the Rule absolute, placed Respondent on Temporary Suspension, pending further Order, and directed respondent to comply with the provisions of Rule 217. (Stipulation 52)

55. Respondent has a record of prior discipline consisting of one Informal Admonition in 1981, three Informal Admonitions in 1984, one Informal Admonition in 1986, and a Private Reprimand in 1991.

III. CONCLUSIONS OF LAW

1. Respondent violated RPC 1.4(a) by failing to communicate with his client [A].

2. Respondent violated RPC 1.5(b) by failing to enter

into a written fee agreement with his client.

3. Respondent violated RPC 1.15(a) by failing to hold funds entrusted to him by a client in an escrow account at a financial institution and by failing to keep records of such funds.

4. Respondent violated RPC 1.15(b) by failing to render an accounting for funds held on behalf of a client.

5. Respondent violated RPC 1.16(d) by failing to cooperate with successor counsel once representation was terminated.

6. Respondent violated RPC 8.4(d) by engaging in conduct prejudicial to the administration of justice, when he failed to cooperate with the investigation of the Office of Disciplinary Counsel and failed to respond to the Rule to Show Cause entered by the Supreme Court.

IV. DISCUSSION

This matter is before the Board on a Petition for Discipline alleging that Respondent failed to carry out his responsibilities to a client to resolve claims of creditors. Furthermore, the Petition alleges that after Respondent obtained checks from his client for that purpose, he failed to deposit the funds in a segregated account, account for the funds, maintain

records of the funds, or hold the proceeds of at least one check intact and return them to the client at her request. Lastly, the Petition alleges that Respondent failed to comply with an investigatory subpoena issued by Petitioner and failed to respond to a Rule to Show Cause issued by the Supreme Court.

Review of the record indicates that Respondent admitted he undertook representation of complainant, [A], without a written fee agreement. He admits he kept client funds in cash, without depositing them into an escrow account, and he did not maintain records of the funds. Respondent does not dispute that he did not render an accounting of the funds, and when [A's] new counsel requested such an accounting, Respondent did not respond to the request for over one year. Respondent did eventually make reimbursement to [A].

The record is equally clear that Respondent did not attempt to cooperate with Petitioner's investigation of the complaint; instead, refusing to provide records and failing to comply with a Subpoena Duces Tecum. Further compounding Respondent's problems were his failure to reveal the existence of an escrow account on his attorney registration forms for 1992, 1993, and 1994, and his failure to respond to a Rule to Show Cause issued by the Supreme Court. Based on the evidence of record, the

Board finds that Petitioner met its burden of proof that Respondent engaged in misconduct which violated Rules of Professional Conduct. As a result of this finding, the Board must determine the appropriate measure of discipline to be imposed on Respondent. This case must be analyzed according to the totality of its facts. The nature and gravity of the offending conduct, as well as the presence of mitigating and/or aggravating circumstances, and the existence of a record of prior discipline are factors which the Board considers when making its decision. Prior case law involving similar misconduct, while not conclusive, is instructive as well.

Relevant case law indicates that there is no per se rule of discipline in Pennsylvania when an attorney engages in mishandling of client funds. Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983). However, the disposition of the majority of cases in which there is a commingling and conversion of client funds is public discipline, as the mishandling of client monies is a serious breach of public trust which cannot be tolerated. Office of Disciplinary Counsel v. Lewis, 495 Pa. 519, 426 A.2d 1138 (1981). In assessing the proper discipline, the cases frequently consider whether forgery was present, whether restitution was made, whether the Respondent

demonstrated an appreciable understanding of the nature of the misconduct, and whether a record of prior discipline existed.

In the instant matter, Respondent was given funds by his client to pay off or compromise debts. Respondent held the first check, approximately \$13,000, but never compromised the debts and never kept his client informed as to the status of her case. He gave back \$11,000 to the client, but there were no records kept to ascertain how much was initially given. The client then gave Respondent \$9,900 from a death benefit to compromise the debts. Respondent took the money but failed to pay back the creditors and neglected to account for it. During this time period, Respondent failed to keep the money in a segregated escrow account. Respondent eventually paid the \$9,900 to his client more than one year later. Although Respondent did reimburse [A], this action does not negate his initial mishandling of her money. Respondent was in possession of [A's] funds for several years and no records exist to indicate what he did with the monies. This is not acceptable behavior for a person in a fiduciary relationship. Additionally, Respondent's attitude following the initiation of Petitioner's investigation demonstrates that he did not particularly understand or care about his misconduct. He made no attempt to cooperate with Petitioner

and ignored letters, a subpoena, and a Rule to Show Cause. Even though Respondent did admit to some violations, thus easing Petitioner's burden at the hearing, Respondent's attitude projected the image that the hearing was an imposition on him. Respondent did not show remorse or contrition for his actions and made no effort to convince the Committee that he would not engage in such conduct in the future.

Respondent's testimony alluded to psychological problems he was suffering due to pressures in his personal life. Respondent desires this evidence to be used as a mitigating factor. The insubstantial and speculative nature of this testimony make it impossible to find even a strong likelihood that Respondent's judgment and conduct were affected to a degree which would excuse the conduct at issue, much less a causal connection between the conduct and the alleged problems. This testimony does not meet the standard set forth in Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A.2d 894 (1989).

While there appear to be no mitigating factors in this case, Respondent's prior record of discipline may be considered as an aggravating circumstance. Office of Disciplinary Counsel v. Davis, 532 Pa. 22, 614 A.2d 1116 (1992). Respondent has received five Informal Admonitions and one Private Reprimand during the

course of his thirty year career. The last incident occurred in 1991, when he received a Private Reprimand for failing to fulfill his administrative duties to his deceased father's estate.

Respondent received entrusted funds from his client and made no effort to use them for the purpose for which they were given. He did not treat the funds as he should under the Rules of Professional Conduct. He did not pursue his client's objectives in the case and failed to communicate with that client. Review of the case law induces the Board to recommend a three year Suspension. In the case of In Re Anonymous No. 132 DB 88, 7 Pa. D. & C. 4th 331 (1990), an attorney failed to maintain client funds separate from his own and used these funds for his own benefit. Mitigating evidence was found in that the attorney voluntarily revealed infractions, had received one informal admonition in thirty-three years of practice, and presented persuasive character testimony. The attorney received a two year suspension. In the case of In Re Anonymous No. 50 DB 87, 3 Pa. D. & C. 4th 627 (1989), an attorney deposited a client check in a non-segregated fund and used it for personal expenses. The Board considered the attorney's unblemished forty year record and the fact that the attorney made restitution with interest as mitigating factors and suspended the attorney for two years. In

the case of In Re Anonymous No. 35 DB 88, 8 Pa. D. & C. 4th 344 (1990), an attorney received client funds which were directed for specific disposition to third parties and the disposition was never made. The attorney was unable to account for the funds. Although mitigation was found in the fact that repayment was made to the Pennsylvania Lawyers Fund for Client Security, the attorney's failure to appear at the hearing and participate in the process necessary to evaluate his standing severely aggravated the circumstances of the case. The Board recommended disbarment; however, the Court imposed a five year suspension. While none of these cases are specifically on point with the instant matter, the logic inherent in the sanctions persuades the Board that a three year retroactive Suspension is the appropriate sanction in this case grounded on the totality of the facts.

Petitioner contends that a prospective suspension is appropriate in consideration of the Respondent's aggravating actions. The Board is not inclined to recommend a prospective suspension unless compelling reasons are apparent. In Re Anonymous No. 92 DB 86 et. al., 5 Pa. D. & C. 4th 225 (1989). While the Board does not condone Respondent's behavior, neither does it consider it to be more egregious than the actions exhibited by other attorneys in cases wherein suspensions were

made retroactive to the date of the temporary suspension. In Re Anonymous No. 74 DB 89, 22 Pa. D. & C. 4th 261 (1994); In Re Anonymous No. 3 DB 89, 18 Pa. D. & C. 4th 490 (1993); and In Re Anonymous No. 78 & 106 DB 88, 18 Pa. D. & C. 4th 256 (1991).

Respondent was temporarily suspended on May 23, 1995 and has not practiced law since that time. The Board perceives no legitimate purpose served in ignoring this time spent on suspension.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], shall be Suspended from the practice of law from the Commonwealth of Pennsylvania for a period of three (3) years, retroactive to May 23, 1995.

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: _____
Robert J. Kerns, Member

Date: June 4, 1996

Board Member Paris dissented without recommendation.

Board Member Carson did not participate in the March 7, 1996 adjudication.

PER CURIAM:

AND NOW, this 26th day of July, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated June 4, 1996, it is hereby

ORDERED that [Respondent], be and he is SUSPENDED from the Bar of this Commonwealth for a period of three (3) years, retroactive to May 23, 1995, and he shall comply with all the provisions of Rule 217 Pa.R.D.E.

It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.