

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1247 Disciplinary Docket No. 3  
Petitioner :  
 : No. 14 DB 2007  
v. :  
 : Attorney Registration No. 56620  
ROBERT MARK UNTERBERGER, :  
Respondent : (Montgomery County)

ORDER

PER CURIAM:

AND NOW, this 18<sup>th</sup> day of June, 2008, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 21, 2008, it is hereby

ORDERED that Robert Mark Unterberger is suspended from the Bar of this Commonwealth for a period of one year and one day retroactive to April 30, 2007, 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.

A True Copy Patricia Nicola

As of: June 18, 2008

Attest:

Chief Clerk

Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 1247 Disciplinary Docket
Petitioner	:	No. 3
	:	
v.	:	No. 14 DB 2007
	:	
	:	Attorney Registration No. 56620
ROBERT MARK UNTERBERGER	:	
Respondent	:	(Montgomery 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

On February 12, 2007, Office of Disciplinary Counsel filed a Petition for Discipline against Robert Mark Unterberger. The Petition charged Respondent with professional misconduct arising out of his unauthorized practice of law while on inactive status. On March 12, 2007, a Joint Petition for Temporary Suspension was filed with the

Supreme Court. On March 27, 2007, a Joint Petition for Discipline on Consent was filed by Petitioner. A three member panel of the Disciplinary Board denied the Joint Petition and it was referred to a Hearing Committee. Subsequent to the denial of the Joint Petition, Respondent filed an Answer to Petition for Discipline on April 27, 2007. On April 30, 2007, the Supreme Court entered an Order temporarily suspending Respondent.

A disciplinary hearing was held on July 24, 2007 before a District I Hearing Committee comprised of Chair Sean P. Buggy, Esquire, and Members Daniel J. Ryan, Esquire, and Robert M. Caplan, Esquire. Respondent appeared pro se.

The Hearing Committee filed a Report on December 17, 2007, finding that Respondent engaged in professional misconduct and recommending that he be suspended for a period of one year and one day retroactive to April 30, 2007.

No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on January 30, 2008.

## II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and 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 said Rules of Disciplinary Enforcement.

2. Respondent, Robert Mark Unterberger, was born in 1961 and was admitted to practice law in the Commonwealth in 1989. His attorney registration address is 20 Conshohocken Road, #4512, Bala Cynwyd PA 19004. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has no prior history of discipline.

4. By Order dated November 1, 2002, effective within 30 days, the Supreme Court of Pennsylvania directed that Respondent be transferred to inactive status pursuant to Rule 219, Pa.R.D.E, for failure to pay his annual registration fee.

5. By letter dated November 1, 2002, addressed to Respondent and sent by certified mail, return receipt requested, Elaine M. Bixler, Secretary to the Disciplinary Board, enclosed a copy of the Order advising Respondent that he would be transferred to inactive status effective December 1, 2002 and advised Respondent that he was required to comply with Rule 217 and 219, Pa.R.D.E.

6. On November 6, 2002, Respondent received actual notice of his transfer to inactive status.

7. Respondent failed to file with the Secretary's Office the verified Statement of Compliance.

8. Respondent failed to file a Pennsylvania Attorney's Annual Registration Form since June 21, 2001.

9. Respondent failed to pay his Annual Attorney Registration Fee since June 22, 2001.

10. Respondent has been on inactive status in Pennsylvania from December 1, 2002 to May 30, 2007.

11. In August 2003, while on inactive status, Respondent was hired as a contract attorney by Maron & Marvel, a Delaware law firm.

12. Respondent is not licensed to practice law in the State of Delaware.

13. Respondent became a staff attorney at the Maron firm and was hired to oversee the firm's client, BP Corporation North America, Inc., in a national complex and class action defense, particularly in Luzerne County, Pennsylvania.

14. As lead counsel for the firm's class action defense litigation, Respondent's duties included pleadings, depositions, dispositive motions, claims tracking, investigation, internal presentation, joint defense strategy, multiple experts, medical records, client reporting and budgets.

15. Respondent failed to advise the Maron firm that he was on inactive status in Pennsylvania and prohibited from practicing law.

16. By Expense Accountability memo dated July 15, 2004, Respondent requested that the Maron firm reimburse him \$175 for the purported payment of his Annual Attorney Registration Fee.

18. Respondent had not paid his 2004-2005 annual fee.

19. By check dated July 26, 2004, and made payable to Respondent, in the amount of \$175, the Maron firm gave Respondent a check in reimbursement of purported payment of his Annual Attorney Registration Fee.

20. Respondent entered his appearance in approximately 294 cases in the Court of Common Pleas of Luzerne County on behalf of BP Corporation North America.

21. In connection with one or more of the BP matters, Respondent:

- a. filed pleadings and other legal documents;
- b. represented himself to clients, judges, court personnel and third parties as a lawyer;
- c. had contact with clients or their representatives either in person, by telephone or in writing;
- d. rendered legal consultation or advice to a client;
- e. appeared on behalf of a client in court; and
- f. negotiated or transacted a matter for or on behalf of a client with third parties and had contact with third parties regarding such negotiation or transaction.

22. Respondent held himself out as an attorney eligible to practice law in the Commonwealth of Pennsylvania despite his transfer to inactive status.

23. Respondent was listed as defense counsel in the case Nancy C. Arendash v. BP Corporation, North America, Inc., in the Court of Common Pleas of Luzerne County.

24. By Order dated September 6, 2005, Judge Mark A. Ciavarella, Jr., granted Plaintiffs' Motion to Compel Discovery from BP and ordered Respondent to answer certain discovery completely and fully on behalf of BP within 30 days or risk sanctions.

25. By letter to Respondent dated September 8, 2005, plaintiffs' counsel served Respondent with a copy of the Judge's Order.

26. Respondent failed to provide that discovery.

27. When questioned by the Maron firm's counsel why Respondent did not timely comply with the discovery Order, Respondent explained that the September 6, 2005 Order was entered in error and that plaintiff's counsel had written the Court requesting that the Order be stricken.

28. Respondent produced a purported copy of a letter dated September 12, 2005, purportedly written by plaintiff's counsel to the Prothonotary of Luzerne County, advising that "the Court has stricken sua sponte the Order to Compel entered against defendants Shell and BP on September 7, 2005."

29. Respondent forged, or caused to be forged, the September 12, 2005 letter.

30. By letter dated October 19, 2005, James J. Maron, Esquire, advised Respondent that his employment at the Maron firm was terminated.

31. On or about October 21, 2005, Respondent withdrew as counsel from 294 BP cases.

32. By Order dated April 30, 2007, the Supreme Court granted a Joint Petition to Temporarily Suspend an Attorney pursuant to Rule 208(f), Pa.R.D.E., and placed Respondent on temporary suspension until further definitive action by the Court.

33. Respondent testified on his own behalf at the disciplinary hearing.

34. Respondent has practiced law for nearly 20 years in the area of complex litigation, both on the plaintiff and defense side.

35. From 1999 to 2002 he operated a litigation support company and did not practice law. The business was not financially successful and Respondent found himself in debt.

36. Respondent did not inform his wife of the financial troubles he was experiencing as he was afraid and anxious. Respondent intercepted creditors' calls, let utilities be shut off and allowed the family home to go into foreclosure.

37. Respondent's wife eventually discovered the state of the family finances and the marriage suffered, ultimately ending in divorce.

38. Since Respondent was terminated from the Maron law firm he has had sporadic employment.

39. Respondent sought treatment from Nancy Gordon, who diagnosed him with major depressive disorder. Respondent was hospitalized twice for psychiatric issues, once in December 2006 and once in January 2007.



40. Respondent takes prescription medication to stabilize his mood.

41. Nancy Gordon is a licensed clinical social worker and engages in private counseling and psychotherapy. She first met with Respondent in September 2006 and continues to meet with him for treatment.

42. Ms. Gordon opined that Respondent's misconduct was directly caused by his mental disorder. She further opined that Respondent's mood is stable and he is doing well.

43. Respondent's psychiatrist is Joseph Bryer, M.D., who wrote a letter verifying the diagnosis of depression and confirming Respondent's use of prescription medications.

44. Respondent cooperated with Petitioner and admitted his wrongdoing.

### III. CONCLUSIONS OF LAW

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

1. RPC 5.5(a) – A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

2. RPC 5.5(b) (superseded May 15, 2004) – A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

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

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

5. Pa.R.D.E. 203(b)(3) – It is grounds for discipline for a lawyer to willfully violate any other provision of the Enforcement Rules, via the Enforcement Rules set forth below.

6. Pa.R.D.E. 217(a) – A formerly admitted attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the disbarment, suspension or transfer to inactive status and the consequent inability of the formerly admitted attorney to act as an attorney after the effective date of the disbarment, suspension, or transfer to inactive status and shall advise said client to seek legal advice elsewhere.

7. Pa.R.D.E. 217(b) – A formerly admitted attorney shall promptly notify, or cause to be notified, by registered or certified mail, return receipt requested, all clients who are involved in pending litigation... and the attorney or attorneys for each adverse party in such matter or proceeding... of the transfer to inactive status and consequent inability of the formerly admitted attorney to act as an attorney after the effective date of the... transfer to inactive status.

8. Pa.R.D.E. 217(c)(1) – A formerly admitted attorney shall promptly notify, or cause to be notified... of the transfer to inactive status, by registered or certified mail, return receipt requested, all persons or their agents or guardian to whom a fiduciary duty is or may be owed at any time after the transfer to inactive status.

9. Pa.R.D.E. 217(c)(2) – A formerly admitted attorney shall promptly notify, or cause to be notified, of the...transfer to inactive status, by registered or certified mail, return receipt requested, all other persons with whom the formerly admitted attorney may at any time expect to have professional contacts under circumstances where there is a reasonable probability that they may infer that he or she continues as an attorney in good standing.

10. Pa.R.D.E. 217(d) – A formerly admitted attorney, after the entry of... the transfer to inactive status Order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature.

11. Pa.R.D.E. 217(e) – Within ten days after the effective date of the...transfer to inactive status Order, the formerly admitted attorney shall file with the Board a verified statement showing that the provisions of the Order and these Rules have been fully complied with.

12. Pa.R.D.E. 217(j)(1) – In pertinent part, a formerly admitted attorney may not engage in any form of law-related activities in this Commonwealth except under the direct supervision of a member in good standing of the Bar of this Commonwealth who

shall be responsible for ensuring that the formerly admitted attorney complies with the requirements of this subdivision.

13. Pa.R.D.E. 217(j)(4)(iv) – (ix) – Without limiting the other restrictions in this subdivision (j), a formerly admitted attorney is specifically prohibited from engaging in any the following activities: (iv) representing himself or herself as a lawyer or person of similar status; (v) having any contact with clients either in person, by telephone, or in writing, except as provided in paragraph (3); (vi) rendering legal consultation or advice to a client; (vii) appearing on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, hearing officer or any other adjudicative person or body; (viii) appearing as a representative of the client at a deposition or other discovery matter; and (ix) negotiating or transacting any matter for or on behalf of a client with third parties or having any contact with third parties regarding such a negotiation or transaction.

14. Respondent has demonstrated by clear and convincing evidence that he suffers from a major depressive disorder, which substantially caused his misconduct. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989)

#### IV. DISCUSSION

This matter is before the Board on a Petition for Discipline charging Respondent with the unauthorized practice of law while on inactive status, engaging in

dishonest conduct and conduct prejudicial to the administration of justice, and forging a letter to his employer to conceal his failure to comply with a court order. Respondent entered into Joint Stipulations of Fact and Law with Petitioner and admitted the underlying facts. By way of his Answer to Petition for Discipline Respondent raised the issue of his depressive symptoms which impacted his work. At the disciplinary hearing Respondent put forth a Braun defense and presented evidence that he suffered from a major depressive disorder which caused his misconduct.

Respondent was transferred to inactive status by Order of the Supreme Court dated November 1, 2002, for failure to pay his annual registration fee required for licensure. He received notice of his inactive status. Despite this notice, Respondent continued to practice law for nearly three years without an active license. While on inactive status Respondent was employed as a contract attorney by the Delaware firm of Maron & Marvel. Respondent did not inform Maron & Marvel that he was on inactive status in Pennsylvania. While employed at the Maron firm Respondent entered his appearance in 294 cases in the Court of Common Pleas of Luzerne County on behalf of BP Corporation North America. In connection with one or more of these matters Respondent filed pleadings and other legal documents, represented himself to clients, judges, court personnel and third parties as a lawyer permitted to practice law in Pennsylvania, appeared in court on behalf of a client, and rendered legal consultation and advice to clients. In one case, Nancy C. Arendash v. BP Corporation North America, Inc., the court ordered Respondent to answer certain discovery requests within 30 days or risk sanctions.

Respondent failed to provide the discovery. When questioned by the Maron firm as to why he did not timely comply with the court order, Respondent produced a letter he forged that purported to be written by plaintiff's counsel to the Prothonotary of Luzerne County indicating that the court struck the order to compel entered against the defendants.

Respondent testified on his own behalf. He involved himself in a litigation support business from 1999 until 2002. His business venture produced little revenue and Respondent found himself approximately \$100,000 in debt. He did not tell his wife about the financial problems at first; when she found out the couple separated and eventually divorced. Respondent sought treatment for depression. Nancy Gordon, a licensed clinical social worker engaged in private counseling, testified on Respondent's behalf. Ms. Gordon first saw Respondent for treatment in September of 2006 and continues in that capacity. She diagnosed Respondent with major depressive disorder. Respondent has been hospitalized twice for psychiatric treatment, once in December 2006 and once in January 2007. Respondent currently takes several different prescription medications to stabilize his mood. Ms. Gordon opined that Respondent is doing well and is stable at this time. Ms. Gordon indicated that Respondent's depression and his fragile emotional and mental state made him engage in poor choices and poor behavior. In addition to Ms. Gordon's testimony, Respondent introduced a letter from his psychiatrist, Joseph Bryer, M.D., who verified that Respondent suffers from major depression. Based on this evidence the Board finds that Respondent demonstrated by clear and convincing evidence that he suffers from a psychiatric disorder which substantially caused his misconduct. Office of

Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989). In addition to the Braun mitigation, the Board finds that Respondent cooperated with Petitioner and took responsibility for his actions.

The Board and the Court have considered the question of the appropriate discipline for attorneys who engage in the unauthorized practice of law. As a general rule, these attorneys are suspended from the practice of law, with the length of suspension dependent on the particular facts and circumstances of each case. An attorney has an affirmative duty to know the status of his or her privilege to practice law and to comply with professional requirements for licensure. In re Anonymous No. 123 DB 1996, 41 Pa. D. & C. 4<sup>th</sup> 290 (1998). Discipline of one year and one day requires an attorney to submit to a reinstatement proceeding so that the Board and the Court can be assured that the attorney has addressed any personal, professional and organizational difficulties that contributed to the misconduct and is competent to resume the practice of law. In the instant case, a suspension of one year and one day is warranted due not only to Respondent's unauthorized practice but to his dishonest conduct relating to the letter he forged. Respondent engaged in serious misconduct; therefore, the sanction he receives must be a reflection of that. Additionally, a reinstatement inquiry is necessary to evaluate Respondent's mental condition and its impact on his competence to practice law.

For the above reasons, the Board recommends that Respondent be suspended for a period of one year and one day retroactive to the temporary suspension date of April 30, 2007.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Robert Mark Unterberger, be suspended from the practice of law for a period of one year and one day to be retroactive to April 30, 2007.

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:   
Sal Cognetti, Jr., Board Member

Date: February 21, 2008

Board Member Jefferies did not participate in the adjudication.