

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 169 Disciplinary Docket
Petitioner : No. 3
:
:
v. : No. 106 DB 1993
:
[ANONYMOUS] : Attorney Registration No. []
:
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

This matter arises from a complaint against Respondent which originally resulted in a determination that Respondent receive a Private Reprimand with Conditions. Respondent failed to appear for the Private Reprimand and subsequently a letter was sent to Respondent advising her that her neglect to appear without

good cause would constitute an independent act of professional misconduct. This letter requested Respondent advise the Board why her failure to appear should not result in the institution of formal proceedings. Respondent sent a letter of acknowledgment that she received notice of the Private Reprimand and offered an explanation for her failure to appear. The Disciplinary Board found Respondent's reason acceptable and advised her that the Private Reprimand would be rescheduled upon Respondent's notice to the Board of her compliance with the Conditions. Respondent failed to so notify the Disciplinary Board of this compliance. Office of Disciplinary Counsel filed a Petition for Discipline against Respondent on August 23, 1994.

In the Petition, Office of Disciplinary Counsel charged Respondent with violation of Rule 204(b), Pa.R.D.E., which provides that failure to comply with conditions attached to a Private Reprimand shall be grounds for prosecution of formal charges. On December 7, 1994, Respondent was given a twenty day extension to file an Answer, but she did not do so within the prescribed time.

On January 17, 1995, this matter was referred to Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. A hearing on this matter

was held on April 17, 1995. Respondent presented her defense on her own behalf. Office of Disciplinary Counsel was represented by [], Esquire. On the day of the hearing, Respondent presented evidence that she partially complied with the Conditions attached to the Private Reprimand. The Hearing Committee filed its Report on May 8, 1995 and recommended a Private Reprimand with Conditions. Petitioner filed a brief on exceptions. Respondent did not file exceptions.

This matter was adjudicated by the Board at the meeting held on August 17, 1995.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, 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, 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 admitted to practice in Pennsylvania on or about November 30, 1987.

3. At all times relevant to these proceedings, Respondent's office address has been and currently is [].

4. Respondent was scheduled to receive a Private Reprimand on December 3, 1993. This disciplinary sanction arose out of a complaint filed by [A] that Respondent never completed her divorce action or returned her money. (ODC-2)

5. Attached to the Private Reprimand were Conditions stating; 1) Respondent must submit an accounting of the fees claimed by Respondent for partial services rendered to [A] for a divorce action and proof of return to [A] of the unearned portion; 2) Respondent must submit proof that she returned [A's] marriage certificate; and 3) payment of costs, if any, by Respondent. (ODC-1)

6. These conditions had to be completed within ten days prior to December 3, 1993, the date of the Private Reprimand. (ODC-1)

7. Respondent did not comply with the conditions nor did she appear for the Private Reprimand. (ODC-3)

8. Pursuant to letter of December 9, 1993, the Board requested that Respondent advise the Board why her failure to appear should not result in the initiation of formal proceedings. (ODC-3)

9. Respondent, by letter of December 21, 1993, explained why she did not appear. After consideration of Respondent's reason, the Board informed Respondent that another Private Reprimand would be scheduled provided Respondent complied with the Conditions and notified the Board of such compliance by February 28, 1994. (ODC-4, 5)

10. There is no dispute between the parties that Respondent received all notices and letters pertinent to these proceedings. (ODC-7)

11. Respondent did not complete the Conditions by February 28, 1994 and consequently, Office of Disciplinary Counsel filed a Petition for Discipline on August 23, 1994.

12. A stipulation was entered into between the parties wherein Respondent was provided twenty additional days in which to file an Answer to the Petition. Respondent failed to file an Answer. (N.T. 8)

13. On the day of the hearing, Respondent refunded \$250 to [A] and returned her marriage certificate. Respondent did not provide an accounting of the remaining \$150 of the fee. (N.T. 12-15)

14. At the hearing, Respondent testified that her failure to comply with all of the conditions either prior to the

scheduled Private Reprimand or during the time frame afforded her by the Board, was attributable to personal difficulties she was experiencing. These difficulties had to do with a bad relationship she was in and confiscation of her belongings by this individual. (N.T. 20-22, 34-35)

15. Respondent has been the subject of a prior disciplinary action in the form of an Informal Admonition issued in 1992.

16. Office of Disciplinary Counsel took exception to the recommendation of the Hearing Committee and recommends some form of public discipline.

III. CONCLUSIONS OF LAW

Respondent violated Pa.R.D.E. 204(b) by failing to comply with the conditions attached to a Private Reprimand within the permitted time frame. Respondent's wilful failure to comply with the conditions constitutes a ground for discipline under Rule 203(b)(3), Pa.R.D.E.

IV. DISCUSSION

This matter is before the Board due to Respondent's failure to comply with conditions attached to a Private Reprimand.

This failure to comply, after several opportunities were made available to Respondent, resulted in the institution of formal

proceedings.

The Petitioner bears the burden of proving that Respondent failed to comply with the conditions within the permitted time frame. Review of the record clearly demonstrates that Petitioner met its burden, as the proof of Respondent's failure to comply is clearly satisfactory. ***Office of Disciplinary Counsel v. Duffield***, 537 Pa. 485, 651 A.2d 1186 (1994). The issue currently before the Board is the appropriate level of discipline to be imposed. In considering the measure of discipline to be meted out, the Board is cognizant of Respondent's failure to comply with the conditions and her prior incident of discipline consisting of an Informal Admonition.

Review of the record indicates that Respondent proffered no legitimate excuse for her failure to comply with the conditions. Respondent testified that she was experiencing difficulties relative to her personal life and these difficulties led to some of her belongings being taken from her. These problems, while perhaps explaining her inability to return the marriage certificate, do not excuse her failure to return [A's] money or account for the fees claimed. Indeed, Respondent testified that returning the unearned portion of the fee to [A] was "not a problem". (N.T. 42-43) Yet, it did manifest into a

problem because Respondent never satisfied that condition until the day of the hearing. Respondent waited over eighteen months from the date of the Board's Order of October 20, 1993, before taking the necessary steps to refund the unearned portion of the fee and return the marriage certificate. As of the day of the hearing, Respondent had not provided an accounting. These conditions were relatively simple to satisfy. Respondent exacerbated her disciplinary problems by neglecting to tend to the conditions in a prompt manner. Her failure to timely comply suggests that Respondent did not believe her discipline problems were serious.

While it is good that Respondent eventually complied with some of the conditions, her partial compliance does not diminish the seriousness of her conduct. *In Re Anonymous No. 81 DB 87*, 11 Pa. D. & C.4th 393 (1991). If the Board excused Respondent's behavior because she made partial satisfaction on the day of hearing, the power of setting conditions with time limits would be negated. The sanction would be meaningless. This would set a dangerous precedent whereby other attorneys would perceive that ignoring conditions until the last possible moment would be acceptable behavior. The Board will not excuse Respondent's behavior.

The Hearing Committee recommended a Private Reprimand with conditions. The Board does not agree with this assessment. Quite obviously this sanction did not work the first time. In two previously adjudicated cases similar to the instant case, the Board recommended a sanction one increment higher than the original punishment. *In Re Anonymous No. 67 DB 87*, 9 Pa. D. & C.4th 467 (1990) (respondent's failure to appear for a private reprimand in combination with his violation of two disciplinary rules warranted public censure); and *In Re Anonymous No. 3 DB 85*, 41 Pa. D. & C.3d 70 (1986) (failure to appear for a private reprimand in combination with violations of four disciplinary rules warranted public censure). In the instant case, Respondent was scheduled to receive a Private Reprimand with conditions. The underlying offenses she committed included failing to return unearned fees and other property. A Private Reprimand was the appropriate remedy for those transgressions considering Respondent's one prior Informal Admonition. A more severe sanction is now warranted in response to Respondent's failure to timely comply. This is a case of Respondent's neglecting to avail herself of several opportunities to explain and make amends. Respondent does not deserve another opportunity for private discipline and should be Publicly Censured to impress upon her the

seriousness of this matter. *Duffield*, 644 A.2d at 1193. The imposition of Public Censure effectuates the primary purpose of lawyer discipline which is to protect the public from unfit attorneys and to maintain the integrity of the legal system. *Office of Disciplinary Counsel v. Keller*, 509 Pa. 573, 506 A.2d 872 (1986).

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania respectfully recommends that Respondent, [], be Publicly Censured.

It is further recommended that the Court direct that Respondent pay all of the necessary expenses incurred in the investigation and processing of this matter pursuant to Rule 208(g), Pa.R.D.E.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
Dean Mary Watson Carson, Member

Date: November 22, 1995

Messrs. Saltz and Witherel recused themselves.

Mr. Paris did not participate in the August 17, 1995 adjudication.

SUPPLEMENTAL
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 supplemental findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

This matter arises from a complaint against Respondent which originally resulted in a determination that Respondent receive a Private Reprimand with Conditions. Respondent failed to appear for the Private Reprimand. Respondent sent a letter of explanation to the Board acknowledging that she failed to appear.

The Board accepted this explanation and advised Respondent that her Private Reprimand would be rescheduled upon Respondent's notice to the Disciplinary Board of her compliance with the Conditions. Respondent failed to notify the Board of her compliance, and a Petition for Discipline was filed against Respondent on August 23, 1994.

A hearing was held on April 17, 1995 before Hearing Committee []. Respondent appeared and presented her defense. The Hearing Committee recommended a Private Reprimand with Conditions. The Disciplinary Board adjudicated this matter at the meeting of August 17, 1995 and determined that a Public Censure was appropriate discipline after considering all of the facts of the matter. The Supreme Court approved this recommendation and scheduled a Public Censure for January 24, 1996. Respondent failed to appear for the Censure. By Order of February 1, 1996, the Supreme Court referred the case to the Board for consideration and recommendation. By Order of February 14, 1996, Board Chairman James J. Powell, Esquire, ordered the parties to submit briefs on the appropriate discipline to be recommended. Petitioner filed a Brief on Discipline to be Imposed on April 1, 1996 and argued that Respondent's behavior warranted disbarment. Respondent did not file a Brief. The Board adjudicated this matter at the meeting of April 30, 1996.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 400, Union Trust Building, 501 Grant Street, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylva-

nia 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 admitted to practice in Pennsylvania on or about November 30, 1987.

3. At all times relevant to these proceedings, Respondent's office address has been [].

4. Respondent was scheduled to receive a Private Reprimand on December 3, 1993. This disciplinary sanction arose out of a complaint filed by [A] that Respondent never completed her divorce action or returned her money.

5. Attached to the Private Reprimand were Conditions requiring Respondent to submit an accounting of fees claimed for her services to [A], proof that she returned [A's] marriage certificate, and payment of costs.

6. Respondent failed to appear for the Private Reprimand or comply with the Conditions.

7. Respondent sent a letter to the Board explaining why she did not appear and as a result she was given an

opportunity to comply with the Conditions.

8. Respondent failed to comply with the Conditions and consequently formal proceedings were initiated.

9. Respondent appeared at the hearing held on April 17, 1995 and evidenced that she refunded some money to [A] and returned her marriage certificate. She did not provide an accounting of the remaining portion of the fee.

10. At the hearing, Respondent testified that her failure to comply with all of the conditions either prior to the scheduled Private Reprimand or during the time frame afforded by the Board, was attributable to personal difficulties she was experiencing. (N.T. 20-22, 34-35)

11. After consideration of the circumstances, the Board recommended and the Supreme Court approved a Public Censure by Order dated December 18, 1995.

12. The Censure was scheduled for January 24, 1996. Respondent was given notice of the order of Public Censure and the scheduling date.

13. Respondent failed to appear to receive her Public Censure.

14. Respondent provided no explanation for her failure to appear and failed to file a Brief with the Disciplinary Board.

15. Respondent has a prior disciplinary record of one Informal Admonition administered in 1992.

III. CONCLUSIONS OF LAW

Respondent's failure to appear before the Supreme Court of Pennsylvania for a Public Censure is a basis for discipline pursuant to Rule 203(b)(2), Pa.R.D.E.

IV. DISCUSSION

This case presents the issue of the type of discipline to be imposed on an attorney who fails to appear before the Supreme Court for a Public Censure. As with every case before the Board, we must consider the facts and circumstances unique to this case. Prior case law may provide guidance but is not a mandate as to the appropriate discipline to be imposed.

The facts of this case are straightforward. After formal proceedings were held to determine the type of discipline to be imposed for Respondent's failure to appear at a Private Reprimand, the Board recommended and the Supreme Court approved the imposition of a Public Censure. Respondent failed to appear for the Censure and has made no effort to contact the Board or the Court regarding this failure to appear. Based on these facts, the Board must recommend an appropriate sanction.

It is evident that such failure to appear is a serious

matter. Numerous cases have addressed the issue of failure to appear for an informal admonition or a private reprimand, or failure to appear at a disciplinary hearing. These cases uniformly state that such failure to appear is an aggravating factor and a basis for imposition of stricter discipline. See In Re Anonymous No. 43 DB 93, 23 Pa. D. & C. 4th 468 (1994); In Re Anonymous No. 8 DB 91, 21 Pa. D. & C. 4th 333 (1993); In Re Anonymous No. 117 DB 89, 14 Pa. D. & C. 4th 128 (1991); In Re Anonymous No. 127 DB 89, 12 Pa. D. & C. 4th 106 (1991); In Re Anonymous No. 130 DB 88, 10 Pa. D. & C. 4th 508 (1990); In Re Anonymous No. 67 DB 87, 9 Pa. D. & C. 4th 467 (1990); and In Re Anonymous No. 43 DB 87 et. al., 3 Pa. D. & C. 4th 598 (1988). In the case of In Re Anonymous No. 91 DB 84, 44 Pa. D. & C. 3d 316 (1987), an attorney failed to appear for a private reprimand and consequently was scheduled to receive a public censure. She failed to appear for the public censure. The Board, without written discussion, recommended that the attorney be disbarred. The Supreme Court entered a Rule to Show Cause why she should not be disbarred. The attorney failed to answer and she was disbarred.

Office of Disciplinary Counsel cites No. 91 DB 84 in support of its recommendation that Respondent be disbarred.

Petitioner argues that Respondent's cavalier attitude and contemptuous disregard for the disciplinary system compromises its integrity and a severe response is required. Petitioner further argues that the public must be shielded from attorneys like Respondent, who refuse to adhere to the requirements of this Commonwealth's disciplinary rules. While the facts of the instant case and No. 91 DB 84 appear similar, the Board is not privy to the reasoning supporting the disbarment of the attorney in No. 91 DB 84. Neither the Board nor the Court set forth a discussion regarding all of the facts and circumstances in support of that attorney's disbarment.

It is a well settled proposition in Pennsylvania that disciplinary sanctions are not primarily designed for their punitive effects. Office of Disciplinary Counsel v. Costigan, 526 Pa. 16, 584 A.2d 296 (1990). Sanctions are not the end of the disciplinary system, but they are a necessary means to accomplish its end. The primary function of the disciplinary system is to protect the public from unfit attorneys and maintain the integrity of the legal system. Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983). In accomplishing such a task there must be a balance of the concern for public welfare with respect for the substantial interest that an attorney has in

continuing his or her professional involvement in the practice of law. Office of Disciplinary Counsel v. Lewis, 493 Pa. 519, 426 A.2d 1138 (1981). Inherent in this analysis are the elements of justice and fairness.

Although there may be a temptation to strictly punish every attorney who brings disgrace to the profession, the Board cannot recommend disbarment for every attorney that comes before it. Clearly there is a range of behavior, and the Board must judiciously determine the egregiousness of the misconduct and recommend discipline accordingly. Disbarment is the most severe sanction available. It is an extreme response to an ethical violation and will only be imposed in the most egregious situation. Office of Disciplinary Counsel v. Jackson, 536 Pa. 26, 637 A.2d 615 (1994). Petitioner urges disbarment in consideration of the results in No. 91 DB 84, wherein the attorney who failed to appear for a public censure was disbarred. Pennsylvania has repeatedly repudiated the theory of per se discipline for specific acts. Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983). Pennsylvania's system of discipline is based on the idea that the circumstances of each case are unique and therefore each case must be judged on those unique facts.

Respondent's act of failing to appear for her Public

Censure is not only egregious but is troublesome. The Board has no idea why Respondent failed to present herself. Although Respondent originally failed to appear for her Private Reprimand, which failure triggered this chain of events, she attended the disciplinary hearing and attempted to explain her situation. Her current failure to appear leaves the Board to wonder what sort of problems Respondent may be experiencing. We are very reluctant to simply disbar Respondent based solely on the facts before us. The record is devoid of any helpful information as concerns Respondent's fitness to practice. Respondent's initial misconduct was not serious, and she does not have an extensive disciplinary record. A suspension for one year and one day would take away Respondent's privilege to practice and require her to petition for reinstatement and prove her fitness to practice. The onus would be on Respondent to initiate further contact with Office of Disciplinary Counsel if she desires to practice law again. This sanction fits the purpose of the disciplinary system and is a just response to a difficult situation. A more severe sanction would only serve to harshly punish Respondent without due consideration for whether the principal goal of the disciplinary system was being effectuated. In this situation a one year and one day suspension would protect the public and preserve the integrity of

the profession, and simultaneously emphasize to Respondent that her contemptuous behavior will not be tolerated.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be suspended for a period of one (1) year and one (1) 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: _____
Dean Mary Watson Carson, Member

Date: August 1, 1996

Board Member Saltz recused himself.

Board Members McGivern and Witherel did not participate in the April 30, 1996 adjudication.

PER CURIAM:

AND NOW, this 26th day of September, 1996, upon consideration of the Supplemental Report and Recommendations of the Disciplinary Board dated August 1, 1996, it is hereby

ORDERED that [Respondent], he and she is SUSPENDED from the Bar of this Commonwealth for a period of one (1) year and one (1) day, and she 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.