BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 187, Disciplinary Docket No. 3
	:	No. 122 DB 1994
v.	:	
	:	Attorney Registration No. [ ]
[ANONYMOUS], Respondent	:	([ ] 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 October 20, 1994, Petitioner filed a three charge Petition for Discipline against Respondent. Charge I alleges Respondent's improper contact with a represented party, and his failure to hold entrusted funds inviolate. Charge II alleges Respondent's failure to act with

diligence on behalf of a client, failure to keep his client informed of the status of a matter, failure to hold entrusted funds inviolate, and failure to return an unearned fee. Charge III alleges his failure to hold entrusted funds inviolate.

On November 29, 1994, the matter was referred to Hearing Committee [ ] consisting of [ ], Esquire, Chairperson and [ ], Esquire and [ ], Esquire, Members.

On February 28, 1995, a Disciplinary Hearing was held.

The Hearing Committee filed its Report on September 25, 1995, recommending a private reprimand.

The matter was adjudicated at the December 7, 1995, meeting of the Disciplinary Board.

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 (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, [ ], Esquire, was born in 1945, was admitted to practice law in the Commonwealth of Pennsylvania in 1971, and his office is located at [ ]. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

CHARGE I (A)

3. Beginning in June or July of 1990, Respondent represented [A] in actions she brought against her husband, [B], for protection from abuse, for divorce, for alimony pendente lite, and as to support and custody of their son, [C].

4. On July 9, 1990, a complaint for support was filed by Respondent on behalf of [A].

5. On August 30, 1990, after a support order had already been entered, Attorney [D] and his law firm, through Attorney [E], entered an appearance of record for [B].

6. Their marital residence had been at [C], under a lease which expired on December 31, 1990.

7 . A separate sales agreement as to the property, dated June 30, 1989, had been executed by the owners, Mr. and Mrs. [F], and [A and B], which indicated a closing date of on or before December 31, 1990.

8. By letter dated November 5, 1990, Respondent forwarded to Attorney [D] a proposed, unexecuted sales agreement under which the [A and B] would agree to convey the [ ] property to "[G]" (actually [ ]) by December 15, 1990, for a consideration of $62,500.

9. That sales agreement provided for payment of $2,500 as hand money to [A and B], but a paragraph providing that the hand money "shall be held in escrow by _______", was not completed.

10. By this letter to Respondent dated November 12, 1990, Attorney [D] asked Respondent for an understanding "concerning the disbursement of any monies from this

closing".

11. After communication between them, by letter to Respondent dated November 21, 1990, Attorney [D] returned the proposed sales agreement, executed by [B], and stated among other things that any equity in the property would be equally split by [A and B], and that the only legitimate deductions from the equity would be the actual costs associated with the closing.

12. However, [G], the prospective buyer, would agree to purchase only upon reduction of the price to $60,500 and upon other conditions.

13. On November 26, 1990, [A and B] executed a modified version of the original proposed Agreement, which stated a price of $60,500 and conveyance by December 15, 1990.

14. Receipt of the $2, 500 hand money was acknowledged in the modified Agreement, which provided that the hand money "shall be held in escrow by [Respondent]".

15. Also on November 26, 1990, [G] signed the agreement as buyer, and gave [A] a $2,500 check payable to Respondent for the hand money.

16. [G's] $2,500 check dated November 26, 1990, was made payable to "[Respondent]" and was annotated "To be held in Escrow".

17. The closing was not held until January 14, 1991, but all parties agreed to honor the prior agreements.

18. On January 2, 1991, the $2,500 check was deposited into Respondent's [H] Bank Escrow Account [ ] (hereinafter "Escrow Account").

19. On January 2, 1991, the same day as the deposit of the $2,500 check, after

its deposit, Respondent's Escrow account balance was reduced to $2,135, less than his entrustment on behalf of [G] and the [A and B].

20. As of January 7, 1991, the balance in Respondent's Escrow Account was $1,217, less than his entrustment.

21. Neither [G] nor [B] gave Respondent any authority to distribute the $2,500, or any part thereof, prior to closing.

22. As of January 14, 1991, prior to closing, the balance in Respondent's Escrow Account was $1,167, less than his entrustment.

23. Closing and settlement of the transaction was held on January 14, 1991, at the office of Attorney [G], counsel for [A]. [A] attended, accompanied by Respondent and her counsel, and [B] attended without counsel.

24. The total due to [A and B] at settlement, without consideration of the $2,500 in hand money, was $989.24.

25. [B] was given a check for $494.62, one-half of the $989.24.

26. After the closing on January 14, 1991, [G] no longer had any interest in the $2,500, and Respondent was entrusted with those funds on behalf of [A and B].

27. On the day of the closing, Respondent drew his check #2748 on his Escrow Account on January 16, 1991.

28. After the closing, as of January 16, 1991, subtracting $1080 for Respondent's fees in addition to $700 for his payment to [A], Respondent was still entrusted with at least $720.

29. After the $700 check cleared on January 16, 1991, the balance in his

Escrow Account was $457, less that his entrustment on behalf of [A and B].

30. By his check #2751 dated January 15, 1991, drawn on the Escrow Account, Respondent paid [A] an additional $200.

31. After the $200 check cleared on January 17, 1991, Respondent was still entrusted with $520, but the balance in his Escrow Account was $246.16, less than his entrustment on behalf of [A and B], and it remained deficient, except for one occasion on January 25, 1991, until February 1, 1991.

32. By letter to Respondent dated January 17, 1991, Attorney [D] asked that Respondent contact him "so that we can resolve any outstanding issues and distribute the escrowed monies".

33. After that letter had been mailed, Attorney [D], by another letter dated January 17, 1991, with regard to the $2,500, stated that "action should be taken to place the monies in an appropriate escrow, with a mutually acceptable escrow agent".

34. In a telephone conversation with Attorney [D] in February, 1991, Respondent referred to [A] having incurred expenses in connection with preparation of the house for sale, but he did not specify them or the amounts involved, and did not indicate that any distribution of the $2,500 hand money had been made.

35 . By letter to Respondent dated February 21, 1991, Attorney [D] referred to their recent conversation regarding the funds with which Respondent was entrusted on behalf of [A and B], and stated that his client would not agree to any division of those funds because they should be used to pay marital debts.

36. Attorney [D] never entered into any agreement with Respondent which

would have allowed him to disburse the $2,500.

37. [A and B] met with Respondent at his office on Wednesday, May 1, 1991, without the knowledge or approval of Attorney [D] and discussed the escrow fund. [A] then consulted Attorney [D] by phone, while still at Respondent's office, and told Respondent that they would not sign "anything" at that time.

38 . As of May 3, 1991, the balance in Respondent's Escrow Account was $398, less than the $520 with which he was entrusted.

39 . On July 12, 1991, hearing was set for August 6, 1991, on a petition on behalf of [B] for modification and reduction of support.

40. On August 5, 1991, [A and B] met with Respondent at this office, although Respondent know that Attorney [D] was still counsel of record for [B] with regard to his divorce and related matter.

41. At that meeting, [B] said he did not want to talk to his lawyer at that time, and was prepared to sign a consent to divorce, conditioned upon a reduction in the support order to which they agreed at that meeting and payment to him of $350, as an agreed division of the approximately $700 Respondent said he was then holding in escrow.

42. At that time, Respondent tendered [B] an Affidavit of Consent to execute, which he did, and Respondent secured his permission to file it for him at the appropriate time.

a. As to the reduction in the support order, Respondent postponed making any written agreement, saying it would "be better" to "make it a public record tomorrow".

b. Respondent told [B] that he was holding only $700 out of the $2,500 escrow, and that it was understood that [A and B] had agreed to split it equally, to which [B] than

assented.

43. Respondent then issued to [B] his Escrow Account check #2889 for $350, dated August 5, 1991.

44. On August 6, 1991, [B] deposited Respondent’s $350 Escrow Account check.

45. That check was returned because Respondent's Escrow Account contained insufficient funds to honor the check.

46. By letter dated August 7, 1991, Respondent told Attorney [D], among other things, that a Consent had been signed by [B] at a meeting at Respondent's office.

47. Attorney [D] did not consent at any time to Respondent's discussion of any matter with [B].

48. On August 9, 1991, Respondent caused the Consents of both parties to be filed. On August 21, he filed a praecipe to transmit the record, and the decree in divorce was granted on August 27, 1991.

49. On August 22, 1991, [B] received notice from his bank that the $350 check had been dishonored.

50. That same day, in exchange for return to him of the dishonored check, Respondent gave [B] $300 in cash and his Escrow Account check #2907 for $50, which was honored without incident after [B] deposited it on August 23, 1991.

CHARGE II ([J])

51. [J] was the sole proprietor of [K] Company (hereinafter "[K]"), located in [

], which was sued in Court of Common Pleas of [ ] County in 1988 by its [ ] supplier, [L], Inc.

52. Respondent represented [K] in a November, 1988, hearing before a panel of arbitrators, which resulted in a split award (due to a counterclaim) favoring [L] by about $1,900.

53. [L] appealed and a jury trial in October, 1990, resulted in a verdict in favor of [L] in the amount of $20,000.

54. Respondent told [J] that exceptions and then an appeal could be filed, and [J] asked him to so proceed.

55. On October 15, 1990, Respondent filed timely exceptions but failed to concurrently order production of the transcript, as required by local rules.

56. By letter dated November 9, 1990, to the court reporter, [M], Respondent requested that the trial testimony be transcribed.

57. By letter to Respondent dated November 20, 1990, the court reporter requested a deposit of $500 before he would begin transcription.

58. By letter dated November 21, 1990, Respondent sent a copy of the court reporter's letter to [J], with a cover letter that told him it was "imperative" that [J] send him $500, "so that the transcript can be paid for immediately".

59. [J] then sent Respondent his check for $500, dated November 30, 1990, which was credited to Respondent's Escrow Account on December 6, 1990.

60. Respondent drew his check #2737, dated December 5, 1990, on his Escrow Account in the amount of $500, to the order of the court reporter.

61. On or about December 13, 1990, before the check to the court reporter

cleared Respondent’s Escrow Account, the balance in Respondent's Escrow Account was $482.66, less than his entrustment on behalf of [J].

62. When presented for payment on December 15, 1990, Respondent's $500 check to the court reporter was dishonored for insufficient funds.

63. Respondent did not redeem the check, and made no other payment to the court reporter, who accordingly did not produce the transcript.

64. On several occasions from December 13, 1990, through August, 1991, Respondent's Escrow Account had a balance less than his $500 entrustment on behalf of [J], falling as low as $63.35 on August 15, 1991.

65. The trial judge considered the exceptions in December, 1990, without having a transcript, and filed an opinion dated January 9, 1991, denying the exceptions as being without merit.

66 . On February 7, 1991, Respondent filed a Notice of Appeal to the Superior Court.

67. On February 28, 1991, the judge filed a Supplemental Opinion in response to the Notice of Appeal. In that opinion:

a. The judge recommended that the appeal be quashed, "because of the failure of Defendant to order and pay for a transcript in a timely fashion".

b. The judge described the prior incident of the insufficient funds check and noted that as of February 28, 1991, there had still been no deposit made with the court reporter, nor transcription performed.

68. Respondent never advised [J] that the exceptions had been denied, or of

the Supplemental Opinion and its content.

69. [J] did not receive any communication from Respondent, until about mid-June, 1991.

70. The Superior Court, by its letter of June 11, 1991, notified Respondent that it had received the record from the court below, and the Respondent's brief on behalf of [J] was due on or before July 21, 1991.

71. By letter to [J] dated June 14, 1991, Respondent stated that he had received the record from the Superior Court, that the brief and reproduced record were due on or before July 2, 1991, and that [J] should pay him $1,250 for his fee for researching and preparing the brief, for oral argument, and for obtaining and filing the reproduced record.

72. The letter made no mention of the fact that the transcript had not yet been paid or received.

73. At about that same time, [J] received notice that a record of the October 10, 1990, verdict in [ ] County had been filed as a foreign judgment in [ ] on June 14, 1991, and that [L] intended to proceed with execution, unless it could be shown that "an appeal was pending".

74. [J] then called Respondent. In that conversation:

a . [J] asked why he had been served with the [ ] judgment if an appeal had been filed, as Respondent's June 14 letter had indicated.

b. Respondent said that action by him would take care of the judgment, and that [J] should send him $1,250, as had been requested.

75. [J] then sent Respondent a check for $1,250, dated June 28, 1991.

76. On June 25, 1991, the Superior Court dismissed the appeal on the basis that the "transcript has not been delivered due to appellant's failure to tender payment".

77. Respondent negotiated [J’s] $1,250 check on July 2, 1991, outside of his Escrow Account.

78. [J] had telephone conversations with Respondent on July 12 and July 15, 1991, over his concern as to possible enforcement of the [ ] judgment against him.

79. In those conversations, Respondent indicated that he would "take care of" matters.

80. On July 26, 1991, [J] spoke by telephone to Respondent, who told him that the appeal of the matter to Superior Court had been denied, without explaining the reason for the denial.

81. On January 27, 1995, Respondent delivered to Disciplinary Counsel a Money Order payable to [J] in the amount of $500.

82. [J] sent Respondent a certified letter dated February 12, 1993, in which he requested return of the $1,750 he had paid for the transcript and appeal.

83. [J] has not received any further communication from Respondent.

CHARGE III (ODC)

84. On or about September 11, 1988, the Estate of [N], hereinafter referred to as "[N] Estate", conveyed real estate in [ ] County, for which Respondent served as settlement agent.

85. At that closing, Respondent withheld from the proceeds due to the [N]

Estate $1,200, which he held in Escrow Account, against payment of inheritance taxes.

86. By letter dated June 28, 1990, Attorney [O], who represented the [N] Estate, informed Respondent that the amount of inheritance tax still due was $116.52, and requested that Respondent send him a check for that amount, and one for the balance of $1,083.48, payable to the Estate.

87. By letter dated August 23, 1990, Respondent sent to Attorney [O] two such checks drawn on his Escrow Account.

88. The check for $1,083.48 was never negotiated; therefore, Respondent continued to be entrusted with that amount.

89. Respondent was then entrusted with $1, 083.48 on behalf of the [N] Estate, and $500 on behalf of [J], a total of $1,583.48.

90. As of December 17, 1990, Respondent's Escrow Account balance had been reduced to $482.66, less than his entrustments.

91. As of January 2, 1991, Respondent was entrusted with a total of $4,083.48 in the following amounts:

a. [N] Estate, $1,083.48;

b. [J], $500; and

c. [G]/[A], $2,500.

92. As of that same date, Respondent's account contained $2,135.66, less than his entrustment.

93. On or about January 14, 1991, the closing in the [G]/[A] matter occurred. Crediting Respondent with a fee of $1,080 for his services in regard thereto, he was still

entrusted with $1,420 on behalf of the [A and B] as of that date.

94. Therefore, as of January 14, 1991, Respondent's total entrustments were at least $3,003.48 in the following amounts:

a. [N] Estate, $1,083.48;

b. [J], $500; and

c. [A], $1,420.

95. As of January 14, 1991, Respondent's Escrow Account contained $1,167.66, less than his entrustments.

96. Respondent's Escrow Account remained deficient concerning his entrustments through at least June 24, 1991.

97. On June 24, 1991, Respondent deposited to his Escrow Account $10,000 which he had received on behalf of client, [P], Inc.

a . Of that amount, $1,000 was Respondent's fee for handling the matter for [P].

b. Therefore, as of June 24, 1991, Respondent was entrusted with $9,000 of behalf of [P].

98. As of June 24, 1991, Respondent was entrusted with a total of $11,103.48 in the following amounts:

a. [N] Estate, $1,083.48;

b. [J], $500;

c. [A], $520; and

d. [P], $9,000.

99. As of June 28, 1991, Respondent was still entrusted with $11,103.48.

100. The balance in his Escrow Account at that time was $10,555.30, less than his entrustments.

101. As of August 15, 1991, the balance in Respondent's Escrow Account was $63.35, less than his entrustments.

102. On January 27, 1995, Respondent delivered to Disciplinary Counsel a Money Order payable to [J] in the amount of $500.

III. CONCLUSIONS OF LAW

CHARGE I ([A])

The Petitioner failed to prove, by clear and convincing evidence, that the Respondent communicated the subject matter of his representations of a client, [A], with [B], a party who he know to be represented by another lawyer, without that lawyer's permission, in violation of Rule 4.2 of the Rules of Professional Conduct.

The Petitioner did prove, by clear and convincing evidence, that the Respondent failed to hold, separate from his own funds, $2,500 of funds entrusted to him with regard to the [A and B] real estate transaction between [B], [A] and [G], in violation of Rule 1.14(a) of Professional Conduct.

CHARGE II ([J])

The Petitioner did prove, by clear and convincing evidence, that the Respondent, after receiving $500 from [J], his client, for the specific purpose to order a trial transcript from the court reporter responsible for transcribing the testimony at trial, failed to order a trial transcript from the court reporter and failed to diligently pursue an appeal by [J], in violation of

Rule 1.3 of the Rules of Professional Conduct.

The Petitioner did prove, by clear and convincing evidence, that the Respondent failed to properly and timely inform his client, [J], that his appeal to the Superior Court was quashed because of Respondent's failure to timely and properly order a trial transcript from the court reporter, for which he was specifically paid $5OO, in violation of Rule 1.4(a) of the Rules of Professional Conduct.

The Petitioner failed to prove, by clear and convincing evidence, that the failure of the Respondent, after his representation of [J] was concluded, to pay [J] $1,250, which was paid by [J] to him was a violation of that portion of the Rules of Professional Conduct which required a portion of a fee which was unearned, in violation of Rule 1.16(d) of the Rules of Professional Conduct.

The Petitioner did prove, by clear and convincing evidence, that the Respondent, by failing to hold $500 entrusted to him by [J] for the purpose of paying a court reporter for a trial transcript, separate from his own funds, violated Rule 1.15(a) of the Rules of Professional Conduct.

<u>CHARGE III (ODC)</u>

The Petitioner did prove, by clear and convincing evidence, that the Respondent, on several important and material occasions from approximately December 17, 1990, through August 15, 1991, failed to hold entrusted funds received from clients, separate from his own funds, in violation of Rule 1.15(a) of the Rules of Professional Conduct.

IV. <u>DISCUSSION</u>

On October 21, 1994, Petitioner filed a three charge Petition for Discipline against Respondent. Charge I alleges Respondent's improper contact with a represented party, and his failure to hold entrusted funds inviolate.

The Hearing Committee found Respondent only violated those rules involving the Respondent's failure to hold entrusted funds inviolate. Although this Board is not bound by the findings of the Hearing Committee, we are guided by their findings with respect to matters of creditability of witnesses, and we accord substantial deference to their conclusions. Having reviewed the record before us, this Board adopts the findings of fact and conclusions of law as determined by the Hearing Committee.

The remaining issue before this Board is the appropriate discipline. Severe discipline from lengthy suspensions to disbarments have been imposed in cases involving the misappropriation of funds. In <u>Office of Disciplinary Counsel v</u>.<u>Davis</u>, 614 A.2d 1116 (1992), an attorney's pattern of misconduct which included the neglect of legal matters, false affidavits and the commingling of entrusted funds resulted in disbarment. The respondent's ignorance of the professional rules and the fact that the commingling of funds was unintentional was not a defense.

In <u>Office of Disciplinary Counsel v. Passyn</u>, 644 A.2d 699 (1994), the respondent mismanaged the assets of a client who was subsequently adjudged incompetent. In addition, respondent mismanaged the real estate investment of a client, lied to both clients and the Trial Court, failed to promptly withdraw her representation after being discharged, knowingly advanced unwarranted claims and, although the client's property was eventually returned, she

was disbarred.

In Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (1983), an attorney who misappropriated client funds through commingling and conversion and signed without his client's permission, their signatures to a settlement document that was materially different from what he had advised them, engaged in conduct that is not only unethical but also illegal, and even considering respondent's evidence of reform from his problems with alcohol and his restitution to his clients, the appropriate discipline was disbarment.

In Office of Disciplinary Counsel v. Kanuck, 535 A.2d 69 (1987), the respondent commingled his client's funds and borrowed these funds for his own use and later made restitution to his clients. The respondent received a five year suspension, rather that disbarment, based on the fact that the respondent's practice was small and consisted solely of friends and relatives.

In Office of Disciplinary Counsel v. Kochel, 529 A.2d 1075 (1987), respondent had two charges filed against him involving multiple conversions of client escrow account funds and the neglect of a legal matter. The respondent reimbursed the account regularly and clients suffered no loss of funds. The appropriate discipline in this matter was determined to be a three month suspension.

Clearly, the Respondent's conduct in the instant case, coupled with his prior discipline, warrants some form of public discipline. However, the fact that all entrustments have been honored, and Respondent's admission that his inadequate record keeping caused the numerous shortfalls in his account are factors that must be taken into consideration in determining discipline.

The cases previously cited involved, in all but one case, conduct that involves more than just the commingling of funds. In Kochel, supra, the conduct in question included in addition to the commingling of funds, the neglect of a legal matter and resulted in a three month suspension.

In In Re Anonymous, No. 18 DB 90, 15 Pa. D&C 4th 245 (1992), an attorney who had shortfalls in his escrow account, and who had deposited personal funds therein, was found to have done so due to his poor bookkeeping. For that reason, the Board ordered the imposition of a private reprimand, rather than more severe discipline. The Board pointed out that no clients suffered any losses and that the private reprimand was warranted, assuming that no record of private discipline existed.

In the present case, the Respondent has been subjected to prior private discipline. Both the informal admonition and private reprimand that he received involved the mishandling of entrusted funds. Disciplinary Counsel is correct when he states that private discipline has not been effective in impressing Respondent with his responsibilities under the Rules of Professional Conduct.

It is this Board's opinion that the Respondent's conduct alone would not warrant public discipline. However, given the Respondent's record of prior discipline, the Board believes that public censure is the most appropriate discipline.

IV. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania respectfully recommends that Respondent, [ ], be subjected to a Public Censure.

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.

Date: February 14, 1996

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: Robert N.C. Nix, III., Member

Mr. Witherel recused himself.

Board Member Carson did not participate in the December 7, 1995 adjudication.

ORDER

PER CURIAM:

AND NOW, this 13th day of March, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 14, 1996, it is hereby

ORDERED that [RESPONDENT] be subjected to PUBLIC CENSURE by the Supreme Court.

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