

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1928 Disciplinary Docket No. 3
Petitioner :
v. : No. 208 DB 2010
: Attorney Registration No. 9867
PHILIP J. BERG, :
Respondent : (Montgomery County)

ORDER

PER CURIAM:

AND NOW, this 19th day of June, 2013, upon consideration of the Report and Recommendations of the Disciplinary Board dated March 8, 2013, respondent's Objections and Exceptions and response thereto, the request for oral argument is denied and it is hereby

ORDERED that Philip J. Berg is suspended from the Bar of this Commonwealth for a period of two years 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 6/19/2013

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 208 DB 2010
Petitioner	:	
v.	:	Attorney Registration No. 9867
PHILIP J. BERG	:	
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 October 18, 2010, Office of Disciplinary Counsel filed a Petition for Discipline against Philip J. Berg. The Petition charged Respondent with numerous violations of the Rules of Professional Conduct arising out of alleged neglect of his client's federal lawsuit. Respondent filed an Answer to Petition on December 13, 2010.

A disciplinary hearing was held on April 7, 2011, May 25, 2011, and February 10, 2012, before a District II Hearing Committee comprised of Chair Steven B. Barrett, Esquire and Members Teresa A. Mallon, Esquire, and Raymond J. Santorelli, Esquire.

Respondent appeared *pro se* at the first two hearings.¹ Samuel C. Stretton, Esquire, represented Respondent at the third hearing. Petitioner presented three witnesses and introduced Exhibits ODC-1 – 32, including Joint Stipulations. Respondent testified on his own behalf and presented eight character witnesses.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on July 31, 2012, concluding that Respondent violated the Rules as charged in the Petition, and recommending that Respondent be suspended for one year and one day.

Respondent filed a Brief on Exceptions on August 22, 2012, and requested oral argument before the Disciplinary Board. Respondent contends that a public censure or a stayed suspension is appropriate discipline in this matter.

Petitioner filed a Brief on Exceptions on August 28, 2012, and requests that the Board recommend a five year period of suspension.

Oral argument was held on October 3, 2012, before a three-member panel of the Disciplinary Board.

This matter was adjudicated by the Disciplinary Board at the meeting on October 18, 2012.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

¹ Respondent filed several motions before and during the proceedings, including a motion to dismiss, a motion to stay, a motion for a protective order and a motion for continuance. All of Respondent's motions were denied by either the Hearing Committee or the Disciplinary Board.

1. Petitioner, whose principal office is situated at the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, 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 any attorney admitted to practice law in the Commonwealth and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules.

2. Respondent is Philip J. Berg. He was born in 1944 and was admitted to practice law in the Commonwealth of Pennsylvania in 1971. He maintains his office at 555 Andorra Glen Court, Suite 12, Lafayette Hill, Montgomery County, Pennsylvania 19444. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has a history of discipline in Pennsylvania. He received a Private Reprimand in 2005 for commingling personal funds in his IOLTA account and making untimely distributions, causing his account to be out of trust. An Informal Admonition was imposed in 2006 after Respondent failed to respond to discovery requests, failed to adequately prepare for trial, and failed to appear for trial resulting in the entry of a judgment of non-pros against his client. Respondent further failed to communicate with his client. In 2008, Respondent received a Private Reprimand with Probation for one year after he failed to pursue a worker's compensation matter.

4. In 2006, Respondent spoke with Diana McCracken regarding a possible lawsuit against the Lancaster City Bureau of Police for an alleged warrantless search and seizure that had occurred at her home on or about November 8, 2004. Ms.

McCracken also claimed to have been assaulted by one of the police officers during the alleged warrantless search. (N.T. 36-37)

5. Ms. McCracken's husband hired an attorney to represent him in his criminal matter and the attorney referred Ms. McCracken to Respondent. Ms. McCracken and Respondent spoke on the telephone several times and also communicated via email. (N.T. 40, 41)

6. On November 8, 2006, Ms. McCracken met with Respondent at his office and provided hard copies of the documents she had previously sent via email. Ms. McCracken reported to Respondent the events of the evening on which the police came to her home. Respondent told Ms. McCracken that he would need additional records from her, including medical records to support her alleged damages. Late that evening, as the statute of limitations was about to expire, Respondent filed the complaint in federal court on behalf of Ms. McCracken. (N.T. 48-49, 52-53, 118, 138, ODC-40)

7. On November 13, 2006, Respondent sent a letter to Ms. McCracken and enclosed a copy of a contingent fee agreement for her to sign and return and a copy of the complaint. (N.T. 54-56, ODC-4)

8. Ms. McCracken never spoke to anyone in Respondent's office other than Respondent. Ms. McCracken and Respondent communicated via email and telephone, and Ms. McCracken's email address never changed. (N.T. 58, 117, 143)

9. On December 19, 2006, the following email exchange occurred between Ms. McCracken and Respondent:

a) Ms. McCracken emailed Respondent and inquired into the status of her case (N.T. 58-59, ODC -5);

b) Respondent replied and asked if Ms. McCracken's husband had been released from prison because Respondent was waiting for him to be released before serving the defendants in the case (N.T. 60, ODC-5);

c) Ms. McCracken answered that her husband had been released (N.T. 60, ODC -6); and

d) Respondent replied, "Can you get someone to serve the [s]ummons before 12/31/06?" (N.T. 61, ODC-6)

10. On December 22, 2006, Respondent sent a letter to Ms. McCracken inquiring as to whether her husband, Terry McCracken, could serve the defendants named in the lawsuit. (N.T. 61-62, ODC-7)

11. On or about January 16, 2007, the defendants filed a Joint Motion to Dismiss the complaint in its entirety under Rule 12(b)(6) of the Federal Rules of Civil Procedure or in the alternative, asking for a more definitive statement under Rule 12(e). (N.T. 185, ODC-8)

12. Responded failed to answer the Joint Motion to Dismiss. (ODC-10) Respondent failed to seek an extension of time in which to file an answer to the Joint Motion to Dismiss. (N.T. 190-191) Respondent did not file a motion to withdraw as counsel for Ms. McCracken. (N.T. 191)

13. On or about February 16, 2007, the Honorable Lawrence F. Stengel granted defendants' Joint Motion to Dismiss, pursuant to Local Rule of Civil Procedure 7.1(c) because Respondent failed to file a response to the Joint Motion to Dismiss. (ODC-10). Judge Stengel stated additional reasons for granting the Joint Motion to Dismiss, which included Respondent's failure to state a valid claim under the Fourth Amendment rather than the Fourteenth Amendment. (ODC-10)

14. Neither Respondent, nor anyone associated with Respondent's office, ever contacted Ms. McCracken to advise her that the District Court had dismissed her case. (N.T. 150)

15. Ms. McCracken called Respondent on his cell phone and/or office phone on January 22, 2007, February 26, 2007, July 3, 2007, and July 31, 2007 to inquire into the status of her case. Each time she received a voice mail message and left a message or spoke to Respondent and received a response, "I'll get back to you." (N.T. 65-69, 153, ODC-9, ODC -11, ODC -15) Respondent failed to return the calls. (N.T. 93)

16. On May 31, 2007, Ms. McCracken sent an email to Respondent to notify him that she was moving at the end of June 2007 and inquired into the status of her case. (N.T. 73-74, ODC-12) Ms. McCracken received a "read" receipt from Respondent via email. (N.T. 74, ODC-13)

17. On June 15, 2007, Ms. McCracken sent an email to Respondent and provided an updated home address, mailing address, current cell phone number and new home number. Ms. McCracken also requested that Respondent send her an email response letting her know Respondent had received the email and asked him to provide a status of the case. (N.T. 77-79, ODC-14) Ms. McCracken's email address never changed. (N.T. 79)

18. On September 27, 2007, Ms. McCracken sent Respondent an email inquiring into the status of her case. (N.T. 80, ODC-16) Ms. McCracken received a "read" receipt from Respondent via email. (N.T. 81, ODC-17) Respondent never answered Ms. McCracken.

19. On June 19, 2008, Ms. McCracken sent Respondent an email seeking advice regarding a township tree that had fallen on her vehicles during a storm in June of

2008. Ms. McCracken asked if there was “[a]ny chance we can get our case with Lancaster over and done with so we can have some money?” Ms. McCracken requested that Respondent call her. (N.T. 81, 84, ODC-18) On the date Ms. McCracken emailed Respondent about the tree accident, Respondent was her attorney. (N.T. 82, 87, 150, 151)

20. On June 20, 2008, Respondent sent Ms. McCracken a reply email that “[he] was looking into it and [he would] get back to [Ms. McCracken].” (N.T. 84, ODC -18)

21. On June 20, 2008, Respondent sent Ms. McCracken an email in response to the tree accident. Although answering her inquiry about the fallen tree, Respondent failed to provide Ms. McCracken with information or a status update on her civil rights action. (N.T. 85-86, ODC-19) Further, Ms. McCracken never received a response to her emails to Respondent requesting a status update on her case. (N.T. 86) As of June 2008, Ms. McCracken believed that her case was open and that Respondent was working on it even though the case had been dismissed 16 months ago. (N.T. 86)

22. On February 9, 2009, Ms. McCracken, while conducting a search of her name online, discovered a court website and learned for the first time that her case had been dismissed on or about February 15, 2007, due to Respondent’s failure to file an answer to the defendants’ Joint Motion to Dismiss. (N.T. 87-89, ODC 10) Ms. McCracken called Respondent on his cell phone and office phone four times. (N.T. 69-73, 90, ODC - 22) During one of those phone calls, Ms. McCracken spoke with Respondent, who advised Ms. McCracken that “he would check into it and get back to [her] within a day or two.” Respondent never called back. (N.T. 101)

23. On February 9, 2009, Ms. McCracken sent an email to two of Respondent's email addresses advising Respondent of her discovery and demanding an explanation. (N.T. 91-93, ODC-20, ODC-21)

24. On February 18, 2009, Ms. McCracken sent Respondent an email to both of his email addresses and advised Respondent that she was going to contact the Disciplinary Board. (N.T. 96-97, ODC-23). Ms. McCracken attempted to receive a read receipt but was unable because both of Respondent's mailboxes were full. (N.T. 97-98, ODC -24)

25. On February 18, 2009, Lisa Liberi, a support staff person at Respondent's office, sent Ms. McCracken an email and advised that Respondent had been in a deposition and in court. Ms. Liberi advised that she would pull Ms. McCracken's file to review the matter and she would respond to Ms. McCracken shortly. (ODC-25)

26. Ms. Liberi claimed to recall sending a letter to Ms. McCracken regarding her case; however, Ms. McCracken never received any letter from Ms. Liberi. (N.T. 99)

27. Ms. Liberi also claimed to remember the defense threatening sanctions, including costs and attorney fees, from Ms. McCracken and Respondent. However, Ms. McCracken had never been told that by either Ms. Liberi or Respondent. (N.T. 99) Opposing counsel never spoke with Respondent or anyone in Respondent's office about seeking attorney's fees or costs. (N.T. 233)

28. Ms. McCracken never received a response from Respondent to her February 18, 2009 emails. (N.T. 99) On February 19, 2009, Ms. McCracken sent an email to Lisa Liberi, in which she thanked her for responding to Ms. McCracken's email to Respondent. (N.T. 99-100, ODC-26)

29. On February 19, 2009, Ms. Liberi sent an email to Ms. McCracken and informed her that Respondent was out sick, had been in court and depositions and that she

would give Ms. McCracken the answers that she was seeking regarding the case. (N.T. 102, ODC -27)

30. On February 20, 2009, Ms. McCracken emailed Ms. Liberi and thanked her "for trying to work this out." (N.T. 104, ODC-28)

31. On March 3, 2009, Ms. McCracken sent a final email to Ms. Liberi and inquired as to whether Ms. Liberi had learned anything about Ms. McCracken's case. Ms. McCracken also mentioned that she would be contacting the Disciplinary Board. (N.T. 105,106, ODC-29)

32. Respondent testified on his own behalf.

33. He has practiced law in Pennsylvania for more than 40 years. He has had his own general practice of law since 1980. (N.T. 59) He handles a number of pro bono cases, which he estimates to be approximately 20% to 25% of his practice. (N.T. 75)

34. Respondent has been active with the Democratic Party of Montgomery County. In the 1990s, Respondent ran for Governor against Bob Casey in the primary, and then in 1994 he ran for Lt. Governor and in 1998 again ran for Governor. (N.T. 62,63) Respondent ran for the United States Senate in 2000. (N.T. 64)

35. Respondent has worked as a volunteer fire police officer since 1981. (N.T. 65) Respondent has reached the rank of lieutenant as a fire policeman. (N.T. 67)

36. Sherry Klein, who served as a fire police captain in the same unit as Respondent, confirmed that he is a very active fire policemen and very consistent in his performance of his duty. (N.T. 35) Ms. Klein opined that Respondent's reputation among the fire company and fire police for truthfulness, honesty and as a peaceful and law abiding person was excellent. (N.T. 37)

37. Respondent has been active with the Wellness Community in Philadelphia, a cancer organization, for some 15 years. He has also been an active member of the Whitemarsh Lion's Club and served on the Board of Directors of a daycare. (N.T. 70 -72)

38. During the years 2004 through 2008, Respondent had significant family responsibilities. (N.T. 81)

39. Respondent took care of his brother between 2004 and 2008, after his brother became ill and eventually died from cancer. (N.T. 83)

40. Respondent regularly cares for his elderly mother. (N.T. 84,85)

41. Respondent believes that the time he spent helping his brother and his mother impacted his ability to properly handle his legal cases, but does not excuse his neglect of Ms. McCracken's case. (N.T. 91)

42. Respondent admitted that he did not follow through on Ms. McCracken's case and he failed in his representation of her. (N.T. 87,88)

43. Respondent represented himself at the first two hearings and his conduct was uncooperative. He agreed that he made some frivolous arguments and admitted that he created unnecessary work for the Hearing Committee and Disciplinary Counsel. He apologized to Disciplinary Counsel and the Hearing Committee for his conduct. (N.T. 99,100)

44. Respondent admits that he violated all of the Rules of Professional Conduct as charged in the Petition for Discipline. (N.T. 99,100)

45. Respondent did not apologize to Ms. McCracken but sought to justify his conduct by continually denigrating the merits of the case and stating that he "did not get certain things from the client." (N.T. 101,102)

46. Respondent did not demonstrate genuine remorse for his misconduct.

III. CONCLUSIONS OF LAW

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

1. RPC 1.1 – A lawyer shall provide competent representation to a client.
2. RPC 1.2(a) – A lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.
3. RPC 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.
4. RPC 1.4(a)(2) – A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished
5. RPC 1.4(a)(3) – A lawyer shall keep the client reasonably informed about the status of the matter.
6. RPC 1.4(a)(4) – A lawyer shall promptly comply with reasonable requests for information.
7. RPC 1.4(b) – A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
8. RPC 1.16(d) – Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering

papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.

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

10. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

In 2006 Respondent agreed to represent Diana McCracken in a case arising out of the arrest of her husband and a search of their home. On November 8, 2006, the last day for filing an action under the applicable statute of limitations, Respondent sued a number of parties alleging a variety of civil rights violations. From that day on Respondent did virtually nothing to prosecute his client's claim. Moreover, he failed to respond to a Joint Motion to Dismiss filed by the defendants in that case. In February 2007, the Honorable Lawrence F. Stengel granted the defendants' motion and Ms. McCracken's case was dismissed.

Respondent never notified Ms. McCracken of the Court's decision. Instead, over the next two years he mostly ignored his client's requests for updates on the status of her case. However, on those rare instances when he responded to Ms. McCracken he led her to believe that her case was still viable.

On February 9, 2009, Ms. McCracken conducted an internet search of her name and discovered that her case had been dismissed on February 15, 2007. This news prompted her to make several calls to Respondent who ultimately told her that he would

“look into it” and “get back” to her. Ms. McCracken then emailed Respondent a number of times demanding an explanation. She never received one from him or from his staff. Knowing that she had reached a dead end in her attempt to learn the reasons for the termination of her case Ms. McCracken, lodged a complaint with the Office of Disciplinary Counsel which resulted in the ten charges that are the subject of the instant case.

While Respondent initially denied the allegations in the complaint and employed tactics designed to obstruct the disciplinary process on the third day of his disciplinary hearing he finally admitted to the myriad violations alleged in the complaint. Given this admission, and the overwhelming evidence that supports it, our task is to recommend the appropriate level of discipline Respondent should receive.

The hearing committee recommended that Respondent be suspended from the practice of law for one year and one day. Both Disciplinary Counsel and Respondent excepted to that recommendation; the former requesting a five year suspension² and the latter requesting a public censure or a stayed suspension. For the reasons that follow we

² Office of Disciplinary Counsel’s request for harsher discipline than we recommend is based in part on its contention that Respondent manufactured evidence in the form of letters that had been purportedly written by Respondent’s paralegal informing Ms. McCracken that her case had been dismissed. Respondent testified that he found the letters on his computer when he was attempting to “recreate” his file and believed that his paralegal had sent them to Ms. McCracken. Ms. McCracken testified credibly that she never received the letters. In support of its contention, Office of Disciplinary Counsel offered the testimony of an investigator who expressed his opinion that the signatures on the letters appeared to have been written simultaneously, thus creating the inference that the letters could not have been written on different dates as Respondent contended. We searched the record for evidence that the paralegal had neither authored nor sent the letters, but found none. Under these circumstances, we could not conclude that Office of Disciplinary Counsel’s proofs clearly and convincingly established that Respondent falsified evidence.

recommend that Respondent be suspended from the practice of law for two years. At the outset we note that Respondent is no stranger to the disciplinary system. In 2005 he received a private reprimand for commingling personal funds in his IOLTA account and causing that account to be out of trust. In 2006 he was administered an informal admonition for neglect that resulted in the dismissal of his client's case. In 2008 Respondent received a private reprimand with one-year probation for failing to pursue a worker's compensation matter. We find it particularly disturbing that while Respondent was on probation for client neglect he was neglecting Ms. McCracken's case. It is clear to us that Respondent's prior discipline did not have the desired effect of changing the way in which he conducts his practice.

A further aggravating factor is Respondent's failure to appreciate his obligation to cooperate in the disciplinary system. Respondent appeared *pro se* at his disciplinary hearing and embarked on a course of conduct that was designed to obstruct the process. He raised frivolous issues and pursued baseless motions that wasted the time and energy of Disciplinary Counsel as well as the hearing committee. Once he was represented by counsel, on the third day of his hearing, Respondent abandoned all of his objections, apologized to the hearing committee and disciplinary counsel, and admitted to all of the charges in the complaint against him.

Nevertheless, Respondent still persisted in his attempts to justify his misconduct by making references to his client's failure to provide him with information and the inherent weakness of her case. Moreover, the hearing committee observed, and we agree, that Respondent did not express adequate remorse for his misconduct nor did he apologize to his client.

The record reveals that Respondent has worked as a volunteer fire

policeman since 1981. He was a dedicated and active worker who performed his duties well and enjoyed an excellent reputation among his fellow volunteer firefighters.

Additionally, for the last fifteen years Respondent has worked with the Wellness Community, a cancer organization based in Philadelphia and has been an active member of the Whitemarsh Lion's Club as well as a member of the board of directors of a day care.

The record further reveals that between 2004 and 2008 Respondent was the primary caregiver for his cancer-stricken brother. Respondent also regularly cares for his elderly mother.

While Respondent's acts of community and family service are admirable we do not believe that they outweigh the substantial aggravating factors that we found to be present here.

Attorneys with a record of discipline who have engaged in client neglect have received discipline ranging from a private reprimand to suspension for two years depending on the aggravating and mitigating circumstances present in their cases. Office of Disciplinary Counsel v. Neil Jokelson, 58 DB 1998 and 102 DB 1998 (Pa. Feb. 26, 2001); Office of Disciplinary Counsel v. Jonah Daniel Levin, 124 DB 2004 (Pa. May 5, 2006); Office of Disciplinary Counsel v. Michael Mayro, 144 DB 2001 (Pa. Feb. 3, 2004).

Recently, in Office of Disciplinary Counsel v. Melanie D. Naro, 212 DB 2011 (Pa. Dec. 6, 2012), the Board recommended that an attorney with a record of discipline that included an informal admonition, private reprimand and six-month suspension with probation for client neglect, be suspended for two years when she failed to provide discovery, attend a hearing, and communicate with her client while she was on probation. The Board emphasized that Ms. Naro's recidivism while on probation for similar

misconduct indicated that a harsher sanction was required to protect the public and uphold the integrity of the profession. We reach the same conclusion for the same reasons here.

Accordingly, we recommend that Respondent be suspended from the practice of law for two years.

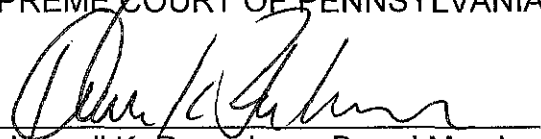
V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Philip J. Berg, be Suspended from the practice of law for a period of two years.

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: 
Howell K. Rosenberg, Board Member

Date: March 8, 2013

Board Members McLemore, Todd, Jefferies and Nasatir recused.

Board Member Momjian did not participate in the adjudication.