

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 243 Disciplinary Docket
Petitioner : No. 3
:
:
v. : No. 58 DB 1995
:
[ANONYMOUS] : Attorney Registration No. []
:
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

A Petition for Discipline was filed against Respondent on April 26, 1995. Respondent filed an Answer on June 8, 1995. A hearing was held on October 25, 1995 before Hearing Committee []

comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Respondent was represented by [], Esquire. Petitioner was represented by [], Esquire. The Committee filed its Report on March 28, 1996 and recommended a one year Suspension. No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Board 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 Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa.R.D.E.), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, [], was born in 1952 and was admitted to practice law in Pennsylvania in 1977. His office is located at []. Respondent is married and has two children. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the

Supreme Court.

3. Respondent became associated with [A], Esquire, in 1984. Two years later, Attorney [A] and Respondent established a professional corporation in which [A] was the majority shareholder. (N.T. 12-13, 55)

4. In 1988, [B] retained the firm of [A] and [Respondent] to represent him in regard to an automobile accident in which [B] had been involved in January of that same year. (PE 1)

5. Attorney [A] settled the third party claim against the defendant prior to June 1992 for the policy limit of \$50,000. (PE 1)

6. Respondent was assigned to handle [B's] underinsured motorist claim against [C] Insurance. (PE 1)

7. An arbitration was scheduled for June 16, 1992. [C] Insurance made an offer to settle the matter for \$21,500. (PE 1)

8. Respondent related this offer to the client, who rejected it. (PE 1)

9. Respondent advised [A] that the client rejected the offer. [A] directed Respondent to convince the client to accept the offer and threatened to fire him if he did not. (N.T.

16)

10. Thereafter, Respondent accepted the \$21,500 offer. Respondent at all times appeared to have authority to settle. (PE 1)

11. Respondent again attempted to convince the client to accept the \$21,500 offer, but the client rejected it. (N.T. 17)

12. Respondent did not advise the client that he had settled the case. (PE 1)

13. Since June 1992, Respondent was sent three sets of releases from [C] Insurance, which Respondent did not return as requested. [C] Insurance has never released any funds to Respondent. (PE 1)

14. Beginning in the fall of 1992 and continuing through February 1994, [B] contacted Respondent periodically regarding the status of the matter, and Respondent advised him that it was "rolling its way up". (N.T. 75)

15. Attorney [A] died on January 23, 1994. (N.T. 22)

16. In February 1994, [B] retained Attorney [D] to assume his representation in the underinsured motorist claim against [C] Insurance. (PE 1)

17. By letter of February 22, 1994, Attorney [D] informed Respondent that his firm had been retained to represent

[B] and requested that the file be released to him promptly. (PE 1)

18. On February 24, 1994, Attorney [D] sent an associate of the firm to Respondent's office to retrieve the file. At that time, Respondent indicated that the file was not yet ready. (PE 1)

19. By letter of March 6, 1994, [B] requested that Respondent turn the files over to Attorney [D] immediately. (PE 1)

20. In mid-March 1994, Respondent spoke with [B], at which time he requested that he be given additional time to settle the claim. [B] agreed, but imposed a deadline of April 1, 1994. (PE 1)

21. At the same time Respondent requested that [B] give him more time, he was negotiating a settlement in another case which he expected to generate a large fee. Respondent planned to pay [B's] final demand out of the fee Respondent earned in the other case. (N.T. 25-26)

22. By letter of April 4, 1994, [B] requested that Respondent turn over the files to Attorney [D] by April 7, 1994, as no settlement had been produced. (PE 1)

23. Respondent did not release the files. (PE 1)

24. On or about April 21, [B] filed a complaint

against Respondent with the Office of Disciplinary Counsel. (PE 1)

25. In May 1994, [E], Senior Disciplinary Counsel, contacted Respondent's counsel, [F], Esquire, pursuant to [B's] complaint. (PE 1)

26. On May 18, 1994, Respondent represented to Attorney [E] that [B] had agreed to allow Respondent to temporarily keep the file. (PE 1)

27. In May 1994, [B] extended the deadline within which Respondent was to conclude a settlement to June 3, 1994 and authorized Respondent to accept no less than \$150,000 in settlement of his underinsurance claim. (N.T. 28-30)

28. On May 27, 1994, Respondent faxed to Attorney [E] a copy of a letter from Respondent to [B]. Pursuant to that letter, Respondent confirmed a telephone conversation of May 27, 1994, at which time [B] authorized Respondent to settle the underinsured motorist claim for \$150,000 by June 3, 1994 and indicated that if the case was not settled by that date, the file would be made available to [B]. (PE 1)

29. By letter dated June 3, 1994, Respondent informed [B] that he had settled the claim for \$153,000, less a 25% fee. (PE 1)

30. Respondent faxed to Attorney [E] a copy of his

letter to [B] informing him of the settlement. (PE 1)

31. At no time prior to June 10, 1994, did Respondent inform the Office of Disciplinary Counsel that he had actually accepted the \$21,500 settlement offer in June 1992. (PE 1)

32. On June 10, 1994, the Office of Disciplinary Counsel discovered that Respondent previously accepted a settlement offer in June 1992. (PE 1)

33. Upon being confronted by Attorney [F] regarding his dishonesty to the Office of Disciplinary Counsel, Respondent acknowledged his dishonesty and thereafter cooperated fully with Office of Disciplinary Counsel's investigation. (N.T. 34-36)

34. [C] Insurance subsequently filed a petition seeking to enforce Respondent's agreement of June 10, 1992, to settle [B's] claim for \$21,500. Through counsel from Attorney [D's] office, [B] opposed the petition on the basis that the settlement had not been authorized by him. The petition was eventually denied by the court, such that [B] maintained his right to proceed with his claim. (N.T. 73-74).

35. Respondent received two prior Informal Admonitions for professional misconduct. In 1991, he was disciplined for failing to appear at call of the list, resulting in a client's case being dismissed. In 1995, he was disciplined for failing to

advise a client of the dismissal of her case and to respond to inquiry from the client regarding the case. (N.T. 41)

36. Respondent has shown remorse for his misconduct. (N.T. 52-53)

37. Respondent's misconduct in accepting the settlement offer without [B's] authority to do so was aberrational and resulted from his reluctance to challenge Attorney [A's] insistence that Respondent secure [B's] acceptance of the settlement offer. (N.T. 18-19)

38. Respondent's subsequent misconduct in misleading [B] and Office of Disciplinary Counsel to believe that Respondent was continuing to negotiate with [C] Insurance, leading to a "settlement" which Respondent intended to pay out of his own funds, was likewise aberrational and resulted from Respondent's attempt to conceal his initial misconduct while ensuring that [B] sustained no financial harm. (N.T. 22-26)

III. CONCLUSIONS OF LAW

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

1. RPC 1.2(a) - A lawyer shall abide by his client's decisions concerning the objectives of representation, including a client's decision whether to accept an offer of settlement.

2. RPC 8.1(a) - A lawyer is subject to discipline if the lawyer has made a materially false statement in, or if the lawyer has deliberately failed to disclose a material fact requested in connection with, the lawyer's application for admission to the bar or any disciplinary matter.
3. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, deceit, fraud, or misrepresentation.

IV. DISCUSSION

This matter is before the Board for consideration of charges against Respondent that he did not abide by a client's decision to reject a settlement offer and instead accepted the offer without the authority of his client. Respondent is also charged with misrepresenting to his client and Office of Disciplinary Counsel that he was still involved in settlement negotiations, when in fact, he settled the case in 1992. When Petitioner alleges that a lawyer has engaged in conduct in violation of the Rules of Professional Conduct, it bears the burden of proving the misconduct by clear and convincing evidence. Office of Disciplinary Counsel v. Jackson, 536 Pa. 26, 637 A.2d 615 (1994). Petitioner presented a stipulation entered into by the parties setting forth the underlying facts of the misconduct. Respondent presented his own testimony and that of three

character witnesses. Respondent testified that his partner, Attorney [A], the majority shareholder in the firm, blamed [B's] rejection of the offer on Respondent's shortcomings as a lawyer. [A] instructed Respondent to obtain the client's consent and threatened to fire him if he did not. Respondent was not able to persuade the client to accept the offer, so he went ahead and accepted it without the client's consent. Respondent acknowledged that he panicked and further compounded the problem by misrepresenting to [B] and Office of Disciplinary Counsel that he was involved in settlement negotiations. Respondent also admits he made an irrational decision to try and settle [B's] case using his own funds. Based on this evidence, the Board finds that Petitioner carried its burden of proving that Respondent violated Rules 1.2(a), 8.1(a), and 8.4(c). We note that in the Petition for Discipline, Petitioner charged Respondent with two separate violations of RPC 8.4(c), attributable to his conduct towards his client and towards Petitioner. We find, as did the Hearing Committee, that any violation by Respondent of RPC 8.4(c) as the result of his dishonesty to Petitioner is within the scope of and subsumed by his admitted violation of RPC 8.1(a), which speaks to false statements in connection with a disciplinary matter.

After determining that Respondent engaged in misconduct

in violation of the Rules, the Board must determine the appropriate sanction to be imposed. When determining the appropriate sanction, the Board must take into consideration not only the misconduct, but any aggravating or mitigating circumstances present.

The Hearing Committee recommended a one year suspension based on Respondent's misconduct and the length of time it lasted, tempered by Respondent's remorse and the fact that his two prior Informal Admonitions did not demonstrate a tendency towards dishonest behavior. The Committee accepted Respondent's testimony that his unauthorized acceptance of the \$21,500 settlement offer stemmed from his fear that Attorney [A] would fire him if he did not convince [B] to accept the offer. The Committee did not find that Respondent engaged in a deliberate, complex scheme to deceive his client and Office of Disciplinary Counsel. The Board agrees that it is apparent from the record that Respondent made an initial error and caused worse consequences by panicking and hiding his actions. Although, it is difficult to get a full appreciation for Respondent's fears that he, as a forty percent shareholder in the law firm, would be fired by [A], especially since [A] was deceased at the time these issues were raised, nevertheless the record does demonstrate that there was a certain

friction between the attorneys. Respondent does not have a history of dishonest actions and he admitted his wrongdoing. Respondent's actions involved one client only, not a pattern of misconduct in numerous ongoing cases. While the Board agrees with the Committee's basic assessment of the circumstances of the case, we do not agree with the level of discipline recommended by the Committee.

A one year suspension is too harsh in a situation where the misconduct was isolated to one case, and Respondent credibly explained how the misconduct occurred, which does not excuse the actions but aids the Board in examining the totality of the facts of the case. The character witnesses' testimony of Respondent's relationship with Attorney [A] supports Respondent's description of the office situation. The client ultimately did not suffer prejudice as he maintained his right to proceed with his claim due to the trial court's denial of the petition to enforce settlement.

Additionally, Respondent's prior history of two Informal Admonitions does not involve other acts of dishonesty, and Respondent demonstrated sincere remorse. The imposition of a Public Censure is supported by the facts of this case as well as prior case law.

In the case of In re Anonymous No. 96 DB 85, 44 Pa. D. & C. 3d 326 (1987), an attorney neglected a legal matter for six

months and failed to provide his client with information as to the status of the case. Office of Disciplinary Counsel sent a letter to the attorney regarding the allegations and the attorney fabricated the existence of a client letter to deceive disciplinary counsel. The Board recommended and the Supreme Court imposed a public censure. In the case of In re Anonymous No. 86 DB 89 & 2 DB 90, 17 Pa. D. & C. 4th 477 (1992), an attorney engaged in a pattern of misconduct that included neglect, misrepresentation, and failure to communicate with clients. The attorney had one prior informal admonition and one prior private reprimand. The attorney received a public censure. In the case of In re Anonymous No. 89 DB 90, 16 Pa. D. & C. 4th 519 (1991), an attorney failed to contact his clients, failed to abide by the decisions of clients, and failed to file various petitions on behalf of his clients. The Board recommended a private reprimand based on Respondent's unblemished record of prior discipline. In the case of In re Anonymous No. 54 DB 88, 5 Pa. D. & C. 4th 593 (1989), an attorney neglected legal matters by failing to take appropriate action and failing to keep clients advised of the status of matters. This attorney had a prior informal admonition. The Court imposed a public censure.

The totality of the circumstances in this case, in

conjunction with prior case law, persuades the Board that the imposition of a public censure is sufficient discipline to effectuate the primary purpose of lawyer discipline, which is to protect the public from unfit attorneys and maintain the integrity of the legal system. Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 506 A.2d 872 (1986). A public censure will impress upon Respondent the seriousness of his misconduct and protect the public and the bar. Office of Disciplinary Counsel v. Duffield, 537 Pa. 485, 644 A.2d 1186 (1994).

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], receive a Public Censure from the Supreme Court of Pennsylvania.

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: _____
Gerald C. Paris, Member

Date: July 2, 1996

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

PER CURIAM:

AND NOW, this 9th day of September, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated July 2, 1996, and the Petition for Review, it is hereby

ORDERED that [Respondent] be and he is suspended from the Bar of this Commonwealth for a period of one year, 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.