BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 281, Disciplinary Docket No. 3 – Supreme Court
v.	:	No. 121 DB 1994
[ANONYMOUS], Respondent	:	Attorney Registration No. [] ([] 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

Petitioner filed a Petition for Discipline against Respondent on October 20, 1994. The Petition alleged that during the time frame from Spring 1992 to Fall 1993 Respondent engaged in

a course of conduct that violated Rules of Professional Conduct 1.1, 1.3, 1.4(a), 1.4(b), 1.5(b), 1.16(a)(2), 1.16(d), and 8.4(c). The Petition also alleged that Respondent abandoned his practice and in so doing, violated Pennsylvania Rules of Disciplinary Enforcement 217(a) and (b), 219(a), (d)(1),(2), and (3), 219(f)(2), and 219(k)(2). Respondent did not file an Answer to the Petition. Disciplinary hearings were held on June 5, July 12, and October 12, 1995 before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Respondent represented himself. Petitioner was represented by [], Esquire. The Committee filed its Report on February 29, 1996 and recommended a two year period of suspension and Respondent's participation in psychiatric counseling before reinstatement. Respondent filed a Brief on Exceptions on April 11, 1996 and requested oral argument. Petitioner filed a Brief Opposing Exceptions on April 22, 1996. Oral argument was held on June 14, 1996 before a three member panel of the Board.

This matter was scheduled to be adjudicated at the meeting of June 28, 1996, but was tabled and ultimately adjudicated at the meeting held on August 14, 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 June, 1943 and was admitted to practice law in the Commonwealth of Pennsylvania on or about December 4, 1973. His last attorney registration address was [], where he currently resides. (S-2)

3. Since about December, 1993, Respondent has not maintained an office in the Commonwealth of Pennsylvania for the practice of law. (S-3)

4. Respondent worked at [] (S-4) but recently started working at []. (N.T. II 262)

5. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court. (S-5)

CHARGE V: ABANDONMENT OF PRACTICE

6. In April, 1992 through July, 1993, Respondent's office was located at [] (N.T. II 34-35, 36)

7. Respondent failed to file his annual attorney registration statement and to pay his annual registration fee by July 1, 1993, as required by Pa.R.D.E. 219. (S-66)

8. Commencing August 1, 1993, the firm of [A] sub-leased office space to Respondent at []. (S-67)

9. By Order dated November 22, 1993, the Supreme Court of Pennsylvania transferred Respondent to inactive status, effective December 22, 1993, pursuant to Pa.R.D.E. 219. (Ex. P-11; S-21)

10. By letter dated November 30, 1993, the Disciplinary Board notified Respondent of the Supreme Court's order of November 22, 1993 and forwarded information and documents related thereto. (Ex. P-1,2; S-22)

11. Respondent did not personally notify clients of the entry of the November, 1993 Order transferring him to inactive status. (S-68)

12. Respondent failed to file a verified Statement of Compliance (DB-25), as required by Pa.R.D.E. 217, with respect to the November, 1993 Order. (S-69)

13. In or about December, 1993, Respondent left his office at [] and left no forwarding address. (S-70)

14. [A] received numerous telephone calls from persons representing themselves to be Respondent's clients, as well as a considerable amount of mail at the []. (N.T. II 95-96)

15. [B], Esquire, who also rented space in those offices, received telephone calls on his telephone number, which he had not authorized Respondent to use, from Respondent's clients who were looking for him. (N.T. 281)

16. On January 21, 1994, [A] obtained a Judgement against Respondent for the unpaid rent plus possession of the premises, which Respondent did not pay. (S-71; Ex. P-58; N.T. II 96)

17. Prior to April, 1994, Respondent did not remove his files from the [A] office. (S-72)

18. Prior to April 27, 1994, Respondent failed to advise his clients that he could no longer represent them or to return their files or the unearned portion of the fees and the unspent costs they had paid to him. (S-73)

19. On April 27, 1994, Respondent filed with the Secretary of the Disciplinary Board an Application for Resumption of Active Status for the period 1993-1994. (S-74; Ex. P-59)

20. By letter dated April 27, 1994 to Petitioner's office, [J], Esq. responded to two letters sent to Respondent concerning these complaints. (Ex. P-60A)

21. On April 28, 1994, the [] Court of Common Pleas, acting upon Petitioner's motion, appointed [C], Esquire, as conservator for Respondent. (S-75; Exs. P-59A, P-60)

22. Upon going to Respondent's office, [C] found milk crates and boxes containing about fifteen client files which were in file folders but which were mixed with portions of other client files, as well as disorganized loose papers (N.T. II 105-108)

23. [C] located the clients and arranged to return their files to them. (N.T. II 109-112)

24. One file required emergency action, which [C] handled. (N.T. II 109)

25. Respondent failed to file his annual attorney registration statement and to pay his annual registration fee for 1994-1995 by July 1, 1994, as required by Pa.R.D.E. 219. (S-76)

26. By Order dated November 29, 1994, the Supreme Court of Pennsylvania transferred Respondent to inactive status pursuant to Pa.R.D.E. 219(g), effective December 29, 1994. (S-77; Ex. P-61)

27. Respondent was advised of the entry of the foregoing order by correspondence from the Disciplinary Board dated December 5, 1994. (S-78; Ex. P-62)

CHARGE I: THE [D] MATTER

28. In May, 1992, [D], a California resident, retained [E], Esquire, to represent him in connection with the estate of his mother, [F]. (S-6; N.T. I 22-23)

29. The claims in the matter involved the alleged failure of the attorneys-in-fact for [F], who were also her executors, to account for their handling of her funds during her lifetime, their failure to promptly probate the will, delinquencies in their settlement of the estate, and actions which they took with respect to her funeral arrangements. (N.T. I 26)

30. [E] addressed the financial concerns by filing petitions in the Orphans Court to compel the filing of accounts by the individuals named as attorney-in-fact and as executors and trustees. (N.T. I 24)

31. [D] desired to pursue claims for damages arising from emotional distress relating to the funeral arrangements for his mother. (N.T. I 26-27, 36)

32. [E] advised [D] that, given the nature of the claim, his firm would not handle it, and that [D] ought to try to find a

lawyer who would be willing to take the case on a contingency fee basis, and who was willing to take a gamble on what [E] thought was not a particularly strong case. (N.T. I 27)

33. In or about March, 1993, [D] contacted Respondent with respect to potential representation of [D] (S-6); on March 25, 1993, he had a telephone conversation with Respondent during which he briefed Respondent about the case. (N.T. 28)

34. [E] sent to Respondent by facsimile a copy of the will and the Power of Attorney. (N.T. I 30)

35. In March, 1993, when he was in [], [D] tried unsuccessfully to contact Respondent. (N.T. I 37)

36. About three weeks later and on several occasions between April and June, 1993, Respondent called [D] in California to discuss the case (N.T. I 38), during which conversations:

a) Respondent told [D] that he would get no results in the Orphans' court, and that Respondent could handle the whole case (N.T. I 39);

b) Respondent advised [D] that he would take depositions that would assist in establishing the Orphans' Court claims (N.T. I 51-52, 129);

c) Respondent pressured [D] to make a decision on the representation by advising him that the statute of limitations would run on August 21, 1993 (N.T. I 162); and

d) Respondent agreed to represent [D] on a contingent fee basis, but asked that [D] would advance Respondent a $1,500 retainer in order to start the proceedings (N.T. I 39-40)

37. In or about June, 1993, Respondent and [D] agreed to retain Respondent for the emotional distress and any other contingent claims, but not for the Orphans' Court proceeding. (N.T. I 44-45)

38. Respondent had not previously represented [D]. (S-7)

39. During the representation, [D] repeatedly asked Respondent to provide him with a written fee agreement, receipts for the checks that he had written, and a statement of services, which Respondent assured him he would provide. (P-1; P-8; N.T. I 41)

40. Respondent failed to provide a written fee agreement, a statement of services, or receipts at any time during the representation. (S-8; N.T. I 41)

41. Under cover of a letter dated June 28, 1993 (Ex. P-1A), [D] sent Respondent a check for $1,500, dated June 28, 1993. (N.T. I 40; Ex. P-1)

42. Respondent endorsed the check, which was then endorsed by [G], Respondent's mother, and negotiated at [H] Bank on July 2, 1993. (S-9, S-11)

43. In late June, 1993, [D] caused to be delivered to Respondent his original records with respect to the estate and his claims. (N.T. I 42, S-12)

44. [D] requested that Respondent make his file available to [I], Esquire, for review, as he was considering replacing [E] with [I]. (N.T. I 42, S-13)

45. In July, 1993, Respondent forwarded [D's] file to [I], who copied the file and returned it to Respondent. (S-13a., S-13b.; N.T. I 123; Ex. P-5)

46. Shortly thereafter, [D] retained [I] to assume his representation in Orphans' Court. (S-14)

47. Respondent, [I], and [D] discussed the matter in several telephone conversations, during which it was agreed that [I] would continue with the Orphans' Court proceedings, and

Respondent would pursue claims of intentional infliction of emotional distress, relating to conduct during [F's] lifetime and shortly after her death. (N.T. I 126-128)

48. In about July, 1993, Respondent advised [D] that he had moved his office to []. (S-15)

49. On July 15, 1993, Respondent and [D] met in person for the first time, at which time they discussed the case in depth, and Respondent stated that he would proceed in federal court. (N.T. I 43, 45)

50. Thereafter, [D] and Respondent returned to Respondent's office, at which time:

a) Respondent requested and received from [D] a check for $3,500 dated July 15, 1993. (N.T. I 48; Ex. P-2)

b) Respondent asked for another check for $3,500, which [D] issued, after which Respondent apparently photocopied it and returned it. (N.T. I 49)

c) Respondent asked for and received a check for $275 from [D], which he represented to be for a filing fee. (N.T. I 49-50; Ex. P-3)

51. On July 16, 1993, Respondent endorsed the first $3,500 check, which was then endorsed by [G] and negotiated at [H] Bank. (S-9)

52. Respondent endorsed the $275 check, which was then endorsed by [G] and deposited on July 21, 1993, to [H] Bank account #[], in the name of [G]. (S-9)

53. On several occasions in July and August, 1993, Respondent discussed the matter on the telephone with [I] and with [D] (S-16), at which time he led both [I] and [D] to believe that he was taking action with respect to [D's] case. (N.T. I 51, 131-132)

54. In or about August, 1993, Respondent advised [D] that he needed money for taking depositions and performing other tasks which he claimed would benefit the Orphans' Court case. (N.T. I 52-53)

55. Under cover of a note asking for a copy of an agreement which had been discussed previously, [D] forwarded a check for $2,000, dated August 11, 1993. (N.T. I 52; Exs. P-4, P-4A)

56. Respondent endorsed the check, deposited it into [H] Bank account #[], captioned "[RESPONDENT], Attorney at Law" ("the [H] attorney account"), on August 17, 1993 (S-9), and utilized the proceeds of the check by no later than August 31, 1993. (Exs. P-4, P-64; S-9)

57. Because August 21, 1993 marked the second anniversary of his mother's death, and based upon Respondent's representations at the time of retention, [D] believed that any action attempted after that time would be barred by the statute of limitations. (N.T. I 81)

58. In a telephone conversation on or around August 21, 1993, Respondent assured [D] that the statute of limitations was not an issue in his case. (N.T. I 54-55)

59. [D] did not hear from Respondent again for the rest of September and October, 1993. (N.T. I 55)

60. During September and October of 1993, [I] called, wrote and transmitted correspondence by facsimile to Respondent on numerous occasions to discuss [D's] matter. (N.T. 131, P-7)

61. Between August 23, 1993 and November 24, 1993, [D] attempted to contact Respondent by telephone on twenty-two occasions, but was unsuccessful in reaching him, as demonstrated by the fact that only twice do his telephone bills reflect a conversation more than one minute. (S-17; N.T. I 54; Exs. P-6A through P-6I)

62. [D] also wrote to Respondent by letter dated November 4, 1993. (N.T. I 56; Ex. P-8)

63. Respondent failed to accept the calls or respond to the calls, letter, and facsimile. (N.T. I 131)

64. By letter to [D] dated November 22, 1993, on letterhead showing Respondent's address as [], and showing a

courtesy copy to [I] (Ex. P-9), Respondent forwarded to [D] a draft Complaint captioned in the United States District Court for the [] District of Pennsylvania. (S-19; Ex. P-10; N.T. I 58)

65. That Complaint was never filed in federal court. (S-20)

66. Respondent did not send that letter or Complaint to [I], who, by letter dated November 29, 1993, asked Respondent to contact him immediately and to send him a copy of the November 22, 1993 letter and of the draft complaint. (Ex. P-13; 5-24; N.T. 58)

67. [I] also requested that Respondent provide original checks from [D's] file, which was in Respondent's possession, as the copies [I] had were not legible. (N.T. I 134)

68. Respondent did not respond to the letter or provide the documents. (N.T. I 134)

69. In response to Respondent's November 22 letter, [D] again tried to contact Respondent by telephone, but he was unable to locate or contact him. (N.T. I 58)

70. After sending the November 22 letter, Respondent did not personally communicate with [D], nor did he personally respond to any further inquiries from him. (S-25). 73. After entry of the Supreme Court Order of November 22, 1993, Respondent did not personally advise [D] that he could no longer represent him or provide his file to him. (S-23)

71. [D] sent Respondent a letter dated December 24, 1993 by certified mail, which came back to [D] marked "unclaimed." (N.T. I 59-60; Ex. P-14, P-14A)

72. By letter dated April 27, 1994, Respondent's counsel, [J], Esquire, advised [D] of the Order transferring Respondent to inactive status and told him that an accounting of his fee would be provided. (Ex. P-15; S-26)

73. After learning from [D] of [J's] letter to [D], [I] wrote to [J] requesting [D's] file, from which he needed, inter alia, the original microfiche copies of bank records. (Ex. 15A; N.T. I 136)

74. [D] did not receive his file until five or six months later, when he received some part of the file from [I], who had received the file from a conservator appointed for Respondent's files. (N.T. 62)

75. Nothing in the file, nor any documents provided by Respondent to [D], reflected that Respondent had ever filed suit or taken action other than the draft complaint. (N.T. I 631 137)

76. By letter dated November 9, 1994, copied to [J], which was returned to [D] unopened, [D] requested that Respondent return the fees he had paid. (N.T. I 61-62; Exs. P-16, P-16A, P-17)

77. Respondent failed to refund of any fees or costs. (N.T. I 63)

CHARGE II: THE [K] MATTER

78. In or about April, 1992, Respondent met with [K], at which time [K] advised Respondent that:

a) [L] was attempting to execute on a judgment note in the amount of $25,000, which

might result in foreclosure against [K's] home, on which note [K] claimed that the signatures were forged (S-27a.; N.T. II 13-14);

b) his claims of forgery and fraud, including the [L] note, arose out of dealings with investment bankers, including the firm of [M] (S-27b.), and involved in excess of $100,000 (N.T. II 12); and

c) there was an additional claim by [N] Bank against him involving approximately $130,000 or $140,000 (N.T. II 13)

79. At Respondent's suggestion, [K] first met with him at Respondent's house on a Friday evening, in April, 1992, to discuss the case. (N.T. II 15)

80. During the weekend after that meeting, Respondent called [K] on several occasions inquiring whether [K] had decided about the representation; upon [K's] assent, Respondent offered to drive to [K's] house to pick up the $10,000 check, which offer [K] declined. (N.T. II 17-18)

81. During these conversations, Respondent:

a) represented to [K] that he was a very effective attorney who had handled large cases in that past and could win his case for him. (N.T. II 16, 25, 55);

b) stated that he knew the president of [L], and thought he could resolve the problem expeditiously (N.T. II 16-17); and

c) stated that he needed a $10,000 retainer to start the case, which might evolve into a contingency fee case (N.T. II 16)

82. On April 14, 1992, Respondent entered into a written fee agreement with [K] and his wife, [O], pursuant to which Respondent would attempt to prevent the foreclosure and seek redress against their brokers, and they pay a retainer of $10,000, against which he would charge on an hourly basis. (S-28; Ex. P-18)

83. On April 14, 1992, [K] gave Respondent a check for $10,000, which Respondent deposited into [L] account #[]. (S-30, S-31; Ex. P-19)

84. During the next two weeks, Respondent represented to [K] that he was working diligently in pursuing a settlement with [L]. (N.T. II 19)

85. During that time, [K] forwarded to Respondent his entire file in connection with his dealings with [M] and [L]. (N.T. II 20)

86. During the course of the representation, at Respondent's request, [K] gave him a list of names of other individuals who had also utilized the services of the same brokers and who might have been victims of similar frauds by those individuals; included on the list were [P] and [Q]. (N.T. II 21; S-32)

87. In April and May, 1992, Respondent discussed the matter with [K] on several occasions, at which time Respondent advised [K] and his wife to sign an agreement he had reached with the president of [L], according to which a new note would be created, making [K], but not his wife, liable for the debt established by the forged note which [L] held; he also advised [K] that he could pursue this loss in his action against [M]. (S-33; N.T. II 23, 55)

88. Despite [K's] belief that the original note was a forgery, he signed the second note on the advice of Respondent, and has continued to pay on that note. (N.T. II 23 - 24)

89. In June, 1992, Respondent told [K] that he wanted to enter into a revised fee agreement (5-34), stating:

a) his investigations of the matter revealed that the case was large enough to become a contingency fee case (N.T. II 24);

b) he would cap the hourly fees, in addition to the original $10,000, at $7,300 (N.T. II 24);

c) he would need another payment of $7,300; and

d) he was actively pursuing the [N] Bank matter for "huge amounts of dollars." (N.T. II 25)

90. Respondent prepared a contingent fee agreement dated June 8, 1992, according to which [K] was to pay an additional $10,000, of which $2,700 would be credited from the original $10,000, after which Respondent would continue the case on a contingency fee basis. (N.T. II 26; S-35; Ex. P-20)

91. In reliance upon Respondent's representations during telephone conversations that he was working hard and the case was going well, [K] signed the second agreement. (N.T. II 25)

92. [K] gave Respondent a check for $7,300, dated June 8, 1992, which Respondent endorsed and deposited into [L] Account #[]. (N.T. II 25, 28; Exs. P-21, S-36)

93. From the inception of the representation, [K] repeatedly asked Respondent for a statement of services, but Respondent failed to provide one at any time during the representation. (N.T. II 26, 32; S-38)

94. In several conversations which took place during the three or four months after the second agreement was signed, Respondent represented to [K] that he was making progress in the case. (N.T. II 28)

95. From summer, 1992 through spring, 1993, [K] made repeated attempts to contact Respondent, with no response. (N.T. II 34)

96. On March 26, 1993, Respondent filed a Praecipe to Issue a Writ of Summons in an action on behalf of [K], his wife, their IRAs and related entities, and [R], against [M] and other individuals and entities, which Summons was served on the defendants. (S-39, S-42; Exs. P-24, P-25)

97. Respondent paid a $155 fee for this filing, by check drawn on [S], account #[], captioned "[RESPONDENT] or [T], []" ("the [S] personal account"). (S-37, S41; Ex. P-26)

98. In about late March or early April, 1993, Respondent provided to [K] a copy of a Request to Produce Documents and stated that he was working on the Complaint. (S-43; Ex. P-27)

99. Respondent never served a Request to Produce Documents on the defendants in the case. (N.T. I 202)

100. At Respondent's request, [K] paid Respondent $530.47 on April 9, 1993, purportedly for costs incurred in pursuing [K's] claim, for which [K] never received a bill. (N.T. II 30-31; Ex. 22)

101. Respondent endorsed that check, deposited it into the [S] personal account on April 9, 1993, and used the proceeds of the check by April 19, 1993. (S-36)

102. [K] paid Respondent an additional $550 on May 22, 1993, again based upon Respondent's representation that it was for costs related to the case. (N.T. II 32; Ex. P-23)

103. Respondent endorsed that check, deposited it into the [S] Personal account (S-36), and used the proceeds from that check by June 1, 1993. (S-36, Ex; P-63)

104. On April 28, 1993, [U], Esquire, entered his appearance for all the defendants in [K] v. [M] and filed a Praecipe for Rule upon Plaintiffs to File a Complaint within 20 days or suffer judgment of non pros, which Rule was entered. (N.T. I 200-201; S-45, S-45a.; Exs. P-28, P-29, P-30)

105. Respondent did not file suit within twenty days, as a result of which, on May 21, 1993, a Praecipe for judgment of non pros was filed; a Judgment by Default was entered; and a Rule 236 Notice thereof was entered. (S-45b., S-45c.; Exs. P-31, P-32)

106. Respondent did not deny knowledge of the foregoing events.

107. Respondent failed to advise [K] of these events. (N.T. II 34)

108. When [K] attempted to bring a new suit with a different attorney, [U] took the position that it is time-barred by the statute of limitations; it was his view that the claims were stale at the time Respondent filed suit. (N.T. I 203-205)

109. Between May and August of 1993, Respondent failed to maintain contact with [K] or to respond to his frequent calls. (N.T. II 34)

110. In August, 1993, [K] called Respondent at the number for his office at [] and found that he was no longer there and at his apartment and found that the telephone had been disconnected. (N.T. II 35)

111. In August or September, 1993, Respondent called [K] and advised him that he had moved his offices to []. (N.T. II 35; S-46)

112. In November of 1993, Respondent showed [K] his new office space at [], at which time Respondent told him that he was now going to begin to make progress on his case and showed him a copy of an unfinished draft complaint (N.T. II 36; Ex. P-33)

113. Respondent did not file the Complaint or serve it upon the defendants. (S-44)

114. Respondent never contacted [K] again. (N.T. II 42)

115. By letter dated November 15, 1993, [K] advised Respondent that he had filed a disciplinary complaint against him. (S-47; Ex. P-34)

116. Respondent did not personally advise [K] of the Order transferring him to inactive status. (S-49)

117. At some time in or after December, 1993, [K] removed his file from Respondent's office. (N.T. II 39-40; S-48)

118. The file contained nothing indicating that Respondent had worked on the case, other than the Writ of Summons and the draft complaint. (N.T. II 40)

119. By letter dated April 27, 1994, [J] provided to [K] information similar to that provided to [D]. (S-50; Ex. P-35)

120. In April, 1994, [K] sued Respondent in the [] Court of Common Pleas. (S-51, S-51a., S-51b.; Exs. P-36, P-37)

CHARGE III: THE [Q] MATTER

121. In or about May, 1993, Respondent contacted [Q], whose case was related to [K's] (S-52), by telephone, at which time Respondent asked him to come in to Respondent's office to discuss claims he had against [M] and [N] Bank. (N.T. I 164)

122. Shortly prior to that call, [Q] had given his records to another law firm to be reviewed in connection with possible representation relating to transactions in 1992 or 1993,

when he had been involved in limited partnerships and financial transactions with these parties, in which he believed he had been defrauded of approximately $175,000 to $225,000. (N.T. I 162-164)

123. As a result of Respondent's representations, [Q] met with Respondent at his office (N.T. I 165), at which time Respondent told [Q]:

> a) he had already filed suit in connection with the same facts on behalf of other individuals and that he could be added to that action (N.T. I 166); and
>
> b) he would need a retainer of $10,000 plus costs of $550 to proceed on [Q's] behalf. (N.T. I 166)

124. By letter dated May 25, 1993 (Ex. P-38), transmitted by facsimile on June 4, 1993 (Ex. P-39), Respondent provided to Mr. and Mrs. [Q] a fee agreement, pursuant to which Respondent would represent them on a contingency basis after an advance retainer of $10,000, to be paid pursuant to a specified schedule. (Ex. P-40; S-53)

125. Respondent did not tell [Q] that the action which he had filed by Writ of Summons had been dismissed for his failure to file a complaint. (N.T. I 169)

126. [Q] signed and returned the agreement to Respondent along with a check for $5,500. (N.T. I 168; Ex. P-41)

127. Respondent endorsed the check, deposited it into the [H] attorney account on June 4, 1993, and used the proceeds of the check by June 11, 1993. (Ex. P-63; S-54)

128. During the following few weeks, Respondent represented to [Q] in telephone conversations that he was making progress in the case. (N.T. I 169)

129. Respondent took no action on behalf of [Q].

130. In late May or early June, [Q] delivered to Respondent all of his records in connection with the case. (N.T. I 172)

131. In early July, 1993, Respondent told [Q] in telephone conversations that he was making progress on [Q's] case and would soon be able to file a complaint or action. (N.T. I 171)

132. In July, 1993, [Q] visited Respondent at his office, at which time Respondent represented that he would soon have a complaint for [Q] to sign. (N.T. I 172-173)

133. [Q] paid Respondent an additional $1,500 by check dated July 2, 1993 (N.T. I 172; Ex. P-42), which was endorsed by Respondent and [G] and negotiated at [H] Bank on July 7, 1993. (S-54)

134. Respondent contacted [Q] in early August, to remind him that his next payment was due. (N.T. I 172, 174; Ex. P-43)

135. On August 4, 1993, [Q] gave Respondent a check for $1,500, which Respondent deposited into [H] attorney account on August 16, 1993, and used the proceeds by August 19, 1993. (P-64; S-54)

136. In August, Respondent stated to [Q] in a telephone conversation that he urgently needed payment of the final installment. (N.T. I 174)

137. Later in August, 1993, Respondent asked [Q] to call another individual involved in the fraud case, [V], and ask him if he would be interested in being represented by Respondent. (N.T. I 175)

138. Respondent's only communication with [Q] between that time and the middle of September was to request his final payment. (N.T. I 175)

139. In September, [Q] sent his last payment, of $2,000, to Respondent's former address (N.T. I 175; Ex. P-44), but after Respondent deposited the check into the attorney account on September 16, 1993 (S-54), [Q] stopped payment on that check on September 22, 1993. (N.T. I 176-177)

140. [Q] then sent a wire transfer of $2,000 to Respondent on October 1, 1993, which was deposited into the [H] attorney

account (N.T. 175-177; Ex. P-45), of which Respondent used the proceeds by October 20, 1993. (Ex. P-64)

141. By letter dated November 8, 1993, transmitted by facsimile, Respondent requested that the [Q] reimburse him for bank charges in connection with checks he had written which were returned due to insufficient funds, due to the stopped payment on the August check. (N.T. II 178-179; S-55; Ex. P-46)

142. This was the only correspondence Respondent sent to [Q] during the representation. (N.T. I 179)

143. By letter dated November 17, 1993, [Q] requested a status update in connection with his action. (N.T. I 180-181; Ex. P-47)

144. After sending the letter of November 17, 1993, [Q] attempted to contact Respondent at his new offices without success. (N.T. I 181)

145. [Q's] attorney requested of Respondent's attorney that Respondent refund the unearned fees. (N.T. I 182183; Ex. P-48A)

146. Respondent did not personally advise [Q] of the November 22, 1993 Order transferring him to inactive status. (S-56)

147. Respondent did not respond to the November 17 letter, send [Q] any documents relating to his case, or refund any portion of the fee. (N.T. I 180, 182)

148. [Respondent's] attorney, [J], sent a letter to [Q] dated April 27, 1994, similar to that sent to the other clients. (S-57; Ex. P-48)

CHARGE IV: THE [P] MATTER

149. By letter dated June 11, 1993, Respondent wrote to [] and [] [P], of South Dartmouth, MA, whose case was related to [K's], offering his legal services in connection with some investments in which they may have been defrauded. (S-58; Ex. P-49)

150. [P's] claims arose from transactions which occurred in 1992, when [N] Bank made a $50,000 charge against [P's] account which he did not approve, apparently related to transactions with [M]. (N.T. I 145-147)

151. Prior to being contacted by Respondent, [P] had never been represented by an attorney. (N.T. I 147)

152. After receiving the letter, [P] called Respondent to ascertain Respondent's objectives (N.T. I 147), at which time Respondent:

a) told [P] that one of the people who had the same experience had already collected money (N.T. I 147);

b) failed to tell [P] that he had already filed a suit on behalf of [K] involving the same claims, which had been dismissed because he had not filed the complaint (N.T. I 149); and

c) told [P] that the fee for the representation would be $10,000.

153. By letter dated July 21, 1993, Respondent advised [P] that he had an excellent chance of recovering his money and forwarded a contingent fee agreement. (Exs. P-50, P-51; S-60)

154. On July 28, 1993, the [P] sent Respondent a check in the amount of $10,000 and the executed fee agreement. (S-61; Ex. P-52)

155. On or about July 30, 1993, Respondent deposited this check into the [H] attorney account (S-61a.), and by August 11, 1993, Respondent had spent the proceeds. (S-61b; Ex. P-64)

156. After [P] sent Respondent the fee agreement and the check, he never heard from Respondent again. (N.T. I 151)

157. Respondent did not personally advise [P] of the Order transferring him to inactive status. (S-62)

158. Between the time [P] retained Respondent and early 1994, [P] tried repeatedly to contact Respondent by telephone and letter to inquire as to the status of his matter. (N.T. I 151-152)

159. Respondent failed to respond to [P's] communications. (N.T. I 151)

160. [Respondent's] attorney, [J], sent a certified letter to [P] dated April 27, 1994, similar to that sent to the other clients. (S-63; Ex. P-53)

161. By certified letter dated October 11, 1994, [P] requested that Respondent refund the unearned fee. (S-64; Exs. P-54, P-54A)

162. Respondent did not respond to the letter or refund the fee. (N.T. I 153, 154; 5-65)

163. [P] did not seek other representation in the matter. (N.T. I 155)

III. CONCLUSIONS OF LAW

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

1. Pa.R.D.E. 217(a) - a formerly admitted attorney shall promptly notify all clients being represented in pending matters, other than administrative or litigation proceedings, of a transfer to inactive status.

2. Pa.R.D.E. 217(b) - a formerly admitted attorney shall promptly notify all clients involved in litigation or administrative proceedings of a transfer to inactive status and advise the prompt substitution of counsel.

3. Pa.R.D.E. 219(a) - every attorney admitted to practice in this Commonwealth shall pay an annual fee.

4. Pa.R.D.E. 219(d)(1) and (2) - all persons required to pay an annual fee shall do so on or before July 1 of each year accompanied by a signed statement of the form provided by the Administrative Office.

5. Pa.R.D.E. 219(d)(3) - every person who has filed such statement shall notify the Administrative Office in writing of any change in the information submitted within 30 days of the change.

6. Pa.R.D.E 219(f)(2) and 219(k)(2) - upon entry of an order transferring the attorney to inactive status the attorney shall comply with Enforcement Rule 217.

7. RPC 1.1 - a lawyer shall provide competent representation to a client.

8. RPC 1.3 - a lawyer shall act with reasonable diligence and promptness in representing a client.

9. RPC 1.4(a) - a lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.

10. RPC 1.4(b) - a lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.

11. RPC 1.5(b) - when a lawyer has not regularly represented a client, the basis or rate of the fee shall be communicated to the client in writing before or within a reasonable time after commencing representation.

12. RPC 1.16(a)(2) - a lawyer shall not represent a client if the lawyer's mental condition materially impairs the lawyer's ability to represent the client.

13. RPC 1.16(d) - upon termination of representation, a lawyer shall take steps to the extent reasonable to protect a client's interests.

14 RPC 8.4(c) - a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

IV DISCUSSION

This matter is before the Board on a Petition for Discipline filed against Respondent [] on October 20, 1994. The Petition alleges that during the time frame from Spring 1992 to Fall 1993 Respondent engaged in a course of conduct that violated Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement. These allegations arose from Respondent's retention by four clients to represent them in litigation, for which he received substantial fees, and his subsequent failure to provide the services promised or to move the matters forward, his termination of communication with the clients and his failure

to return the clients' files and the unearned fees after abandoning the representation. Furthermore, the Petition charges that in late 1993, Respondent abandoned his office, was transferred to inactive status and made himself unavailable to clients.

Respondent entered into stipulations with Petitioner regarding the underlying facts of the misconduct as contained in the Petition for Discipline. Respondent testified at the hearing and presented the testimony of his psychiatrist and a fellow lawyer. Although Respondent did not dispute that he engaged in misconduct, he attempted to defend himself by presenting evidence that he suffered from Attention Deficit Disorder (hereinafter ADD), complicated by a co-dependent dysfunctional relationship with his wife who was prone to violent and bizarre behavior. The Hearing Committee did not find Respondent's evidence to be persuasive and found that no significant mitigating factors existed. The Committee instead found that Respondent was fully aware of and responsible for his actions. The Committee found that Petitioner met its burden of proof for all of the allegations contained in the Petition and recommended a two year prospective suspension. Respondent took exception to the Committee's findings and requested

that the Board give proper consideration to the evidence of Respondent's disorder.

Review of the record indicates that Petitioner met its burden of proof as to Respondent's violations of the Rules of Professional Conduct and the Rules of Disciplinary Enforcement. The issue presently before the Board is the appropriate sanction to be imposed as a result of these violations, after considering all aggravating and mitigating circumstances.

Respondent attempted to mitigate his conduct by presenting the expert testimony of [W], Respondent's treating psychiatrist since 1993. Dr. [W] did not treat Respondent during the time period when the misconduct occurred. Dr. [W] testified that Respondent has ADD, a personality

disorder classified in the Diagnostic and Statistical Manual-IV. This disorder impairs Respondent's ability to maintain a sustained and continuous focus of attention, to concentrate or perform routine cognitive functions without medication, and causes Respondent to be more easily distracted than persons without the disorder. The doctor testified that in his opinion, the ADD was a factor in causing the conduct which led to the instant disciplinary proceeding. The doctor also described Respondent as involved in a co-dependent relationship with his wife. This relationship was very intense and would result in Respondent ignoring his caseload in order to deal with situations with his spouse. Dr. [W] testified that Respondent began therapy in December 1993 when he sought help for his marital problems. Respondent at that time discussed his ADD problem with Dr. [W]. Respondent was aware since he was in college that he suffered from ADD. Respondent began taking Ritalin and Dexedrine in college to combat the disorder, although prior to seeing Dr. [W], Respondent had discontinued his medication. Dr. [W] placed Respondent on Ritalin initially, then changed the medication to Dexedrine and Prozac. Currently Respondent is taking Dexedrine and Zoloft. The doctor testified that the counseling portion of treatment was concentrated in the beginning of the sessions when Respondent was unable to separate from his wife.

After separation was achieved in February 1994, Dr. [W's] contact with Respondent was solely to monitor his medication. Dr. [W] testified that he was not really aware of the disciplinary problems Respondent was having nor was he aware of the specific acts of misconduct alleged in the Petition for Discipline. Dr. [W] testified he did not feel the need to know anything more specific than the general problems experienced by Respondent. He also testified that Respondent's disorder did not render him incapable of judging right from wrong.

In order for a mental infirmity to be considered as a mitigating factor, Respondent must prove by clear and convincing evidence that the infirmity was a causal factor in his misconduct. Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A.2d 894 (1989). A mental disorder is not a defense to the charges of misconduct, but if a causal connection is proven, such evidence may be used to mitigate the severity of the disciplinary sanction. No prior cases have addressed the specific issue of ADD as an infirmity or problem that may appropriately be considered as a mitigating factor. There is no pre-determined checklist of diseases that may be referred to when determining whether a certain condition is appropriate to consider under Braun. The type of

disorder is not important as long as there is appropriate testimony linking it to the misconduct. The expert testimony presented must be examined to ascertain whether the testimony sufficiently describes and explains the disorder, and whether the expert definitively designates the disorder as the cause of the misconduct. It is also important that the expert testify to an understanding and a knowledge of the professional problems that the attorney is experiencing. This is critical because it lends credence to the expert's determination of a causal connection between a disorder and the misconduct. In the instant case, Dr. [W] was not aware of the particulars of Respondent's misconduct, nor did Dr. [W] treat Respondent during the time period when Respondent engaged in the misconduct. Most of Dr. [W's] counseling sessions with Respondent focussed on his marital problems, not his professional problems. After the dissolution of his marriage in 1994, Respondent went to Dr. [W] mainly to have his medicine monitored, but did not receive therapy or counseling relative to his disorder.

Although Dr. [W] has knowledge of ADD and its symptoms and effects and testified that in his opinion Respondent's ADD caused his misconduct, the Board finds that Respondent has not met

his burden of proof relative to the Braun standard. Dr. [W] was not even aware of the specifics of Respondent's misconduct and testified that he never discussed in detail the professional problems Respondent was having. The Board is not convinced that Dr. [W] can adequately ascertain that a causal link existed between Respondent's ADD and his behavior without any background or knowledge of Respondent's professional problems.

Respondent also presented testimony that his misconduct was caused by his extreme marital difficulties. Respondent described the volatile relationship with his wife and its effects on his work. She would call constantly through the day and demand Respondent's attention. She sometimes acted violently. Dr. [W] described the relationship as co-dependent and dysfunctional, in that the person focuses so much on the needs of the other person in the relationship that he pays insufficient attention to his own well-being. Respondent has separated from his wife with the help of Dr. [W] and has not had contact with her since February 1994.

Dr. [W] testified that the term "co-dependency" is a popular phrase and not a medical term. While it is not clear that a co-dependent marital relationship may properly be described as a

disorder that may be considered relative to the Braun standard, case law does indicate that marital or domestic problems may be considered in mitigation. In the case of In re Anonymous No. 123 DB 90, 17 Pa. D. & C. 4th 464 (1992), an attorney mishandled and misappropriated estate funds. She presented testimony at her disciplinary hearing that she had extreme personal problems when the misconduct occurred. These problems included marriage to a man who had a chemical brain imbalance, which led him to develop uncontrollable paranoia and hallucinations, resulting in his terrorizing the attorney. The Board found that these problems offered an explanation for the attorney's actions and were a factor to be considered in the final determination of the case. This attorney was suspended for a period of one year and one day. In the case of In re Anonymous No. 81 DB 87, 11 Pa. D. & C. 4th 393 (1991), an attorney misappropriated client funds. She presented evidence that during the period in question she experienced a physically debilitating pregnancy and family stress. She also presented expert evidence that she suffered from chronic pain syndrome. Although the Board did not accept the expert testimony as it failed to establish a causal link between the disorder and the misconduct, the Board acknowledged the unusual and extremely stressful circumstances occurring in the attorney's life and

considered these circumstances in mitigation. The Supreme Court suspended the attorney for two years.

The Board's review of the record persuades us that a two year suspension from the practice of law is appropriate in light of Respondent's misconduct and the totality of the facts of this case. Respondent was experiencing personal stresses at the time of his misconduct. We are cognizant that his behavior is not excused by the presence of these factors, but they provide some insight into the context of Respondent's actions. The Board is also aware that this matter is Respondent's first encounter with the disciplinary system since he was admitted to the bar in this jurisdiction in 1973. This sanction will protect both the interests of the public and the integrity of the bar. Office of Disciplinary Counsel v. Stern, 515 Pa. 68, 526 A.2d 1180 (1987). Respondent will be required to file a petition for reinstatement and prove that he is competent to practice law in Pennsylvania.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be suspended from the practice of law for a period of two (2) 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:_____
Robert J. Kerns, Member

Date:October 31, 1996

Board Member Paris dissented without recommendation.

ORDER

PER CURIAM:

AND NOW, this 30th day of December, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated October 31, 1996, it is hereby

ORDERED that [Respondent] be and he is SUSPENDED from the Bar of this Commonwealth for a period of two (2) 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.