

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 286, Disciplinary Docket
Petitioner : No. 3 - Supreme Court:
:
v. : No. 73 DB 1995
:
: 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

Petitioner filed a Petition for Discipline against Respondent on May 19, 1995. The Petition alleged that Respondent practiced law while on inactive status and committed general

misconduct, including failure to communicate with clients, neglect of legal matters, and failure to refund unearned client fees.

Petitioner also alleges that during the course of disciplinary proceedings Respondent made a material misrepresentation to the Hearing Committee when he testified that his annual attorney registration fee was current. Respondent did not file an Answer to the Petition. By Notice dated July 12, 1995, a hearing was set for August 25, 1995. Respondent sought a continuance of the disciplinary hearing, which was granted, and the hearing was rescheduled for September 7, 1995. The hearing was held on September 7, 1995, before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire.

At the hearing, Petitioner introduced a Stipulation and rested its case. The Committee found Respondent violated the charged Rules of Professional Conduct. Respondent testified but offered no witnesses or exhibits. At the close of the hearing, the record was held open for ten days to allow Respondent to provide verification that he paid his current registration fee. The parties were also permitted to submit memoranda of law to the Committee. By letter of September 15, 1995, Petitioner requested

that the record remain open until September 29, 1995 in order to take the deposition of Attorney Registrar [A]. The record was closed on November 8, 1995. The Committee filed a Report on May 13, 1996 and recommended a Public Reprimand and a two year period of probation with a practice monitor. Petitioner filed a Brief on Exceptions on June 3, 1996 and contended that a suspension of at least one year and one day was the appropriate sanction in this case. Respondent did not file a Brief on Exceptions.

This matter was adjudicated by the Board at the meeting of 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 proceed-

ings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, [], was born in 1960, was admitted to practice law in the Commonwealth of Pennsylvania in 1991, and his office mailing address is []. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

Charge I ([B])

3. On or about April 7, 1992, Respondent was retained to represent [B] on matters involving the modification of her custody/visitation order.

a) Respondent told [B] that he would represent her for \$300 which would include all costs, fees and court time.

b) [B] paid \$300 at that meeting and Respondent provided her with a receipt.

4. Shortly thereafter, Respondent told [B] that he had filed a Petition for Modification.

5. From that time until approximately August 1992, [B] had periodic telephone conversations with Respondent at which time he would tell her that he did not know what was happening.

6. In August 1992, [B] discovered that no Petition had been filed on her behalf.

7. Shortly thereafter [B] was again advised that Respondent had filed a Petition and that Respondent would be in contact with a hearing date.

8. [B] did not hear from Respondent at any time thereafter.

9. [B] filed a Petition for Modification on her own behalf and received a hearing date immediately.

10. By letter to Respondent dated September 2, 1992, [B] terminated the attorney-relationship and requested that Respondent refund \$200 of the \$300 she had paid him.

11. To date, [B] has not heard from Respondent and has not received a refund.

12. By Order of the Pennsylvania Supreme Court dated November 27, 1991, and effective 30 days thereafter, Respondent was transferred to inactive status for failure to pay his annual attorney registration fee.

13. Respondent remained on inactive status until June 6, 1994.

14. Respondent was on inactive status at the time he undertook to represent [B] in her legal matter, and he did not advise [B] of his status.

Charge II ([C])

15. In April 1993, [C] told Respondent, his co-worker, that he wished to retain a lawyer for the purpose of seeking custody rights to his daughter.

16. Respondent told [C] that he would pursue such action for a total fee of \$300, which would include his attendance at a hearing.

17. Although Respondent had not regularly represented [C] in the past, he did not communicate to [C] the rate or basis of his fee in writing before or within a reasonable time after commencing representation.

18. Respondent and [C] reached the oral understanding that [C] would make payments toward the total fee of \$300, but that Respondent would proceed immediately on the case.

19. [C] made three separate cash payments to Respondent totalling \$120.

20. During the time the payments were being made, Respondent told [C] that he had filed documents on his behalf with the court.

21. At about the time the third payment was made, Respondent told [C] that a hearing date had been scheduled but had to be changed, and that he would advise [C] accordingly.

22. Thereafter, [C] did not make further payments and told Respondent that he did not intend to continue the payments until he had proof that action had been taken on his behalf.

23. Throughout the summer of 1993, Respondent continued to assure [C] that he had filed a pleading on his behalf, but gave various reasons why he did not produce any evidence to substantiate his statements.

24. In August 1993, [C] went to the Prothonotary and discovered that there was no record of any filing on his behalf.

25. In the latter part of August 1993, [C] told Respondent of his findings to which Respondent insisted that he had filed something on his behalf and that he would check.

26. In September 1993, Respondent tendered \$120 to [C] with no explanation.

27. By Order of the Pennsylvania Supreme Court dated November 27, 1991, and effective 30 days thereafter, Respondent was transferred to inactive status for failure to pay his annual attorney registration fee.

28. Respondent remained on inactive status until June 6, 1994.

29. Respondent was on inactive status at the time he undertook to represent [C] in his legal matter and he did not advise [C] of his status.

Charge III ([D])

30. In or around March 1993, [D] told Respondent, her co-worker, of her desire to retain a lawyer for the purpose of seeking a divorce from her husband, who was incarcerated.

31. Respondent told [D] that he would pursue such an action for a total fee of \$500.

32. Based upon that oral agreement, on or about March 1, 1993, [D] gave Respondent \$193 in cash, for which Respondent gave her a receipt annotated "for legal services".

33. On or about March 26, 1993, [D] gave Respondent \$307 in cash, for which Respondent gave her a receipt acknowledging payment of a total of \$500 for legal services.

34. Thereafter, Respondent told [D] that he had filed her papers in the divorce action.

35. Respondent also indicated that he had sent copies to her husband by certified mail on two occasions, but had not received any response.

36. Sometime thereafter, [D] questioned Respondent about the divorce and Respondent gave her three documents purporting to be documents he had filed on her behalf.

37. At that time, there was no record of any divorce action filed on behalf of [D] in the Prothonotary's office.

38. On or about October 20, 1993, [D] phoned Respondent:

- a) She told him that she learned there was nothing filed on her behalf.
- b) She indicated that she learned Respondent had been on inactive status for some period of time.
- c) She requested that Respondent return the \$500 she had paid.

39. Respondent agreed to return the money and agreed to meet with her for that purpose.

40. Respondent failed to appear at the appointed time and did not return [D] telephone message.

41. Respondent has failed to contact [D] or in any way tender monies as refund of any part of the \$500 paid in advance.

42. Respondent was on inactive status at the time he undertook to represent [D] and he did not advise her of this.

Charge IV ([E])

43. On November 19, 1992, Respondent filed a Complaint in Civil Action in the matter of [] and [] [E] v. [F] and [G], in the [] County Court of Common Pleas.

44. On January 14, 1994, Respondent appeared before the Honorable [H] as counsel for the plaintiffs to argue defendant's preliminary objections and motions to strike off judgment.

45. Respondent was on inactive status at the time he filed the Complaint and at the time he appeared before Judge [H], but he never informed the Court of his transfer to inactive status.

Charge V ([I])

46. In April 1993, Respondent met with Attorney [J], who had represented [I] in a legal action against the [K] of [] County.

47. Respondent advised [J] that he would be entering his appearance for [I] in the matter.

48. On May 3, 1993, Respondent appeared with [J] and [L], counsel for the [K], before the Honorable [M] to present a Motion for Continuance.

49. At that time, Respondent indicated that he had entered his appearance on behalf of [I].

50. The case was listed for trial before Judge [N].

51. Neither Respondent nor [I] appeared before Judge [N] on the date listed for trial.

52. On November 10, 1993, the case was dismissed for failure to appear and prosecute.

53. The records of the [] County Prothonotary indicate that Respondent never filed his appearance of record on behalf of [I].

54. Respondent was on inactive status at the time he appeared before Judge [M] and held himself out as an attorney to the Court.

Charge VI ([O])

55. In June 1993, Respondent was retained by [O], the owner of a nightclub called "[P]" to collect on an outstanding judgment due to [P] from [Q].

56. At the time of the retention, [O] was Respondent's landlord.

57. Respondent advised [O] that his fee for the matter would be one-third of the collection amount.

58. Respondent did not place the contingent fee in writing.

59. On or about October 6, 1993, Respondent filed a Praecipe for Writ of Execution against [Q] in the [] County Prothonotary's Office. The writ was issued and filed with the Sheriff's Department that same day.

60. Around the end of November 1993, [O] spoke with Respondent about this matter. Respondent advised [O] that:

- a) A proceeding was scheduled for December 6, 1993; and
- b) The cost associated with that proceeding was \$900.

61. Respondent requested and received a check from [O] in that amount made payable to the Sheriff's Department.

62. On or about December 9, 1993, [O] spoke with Respondent about his case in an effort to inquire about what had

transpired at the December 6 proceeding. At that time, Respondent told [O] that it had been "rescheduled" for January 3, 1994.

63. Having heard nothing further from Respondent about the case, [O] contacted the Sheriff's Department and was informed that no proceeding had taken place on December 6 and that there was nothing reschedule for January 3, 1994.

64. In a letter to Respondent dated January 3, 1994, [O] informed him that he retained new counsel and requested that Respondent return his file.

65. To date, Respondent has not returned the requested documents or otherwise communicated with [O].

66. Respondent was on inactive status at the time he undertook to represent [O], and he did not advise [O] of his status.

Charge VII ([R])

67. On August 16, 1991, [R] told Respondent that she wanted to retain a lawyer to represent her in bankruptcy proceedings.

a) Respondent told [R] that he would represent her for a fee of \$600, plus \$120 for the filing fee, to which she agreed.

b) On that same day, [R] paid Respondent \$170 by a money order, for which he gave her a receipt.

68. [R] made payments toward the fee and by October 4, 1991, she paid the entire fee and filing costs.

69. Although Respondent had not regularly represented [R] in the past, he did not provide her with the basis or rate of his fee in writing or within a reasonable time after commencing representation; however, he provided her with receipts.

70. On August 23, 1991, Respondent filed a Voluntary Petition under Chapter 7 on behalf of [R], and Respondent was immediately issued a Notice of Deficiency as to the filing and notified that all information and documents were due by September 9, 1991.

71. Thereafter, Respondent filed two separate Motions to Extend Time to complete filing, upon which he was granted an extension on each occasion.

72. On October 29, 1991, the meeting of creditors was set for November 25, 1991.

73. Respondent did not appear for the meeting of creditors.

74. On February 4, 1992, the Court gave Respondent Notice of Deficiency as to documents for [R's] Chapter 7 filings and required that the deficiency be cured by February 18, 1992.

75. On February 18, 1992, Respondent filed a Motion to Extend Time for complying with the Notice of Deficiency.

76. On February 20, 1992, the Court granted Respondent's Motion to Extend Time and directed that the case would be dismissed unless the information required for the Petition was completed by March 2, 1992 and that no further extensions would be granted.

77. Thereafter, on March 3 and on March 25, 1992, Respondent filed two more Motions to Extend Time, and extensions were granted to March 18 and April 2, 1992.

78. On April 2, 1992, Respondent filed another Motion to Extend Time for filing completion of the amendments in compliance

with the Notice of Deficiency but had not filed such amendments for April 8, 1992.

79. On April 8, 1992, [R's] bankruptcy petition was dismissed.

80. On April 10, 1992, with regard to Respondent's prior April 2 Motion, the Court issued an Order denying it and requiring payment of a new filing fee and a Motion to Reopen Complainant's Chapter 7 case.

81. On May 15, 1992, Respondent filed a Motion to Extend Time, and on May 20, 1992, the Court issued an Order denying Respondent's latest Motion, and again requiring payment of a new filing fee and a Motion, in order to reopen the case.

82. Respondent never filed a Motion to Reopen the Chapter 7 bankruptcy on behalf of [R].

83. Respondent did not tell [R] that her case had been dismissed.

84. In about September 1992, [R] contacted the Office of the Chapter 7 Trustee and learned for the first time that her case had been dismissed.

85. On or about November 9, 1992, [R] met with Attorney [S] of [T] Legal Services about her case, after which Attorney [S] contacted Respondent by telephone to seek assurance that Respondent would resume bankruptcy proceedings on behalf of [R].

86. Respondent advised Attorney [S] that he would resume the bankruptcy proceedings at no additional cost to [R]. Attorney [S] memorialized this conversation in a letter to Respondent dated November 10, 1992.

87. On November 20, 1992, Respondent filed a Voluntary Petition on behalf of [R] under Chapter 13 of the Bankruptcy Code. Respondent was immediately issued a Notice regarding deficiency as to that filing and was advised that all information and documents were due by December 17, 1992.

88. Respondent never corrected that deficiency.

89. Respondent had included in the filing of the Chapter 13 Petition, a request to pay the filing fee in installments and on

November 23, 1992, an Order granted that request, scheduling payments of \$30 to be due November 30, December 7, 14, and 21, 1992.

90. Respondent made one payment of \$30 on December 7, 1992, but made no others.

91. On February 2, 1993, one of [R's] creditors filed a Motion for Relief from Stay and that relief was granted by Default Order.

92. On February 11, 1993, Chapter 13 Trustee [U] filed an Objection to the plan filed in this case. A hearing was scheduled on the objection for March 3, 1993. A Certificate of Service dated February 11, 1993 reflected service by mail on Respondent of the Trustee's objection.

93. At or around that time, Respondent told [R] that he was working on the preparation for the March 3, 1993 hearing, and that he would see her there.

94. Respondent failed to attend the hearing.

95. Respondent took no further actions on [R's] case, and she retained other counsel in March 1993.

96. Although [R] requested a refund of the fee paid to Respondent by letter dated November 16, 1993, Respondent has never refunded any portion of the fee, nor has he communicated with [R] in any other manner.

97. In June 1994, Respondent obtained regular employment with [] County Children and Youth Services. He represents indigent parties in custody matters and has supervision and guidance in this position.

98. Respondent works solely for Children and Youth Services and does not perform work for private clients.

99. Respondent has not informed his employer of the instant proceedings as he is afraid he will lose his job. (N.T. 34)

100. Respondent does not dispute that he engaged in the above misconduct as stipulated to by the parties; however, he testified that during the time frame in question he was a sole practitioner, and he suffered from many financial stresses and never seemed to have the required fee. (N.T. 15)

101. Respondent testified that he did not regard his inactive status as seriously as he should have. (N.T. 15-16)

102. Respondent assumed that he could earn enough money and send it in and everything would be okay. (N.T. 16)

103. Respondent testified that he became aware of his obligation to pay the fee when notice came in the mail in 1991. (N.T. 39)

104. Respondent first paid the fee in 1994, three years after he was admitted to this jurisdiction. (N.T. 40)

105. Respondent represented to the Hearing Committee that he was current at that particular time, and he had paid his fee at least one week prior to the disciplinary hearing. (N.T. 41)

106. Deposition testimony of Attorney Registrar [A] evidences that Respondent's registration fee was postmarked September 7, 1995, the date of the hearing and was not received by the Office of the Secretary until September 12, 1995.

III. CONCLUSIONS OF LAW

Respondent violated Rule 1.3 when he failed to act with reasonable diligence and promptness in representing his clients in the [B], [C], [D] and [R] matters.

Respondent violated Rule 1.4(a) when he failed to keep his client informed about the status of a matter and failed to promptly comply with reasonable requests for information in the [D] and [R] matters.

Respondent violated Rule 1.5(b) when he failed to communicate the basis or rate of his fee in writing in the [R] matter.

Respondent violated Rule 1.5(c) when he failed to put a contingent fee in writing and failed to state in writing the method by which the fee was to be determined in the [O] matter.

Respondent violated Rule 1.16(d) when he failed to take steps to the extent reasonably practicable to protect a client's interest in the [B], [O], and [R] matters.

Respondent violated Rule 5.5(b) when he engaged in the unauthorized practice of law in the [B], [C], [D], [I], [O], and [R] matters.

Respondent violated Rule 8.4(c) when he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation relative to his conduct in the above matters.

Respondent violated Rule 217, Pa.R.D.E., in that he had a continuing responsibility to provide notice of his inactive status to all persons with whom he expected to have professional contact where there was a reasonable probability that it may have been inferred that Respondent was an attorney in good standing.

IV. DISCUSSION

This matter is before the Board on a Petition for Discipline alleging that Respondent practiced law while on inactive status and committed other acts of professional misconduct relative to his representation of seven clients. Furthermore, Petitioner contends that Respondent made a material misrepresentation to the Hearing Committee and Petitioner at the disciplinary hearing relative to his registration fee that was due at that time.

Respondent entered into a stipulation with Petitioner as to the essential facts and does not deny that he engaged in the practice of law while he was inactive, nor does he dispute his ineptitude in handling his clients' cases. Based on the clear and

convincing evidence of record, the Board finds that Petitioner met its burden of proof that Respondent engaged in misconduct constituting a violation of the Rules of Professional Conduct and the Pennsylvania Rules of Disciplinary Enforcement. As a result of this finding, the Board must determine the appropriate measure of discipline to be imposed on Respondent. This case must be analyzed according to the totality of the facts. The nature and gravity of the offending conduct, as well as the presence of mitigating and/or aggravating circumstances, and the existence of a record of prior discipline are factors that the Board considers when making a decision. Prior case law involving similar misconduct, while not conclusive as to the appropriate discipline to be imposed, is instructive.

Respondent testified in his defense and explained his reasons for engaging in the misconduct. Respondent testified that at the time period in question, he was a sole practitioner with a family to support and little income. He believed that it would be acceptable if he paid his fee when he had enough money, and he testified that he did not know that his failure to pay his annual registration fee would result in his being made inactive. Respondent now realizes that he was wrong to so lightly regard the payment of his annual registration fee.

As to Respondent's misconduct in handling client matters, he testified that in hindsight he understands that he should not have accepted the cases, because he lacked the appropriate experience in certain areas of the law. He knew that the cases had flaws in them, but he took them anyway because of his dire financial situation. He expressed his remorse that these clients suffered due to his inexperience.

Respondent's employment situation has improved. He is currently employed by [] County Children and Youth Services to represent indigent parties in custody cases. Respondent does not engage in private practice. Respondent testified that this position has taught him how to practice law, as he now has a supervisor to whom he can direct questions and seek guidance. Respondent has not informed his supervisor of the instant proceedings, and he is very concerned that he will lose his job should public discipline be prescribed. Respondent understands that he deserves some type of discipline based on his conduct, yet he feels that he is finally at a point in his career where he is stable.

The Hearing Committee recommended a "public reprimand" based on their interpretation of the evidence. It should be noted that the sanction of "public reprimand" does not exist in Pennsylvania. (Rule 204, Pa.R.D.E.) The Committee could have recommended

a private reprimand or a public censure. A public censure is public discipline imposed by the Supreme Court of Pennsylvania. A private reprimand is private discipline imposed by the Disciplinary Board. It appears that the Committee thought that public discipline was appropriate in this matter from the use of the term "public" in their recommendation. Petitioner argues that this case is a public discipline case, but a suspension for at least one year and one day is the appropriate sanction in light of Respondent's misconduct and his false testimony at the hearing, which constitutes an aggravating factor. Petitioner cites cases that range in severity from public censure to disbarment. Review of the totality of the facts convinces the Board that this is not a disbarment case, or even a lengthy suspension situation. In a case similar to the case at bar, an attorney failed to pursue his clients' interests and failed to keep them informed as to the status of their cases. In re Anonymous No. 131 DB 90, 17 Pa. D. & C. 4th 170 (1992). He failed to promptly return property and funds in a timely manner and misappropriated client funds. He was placed on inactive status in 1989, during the time frame of this misconduct, but he continued to represent his clients without informing them of this changed status. He was placed on active status in March 1991. This attorney had three prior incidents of discipline consisting of two informal admonitions and one private reprimand. He received a six month suspension and a practice monitor for one year.

Another element that must be considered in this case is Respondent's misrepresentation to the Hearing Committee and Petitioner that his annual fee for the year 1995-1996 was current.

Respondent testified that he paid the fee at least one week prior to the hearing. He testified that he paid it by money order, and he remembered paying it because he got paid at the same time at his job. (N.T. 41) He did not have a receipt at the hearing to substantiate his claim. The record was held open to take the deposition of the Attorney Registrar as to whether her office had received Respondent's fee. The Registrar testified that Respondent's fee was postmarked September 7, 1995, the date of the hearing and was not received by her office until September 12, 1995. It is apparent from this evidence that Respondent did not send his fee until the day of the hearing but testified otherwise at the hearing. Respondent's misrepresentation to the Committee and to Petitioner may be considered an aggravating factor in this matter. In re Anonymous No. 17 DB 86, 14 Pa.D. & C. 4th 254 (1991). The instant case is based in part on Respondent's practice of law while on inactive status, yet it appears that Respondent is still having trouble understanding the importance of timely paying his fee.

Other factors exist in this case which the Board must weigh in determining the ultimate sanction. Respondent's failure to refund unearned fees to several clients may be considered as an aggravating factor. Respondent did not explain why he did not return these funds, and he has taken no steps since the Petition for Discipline was filed against him to make reimbursement to these clients. Such failure to act constitutes an aggravating factor, as failure to refund unearned fees is unacceptable behavior. In re Anonymous No. 47 & 89 DB 87 & 15 & 23 DB 88, 12 Pa. D. & C. 4th 122 (1990).

In Respondent's favor is his lack of disciplinary record and his remorse, which may be considered as a mitigating factor. Office of Disciplinary Counsel v. Christie, 536 Pa. 394, 639 A.2d 782 (1994); Office of Disciplinary Counsel v. Anonymous Attorney, 536 Pa. 26, 637 A.2d 615 (1994).

Balancing the above factors with the underlying misconduct, the Board is persuaded that a six month suspension is appropriate. Such a sanction will protect the public and preserve the integrity of the profession and simultaneously emphasize to Respondent that his behavior will not be tolerated.

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 six (6) months.

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: _____
Mary Watson Carson, Member

Date: November 6, 1996

Board Member Paris recused himself.

Board Members Kerns, Witherel and Miller dissented and would recommend a one (1) year and one (1) day suspension.

O R D E R

PER CURIAM:

AND NOW, this 30th day of December, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated November 6, 1996, it is hereby

ORDERED that [RESPONDENT] be and he is SUSPENDED from the Bar of this Commonwealth for a period of one year and one day 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.

Mr. Justice Cappy dissents.