

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 46, Disciplinary Docket
Petitioner : No. 3 - Supreme Court
:
:
v. : No. 83 DB 1994 - Disciplinary
Board
:
:
: Attorney Registration No. []
[ANONYMOUS] :
Respondent : ([] County)

REPORT AND RECOMMENDATIONS OF
THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(d)(2)(iii) of the Pennsylvania Rules of Disciplinary Enforcement, The Disciplinary Board of the Supreme Court of Pennsylvania ("Board") herewith submits its findings and recommendations to your Honorable Court with respect to the above-captioned Petition for Discipline.

I. HISTORY OF PROCEEDINGS

On March 31, 1994, Respondent pleaded guilty to one count of theft by failure to make required disposition of funds,

one count of theft by unlawful taking or disposition, and one count of bad checks. Respondent was sentenced to seven years probation. Respondent's criminal conviction was referred to the Supreme Court of Pennsylvania. By Order of August 18, 1994, the Supreme Court referred the matter to the Disciplinary Board pursuant to Rule 214(f)(1), Pa.R.D.E. By Order of the Pennsylvania Supreme Court dated June 17, 1994, Respondent was transferred to inactive status effective July 18, 1994, for failure to comply with the Pennsylvania Rules for Continuing Legal Education, pursuant to Rule 111(b), Pa.R.C.L.E.

A Petition for Discipline was filed against Respondent on September 23, 1994, on the basis of his conviction. Respondent did not file an Answer. A hearing on this matter was held on February 1, 1995 before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire and [], Esquire. Respondent appeared on his own behalf. Office of Disciplinary Counsel was represented by [], Esquire. The Committee filed its Report on August 9, 1995 and recommended a three month suspension followed by a two year probationary period with a practice monitor. No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board

at the meeting of October 6, 1995.

II. FINDINGS OF FACT

1. Petitioner, whose principal office is located at Suite 400, Union Trust Building, 501 Grant Street, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa.R.D.E.), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, [], Esquire was born in 1954, was admitted to practice law in the Commonwealth of Pennsylvania in 1979, and his home address is []. [Respondent] is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. By check dated February 25, 1992, in the amount of \$10,000, made payable to "[A] and [Respondent], his attorney", [B] Insurance Company settled the claim of [A] against their insured, [C].

4. On or about March 2, 1992, the check was deposited into [Respondent's] escrow account located at [D], account number

[], captioned "[Respondent], Esquire".

5. The portion due to [A], approximately \$8,300, was not immediately delivered to [A].

6. From March 10, 1992 to May 29, 1992, [A] telephoned [Respondent's] office on several occasions to inquire as to when he would receive the settlement funds.

7. [Respondent] provided [A] with check number 0210, written on [D] Account number [], in the amount of \$8,798, which represented the full amount due and owing to [A] from the proceeds of the \$10,000 settlement, plus interest at six percent.

8. [A] thereafter attempted to negotiate the check; however, the bank refused to honor the check due to insufficient fund in [Respondent's] account.

9. On about June 2, 1992, [Respondent] provided a Cashier's Check to [A] in the amount of \$8,798.

10. On July 7, 1992, [Respondent] purchased a Cashier's Check number 2170506 made payable to [E] Investment Company for \$3,046.39 at the [F] branch of [D].

11. On July 8, 1992, [Respondent] went back to the [F] branch of [D] and had a stop payment placed on check number 2170506 as he indicated that the check had either been lost or destroyed.

12. Replacement check number 2170510 was issued in the amount of \$3,046.39.

13. [Respondent] forwarded the replacement check to [E] Investment Company.

14. On September 8, 1992, [Respondent] presented to the [D] branch located at [G] the original Cashier's Check, number 2170506, in the amount of \$3,046.39 dated July 7, 1992.

15. At that time, [Respondent] indicated to [H], Manager, that he no longer needed the check to be made payable to his mortgage company and requested that the Cashier's Check be applied to his personal account, number [], which had obtained a negative balance.

16. [H] typed on the back of the check "not used for intended purpose returned by purchaser" and deposited the check into [Respondent's] account.

17. Of the \$3,046.39, \$2,970.13 was applied to [Respondent's] account and [Respondent] was presented with \$76.27 in cash.

18. On that same date, [Respondent] also requested cash for a [I] Bank check number 102 made payable to "Cash" dated February 5, 1992 in the amount of \$3,000.

19. The date on the check was changed by [H] to

September 8, 1992 and [Respondent] was given \$3,000 in cash.

20. The [I] Bank check was then returned N.S.F., as [I] Bank refused to grant [Respondent] additional credit.

21. Subsequently, [Respondent] made restitution to [J] Bank (formerly [D]), in the amount of \$6,046.

22. As a result of [Respondent's] conduct, on July 14, 1993, a five-count criminal information was filed in the [] County, Pennsylvania Court of Common Pleas at Criminal Complaint Number [].

a) Count 1 of the information charged [Respondent] with theft by failure to make required disposition of funds received on behalf of his client, [A], in violation of 18 Pa.C.S. §3927.

b) Count 2 of the information charged [Respondent] with forgery, in violation of 18 Pa.C.S. §4101.

c) Count 3 of the information charged [Respondent] with theft by deception, in violation of 18 Pa.C.S. §3922.

d) Count 4 of the information charged [Respondent] with theft by unlawful taking or

disposition of United States currency belonging to [D], in violation of 18 Pa.C.S. §3921.

e) Count 5 of the information charged [Respondent] with bad checks in regard to a sight order which was not honored by the drawee, [I] Bank, in violation of 18 Pa.C.S. §4105.

23. On March 31, 1994, [Respondent] appeared before Judge [K] of the [] County Court of Common Pleas and entered a plea of guilty as to Counts 1, 4 and 5 of the information. Upon motion of the Assistant District Attorney, Counts 2 and 3 were dismissed by the Court.

24. Also on March 31, 1994, [Respondent] was sentenced by Judge [K].

a) On Count 4, [Respondent] was released on probation for a period of seven years, with conditions. [Respondent] was ordered to pay restitution in the amount of \$6,046.00 to [J] Bank formerly [D]), and to pay the costs of prosecution. Restitution and costs were to be paid at no less than \$50.00 per month. Further, [Respondent] was ordered to perform 500 hours of prescribed volunteer work.

b) On Count 5, [Respondent] was released on probation for a period of two years, with conditions. [Respondent] was ordered to pay the costs of prosecution. The sentence on this count was to run concurrently with that which was imposed on Count 4.

c) On Count 1, [Respondent] was sentenced to no further penalty, and was ordered to pay the costs of prosecution.

25. Following [Respondent's] conviction for the offenses of theft by failure to make required disposition of funds received, theft by unlawful taking or disposition and bad checks, by order dated August 18, 1994, the Supreme Court of Pennsylvania referred this matter to the Disciplinary Board pursuant to Rule 214(f) Pa.R.D.E.

26. Respondent has no prior record of attorney discipline.

27. Respondent is currently on inactive status because he failed to meet his CLE requirements.

III. CONCLUSIONS OF LAW

Respondent's conviction on charges of theft by failure to make required disposition of funds, theft by unlawful taking,

and bad checks is a conviction under Rule 214(d), Pa.R.D.E.

Respondent's conviction constitutes a per se individual basis for discipline under Rule 203(b)(1), Pa.R.D.E.

IV. DISCUSSION

Respondent's criminal conviction constitutes a per se individual ground for discipline pursuant to Rule 203(b)(1), Pa.R.D.E. As Respondent's misconduct establishes a basis for the imposition of discipline, the sole issue for disposition in this matter is the appropriate measure of discipline to be imposed.

The primary purpose of this Commonwealth's system of lawyer discipline is to protect the public from unfit attorneys and to maintain the integrity of the legal system. **Office of Disciplinary Counsel v. Stern**, 515 Pa. 68, 526 A.2d 1180 (1987).

Disciplinary sanctions are therefore not primarily designed for their punitive effects, but seek to determine the fitness of an officer of the court to continue in that capacity. **Office of Disciplinary Counsel v. Duffield**, 537 Pa. 485, 644 A.2d 1186 (1994).

In order to determine the type of discipline warranted by Respondent's actions, the Board must judiciously consider and evaluate the facts which gave rise to the criminal charges as well as any mitigating or aggravating circumstances. **Office of**

Disciplinary Counsel v. Eilberg, 497 Pa. 388, 441 A.2d 1193 (1982).

Respondent pleaded guilty to two theft charges and one bad checks charge. The background of this conviction can be summarized as follows. In the first situation, Respondent received a settlement check on behalf of his client. He deposited this check into his escrow account at [D]. Respondent provided his client with a check written on the [D] account. When his client attempted to negotiate the check the bank refused to honor it due to insufficient funds. In the second situation, Respondent purchased a cashier's check to pay his mortgage and stopped payment on the check as he thought it was lost. A replacement check was issued for the mortgage company. Respondent later found the first check and deposited that same check to his personal account. He requested cash for a [I] Bank check, which was returned due to insufficient funds.

At the hearing, Respondent explained that he never opened his bank statements; he never knew the balance in his accounts; and it was his practice to write checks without this knowledge and rely on his banker friend to cover for him. This pattern continued for a length of time and eventually caught up with Respondent when he moved to [F] and the bank manager at his

new branch would not cover for him. Respondent admitted he was very inept at handling financial and business matters. The Committee found, and Petitioner agreed, that Respondent did not act intentionally to defraud but was extremely careless and ignorant about the state of his bank accounts. The Committee recommended a three month suspension, with two years probation and a practice monitor.

It is the Board's recommendation that Respondent receive a longer suspension than three months. Respondent was convicted of two felony counts and one misdemeanor. The Board will not lightly regard this conviction. Review of other theft cases indicates that conviction for theft can result in disbarment. In *Office of Disciplinary Counsel v. Costigan*, 526 Pa. 16, 584 A.2d 296 (1990), an attorney was disbarred for conviction on six counts of theft, one count of conspiracy and one count of aiding in the consummation of a crime. The facts of *Costigan* are more egregious than the facts of the instant case, as *Costigan* was convicted of more than theft. The Supreme Court therein did not find any circumstances that would mitigate the severity of Respondent's crimes. The Court determined that disbarment was the appropriate sanction. In the instant case, mitigating factors exist. No finding of intent to defraud was

made by the Committee. The Committee found that Respondent was inept and careless in his manner of administering his affairs. Lack of administrative skills does not serve as an excuse for misconduct; however, such evidence may be considered when determining the appropriate sanction. ***In Re Anonymous No. 58 DB 89***, 10 Pa. D. & C. 4th 545 (1990). Respondent has no prior record of discipline. Respondent made his client whole by paying his client with interest after the original check issued was not honored.

In the case of ***In Re Anonymous No. 32 DB 83***, 37 Pa. D. & C. 3d 198 (1984), an attorney convicted of two counts of theft by failure to make required disposition was disbarred. Aggravating factors existed in this case, as it was found that the attorney committed forgery and commingled and converted client funds. No mitigating circumstances were found. The instant case can be distinguished as the mitigating factors discussed above are present. The Board does not believe that the instant case warrants disbarment; however, in light of the two felony counts, a one year suspension is appropriate.

The Board agrees with the Committee that probation with a practice monitor is appropriate as well. Respondent candidly admits that he does not understand how to keep his bank accounts

organized. Respondent needs guidance in implementing and running the business side of his law practice. In the case of ***In Re Anonymous No. 61 DB 92***, 19 Pa. D. & C. 4th 494 (1993), an attorney failed to timely distribute settlement funds to a client and wrongfully commingled and converted client funds. The Board recommended a one year suspension; however, the Supreme Court rejected this proposal and imposed a two year probationary period with a practice monitor. Although the cited case is not a criminal conviction case, it is similar in that the attorney failed to timely turn over settlement funds and engaged in theft.

The Supreme Court determined that this type of conduct warranted a practice monitor. The instant case presents a stronger argument for a practice monitor, as Respondent engaged in a pattern of incompetence and mismanagement as a result of his lack of financial and business acumen. A practice monitor will ensure that Respondent has an adequate understanding of the business portion of his practice. ***Office of Disciplinary Counsel v. Geisler***, 532 Pa. 56, 614 A.2d 1134 (1992).

Upon consideration of the unique facts of this case and the mitigating circumstances present, the Board recommends a one year suspension followed by a two year probation period and a practice monitor. This sanction will impress upon Respondent the

seriousness of his misconduct and effectuate the purpose of the disciplinary system by protecting the public and the integrity of 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, [], shall be suspended for a period of one year followed by probation for a period of two years, subject to the following conditions:

Respondent shall be required to select a practice monitor subject to the approval of the Office of Disciplinary Counsel. The practice monitor shall do the following during the period of Respondent's probation:

- a) Periodically examine Respondent's office and escrow accounts, clients' ledgers, and other financial records to ensure that the Respondent has appropriately maintained such records and is aware of the proper manner of handling funds and keeping appropriate records pertaining thereto;
- b) Periodically, but not less than once every sixty days, examine Respondent's financial records to ensure continued compliance with proper handling of funds;
- c) Meet with Respondent at least monthly to examine Respondent's progress;
- d) File with the Secretary of the Board quarterly written reports verifying that the

above conditions have been met; and

e) Immediately report to the Secretary of the Board any violation by the Respondent of the terms and conditions of probation.

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: _____
Penina K. Lieber, Member

Date: February 20, 1996

Board Member Kerns dissents and would recommend a one year and one day suspension.

Board Members Paris and George did not participate in the October 6, 1995 adjudication.

PER CURIAM:

AND NOW, this 13th day of March, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 20, 1996, it is hereby

ORDERED that [Respondent] be and he is SUSPENDED from the Bar of this Commonwealth for a period of one (1) year, to be followed by two years' probation with a practice monitor, 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.