BEFORE THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	No. 668, Disciplinary Docket No. 3 Supreme Court No. 49 DB 1998 – Disciplinary Board
v.	
[ANONYMOUS] Respondent	ATTORNEY REG. NO. [ ] ([ ] County)

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

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

MORRIS, J., *Member of the Board*.

I. HISTORY OF PROCEEDINGS

This matter involves the conduct of an experienced attorney with no prior disciplinary record who wrongfully appropriated approximately $31,500 of funds which belonged to his firm. The conduct occurred over a four-month period in 1996.

A Petition for Discipline was filed on May 20, 1998, and a hearing was held before Hearing Committee [ ] on March 22, 1999. Following the hearing, Respondent made application to re-open the record concerning psychiatric testimony which he had presented. This application was opposed by the Office of Disciplinary Counsel and was denied by the Hearing Committee.

On May 16, 2000, the Hearing Committee filed its report, finding various disciplinary violations and recommending a six-month suspension and psychiatric treatment. Respondent filed exceptions and requested oral argument.

On October 11, 2000, oral argument was held before a three-person panel of the Disciplinary Board. The primary issues advanced by Respondent during oral argument were (1) his re-application to open the record as to the proffered psychiatric testimony; and (2) the appropriateness of the recommended discipline.

The matter was adjudicated by the Disciplinary Board of November 15, 2000.

II. FINDINGS OF FACT

1. Petitioner, Office of Disciplinary Counsel, whose principal office is located at Suite 3710, One Oxford Centre, Pittsburgh, Pennsylvania, is invested, pursuant to *Rule 207 Pa. R.D.E.*, with the power and duty to investigate all matters involving alleged misconduct of any 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, [ ], is an attorney admitted to practice in the Commonwealth of Pennsylvania, having been admitted to practice on or about January 12, 1982. Respondent maintains an office at [ ]. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. After his admission to the Bar in 1982, Respondent became employed by the firm of [A] (hereinafter "[A]"). From 1987 through 1998, Respondent was a shareholder in that firm.

4. Between April 26, 1996 and July 17, 1996, Respondent engaged in six separate transactions in which he misappropriated funds which belonged to his firm. On each of these occasions, Respondent participated in the settlement of a commercial transaction at which his firm

was to receive its fee at closing. On three of the occasions, Respondent took checks payable to the firm and deposited them into his account. On the other three occasions, Respondent arranged for the fee checks to be made out to him personally. Respondent deposited these checks into his account. The specific occasions were:

1. April 26, 1996 – $5,000 check payable to the firm (Ex. P-4);

2. May 16, 1996 – $2,950 check payable to Respondent (Ex. P-9);

3. May 16, 1996 – $700 check payable to the firm (Ex. P-11);

4. July 2, 1996 – $7,750 check payable to Respondent (Ex. P-14);

5. July 9, 1996 – $600 check payable to firm (Ex. P-17); and

6. July 17, 1996 – $7,250 check payable to Respondent (Ex. P-19).

5. Respondent did not notify his firm of his receipt of any of these checks (Tr. 92-93); in each case, he deposited the check into his personal checking account. (Ex. P-11.) During the entire period, Respondent expended funds from this account for his personal use and benefit. (Exs. P-6, P-7, P-8, P-12, P-13, P-16, P-18, P-20, and P-21.)

6. During the period of these transactions, Respondent was experiencing financial difficulties. (Tr. 239-40, 318.)

7. In the late summer of 1996, Respondent's partners confronted him regarding the whereabouts of these fees and his handling of funds of the firm. (Tr. 114-118, 122-123, 259-260.)

8. Discussions between Respondent and his partners concerned missing fees, reconciliation of various firm accounts, and his use of firm funds to pay certain obligations of a personal real estate venture.[1]

9. Following confrontation by and discussion with his partners, Respondent, on September 18, 1996, agreed to repay his firm $18,900 to settle various accounts including the missing fees that the partners had discovered and which Respondent admitted taking. (Tr. 292-293; Ex. R-1.)

10. However, at that point, the partners had discovered and Respondent admitted taking only those checks which had been made payable to the firm. Respondent did not mention the other three checks which he arranged to be payable to himself. (Tr. 292-303.)

11. Similarly, on December 9, 1996, Respondent signed a Memorandum of Undertaking with [A] in which he represented that he had truthfully disclosed all misappropriations. (Ex. P-31, ¶ 26.)

12. Respondent eventually admitted to and repaid the remaining misappropriated funds in January of 1997, after the filing of the Petition for Discipline. (Tr. 317.)

13. Beginning in October of 1996 and continuing for about a year, Respondent received psychiatric counseling for mental problems including depression. (Tr. 317.)

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[1]Respondent and his father were attempting to develop a family-owned parcel called [B]. Respondent paid certain expenses of the project from the firm account. (Tr. 40-45, 74-75, 245-249; Exhs. P-1, P-23, P-24.) Office of Disciplinary Counsel charged Respondent with various violations stemming from these transactions. (Petition for Discipline, Charge II) The Hearing Panel did not sustain any charges relating to these transactions based upon their finding that such uses of the firm account were customary within the firm. (Hearing Committee Report, FOF 131, 132.) Office of Disciplinary Counsel did not press Charge II in argument before the Disciplinary Board Panel.

The Board is satisfied that the Hearing Panel properly found no disciplinary violations in connection with Charge II.

14. Respondent has no prior disciplinary record.

15. Prior to these occurrences, Respondent enjoyed a good reputation in the [ ] County legal community for honesty and competence. (Tr. 172-174.)

III. CONCLUSIONS OF LAW

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

1. RPC 1.15(a) – requiring that property of another person be held separately from an attorney's own property;

2. RPC 1.15(b) – requiring prompt notification and delivery of property belonging to another person;

3. RPC 8.4(b) – prohibiting criminal acts which reflect upon an attorney's fitness. (*See 18 Pa.C.S.A. § 3972* – "Theft by failure to make required disposition of funds received" – and *18 Pa.C.S.A. § 4101* – "Forgery."); and

4. RPC 8.4(c) – prohibiting dishonest or fraudulent conduct.

17. The conduct described above does not constitute a violation of RPC 8.4(d) which prohibits conduct prejudicial to the administration of justice.

18. Respondent committed no disciplinary violations in connection with Charge II of the Petition for Discipline.

19. The Hearing Panel properly denied Respondent's request to re-open the record regarding psychiatric testimony.

IV. DISCUSSION

After 14 years as a member of the bar and contrary to his otherwise good reputation, Respondent, over a four-month period in 1996, sought to resolve personal financial difficulties by misappropriating funds from the law firm in which he was a shareholder. On six occasions, Respondent appeared at commercial settlements, collected fees owed to his firm, and then deposited those fees into his personal bank account. The misappropriation totaled approximately $31,500.

The hardship which motivated these thefts stemmed from his firm's decision, motivated by its own difficulties, to forego the annual bonuses which Respondent had counted upon. Needless to say, Respondent's solution of his own financial problem did not go unnoticed by the other members of the firm, who confronted him as to the whereabouts of the fees. Initially, Respondent admitted to roughly half of his wrongdoing and undertook to repay that portion of his peculation. Eventually, the entirety of the matter became known and, after initiation of the Petition for Discipline, Respondent repaid the remainder.

In his Answer to the Petition for Discipline and throughout the committee hearing, Respondent offered explanations for his conduct which do not constitute defenses. As he now recognizes, his unexpected shortage of funds, his intent to eventually repay the sums, the somewhat loose practices in his firm, the fact that other sums may have been owed to him by the firm, the cheapness and unfairness of his partners, as well as their harsh attitude as the facts became known [2] neither excuse nor mitigate the offenses.

[2]The record reflects and the Hearing Committee chose to note (*see* FOF § 123-126) that the firm extracted more than its pound of flesh from Respondent, both financially and emotionally – *i.e.*, the daily peeling off of one letter of Respondent's name from the firm's sign. The Board, however, sees no retroactive relevance of the unworthy behavior of his partners.

Rather, at the Panel argument Respondent basically argued mitigation and, to do so, argued that he should be entitled to re-open the record in order to supply testimony which would support that plea.[3]

Basically, Respondent's problem is that the testimony offered at the hearing failed to support mitigation as set forth in *Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A.2d 894 (1989).* The submitted evidence consisted of a report from a forensic psychiatrist, [C], M.D., who concluded that Respondent's depression was caused by his disciplinary offenses. (Ex. P-2, page 10, § 11.)[4] Respondent now proposes to re-submit a re-edited version of the report which would reverse the cause and effect.

The Hearing Committee denied this request as did the three-member Panel of the Disciplinary Board. The full Board adheres to this position. In any case the Board would be reluctant to further delay adjudication of offenses which occurred four years ago where a full hearing has been held and where Respondent has been represented throughout by excellent counsel. Here, however, this decision is made easier by an examination of the psychiatric report which, even with a relocation of the key words, would not support the claim of mitigation. In short, the report does not explain and far less does it convince how these offenses were caused by childhood difficulties, feelings of inadequacy, or by the diagnosed dysthemic disorder. In reading the report in the context

[3]Respondent also argued two technical points with which the Board agrees. First, Respondent objected to the finding of a violation of *R.P.C. 8.4(d)* – the all-purpose "prejudicial to the administration of justice" provision. Second, he objected to FOF 18 and 20 which imply a cover-up attempt as to one of the fees at issue. The Board agrees with the Respondent and notes that these adjusted findings are immaterial to the resolution of this matter.

[4]Thus, the report was introduced at the hearing by Office of Disciplinary Counsel as admissions of the charged conduct.

of the full record, it seems more likely that Respondent's current anxiety and depression were indeed caused by his offenses.

In this matter, the Petitioner has clearly carried its burden of proving ethical misconduct by a preponderance of the evidence that is clear and satisfactory. *Office of Disciplinary Counsel v. Grigsby, 493 Pa. 194, 425 A.2d 730 (1981).* The issue before the Board is therefore the measure of discipline to be imposed as a result of the misconduct.

The record discloses that Respondent, over a relatively brief period within an otherwise unblemished career, helped himself to funds which should have been promptly turned over to his firm. Beyond this unfortunate fact, the Board finds no aggravation nor, other than prior good reputation, any mitigation. Although there is no *per se* measure of discipline, the mishandling of funds is determinatively held to be a serious offense. *Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983).* Here, the breach of trust was directed not at clients but at Respondent's own firm. While this fact spares harm to the public and lessens embarrassment to the profession, the mishandling of non-client funds remains a serious offense. *See In re Anonymous, No. 32 DB 89, 13 D&C 4th 478 (1992).*

There is no doubt that the Hearing Committee's recommendation of a six-month suspension falls at the lowest end of discipline for this type of offense.[5] Compare *In re Anonymous, No. 32 DB 89, 13 D&C 4th 478 (1992)* in which misappropriation of a lesser amount of firm funds resulted in a three-year suspension. Similar discipline was imposed in the case of an uncooperative Respondent who misapplied client funds. *See In re Anonymous Attorney, 67 DB 92, 27 D&C 4th 202 (1994)* and

[5]The Hearing Committee recommended that the suspension be coupled with mandatory psychiatric treatment. This proposal is not permitted by the Rules of Disciplinary Enforcement. *R.D.E. § 204.*

in our recently adjudicated case of *In re Anonymous Attorney*, *No. 114 DB 1998 (2000)*, in which the Respondent was notoriously uncooperative.

However, in light of Respondent's cooperation throughout these proceedings and with due regard to his years of reputable practice, the Board is reluctant to ignore the recommendation of an experienced Hearing Committee, especially where Office of Disciplinary Counsel has not advocated any higher level of discipline. Thus, concluding that Respondent's conduct was an aberrant reaction to aberrant circumstances unlikely to repeat themselves in the future, the Board adopts the recommendation of the Hearing Committee.

V. RECOMMENDED DISPOSITION

It is the unanimous recommendation of the Disciplinary Board that Respondent be suspended from the practice of law for a period of six months.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

BY: _____
John W. Morris, Member

Date: March 9, 2001

Board Members Caroselli, Schultz, Rudnitsky and Teti did not participate in the November 15, 2000 adjudication.

PER CURIAM:

AND NOW, this 8th day of May, 2001, upon consideration of the Report and Recommendations of the Disciplinary Board dated March 9, 2001, 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.