

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 947, Disciplinary Docket
Petitioner : No. 2 - Supreme Court
:
:
v. : No. 90 DB 1993 - Disciplinary
Board
:
:
: Attorney Registration No. []
[ANONYMOUS] :
Respondent : ([])

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 July 15, 1993, a Rule to Show Cause why Respondent should not be placed on Temporary Suspension was issued by the Supreme Court.

On October 5, 1993, the Respondent was placed on Temporary Suspension.

On June 16, 1994, a Petition for Discipline was filed against the Respondent.

On September 9, 1994, Service of Petition for Discipline was made on Respondent.

On September 21, 1994, a request for a continuance of Hearing was made by the Respondent.

On October 7, 1994, the Disciplinary Board Ordered that the Hearing be scheduled after August 17, 1995.

On August 25, 1995, the matter was referred to Hearing Committee [], consisting of [], Esquire, Chairperson, [], Esquire and [], Esquire, Members.

On September 15, 1995, a Disciplinary Hearing was held.

On March 4, 1996, a Hearing Committee Report was filed recommending a five (5) year suspension.

This matter was adjudicated at the April 30, 1996 meeting of the Disciplinary Board.

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. The Respondent, [], was born on November 15, 1949. He was admitted to practice law in the Commonwealth on June 5, 1980 and resides at []. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. On October 9, 1990, the Respondent was indicted on five counts in a criminal action brought before the United States District Court for the District of Columbia.

4. The charges involved allegations that the Respondent had assisted [A], an alien who was a fugitive from justice in England, to obtain illegally a United States passport by establishing a false identity for [A]. The facts of the criminal case were stated by the United States Court of Appeals as follows:

The facts are essentially undisputed. Acting on behalf of a client on November 1, 1989, [Respondent], who is an attorney, obtained a birth certificate from the Maryland Vital Records Office bearing the name [B]. Subsequently, on November 13, he signed an Affidavit in support of the same client's application for a United States passport. [Respondent] swore that he had known the applicant

for five years, that he knew the applicant was a United States citizen, and that the applicant's name was [B]. The birth certificate was used as proof of identity in the passport application.

5. The behavior of Respondent as stated in Finding of Fact No. 4 was the subject of a jury trial held between June 28 and July 3, 1990, when Respondent was charged with violating 18 U.S.C. §1028(a)(4). Respondent was acquitted of this violation, which involved the exact behavior upon which Respondent was later tried during March 2 through March 5, 1992.

6. Respondent went to trial on four of the five counts before a jury, with Judge [C] presiding, on March 5, 1992. Count 2 of the indictment was dismissed before trial.

7. On March 5, 1992, the jury entered a verdict of not guilty as to Counts 1 and 3, and guilty as to Counts 4 and 5 charging violation of the following statutes:

- a) 18 U.S.C. §1542, passport fraud, and
- b) 18 U.S.C. §2, passport fraud, aiding and abetting.

The aforesaid violations were the two counts on which the jury was hung in the initial prosecution of Respondent.

8. Respondent filed an appeal for his conviction, which was dismissed by the United States Court of Appeals, District of Columbia Circuit, by Opinion dated May 7, 1992 on the

grounds the Order appealed from was not final.

9. On May 13, 1992, Respondent was sentenced by Judge [C] (Petitioner's Exhibit No. 3). Respondent received the following sentence

- a) Twelve (12) months incarceration each on Counts 4 and 5 to be served concurrently;
- b) Two (2) years of supervised release on Counts 4 and 5 to run concurrently;
- c) Special Assessment of \$100.00;
- d) In lieu of a fine, two hundred (200 hours of community service.

10. Respondent filed a Notice of Appeal to the United States Court of Appeals on May 15, 1992. This appeal was docketed to No. [] in the United States Court of Appeals, District of Columbia Circuit.

11. On July 27, 1993, the United States Court of Appeals, District of Columbia Circuit, entered an Opinion and Order affirming the Respondent's conviction and sentence. ([Respondent] v. United States, [] (D.C. Cir. 1993))

12. Respondent filed a Petition for Writ of Certiorari with the United States Supreme Court. Certiorari was denied on February 22, 1994 ([Respondent] v. United States, cert. den., [] (2/22/94).)

13. The Respondent petitioned the Supreme Court for rehearing, which was denied April 18, 1994 ([Respondent] v. United States, ren. den., [] (4/18/94))

14. By Order dated May 22, 1992, the United States Court of Appeals, District of Columbia Circuit, suspended the Respondent from the practice of law in the District of Columbia and referred the matter to the Board on Professional Responsibility for disciplinary proceedings. Said proceedings have been held in abeyance pending resolution of Respondent's appeals and are still pending.

15. By Order dated October 5, 1993, the Supreme Court of Pennsylvania suspended the Respondent from the practice of law in Pennsylvania, and the instant matter was referred to the Disciplinary Board.

16. During the period of Respondent's suspension from the practice of law, Respondent has complied with all of the requirements governing suspended attorneys.

III. CONCLUSIONS OF LAW

Respondent's convictions provide an independent basis for the imposition of discipline under the terms of Rule 203(b)(1) and Rule 214 of the Pennsylvania Rules of Disciplinary Enforcement.

By the conduct for which he was convicted, Respondent has violated the following Rules of Professional Conduct:

- a) RPC 1.2(d), which forbids a lawyer to counsel or assist a client in conduct which is criminal or fraudulent;
- b) RPC 1.16(a)(1), which forbids a lawyer to represent a client if the representation will result in violation of the Rules of Professional Conduct or other law;
- c) RPC 3.3(a), which forbids a lawyer to make a false statement to a tribunal or to offer evidence that the lawyer knows to be false, and requires a lawyer to disclose material facts to the tribunal necessary to prevent criminal or fraudulent conduct by the client;
- d) RPC 4.1(a), which forbids a lawyer in the course of representing a client to make false statements of material fact to a third person;
- e) RPC 4.1(b), which requires a lawyer to disclose a material fact to a third person when necessary to avoid aiding and abetting a criminal or fraudulent act of a client;
- f) RPC 8.4(b), which forbids a lawyer to commit a criminal act that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- g) RPC 8.4(c), which forbids a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and
- h) RPC 8.4(d), which forbids a lawyer to

engage in conduct prejudicial to the administration of justice.

The prohibition on double jeopardy contained within the Fifth Amendment to the Constitution of the United States does not prevent the imposition of appropriate disciplinary action regarding the Respondent's admission to the Bar in Pennsylvania.

IV. DISCUSSION

The sole issue before this Board is the imposition of appropriate discipline. In the present case, the Hearing Committee determined that the Respondent's criminal punishment was greater because he was an attorney and that he was acquitted in his first criminal trial are factors that should be considered in mitigation of discipline. Further, that his having served twelve (12) months in prison and remorseful behavior are additional factors to be weighed when mitigating discipline.

This Board does not believe that a lawyer's having served jail time is a mitigating factor. In fact, leniency in sentencing and not prison time served should be viewed as a mitigating factor. In Re Anonymous No. 103 DB 89, 13 Pa. D.&C. 4th 238 (1991).

Secondly, the Hearing Committee incorrectly viewed the Respondent's acquittal in his first trial as a mitigating factor.

Since the criminal charges on which Respondent was acquitted did not have any effect on the disciplinary charges against him, no credence should be given to those charges. In Re Anonymous No. 17 DB 86, 14 Pa. D.&C. 4th 254 (1991).

This Board does, however, agree with the Hearing Committee that Respondent's remorsefulness and the fact that he had no previous record of discipline are appropriately considered as mitigating factors.

Therefore, given the Respondent's expressed remorse and the fact that he had no prior disciplinary record, this Board recommends a five (5) year suspension.

The remaining issue before this Board is the date from which the Respondent's suspension should run. The Petitioner correctly states that it is the practice in Pennsylvania that suspensions be made retroactive to the date when the Respondent was suspended by the Supreme Court of Pennsylvania. On October 5, 1993, the Supreme Court of Pennsylvania placed the Respondent on temporary suspension and it is this Board's decision that Respondent's suspension be made retroactive to this date.

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 five (5) years, retroactive to October 5, 1993.

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 N.C. Nix, III, Member

Date: June 13, 1996

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

PER CURIAM:

AND NOW, this 26th day of July, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated June 13, 1996, it is hereby

ORDERED that [Respondent], be and he is SUSPENDED from the Bar of this Commonwealth for a period of five (5) years, retroactive to October 5, 1993, 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.