

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, :
Petitioner : No. 28 DB 1993
:
:
v. :
: 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

A Petition for Discipline was filed against Respondent on March 24, 1993. An Answer was filed on July 6, 1993, after a request for an extension to file was granted by the Chairman of the Disciplinary Board. A hearing was held on February 3, 1994, before Hearing Committee [] comprised of Chairperson [],

Esquire, and Members [], Esquire, and [], Esquire. Respondent was represented by [], Esquire and later [], Esquire. Petitioner was represented by [], Esquire. The Committee filed its Report on February 12, 1996 and recommended a two year suspension. Respondent filed a Brief on Exceptions on March 19, 1996. Petitioner filed a Brief Opposing Exceptions on April 1, 1996.

This matter was adjudicated by the Board at the meeting held on April 30, 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 on May 14, 1930, he is currently 66 years old, and was admitted to the practice of law in

Pennsylvania on February 1, 1955. His office is located at [].

Respondent has been married for approximately forty years and has four children.

3. In 1985 and 1986, Respondent was retained by a client to represent his company in a contract matter involving another corporation.

4. By January 6, 1987, Respondent had collected \$52,874.37 on behalf of his client in the contract matter.

5. Respondent deposited these funds into his trust account, entitled "[Respondent] and Associates, P.C. Trust".

6. The funds deposited represented both his client's recovery and the contingent fee due for his representation in the contract matter.

7. Respondent agreed to retain his client's portion, and over time, satisfied the client's financial obligations as the client directed.

8. As of December 1987, Respondent should have retained somewhat in excess of \$20,000 on behalf of his client.

9. In 1987, Respondent was again retained by the client to defend his company in a landlord/tenant dispute.

10. By letter dated November 30, 1987, the client notified Respondent that another attorney was authorized to act on

his behalf.

11. By certified letter dated January 18, 1988, the client's new attorney demanded that Respondent pay a portion of the funds Respondent had retained on behalf of the client to satisfy one of the client's debtors, return the balance of funds to the client and provide a breakdown of Respondent's fees.

12. Respondent failed to respond to the certified letter dated January 18, 1988.

13. By certified letter dated March 3, 1988, the client's new attorney discharged Respondent from further representation on behalf of the client and demanded that Respondent forward the client's files to him.

14. Respondent failed to deliver to successor counsel the client's file and promptly withdraw his appearance until January of 1989.

15. On February 13, 1989, Respondent was informed that the client had filed a disciplinary complaint against him and Office of Disciplinary Counsel requested a response and documentation concerning the client's funds.

16. Respondent withdrew from the client's matter in April of 1989, approximately two months after he was notified by Office of Disciplinary Counsel of its investigation of the matter.

17. Respondent finally provided a breakdown of his fees for the client in May 1989, three months after he was notified of Office of Disciplinary Counsel's investigation and five months after he withdrew his appearance.

18. Respondent finally delivered funds belonging to the client in June 1989, four months after he was notified of Office of Disciplinary Counsel's investigation and two months after he withdrew from the client's matter.

19. On December 20, 1990, an investigative hearing was convened to which Respondent was subpoenaed to provide his financial records.

20. At the time of the investigative hearing, Respondent admitted, under oath, that through 1989 he commingled his client's funds in the trust account with his own and he converted the client's funds for his own use.

21. Specifically, between December 1986 and June 1989, Respondent admitted that he commingled the client's funds with his own in violation of DR 9-102(A) and RPC 1.15(a).

22. In addition, Respondent admitted that between June and November of 1987, he converted funds belonging to his client for his personal use in violation of DR 1-102(A)(4) and RPC 8.4(c).

23. By November 30, 1987, Respondent was out of trust by approximately \$42,000.

24. After November 1987, Respondent deposited his personal funds into his trust account to cover his obligation to the client.

25. In April and May of 1988, Respondent again converted funds belonging to his client for personal use.

26. By May 30, 1988, Respondent was again out of trust by approximately \$13,000.

27. By August 1988, Respondent made another deposit of personal funds into his trust account. These funds were loaned to him by his wife.

28. Respondent lied to his wife about the reason for his needing the extra funds.

29. In January and February 1989, Respondent again converted funds belonging to his client for his personal use.

30. By the end of February 1989, Respondent was out of trust by approximately \$8,500.

31. In June or July of 1989, Respondent made another deposit of personal funds into his trust account. These funds were loaned to him by his mother.

32. Respondent failed to disclose to his mother the

reason for needing the extra funds.

33. Respondent used client's funds to fulfill his personal and business obligations.

34. On February 7, 1988, Respondent's father died.

35. Between the spring of 1987 and February 1988, Respondent was distracted from his law practice by the hospitalization and eventual death of his father.

36. At the hearing, Dr. [A], a Board Certified psychiatrist, testified on behalf of Respondent.

37. Dr. [A] testified that Respondent suffered from pathological grieving which caused him to inflict punishment on himself for the unresolved guilt feelings he had in connection with his father's death. Dr. [A] also opined that Respondent suffered from a major depression and was unable to accomplish ordinary tasks. (N.T. 17-20)

38. Dr. [A] testified that Respondent's depression and grieving were causal factors in his mishandling of client funds. (N.T. 26)

39. Dr. [A] testified that Respondent was working effectively in therapy and attempting to gain insight into his problems in order to avoid repetition of his misconduct. (N.T. 32)

40. Respondent has been participating in bi-weekly counseling sessions with Dr. [A] since the fall of 1993. (N.T. 17)

41. Respondent expressed sincere remorse for his misconduct but did not try to excuse his actions. (N.T. 92)

42. Respondent has practiced law for over 40 years with no record of prior discipline.

III. CONCLUSIONS OF LAW

Respondent violated DR 9-102(A) and RPC 1.15(a) by commingling his client's funds with his own between December 1986 and June 1989.

Respondent violated DR 1-102(A)(4) and RPC 8.4(c) by converting funds belonging to his client for his personal use between June 1987 and July 1989.

Respondent violated DR 2-110(A)(2), 2-110(B) and 9-102(B)(3)(4) and RPC 1.15(b), 1.16(a)(3), and 1.16(d) by his failure to promptly withdraw from his representation of his client and return to client the property to which the client was entitled along with a requested accounting of the funds Respondent held on his client's behalf upon being discharged from further employment.

IV. DISCUSSION

Petitioner has demonstrated by clear and convincing evidence that Respondent engaged in misconduct in violation of the

Rules of Professional Conduct and the Disciplinary Rules of the Code of Professional Responsibility. Respondent entered into stipulations with Petitioner and admitted that he commingled and converted client funds between 1986 and 1989. These funds were fully restored by July 1989. 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 aggravating circumstances, and the existence of a record of prior discipline are factors which the Board considers when making its decision. Prior case law involving similar misconduct, while not conclusive as to the discipline imposed, may be instructive.

Relevant case law indicates that there is no per se rule of discipline in Pennsylvania when an attorney engages in mishandling of client funds. Office of Disciplinary Counsel v. Lucarini, 504 Pa. 271, 472 A.2d 186 (1983). However, the disposition of the majority of cases in which there is a commingling and conversion of client funds is public discipline, as the mishandling of client monies is a serious breach of public trust which cannot be tolerated. Office of Disciplinary Counsel v. Lewis, 495 Pa. 519, 426 A.2d 1138 (1981). In assessing the

proper discipline, the cases frequently consider whether forgery was present, whether restitution was made, whether Respondent demonstrated an appreciable understanding of the nature of the misconduct, and whether a record of prior discipline existed.

In Respondent's defense, he offered expert testimony, as well as testimony of his wife and himself, to establish that he suffered from pathological grieving and depression during the time period that the misconduct took place. By doing so, Respondent seeks to come within the standard set by the Pennsylvania Supreme Court for consideration of mental illness as a mitigating factor in imposing disciplinary sanctions. Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A.2d 894 (1989). The standard states that an attorney must demonstrate through expert testimony that he or she suffers from a mental infirmity which caused the misconduct. Careful review of the record reveals that Respondent has satisfactorily met his burden under Braun. Respondent presented the expert testimony of Dr. [A], a psychiatrist. Dr. [A] has been Respondent's treating psychiatrist since 1993 and sees him twice per week. Dr. [A] testified that Respondent was suffering from pathological grief and depression over his father's illness in 1987 and death in February 1988. The doctor testified that Respondent's behavior following the death was an effort to

punish himself. Respondent fell into a serious depression during this time and was unable to accomplish ordinary tasks such as opening his office mail. Respondent suffered physical manifestations of the depression, including insomnia, weight and appetite loss and diarrhea. Dr. [A] testified that Respondent's depression and grieving were causal factors in his mishandling of client funds. Dr. [A] testified that he believed Respondent was progressing and was working effectively in therapy to gain insight into his problem in order to avoid repetition of his misconduct.

The Hearing Committee found that the expert testimony did not meet the Braun standard. The Committee specifically emphasized that Respondent did not obtain counseling until the fall of 1993, after the misconduct occurred, and the expert could not assure the Committee that Respondent would not engage in similar misconduct in the future. The Committee also found that Respondent lacked the ability to acknowledge his wrongdoing and accept responsibility for his ethical breaches.

The Board does not agree with the Committee's appraisal of the testimony of Dr. [A] or Respondent. Careful review of the record indicates that Dr. [A] satisfactorily testified as to a causal connection between Respondent's depression and grieving and his misconduct. While the Court in Braun set forth the

requirement that a respondent has the burden of establishing a causal connection between the misconduct and the infirmity, the Court did not specify criteria an attorney must present in order for the expert testimony to be considered sufficient. In determining the sufficiency of expert testimony, the Board looks to prior case law as an indicator of what has been found to be adequate in the past and thoroughly reviews the testimony of the present expert. In the case at bar, Dr. [A] is actively treating Respondent and is very familiar with the details of the case. Dr. [A] provided credible, persuasive testimony as to the depression and grieving suffered by Respondent, and he clearly linked these problems to the ethical misconduct. He provided a lucid picture of Respondent's situation, thus enabling the Board to reach the conclusion that Respondent in fact suffered from these psychological problems and in fact committed the misconduct as a result of these problems. Although Dr. [A] did not pinpoint Respondent's psychological state on a specific given date, a point of contention with Office of Disciplinary Counsel, Dr. [A] clearly connected the depression and grieving with the misconduct. In the past, the Board has determined that such finding of a causal connection is sufficient without pinpointing specific dates when Respondent suffered from the problem. In re Anonymous No. 66 DB

84, 17 Pa. D. & C. 4th 414 (1992). The Board has also found expert testimony to be sufficient even though the doctor did not start treating the Respondent until after the misconduct occurred.

In the case of In re Anonymous No. 32 DB 89, 13 Pa. D. & C. 4th 478 (1992), the attorney commingled and converted funds belonging to his law firm during the time frame January 1984 to August 1987.

The attorney started treatment with a psychiatrist in March 1988.

The psychiatrist testified at the hearing that the attorney suffered from a personality disorder which caused the misconduct.

The Board accepted this expert's testimony as sufficient under the Braun standard. As to the Committee's analysis of Respondent's lack of remorse, the Board finds no intimation in the record that Respondent was anything but ashamed of his conduct and accepting of his responsibility for his actions.

Although Respondent's psychological problems in no way excuse his misconduct, the Board finds that these disorders offer an explanation for his actions and are factors to be considered in determining the final disposition of this matter. Other factors to be considered include the credible testimony of Respondent's wife, Respondent's sterling record as an attorney for forty years, his active involvement in community affairs, and his restitution of commingled funds and the fact that these offenses occurred in

1988 and 1989 and there have been no further transgressions for over six (6) years.

Review of similar cases, while not a mandate as to the appropriate discipline for the instant case, indicates that a suspension of one year to be stayed in its entirety with a two year probation with a financial and practice monitor is appropriate. In the case of In re Anonymous No 132 DB 88, 7 Pa. D. & C. 4th 331 (1990), an attorney failed to maintain client funds separate from his own and used these funds for his own benefit. Mitigating evidence was found in that the attorney voluntarily revealed the infractions, had received one informal admonition in thirty-three years of practice and presented persuasive character testimony. The attorney received a two year suspension. In the instant case, Respondent's mitigating evidence is weightier due to the existence of Respondent's depression and grieving. In the case of In re Anonymous No. 50 DB 87, 3 Pa. D. & C. 4th 627 (1989), an attorney deposited a check in a non-segregated fund and used it for personal expenses. The Board considered the attorney's unblemished forty year record, and the fact that he made restitution and suspended the attorney for two years. Again, in the instant case Respondent presents more compelling mitigating factors due to his psychological problems.

In the case of In re Anonymous No. 111 DB 89, 9 Pa. D. & C. 4th 526 (1990), an attorney admitted to converting client funds to his own use. The attorney was not aware of his actions until notified by Office of Disciplinary Counsel, at which time he promptly repaid the funds to the client. During the time frame of the conversion, the attorney was experiencing serious personal problems, including family and health problems. The attorney showed that he had made great strides in resolving the difficulties with his practice, and he had a good prior record of discipline, with the exception of three informal admonitions received during the time frame of the conversion. The Board recommended and the Supreme Court imposed a three month suspension. The instant case is more serious in that the misconduct occurred over a longer period of time and involved not only commingling and conversion of client funds but failure by Respondent to communicate with his client or return client files when requested. A suspension of three months would be inadequate to address these ethical violations. The above cases, as well as the persuasive mitigating factors presented, induce the Board to recommend a one year suspension to be stayed in its entirety with two years probation and a financial and practice monitor. This Board must take into consideration that Respondent is 66 years old

and has practiced law for over 40 years with no prior discipline.

Moreover, these offenses occurred over six (6) years ago and there have been no further transgressions. Respondent is a good candidate for probation as he has demonstrated his desire to conquer his psychological problems and is participating twice per week in therapy with Dr. [A]. A financial and practice monitor will help ensure that Respondent continues on the proper course with his practice.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, [], be suspended from the practice of law for a period of one (1) year; that the suspension be stayed in its entirety and that he be placed on probation for a period of two (2) years. Respondent shall select a financial and practice monitor subject to the approval of the Office of Disciplinary Counsel. The financial and practice monitor shall do the following during the period of Respondent's probation:

1. Meet with Respondent on a monthly basis to review Respondent's caseload and trust account to ensure continued compliance with proper handling of funds and maintenance of appropriate records;
2. File quarterly written reports on a Board-approved form with the Secretary of the Board; and

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

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: _____
Leonard A. Sloane, Member

Date: July 23, 1996

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

PER CURIAM:

AND NOW, this 9th day of September, 1996, upon consideration of the Report and Recommendations of the Disciplinary Board dated July 23, 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, that the suspension be stayed in its entirety, and Respondent is placed on probation for a period of two (2) years. Respondent shall select a financial and practice monitor subject to the approval of the Office of Disciplinary Counsel. The financial and practice monitor shall do the following during the period of Respondent's probation:

4. Meet with Respondent on a monthly basis to review Respondent's caseload and trust account to ensure continued compliance with proper handling of funds and maintenance of appropriate records;
5. File quarterly written reports on a Board-approved form with the Secretary of the Board;
6. Immediately report to the Secretary of the Board any violation by the Respondent of the terms and conditions of probation; and
4. The Secretary of the Board shall report any violations by the Respondent of the terms and conditions of the probation to Office of Disciplinary Counsel.

It is further ORDERED that respondent shall pay costs to the
Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.