

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL : No. 74 DB 1995  
Petitioner :  
:  
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 May 23, 1995. The Petition alleged numerous violations of the Rules of Professional Conduct based on Respondent's representation of [A] for injuries sustained in an automobile accident. Respondent filed an Answer on September 11, 1995.

Hearings were held on November 28, 1995 and June 6, 1996 before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Respondent was represented by [], Esquire. Petitioner was represented by [], Esquire.

The Committee filed its Report on October 23, 1996 and recommended a one year period of suspension to be stayed and one year probation with a sobriety monitor and a financial/practice monitor. No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting of January 29, 1997.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is now located at Suite 3710, One Oxford Centre, 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 in 1941 and was admitted to practice law in Pennsylvania in 1976. His present office is located at []. He is married and has three children. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent was retained on September 15, 1988 by [A] to represent her in a claim for personal injuries resulting from an automobile accident that occurred on July 10, 1988.

4. [A], who was uninsured, was a passenger in a car driven by [B], who was insured through [C] ([C]) by [D] Insurance.

5. [B's] car collided with a car driven by [E], which was owned by [F], who was insured through [C] by [G] Insurance.

6. Sometime in June, 1989, Respondent negotiated with [D] a settlement of [A's] third-party claim for the sum of \$8,500.

7. In late June 1989, Respondent received a settlement check from the [C] through [D] for [A's] third party claim against [B], in the amount of \$8,500.

8. Respondent caused the check to be deposited into his law firm's escrow account.

9. A check dated July 7, 1989 was issued to [A] in the amount of \$4,600 from the law firm account.

10. [A] was provided a Statement of Distribution, which reflected the gross settlement of \$8,500, an attorney fee of \$3,400, the client's distribution of \$4,600, and the withholding of \$500 for "outstanding medicals".

11. By memorandum dated August 29, 1989, from Respondent to [H], head of accounting at Respondent's law firm, Respondent directed that the \$500 escrowed for medical bills be distributed as follows: \$250 to Dr. [I] for thermography treatment rendered to [A], 40% of the remaining \$250 be distributed to the firm and \$150 to [A].

12. On August 16, 1989, Respondent reached a settlement with [G] in the amount of \$1,600 for [A's] third-party claim against the [E and F] and agreed to provide [G] with an executed release.

13. By letter dated August 31, 1989, Respondent forwarded to [J], [G-s] Claims Representative, the release executed by [A] and requested that [J] forward the settlement draft to his attention immediately.

14. In September 1989, Respondent received a settlement check from [G] for [A-s] claim against [E] in the amount of \$1,600.

15. Respondent deposited the check in his personal escrow account at [K] Bank.

16. Respondent deposited the check in this account rather than the firm account to avoid a potential conflict of interest since the firm represented [G] in some legal matters.

17. According to the contingent fee agreement, [A-s] portion of the [G] settlement was \$960.

18. Respondent failed to promptly disburse the settlement proceeds to [A].

19. Beginning in October 1989 and ending on August 14, 1990, when the personal account was closed, Respondent failed to

maintain a sufficient balance in the personal escrow account and allowed the account to fall out of trust.

20. Sometime in September 1989, Respondent was advised by [A] that she was receiving dunning notices for outstanding medical bills related to the accident.

21. Respondent initially and erroneously believed that the dunning notices referred to [A's] bill for \$700 from [I].

22. Respondent failed to refer to [A's] legal file which would have reflected he had previously compromised her bill from [I] for \$250.

23. Eventually, Respondent realized that [L] had unsatisfied bills for medical treatment rendered to [A] for injuries in her automobile accident.

24. By letter dated June 1990, Respondent advised [L] that any bills for [A] would be satisfied before any distribution from award, settlement or arbitration.

25. Respondent advised [A] that he could not make distribution of the settlement proceeds from [G] until he had resolved her outstanding medical bills.

26. Respondent failed to distribute to [A] \$577, which represented the undisputed portion of her settlement proceeds, while holding in reserve an amount equal to her outstanding medical bill of \$383.

27. Respondent had discussions with [D] regarding [A=s] outstanding bills with [L] and was advised by [D] that it would pay those bills if Respondent provided written confirmation from all of [A=s] medical providers that their bills were satisfied.

28. Respondent failed to provide [D] with the documentation requested.

29. Respondent failed to institute an action against [D] for payment of PIP benefits for [A=s] unsatisfied bills from [L] before the expiration of the statute of limitations.

30. By letter dated January 3, 1991, [A] provided Respondent with her new address and requested that Respondent

communicate with her concerning the status of her settlement proceeds from [G].

31. Although Respondent communicated with [A] sporadically thereafter, he failed to distribute to her the [G] settlement funds to which she was entitled until December of 1992.

32. By letter dated November 3, 1992, [A] advised Respondent she had not heard from him in months and inquired about the delay in releasing settlement proceeds to her. She also reminded him of a previous promise to her to personally pay the amounts due and owing.



33. On November 8, 1992, Respondent called [A] and advised her that he had been terminated from his employment due to attorney cutbacks, confirmed that she was owed money and promised that he would meet with her and pay it.

34. By December of 1992, Respondent had distributed to [A] \$940 from the [G] settlement funds by writing her a check from an account in which he commingled his personal funds with funds belonging to third persons.

35. Respondent still owed [A] \$120 from the [G] settlement funds. He eventually paid all monies owed to [A] in August 1994.

36. In June 1993, Respondent paid [L] bills for services provided to [A] from his own funds.

37. Respondent admits that he commingled his funds with [A-s] funds, and he neglected her case. (N.T. 12, S-41)

38. During the time frame that Respondent handled [A-s] case, he was an active alcoholic and used prescription drugs.

39. Respondent's alcohol and drug dependency was a causal factor in his misconduct.

40. Respondent sought treatment for his alcohol and drug dependency by attending an outpatient treatment program called [M].

41. Sometime in June 1993, Respondent had a relapse in his recovery; however, he immediately sought treatment and has maintained his sobriety since that time.

42. Respondent currently participates in Alcoholics Anonymous.

43. Respondent meets once per week with [N], a licensed psychologist and alcohol counselor, as part of this treatment program.

44. Respondent utilizes the services of an accountant and bookkeeper and meets with them monthly to ensure the proper handling of his finances.

45. Respondent does not have a prior record of discipline.

III. CONCLUSIONS OF LAW

Respondent violated RPC 1.1 by failing to provide competent representation to [A].

Respondent violated RPC 1.3 by failing to conclude [A-s] case in a diligent and prompt manner.

Respondent violated RPC 1.4(a) by failing to keep [A] informed of the status of her case and by failing to comply with her reasonable requests for information.

Respondent violated RPC 1.4(b) by failing to explain to [A] the status of her case so as to allow her to make an informed decision regarding the representation.

Respondent violated RPC 1.15(a) by commingling client funds with funds belonging to Respondent.

Respondent violated RPC 1.15(b) by converting [A-s] funds for his own use.

Respondent violated RPC 1.15(b) by failing to promptly distribute the settlement funds which he received to [A].

IV. DISCUSSION

Petitioner has demonstrated by clear and convincing evidence that Respondent engaged in misconduct in violation of the Rules of Professional Conduct. Respondent entered into stipulations with Petitioner and admitted that he commingled and converted the funds of one client from approximately October 1989 to August 1990, neglected that client's case and failed to communicate with the client. Respondent's client received all monies owed to her in August 1994. The Board must now 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 or aggravating circumstances, and the existence of a record of prior discipline are factors which the Board considers when making its recommendation. 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.

Respondent presented the expert testimony of [N], a licensed psychologist, to establish that he was an active alcoholic during the time frame of the misconduct. Respondent also presented evidence that he suffers from Attention Deficit Disorder (hereinafter ADD) and this disorder affected his professional life and caused his misconduct. By presenting this evidence, Respondent seeks to come within the standard set by the Pennsylvania Supreme Court for consideration of a psychiatric disorder as a mitigating factor in imposing disciplinary sanctions. Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 553 A.2d 894 (1989). The Braun test states that if an attorney demonstrates clearly and convincingly through expert testimony that he or she suffers from a mental infirmity which caused the misconduct, such illness will be considered as a mitigating factor when determining the disciplinary sanction.

The record demonstrates that Respondent began using alcohol on a daily basis in 1985 and by the time he began work on the [A] case, he was mixing alcohol and prescription drugs. Respondent sought help for his addiction in 1992. He was referred to a drug and alcohol rehabilitation program called [M], where he received treatment from Fall 1992 through Spring 1993. In June 1993 Respondent suffered a relapse but returned to treatment and stayed with the program until late in 1993. Respondent underwent psychotherapy and group therapy to understand his addiction. Respondent began attending Alcoholics Anonymous on a regular basis and continues to do so. Respondent has been sober since 1993.

Respondent started seeing [N] as part of his therapy. [N] is a licensed psychologist who specializes in addiction counseling and therapy for ADD. Respondent did not go to [N] for treatment for ADD initially, but after successive sessions, [N] suggested that Respondent be tested for ADD. While the tests utilized by professionals to diagnose ADD cannot concretely determine whether a person has ADD, they are useful tools. Respondent underwent various tests and after analyzing the results, [N] diagnosed Respondent as having ADD. [N] testified at the disciplinary hearing that Respondent's ADD combined with alcoholism and drug dependence substantially caused the misconduct. He went on to testify that Respondent is dealing realistically with his

problems and is following a viable recovery track. [N's] prognosis for Respondent was good.

The Hearing Committee determined that Respondent met his burden under Braun as to his alcoholism, but failed to meet his burden as to his ADD. While the Committee does not discuss the reasons for rejecting ADD as a credible mitigating factor, review of the record indicates that [N] did not review any records from Respondent's childhood that would indicate that he suffered from symptoms of the disorder at that time. The expert made clear that ADD is not a disorder that an individual develops later in life.

If a person has ADD as an adult, he or she had it as a child. [N] testified that it is important to determine whether a person displayed symptoms of ADD at or before the age of seven, because when a person is older, the symptoms may also be attributable to depression, anxiety or other medical problems. If the symptoms did exist in early childhood, the probability that the symptoms experienced by the person as an adult may be attributable to ADD is more likely. Although [N] explained the diagnostic importance of determining whether an adult had ADD as a child, he testified that he did not review records from Respondent's family physician or his school, nor did he talk to family members who knew Respondent as a child. Based on this evidence of record, the Board finds that Respondent did not clearly meet his burden of proving that he has

ADD and it caused his misconduct. The Board does find the evidence clear and convincing that Respondent is an alcoholic and his alcoholism and prescription drug dependency was a causal factor in his misconduct.

Although Respondent's alcoholism in no manner excuses his misconduct, the Board finds that his disorder offers an explanation for his action and is a factor to be considered in determining the outcome of this case. The most serious misconduct committed by Respondent in his handling of the [A] case was the commingling and conversion of her settlement funds. Typically, such misconduct calls for public discipline, the severity of which depends upon mitigating and aggravating circumstances. Review of similar cases indicates that a suspension of one year is appropriate. In re Anonymous No. 103 DB 90, 18 Pa. D. & C. 4th 97 (1992), In re Anonymous No. 15 DB 90, 18 Pa. D. & C. 4th 113 (1992). Additionally, the Board finds that Respondent is an appropriate candidate for alcohol probation. He has admitted he is an alcoholic and voluntarily sought treatment. He has been sober since 1993 and regularly attends AA meetings and therapy sessions with [N]. He appears committed to his recovery and is trying to get his law practice back on track. To that end, the Board believes that a practice monitor will ensure that Respondent remains organized and is cognizant of his responsibilities as a practitioner.



V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be suspended for one (1) year; that the suspension be stayed in its entirety and that Respondent be placed on probation for a period of one (1) year subject to the following conditions:

1. Respondent shall abstain from using alcohol or any other mind altering chemical;
2. Respondent shall regularly attend Alcoholics Anonymous meetings on a weekly basis;
3. Respondent shall obtain a sponsor in Alcoholics Anonymous and maintain weekly contact with that sponsor;
4. A sobriety monitor shall be appointed to monitor for Respondent in accordance with Disciplinary Board Rule '89.293(c);
5. Respondent shall furnish his sobriety monitor with his Alcoholics Anonymous sponsor's name, address and telephone number;
6. Respondent shall establish his weekly attendance at Alcoholics Anonymous meetings by providing written verification on a Board approved form to his sobriety monitor;
7. Respondent shall undergo any counseling, outpatient or in-patient treatment, prescribed by a physician or alcohol counselor.
8. With the sobriety monitor, Respondent shall:
  - a) meet at least twice per month;
  - b) maintain weekly telephone contact;
  - c) provide the necessary properly executed written authorizations to verify his

compliance with the required substance  
abuse treatment; and

d) cooperate fully.

9. The appointed sobriety monitor shall:
  - a) monitor Respondent's compliance with the terms and conditions of the order imposing probation;
  - b) assist Respondent in arranging any necessary professional or substance abuse treatment;
  - c) meet with Respondent at least twice per month and maintain weekly telephone contact with Respondent;
  - d) maintain direct monthly contact with the Alcoholics Anonymous chapter attended by the Respondent;
  - e) file with the Secretary of the Board quarterly written reports; and
  - f) immediately report to the Secretary of the Board any violations by the Respondent of the terms and conditions of the probation.

It is further recommended that 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:

1. 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;
2. Periodically, but not less than once every sixty days, examine Respondent's financial records to ensure continued compliance with proper handling of funds;

3. Meet with Respondent at least monthly to examine Respondent's progress;

4. File with the Secretary of the Board quarterly written reports verifying that the above conditions have been met; and
5. 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: \_\_\_\_\_  
Carolyn Raven Rudnitsky, Member

Date: April 11, 1997

O R D E R

PER CURIAM:

AND NOW, this 4th day of June, 1997, upon consideration of the Report and Recommendations of the Disciplinary Board dated April 11, 1997, 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 one (1) year subject to the following conditions:

1. Respondent shall abstain from using alcohol or any other mind altering chemical;
2. Respondent shall regularly attend Alcoholics Anonymous meetings on a weekly basis;
3. Respondent shall obtain a sponsor in Alcoholics Anonymous and maintain weekly contact with that sponsor;
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2. Periodically, but not less than once every sixty days, examine Respondent's financial records to ensure continued compliance with proper handling of funds;
3. Meet with Respondent at least monthly to examine Respondent's progress;
4. File with the Secretary of the Board quarterly written reports verifying that the above conditions have been met; and
5. Immediately report to the Secretary of the Board any violation by the Respondent of the terms and conditions of probation.

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