

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 1067, Disciplinary Docket No. 3
Petitioner	:	
	:	No. 25 DB 2003
v.	:	
	:	Attorney Registration No. 27148
CHARLES J. ALIANO	:	
Respondent	:	(Susquehanna 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 21, 2003, Office of Disciplinary Counsel filed a Petition for Discipline against Charles J. Aliano, Respondent. The Petition charged Respondent with misconduct in two matters. Respondent filed an Answer to Petition for Discipline on April 21, 2003.

A disciplinary hearing was held on November 4 and 5, 2003, and February 19 and 20, 2004, before Hearing Committee 3.06 comprised of Chair Elizabeth P. Quigley, Esquire, and Members Michael W. King, Esquire, and Phillip J. Murren, Esquire. Respondent was represented by James C. Schwartzman, Esquire.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on February 22, 2005, finding that Respondent violated Rules of Professional Conduct 1.7(a) and (b) and 8.4(d) in Charge I. The Committee further found that Petitioner did not prove its case in Charge II and so dismissed those charges. The Committee recommended that Respondent receive a private reprimand.

The parties did not file exceptions to the Hearing Committee Report.

This matter was adjudicated by the Disciplinary Board at the meeting of May 18, 2005.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania 17101, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and 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, Charles J. Aliano, was born in 1948 and was admitted to practice law in the Commonwealth in 1978. He maintains his office at 28 Maple Street, Montrose, PA 18801.

Charge I – Gulick Matter

3. Respondent was Susquehanna County District Attorney from January 1996 until 2004. The position was a part-time position. Respondent maintained a part-time private practice at all times relevant hereto.

4. Commencing in November 1995, Respondent privately represented Teri M. Gulick in connection with a Protection From Abuse matter. This representation involved Ms. Gulick's belief that her former husband was sexually abusing their minor daughter during the course of visitations.

5. Ms. Gulick married Kevin Yachymiak in December 1995, one month after she hired Respondent in the PFA matter.

6. On June 15, 1996, Mr. Yachymiak was involved in an automobile accident. He subsequently submitted to a chemical test, which indicated that his blood alcohol content was .20%, in excess of the legal limit. Mr. Yachymiak also made statements to the investigating State Police officers admitting that he operated the vehicle in question after consuming intoxicants.

7. On June 18, 1996, Pennsylvania State Trooper William Gross charged Mr. Yachymiak with Driving Under the Influence (DUI) and various summary offenses related thereto.

8. Also on June 18, the State Police charged Ms. Gulick with false reports to law enforcement authorities, relating to allegedly false information she provided to the State Police investigating the June 15 accident.

9. On July 23, 1996, Mr. Yachymiak waived his preliminary hearing pursuant to the advice of his counsel, Attorney Fred Meagher, and the DUI charges against him were held for court action.

10. On August 6, 1996, Mr. Yachymiak entered a plea of not guilty. His case was scheduled for trial on September 24, 1996.

11. On or about August 6, 1996, Ms. Gulick met with Respondent in his private office. Respondent and Ms. Gulick discussed various issues related to the PFA matter. Ms. Gulick also told Respondent in more detail about the circumstances attendant to the charges then pending against both her and her husband. Respondent did not raise the issues of possible conflict of interest or confidentiality related to his status as the Susquehanna County District Attorney.

12. On August 28, 1996, Ms. Gulick and Mr. Yachymiak met with Attorney Michael Giangrieco to discuss his possible representation in their criminal cases.

13. On September 5, 1996, Ms. Gulick retained Attorney Giangrieco in connection with her false reports preliminary hearing, which had been continued until September 13, 1996.

14. On September 13, 1996, the charges against Ms. Gulick were dismissed at her preliminary hearing.

15. On September 17, 1996, Ms. Gulick hired Attorney Giangrieco to represent her husband in connection with his DUI charges.

16. On September 26, 1996, Ms. Gulick met with Respondent. At this meeting she initiated a discussion about her ability to pay fees to Respondent on the PFA matter and to Attorney Giangrieco on her husband's matter.

17. On September 30, 1996, Attorney Giangrieco filed a Petition to Remand for a preliminary hearing in connection with Mr. Yachymiak's DUI charges. Respondent as District Attorney joined this request. On October 1, 1996, the Susquehanna County Court of Common Pleas granted this joint request.

18. Following the remand the charges were again before District Justice Gene Franklin. A preliminary hearing was scheduled for October 25, 1996.

19. On October 4, 1996, Ms. Gulick called Respondent and inquired about the status of her husband's DUI charges. Respondent told her he was trying to get the charges "dropped".

20. Approximately two days before the preliminary hearing date, on or about October 23, 1996, Respondent left a message on Trooper Gross's answering machine requesting that he call Respondent about withdrawing the DUI charges filed against Mr. Yachymiak. Respondent indicated that he did not believe there was anything to the charges and that they should go away.

21. Trooper Gross subsequently called Respondent at his private law office. Respondent told him the charges should go away. Trooper Gross stated his

disagreement, in that he believed the charges were supported by sufficient and proper evidence.

22. Based upon Respondent's direction that the charges be withdrawn, and given Respondent's position as Susquehanna District Attorney, Trooper Gross withdrew the charges.

23. On October 24, 1996, Respondent advised Mr. Yachymiak's attorney, Mr. Giangrieco, that the charges against him would be withdrawn. Respondent further advised that it would be unnecessary to appear at the preliminary hearing scheduled for the next day. Attorney Giangrieco called Ms. Gulick to tell her that the charges against her husband were withdrawn.

24. On October 25, 1996, Trooper Gross went to District Justice Franklin's office and withdrew the DUI charges against Mr. Yachymiak. In doing so, he stated, in writing, "Prosecution withdrawn as per the recommendation of Susquehanna County DA Charles Aliano." He signed and dated his handwritten entry on the face of the criminal complaint.

25. During the period October 24 to November 4, 1996, Trooper Gross talked with superior officers, and to Assistant Susquehanna County Assistant District Attorney Marion O'Malley, about the circumstances attendant to his withdrawal of the DUI charges.

26. After reviewing the circumstances of the case with Trooper Gross, ADA O'Malley concluded that the case was legally sufficient and so advised Gross.

27. On November 5, 1996, Trooper Gross refiled the charges against Mr. Yachymiak, in that he had come to believe his withdrawal of those charges was ill advised and improper.

28. A preliminary hearing in connection with the refiled charges was scheduled for December 4, 1996, and later rescheduled for December 23, 1996.

29. Some time after the charges were refiled, Ms. Gulick and Mr. Yachymiak, while on their way to meet with Attorney Giangrieco, stopped at Respondent's office and inquired as to why the charges had been refiled. Respondent indicated that Trooper Gross had refiled the charges because he had probably "gotten into trouble". In response to Ms. Gulick's inquiry as to whether Respondent could "help out" with the refiled charges, Respondent indicated he would attempt to arrange for Mr. Yachymiak to plead guilty to lesser charges with the DUI charges to be dropped.

30. Ms. Gulick stated that if Respondent were able to get some of the larger charges dropped, she would be able to pay him the money she owed.

31. Ms. Gulick and Mr. Yachymiak proceeded to their scheduled meeting with Attorney Giangrieco. During the course of this meeting Respondent and Attorney Giangrieco spoke by telephone.

32. Respondent told Attorney Giangrieco that Ms. Gulick and her husband could not afford two attorney fees, and that by dropping the DUI charge they would only have to pay Respondent's outstanding fee for Ms. Gulick's PFA case.

33. Respondent stated his willingness to nolle pros the DUI charges in exchange for a guilty plea by Mr. Yachymiak, to two minor summary offenses.

34. Respondent and Attorney Giangrieco agreed that the preliminary hearing would be waived, so the plea agreement could be implemented at the trial court level.

35. By letter from Attorney Giangrieco to Respondent, dated December 19, 1996, the agreement to drop the charges was memorialized.

36. On April 25, 1997, Mr. Yachymiak entered a plea of guilty to two summary offenses; improper sun screening and improper off-road lighting.

37. All of the remaining charges were dismissed pursuant to a nolle prosequi petition filed by Respondent as District Attorney.

Charge II – Hollister Matter

38. Commencing in September 1999, Respondent represented Edward Gallagher, Plaintiff, in a Susquehanna County divorce and custody case.

39. Attorney Robert J. Hollister represented the defendant, Veronica Gallagher.

40. In September 1999, Respondent advised Mr. Gallagher that he should tape-record face-to-face conversations with his wife.

41. Mr. Gallagher subsequently utilized a tape recorder to record a series of conversations with his wife, without her knowledge or consent.

42. Mr. Gallagher's conduct was unlawful.

43. Respondent admitted that he erred in advising his client to tape record conversations with his wife, but explained that it was an error of legal interpretation and judgment.

44. Respondent subsequently advised his client not to tape record his conversations with his wife.

Further Findings

45. Respondent has no record of prior discipline.

46. Respondent has an excellent reputation within Susquehanna County and surrounding communities as an attorney and citizen.

47. Character witnesses who testified or wrote letters attesting to his reputation included seventeen attorneys and judges, and twelve other individuals.

48. Respondent has been an active participant in civic and community activities for many years, including service on the boards of directors of various non-profits as well as the local Industrial Development Authority, and is past president of the local Lion's Club.

III. CONCLUSIONS OF LAW

By his conduct in Charge I, the Gulick matter, Respondent violated the following Rules of Professional Conduct:

1. RPC 1.7(a) – A lawyer shall not represent a client if the representation of that client will be directly adverse to another client.

2. RPC 1.7(b) – A lawyer may not represent a client if the representation of that client may be materially limited by the lawyer’s own responsibilities to another client or to a third person, or by the lawyer’s own interests.

3. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Petitioner failed to prove, by a preponderance of the evidence that was clear and satisfactory, that Respondent violated the Rules of Professional Conduct in Charge II, the Hollister matter.

IV. DISCUSSION

Respondent has been charged with two counts of professional misconduct. Charge I, the Gulick matter, involves allegations that Respondent, who was then the Susquehanna County District Attorney, violated Rules of Professional Conduct 1.7(a) and (b), and 8.4(b),(c) and (d) as a result of his active involvement as District Attorney in dropping criminal charges against a defendant while simultaneously representing that defendant’s wife in an unrelated Protection From Abuse matter. Charge II, the Hollister matter, involves allegations that Respondent violated Rules of Professional Conduct 1.1 and 8.4(b) in the course of his representation of a divorce client by advising him to tape-

record in-person conversations with his wife, during the course of a marital dispute, without her consent.

The evidence of record in Charge I demonstrates an intertwined series of events and circumstances between Respondent's on-going private representation of Ms. Gulick in her PFA matter and the institution and disposition of criminal charges against Ms. Gulick's husband, Mr. Yachymiak, while Respondent served as the Susquehanna County District Attorney. The evidence compiled regarding this Charge is considerable. Four days of hearing were conducted with many witnesses testifying. It is easy to get lost in the convoluted details of this matter; however, the fundamental question is whether Respondent violated the conflict of interest provisions of the Rules by his involvement, as District Attorney, in the Yachymiak criminal proceedings. The simple answer is that he did, and in a glaring way. Respondent made no effort to distance himself from the Yachymiak prosecution even though Ms. Gulick herself was initially charged and was a likely witness. Ms. Gulick had a compelling interest in having her husband avoid prosecution, while the Commonwealth had the opposite interest in seeing him prosecuted. Respondent advised the State Trooper to make the charges "go away", which the Trooper did by withdrawing the charges. The Trooper refiled the charges after consultation with others, including the Assistant District Attorney. Again, Respondent intervened, resulting in Mr. Yachymiak pleading guilty to lesser charges and the remaining, more serious DUI charges being dismissed. At all times, Respondent used his position as District Attorney to impact the outcome of the case and ultimately get the more serious charges against his client's

husband dismissed. By his conduct, Respondent violated Rules 1.7(a) and (b), and 8.4(d).

The Hearing Committee, after finding a conflict of interest existed, delved into Respondent's motives for his unprofessional actions. This included a discussion of the financial circumstances of Respondent's client and her husband as it pertained to Respondent and his ability to receive payment of his fees. The Board finds no necessity in examining Respondent's motives, as conflicts of interest are not motive-oriented. Respondent's motives are not crucial to the determination that he violated the Rules of Professional Conduct and must be sanctioned.

The evidence in Charge II is less clear. The Hearing Committee dismissed Charge II at the conclusion of the hearings on the basis of failure to make out a prima facie case. The Committee concluded that Respondent's incorrect advice to his client concerning the secret recording of conversations with the client's wife was not more than an error caused by lack of familiarity with the specific provisions of the Wiretapping Act. Upon the realization that his client's conduct could violate the law, Respondent directed the client to discontinue any such tape recording and advised that no such recordings could be used in the divorce matter. The Board agrees with the Committee's dismissal of these charges. While it might be expected that an attorney with Respondent's background as a District Attorney would be familiar with such provisions, simple negligence in that regard does not constitute a violation of Rules 1.1 and 8.4(b).

Respondent's misconduct in Charge I warrants a public censure. Respondent abused his position as a public official. The course of action chosen by him in the

Yachymiak criminal proceeding was directly impacted by his concerns for the interests of his private client, who was the wife of the criminal defendant. As an official in a position specifically entrusted with the protection of the public, and from whom the public expects a high level of integrity, this is unacceptable. Public discipline is required to address a breach of the public confidence and trust.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Charles J. Aliano, be subjected to a Public Censure.

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: _____
William A. Pietragallo, Board Member

Date: August 31, 2005

Board Members Curran and Sheerer dissented and would recommend a Private Reprimand.

Board Member O'Connor recused.

Board Members Raspanti and Nordenberg did not participate in the May 18, 2005 adjudication.

PER CURIAM:

AND NOW, this 1st day of December, 2005, upon consideration of the Report and Recommendations of the Disciplinary Board dated August 31, 2005, the Petition for Review and response thereto, the request for oral argument is denied pursuant to Rule 208(e)(4), Pa.R.D.E., and it is hereby

ORDERED that CHARLES J. ALIANO be subjected to PUBLIC CENSURE by the Supreme Court.

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

Mr. Justice Saylor dissents in favor of a private reprimand.