

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 1086, Disciplinary Docket No. 3
Petitioner	:	
	:	No. 18 DB 2004
v.	:	
	:	Attorney Registration No. 21616
JOHN FRANCIS MURPHY	:	
Respondent	:	(Tioga 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 February 6, 2004, Office of Disciplinary Counsel filed a Petition for Discipline against John Francis Murphy, Respondent. The Petition charged Respondent with professional misconduct arising out of his representation of his clients in a bankruptcy proceeding and actions taken by Respondent after the conclusion of such proceeding.

Respondent filed an Answer to Petition for Discipline on March 18, 2004. Respondent filed an Amended Answer to Petition on May 12, 2004.

A disciplinary hearing was held on June 29, 2004 and September 10, 2004 before Hearing Committee 3.04 comprised of Chair Donald H. Brobst, Esquire, and Members David E. Hershey, Esquire, and Jack Mentzer Stover, Esquire. Respondent appeared pro se. At the conclusion of the hearing Petitioner advised the Committee that it was withdrawing its charge against Respondent of violating Rules 8.1(a) and 8.4(c).

Following the submission of briefs by the parties, the Hearing Committee filed a Report on March 14, 2005, and found that Respondent engaged in professional misconduct as alleged in the Petition for Discipline. A majority of the Committee recommended that he be suspended for one year and one day. The dissenting member recommended that Respondent be suspended for two years.

After his hearing, Respondent retained counsel, James C. Schwartzman, Esquire, who filed a Brief on Exceptions to the Report on April 20, 2005. Petitioner filed a Brief on Exceptions on April 20, 2005 and a Brief Opposing Exceptions on May 6, 2005. Respondent filed a Brief Opposing Exceptions on May 9, 2005.

This matter was adjudicated by the Disciplinary Board at its meeting on July 16, 2005.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at 200 North Third Street, Suite 1400, Harrisburg, Pennsylvania 17101, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, 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, John Francis Murphy, was born in 1947 and was admitted to practice law in the Commonwealth in 1975. He maintains his office at 16 Pearl Street, P.O. Box 741, Wellsboro PA 16901. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has no prior history of any discipline.

4. In 1997, Alfred and Eleanor Tomb were experiencing severe financial difficulties due to insurmountable debt they accumulated. The Tomb family farm had several mortgages and liens on the property.

5. Farm Service Agency (FSA) held six mortgages totaling \$239,696.51; Robert and Lucille Hoppe, t/a Valley Milling Company, held a junior mortgage in the amount of \$20,000; and there were tax liens and other liens on the property.

6. The money owed on the farm exceeded the value of the farm, estimated at about \$170,000 to \$185,000.

7. On December 13, 1997, the Tombs entered an Agreement of Sale with Daniel and Irene Mullett for \$112,000 for a portion of the Tomb farm and Joseph and Naomi Mullett for \$56,800 for the remaining portion of the Tomb farm. The Mulletts moved into the farmhouse on the Tomb farm in approximately May 1998.

8. Attorney Alan Acker represented the Mulletts in their purchase of the farm, conducted a title search on the farm and found that the liens and mortgages of the property exceeded its appraised value.

9. Mr. Acker recommended that Mr. Tomb consult with a bankruptcy attorney about his financial problems when it became clear that the sales agreement with the Mulletts was in jeopardy.

10. In July 1998 the Tombs consulted with Respondent and reviewed their financial situation with him. The Tombs informed Respondent that they wanted to partition 2.2 acres of the farm, sell it for fair market value to Gerald Pirrung, rent the 2.2 acres from Mr. Pirrung and sell the remaining portion of the farm to the Mulletts.

11. Mr. and Mrs. Tomb were unsophisticated clients with a limited knowledge of financial or real property transactions.

12. From the inception of the representation of the Tombs by Respondent, Respondent knew that the Tombs sought to subdivide slightly in excess of two acres of their farm, sell this acreage to Mr. Pirrung, and lease the two acres from Mr. Pirrung for their personal residence.

13. The Tombs did not seek advice from any other attorney regarding the bankruptcy.

14. Respondent advised the Tombs that their best option was to file for Chapter 7 bankruptcy, since their debts far exceeded their assets.

15. On July 20, 1998, Respondent sent the Tombs a letter in which he agreed to represent them in a Petition for Relief in Bankruptcy. Respondent's letter indicated that the fee was \$825.00 for legal services plus the Chapter 7 filing fee of \$175.00. On August 22, 1998 the Tombs met with Respondent and signed the bottom of Respondent's July 20, 1998 letter, acknowledging Respondent's fee agreement. They paid Respondent \$1,000 as requested in the agreement.

16. In August 1998, Respondent drafted a Sale Agreement between Mr. Tomb and Mr. Pirrung for the sale of 2.2 acres of the Tomb farm. Respondent sent the contract to both parties for their signatures.

17. The purchase price in the Sale Agreement between Mr. Tomb and Mr. Pirrung for the sale of 2.2 acres was \$8,000.

18. On September 1, 1998, Respondent filed a Chapter 7 bankruptcy on behalf of the Tombs in the United States Bankruptcy Court.

19. On November 4, 1998, Respondent represented the Tombs at a creditors' meeting before United States Trustee, Lawrence G. Frank.

20. On December 8, 1998, Respondent filed a request for relief with the Bankruptcy Court to enter an order abandoning the Tombs' home to FSA.

21. Mr. Tomb was aware that the request for an order abandoning the Tombs' home was filed with the Bankruptcy Court, but he did not understand why it was filed and was advised by Respondent that it was part of the procedure.

22. On February 4, 1999, the Tombs were granted a discharge in U.S. Bankruptcy Court. There was no distribution made. The final Decree was issued on March 15, 1999.

23. Respondent did not advise the Tombs that he was terminating his representation of their interest at the conclusion of the bankruptcy. He sent the Tombs a short thank you note but did not make a copy of it for his file.

24. Respondent did not send a letter to the Tombs until January 11, 2001, advising them of any termination of his representation of their interest.

25. On March 27, 1999, at a meeting held in Respondent's office, Respondent advised Mr. Tomb that Respondent might acquire the second mortgage from the Hoppes, t/a Valley Milling Company, and further advised Mr. Tomb that such an acquisition was part of a procedure for having the mortgage cleared off the books.

26. By letter dated April 8, 1999, Respondent advised Charles A. Szybist, Esquire, that "my clients and I agree with your offer to purchase the Valley Milling Company mortgage". This letter was copied to the Tombs.

27. Respondent bought the second mortgage from the Hoppes, which had a principal sum of \$20,000, for \$2,000. This agreement was reached two months after

the Tombs were discharged in bankruptcy. Respondent received the assignment of mortgage on June 9, 1999.

28. On July 21, 1999, Respondent filed a notice of default judgment against the Tombs on the mortgage Respondent acquired from the Hoppes.

29. On January 3, 2000, Respondent filed a mortgage foreclosure action against the Tombs.

30. On January 31, 2000, Respondent signed an Agreement of Sale to sell the entire Tomb farm including the 2.2 acres on which the Tombs were living to Aden L. Mast for \$250,000. Respondent never advised the Tombs of this agreement.

31. By letter dated March 14, 2000, Don Van Vliet of FSA confirmed his understanding of Respondent's agreement with Farm Service Agency by writing to Respondent, "I assume that at the sheriff's sale to be held sometime in mid May, you will be the successful bidder, subject to our mortgage. Once you acquire title you will proceed to sell per your sales agreement of \$250,000".

32. On April 13, 2000, Respondent filed a Writ of Execution against his clients the Tombs.

33. Through this entire period potential buyers approached Respondent in order to buy the Tomb farm. Respondent inquired of potential buyers as to whether they would consider allowing the Tombs to subdivide the 2.2 acres. No one agreed, according to Respondent.

34. On July 19, 2000, a sheriff's sale was held on the Tomb farm subject to six mortgage liens of the FSA.

35. At the sheriff's sale, Respondent opened the bidding. Rick Van Etern bid approximately \$25,000 and Respondent bid \$40,000, which ended the bidding.

36. The ultimate purchasers of the Tomb farm were the Hochstetlers. Respondent first met them in June 2000, when they came to his office. Respondent represented the Hochstetlers in the September 2000 sale of the farm.

37. On August 24, 2000, Respondent filed a complaint in ejectment against the Tombs. On September 5, 2000, Respondent sold the Tomb farm to Mr. Hochstetler, including the 2.2 acres on which the Tombs were living. On September 8, 2000, Respondent sent Don Van Vliet of FSA a check in the amount of \$180,375.65 in full satisfaction of FSA's six mortgages on the Tomb farm.

38. By selling the Tomb farm to the Hochstetlers, Respondent made a profit of \$9,000. Respondent also received a \$4,000 attorney fee in the Hochstetler transaction. This was in addition to the fee paid by the Tombs.

39. On October 2, 2000, Respondent filed a judgment in possession against Mr. Tomb and evicted the Tombs from the property.

40. While Mr. Tomb was aware of the various actions prior to the eviction, Mr. Tomb believed that Respondent was acting as his attorney up to and through the time of the sheriff's sale.

41. Several days after the sheriff's sale, Mr. Pirrung met with the Respondent and discussed the acquisition of the tract of 2.2 acres which Mr. Pirrung believed he would buy in order to rent to the Tombs. Respondent indicated that the value of the tract could have a price of \$10,000, which was \$2,000 more than the price originally included in the Agreement of Sale which Respondent drafted between Mr. Pirrung and Mr. Tomb in 1998.

42. Following receipt of the eviction notice, the Tombs were forced to leave their former property in January 2001.

III. CONCLUSIONS OF LAW

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

1. RPC 1.8(a) – A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to the client unless:

1. the transaction and terms in which the lawyer acquires the interest are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

2. the client is advised and given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

3. the client consents in writing thereto.

2. RPC 1.8(b) – A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation.

3. RPC 1.9 – A lawyer who has formerly represented a client in a matter shall not thereafter:

a. represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation; or

b. use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

4. The Board concludes that Respondent did not violate Rules of Professional Conduct 1.1 and 1.2(a), relating to competency.

IV. DISCUSSION

Before this Board for consideration is the matter of John Francis Murphy, who has been charged with misconduct in his representation of Alfred and Eleanor Tomb in their bankruptcy action. Respondent's course of conduct occurred between July 1998 and October 2000, when he represented the Tombs in bankruptcy proceedings arising from a severe debt load on the farm where they resided. After obtaining a bankruptcy discharge for the Tombs, Respondent then purchased a junior mortgage on the property, foreclosed on that mortgage, and evicted the Tombs from the property after which he sold the land at a profit.

Petitioner bears the burden of proof by clear and satisfactory evidence that Respondent engaged in professional misconduct. Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730 (Pa. 1981). Petitioner charged Respondent with violation of Rules of Professional Conduct 1.1 and 1.2(a) relating to competency and abiding by the client's decision concerning the objectives of the representation. In support of these charges Petitioner produced the testimony of the bankruptcy trustee and an expert witness. While there is no doubt as to the credentials and expertise of these witnesses, their testimony reflects possible alternative strategies and approaches to the Tomb's case but does not provide clear and satisfactory evidence that Respondent lacked legal competence and failed to abide by his client's decisions as to the objectives of the representation in the manner in which he pursued the bankruptcy action.

In contrast to our conclusions with respect to Respondent's action during the

course of the bankruptcy proceeding, the Board concludes that Petitioner met its burden of establishing that Respondent violated Rules of Professional Conduct 1.8(a), 1.8(b), and 1.9 as a result of his actions taken subsequent to the bankruptcy. Respondent acquired an ownership interest adverse to his clients by acquiring the second mortgage on the Tomb farm. He then utilized that mortgage in January 2000 to file a foreclosure action against the Tombs and executed an agreement of sale to sell the entire Tomb farm, without reserving the 2.2 acre tract, to a third party. On April 13, 2000, Respondent filed a writ of execution against the Tombs and on July 19, 2000, Respondent was the successful bidder at a sheriff's sale for the Tomb farm. Approximately 30 days after the sheriff's sale, Respondent filed a complaint in ejectment against his clients the Tombs and sold their farm to the Hochstetlers.

While there is some evidence of record that Mr. Tomb was advised by Respondent that he intended to acquire the second mortgage on the farm, including the fact that Respondent apparently copied the Tombs with his April 8, 1999 letter agreeing to the purchase of the second mortgage, the evidence also demonstrates that the Tombs did not comprehend that this transaction was adverse to their interest in retaining the 2.2 acre tract of land on which their residence was located. Rather, the Tombs believed, on the advice of Respondent, that the acquisition was part of a procedure for clearing the second mortgage from their property. The evidence shows that the Tombs were unsophisticated clients with little understanding of business or real estate transactions. The Tombs clearly believed that Respondent continued to represent their interests during this period.

Although Respondent asserted that his representation of the Tombs concluded at the time of the bankruptcy discharge, the Tombs were not informed of this fact in writing until January 11, 2001, long after the sale of their farm. Respondent's own letter of April 8, 1999, written several weeks after the discharge in bankruptcy, refers to the Tombs as "my clients". This directly refutes Respondent's position taken at the hearing. For these reasons, the Board concludes that Respondent violated Rule 1.8(a).

Respondent's actions also violated Rule 1.8(b), which prohibits a lawyer from using information relating to representation of a client to the disadvantage of the client unless the client provides consent. While the second mortgage was a matter of public record, Respondent admitted that he learned of the existence of the mortgage through his representation of the Tombs in the bankruptcy discharge. He then used this information to defeat the Tombs' fundamental and pivotal goal of preserving their residence on the two acre tract of land. Aggravating this situation is that Respondent made a profit of approximately \$9,000 on the sale of the Tomb farm and also secured additional attorney's fees of \$4,000 for handling the sale of the farm to the Hochstetlers.

Rule 1.9 prohibits a lawyer who has formerly represented a client in a matter from representing another person in the same or substantially related matter in which the latter person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, and the lawyer may not use the information to the disadvantage of the former client except when the information has become generally known. Respondent represented himself in a substantially related matter where his own

interests were materially adverse to the interest of his clients the Tombs.

While Respondent denied in his testimony that a substantial relationship existed between his representation of the Tombs in the bankruptcy proceeding and his subsequent representation of his own interests in the foreclosure on the mortgage, the sale of the farm and the eviction of the Tombs from their home, the connection between the representation and the subsequent events is patently self-evident.

Respondent's actions in this matter are perplexing. While at face value his conduct appears calculating, the evidence of record infers that Respondent was apparently a skilled and experienced attorney who was respected by other members of the bar and local community. His demeanor at the hearing was respectful with due deference given to the Committee, the process and to Disciplinary Counsel. Briefs were appropriate and timely filed in his pro se capacity.

Respondent's testimony suggests that he experienced an unexplainable disconnect. He appeared unable to view the matter with the clarity needed to gauge his obligations and responsibilities to the Tombs, who clearly were his clients. A neutral party observing the escalation of events would be able to discern the wrongfulness of Respondent's actions, yet Respondent's own outlook was so obfuscated that he took a position adverse to the Tombs' interests. The Tombs entrusted Respondent to save their home, and instead he became the agent who evicted them from that home. An analysis of the record allows for no other interpretation of these events.

The mitigating factor brought to bear in this matter is Respondent's clean

record of discipline and apparent competence during his thirty years of legal practice. No other evidence was presented at the hearing. Based on the totality of the circumstances as set forth above, a majority of the Board recommends that a two year suspension be imposed. That Respondent could engage in such a patent conflict with his clients without a red flag raised as to its ethical propriety leaves serious doubts as to Respondent's fitness. Unfortunately, his breach of professional ethics requires a lengthy suspension followed by a reinstatement hearing to prove his fitness to practice law in the future.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, John Francis Murphy, be suspended from the practice of law for a period of two years.

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: _____
Marc S. Raspanti, Board Member

Date: October 26, 2005

Board Members Rudnitsky, Curran, Wright, Sheerer and Gephart dissented and would recommend disbarment.

Board Member Newman dissented and would recommend a five year suspension.

Board Member Nordenberg did not participate in the July 16, 2005 adjudication.

PER CURIAM:

AND NOW, this 7th day of February, 2006, upon consideration of the Report and Recommendations of the Disciplinary Board dated October 26, 2005, the Petition for Review and response thereto, it is hereby

ORDERED that JOHN FRANCIS MURPHY be and he is SUSPENDED from the Bar of this Commonwealth for a period of five years, 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.

Former Justice Nigro did not participate in this matter.

Mr. Justice Eakin dissents and would impose a suspension for a period of two years.