BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 310, Disciplinary Docket No. 3 – Supreme Court
v.	:	No. 132 DB 1995
[ANONYMOUS], Respondent	:	Attorney Registration No. [] ([])

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

Petitioner filed a Petition for Discipline against Respondent on September 13, 1995. The Petition alleged that Respondent commingled client funds with his own and failed to

preserve complete records of an escrow account, converted client funds to his own use, failed to promptly distribute client funds in his possession and failed to list his escrow account on his annual Attorney Registration form. Respondent filed an Answer on October 20, 1995. A hearing was held on April 15, 1996 before Hearing Committee [] comprised of Chairperson [], Esquire, and Members [], Esquire, and [], Esquire. Respondent appeared pro se. Petitioner was represented by [], Esquire. The Committee filed its Report on July 15, 1996 and recommended a one year suspension and two years' probation. No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting held on August 14, 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 Common-

wealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent, [], was born on March 18, 1950 and was admitted to practice law in the Commonwealth of Pennsylvania on May 12, 1978. His office is located at []. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. From at least September 28, 1992 until May 9, 1994, Respondent maintained an account at [A] Bank captioned [RESPONDENT] ESCROW ACCOUNT.

4. Respondent had sole signature authority on the escrow account.

5. Between January 1993 and May 1994, Respondent used the escrow account as both an operating account and an escrow account.

6. During that same time period, Respondent commingled in the escrow account funds belonging to clients and held in a fiduciary capacity with funds belonging to Respondent.

7. Between 15 and 32 occasions, the escrow account balance fell below the minimum balance that Respondent was required to hold in trust on behalf of others.

a) Respondent was out of trust in various amounts ranging from $23 to $6,671.

b) At times, the account balance remained out of trust for several months.

8. On July 22, 1993, Respondent filed his annual attorney registration statement for 1993-1994, wherein Respondent failed to list [A] Bank as a financial institution in which he held fiduciary funds. Respondent certified that the information in his statement was true and correct.

9. Beginning in 1992 and thereafter, Respondent represented [B] in a civil trespass action.

10. From January to approximately May 1993, Respondent shared his office space with [C], an attorney, pursuant to verbal agreement.

11. In or about January 1993, [B] consulted with Respondent about an unrelated mortgage foreclosure action that had resulted in the entry of a default judgment as well as a sheriff's sale.

12. [C] began providing legal services to [B] in his mortgage foreclosure action.

13. On January 12, 1993, [C] deposited $6,000 of funds belonging to [B] into the escrow account to be held on behalf of [B].

a) Respondent authorized [C] to make the deposit and provided [C] with a deposit slip.

b) [B] did not authorize [C] or Respondent to use the [B] funds.

c) Respondent held the funds in a fiduciary capacity.

d) Respondent was required to maintain, at a minimum, $3,000 of the [B] funds.

14. On February 23 and March 1, 1993, Respondent deposited personal funds into the escrow account which were commingled with the [B] funds.

15. Respondent used $2,042 of the [B] funds to pay for office expenses and transferred $2,895 to his personal account, which caused the escrow account balance to fall below the minimum amount of funds that Respondent was required to hold in trust.

16. By letter dated May 8, 1993, to Respondent and an office investigator, [C] gave Respondent notice that [B] was demanding the return of the [B] funds.

17. Respondent failed to segregate the remaining [B] funds until any dispute over them could be resolved.

18. [B] sent letters dated June 30 and July 2, 1993 to both Respondent and [C] requesting the return of his funds.

19. Respondent did not disburse any funds to [B] at any time or to [C] after May 1993.

20. On October 29, 1993, [B] filed a claim with the Pennsylvania Lawyers Fund for Client Security.

21. On August 18, 1994, the Fund Board approved an award, joint and several, against Respondent and [C] in the amount of $6,000.

22. On June 20, 1992, [D], individually and in her capacity as administratrix of her husband's estate, retained Respondent to recover $30,000 from [E], Esquire, her former attorney.

23. In December 1992, Respondent assisted [D] in filing claims with the Fund for Client Security.

24. At its August 19, 1993 meeting, the Fund Board approved [D] claims, thereby awarding $15,000 to the Estate of [F] and $15,000 to [D] individually, $4,631 of which was allocated to various medical providers.

25. On October 7, 1993, [G] Bank, the Fund Trustee, issued two checks from the Fund's trust account and forwarded them to Respondent.

26. On October 12, 1993, Respondent endorsed [D's] name on the back of the $10,368 Fund check and deposited that check into the escrow account.

27. Between October 11 and 18, 1993, Respondent issued four checks on the escrow account and used [D's] funds, without her knowledge or authorization. He used the funds to pay for his apartment and office rent as well as to pay other clients funds due to them.

28. Without [D's] knowledge or authorization Respondent also transferred funds from the escrow account to his [A] Bank personal checking account and wrote checks on his escrow account

for personal and office expenses, which caused the balance in the escrow account to fall to $8,173 by October 20, 1993.

29. On October 20, 1993, Respondent had [D] sign a distribution schedule stating that she was to receive distribution in the amount of $18,058, and Respondent delivered to [D] the $15,000 check made payable to Estate of [F].

30. Respondent failed to promptly deliver to [D] $3,058 of funds belonging to her.

31. After October 20, 1993, Respondent, without [D=s] knowledge or authorization, continued to disburse the remaining balance of [D=s] funds by writing a distribution check to another client, by issuing other checks on the escrow account, and by transferring funds to his personal checking account.

32. On November 17, 1993, Respondent received from [D] a letter requesting, within ten working days, an accounting and distribution of all monies belonging to her.

33. Respondent failed to provide [D] with an accounting of funds within that time period.

34. On November 29, 1993, [D] filed against Respondent a pro se claim with the Fund, and Respondent was put on notice of that claim on December 1, 1993.

35. After December 9, 1993, Respondent forwarded to [D] a check dated December 1, 1993 in the amount of $3,058, drawn on the escrow account.

36. Respondent has no prior record of discipline.

III. CONCLUSIONS OF LAW

1. Respondent violated RPC 1.15(a) by commingling in the escrow account client funds, including funds of [B] and [D], with funds belonging to Respondent.

2. Respondent violated RPC 1.15(b) by using funds in the escrow account indiscriminately for his own purposes.

3. Respondent violated RPC 1.15(b) by failing to account to his client, [D], for funds in his possession and failing promptly to distribute such funds upon her request.

4. Respondent violated RPC 1.15(c) by failing to segregate [B's] funds promptly upon [B's] demand for the return of his funds.

5. Respondent violated Pa.R.D.E. 219(d)(1)(iii) and (iv) by failing to list [A] Bank on his annual attorney registration statement and certifying falsely that Respondent was familiar and in compliance with RPC 1.15.

IV. DISCUSSION

This matter is before the Disciplinary Board on a Petition for Discipline alleging that Respondent commingled and converted client funds, failed to make prompt distribution of funds to a client, failed to provide a client with an accounting and prompt distribution on request, and failed to list the financial institution in which he held fiduciary funds on his 1993-1994 attorney registration statement.

Review of the record manifests that Respondent admitted that he commingled client funds with his own and that the balance of funds in his escrow account on numerous occasions during the time frame January 1993 to May 1994, was less than the minimum amount required to be held in trust. In the [D] matter, Respondent received funds on behalf of his client from the Pennsylvania Lawyers Fund for Client Security and failed to make prompt distribution to [D]. Instead, he converted the funds by using them

to pay for personal and business expenses. In the [B] matter, Respondent commingled and converted funds belonging to [B]. After receiving notice of [B's] demand for return of his monies, Respondent failed to hold the funds in trust pending resolution of any dispute. Evidence was presented that established that Respondent failed to list [A] Bank on his attorney registration statement as a financial institution holding fiduciary funds. Based on the evidence of record, the Board finds that Petitioner has met its

burden of proof that Respondent engaged in misconduct constituting a violation of the Rules of Professional Conduct and the Pennsylvania Rules of Disciplinary Enforcement. 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/or aggravating circumstances, and the existence of a record of prior discipline are factors that the Board considers when making a recommendation. Prior case law involving similar misconduct, while not conclusive as to the appropriate discipline to be imposed, is 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, precedent establishes that unauthorized dealings with client funds by an attorney has historically required some form of public discipline which varied depending upon aggravating or mitigating circumstances, as the mishandling of client monies is a serious breach of public trust. In assessing the proper discipline, the cases frequently consider

whether restitution was made, whether Respondent demonstrated an appreciable understanding of the nature of the misconduct, and whether a record of prior discipline existed.

The uncontroverted evidence establishes that Respondent commingled and converted funds for a period of approximately twenty months. The [D] situation is particularly offensive because the monies Respondent commingled and converted were due and owing to [D] from the Client Security Fund. The Fund awarded [D] a specific sum after Respondent helped her file a complaint based on a prior attorney's conversion of her funds without restitution. [D] was taken advantage of by two consecutive attorneys. Certainly, [D-s] trust in the profession has been shattered, perhaps permanently. All of Respondent's clients eventually received the funds due to them.

Case law indicates that similar misconduct has been treated with a period of suspension. In the case of In re Anonymous No. 67 DB 92, 27 Pa. D. & C. 4th 202 (1994), an attorney commingled client funds with his own during a two year period and used a portion of the funds for personal expenses. It was only after the client demanded an accounting and initiated an investiga-

tion and a lawsuit that the attorney restored the client's funds. The Board recommended a two year suspension, but the Supreme Court rejected this recommendation and imposed a three year suspension. In the case of In re Anonymous No. 58 DB 89, 10 Pa. D. & C. 4th 545 (1990), an attorney admitted to commingling and converting client funds during a two year period. Among the factors considered by the Board in making a recommendation were that the attorney paid all of his clients in full prior to the disciplinary proceedings, and he had a prior record of three informal admonitions and one private reprimand. The Board recommended and the Court imposed a suspension of three years. In the case of In re Anonymous No. 81 DB 87, 11 Pa. D. & C. 4th 393 (1991), an attorney failed to maintain separate bank accounts for client funds and misappropriated client funds. The Board recognized that the violations were serious; however, it also recognized that the attorney was experiencing very stressful personal circumstances during the time frame in question. The Board also found persuasive the favorable character testimony presented by the attorney which underscored the impression that the violations were an aberration. The Board recommended a three year suspension, but the Court instead imposed a two year suspension. In the case of In re Anonymous No. 50 DB 87, 3 Pa. D. & C. 4th 627 (1989), an attorney

deposited a client's check into his personal account and used the funds for office and personal expenses. The Board found that although the attorney's conduct was wrong, he did not knowingly make false statements concerning the funds to his client, and he did make restitution. The Board considered that the attorney had an unblemished forty year record as an attorney and expressed remorse. The attorney was suspended for two years.

Respondent testified at the disciplinary hearing that he did not intentionally commingle and convert client funds. In an attempt to mitigate his misconduct, Respondent testified that he was a sloppy bookkeeper, and he lacked the proper knowledge regarding his obligation to maintain client funds separately. While the Board accepts Respondent's testimony as credible, this excuse does not justify his misconduct. The Board notes that after the institution of disciplinary proceedings, Respondent failed to take any meaningful action to improve his record keeping skills to ensure that his problems do not occur again. It was Respondent's duty to know how to properly administrate client funds. The Rules of Professional Conduct clearly set forth an attorney's responsibilities with regard to client funds, and Respondent was obliged to apprise himself of the Rules. Respondent is not a new or inexperi-

enced attorney and has had ample time to acquaint himself with the ethical rules governing his profession. A failure to maintain adequate financial records epitomizes the type of professional misconduct from which the public is to be protected. In re Anonymous No. 10 DB 91, 20 Pa. D. & C. 4th 159 (1994).

Examination of all of the supporting facts of this case, including the fact that this is Respondent's first involvement with the disciplinary system, balanced by review of the relevant case law in the pertinent area of commingling and conversion, leads the Board to recommend that Respondent be suspended for a period of three years. This is a serious sanction; however, the Board perceives that the current danger to the public is too immediate to allow for any lesser period of suspension. This length of suspension is necessary to ensure that Respondent learns how to maintain separate bank accounts and keep accurate financial records without further harm to his clients.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be suspended from the

practice of law in this Commonwealth for a period of three (3) 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:_____
Angelo L. Scaricamazza, Jr., Member

Date:February 5, 1997

ORDER

PER CURIAM:

AND NOW, this 20th day of March, 1997, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 5, 1997, it is hereby

ORDERED that [RESPONDENT], be and he is SUSPENDED from the Bar of this Commonwealth for a period of three (3) 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.