

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 475, Disciplinary Docket
Petitioner	:	No. 3 - Supreme Court
	:	
	:	Nos. 5 DB 1999 and 24 DB 1999
	:	Disciplinary Board
	:	
v.	:	Attorney Registration No. []
	:	
[ANONYMOUS],	:	
Respondent	:	([] 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

The Pennsylvania Supreme Court issued an Order dated January 22, 1999, placing Respondent, [], on temporary suspension and referring this matter to the Disciplinary Board pursuant to Pa.R.D.E. 214(f)(1). Respondent was temporarily suspended as a result of his criminal

conviction of possession of drug paraphernalia in violation of 35 P.S. 780-113(a)(32) and possession of a controlled substance in violation of 35 P.S. 780-113(a)(16). A Petition for Discipline at No. 5 DB 1999 was filed against Respondent by Petitioner, Office of Disciplinary Counsel, on March 4, 1999. This Petition charged Respondent with a violation of Pa.R.D.E. 203(b)(1) based on the criminal conviction.

A separate Petition for Discipline at No. 24 DB 1999 was filed against Respondent on March 4, 1999 charging Respondent with a violation of Rule of Professional Conduct 3.3(a)(1) based on a statement Respondent made to the sentencing court in his criminal case. These Petitions were consolidated by Order of the Disciplinary Board dated April 5, 1999. Respondent did not file an Answer to these Petitions.

A disciplinary hearing was held on June 14, 1999 before Hearing Committee [] comprised of Chair [], Esquire, and Members [], Esquire, and [], Esquire. Respondent did not appear at the hearing, nor was he represented.

The Committee filed a Report on July 30, 1999 and found that Respondent violated Pa.R.D.E. 203(b)(1), but did not violate R.P.C. 3.3(a)(1). The Committee recommended a public censure with probation consistent with Respondent's criminal probation. Petitioner filed a Brief on Exceptions on August 9, 1999 and contended that the appropriate discipline was a suspension of one year and one day.

This matter was adjudicated by the Disciplinary Board at the meeting of October 5, 1999.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is 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 1960 and was admitted to practice law in Pennsylvania in 1989. His registered address is []. Respondent is subject to disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. By Order of the Supreme Court dated January 22, 1999, Respondent was placed on temporary suspension.

4. In the Court of Common Pleas of [] County, Respondent was charged with violations of 35 P.S. 780-113(a)(16), possession of a controlled substance, and 35 P.S. 780-113(a)(32), possession of drug paraphernalia. These crimes are punishable by imprisonment of not less than one year nor more than two years.

5. On August 18, 1998, Respondent entered a plea of guilty to both charges.

6. On August 18, 1998, Respondent was sentenced to two years of probation and random drug and alcohol screening.

7. The underlying facts of the conviction reveal that Respondent was seen frequenting a home that the police had under surveillance for suspected drug activity.

8. Respondent left the house and was a passenger in a car which was stopped by the police for a traffic violation.

9. The police officer noted that Respondent was disheveled and glassy-eyed and he volunteered to the officer that he was high .

10. The officer asked if Respondent had anything illegal on him, and Respondent acknowledged that he had crack cocaine in his sock. A search of Respondent revealed

a small amount of crack cocaine and a crack pipe.

11. In connection with the disciplinary hearing, Respondent was served with the Petitions for Discipline and with a Notice of the hearing. Respondent did not file an Answer to the Petitions, nor did he appear for the hearing.

12. Respondent was transferred to inactive status by Order of the Supreme Court dated July 16, 1998 for his failure to comply with the Continuing Legal Education rules.

13. During the course of Respondent's sentencing on August 18, 1998, Respondent informed the court that he had voluntarily resigned earlier this year .

14. Respondent was scheduled to receive two informal admonitions in April 1999 for violations of the Rules of Professional Conduct in two separate matters. Respondent did not demand formal proceedings in these matters, nor did he appear for the scheduled informal admonitions.

III. CONCLUSIONS OF LAW

By his actions as set forth above, Respondent violated the following Rule of Disciplinary Enforcement:

Respondent's conviction of possession of a controlled substance and possession of

drug paraphernalia is an independent basis for the imposition of discipline pursuant to Pa.R.D.E. 203(b)(1).

IV. DISCUSSION

This matter is before the Board upon joint Petitions for Discipline. The first Petition at No. 5 DB 1999 charges Respondent with violation of Pennsylvania Rule of Disciplinary Enforcement 203(b)(1) as a result of his criminal conviction.

Rule 203(b)(1) of the Pennsylvania Rules of Disciplinary Enforcement provides that conviction of a serious crime shall be grounds for discipline. Pa.R.D.E. 214(e) specifies that a certificate of conviction of an attorney for a serious crime shall be conclusive evidence of that crime. When a disciplinary proceeding is commenced against an attorney based upon a criminal conviction, the Board does not engage in a retrial of the underlying facts of the crime. The Board's responsibility is to determine the appropriate measure of discipline relative to the seriousness of the crime. The focal issue is whether the attorney's character, as shown by his or her conduct, makes the attorney unfit to practice law. *Office of Disciplinary Counsel v. Casety*, 511 Pa. 177, 512 A.2d 607 (1986). This test balances a concern for the public with a respect for the substantial interest of an attorney in maintaining his or her privilege to practice law. *Office of Disciplinary Counsel v. Lewis*, 492 Pa. 519, 426 A.2d 1138 (1981). It is appropriate for the Board to examine the events surrounding the criminal charge as well as any aggravating and/or mitigating circumstances when determining an appropriate measure of discipline. *Office of Disciplinary Counsel v. Eilberg*, 497

Pa. 388, 441 A.2d 1193 (1982).

Respondent was found guilty of one count of possession of a controlled substance and possession of drug paraphernalia. Respondent was sentenced on August 18, 1998 to a term of probation of two years. Respondent was placed on temporary suspension from the practice of law by Order of the Supreme Court dated January 22, 1999.

The underlying facts of the criminal conviction as evidenced by the record reveal that Respondent was a passenger in a car that was stopped by the police for a traffic violation. The officer observed that Respondent appeared disheveled and glassy-eyed. When the officer asked Respondent if everything was okay, Respondent told him that he was high. Respondent also revealed that he had crack cocaine in his sock. A subsequent search of Respondent's person revealed a crack pipe as well as the crack cocaine.

The second Petition at No. 24 DB 1999 charges Respondent with violation of R.P.C. 3.3(a)(1) arising out of a statement made by Respondent to the court during his sentencing for the criminal conviction. The court asked Respondent if he was a member of the Pennsylvania bar and Respondent informed the court that he voluntarily resigned earlier in the year. Petitioner claims that this statement constitutes a false statement of material fact to a tribunal, in violation of R.P.C. 3.3(a)(1). At the time of the statement Respondent in fact had been transferred to inactive status by the Supreme Court for failure to fulfill his CLE credits. The Hearing Committee found

that in the context of the proceeding in which Respondent advised the court of his voluntary resignation, the utterance appeared to be de minimis and more a matter of semantics than a contrived false statement. Respondent voluntarily chose not to attend CLE courses for credit, thus necessitating the Supreme Court to transfer him to inactive status. The Board agrees with the Committee that Respondent's statement does not violate Rule 3.3(a)(1).

The Hearing Committee recommended a public censure be imposed to address Respondent's criminal conviction. The Committee did not discuss the conviction in terms of Respondent's fitness to practice, nor did it cite any relevant case law supporting public censure. Review of the case law indicates that public censure is within the range of appropriate discipline for a drug conviction of this type. *In re Anonymous No. 27 DB 90*, 17 Pa. D. & C. 4th 12 (1991), *In re Anonymous No. 100 DB 88*, 12 Pa. D. C. 4th 60 (1990). However, Respondent's failure to appear at the hearing must be weighed in the final analysis of discipline. *In re Anonymous No. 115 DB 92*, 26 Pa. D. & C. 4th 248 (1995). Respondent's non-appearance deprived the Committee and Petitioner of the opportunity to question Respondent as to his current fitness to practice law and his intentions as to his legal career. Respondent's drug conviction and the circumstances of the crime raise the specter of a substance abuse problem, although the conviction by itself is not determinative of such a problem. Respondent may or may not have a substance abuse problem; however, there is simply no evidence of record pertaining to that issue to permit the Board to consider how such a problem would impact Respondent's ability to practice in a competent manner.

Although Respondent is currently on inactive status, he need only fulfill his CLE requirements in order to be reinstated to active status. Therefore, if Respondent received a public censure, as recommended by the Hearing Committee and was subsequently reinstated to active status, he would be free to practice law without any sort of inquiry into the crucial issue of Respondent's fitness and competence. The disciplinary system would therefore have failed in its mandate to protect the public and the integrity of the legal system.

In this situation, it is in the best interests of the public for the Respondent to be required to go through the reinstatement process in order for Respondent's fitness to be tested. The Board recommends that Respondent be suspended for a period of one year and one day.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be suspended from the practice of law in the Commonwealth of Pennsylvania for a period of one (1) year and one (1) day.

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: January 12, 2000

PER CURIAM:

AND NOW, this 16th day of March, 2000, upon consideration of the Report and Recommendations of the Disciplinary Board dated January 12, 2000, it is hereby

ORDERED that [Respondent] be and he is SUSPENDED from the Bar of this Commonwealth for a period of one (1) year and one (1) day, 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.

Mr. Justice Nigro dissents and would suspend respondent for three years retroactive to January 22, 1999.