

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 756, Disciplinary Docket
	:	No. 3 – Supreme Court
Petitioner	:	
	:	No. 98 DB 2002 – Disciplinary Board
v.	:	
	:	Attorney Registration No. 34508
KEVIN JOHN WALSH	:	
Respondent	:	(Allegheny 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

By Order of the Supreme Court of Pennsylvania dated August 8, 2002, Respondent, Kevin John Walsh, was placed on Temporary Suspension from the practice of law as a result of his conviction of five counts of the offense of Violation of the Pharmacy

Act, 63 P.S. §390-8(13)(i). On August 23, 2002, Petitioner, Office of Disciplinary Counsel, filed a Petition for Discipline against Respondent based on his conviction. Respondent filed an Answer to Petition for Discipline on September 20, 2002.

A disciplinary hearing was held on April 22, 2003, before Hearing Committee 4.08 comprised of Chair Gregory J. Hammond, Esquire, and Members Dusty Elias Kirk, Esquire, and Robert Given Rose, Esquire. Peter G. Nychis, Esquire, represented Respondent at the hearing. Respondent did not appear for the hearing.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on July 10, 2003 and recommended that Respondent be Disbarred from the practice of law.

This matter was adjudicated by the Disciplinary Board at the meeting of August 26, 2003.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is situated at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania, 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 of Disciplinary Enforcement.

2. Respondent was born in 1955 and was admitted to practice law in the Commonwealth in 1981. His registration address is 147 Glenwood Drive, Monroeville PA 15146. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. On April 25, 2000, Respondent was charged in the Allegheny County Court of Common Pleas at CC number 2000-09427 with a total of 24 counts, including Insurance Fraud, Violation of the Pharmacy Act, and Theft by Deception. On July 12, 2000, at CC number 2001-04449, Respondent was charged with a total of 126 counts, involving Insurance Fraud and Violation of the Pharmacy Act. Respondent was also charged at CC number 2001-04501 with a total of 176 counts of Insurance Fraud and Violation of the Pharmacy Act.

4. On January 30, 2002, Respondent entered a plea of guilty to five counts of the offense of Violation of the Pharmacy Act.

5. The criminal conduct in which Respondent engaged on several occasions, during the period of February 1997 through January 1999, consisted of procuring for himself, or another, by fraud, deceit, misrepresentation or subterfuge, various drugs such as, Toradol, Ultram and Ibuprofen.

6. Respondent had his wife, Donna Walsh, telephone prescriptions to various pharmacies to order drugs, purportedly under the authority of Dr. Karen Hallmark and/or Dr. Lisbeth Shelley. In fact, Donna Walsh had no authority to do so. Respondent signed insurance signature log forms affirming the dispensation of the medication.

7. On April 25, 2002, Respondent was sentenced as follows:

- a. At Count 12 of #2000-09427, to serve a period of incarceration of not less than three months, nor more than 12 months and he was permitted to serve his sentence in alternative housing through the House Arrest Program and granted work release. He was ordered to pay restitution of \$14,163.72 to Highmark, Inc.
- b. At Count 13 of #2000-09427, to serve a period of incarceration of not less than three months nor more than 12 months, less one day, to be served consecutive to the sentence imposed at Count 12.
- c. At Count 64 of #2001-04449, to serve a period of probation of one year, with conditions, to be served consecutive to the sentence imposed at Count 13.
- d. At Count 65 of #2001-04449, to serve a period of probation of one year, to be served consecutive to the sentence imposed at Count 64.
- e. At Count 89 of #2001-04501, to serve a period of probation of one year, to be served consecutive to the sentence imposed at Count 65.

8. In exchange for Respondent's entry of a plea of guilty, all remaining counts involving insurance fraud were *nolle prossed*.

9. None of the drugs involved were controlled substances.

10. One character witness testified on behalf of Respondent. Frank Communale is a former magistrate in front of whom Respondent practiced for many years. Mr. Communale found Respondent to be a fine lawyer and consummate professional.

11. Respondent has no prior history of discipline.

12. Respondent failed to appear for the disciplinary hearing.

III. CONCLUSIONS OF LAW

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

The conviction of Respondent constitutes a “serious crime” as defined by Rule 214(i), Pa.R.D.E., and forms the basis for discipline, pursuant to Rule 203(b)(1).

IV. DISCUSSION

This matter comes before the Disciplinary Board on a Petition for Discipline charging Respondent with violation of Rule 203(b)(1) of the Pennsylvania Rules of Disciplinary Enforcement arising out of his conviction of five counts of Violation of the Pharmacy Act. Respondent, by his plea of guilty to the aforementioned charges, admitted

that he procured for himself or another person, by means of fraud, deceit, misrepresentation or subterfuge, the drugs Toradol, Ultram and Ibuprofen, during the period of February 1997 through January 1999. As with all disciplinary matters predicated on a criminal conviction, the sole issue to be resolved is the extent of discipline to be imposed on Respondent. Office of Disciplinary Counsel v. Eilberg, 441 A.2d 1193 (Pa. 1982). Consideration is to be given to any aggravating or mitigating factors. Office of Disciplinary Counsel v. Valentino, 730 A.2d 479 (Pa. 1999).

The Hearing Committee recommended the disbarment of Respondent based on the nature of the misconduct, Respondent's failure to appear at the disciplinary hearing, and the lack of any mitigating circumstances.

The Board is not persuaded by the facts of the record that disbarment is appropriate. Respondent's crime, while quite serious, did not involve clients or the legal profession, nor did it involve misrepresentations or dishonesty to the court or his clients. While his failure to appear at the hearing and offer testimony deprived the Hearing Committee of the opportunity to assess the circumstances of the conviction and any remorse or steps taken to change his life since his conviction, this does not aggravate the matter to the level of disbarment.

Disbarment is reserved for the most egregious situations, such as in Office of Disciplinary Counsel v. Raiford, 687 A.2d 1118 (Pa. 1997). Mr. Raiford used an impersonator to act as one of his clients and enter a plea in her stead. By engaging in this

misconduct, for which he was criminally convicted, Mr. Raiford committed a fraud on the court and deserved to be disbarred.

In the matter of In re Anonymous Nos. 75 DB 94 and 7 DB 95, 34 Pa. D. & C. 4th 32 (1996), an attorney was disbarred after she was convicted of writing bad checks and held in contempt for abandoning the representation of three clients. In this matter, the attorney failed to make restitution on bad checks that she wrote, failed to appear in court on behalf of her clients, failed to return client files and failed to return unearned advance fees. This attorney failed to appear at her disciplinary hearing. The Board determined that this attorney's actions rendered her unfit to practice law and the only sanction that would protect the public and the integrity of the bar was disbarment.

The facts of Respondent's criminal conviction simply do not warrant disbarment, even after taking into account the aggravating nature of his failure to appear. Case law suggests that a lengthy suspension is appropriate. In the matter of Office of Disciplinary Counsel v. Valentino, 730 A.2d 479 (Pa. 1999), a five year suspension was imposed on Mr. Valentino after he was convicted of one count of mail fraud for his participation in a fraud against insurance companies. Aggravating this situation was the fact that Mr. Valentino suborned perjury by advising his mother to testify falsely in front of a grand jury. Mr. Valentino subsequently consulted with legal counsel and had the perjured testimony corrected. Although the Board recommended disbarment, the Court imposed a

five year suspension due to Mr. Valentino's recognition of his wrongdoing in suborning the perjury and his quick attempts to bring his malfeasance to the attention of the authorities.

In the matter of Office of Disciplinary Counsel v. Chung, 695 A.2d 405 (Pa. 1997), Mr. Chung was convicted of five counts of making false statements to a federally insured financial institution. These false statements were made in order to help clients secure loans. Mr. Chung presented impressive character testimony on his behalf. Despite this impressive testimony, the Board recommended disbarment. The Court gave greater deference to this testimony, as well as other factors in Mr. Chung's background, and imposed a five year suspension.

The instant case is more in line with the five year suspension cases than the disbarment cases. Respondent's actions do not rise to the egregious level of the crime committed in the Raiford case, nor do the aggravating factors of the instant case rise to the serious level of those present in the case at Nos. 75 DB 94 and 7 DB 95.

For the reasons as set forth above, the Board recommends that Respondent be Suspended from the practice of law for a period of five years retroactive to August 8, 2002, the date of Respondent's temporary Suspension.

IV. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Kevin John Walsh, be Suspended from the Bar of this Commonwealth for a period of five years retroactive to August 8, 2002.

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: _____
Lori A. Flickstein, Member

Date: January 16, 2004

Board Members Saidis and Peck dissented and would recommend Disbarment.

PER CURIAM:

AND NOW, this 8th day of April, 2004, upon consideration of the Report and Recommendations of the Disciplinary Board dated January 16, 2004, it is hereby

ORDERED that KEVIN JOHN WALSH be and he is SUSPENDED from the Bar of this Commonwealth for a period of five years, retroactive to August 8, 2002, 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.