

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 875, Disciplinary Docket No. 3
Petitioner	:	
	:	Nos. 140 DB 2001 and 7 DB 2002
v.	:	
	:	Attorney Registration No. 38793
DENNIS J. MARK	:	
Respondent	:	(Lackawanna 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 October 10, 2001, Petitioner, Office of Disciplinary Counsel filed a Petition for Discipline at No. 140 DB 2001 against Respondent, Dennis J. Mark. At the time that this Petition was filed, four other matters involving Respondent were pending in the

disciplinary system. Respondent waived the filing of a Petition for Discipline referencing these matters and agreed to permit a Stipulation in Lieu of Petition to be filed at No. 7 DB 2002 on January 23, 2002 based on the four complaints. Petitioner and Respondent further agreed that the Stipulation should be consolidated with the Petition for Discipline filed on October 10, 2001. By Disciplinary Board Order of January 28, 2002, consolidation was granted.

A disciplinary hearing was held on November 7, 2002, before Hearing Committee 3.03 comprised of Chair Joanne C. Ludwikowski, Esquire, and Member Charles Owen Beckley, II, Esquire, and Alternate Member Herman A. Gailey, III, Esquire. Sal Cognetti, Jr., Esquire, represented Respondent.

Following briefing by the parties, the Hearing Committee filed a Report on April 10, 2003 and recommended that Respondent receive a Public Censure and one year of Probation with a practice monitor.

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

This matter was adjudicated by the Disciplinary Board at the meeting of May 14, 2003.

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 (hereafter Pa.R.D.E.), 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 was born in 1953 and was admitted to practice law in the Commonwealth in 1983. He maintains an office at 148 Adams Avenue, Scranton, PA 18503. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

### **Complaint of Rainelle M. Murphy**

3. In August 1991, Rainelle M. Murphy, formerly known as Rainelle Robertson, and her former husband, Mark D. Robertson, entered into a real estate contract with Paul J. Enrico, Sr., President of Elk Hill Estates, Ltd., to buy Lot 8 of a subdivision of Elk Mountain, Uniondale, Pennsylvania.

4. As part of the real estate contract, Ms. Murphy and Mr. Robertson made a \$10,000 down payment, and Mr. Enrico agreed to "personally guarantee the return of this down payment in the event the Buyers [Murphy and Robertson] are entitled to cancel the contract."

5. Mr. Enrico failed to provide clear title to the property so Ms. Murphy and Mr. Robertson repeatedly requested a return of their down payment as a result of Mr. Enrico's breach of contract.

6. The Office of the Attorney General initiated litigation at Docket No. E91-3324 alleging that this was a fraudulent land sale, but the matter was later dismissed without a decision on the merits.

7. Ms. Murphy retained Respondent to represent her in a divorce matter involving support and equitable distribution in 1993.

8. At the time that Respondent was retained, Ms. Murphy informed Respondent that she wanted to pursue a claim against Mr. Enrico for his failure to refund her \$10,000 down payment. Since Ms. Murphy paid the \$10,000 down payment from her personal funds, she felt that she was entitled to a return of the entire \$10,000, not half. Respondent advised her to wait until after the divorce was finalized to pursue this matter.

9. From the beginning of Respondent's representation in the divorce matter, Ms. Murphy informed Respondent that she wanted to pursue a claim for alimony. Respondent advised her that she could not receive alimony payments until after the divorce was finalized.

10. Respondent filed a Divorce Complaint on behalf of Rainelle Murphy on May 21, 1993, in the Court of Common Pleas of Lackawanna County Docket No. 93 Civ 2778 captioned *Rainelle M. Robertson v. Mark D. Robertson*.

11. Defendant filed an Answer and Counterclaim on December 1, 1993, and Respondent filed an Answer to the Defendant's Counterclaim on December 14, 1993.

12. Respondent sent an inventory and appraisalment from his client on December 1, 1994, to Brian Cali, opposing counsel, and Richard Fanucci, the Divorce Master in this case.

13. At a pretrial hearing which occurred on June 12, 1995, Respondent and Mr. Cali agreed to enter serious negotiations with the intent of amicably resolving the equitable distribution issues between their respective clients.

14. By letter dated June 13, 1995, Richard Fanucci confirmed counsels' intent to enter serious negotiations. Mr. Fanucci further requested in his letter that both counsel reserve July 24, 1995, as a tentative date for a Master's hearing in the event that the settlement negotiations were not successful.

15. By letter dated July 19, 1995, Respondent advised Brian Cali that:

- a) He had spoken to Ms. Murphy with regard to a proposed settlement proposal;
- b) Ms. Murphy was not willing to accept \$1,000;

- c) Ms. Murphy wanted to receive \$2,000, knickknacks, baby furniture and jewelry;
- d) Ms. Murphy was willing to pick up the aforementioned items at her expense; and
- e) Respondent has notes reflecting that Mr. Cali was trying to schedule a Master's hearing, but Respondent was unaware whether a hearing had been scheduled.

16. The items that Respondent requested in his letter to Brian Cali were only a portion of the items that Ms. Murphy agreed to accept in settlement of her equitable distribution claims. Ms. Murphy requested that she receive, among other things, one set of bedroom furniture, the car that she had driven and paid for during the marriage, kitchen appliances, and a washer. Since Ms. Murphy had paid the monthly payments on the automobile and had paid for the insurance and maintenance, she felt that she was entitled to the car. Respondent advised her that she was not entitled to the car because the car was not titled in her own name even though it was marital property. Moreover, Ms. Murphy advised Respondent that Mr. Robertson, not she, was to be responsible for the costs of transporting these items. Since Respondent did not send Ms. Murphy a copy of this settlement proposal, she was not aware of his July 19, 1995 settlement proposal to Mr. Cali.

17. Respondent telephoned Ms. Murphy on July 24, 1995 and advised her that the Master's hearing scheduled for that day, had been postponed. However, the hearing had not been postponed.

18. Neither party appeared for the Master's hearing scheduled for July 24, 1995, and the court reporter requested payment for her services that were not utilized.

19. Ms. Murphy was later told that she was responsible for paying one-half of the court reporter's fees even though she was not at fault in causing the postponement or failing to notify the court reporter of the postponement. Ms. Murphy was also told that if she did not pay the court reporter's fees, no more hearings could be scheduled. Therefore, she paid Respondent for one-half of the court reporter's fees.

20. A Master's hearing was rescheduled for September 22, 1995.

21. By letter dated August 17, 1995, Brian Cali requested that Respondent call him to discuss a proposal that his client wanted to make.

22. By letter dated September 11, 1995, Respondent advised Mr. Cali that Ms. Murphy was willing to accept \$3,000, sole possession of the Elk Mountain property located at Lot 8, all her jewelry and her Polish cookbook. Respondent requested that Mr. Cali discuss the matter with his client and advise Respondent whether it was an acceptable arrangement.

23. Ms. Murphy does not recall discussing any such settlement proposal with Respondent and did not discuss the Elk Mountain property as part of any proposed settlement until December 10, 1996. Moreover, Ms. Murphy could not take possession of

the Elk Mountain property because the purchase of the Elk Mountain property had been unsuccessful due to title problems.

24. Respondent failed to send Ms. Murphy a copy of the proposed marital settlement agreement that Respondent sent to Mr. Cali on September 11, 1995.

25. After Mr. Cali received the September 11, 1995 letter, Respondent and Mr. Cali had a telephone conversation during which Respondent advised Mr. Cali that Ms. Murphy would accept the following agreement: 1) a \$2,000 payment from Mr. Robertson; 2) Ms. Murphy would receive any proceeds from the lawsuit dealing with the Elk Mountain property; and 3) all items in the parties' possession would remain their property.

26. Although Respondent and Ms. Murphy had discussed various settlement proposals, Ms. Murphy never discussed the above referenced settlement proposal with Respondent, and never authorized Respondent to make the above referenced offer to settle.

27. Mr. Cali, on behalf of Mr. Robertson, accepted Respondent's unauthorized offer to settle the divorce and equitable distribution matters, and shortly before the September 22, 1995 Master's hearing, he informed Mr. Fanucci that the case was settled.

28. By letter dated November 3, 1995, addressed to Respondent and Mr. Cali, Mr. Fanucci confirmed his understanding that the matter had been settled. In the



same letter, Mr. Fanucci requested that he receive a copy of the final Marital Settlement Agreement, and that the agreement include a provision for his fees as well as the outstanding stenographer bill.

29. Respondent did not notify Ms. Murphy that this matter was settled and did not send a copy of Mr. Fanucci's letter to her. She was also unaware that there was still an outstanding bill from the stenographer, for which she had previously paid Respondent.

30. By letter dated November 8, 1995, Mr. Cali sent Respondent a Marital Settlement Agreement that set forth the verbal agreement that Respondent reached by telephone. Mr. Cali requested that Respondent review the Marital Settlement Agreement with his client, and advise him whether the agreement met with his approval.

31. Respondent failed to contact his client or Mr. Cali after receiving the Marital Settlement Agreement.

32. Thereafter, Mr. Cali forwarded another copy of the Marital Settlement Agreement to Respondent on December 5, 1995.

33. By letter dated December 13, 1995, Mr. Cali again requested that Respondent advise him whether his client was in agreement regarding the Marital Settlement Agreement that he had previously forwarded on November 8, 1995 and December 5, 1995. This letter was sent via facsimile and regular mail.

34. By letter dated December 20, 1995, Mr. Fanucci again wrote to Respondent and Mr. Cali requesting a copy of the Marital Settlement Agreement and that his fees be paid.

35. Respondent did not respond to that letter.

36. By letter dated December 26, 1995, Mr. Cali advised Respondent that he had tried to reach Respondent by phone and was told that the office was closed until January 2, 1996. He requested that Respondent advise him whether his client would accept the Marital Settlement Agreement that he had forwarded on November 8, 1995, and December 5, 1995. Mr. Cali advised Respondent that if his client accepted the terms of the Marital Settlement Agreement, he would prepare originals for signature. He also requested Respondent's immediate attention to this matter.

37. Respondent failed to respond to that letter.

38. By letter dated January 30, 1996, Mr. Cali sent Respondent the following documents:

- a) Two copies of the Marital Settlement Agreement;
- b) An original Affidavit of Consent and Waiver for his client's signature; and,
- c) Copies of Mr. Cali's client's executed Affidavit of Consent and Waiver.

39. Mr. Cali requested that Respondent have Ms. Murphy execute the documents and forward them to him so that he could praecipe the matter for finalization. He also advised Respondent that he had items in his possession that were given to him by Mr. Robertson to give to Ms. Murphy.

40. Respondent never informed Ms. Murphy that Respondent had received the Marital Settlement Agreement, Affidavit of Consent and Waiver that Mr. Cali had sent to Respondent. Respondent failed to discuss these documents with Ms. Murphy and failed to forward copies of these documents to her. Respondent also failed to notify Ms. Murphy that Mr. Cali had items in his possession that were given to him by Mr. Robertson to give to Ms. Murphy.

41. None of the items which Mr. Cali received from Mr. Robertson have been forwarded to Ms. Murphy.

42. By letter dated February 13, 1996, Mr. Fanucci advised Respondent and Mr. Cali that he had checked the courthouse and the divorce had not been settled. He therefore requested that Respondent advise him of the status of the matter.

43. Mr. Cali telephoned Respondent's office on February 16, 1996 to find out the status of this matter, and left a message since Respondent was out of the office.

44. By letter dated February 16, 1996, Mr. Cali advised Mr. Fanucci that he had sent Respondent a proposed Marital Settlement Agreement and an Affidavit of

Consent. He advised Mr. Fanucci that Respondent had not responded to the Marital Settlement Agreement sent January 30, 1996, and that he had been unable to reach Respondent by telephone to find out the status of the matter.

45. Respondent failed to respond to Mr. Fanucci's request for a status report.

46. By letter dated March 1, 1996, Mr. Cali advised Respondent of the following:

- a) He was frustrated about Respondent's failure to resolve this matter;
- b) He had sent a Marital Settlement Agreement, Affidavit of Consent and Waiver for Respondent's client's signature on January 30, 1996;
- c) He had attempted to call Respondent's office on two occasions and did not receive an answer;
- d) His client was ready and willing to pay the money that he had agreed to pay and that his client was very anxious to resolve this matter; and,
- e) He wanted Respondent to call and discuss this matter.

47. By letter dated March 13, 1996, Mr. Cali informed Respondent that Mr. Cali's client was very upset because he had believed that a settlement had been reached, and now, it appeared that Ms. Murphy was no longer willing to resolve this matter. Mr. Cali requested that Respondent notify him immediately as to whether this matter was resolved or not, so that he could proceed to trial if the matter was not settled. Mr. Cali advised

Respondent that he believed that it was ludicrous to litigate this matter due to the costs involved. He gave Respondent one week to respond.

48. Shortly after receiving Mr. Cali's letter, Respondent telephoned Ms. Murphy and told her that she should come in to sign the papers to finalize the divorce. Respondent did not discuss the terms of this Marital Settlement Agreement over the telephone, but Ms. Murphy believed that Respondent would discuss the matter with her when she came in to sign the papers.

49. In approximately late March 1996, Ms. Murphy, accompanied by her father, went to Respondent's office to discuss the property settlement and to sign the papers to finalize her divorce. Respondent was not present to answer the many questions that she had. Ms. Murphy started crying, because she did not understand the papers that she was being asked to sign. Respondent's secretary advised Ms. Murphy to sign the documents, otherwise her divorce would be delayed for months. Respondent's secretary told her not to worry, because Respondent would make any changes and/or answer any questions the next time that she saw Respondent. After Ms. Murphy's father heard that Respondent could change anything in the document afterward, he advised her to sign the Marital Settlement Agreement, and she did so.

50. By letter dated April 15, 1996, Respondent sent Mr. Cali the signed Marital Settlement Agreement, Affidavit of Consent and Waiver even though Respondent had not discussed this matter with Ms. Murphy. Respondent requested that prior to filing

the Marital Settlement Agreement that Mr. Cali provide the following items from his client: baby books, stereo system, gold head of Christ, baby furniture and a brass with glass table and chair set.

51. Respondent did not send a copy of the April 15, 1996 letter to Ms. Murphy and she never received the items enumerated therein.

52. By letter dated June 18, 1996, Mr. Fanucci again requested that Respondent advise him of the status of the case.

53. Sometime between late March and July 1996, Ms. Murphy finally got an opportunity to discuss the terms of the Marital Settlement Agreement that she had signed in March 1996. Ms. Murphy told Respondent that she would not accept the terms of the settlement, and she wanted a Master's hearing.

54. By letter dated July 2, 1996, Respondent advised Mr. Fanucci and Mr. Cali that Respondent's client had reconsidered the Marital Settlement Agreement and had ordered him to list the matter for trial.

55. Ms. Murphy did not reconsider the Settlement Agreement, because she had never agreed to the proposed Marital Settlement Agreement in the first place. She had only signed the Agreement because Respondent's secretary had told her that it could be modified later.

56. By letter dated August 5, 1996, Respondent paid \$258.75 in outstanding Master's fees to Mr. Fanucci, which Respondent had previously received from Ms. Murphy.

57. A Master's hearing was originally scheduled for October 1, 1996, but had to be rescheduled for December 10, 1996, due to a scheduling conflict.

58. The Master's hearing took place on December 10, 1996. At that time, Mr. Fanucci and Mr. Cali advised Ms. Murphy that she had signed the Marital Settlement Agreement and could not change her mind.

59. During the four years of representing Ms. Murphy, Respondent never filed a petition for alimony pendente lite or alimony on Ms. Murphy's behalf even though she had requested that Respondent do so. Respondent had continually advised Ms. Murphy that she would be able to receive alimony payments after the divorce had been finalized. Ms. Murphy only found out that this was not true when Mr. Fanucci told her that she would not be entitled to spousal support at the Master's Hearing on December 10, 1996. When Ms. Murphy realized that she would only receive \$2,000 in equitable distribution and would not receive any alimony, Ms. Murphy became distraught, and explained that was not acceptable, and that was the reason that she had requested a Master's hearing. Respondent then requested a recess to talk to his client.

60. Ms. Murphy and Respondent went into a separate office. Respondent told Ms. Murphy that he wanted to withdraw from her case and advised her that he had

done such a poor job that she should get other counsel. Respondent attempted to terminate his representation in the middle of a hearing after representing Ms. Murphy for almost four years. Ms. Murphy became hysterical and requested that her parents join her in this conference.

61. When Richard Visneski, Ms. Murphy's father, was advised that Respondent wanted to quit, he told Respondent that he could not simply abandon Ms. Murphy in the middle of a hearing. Ms. Murphy's father then asked whether Ms. Murphy could at least receive the \$10,000 from Paul Enrico of Elk Hill estates.

62. After the consultation with his client, Respondent then requested that his client be permitted to keep any proceeds that might be recovered from Mr. Enrico and Elk Hill Estates. Mr. Cali privately advised his client, Mr. Robertson, that the claim against Mr. Enrico was probably already barred by the statute of limitations, so in his view, Mr. Robertson was not giving up anything by agreeing to allow Ms. Murphy to keep whatever proceeds she thought she could recover. Therefore, he agreed to the proposition.

63. Thus, the Marital Settlement was finalized on December 10, 1996, and the terms of the settlement were that Ms. Murphy would receive \$2,000 and the right to any money which might be recovered from Mr. Enrico relating to the Elk Hill Estates. Ms. Murphy did not receive any alimony or any of the furniture or the automobile on which she had made payments and incurred maintenance costs.



64. After the hearing was concluded, Respondent promised Ms. Murphy that Respondent would pursue her \$10,000 claim against Paul Enrico pro bono since Respondent had represented her so poorly in the divorce.

65. On July 31, 1998, Respondent filed a complaint in the case captioned *Rainelle M. Robertson v. Paul J. Enrico, Sr.*, in the Court of Common Pleas of Susquehanna County, docket number 1998-00086.

66. On or about January 19, 1999, Respondent filed a praecipe to list the case for trial; the trial was scheduled on this matter for March 29, 1999, at 10:00 a.m., but was postponed and rescheduled four times: 1) May 24, 1999; 2) July 12, 1999; 3) September 23, 1999; and 4) December 9, 1999.

67. Two days prior to the December 9, 1999 trial date, Respondent telephoned Ms. Murphy and advised her that Robert Gilardi, Esq., would handle the trial for her on December 9, 1999. Respondent made the arrangements for Mr. Gilardi to represent Ms. Murphy at the trial without Ms. Murphy's authorization or consent. Mr. Gilardi was not associated with Respondent's law firm at the time that Respondent had requested that he represent Ms. Murphy.

68. Respondent failed to notify the court or opposing counsel that Mr. Gilardi was going to represent Ms. Murphy at the trial scheduled on December 9, 1999. Respondent was the only attorney who was listed as attorney of record in this case.

69. Mr. Gilardi met with Ms. Murphy's parents on the day before the trial. Ms. Murphy's parents gave Ms. Murphy's only copies of her documents to him.

70. On December 9, 1999, Ms. Murphy and her witnesses, Deputy Attorney General J. P. McGowan and James Aita, were present in court and ready to proceed. Defendant and his counsel, Charles J. Aliano, were also present. Judge Kenneth Seamans waited for over an hour for either Respondent or Mr. Gilardi to appear. Neither Respondent nor Mr. Gilardi appeared to represent Ms. Murphy on December 9, 1999.

71. On December 9, 1999, opposing counsel filed a Motion for Summary Judgment on the Pleadings and Memorandum in Support Thereof based on the fact that the complaint that Respondent had filed on Ms. Murphy's behalf was barred by the applicable statute of limitations.

72. Judge Seamans issued an order that Respondent shall have 20 days to file a brief. The court advised that it would consider both briefs and dispose of the matter in either granting or not granting the motion for judgment on the pleadings. A copy of this order was sent to Respondent on December 10, 1999.

73. In addition to the notice that Respondent received from the court, Ms. Murphy also sent Respondent a copy of the request for a brief.

74. Respondent failed to file a brief.

75. By Order dated January 5, 2000, Defendant Paul Enrico's Motion for Judgment on the Pleadings was granted.

76. From December 1999 until approximately July 19, 2000, Ms. Murphy repeatedly attempted to contact Respondent to find out the status of the case.

77. Respondent failed to return Ms. Murphy's telephone calls, and failed to advise her that her case was dismissed.

78. By letter dated July 19, 2000, Respondent advised Ms. Murphy that Respondent could no longer represent her with her current legal situation because Respondent was involved in several murder cases. This statement was a misrepresentation because Ms. Murphy's case had been dismissed six months earlier.

79. Disciplinary Counsel telephoned Respondent on February 22, 2001, and read Ms. Murphy's complaint to him. At that time, Respondent advised Disciplinary Counsel that he thought that Mr. Gilardi was going to handle the matter for Ms. Murphy. Respondent also stated that Respondent believed that Respondent had written to Ms. Murphy and told her she could pick up her file.

80. After speaking with Respondent, Disciplinary Counsel then called Rainelle Murphy and suggested that she make arrangements to pick up her file. Ms. Murphy advised Disciplinary Counsel that she no longer lives in the area in which Respondent's office is located, so her parents would pick up the file.

81. On February 22, 2001, Respondent telephoned Richard Visneski, Rainelle Murphy's father. Respondent advised him that Ms. Murphy had filed a complaint against Respondent with the Disciplinary Board. Mr. Visneski advised Respondent that he felt that Respondent had not represented Ms. Murphy properly in that Respondent failed to file for spousal support in her divorce and Respondent had promised to represent Ms. Murphy free of charge in the lawsuit against Mr. Enrico. Instead of handling the case involving the fraudulent land sale against Mr. Enrico, Respondent simply asked someone else to step in for him two days before the hearing, and Respondent missed the deadline for filing a brief.

82. During the same conversation on February 22, 2001, Respondent told Mr. Visneski the following:

- a) Respondent had asked Mr. Gilardi to handle the case against Mr. Enrico because Respondent was involved in a murder case;
- b) Respondent did not file a brief pursuant to Judge Seamans' order because Respondent did not think he could win the case;
- c) Respondent asked Mr. Visneski to telephone his daughter and tell her to withdraw her disciplinary complaint;
- d) Respondent was in deep trouble, and that he could lose his license;
- e) Respondent promised Mr. Visneski that if he could get his daughter to withdraw the charges, Respondent would look through his file and see if he could find a way to open the case and get Ms. Murphy's money back from Mr. Enrico; and,
- f) Respondent was not permitted to talk to his daughter, and he should make sure that he did not make Ms. Murphy angry or push her too

hard or she would call the Disciplinary Board and tell them that Respondent was harassing her and Respondent would get in trouble.

83. On or about February 28, 2001, Mr. Visneski received a phone call from someone identifying herself as Respondent's secretary. She said that Respondent had asked her to call to find out whether Ms. Murphy had made a decision concerning the matter that Respondent had discussed with him on February 22, 2001. Mr. Visneski stated that he had not had an opportunity to speak to his daughter, because she was very busy with work.

84. On or about March 1, 2001, Carrie from Respondent's office telephoned and left a message on Richard Visneski's answering machine. Carrie explained that Ms. Murphy's file could not be located, and therefore, Respondent would be unable to return the file.

#### **Complaint of Jean A. Gostomski**

85. On or about June 28, 2000, Mr. and Mrs. Gostomski telephoned Respondent for legal advice concerning a duplex home that they owned jointly with their son, Phillip Gostomski, Jr. Respondent advertised that he gave free initial legal consultations so they went for an initial consultation.

86. Mrs. Gostomski explained in her initial telephone call that she and her husband lived on one side of the duplex, and her son and his girlfriend resided in the other

half of the property. Her son's girlfriend, Michelle Powell, intended to have her fifteen-year old sister, Rene Leake, live with them after she was released from a juvenile detention facility. Mrs. Gostomski wanted legal advice from Respondent regarding her right to evict Ms. Powell and prohibit her sister from moving into the property, because Mrs. Gostomski believed that the fifteen-year-old sister would cause problems.

87. Mrs. Gostomski explained that since Rene was planning on moving into the duplex within a week, time was of the essence. Respondent advised her to send him \$350.00 by express mail. Respondent told Mrs. Gostomski that he would receive the money the next day, and would give her an answer within a couple of days.

88. Respondent had not previously represented Mr. and Mrs. Gostomski in any legal matters and failed to communicate the basis or rate of his fees in writing within a reasonable time after commencing representation.

89. On or about June 29, 2000, Mrs. Gostomski sent a \$350.00 money order to Respondent's office, which was received on June 30, 2000. Respondent considered this \$350.00 a flat fee, and did not put this money into an escrow account.

90. After receiving the money, Respondent never contacted the Gostomskis, and to the best of their knowledge, Respondent never performed any work on their behalf.

91. After waiting two days to hear from Respondent, Mrs. Gostomski telephoned his office every couple of days for a few weeks. She then telephoned Respondent's office every day for one week. Respondent's secretary told her that she would give him the messages. Respondent failed to return any of her phone calls.

92. In mid-July, Mrs. Gostomski consulted another attorney, Mr. Bufalino, in West Pittston, PA, regarding this matter since Respondent did not get them the information they needed. Mr. Bufalino advised them that they could evict Michelle Powell. The Gostomskis then gave Ms. Powell thirty-days written notice to vacate the premises. Michelle Powell thereafter moved out without having to initiate formal eviction proceedings. Mr. Bufalino did not charge the Gostomskis for his advice.

93. On or about August 20, 2000, Mrs. Gostomski wrote Respondent a letter requesting that Respondent refund her money since he failed to provide any legal services, and another attorney took care of this matter.

94. Respondent failed to respond to her letter. In August 2000, Mrs. Gostomski complained to the Bureau of Consumer Protection of the Office of Attorney General about Respondent's failure to perform any work after accepting an advanced retainer. The Bureau of Consumer Protection acknowledged Mrs. Gostomski's complaint, but did not resolve this matter.

95. On October 5, 2000, the Gostomskis filed a civil complaint against Respondent at District Justice Farrell's office at Docket No. CV-322-00. Respondent failed

to attend the hearing. On November 16, 2001, the Gostomskis were awarded a default judgment of \$392.50; i.e., \$350.00 in damages and \$42.50 in costs. Respondent failed to pay the judgment.

96. In June or July 2001, Mrs. Gostomski then filed a complaint with the Lackawanna Fee Dispute Committee. By letter dated July 26, 2001, Lucille Marsh advised Respondent and the Gostomskis that the District Justice's judgment precluded them from making a determination in this case. However, she explained that given the fact that Respondent did not contradict any of the information that they received from the Gostomskis, it appeared that no services were provided for which a fee should be charged.

97. On July 28, 2001, the Gostomskis, in an effort to recoup the money that they paid Respondent, filed a complaint with the Pennsylvania Lawyers Fund for Client Security who referred this matter to Office of Disciplinary Counsel.

98. By letter dated August 1, 2001, Respondent was sent notice by regular and certified mail that the Gostomskis had filed a complaint with the Pennsylvania Lawyers Fund for Client Security, and that Board requested Respondent's position on this matter.

99. On August 2, 2001, Respondent received notice from the Pennsylvania Lawyers Fund for Client Security.

100. On August 2, 2001, Respondent obtained a money order in the amount of \$500.00 and sent it via express mail to Mrs. Gostomski the same day.



101. On August 3, 2001, Mrs. Gostomski received a check in the amount of \$500.00. In a cover letter, Respondent requested that Mrs. Gostomski deduct the amount he owed her and return the balance. She deducted the amount of \$392.50 and returned the balance of \$107.50 via a money order on August 6, 2001.

### **Complaint of David M. Peterson, Jr.**

102. On or about February 14, 2000, David and Hazel Peterson contacted Respondent on behalf of their son, John R. Peterson, who was in the hospital, having had a massive heart attack during bypass surgery. John Peterson had been in a coma and his parents believed that he might not survive.

103. At the time of John Peterson's hospitalization, he had been separated from his wife for about 19 months. He had been paying his wife \$800 per month in support, and Mr. Peterson had assumed all of the marital debt.

104. Because of John Peterson's fear that his death might be imminent, he asked his parents to advise Respondent that he wanted Respondent to draft a Power of Attorney. He also wanted Respondent to file for divorce on his behalf and to draft a will.

105. Respondent never previously represented John Peterson, but Mr. Peterson knew Respondent because of Respondent's affiliation with the Sunset Lodge, a hunting club.

106. David Peterson explained his son's situation and asked Respondent if he would handle the divorce, draft a Power of Attorney and draft Mr. Peterson's son's will. Respondent requested \$1,000 to complete all three matters.

107. David Peterson offered to send Respondent a check immediately, but Respondent advised him that in order to do this work for Mr. Peterson's son, David Peterson would have to send \$1,000 in money orders immediately via overnight mail. Respondent then advised David Peterson that he would take care of these matters immediately since time was of the essence.

108. On February 14, 2000, the Petersons sent Respondent two money orders: money order number 69596831643 in the amount of \$700 and money order number 69596831654 in the amount of \$300 via overnight mail.

109. Respondent told them this fee would cover all of the work to be performed on John's behalf.

110. Respondent considered this money a flat fee, and did not place this money into an escrow account until such time as it was earned.

111. Even though Respondent had never previously represented John Peterson, Respondent failed to communicate the basis or rate of his fees in writing before or within a reasonable period after commencing the representation.

112. On or about February 17, 2000, Respondent visited John Peterson in the hospital and completed the Power of Attorney for him.

113. Shortly after John Peterson was released from the hospital, Respondent went to visit him at home, at which time Respondent discussed John Peterson's desire to obtain a divorce as quickly as possible and informed him that he needed \$750 to file the divorce and do the will.

114. John Peterson was under the impression that Respondent would initiate the divorce proceedings immediately due to his poor health. John Peterson promptly paid Respondent \$750 by check number 678 dated February 28, 2000. This check was negotiated the same day.

115. Respondent considered this to be a flat fee and did not put this money into an escrow account until such time as it was earned.

116. Unbeknownst to John Peterson, his parents had already paid Respondent \$1,000 to complete his will, the Power of Attorney and handle his divorce.

117. Respondent failed to communicate the basis or rate of his fees in writing to John Peterson before or within a reasonable time after commencing the representation.

118. Respondent did not inform John Peterson that his parents had already sent Respondent \$1,000 for this work to be performed on John Peterson's behalf.

119. John Peterson repeatedly telephoned Respondent's office to find out about his will and the status of his divorce.

120. Respondent very rarely returned his phone calls and when Respondent spoke to John Peterson, Respondent simply advised him that he was working on the case.

121. On or about April 17, 2000, Respondent filed the divorce complaint on behalf of John Peterson at docket number 2000-01861 in the Court of Common Pleas of Lackawanna County.

122. Respondent failed to inform John Peterson that he had filed the divorce and failed to send him a copy of the divorce complaint. John Peterson found out that Respondent had filed his divorce complaint because his brother-in-law saw it listed in the Scranton newspaper.

123. John Peterson repeatedly requested that Respondent send him a copy of the divorce complaint and other documents relevant to his case. Respondent failed to send him copies of any documents. Respondent eventually explained that he would not provide John Peterson with copies of documents in order to keep Respondent's costs low.

124. Genevieve Peterson, John Peterson's estranged wife, then filed a Petition for Spousal Support. A spousal support conference was scheduled for June 9, 2000.

125. At the time of the support conference, John Peterson's employment had been terminated due to his poor health, and he had no income. In addition, he was scheduled to undergo an evaluation for a heart transplant at Hershey Medical Center.

126. By letter dated May 23, 2000, Respondent requested a continuance from the Domestic Relations Section due to Mr. Peterson's heart condition and possible surgery in the near future. Respondent requested that the conference for spousal support scheduled for June 9, 2000, be postponed until some time in August.

127. By letter dated May 25, 2000, opposing counsel, John Mercuri, opposed the continuance because his client was not receiving any spousal support. The postponement was denied, and the parties and their counsel appeared on June 9, 2000, for the support conference.

128. On or about May 25, 2000, Respondent received a comprehensive set of interrogatories propounded by John Mercuri for John Peterson to answer.

129. Respondent did not notify John Peterson of his receipt of these interrogatories until mid-July 2000.

130. On June 9, 2000, John Mercuri and Respondent met with the spousal support master, Kelly Walsh, without their clients present. Respondent explained that Respondent's client had no income due to his job loss, and it had not yet been determined

whether he would get disability. The spousal support officer agreed to verify that information.

131. It was then decided that the spousal support conference should be postponed until such time as John Peterson would receive disability benefits.

132. Respondent erroneously advised John Peterson in the presence of Susan Carity, John Peterson's friend, that the spousal support motion had been withdrawn and that Mrs. Peterson would refile at a later date.

133. In fact, the petition had not been withdrawn, but had merely been continued until such time as John Peterson began to obtain SSI benefits.

134. Respondent failed to advise John Peterson that the spousal support hearing was indefinitely postponed, and that he had an obligation to inform the Domestic Relations Office when he began to get disability payments.

135. By letter dated June 7, 2000, John Peterson was notified by Intertractor America Corporation that, because he would not be able to return to work in the foreseeable future, he was being terminated effective June 30, 2000.

136. By letter dated June 12, 2000, Kelly Walsh requested that Intertractor notify her when Mr. Peterson began collecting long-term disability benefits.

137. In approximately June or July 2000, John Peterson completed and filed the papers required to obtain SSI benefits. He filed for SSI without benefit of counsel.

138. In approximately mid-July 2000, Respondent went to John Peterson's home in order to help him prepare the answers to the interrogatories that Respondent had received on May 25, 2000. At that time, John Peterson received a phone call from Mrs. Vitale of the Carbondale Office of the Social Security Administration regarding his application for SSI benefits. Respondent asked John Peterson if Respondent could speak to the Social Security Administration representative.

139. Respondent told Mrs. Vitale that he was attorney of record. Respondent asked one question regarding the effect that SSI would have on Mr. Peterson's short-term disability payments from his employer.

140. After finishing the telephone call, Respondent told John Peterson that he should retain Respondent to handle his SSI claim, because he would certainly be denied, and that Respondent would handle his appeal.

141. Respondent then advised Mr. Peterson that he should finish answering the interrogatories by himself and he should mail his answers to Respondent's office.

142. John Peterson believes that he sent the answers to the interrogatories to Respondent in August or September 2000 at the latest.

143. Respondent failed to send John Peterson's responses to the interrogatories to Mr. Mercuri after receiving them.

144. On or about July 19, 2000, Mr. Peterson and Respondent signed an Appointment of Representative requesting that Respondent be appointed his attorney for the purpose of obtaining SSI benefits.

145. In September 2000, John Peterson received notice that he would be receiving SSI benefits. John Peterson had completed all the paperwork and obtained all the medical records without Respondent's assistance.

146. Respondent did not do anything to help Mr. Peterson obtain benefits with the exception of asking one question to Mrs. Vitale on the telephone when Respondent happened to be present when she called Mr. Peterson.

147. On September 25, 2000, John Peterson started receiving SSI benefits. Respondent received \$671 in legal fees from John Peterson's SSI benefits, despite the fact that Respondent had not done any work to assist him in obtaining his SSI benefits.

148. Mr. Peterson did not notify the Domestic Relations office that he had begun to receive disability payments because Respondent failed to advise him that he had an obligation to do so.

149. John Peterson still had no idea what was going on in his divorce. Therefore, he went over to Sunset Lodge on an evening when he knew that Respondent



would be there to find out the status of his divorce. Respondent informed him that a divorce master had been appointed, and then they had withdrawn due to a conflict of interest. Respondent further told Mr. Peterson that Respondent could not do anything to expedite the divorce because Respondent could not get a master to give Respondent a hearing date.

150. By letter dated October 11, 2000, George E. Gretz informed Respondent that he had entered his appearance on behalf of Genevieve Peterson, and asked Respondent to have John Peterson send formal responses to the Interrogatories sent to Respondent on May 25, 2000, so that Mr. Gretz could obtain a master's hearing on the matter.

151. On or about October 11, 2000, Mr. Gretz, on behalf of his client, filed an answer to the divorce and a counterclaim.

152. Respondent never sent John Peterson's answers to the interrogatories to Mr. Gretz.

153. Respondent never informed his client that his spouse had filed an Answer or a counter-claim to the divorce.

154. Respondent did not inform John Peterson that Respondent had not sent his answers to the interrogatories to opposing counsel.

155. By letter dated January 8, 2001, Kelly Walsh requested that John Peterson provide information within the next five days regarding whether he had in fact begun to receive disability payments, and the amounts.

156. John Peterson telephoned Respondent's office to notify Respondent of the letter requesting information from Ms. Walsh. Respondent failed to respond.

157. John Peterson then notified Kelly Walsh directly that he had begun to receive benefits in September 2000 in the amount of \$1342 per month.

158. Shortly thereafter, Ms. Walsh scheduled a spousal support hearing for February 23, 2001, at 10:00 a.m. Respondent requested that the support hearing be postponed without his client's authorization or consent.

159. The support hearing was rescheduled for March 9, 2001, at 2:00 p.m.

160. Respondent again postponed this hearing without his client's authorization or consent.

161. On or about March 6, 2001, John Peterson telephoned the Lackawanna County Clerk of Courts to find out the status of his divorce since Respondent was not keeping him informed. He was told that nothing had been done on the divorce since October 2000 when opposing counsel filed an Answer.

162. The spousal support hearing was rescheduled for March 27, 2001.

163. Respondent postponed the hearing again without his client's authorization or consent.

164. After receiving notice of the spousal support hearing scheduled on March 27, 2001, John Peterson telephoned Respondent's office on March 26, 2001, to confirm that the hearing was going to occur as scheduled. Respondent's secretary told John Peterson that the hearing was still scheduled.

165. Mr. Peterson then drove 1 ½ hours to attend the hearing on March 27, 2001. When he arrived, he was told that Respondent had previously rescheduled the hearing. Respondent failed to inform his client of the postponement and failed to inform him of the reason for the postponement.

166. The spousal support hearing was rescheduled for April 12, 2001.

167. Aside from the first request to postpone the spousal support matter, Respondent informed John Peterson that there were three postponements, but Respondent never informed John Peterson that he had requested the postponements and never explained the reasons for the postponements. When John Peterson tried to find out the reasons for the postponements from Respondent, Respondent never returned his calls and never gave him information.

168. During one of the scheduled spousal support hearings in which neither Respondent nor his client appeared due to Respondent's postponements, Mrs. Peterson

was permitted to present her evidence regarding her financial information to the spousal support master, Kelly Walsh. Respondent was not present to cross-examine Mrs. Peterson or to examine the documents that she presented to the spousal support officer. This failure to appear may have caused prejudice to John Peterson in the spousal support action.

169. As a result of Respondent's failure to diligently pursue John Peterson's legal matters and Respondent's failure to communicate with him, on or about April 5, 2001, John Peterson terminated Respondent's representation and retained Kimberly Martin, Esq., to handle his legal affairs.

170. By letter dated April 11, 2001, Ms. Martin informed Respondent that Mr. Peterson had retained her to handle his divorce action. Ms. Martin requested that Respondent send her a copy of the divorce complaint that Respondent had filed, and requested that Respondent sign a Withdrawal of Appearance so that she could enter her appearance. Moreover, she requested that Respondent provide an accounting and a refund of unearned fees.

171. Respondent failed to sign the Withdrawal of Appearance, failed to provide an accounting and failed to provide a refund of unearned fees.

172. Ms. Martin attempted to get a postponement of the spousal support hearing on April 12, 2001, because she had another court appearance. The request for postponement was denied because Respondent had previously requested three postponements on John Peterson's behalf. Although Mr. Peterson had received notices

from the domestic relations office advising him of the rescheduled hearing dates, John Peterson was not aware until April 12, 2001, that Respondent had requested three postponements for Respondent's convenience without consulting him. Ms. Martin was able to participate in the support conference via speakerphone.

173. During the hearing, the Spousal Support Master, Kelly Walsh, questioned Mr. Peterson about his failure to report his disability payments when he received them. He explained to Ms. Walsh that Respondent had not told him that he had a duty to report his disability payments when he received them.

174. On April 16, 2001, the Support Master filed an interim order which found that Mr. Peterson's net income was \$2,231.92. Mr. Peterson was ordered to pay \$73.00 per month, and arrearages in the amount of \$3,452.97 to be paid in monthly payments of \$100.00 per month.

175. Due to Respondent's failure to inform Mr. Peterson that the Petition For Spousal Support had been continued, and because Respondent failed to inform Mr. Peterson that he was obligated to notify the domestic relations office when he received benefits, John Peterson owed arrearages in the amount of \$3,452.97 from the date that the spousal support petition had been filed.

176. Since Respondent failed to draft a will on John Peterson's behalf despite having been paid to do so, Ms. Martin drafted his will. Since it was a very simple will

and Mr. Peterson had very few assets, she only charged him \$100.00 for drafting his will and did it within one day.

177. When Ms. Martin failed to receive a signed Withdrawal of Appearance, she telephoned Respondent's office in mid-June. Respondent's secretary told Ms. Martin that Respondent said that he would sign the Withdrawal of Appearance.

178. By faxed letter dated August 15, 2001, Ms. Martin sent Respondent another copy of the Withdrawal of Appearance and requested that Respondent sign and return it to her office for filing.

179. Five months after receiving Ms. Martin's request to sign a Withdrawal of Appearance Form, Respondent finally complied with this request in late September or October 2000, after he received a Letter of Inquiry from Office of Disciplinary Counsel.

180. As a result of Respondent's failure to turn over the file to Kimberly Martin in a timely fashion and Respondent's failure to send Respondent's client's answers to interrogatories to Mr. Gretz, this case was substantially delayed, thereby increasing John Peterson's legal fees.

### **Complaint of Rose A. Zielinski**

181. In approximately September 1999, Rose Zielinski telephoned Respondent and told him that she wanted to retain Respondent to help her obtain an increase in her child support payments. Respondent told her to bring her legal papers and

to meet him at Perkins Restaurant. Respondent also advised her that he would need a \$250.00 advanced retainer.

182. Ms. Zielinski met with Respondent at Perkins Restaurant in Dixon City, PA. She asked him to represent her in obtaining additional child support payments for her daughter, Desiree. At the time, she was receiving \$50.00 per week in child support as set forth in her divorce decree and she wanted her ex-husband to increase the payments to \$100.00 per week. Respondent reviewed her Divorce Decree.

183. Respondent had not previously represented Ms. Zielinski. She chose to consult with Respondent about this legal matter by getting his name out of a telephone book. Respondent failed to communicate the basis or rate of his fees in writing within a reasonable time after commencing the representation.

184. Ms. Zielinski advised Respondent that she only had \$246.00, and Respondent agreed to accept that sum in lieu of \$250.00.

185. By letter dated September 17, 1999, Respondent advised Catherine Van Deusen, opposing counsel, of the following:

- a) After the Zielinski's Marital Settlement Agreement had been signed, Mr. Zielinski had agreed to increase the amount of his support payments to \$200 per week in 1996.
- b) Ms. Zielinski had lost her job, and had taken a job at a reduced rate, therefore, Respondent was requesting that Mr. Zielinski agree to pay \$400 per month in child support in lieu of the \$200 payment he was currently making;

- c) If this proposal was not agreeable to Ms. Van Deusen's client, Respondent would proceed with an equity action based on the marital settlement agreement; and,
- d) Respondent would give her 10 days to respond to his proposal.

186. By letter dated September 27, 1999, Ms. Van Deusen advised Respondent that she had not yet had an opportunity to speak to her client about the increased support payments, but she would call Respondent by the end of the week.

187. Ms. Van Deusen believes that Respondent may have left one message for her to return his telephone call.

188. By letter dated October 12, 1999, Ms. Van Deusen advised Respondent that she had left a telephone message on October 5, 1999, asking Respondent to call her about this spousal support matter.

189. Respondent failed to contact Ms. Van Deusen either by telephone or by letter after the October 5, 1999 letter.

190. Ms. Zielinski did not hear from Respondent for several months. She telephoned Respondent's office on at least two occasions within the next six months and left messages with his secretary, but Respondent failed to return her telephone calls.

191. When Respondent failed to return Ms. Zielinski's telephone calls, she went to his office in approximately Spring 2000 and left him a note asking to know the



status of her case. She requested that Respondent telephone her, because she wanted to get another lawyer to handle this matter if Respondent would not.

192. In approximately Summer 2000, Respondent telephoned Ms. Zielinski and told her that he was still working on her case. Respondent requested that she permit him to continue to represent her. She agreed.

193. Respondent then failed to take any action on her case and failed to contact her for approximately nine months. In approximately May 2001, Ms. Zielinski sent Respondent a certified letter advising him that if he did not refund her advanced retainer within five days, she would report him to the Disciplinary Board.

194. Respondent failed to respond to that letter.

195. Since Respondent failed to pursue Ms. Zielinski's interest, Ms. Zielinski then hired Barbara O'Hara, Esq., to represent her in obtaining an increase in support in December 2000. Ms. O'Hara filed for spousal support in January 2001. Ms. O'Hara was successful in obtaining additional support in the amount of \$391.00 per month.

196. To the best of Ms. Zielinski's knowledge, Respondent never performed any work on her behalf with the exception of the letter that he wrote to opposing counsel.

197. After advising Ms. Zielinski of sending one letter to opposing counsel, Respondent failed to keep Ms. Zielinski informed of the status of the case and failed to respond to reasonable requests for information.

### **Complaint of James P. O'Brien**

198. In or about September 2000, James O'Brien retained Respondent to represent him in his divorce and custody proceedings. Mr. O'Brien had previously been represented by John J. Cerra, Esq.

199. There was a hearing scheduled for September 21, 2000, which was indefinitely postponed when Mr. Cerra informed the court that he was filing a Motion to Withdraw.

200. During the initial consultation, Respondent requested an advanced retainer of \$1,000, and informed James O'Brien that Respondent usually charged one hundred dollars per hour to handle divorce and custody matters.

201. James O'Brien paid Respondent \$1,000 by check number 225 dated October 5, 2000. Respondent entered his appearance on or about October 12, 2000.

202. Although Respondent had not previously represented James O'Brien, he failed to communicate the basis or rate of his fees in writing before or within a reasonable time after commencing the representation.

203. Respondent believed that these funds were a flat fee, and did not place these funds into an escrow account until such time as they were earned.

204. On November 1, 2000, Divorce Master Gallo rescheduled the divorce hearing for December 5, 2000 and ordered that pretrial statements, inventories and appraisements be submitted to her and opposing counsel by November 28, 2000.

205. On December 5, 2000, instead of a master's hearing, there was a settlement conference between Respondent, Attorney Brian Cali and the Divorce Master. The Divorce Master then rescheduled the hearing until January 10, 2001, and ordered that the inventory, appraisal and pretrial statement be filed by December 28, 2000.

206. On December 7, 2000, Attorney Cali filed his pretrial statement, inventory and appraisal.

207. Respondent failed to file the pretrial statement, inventory and appraisal on or before December 28, 2000.

208. On January 4, 2001, Respondent notified the Divorce Master and opposing counsel that he would be unable to attend the master's hearing as a result of an injury he sustained in an automobile accident. The Divorce Master continued the matter until March 14, 2001 and advised Respondent that he must provide the inventory, appraisal and pretrial statement no later than February 28, 2001.

209. On February 27, 2001, Respondent requested that the Master reschedule the hearing for 11:00 a.m. on March 14, 2001 instead of 10:00 a.m. because he had to be in federal court at 10:00 a.m.

210. By letter dated February 27, 2001, which was sent to Respondent's office via facsimile and first class mail, Divorce Master Gallo informed Respondent that his request for a continuance was granted, and reminded Respondent that Respondent's pretrial statement, inventory and appraisal were due on February 28, 2001.

211. Respondent failed to file the pretrial statement, inventory and appraisal before February 28, 2001.

212. On March 12, 2001, Respondent contacted Brian Cali and requested a continuance because he would not be in town on March 14, 2001. Mr. Cali then informed the Divorce Master that Respondent had requested that the hearing be rescheduled. The Master rescheduled this hearing for April 23, 2001.

213. By letter and Notice of Rescheduling dated March 22, 2001, Divorce Master Gallo advised Respondent of the following:

- a) The hearing was rescheduled for April 23, 2001;
- b) She would not grant another continuance without leave of court;
- c) The inventory, appraisal and pretrial statements must be filed on or before April 12, 2001; and
- d) Either party failing to file their pretrial statement would be subject to sanctions under Pa.R.C.P. 1920.33(d)(1) which provides that a party, except upon good cause shown, shall be barred from offering testimony or introducing evidence in support of or in opposition to claims for the matters not covered by the Pretrial Statement.

214. Mr. Cali then filed an amended pretrial statement, inventory and appraisal which was necessitated by the continuing delays that had occurred as a result of Respondent's requests for continuances.

215. Respondent failed to file an inventory and appraisal by April 12, 2001.

216. Respondent did not notify James O'Brien of the Master's hearing until 6:00 a.m. on April 23, 2001, the same day that the hearing was scheduled to begin at 9:00 a.m. James O'Brien informed Respondent that he could not attend the hearing, because he was scheduled to undergo a colonoscopy, which he had arranged weeks earlier.

217. After talking to Mr. O'Brien at 6:10 a.m., Respondent telephoned Divorce Master Gallo and left a voicemail message for her at 6:34 a.m. that neither Respondent nor James O'Brien would be present at the hearing because James O'Brien was going into the hospital for a colon procedure. Respondent then sent a handwritten letter via facsimile to the Divorce Master reiterating the information that Respondent had left on her voice mail, stating that Respondent "felt somewhat responsible for not getting this information to her sooner." Respondent also faxed a letter to Brian Cali at approximately 6:30 a.m., advising him that neither Respondent nor James O'Brien would attend the hearing that day due to James O'Brien's surgery.

218. Respondent failed to attend the hearing held on April 23, 2001, and failed to inform Mr. Cali or Divorce Master Gallo that Respondent had not given James O'Brien notice of the hearing until that morning at 6 a.m.

219. On April 23, 2001, Mr. Cali showed up for the hearing with his witnesses and prepared to proceed. Divorce Master Gallo made several attempts to contact Respondent at Respondent's office, and asked Respondent's secretary to have Respondent return her telephone call. Respondent's secretary returned the Master's telephone call, and advised her that Respondent declined to speak with her or Mr. Cali until after Respondent had spoken to James O'Brien after his colon surgery. The Divorce Master requested that Respondent's secretary provide her with Respondent's cell phone number and pager number. Respondent's secretary declined to give the Master those numbers, stating that she was not authorized to do so. The Divorce Master left a message requesting that Respondent return his telephone call. Respondent failed to contact the Divorce Master.

220. On May 10, 2001, the Divorce Master filed a preliminary report and recommendation that James O'Brien be precluded from presenting any evidence, and that he be responsible for paying Mr. Cali's attorney fees in the amount of \$825.00, the stenographer's fees in the amount of \$140.00 and the Master's fees in the amount of \$350.00 for a total of \$1,315.00 as a result of his failure to appear on April 23, 2001.

221. Although Respondent received a copy of the order, Respondent refused to tell James O'Brien what happened at the April 23, 2001 hearing despite his having made several requests for information. Respondent only advised James O'Brien that serious sanctions had been imposed against him for failure to appear. Respondent just told him not to worry about it because Respondent would appeal the decisions made that day.

222. On May 18, 2001, Respondent filed Exceptions to the Divorce Master's Preliminary Report and Recommendations.

223. James O'Brien often left messages with Respondent's secretary or on Respondent's answering machine, requesting that Respondent return his calls. Respondent rarely returned his phone calls.

224. By letter dated June 15, 2001, James O'Brien informed Respondent of the following:

- a) He had several issues regarding his son's custody which he wanted to discuss with Respondent;
- b) He had called Respondent with questions regarding the custody, but that Respondent had not returned his calls; and
- c) Ms. Van Wie, Daniel O'Brien's Guardian Ad Litem, wanted to observe Mr. O'Brien's interaction with his son and that Mr. O'Brien wanted to discuss certain questions with Respondent before submitting the observation between him and his son.

225. Since Ms. Van Wie only gave James O'Brien approximately twenty hours notice of the visit, time was of the essence. Since Respondent failed to return Mr. O'Brien's phone calls, he refused to permit Ms. Van Wie to observe his interaction with his son, at least until after he had an opportunity to talk with Respondent. His refusal was viewed as being uncooperative with his son's guardian ad litem.

226. By letter dated June 19, 2001, James O'Brien advised Respondent of the following:

- a) He had been attempting to contact Respondent by letter, phone, and fax, but had yet to receive any response;
- b) On April 13, 2001, he had complained about Respondent's ongoing lack of communication and that Respondent was ignoring issues that were important to him, and that Respondent had simply told him, "You know what, all I can say is you're right";
- c) He had repeatedly asked Respondent to meet with Ms. Van Wie to address his concerns about the custody of his son. Respondent informed him that he was meeting with her to resolve the situation, but according to Ms. Van Wie, no meeting was ever scheduled; and
- d) He had contacted the Lackawanna County Bar Association concerning Respondent's lack of concern and lack of communication and they had advised him to contact the Disciplinary Board.

227. By letter dated June 22, 2001, Respondent requested Ms. Van Wie to submit her guardian's report to the court so that Respondent could schedule a hearing to deal with the custody issues in the case.



228. On June 28, 2001, Ms. Van Wie submitted her report to the court in which she recommended that James O'Brien seek psychological counseling, attend anger management classes and schedule an evaluation with Dr. Jeff Fremont by July 16, 2001.

229. Respondent failed to inform James O'Brien that the report had been filed, or relay the contents of Ms. Van Wie's report to James O'Brien so that he could comply with the recommendations of Ms. Van Wie.

230. Mr. O'Brien first learned of the recommendations in Ms. Van Wie's report at a custody hearing before Special Master Peter Povonda on August 9, 2001, when the Special Master questioned James O'Brien about his failure to seek psychological counseling or attend anger management classes. Thus, James O'Brien did not find out about the contents of this report until a full three weeks after the July 16, 2001 deadline established in the report to comply with the recommendations.

231. After the hearing on August 9, 2001, when James O'Brien's motion to have more visitation with his son was denied, Mr. O'Brien confronted Respondent about the fact that Respondent had never given him a copy of Ms. Van Wie's report or told him about her recommendations for counseling, etc. Respondent then went into the court administrator's office and made a copy of Ms. Van Wie's report for Mr. O'Brien.

232. On or about August 14, 2001, Mr. O'Brien confronted Respondent about the fact that Respondent did not have the courage to tell the Special Master Povanda at the hearing that Respondent never sent a copy of the Guardian's Ad Litem's Report and

Recommendations to Mr. O'Brien and did not discuss the contents with him. Respondent told James O'Brien that Respondent thought that Ms. Van Wie had sent him a copy of the report.

233. As a result of James O'Brien's lack of knowledge concerning the recommendations contained in this report, he failed to comply with the recommendations and was viewed by the court as being uncooperative.

234. Respondent's conduct has been prejudicial to the administration of justice in that it has prevented Respondent's client from complying with court orders. On or about August 17, 2001, James O'Brien became so disillusioned with Respondent's legal services that he retained a new attorney, Frank Ruggiero. On Friday, August 17, 2001, James O'Brien informed Mr. Ruggiero that he had a conciliation conference scheduled on Tuesday, August 21, 2001.

235. By letter dated August 17, 2001, Mr. Ruggiero requested that Respondent sign a Withdrawal of Appearance.

236. On August 17, 2001, Mr. Ruggiero, through his paralegal, then requested a continuance of the conciliation conference scheduled for August 21, 2001 from Brian Cali, opposing counsel. Mr. Cali was not in his office on August 17, 2001, but his paralegal, Mary Ann, advised Mr. Ruggiero's office that he could discuss postponing the conciliation conference at the oral argument scheduled for August 20, 2001.

237. Respondent failed to tell James O'Brien that oral argument in his divorce case was scheduled for August 20, 2001. It was only fortuitous that Mr. Ruggiero became aware of the oral argument through his telephone call to Mr. Cali's office concerning the custody hearing.

238. One of the issues at the time of the oral argument was whether Mr. O'Brien would be precluded from admitting testimony in light of Respondent's failure to file a pretrial statement, inventory and appraisal on his behalf. Mr. Ruggiero argued that it would be unfair given the fact that James O'Brien did not have timely notice of the hearing in which he was to present those items.

239. By Order dated August 21, 2001, Judge Carlon M. O'Malley granted Mr. O'Brien 45 days in which to file an inventory, appraisal and pretrial statement. However, Judge O'Malley affirmed the sanctions against Mr. O'Brien for his failure to appear at the April 23, 2001 hearing. James O'Brien was ordered to pay Mr. Cali's attorneys fees in the amount of \$850, \$140 for the court stenographer, and \$350 for the conciliation officer. Mr. O'Brien also had to pay attorney's fees for Mr. Ruggiero appearing at the oral argument.

240. These sanctions were imposed as a result of Respondent's failure to timely notify James O'Brien of the hearing scheduled for April 23, 2001 and Respondent's failure to attend the hearing on James O'Brien's behalf and explain to the court that Mr. O'Brien's failure to appear was the result of Respondent's failure to give him notice.

241. On or about October 16, 2001, two months after receiving Mr. Ruggiero's letter that Mr. O'Brien had retained him, and over one month after receiving a Letter of Inquiry from Office of Disciplinary Counsel on this matter, Respondent transferred Mr. O'Brien's incomplete file to Mr. Ruggiero.

### **Other Findings**

242. Respondent cooperated with the Office of Disciplinary Counsel.

243. In the mid-1990s, Respondent experienced significant problems in his marriage. These problems caused him to feel depressed and withdrawn. He did not give attention to client matters. He failed to return telephone calls and began spending less and less time at his office. He made excuses to clients to cover for his inattention. At this same time, Respondent began experiencing financial problems due to the failure of a business venture.

244. In the fall of 2001, Respondent sought counseling with Jeanne Rosencrance, a therapist associated with the Lackawanna County District Attorney's Office. Through counseling, Respondent was able to develop skills to cope with his feelings of depression and withdrawal, which skills helped him to deal with the ultimate end of his marriage in February 2002.

245. Jeanne Rosencrance testified at the hearing that Respondent was depressed; however, she did not testify as to a causal connection between the depression and Respondent's misconduct.

246. Respondent's depression did not cause his acts of misconduct.

247. Respondent has made changes to his law practice which include limiting the number and type of cases he accepts. He does primarily criminal defense work at this time.

248. Respondent is an Assistant County Solicitor for Lackawanna County and represents Children and Youth Services.

249. Respondent is employed at Lackawanna College in Scranton teaching the required courses and skills needed for individuals to obtain certification as municipal police officers, pursuant to Act 120.

250. Respondent submitted seven character letters from fellow lawyers and two judges who spoke to Respondent's good reputation as a reliable, trustworthy attorney.

251. Respondent has a history of prior discipline consisting of an Informal Admonition in 1999 and an Informal Admonition in 2000.

III. CONCLUSIONS OF LAW

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

Professional Conduct:

1. RPC 1.1 – A lawyer shall provide competent representation to a client.
2. RPC1.2(a) – A lawyer shall abide by a client’s decision concerning the objectives of representation.
3. RPC 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.
4. RPC 1.4(a) – A lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.
5. RPC 1.4(b) – A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.
6. RPC 1.5(a) – A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
7. RPC 1.5(b) – When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.
8. RPC 1.15(a) – A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property.
9. RPC 1.15(b) – Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

10. RPC 1.16(d) – Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest.
11. RPC 8.4(c) – It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.
12. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice.

#### IV. DISCUSSION

This matter is before the Board on a Petition for Discipline and a Stipulation charging Respondent with violations of the Rules of Professional Conduct in five separate matters. Respondent’s violations of the Rules have been established both by an extensive stipulation and by Respondent’s testimony at the disciplinary hearing. Having admitted that these violations occurred, the only issue to be resolved is the appropriate discipline to address the misconduct.

Respondent has been practicing law since 1983 and is an experienced practitioner. The instances of client neglect took place over approximately seven years, beginning in 1993. This neglect involved Respondent's failure to take action on client cases for long periods of time, and failure to communicate with clients concerning their matters. In one instance Respondent made a misrepresentation to cover his neglect.

Respondent testified that he was depressed and withdrawn during the time frame of the misconduct due to the deterioration of his marriage and financial concerns.

While Respondent presented an expert witness who stated that Respondent suffered from depression, the expert did not opine that the depression caused Respondent's misconduct. Accordingly, the Board concludes that Respondent did not present sufficient evidence to establish that the illness of depression was a causal factor in his misconduct. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989). Respondent's depression may not be considered as a mitigating factor in the determination of discipline.

Respondent has taken responsibility for his misconduct and cooperated extensively with Office of Disciplinary Counsel. He made restitution to clients when required. Respondent has shown considerable remorse and has provided a plan of action to prevent this sort of misconduct from happening in the future. To that end, Respondent has significantly reduced his practice of law and is concentrating on criminal law matters. He plans to be much more selective in the cases he takes and will not take cases wherein clients have been problematic to previous counsel. He hopes to associate himself with other attorneys instead of remaining a sole practitioner, as he feels he will have a better support system. To offset his reduction in practicing law, Respondent has become certified to teach classes in ACT 120 training and at the time of the hearing, was scheduled to begin teaching at Lackawanna College in Scranton. Respondent plans to continue his work as an Assistant County Solicitor, which provides stable income and health insurance benefits for him and his daughter.



The case law supports a recommendation of public censure. In the matter of In re Anonymous No. 86 DB 89 and 2 DB 90, 17 Pa. D. & C. 4<sup>th</sup> 477 (1992), an attorney engaged in four cases of neglect and failure to communicate. This attorney had a prior record of discipline for similar conduct including an informal admonition and a private reprimand. The Court imposed a public censure. In two other cases of neglect of client matters where the attorneys had prior records of discipline, the Court imposed a public censure. In re Anonymous No. 54 DB 88, 5 Pa. D. & C. 4<sup>th</sup> 593 (1989), In re Anonymous Nos. 58 DB 1998 and 102 DB 1998, No. 651 Disciplinary Docket No. 3 (Pa. Feb. 26, 2001).

There is no doubt that Respondent engaged in serious misconduct. It is equally clear that Respondent has not shied away from taking responsibility for his actions. He was sincerely remorseful, and the Hearing Committee noted that it was impressed with his testimony. Respondent, in addition to understanding his wrongdoing and pinpointing the causes for it, has made specific plans for his personal and professional life to avoid such misconduct in the future. When taking into consideration the facts of this matter, the Board concludes that a Public Censure with one year of Probation and a practice monitor is appropriate for this Respondent. It appears that Respondent has already used his involvement in the disciplinary process as a wake-up call to get organized, and a public censure will serve to emphasize the necessity of changing his law practice habits.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Dennis J. Mark, be subjected to a Public Censure before the Supreme Court and that he be placed on Probation for a period of one year with a practice monitor, subject to the following Conditions:

- a. Respondent shall select a practice monitor subject to the approval of the Office of Disciplinary Counsel. Respondent shall cooperate fully with his practice monitor.
- b. The practice monitor shall do the following during the period of Respondent's probation:
  1. Meet with the Respondent at least monthly and review all client files to ensure that proper and timely representation is being provided to all clients;
  2. Meet with the Respondent at least monthly and review all client files to ensure that proper and timely communication is being provided to all clients;
  3. File with the Executive Director & Secretary of the Board quarterly written reports that the above conditions have been met; and

4. Immediately report to the Executive Director & Secretary of the Board any violation by the Respondent of the terms and conditions of probation.

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: \_\_\_\_\_  
J. Michele Peck, Member

Date: September 19, 2003

Board Members Stewart and Rudnitsky dissented and would recommend a three month Suspension.

Board Member Sheerer did not participate in the May 14, 2003 adjudication.

PER CURIAM:

AND NOW, this 10<sup>th</sup> day of December, 2003, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 19, 2003, it is hereby

ORDERED that DENNIS J. MARK be subjected to a PUBLIC CENSURE before the Supreme Court and that he be placed on Probation for a period of one year with a practice monitor, subject to the following Conditions:

- a. Respondent shall select a practice monitor subject to the approval of the Office of Disciplinary Counsel. Respondent shall cooperate fully with his practice monitor.
- b. The practice monitor shall do the following during the period of Respondent's probation:
  1. Meet with the Respondent at least monthly and review all client files to ensure that proper and timely representation is being provided to all clients;
  2. Meet with the Respondent at least monthly and review all client files to ensure that all proper and timely communication is being provided to all clients;
  3. File with the Executive Director & Secretary of the Board quarterly written reports that the above conditions have been met; and
  4. Immediately report to the Executive Director and Secretary of the Board any violation by the Respondent of the terms and conditions of probation.

It is further ORDERED that respondent shall pay costs to the Disciplinary Board pursuant to Rule 208(g), Pa.R.D.E.