

**BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA**

OFFICE OF DISCIPLINARY COUNSEL	:	No. 900, Disciplinary Docket
Petitioner	:	No. 3 – Supreme Court
	:	
v.	:	No. 59 DB 2004 – Disciplinary Board
	:	
	:	Attorney Registration No. 61456
JAMES MARTIN FOGERTY	:	
Respondent	:	(Chester 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 May 4, 2004, Office of Disciplinary Counsel filed a Petition for Discipline against Respondent, James Martin Fogerty. The Petition charged Respondent with professional misconduct arising from his conviction of criminal trespass, possession of an interception device, and interception of oral communications. Respondent filed an Answer to Petition on May 24, 2004.

A disciplinary hearing was held on July 23, 2004, before Hearing Committee 2.09 comprised of Chair James J. Greenfield, Esquire, and Members Robert F. Morris, Esquire, and Richard L. Cantor, Esquire. Respondent was represented by Samuel C. Stretton, Esquire.

Following the submission of briefs by the parties, the Committee filed a Report on November 3, 2004, and recommended that Respondent be suspended for three years retroactive to April 18, 2004, the date of his temporary suspension by the Supreme Court of Pennsylvania.

Respondent filed a Brief on Exceptions on November 19, 2004 and requested oral argument. Petitioner filed a Brief Opposing Exceptions on November 29, 2004.

Oral argument was held on January 18, 2005, before a three member panel of the Disciplinary Board chaired by Laurence H. Brown, Esquire, with Members Louis N. Teti, Esquire and C. Eugene McLaughlin.

This matter was adjudicated by the Disciplinary Board at the meeting of January 19, 2005.

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, PA 17101, 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 Rules.

2. Respondent, James Martin Fogerty, was admitted to practice law in the Commonwealth of Pennsylvania in 1991. His address is 400 N. Coronado St., Apt. 2166 Chandler, AZ 85224. His law office was formerly located at Suite 210, 7 Great Valley Parkway, Malvern PA 19355.

3. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

4. Respondent has no history of prior discipline.

5. On February 24, 2003, Respondent was arrested by an officer of the Upper Merion Township Police Department, after having been accused of various acts, which included criminal trespass, possession of an interception device and interception of oral communications.

6. On June 23, 2003, criminal informations were filed in the Court of Common Pleas of Montgomery County, which charged that from on or about September 1, 2002, through February 2003, Respondent engaged in, inter alia, the following felony criminal acts:

- a. Criminal trespass in violation of 18 Pa.C.S. §3503(a)(1)(ii), by unlawfully breaking into the apartment of Kim Nguyen;
- b. Unlawful interception, endeavor to intercept, or procurement of another person to intercept or endeavor to intercept any wire, electronic or oral communication in violation of 18 Pa.C.S. §5703; and
- c. Possession of an electronic device for the purpose of surreptitious interception of a wire, electronic or oral communication in violation of 18 Pa.C.S. §5705.

7. On or about September 18, 2003, Respondent pleaded guilty to the charges of the criminal informations described above.

8. On September 18, 2003, the Honorable Maurino J. Rossanese sentenced Respondent to five years probation for each of the three charges, to be served concurrently.

9. On April 8, 2004, the Supreme Court of Pennsylvania entered an Order placing Respondent on temporary suspension, as a result of Respondent's convictions.

10. Respondent's actions towards the victim, Kim Nguyen, began in September 2002, shortly after he moved out of the apartment they had shared, and did not end until his arrest in February 2003. Respondent used a key obtained for him by his uncle to enter Ms. Nguyen's new apartment and plant a listening device.

11. After intercepting the victim's oral communications, Respondent sent the victim dozens of lengthy e-mails and left voice mail messages at her place of employment and her apartment.

12. The content of the e-mails demonstrated that Respondent had used a listening device to obtain private, intimate, sexual information, which he periodically repeated to Ms. Nguyen, including verbatim transcripts of conversations that had taken place in Ms. Nguyen's apartment.

13. Respondent's e-mails repeatedly characterized Ms. Nguyen as a "whore". The e-mails also contained numerous statements of racial animus toward black people.

14. More than once, Respondent eavesdropped on Ms. Nguyen's private conversations and monitored her activities by physically placing himself outside her apartment.

15. Respondent began therapy with Dr. David Terjanian, a clinical psychologist, in April 1999.

16. Respondent treated with Dr. Terjanian for four years, until the spring of 2003. Respondent's treatment concluded when he moved to Arizona.

17. Dr. Terjanian diagnosed Respondent with dysthymia, a low-grade depression. Dr. Terjanian also noted aspects of obsessive-compulsive personality.

18. Dr. Terjanian opined that Respondent's psychiatric disorder substantially caused his criminal misconduct.

19. After Respondent moved to Arizona, he began treating in February 2004 with Dr. Kenneth J. Goldberg, Ph.D.

20. Respondent meets with Dr. Goldberg on a weekly basis.

21. Dr. Goldberg made a primary diagnosis of post-traumatic stress disorder as a result of a history of physical, emotional and sexual abuse. Dr. Goldberg also diagnosed Respondent with dysthymia and anxiety disorder.

22. Dr. Goldberg opined that Respondent's psychiatric condition caused his criminal conduct.

23. Respondent's treatment consists of cognitive behavioral therapy to assist him in developing more self-management over his thoughts and emotions, as well as his behavior. Respondent does not take any medication.

24. Respondent needs to continue treatment for an extended time as the issues for which Respondent sought treatment are not resolved at this point in time.

25. Respondent's psychological condition would not prevent him from practicing law. It could diminish the amount of time Respondent is able to devote to his practice.

26. In 2003, Respondent moved to Arizona and his probation has been transferred there.

27. Respondent is currently in compliance with all terms and conditions of his probation.

28. At the time of the disciplinary hearing, Respondent had been accepted as a seminary student at Fuller Theological Seminary in Pasadena, California and was due to begin his study in September 2004. This move would necessitate a transfer of probation to California, which at the time of the hearing Respondent was in the process of addressing.

29. Seven character witnesses testified on behalf of Respondent. These witnesses included an attorney, a former client, and other community members. These witnesses all testified to Respondent's good reputation as a peaceful, law abiding and truthful person.

III. CONCLUSIONS OF LAW

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

1. The crimes of criminal trespass, possession of an interception device, and interception of oral communications are all felonies, punishable by more than one year imprisonment, and are therefore "serious" crimes pursuant to Pa.R.D.E. 214(i).

2. Respondent's convictions of the crimes of criminal trespass, possession of an interception device, and interception of oral communications constitute a per se ground for discipline pursuant to Pa.R.D.E. 203(b)(1).

3. Respondent has established that he is entitled to mitigation pursuant to Office of Disciplinary Counsel v. Braun, 520 Pa. 157, 533 A.2d 139 (1981).

IV. DISCUSSION

This matter is before the Disciplinary Board upon a Petition for Discipline charging Respondent with violations of the Rules of Disciplinary Enforcement based upon his criminal convictions of criminal trespass, possession of an interception device, and interception of oral communications.

The sole issue to be determined is the extent of discipline to be imposed as the disciplinary proceeding is based upon Respondent's conviction of a serious crime. Pa.R.D.E. 214(f)(1). In order to determine the discipline, the events surrounding the criminal charge must be considered. Office of Disciplinary Counsel v. Valentino, 730 A.2d 479 (Pa. 1999). All relevant aggravating and mitigating factors must be evaluated. Office of Disciplinary Counsel v. Chung, 695 A.2d 405 (Pa. 1997).

Respondent contends that he suffers from a psychiatric disorder which substantially caused his criminal conduct and is, therefore, entitled to mitigation pursuant to Office of Disciplinary Counsel v. Braun, 553 A.2d 984 (Pa. 1989).

Respondent presented the expert testimony of Dr. David Terjanian and Dr. Kenneth Goldberg. Dr. Terjanian was Respondent's treating therapist from 1999 to 2003, while Respondent lived in Pennsylvania. Respondent moved to Arizona in 2003 and began treatment with Dr. Goldberg in 2004. Dr. Terjanian diagnosed Respondent with dysthymia and noted some elements of obsessive compulsive personality. Dr. Goldberg essentially agreed with his diagnosis, also noting anxiety disorder and post-traumatic stress disorder. Both experts opined that Respondent's psychiatric disorder caused his criminal conduct. Respondent continues to be afflicted by these disorders and has shown an understanding that he suffers from these disorders and a willingness to receive treatment. This evidence is

clear and convincing and supports the conclusion that Respondent met the Braun standard and is entitled to mitigation.

Conversely, the nature and duration of Respondent's crimes are significant aggravating circumstances. Respondent engaged in a prolonged and egregious intrusion into the private life of his victim and subjected her to a physical invasion of her residence. The harassing e-mails sent to the victim were repulsive in nature. While Respondent characterized his crimes as an "isolated mistake", as he wrote in a letter to the Disciplinary Board in September 2003 (Ex. P-10), they took place over a period of five months, and required careful preparation with the assistance of others, thus rendering the crimes neither isolated nor a mistake.

Two prior cases are analogous to the instant matter. In the case of In re Anonymous No. 76 DB 1998 , 424 Disciplinary Docket No. 3 (Pa. Dec. 14, 2000), the Supreme Court suspended the attorney for three years following his conviction of the misdemeanors of terroristic threats, harassment of a woman and a priest, indecent exposure and disorderly conduct. This respondent suffered from very serious psychiatric conditions, including bipolar disorder.

In the case of In re Anonymous No. 34 DB 1993, 32 D. & C. 4th 23 (1996), the respondent was convicted of two counts of terroristic threats, harassment, and harassment by communication in connection with his misconduct toward the mother of his son. This respondent was suspended from the practice of law for 30 months.

Review of the totality of the record and case law persuades the Board that a suspension of three years, retroactive to the date of Respondent's temporary suspension, is appropriate discipline. This suspension requires Respondent to petition for reinstatement

and prove his character and fitness if he desires to practice law in Pennsylvania in the future.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James Martin Fogerty, be Suspended from the practice of law for a period of three years retroactive to April 8, 2004.

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: _____
Laurence H. Brown, Board Member

Date: February 25, 2005

PER CURIAM:

AND NOW, this 27th day of May, 2005, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 25, 2005, it is hereby

ORDERED that JAMES MARTIN FOGERTY be and he is SUSPENDED from the Bar of this Commonwealth for a period of three years retroactive to April 8, 2004, 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.