

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1658 Disciplinary Docket No. 3
Petitioner :
 : No. 123 DB 2009
v. :
 : Attorney Registration No. 93618
JAMES D. HAYWARD, JR., :
Respondent : (Luzerne County)

ORDER

PER CURIAM:

AND NOW, this 19th day of January, 2011, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 27, 2010, it is hereby

ORDERED that James D. Hayward, Jr. is suspended from the Bar of this Commonwealth for a period of one year and one day and he shall comply with all the provisions of Rule 217, Pa.R.D.E.

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

A True Copy Patricia Nicola

As of: January 19, 2011

Attest:

Chief Clerk

Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 123 DB 2009
Petitioner	:	
	:	
v.	:	Attorney Registration No. 93618
	:	
JAMES D. HAYWARD, JR.	:	
Respondent	:	(Luzerne 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 August 8, 2009, Office of Disciplinary Counsel filed a Petition for Discipline against James D. Hayward, Jr. The Petition charged Respondent with violations of the Rules of Professional Conduct arising from his representation of a client in a bankruptcy action. Respondent filed an Answer to Petition on September 8, 2009, wherein he admitted all of the allegations contained in the Petition for Discipline.

A disciplinary hearing was held on December 16, 2009, before a District III Hearing Committee comprised of Chair Michael T. Hudock, Esquire, and Members David J. Solfanelli, Esquire, and Daniel T. Brier, Esquire. Respondent was represented at the hearing by James C. Schwartzman, Esquire. Prior to the start of the hearing the Committee heard argument from counsel regarding a Motion in Limine filed by Petitioner to preclude Respondent from offering evidence contrary to his Answer. The Committee deferred a ruling on the Motion until it heard the testimony of Respondent and his character witnesses. The Committee denied the Motion in Limine.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on May 4, 2010 and recommended that Respondent receive a public censure and probation. The term of probation was unspecified.

Petitioner filed a Brief on Exceptions to the Report on May 21, 2010. Petitioner argues that the Committee erred in its Conclusions of Law and its ruling on the Motion in Limine and further contends that the appropriate recommendation for discipline is a suspension of one year and one day.

This matter was adjudicated by the Disciplinary Board at the meeting on July 17, 2010.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, 601 Commonwealth Ave., Suite 2700, Harrisburg, Pennsylvania, is invested,

pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent is James D. Hayward, Jr. He was born in 1951 and was admitted to practice law in Pennsylvania in 2004. His registered address is 264 N. Main Street, Wilkes-Barre, PA 18702. He is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has no record of prior discipline.

4. Upon discovering that Melissa A. Meade was being sued by a credit card company in the Luzerne County Court of Common Pleas, Respondent sent her a solicitation letter offering his legal services.

5. Subsequently Ms. Meade contacted Respondent and retained him to represent her in a Chapter 7 Bankruptcy.

6. Respondent verbally advised Ms. Meade that his legal fee was \$500 and the filing fee was \$300 and that as soon as she paid him the \$300, he would file her bankruptcy, and she could pay his fee in installments.

7. By check dated July 8, 2008, Ms. Meade paid Respondent \$400, \$300 of which was for the filing fee and \$100 of which was towards his legal fee of \$500.

8. Even though Respondent had not previously represented Ms. Meade, Respondent failed to communicate to her in writing the basis or rate of his fee.

9. The \$400 Ms. Meade paid Respondent by check dated July 8, 2008 were advanced filing fees and legal fees which constituted Qualified Funds pursuant to RPC 1.15(d)(2) and should have been deposited into an IOLTA account pursuant to RPC 1.15(e) and (g) and withdrawn only upon paying the filing fee and as earned by Respondent.

10. Instead, Respondent deposited the \$400 check into his Wilkes-Barre Employee Credit Union account, which was a personal account.

11. On July 9, 2008, Respondent filed Ms. Meade's Chapter 7 Bankruptcy in the Middle District of Pennsylvania; however, he did not pay the filing fee of \$299 from the \$400 Ms. Meade had paid him.

12. On the Disclosure of Compensation of Attorney for Debtor form Respondent filed with Ms. Meade's bankruptcy, Respondent indicated that his legal fee was \$500 of which \$100 had been paid before filing and \$400 was due.

13. As a result of Respondent's failure to pay the \$299 filing fee, by Order of July 23, 2008, the Bankruptcy Court directed that the fee be paid by July 30, 2008, or else the bankruptcy case may be dismissed.

14. Respondent did not inform his client of this Order.

15. Without Ms. Meade's knowledge or consent, on July 26, 2008, Respondent filed an Application to Pay Filing Fee in Installments wherein Respondent knowingly misrepresented that Ms. Meade could not afford to pay the filing fee except in installments and requested permission to pay the fee in installments, and made the first payment of \$25.

16. On his electronic filing, Respondent indicated that Ms. Meade had signed the application when she had not. Ms. Meade had not authorized Respondent to file the Application as she had paid him the full filing fee in advance.

17. Paragraph 3 of the Application to Pay Filing Fee in Installments provided that Ms. Meade would not make any further payments to an attorney until the filing fee was paid in full.

18. Respondent converted to his own use the \$300 that he had been given by Ms. Meade to pay the filing fee of \$299.

19. By Order dated July 28, 2008, the Bankruptcy Court granted Respondent's Application; however, he made no further payments toward the filing fee of \$299.

20. Respondent did not advise Ms. Meade of the July 28, 2008 Order or his failure to pay the filing fee.

21. On August 15, 2008, the 341 Meeting of Creditors was held at which time Ms. Meade gave Respondent a check for \$100, leaving a balance of \$300 toward his legal fee of \$500.

22. Respondent deposited this \$100 payment into his Wilkes-Barre Employee Credit Union account.

23. By not using the \$100 to pay toward the filing fee, Respondent acted contrary to Paragraph 3 of the Application to Pay Filing Fee in Installments which prohibited Ms. Meade from making any further payment to an attorney until the filing fee was paid in full.

24. Ms. Meade took the required pre-discharge bankruptcy education seminar from Consumer Credit Counseling Services which issued her a certificate of attendance on August 20, 2008, a copy of which was sent to Respondent for filing with the Bankruptcy Court; however, Respondent failed to file it.

25. On August 21, 2008, Toyota Motor Credit Corporation sent Respondent's reaffirmation agreement for Ms. Meade to sign reaffirming her obligation to make payments on her car.

26. Thereafter, Ms. Meade called Respondent and asked if he had received the reaffirmation agreement and Respondent advised her that he had received it and misrepresented that he had "taken care of it".

27. Respondent did not have Ms. Meade sign the reaffirmation agreement or execute it on her behalf and send it back to Toyota.

28. As a result of Respondent's failure to pay the bankruptcy filing fee, by Order of November 11, 2008, the Bankruptcy Court dismissed Ms. Meade's case for failure to comply with the Order of July 28, 2008.

29. On November 21, 2008, after she had received a copy of the Order dismissing her case, Ms. Meade sent Respondent an e-mail and asked him what the Order meant. Respondent did not respond to the e-mail.

30. Having learned that Respondent had not sent in the reaffirmation agreement to Toyota, by e-mail on November 25, 2008, Ms. Meade asked Respondent to please fax to her the reaffirmation form so she could send it to Toyota. Respondent failed to respond.

31. On November 26, 2008, at 12:48 p.m., Ms. Meade called Respondent's office and left a voice mail for him to call her. Respondent failed to return the call.

32. On her own, Ms. Meade was able to have her bankruptcy case reopened, paid the filing fee, filed the certificate of attendance, and obtained a discharge.

33. By letter of February 3, 2009, Ms. Meade wrote to Respondent requesting a refund of the \$300 she had paid him for the filing fee he failed to pay, an accounting of the \$200 she had paid toward his legal fee of \$500, and a refund of the unearned portion thereof. Respondent did not respond.

34. A DB-7 Request for Statement of Respondent's Position was sent to Respondent on February 12, 2009.

35. On April 2, 2009, Respondent called Disciplinary Counsel Edwin Frese, and requested an extension of time to respond to the DB-7 due to Respondent's being under the influence of prescription medication. Respondent received an extension until April 10, 2009.

36. By letter to Respondent dated April 29, 2009, Disciplinary Counsel referenced the April 2, 2009 telephone call and noted that no response had been forthcoming from Respondent. Disciplinary Counsel stated that a postponement until May 8, 2009 would be given.

37. On May 8, 2009, Respondent faxed his letter response to the DB-7 wherein he represented to Disciplinary Counsel the following:

a. That he had sent Ms. Meade a fee agreement which she failed to sign and return;

b. That the \$400 he had been paid on July 8, 2008 was payment for work already completed;

c. That the \$100 he had been paid on August 15, 2008 was the balance of his legal fee of \$500 and work already completed;

d. That Ms. Meade had agreed to pay his legal fee first and to pay the filing fee in installments and was well aware of paying the filing fee in installments;

e. That a copy of the reaffirmation agreement from Toyota was sent to Ms. Meade and that later a second copy was sent; and

f. That he had made a number of attempts to contact Ms. Meade in response to her letter of February 3, 2009.

38. By letter to Respondent dated May 11, 2009, Disciplinary Counsel requested Respondent to provide additional information and documentation to corroborate certain claims he made in his response.

39. By letter to Respondent dated May 27, 2009, Disciplinary Counsel indicated that he had yet to receive the additional information and documentation requested by letter and asked that Respondent respond by early the following week.

40. Respondent did not respond and testified at the hearing that he did not recall receiving the letter of May 27, 2009.

41. By DB-7A Request for Supplemental Statement of Respondent's Position dated June 19, 2009, Disciplinary Counsel provided Respondent with a copy of Ms. Meade's letter of May 12, 2009, in which she commented upon Respondent's position on the matter.

42. The DB-7A advised Respondent that a detailed and documented response to Disciplinary Counsel's letter of May 11, 2009 was expected, and it afforded Respondent a 20 day period to respond.

43. Respondent did not respond, although he testified that he recalled receiving the letter.

44. Respondent did speak to Ms. Meade by telephone when she called him. He apologized to her and refunded her \$500 by check dated June 3, 2009.

45. When the Petition for Discipline was filed against him, Respondent filed an Answer and admitted all of the factual allegations and rule violations.

46. Respondent testified on his own behalf at the disciplinary hearing.

47. He admitted that the dismissal of Ms. Meade's case was his fault and he did not properly communicate with Ms. Meade.

48. Respondent had no explanation for why he did not respond to his client's request for information.

49. Respondent testified that he mailed an Agreement to Provide Legal Services to Ms. Meade and she never returned it. Respondent submitted an unsigned, undated copy of the Agreement as Exhibit R-3.

50. Respondent's testimony is unsupported by other evidence. Even if he did send such an agreement to Ms. Meade, it does not accurately set forth the basis or rate of the legal fee of \$500 Respondent claims he was charging. It sets forth as "Legal Fees" the sum of \$800 without indicating that \$299 was for the bankruptcy filing fee.

51. Ms. Meade's testimony is credible that Respondent never provided her with any writing setting forth the basis or rate of his fees.

52. Respondent's testimony that he told Ms. Meade that he would file a fee application to pay the filing fee in installments and that she understood that she was supposed to provide monies to pay these installment fees on a regular basis is not supported by other evidence.

53. Ms. Mead's testimony is credible that Respondent never discussed paying the filling fee in installments and that she learned of the filing fee being paid in installments only after her bankruptcy case was dismissed.

54. Respondent's testimony that he mailed a reaffirmation agreement to Ms. Meade by letter dated September 24, 2008 and mailed her another copy in response to an e-mail is not supported by other evidence.

55. Ms. Meade's testimony is credible that she never received a reaffirmation agreement from Respondent.

56. Respondent admitted that he made mistakes and apologized to everyone at the disciplinary hearing.

57. Respondent presented the testimony of four character witnesses who have known Respondent for many years and who know his reputation in the community as a truthful and honest person.

58. Following his graduation from law school in 1996, Respondent did not immediately take the bar examination. He obtained employment with the City of Wilkes-Barre, eventually becoming the City Administrator in 2001. He lost his position in 2003 when a new mayor was elected.

59. Respondent took and passed the bar examination in 2004. He started a solo practice and worked part-time for Legal Aid.

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. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

2. RPC 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.

3. RPC 1.4(a)(2) – A lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished.

4. RPC 1.4(a)(3) – A lawyer shall keep the client reasonably informed about the status of the matter.

5. RPC 1.4(b) – A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

6. 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.

7. RPC 1.15(a) – A lawyer shall hold property of a client or third person that is in a lawyer’s possession in connection with a client-lawyer relationship separate from the lawyer’s own property.

8. RPC 1.15(b) – Except as stated in this Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person any 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.

9. RPC 1.15(e) – A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.

10. RPC 1.15(g) – All Qualified Funds shall be placed in an IOLTA Account.

11. RPC 3.3(a)(1) – A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

12. RPC 8.1(a) – An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not knowingly make a false statement of material fact.

13. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

14. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

This case is before the Board for consideration of the Petition for Discipline filed against Respondent, wherein he is charged with multiple violations of the Rules of Professional Conduct arising from allegations that he mishandled the bankruptcy matter of his client, Melissa Meade. Respondent filed an Answer in which he admitted all of the allegations contained in the Petition for Discipline.

The record demonstrates that Respondent incompetently and neglectfully represented Ms. Meade in her Chapter 7 Bankruptcy in that he failed to communicate the basis or rate of his fee in writing, failed to promptly deposit the monies he was paid into an IOLTA account, failed to pay the filing fee with the \$300 he was paid for that specific purpose, misrepresented to the Bankruptcy Court that Ms. Meade could not pay the filing fee except by installments, and failed to advise Ms. Meade that he had not paid the filing fee and that if it was not paid her case would be dismissed, which indeed was what occurred. Furthermore, Respondent accepted an additional \$100 toward his fee contrary

to the Bankruptcy Court Order allowing installment payments, failed to either send Toyota Motor Credit Corporation the reaffirmation agreement or provide Ms. Meade with a reaffirmation agreement despite a number of requests from her, failed to file her pre-discharge certificate of counseling, failed to advise Ms. Meade that her case was dismissed, and failed to promptly respond to her request for an accounting and refund. Respondent did eventually pay Ms. Meade \$500 in June of 2009 and apologized to her in a telephone conversation.

Respondent compounded his misconduct by not timely responding to the DB-7 letter sent by Petitioner, and by totally ignoring Petitioner's subsequent requests for information and documentation to substantiate his response to the DB-7. Certain statements Respondent made in the DB-7 were later contradicted by the admissions he made in his Answer, yet in his testimony at the disciplinary hearing Respondent asserted his original position, basically repudiating his admissions. The Committee found him to be not credible, and the Board concurs with this finding.

The Hearing Committee concluded that Respondent violated Rules of Professional Conduct 1.1, 1.3, 1.4(a)(2), 1.4(a)(3), 1.4(b), 1.5(b), 1.15(b), and 3.3(a)(1). Petitioner takes exception to the Committee's conclusions of law and argues that in addition to these Rules violations, Respondent also violated RPC 8.1(a), 8.4(c), 1.15(e) and 1.15(g), as charged in the Petition for Discipline.

Review of the facts of record persuade the Board that the Petitioner's position is correct. Respondent knew that the \$300 given to him by Ms. Meade was designated for the filing fee. Respondent knowingly misrepresented to the Bankruptcy Court that his client

could not afford to pay the filing fee except in installments, and thereby obtained an order allowing payment of the filing fee in installments without his client's knowledge or consent. Respondent made various statements to the contrary in his response to the DB-7 letter, and then compounded those misrepresentations by his testimony under oath at the December 16, 2009 disciplinary hearing. By his actions he violated RPC 8.1(a), which prohibits a lawyer in connection with a disciplinary matter from knowingly making a false statement of material fact. He also violated RPC 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The facts support the conclusion that Respondent violated RPC 1.15(e) and 1.15(g). These violations go to the safekeeping of property, and state that a lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, to be withdrawn only as fees are earned or expenses incurred, and that all Qualified Funds shall be placed in an IOLTA Account. Respondent did not have his client's informed consent, confirmed in writing, to treat the total of \$500 that she paid Respondent as his own. He did treat the payments of \$400 and \$100 as his own and failed to deposit them into an IOLTA account.

Petitioner objects to the Hearing Committee's denial of the Motion in Limine to preclude Respondent from offering evidence contrary to his Answer. Rule 208(b)(4) of the Pennsylvania Rules of Disciplinary Enforcement provides that no evidence with respect to factual allegations of the complaint that have been deemed or expressly admitted may be presented at any hearing on the matter, absent good cause shown. The Committee allowed the testimony even though Respondent expressly admitted all of the allegations in

the Petition for Discipline. The Committee reasoned that Respondent filed his Answer without benefit of counsel, whom he later obtained for the hearing, and that Respondent was under stress at the time he filed his Answer. The Committee further reasoned that as the purpose of the disciplinary system is to protect the public, and not simply punish the attorney, it was a wiser course to allow the testimony. Petitioner argues that there was no legally sufficient reason to permit the testimony.

The Board's review of this issue suggests no reason for disturbing the Committee's ruling on the Motion in Limine. The Committee made a judgment that the testimony should be allowed due to circumstances it found to show good cause. Ultimately, Respondent diminished his own position by testifying contrary to his Answer, resulting in a finding that he was not credible.

The Hearing Committee has recommended that Respondent be publicly censured by the Supreme Court, with probation of an unspecified duration. The Committee reasoned that the facts of Respondent's misconduct are balanced by his ultimate apology to Ms. Meade and the refund of the \$500 she paid him. The Committee noted that Ms. Meade did obtain her discharge in bankruptcy, albeit on her own. The Committee also considered the fact that Respondent has only practiced law since 2004 and is relatively inexperienced.

Petitioner objects to the recommended discipline and contends that the charges against Respondent warrant a more significant sanction. While Petitioner concedes the mitigating facts of Respondent's apology and refund to his client, it contends

that Respondent's lack of credibility aggravates the discipline and warrants a suspension of at least one year and one day.

The Board's careful assessment of the record leads us to the conclusion that a suspension of one year and day is appropriate. We make this determination with due consideration for Respondent's inexperience and his ultimate restitution to his client. Had this matter not involved acts of dishonesty by Respondent, we would most likely not consider a suspension of this length. Respondent engaged in dishonesty to his client and the Court, and demonstrated an inability to be truthful to Disciplinary Counsel and the Hearing Committee. Respondent's lack of credibility is very troubling. Dishonesty cannot be excused, nor remedied by a public censure or probation.

Prior cases involving similar aspects of the instant case support a suspension of one year and one day. In the matter of Office of Disciplinary Counsel v. Arthur Joseph Werner, No. 202 DB 2003, No. 1032 Disciplinary Docket No. 3 (Pa. Aug. 10, 2005), Mr. Werner engaged in client neglect and misrepresentation to Disciplinary Counsel. The Board noted that while the underlying neglect of the client was regrettable, the respondent's conduct toward Disciplinary Counsel was particularly serious as it revealed a core failure to act honestly, which suggested unfitness to practice law.

For the reasons set forth above, the Board recommends that Respondent be suspended for a period of one year and one day.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James D. Hayward, Jr., be Suspended from the practice of law for a period of one year and one day.

It is further recommended that the expenses incurred in the investigation and prosecution of this matter are to be paid by the Respondent.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: 
Gabriel L. Bevilacqua, Board Member

Date: September 27, 2010