

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 789, Disciplinary Docket No. 3
Petitioner	:	Supreme Court
	:	
v.	:	No. 129 DB 2000 – Disciplinary Board
	:	
STEPHEN J. BANIK	:	Attorney Registration No. 33850
Respondent	:	(Tioga 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 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 3, 2000, Petitioner, Office of Disciplinary Counsel, filed a Petition for Discipline against Stephen J. Banik, Respondent in these proceedings. The Petition charged Respondent with violation of Rules of Professional Conduct 1.15(a), (b), and (c), and 8.4(b) and (c) based on allegations that he mishandled client funds.

Petitioner withdrew the violation of Rule 1.15(c) at the hearing. Respondent filed an Answer to Petition for Discipline on November 21, 2000.

A disciplinary hearing was held on June 4, 2001 before Hearing Committee 3.05 comprised of Chair Paul W. Brann, Esquire, and Members John W. Frommer, III, Esquire, and Henry A. Goodall, Jr., Esquire. William A. Hebe, Esquire, represented Respondent. Petitioner was represented by Patti S. Bednarik, Esquire.

Following briefing by the parties, the Hearing Committee filed a Report on November 20, 2001 and found that Respondent violated Rules of Professional Conduct 1.15(a) and (b) and 8.4(b) and (c). The Committee recommended that Respondent be publicly censured

This matter was adjudicated by the Disciplinary Board at the meeting of February 13, 2002.

## II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office was located at Suite 3710, One Oxford Centre, Pittsburgh, Pennsylvania 15219, is vested, under Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter "Pa.R.D.E."), with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of that rule.

2. Respondent was born in 1955 and was admitted to practice law in the Commonwealth in 1981. He maintains his office at 107½ Main Street, P.O. Box 55, Wellsboro, Pennsylvania 16901, and is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Jan A. Terry and Respondent were friends since high school.

4. On March 10, 1999, Respondent submitted a request to the Social Security Administration to be designated Jan Terry's representative payee for the purpose of receiving SSI benefits as a result of Jan Terry's mental impairment.

5. In Respondent's request to be named as Jan Terry's representative payee to receive SSI Benefits, Respondent stated, "Jan A. Terry does not owe me any money and I do not expect him to in the future."

6. Respondent claims that at the time this statement was made, Respondent did not consider the value of an in-kind exchange between Jan Terry and himself as "money" owed by either party.

7. Respondent's request to become a representative payee includes a statement that "anyone who makes or causes to be made a false statement or representation of material fact relating to a payment under the Social Security Act commits a crime punishable under Federal law by fine, imprisonment or both. I affirm that all information I have given in this document is true."

8. Shortly before or after Respondent became Jan Terry's representative payee, he went to Jan Terry's home and asked him to sign an agreement

or disbursement sheet which would allow Respondent to keep 25% of Mr. Terry's retroactive supplemental security income for himself.

9. Jan Terry refused to sign the agreement or disbursement sheet, which included the provision that Respondent would receive 25% of Jan Terry's retroactive supplemental security income payment of \$6,328.80.

10. On or about April 1, 1999, April 2, 1999, and May 1, 1999, Respondent received the following payments on behalf of Jan Terry:

	Federal Amount	State Amount	
April 1, 1999	\$ 500.00	\$ 27.40	\$ 527.40
April 2, 1999	\$5,972.60	\$ 356.20	\$6,328.80
May 1, 1999	\$ 500.00	\$ 27.40	\$ 527.40
		TOTAL	\$7,383.60

11. Respondent had a fiduciary duty to promptly turn these funds over to Mr. Terry or use them on Jan Terry's behalf, or keep them in an account separate from his own funds to be used on Jan Terry's behalf as needed.

12. Respondent failed to establish a separate account for monies that he received from the Social Security Administration on behalf of Jan Terry.

13. After receiving the April 2, 1999 payment, Respondent paid \$1,000 of this sum for Jan Terry's electric bill, Respondent paid Jan Terry \$3,000 by check, Respondent gave him an additional \$746 in cash, and kept \$1,582.80. This sum, \$1,582.80, equals 25% of Jan Terry's retroactive benefits, which equals the same amount that Respondent would have kept if Jan Terry had signed the document that Respondent had taken to his house.

14. Respondent failed to pay Jan Terry \$1,582.80 of his SSI benefits, failed to use this money on behalf of Jan Terry and kept this money for his own personal use.

15. For the first three weeks of May 1999, Respondent failed to put any money into Jan Terry's account.

16. While serving in his capacity as representative payee, Respondent occasionally advised Jan Terry that Respondent had to "borrow" some of his money from his SSI benefits, and then, Respondent eventually paid the money back. Respondent claims that his statements to Jan Terry about loans were a "ruse" to keep Jan Terry from requesting all his money at once.

17. On or about May 19, 1999, shortly after Respondent made it clear to Jan Terry that he did not intend to give him \$1,582.80 of his SSI benefits from the April 2, 1999 payment, Jan Terry complained to Paul Hensen, a claims representative for the Social Security Administration, about Respondent's handling of his money, in particular, the fact that Respondent had kept \$1,582.80.

18. Mr. Hensen sent Respondent two letters dated June 9, 1999 and June 23, 1999 requesting that Respondent provide information regarding Jan Terry's complaint that Respondent had taken his money without his authorization.

19. Respondent failed to respond to those letters.

20. On July 26, 1999, Respondent and Mr. Hensen had a telephone conversation regarding Jan Terry's claims that Respondent had taken his money without authorization. During that conversation, Respondent claimed the following:

a. that Jan Terry owed Respondent money for representing his former girlfriend, Jill Sumner,

b. that Respondent spent considerable time preparing Jan Terry's case for the administrative law judge, even though Catherine Rusk had actually represented Jan Terry at the hearing, and

c. that Respondent loaned Jan Terry money to have work done on his house.

21. Jan Terry asked Respondent to represent his former girlfriend, Jill Sumner, on a criminal case involving theft of leased property as a result of Ms. Sumner's failure to return some videotapes to a video store.

22. Jan Terry claims that he never agreed to pay Jill Sumner's legal fees.

23. Respondent orally advised Jill Sumner, now known as Jill Ellison, that he would charge her \$100.00 to represent her in her criminal case, assuming that he would be able to resolve this matter expeditiously with a Rule 314 disposition. The case was scheduled for a 314 disposition three times, but Ms. Sumner only paid \$25.00 partial restitution. Respondent had to request three continuances to give Ms. Ellison more time to pay restitution. Eventually, Ms. Ellison paid Respondent the court costs and fees, which Respondent in turn paid to the court. Her case was dismissed pursuant to Rule 314 on January 5, 1999. Ms. Ellison never had to go to court and never paid Respondent the \$100.00 legal fees that she agreed to pay Respondent. To the best of

Ms. Ellison's knowledge, Jan Terry never agreed to pay Respondent for her legal bills, nor does she have knowledge of any agreement for Jan Terry to pay Respondent \$250.00 for her legal fees.

24. Prior to Respondent becoming Jan Terry's representative payee, Respondent bought and delivered pipe and cement which cost \$109.09 to repair the sewage system at Jan Terry's house. Jan Terry's father, Shirley Clyde Terry, who was a one-half owner of the house, agreed to reimburse Respondent for the parts but failed to do so, because Jan Terry refused to participate in a proposed refinancing of the house. Respondent believed that Jan Terry was morally obligated to reimburse Respondent for these items since he had benefited from their use, and they had enhanced the value of the house in which Jan Terry was a one-half owner.

25. Catherine Rusk, a paralegal with Susquehanna Legal Services, obtained SSI benefits for Jan Terry in 1995, retroactive to 1991, and after Jan Terry's benefits were terminated, she began the process again in 1998, and was able to get Jan Terry retroactive benefits.

a. There is nothing in Ms. Rusk's files to indicate that Respondent did any work on behalf of Jan Terry with respect to obtaining SSI benefits. Her file contained one document signed by Respondent's secretary in 1993 which initiated the process for Mr. Terry to get benefits back in 1994;

b. There is nothing in the extract from Jan Terry's Social Security Administrative file that indicates Respondent had done any work on Jan Terry's behalf to help him obtain benefits;

c. Respondent failed to file an entry of appearance on behalf of Jan Terry on the social security matters;

d. Respondent failed to file a fee petition with the Social Security Administration as required by the Social Security Administration regulations if he were in fact owed any money as legal fees for obtaining benefits on Jan Terry's behalf;

e. In response to Petitioner's request for all documentation supporting Respondent's claim that he did substantial legal work on Jan Terry's behalf to obtain his SSI benefits, Respondent provided the following:

i.) a letter from the Social Security Administration dated June 7, 1996, advising Respondent that they intended to terminate Jan Terry's benefits unless he appealed that decision within ten days of the letter;

ii) a cover letter from Respondent dated August 21, 1996 to the Social Security Office including a Disability Report and Statement of Claimant, which was completed by Respondent's office staff.

f. As a result of Respondent's failure to appeal Jan Terry's termination of his SSI benefits, Catherine Rusk had to initiate the whole process of reapplying for SSI benefits. Respondent did not help Catherine Rusk in her legal representation to reinstate Jan Terry's SSI benefits.



26. By letter dated August 20, 1999, Paul Hensen requested that the Respondent complete an accounting form summarizing the disposition of the Supplement Security benefits paid to him as a representative payee for Jan Terry. Mr. Hensen enclosed an envelope to return any funds withheld as a fee and to return the accounting.

27. In the same August 20, 1999 letter, Mr. Hensen advised Respondent:

a. that Jan Terry was accusing Respondent of keeping \$1,582.80 of his retroactive SSI payment as Respondent's attorney fee;

b. that the Social Security Administration had no fee agreement or fee petition in their records from Respondent; that their records indicate that Jan Terry was represented by someone other than Respondent; and

c. that if Respondent had collected an unauthorized fee, it was a violation of 20 CFR 404.1740(b).

28. Respondent failed to respond to the August 20, 1999 letter and Respondent failed to return an accounting.

29. On or about September 13, 1999, Paul Hensen sent another copy of his August 20, 1999 letter to Respondent with the notation, "second request please respond."

30. Respondent again failed to respond to Mr. Hensen's request for an accounting of funds and failed to respond to Mr. Hensen's request for information.

31. Respondent retained \$1,582.80 of Jan Terry's SSI benefits. 20 CFR 404.1740(b) provides:

A representative shall not knowingly charge, collect or retain, or make arrangement to charge, collect or retain, from any source, directly or indirectly, any fee for representation services in violation of applicable law or regulation.

32. When Jan Terry threatened to report Respondent to the Disciplinary Board, Ms. Catherine Rusk, the paralegal at Susquehanna Legal Services, attempted to negotiate a settlement between Respondent and Jan Terry with respect to the \$1,582.80 that was in dispute.

33. By letter dated January 7, 2000, Respondent advised Catherine Rusk of the following:

- a. that Jan Terry owed Respondent \$250.00 for Jill Sumner's representation;
- b. that Respondent had looked through his file, and that he believed that he had spent at least five hours on Jan Terry's file, but would be willing to settle for three hours at \$75.00 per hour;
- c. that Respondent would not pay Jan Terry a storage fee for having his car stored at Terry's home for months after Jan Terry requested that the Respondent move it elsewhere;
- d. that Respondent spent \$109.09 on materials for Terry's house; and

e. that Respondent offered to pay Jan Terry \$1,000.00 to settle his claim against him.

34. Jan Terry agreed to settle his dispute with Respondent if Respondent paid him \$1,000.00 and removed his car from Jan Terry's premises.

35. Respondent failed to pay Jan Terry \$1,000.00.

36. Respondent failed to remove his car from Jan Terry's premises.

37. As a result of Jan Terry's complaint about Respondent's misappropriation of his money, Paul Hensen stopped sending Jan Terry's SSI benefits to Respondent to prevent any further misuse of Jan Terry's funds. After Jan Terry named another representative payee, his benefits resumed.

38. When Respondent failed to pay Jan Terry \$1,000.00 to settle this matter, Jan Terry complained to the Office of Disciplinary Counsel. Respondent then claimed to the Office of Disciplinary Counsel that Jan Terry owed him money for representing Jill Sumner, for repairs to the Terry home, and for legal work performed for Jan Terry.

39. Respondent has no disciplinary history.

40. Respondent has cooperated with Office of Disciplinary Counsel in this investigation.

41. Respondent repaid Jan Terry \$1,582.80 prior to the disciplinary hearing.

42. Respondent has admitted his wrongdoing and has expressed remorse for his actions.

### III. CONCLUSIONS OF LAW

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

1. 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.
2. 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.
3. RPC 8.4(b) – It is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.
4. RPC 8.4( c) – It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

#### IV. DISCUSSION

Mishandling client funds is one of the most troubling forms of attorney misconduct, and the discipline imposed has ranged from rare instances of non-public discipline to disbarment. In this case there is uncharacteristic unanimity among Respondent's counsel, the Hearing Committee and the Office of Disciplinary Counsel that public censure is the appropriate discipline for Respondent's conduct.

Respondent stipulated to violations of the following Rules of Professional Conduct:

- 1.15(a) a lawyer shall hold property of clients...separate from the lawyer's own property;
- 1.15(b) a lawyer shall promptly deliver to the client or third persons any funds or other property that the client or third person is entitled to receive, and
- 8.4(c) it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Originally Respondent stipulated to a violation of Rule 8.4(b), which states that it is professional misconduct for a lawyer to commit a criminal act, but at the hearing Petitioner and Respondent reached an agreement to withdraw that violation from the stipulation and let the Hearing Committee make the determination as to whether Respondent violated that Rule. The Committee decided that Respondent's

conduct did constitute a violation of the crime of theft by failure to make required disposition as set forth in 18 Pa. C.S. §3927, as it was not persuaded that Respondent believed he was legally entitled to keep the Complainant's SSI disability benefits. The evidence of record established that Respondent knew he had an obligation to use the Complainant's benefits on behalf of the Complainant or to conserve the funds for Complainant's future needs. As such, Respondent failed to make the required disposition of these funds.

Respondent stipulated to extensive findings of fact, and some of these more significant factual findings are repeated here to contextualize Respondent's misconduct and the recommended discipline for the conduct.

Respondent's practice is concentrated in Tioga, Potter, McKean, Bedford and Lycoming Counties. He became friendly with Complainant when they attended high school together, and they remained friendly thereafter. Complainant was receiving social security disability benefits, and requested that Respondent become a representative payee for the Supplemental Security Income Benefits he received from the Social Security Administration. The record does not precisely describe the nature, extent or timing of Complainant's disabilities but these include mental impairment, alcohol addiction and a back injury. (NT 39) Complainant's father had a drinking problem and often fought with Complainant and in at least one instance threatened to throw him out of the house. (NT 17) Respondent intervened over a period of years in

various domestic disturbances and convinced Complainant's father not to throw him out of the house. The father later moved to Arkansas and left Complainant on his own, and he was apparently helped by a neighbor who "wouldn't deal with it anymore". Apparently at that time, Complainant requested Respondent to become his protective payee for the Social Security benefits. (NT 17-18)

After Respondent completed the required forms he became Complainant's protective payee and received nearly \$7,000 in these benefits. He used this benefit payment to purchase money orders and paid some long overdue utility bills for Complainant and gave Complainant the balance of funds less \$1,582 which he kept as a fee. (NT 36-37) Complainant voiced his considerable displeasure at Respondent retaining this fee, and it was repaid in total to Complainant. Respondent compounded his retention of this unauthorized fee by his delay in repaying it. During the delay in repaying Complainant, Respondent kept the unauthorized fee for his own use and told Complainant that he had to "borrow" some of the benefit funds, and failed to respond and/or submit an accounting to representatives of the Social Security Administration regarding the retained funds.

The Hearing Committee's thorough discussion of recommended discipline begins with the statement that the testimony and evidence of record demonstrates that Respondent did not volunteer to be Complainant's representative payee in order to defraud him. (Hearing Committee Report at p. 22)

In addition to the domestic dispute resolution discussed earlier, Respondent has acted as friend, occasional provider of food and shelter, and non-fee paid attorney for Complainant's girlfriend in a criminal matter. Respondent also delivered to Complainant a vehicle for a restoration which was undertaken by removing the bumpers and nothing more. Respondent's motivation for the retention of the unauthorized fee was not an attempt to steal money from Complainant but a misguided attempt to secure reimbursement for these efforts he made on Complainant's behalf.

The record contains several mitigating factors which support the recommended discipline of public censure.

- Respondent has no prior discipline in his more than 20 years of practice in his native Tioga County;
- Respondent understood the seriousness of his misconduct, admitted his wrongdoing and was genuinely remorseful;
- Respondent testified that this situation should have never occurred and will not re-occur;
- Respondent cooperated with the Office of Disciplinary Counsel and fully repaid Complainant prior to his disciplinary hearing,
- A variety of significant members of the legal community who knew Respondent personally and professionally submitted letters on his behalf including:



- The District Attorneys of Potter and Tioga Counties;
- The Chief Probation Officer of Tioga County;
- The Bailiff of Tioga County's Court of Common Pleas (a retired Pennsylvania State Trooper);
- The Domestic Relations Officer and Master for Tioga County;
- The Court Administrator of Potter County;
- The Prothonotary and Clerk of Courts of Tioga County's Court of Common Pleas;
- A senior member of the Tioga County Bar

All of these support letters expressed the long time (none for less than 10 years and most for 20 years or more) they have personally known Respondent and the uniformly high professional and personal regard in which the authors hold Respondent.

Respondent is clearly well regarded in this largely rural legal community in which he practices and that further underscores the aberrant nature of this incident, and reinforces the likelihood that it will not be repeated.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Stephen J. Banik, be subjected to a Public Censure by the Supreme Court.

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

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

By: \_\_\_\_\_  
Thomas J. Elliott, Member

Date: September 27, 2002

PER CURIAM:

AND NOW, this 17<sup>th</sup> day of December, 2002, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 27, 2002, it is hereby

ORDERED that STEPHEN J. BANIK be subjected to Public Censure by the Supreme Court.

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