

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1810 Disciplinary Docket No. 3
Petitioner :
v. : No. 160 DB 2010
: Attorney Registration No. 80716
JAMES EDWARD ELAM, :
Respondent : (Philadelphia)

ORDER

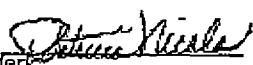
PER CURIAM:

AND NOW, this 30th day of May, 2012, upon consideration of the Report and Recommendations of the Disciplinary Board dated December 30, 2011, it is hereby

ORDERED that James Edward Elam is suspended from the Bar of this Commonwealth for a period of three years 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 5/30/2012

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 160 DB 2010
Petitioner	:	
	:	
v.	:	Attorney Registration No. 80716
	:	
JAMES EDWARD ELAM	:	
Respondent	:	(Philadelphia)

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 25, 2010, Office of Disciplinary Counsel filed a Petition for Discipline against James Edward Elam. The Petition charged Respondent with misconduct arising from allegations that he misappropriated funds of a client and made misrepresentations to Office of Disciplinary Counsel. Respondent filed an Answer to Petition on October 20, 2010.

A disciplinary hearing was held on January 26, 2011 and February 3, 2011, before a District I Hearing Committee comprised of Chair Robert E. Welsh, Esquire, and Members Linda M. Hee, Esquire, and Sarah Louise Wyatt, Esquire.

Respondent appeared pro se. Petitioner introduced exhibits ODC-1 through ODC-37 and Joint Stipulations of Fact and Law. Petitioner presented the testimony of two witnesses. Respondent testified on his own behalf.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on July 15, 2011, concluding that Respondent violated the Rules of Professional Conduct and Rules of Disciplinary Enforcement and recommending that he be suspended for a period of three years.

This matter was adjudicated by the Disciplinary Board at the meeting on October 18, 2011.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at the Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Avenue, Harrisburg, Pennsylvania, is invested, pursuant to Pa.R.D.E. 207, 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 said Rules of Disciplinary Enforcement.

2. Respondent is James Edward Elam. He was admitted to practice law in the Commonwealth in 1997. He maintains his office for the practice of law at 210 West Rittenhouse Square, Suite 400, Philadelphia, PA 19103. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has a record of discipline consisting of an Informal Admonition administered in 2008 for violations of Rules of Professional Conduct 1.3, 1.4(a)(2), (3) and (4), 1.5(b), 1.16(d), and 8.4(d). As a condition, Respondent was to complete three hours of law office management courses within six months of receiving the Informal Admonition and provide Office of Disciplinary Counsel with written notice of completion. Respondent failed to complete the condition of the Informal Admonition.

Lyle Matter

4. In January 2008, Respondent spoke with Lorin W. Lyle regarding Mr. Lyle's forming a nonprofit corporation and a corporate entity to buy real estate.

5. On or about January 9, 2008, Mr. Lyle retained Respondent to handle his legal matter and gave Respondent a check in the amount of \$5,000, made payable to "James Elam, Esq." with the notation "Lawyers Retainer."

6. Respondent failed to provide Mr. Lyle with a written fee agreement setting forth the basis or rate of Respondent's fee.

7. On January 10, 2008, Respondent deposited the check from Mr. Lyle in Respondent's personal bank account at TD Banknorth.

8. Respondent failed to deposit the check into a Trust Account to be withdrawn as fees were earned and expenses incurred.

9. At the time Respondent deposited Mr. Lyle's check in Respondent's personal bank account, Respondent's account had a balance of (-1,266.70).

10. Respondent failed to hold Mr. Lyle's funds separate from his own property, and converted the funds for Respondent's personal use, including clearing the negative balance in Respondent's personal account, making debit card purchases at various stores, and making cash withdrawals.

11. As of February 4, 2008, the balance in Respondent's TD Banknorth personal account was \$41.38.

12. On January 12, 2008, Respondent sent Mr. Lyle information regarding the formation of a nonprofit entity.

13. Thereafter, Respondent took no substantive action on Mr. Lyle's legal matters.

14. From time to time, Mr. Lyle would call Respondent requesting information about the status of his legal matter.

15. Respondent failed to return these telephone calls or provide Mr. Lyle with the requested information.

16. By emails to Respondent dated February 24, 25, 26, and 27, 2009, Mr. Lyle advised Respondent that he was terminating Respondent's services and requested a refund of his \$5,000.

17. By email to Mr. Lyle dated March 2, 2009, Respondent informed Mr. Lyle that Respondent was "away on a travel project" and would review the matter "ASAP" and get back to him.

18. By emails to Respondent dated March 4, 11, and 12, 2009, Mr. Lyle repeated his intention to terminate Respondent's services and reiterated his request for a refund.

19. By email to Mr. Lyle dated March 15, 2009, Respondent apologized for the delay in not responding, informed Mr. Lyle that Respondent had not had a chance to review his file, and advised Mr. Lyle that Respondent was not in a position to repay the monies.

20. Respondent failed to refund the unearned fee to Mr. Lyle.

21. By email to Respondent dated April 3, 2009, Mr. Lyle:

a. noted that Respondent failed to give him a letter setting forth the services Respondent would be providing;

b. stated that Respondent failed to provide any itemization of the work Respondent performed;

c. claimed that Respondent never did any work on his behalf;

d. repeated his request for a refund; and

e. warned Respondent that he would report Respondent's conduct to the Fee Dispute Committee and Pennsylvania Bar if Respondent did not respond by April 7, 2009.

22. By email to Mr. Lyle dated April 7, 2009, Respondent:

a. stated that Respondent was not in a position to repay the retainer fee, but would provide a credit for legal services;

b. claimed that Mr. Lyle paid Respondent his fee "on his own volition";

- c. maintained that Respondent "did not have a clear understanding" of what Mr. Lyle wanted;
- d. blamed Mr. Lyle for never contacting Respondent "again to ask for anything"; and
- e. alleged that Respondent did not intend "to take money from Mr. Lyle unjustly."

23. By email to Respondent dated April 8, 2009, Mr. Lyle informed Respondent that he was not interested in Respondent's offer of a credit and provided four different payment options for reimbursement.

24. By email to Mr. Lyle dated April 16, 2009, Respondent agreed to sign a promissory note.

25. Thereafter, Mr. Lyle retained Roger F. Perry, Esquire, to draft a promissory note.

26. By email dated May 6, 2009, Mr. Perry sent the promissory note to Respondent for Respondent's review and signature.

27. By email to Mr. Perry dated May 14, 2009, Respondent:

- a. stated that he had reviewed the agreement and was "fine" with its terms with the exception of the confession of judgment clause;
- b. "agreed to repay" the funds; and
- c. claimed that Respondent would execute the note and begin making payment upon removal of the clause.

28. By email to Respondent dated May 20, 2009, Mr. Perry:

- a. attached the revised promissory note omitting the confession clause;
- b. instructed Respondent to sign and notarize the note; and
- c. requested Respondent to send the original note with payment to Mr. Lytle and a copy to Mr. Perry.

29. Respondent failed to deliver the signed promissory note and payment to Mr. Lytle, as Respondent had agreed.

30. By email to Respondent dated June 6, 2009, Mr. Perry inquired as to whether Respondent signed the promissory note and reminded Respondent that the first payment was due on June 1, 2009.

31. Respondent failed to respond to Mr. Lytle's and Mr. Perry's telephone calls and emails.

32. On July 6, 2009, Mr. Lytle filed a small claims complaint against Respondent in the Municipal Court of Philadelphia seeking the return of his \$5,000 fee, plus interest, attorney fees and court costs.

33. On September 9, 2009, Mr. Lytle obtained a default judgment against Respondent for \$5,986, which remains unsatisfied.

Mishandling of Fiduciary Funds

34. Respondent maintains a business checking account at TD Banknorth, entitled "The Elam Law Firm."

35. On or before September 29, 2008, Respondent received check number 0274, made payable to James Elam, in the amount of \$1,275, with the notation "½ of retainer."

36. On September 29, 2008, Respondent deposited the retainer check into Respondent's business checking account at TD Banknorth.

37. Respondent failed to hold the retainer fee separate from Respondent's own property.

38. Respondent maintains an IOLTA account at Wachovia Bank.

39. On or before April 13, 2009, Respondent received an "Official" JP Morgan Chase Bank check from Bax Global Group, in the amount of \$250,000, dated April 9, 2009, made payable to "The Elam Law Firm."

40. On April 13, 2009, Respondent deposited the bank check into his IOLTA account at Wachovia Bank.

41. On August 14, 2009, Petitioner served Respondent with a DB-7 Request for Statement of Respondent's Position, which included a request for all records showing Respondent's receipt, deposit, and disbursement of Mr. Lyle's retainer fee.

42. On September 18, 2009, Respondent submitted an Answer to Petitioner. Respondent's Answer did not provide the requested bank records; falsely stated that he deposited Mr. Lyle's \$5,000 check into his account at Wachovia Bank; and falsely claimed that his inability to repay Mr. Lyle was due to him being a victim of a foreign check fraud scheme and bank mistakes.

43. By letters from Petitioner to Respondent dated October 1 and October 21, 2009, Petitioner requested that Respondent clarify his DB-7 Answers and provide requested bank records; by letters to Petitioner dated October 8 and November 2, 2009, Respondent replied and failed to provide all of the requested information.

44. On November 9, 2009, Petitioner served Respondent with a subpoena duces tecum requesting records of Respondent's bank accounts at Wachovia Bank, Commerce Bank, and TD Banknorth from 2007 to the present.

45. On November 23, 2009, Respondent appeared at Petitioner's office in response to the subpoena duces tecum. He failed to bring any of the records requested to the November 23, 2009 hearing.

46. After 5:00 p.m. on November 24, 2009, Respondent hand-delivered to Petitioner's office incomplete records from Wachovia bank accounts.

47. Respondent failed to deliver any records for the bank account where he had deposited Mr. Lyle's retainer fee, which was his personal bank account at TD Banknorth.

48. By letter dated January 12, 2010, to Respondent via email and certified mail, Petitioner advised Respondent that he had failed to provide the subpoenaed records regarding the TD Banknorth account and requested that Respondent provide the bank account number by January 13, 2010, and the remaining requested bank records by January 15, 2010.

49. Respondent received Petitioner's email and certified letter.

50. By email transmitted letter dated January 13, 2010, Respondent wrote that "I am certain that I provided to [ODC]'s office the attached bank records" and attached the December 14, 2007 to January 13, 2008 monthly statement for his TD Banknorth personal bank account.

51. By email transmissions dated January 15, 2010, Respondent provided additional bank records for TD Banknorth, apologized for the delay caused by

Respondent's reformatting the documents to be emailed, and explained that he did not have the complete records for his personal account.

52. On January 28, 2010, Petitioner served Respondent with a DB-7a Request for Statement of Respondent's Position; on February 23, 2010, Respondent acknowledged receipt of the DB-7a; on March 12, 2010, Respondent submitted a DB-7a Answer.

53. On Respondent's 2008-2009 Annual Attorney Registration Statement, Respondent identified Commerce Bank as an account where he held fiduciary funds subject to RPC 1.15.

54. Respondent's 2008-2009 Annual Attorney Registration Statement failed to identify accounts at Wachovia and TD Banknorth.

55. Respondent falsely certified that he was in compliance with RPC 1.15.

56. Respondent falsely certified that all the information on Respondent's 2008-2009 Annual Attorney Registration Statement was true and correct.

57. On April 2, 2010, Respondent was placed on Administrative Suspension for failing to file his 2009-2010 Annual Attorney Registration Statement; on or about May 4, 2010, Respondent applied for resumption of active status for the fiscal year 2009-2010.

58. The Supreme Court placed Respondent on Administrative Suspension effective December 18, 2010. He remained on Administrative Suspension through February 3, 2011.

59. Respondent appeared at the disciplinary hearing on January 26 and February 3, 2011, and testified on his own behalf.

60. Respondent admitted to failing to provide Mr. Lyle with a written fee agreement, and admitted that he failed to deposit Mr. Lyle's \$5,000 retainer into an escrow account.

61. In an attempt to justify what happened to Mr. Lyle's \$5,000 fee, Respondent claimed he was the victim of a check fraud in an unrelated bank account.

62. Respondent conceded that his financial records were in disarray for the past several years.

III. CONCLUSIONS OF LAW

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

1. RPC 1.3 - A lawyer shall act with reasonable diligence and promptness in representing a client.
2. RPC 1.4(a)(4) - A lawyer shall promptly comply with reasonable requests for information.
3. RPC 1.5(b) - When a 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.
4. RPC 1.15(a) (former, effective 4/23/05) - A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a client-lawyer relationship separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded. Complete records of the receipt, maintenance and disposition

of such property shall be preserved for a period of five years after termination of the client-lawyer relationship or after distribution or disposition of the property, whichever is later.

5. RPC 1.15(b) (former, effective 4/23/05) - Upon receiving property of a client or third person in connection with a client-lawyer relationship, a lawyer shall promptly notify 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 requests by the client or third person, shall promptly render a full accounting regarding such property.

6. RPC 1.15(b) (effective 9/20/08) - A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded.

7. RPC 1.15(e) (former, effective 4/23/05) - The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying bank services charges on that account, and only in an amount necessary for that purpose. 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. At all times while a lawyer holds funds of a client or third person in connection with a client-lawyer relationship, the lawyer shall also maintain another account that is not used to hold such funds.

8. RPC 1.15(e) (effective 9/20/08) - 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, including but not limited to Rule

1.15 Funds, 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 the property; Provided, however, that the delivery, accounting and disclosure of Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of Fiduciary Administration, confidentiality, notice and accounting applicable to the Fiduciary entrustment.

9. RPC 1.15(i) (effective 9/20/08) - 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 1.16(d) - Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

11. 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.

12. RPC 8.1(b) - 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 fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information

from an admission or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by Rule 1.6.

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

14. Pa.R.D.E. 203(b)(3) - Willful violation of any other provision of the Enforcement Rules shall be grounds for discipline, via Pa.R.D.E. 219(d)(1)(ii) - On or before July 1 of each year all persons required by this rule to pay an annual fee shall file with the Attorney Registration Office a signed form prescribed by the Attorney Registration Office in accordance with the following procedures: (1) The form shall set forth: (iii) The name of each financial institution in this Commonwealth in which the attorney on May 1 of the current year or at any time during the preceding 12 months held funds of a client or a third person subject to Rule 1.15 of the Pennsylvania Rules of Professional Conduct. The form shall include the name and account number for each account in which the lawyer holds such funds, and each IOLTA Account shall be identified as such.

IV. DISCUSSION

This matter is before the Disciplinary Board for consideration of the charges against Respondent that he violated the Rules of Professional Conduct. Petitioner bears the burden of proving ethical misconduct by a preponderance of the evidence that is clear and convincing. Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730, (Pa. 1981). The Joint Stipulations of Fact and Law and exhibits support the conclusion that Respondent violated the Rules as contained in the Petition for Discipline.

The undisputed facts are that Respondent's client, Lorin Lyle, gave Respondent a \$5,000 check to hold intact and use for future legal services. The day after receiving the check, Respondent deposited the funds into his personal bank account, which had a negative balance. Respondent used Mr. Lyle's funds to clear the negative balance, and then used the remaining funds to make purchases at various places of business.

Respondent never provided his client with a written fee agreement and at most, performed minimal legal work for Mr. Lyle. Approximately one year after retaining Respondent's services, Mr. Lyle began calling and emailing Respondent to request an accounting and the refund of unearned legal fees. Respondent utterly failed to respond, to provide an accounting, or to refund the unearned fee. Mr. Lyle ultimately obtained a Small Claims Court judgment against Respondent. This judgment remains unsatisfied.

Respondent was not willing to cooperate with Petitioner in its investigation of this matter. He failed to provide requested information concerning his receipt and handling of fiduciary funds. Due to this lack of cooperation, Petitioner was required to write numerous letters and follow-up emails, and issue subpoenas to Respondent and his banks. Eventually, Respondent provided some responsive records to Petitioner, which revealed the mishandling of Mr. Lyle's check. Respondent's 2008-2009 Annual Attorney Registration Statement reveals that he did not list all accounts where he had held entrusted funds.

Attorneys who fail to safeguard and knowingly convert entrusted funds, and who make misrepresentations to conceal the misappropriation may be suspended from the practice of law for a lengthy amount of time. The Supreme Court imposed a suspension of

three years where an attorney failed to make any restitution of the \$11,082.75 he misappropriated from settlement funds. Office of Disciplinary Counsel v. Bargeron, 80 Pa. d. & C. 4th 117 (2005). This attorney also failed to identify accounts on his Annual Attorney Registration Statements, and had a record of discipline consisting of an Informal Admonition.

A three year suspension was imposed by the Court in the matter of Office of Disciplinary Counsel v. Alex Hugues Pierre, No. 193 DB 2003 (Pa. Aug. 30, 2005). Mr. Pierre mishandled a personal injury matter, made misrepresentations to the client regarding receipt of entrusted funds, and converted to his own use the sum of \$2,300 that was owed to a medical provider. Aggravating facts included Mr. Pierre's failure to show remorse and his less than candid behavior at the disciplinary hearing. Similarly, a three year suspension was imposed on the attorney in Office of Disciplinary Counsel v. Zeigler, 83 Pa. D. & C. 4th 401 (2006), after he misappropriated \$15,000 from an estate and failed to cooperate with requests for information from Office of Disciplinary Counsel and the Lawyers Fund for Client Security.

The totality of Respondent's misconduct, including his failure to provide a fee agreement, conversion of a \$5,000 retainer, misrepresentations to Petitioner, and failure to pay restitution, demonstrate that Respondent is not fit to practice law and must receive substantial public discipline. A three year suspension is consistent with prior matters involving similar fact patterns, and will serve to protect the public and maintain the integrity of the profession.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James Edward Elam, be Suspended from the practice of law for a period of three years.

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: 
David A. Nasatir, Board Member

Date: December 30, 2011