

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 1704 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 162 DB 2009
	:	
	:	Attorney Registration No. 37880
	:	
JAMES BARNETT GEFSKY,	:	
Respondent	:	(Westmoreland County)

ORDER

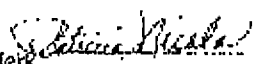
PER CURIAM:

AND NOW, this 16th day of May, 2011, upon consideration of the Report and Recommendations of the Disciplinary Board dated January 26, 2011, the Petition for Review and response thereto, it is hereby

ORDERED that James Barnett Gefsky is suspended from the Bar of this Commonwealth for a period of five 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 5/16/2011

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 162 DB 2009
Petitioner	:	
	:	
v.	:	Attorney Registration No. 37880
	:	
JAMES BARNETT GEFSKY	:	
Respondent	:	(Westmoreland 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 6, 2009, Office of Disciplinary Counsel filed a Petition for Discipline against James Barnett Gefsky. The Petition charged Respondent with violations of the Rules of Professional Conduct in two separate client matters. Respondent filed an Answer to Petition on November 30, 2009.

A disciplinary hearing was held on February 18, 2010, before a District IV Hearing Committee comprised of Chair Robert J. Behling, Esquire, and Members John C. Unkovic, Esquire, and Robert G. Dwyer, Esquire. Respondent appeared pro se.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on May 19, 2010 and recommended that Respondent be suspended from the practice of law for a period of three years, and that upon the expiration of the suspension and his subsequent reinstatement to the practice of law, Respondent be placed on probation for a period of two years with a practice monitor.¹

Petitioner filed a Brief on Exceptions on June 7, 2010, requesting that the Board reject the Committee's recommendation and instead recommend to the Supreme Court that Respondent be disbarred.

Respondent filed a Brief Opposing Exceptions on June 12, 2010 and requests that the Board accept the Committee's recommendation.

This matter was adjudicated by the Disciplinary Board at the meeting on October 11, 2010.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, Suite 2700, 601 Commonwealth Ave., Harrisburg PA 17106-2485, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the

¹ The Board notes that the imposition of probation following reinstatement to the practice of law is not

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 the aforesaid Rules.

2. Respondent is James Barnett Gefsky. He was born in 1957 and was admitted to practice law in Pennsylvania in 1983. His attorney registration mailing address is 450 S. Main St., Suite 200, Greensburg, PA 15601. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has a history of discipline. He received a Private Reprimand in 2004 for his violations of Rules of Professional Conduct 1.3, 1.4(a), 1.4(b), 1.5(b) and 1.16(d) in regard to his representation of three separate clients.

Ellen Cindric Matter

4. In November 2004, Ellen Cindric retained Respondent to represent her in a divorce matter.

5. By written fee agreement dated November 29, 2004, Respondent agreed to represent Mrs. Cindric in exchange for a \$1,000 retainer and to bill her at an hourly rate of \$120.

6. Respondent entered his appearance on behalf of his client in December 2004.

7. In or about mid-2006, Mrs. Cindric paid Respondent an additional \$2,000 fee for the representation.

8. On November 8, 2007, Mr. and Mrs. Cindric executed a Marital Settlement Agreement. It provided, among other things, that:

a. Within 90 days from the date of the signing of the Marital Settlement Agreement, Mr. Cindric was to pay to Mrs. Cindric the sum of \$80,645;

b. Upon the signing of the Agreement by Mrs. Cindric, the sum of \$3,400 representing the balance of timber proceeds held in escrow by counsel for Mr. Cindric, as directed by Order of court, was to be released to Mrs. Cindric;

c. Mr. and Mrs. Cindric were to share equally in royalties from certain gas wells located on the marital real estate.

9. By check dated November 8, 2007, in the amount of \$3,400, made payable to "James B. Gefsky, Attorney for Ellen I. Cindric," and annotated "Cindric Marital Settlement," Matthew T. Budash, counsel for Mr. Cindric, hand-delivered to Respondent the proceeds due Mrs. Cindric per the terms of the Marital Settlement Agreement.

10. At the time Mr. Budash delivered the \$3,400 to Respondent, Respondent informed Mrs. Cindric that he would send her a check for that amount when Respondent got back to his office, since the check had been made payable to him.

11. On November 9, 2007, a divorce decree was entered in the Cindric divorce matter.

12. On or about November 9, 2007, Respondent deposited the proceeds of the \$3,400 check into his Citizens Bank IOLTA Account.

13. Respondent would later deduct \$300 from the \$3,400 amount as his fee.

14. As of November 9, 2007, Respondent was entrusted with \$3,100 on behalf of Mrs. Cindric.

15. Respondent failed to promptly forward the \$3,100 to Mrs. Cindric

16. On November 29, 2007, the balance in Respondent's Citizens Bank IOLTA account was \$1,606.47, which was less than the \$3,100 with which he was entrusted on behalf of Mrs. Cindric.

17. By check dated December 3, 2007, made payable to Ellen Cindric in the amount of \$3,100, Respondent disbursed the monies owed to his client.

18. This check did not clear Respondent's IOLTA Account until January 2, 2008.

19. By letter dated December 17, 2007, Attorney Budash informed Respondent that he enclosed a check in the amount of \$71,527.85, made payable to Respondent as attorney for Mrs. Cindric. This amount was pursuant to the Marital Settlement Agreement. This amount was less than that stated in the Agreement due to deductions made for a separate expense.

20. Respondent deposited the proceeds of the \$71,527.85 into his Citizens Bank IOLTA Account on December 18, 2007.

21. On December 27, 2007, the balance in the IOLTA Account was \$68,448.82, which was \$6,179.03 less than the amount with which Respondent was entrusted on behalf of Mrs. Cindric.

22. By letter of February 7, 2008, Attorney Budash requested that Respondent have Mrs. Cindric execute a Partial Assignment of Landowner Royalty Interest within 30 days of date of the letter.

23. Respondent failed to inform his client about Attorney Budash's letter.

24. Respondent failed to reply to the letter.

25. On March 14, 2008, Attorney Budash filed a Petition to Enforce Marital Settlement Agreement.

26. Respondent failed to inform his client about the filing of the Petition to Enforce.

27. Respondent failed to reply to the Petition to Enforce.

28. By order of court dated April 24, 2008, Mr. Cindric was authorized to execute the Partial Assignment on behalf of Mrs. Cindric.

29. From March 2008 through September 2008, Mrs. Cindric called Respondent's office and left messages with his secretary requesting that he call her about the funds that she was supposed to have received pursuant to the Marital Settlement Agreement.

30. On the occasions that Mrs. Cindric was able to speak with Respondent, he advised her that he would look into the matter.

31. Respondent thereafter failed to respond to Ms. Cindric's inquiry.

32. On April 24, 2008, the balance in Respondent's IOLTA Account was \$37,635.67, which was \$33,892.18 less than the amount with which he was entrusted on behalf of his client.

33. From November 29, 2007 through September 2, 2008, on a recurring monthly basis, Respondent's IOLTA Account balance was less than the amount with which he was entrusted on behalf of the client.

34. On September 2, 2008, the balance in the IOLTA Account was negative 16.06.

35. Respondent did not promptly disburse to Mrs. Cindric the \$71,527.85 she was entitled to receive.

36. Respondent was not authorized to disburse the funds from the Cindric entrustment to anyone other than Mrs. Cindric.

37. Respondent transferred his client's funds from his IOLTA Account to his other Citizens Bank Accounts by means of multiple online transfers.

38. Respondent then dissipated the funds via debit card transactions for his personal use from those accounts.

39. On or about December 16, 2008, Mrs. Cindric sent Respondent a letter by certified mail, return receipt requested, stating, among other things, that she had been attempting to communicate with him by telephone since March 2008 in an effort to receive her settlement proceeds and wanted the matter settled promptly.

40. By check dated January 2, 2009, drawn on Respondent's IOLTA Account in the amount of \$74,000, Respondent disbursed to Mrs. Cindric an amount in excess of the total with which he was entrusted.

Eduardo Alvendia Matter

41. On April 23, 2002, Eduardo Alvendia was involved in a motor vehicle accident.

42. In April 2004, Mr. Alvendia retained Respondent to represent him in filing a civil action against the other driver in the accident.

43. At about that time, Respondent entered into a fee agreement with Mr. Alvendia which provided that Respondent was to receive 33 and 1/3 percent of any recovery obtained.

44. The suit proceeded and throughout December 2007 the parties conducted negotiations, which culminated in Respondent's agreement that Mr. Alvendia would accept \$5,000 as a full and final settlement of his claim.

45. Respondent failed to obtain Mr. Alvendia's authorization to settle his claim for \$5,000.

46. Respondent's representation to opposing counsel that Mr. Alvendia had agreed to accept the \$5,000 settlement was false.

47. In January 2008, Respondent was provided with an original Release for his client to execute.

48. Respondent failed to obtain his client's signature on the Release.

49. On August 8, 2008, opposing counsel filed a Petition to Enforce Settlement of Mr. Alvendia's claim.

50. In or about October 2008, Respondent contacted his client about settling his civil action and Mr. Alvendia informed Respondent that he wanted approximately \$9,000 to \$15,000 to settle his case.

51. Respondent informed Mr. Alvendia that he would do his best, but did not know if he could get him that much money.

52. Respondent failed to inform his client that Respondent had agreed to settle his claim for \$5,000.

53. Respondent failed to inform Mr. Alvendia about the Petition to Enforce Settlement.

54. By order of court dated October 3, 2008, Judge Daniel J. Ackerman granted the Petition to Enforce Settlement and ordered that defendants pay the sum of \$5,000 to the Prothonotary for future payment to Respondent and Mr. Alvendia. The order further stated that plaintiff (Mr. Alvendia) failed to file an answer; Respondent informed the court he would not appear for the scheduled hearing; Respondent did not oppose the Petition.

55. By check dated November 14, 2008 in the amount of \$4,940.98, made payable to Respondent, the Westmoreland County Prothonotary's Office forwarded to Respondent the funds it had been holding.

56. On November 14, 2008, Respondent deposited the proceeds of the \$4,940.98 check into his IOLTA Account.

57. Respondent's contingent fee totaled \$1,647. Respondent was entrusted with \$3,293.98 on behalf of his client.

58. Respondent failed to inform Mr. Alvendia that he had received the settlement proceeds from Mr. Alvendia's civil action.

59. On November 26, 2008, the balance in Respondent's IOLTA Account was a negative 379.26.

60. Respondent did not promptly disburse the funds to which Mr. Alvendia was entitled.

61. Respondent was not authorized to disburse the funds to anyone other than his client.

62. Respondent transferred his client's funds from his IOLTA Account to his other Citizens Bank Accounts by means of multiple online transfers. He then dissipated those funds via debit card transactions for his personal use from those accounts.

63. In November and December 2008, Mr. Alvendia attempted to contact Respondent about the status of his civil action.

64. Respondent informed his client that his case had not been settled.

65. In January 2009, Mr. Alvendia again called Respondent about the status of his matter.

66. Respondent again informed Mr. Alvendia that his case had not been settled.

67. Respondent told his client that he would call him the following week because he expected to settle the matter soon.

68. In February 2009, Mr. Alvendia called Respondent yet again about the status of his matter.

69. Again, Respondent informed his client that the case should settle in a few days.

70. When Respondent made the foregoing statements to his client, he knew on each of those occasions that his statements were false.

71. Since November 2008, Respondent has failed to disburse to Mr. Alvendia any portion of the settlement proceeds owed to him.

72. Respondent also failed to provide to Mr. Alvendia a written statement of the outcome of his contingent fee matter, showing the recovery, remittance to Mr. Alvendia, and the method of its determination.

73. Mr. Alvendia filed a claim with the Pennsylvania Lawyers Funds for Client Security. (PaLFCS)

74. In December 2009, the PaLFCS Board awarded Mr. Alvendia \$4,940.

75. In January 2010, the PaLFCS Board informed Mr. Alvendia that Respondent had requested reconsideration of the Board's decision.

76. Respondent testified on his own behalf.

77. He has been in private practice for approximately 20 years. He focuses primarily on bankruptcy, family law, and criminal law, with a smattering of civil law. He was employed in a part-time capacity for the Westmoreland County Public Defender's office from 1990 through 2008.

78. As to the Alvendia matter, Respondent believes he communicated the \$5,000 offer to Mr. Alvendia, although he presented no evidence to support his belief.

79. Respondent's reason for not responding to the Petition to Enforce in the Alvendia matter is that he did not object to the settlement amount, even though he had no consent from his client.

80. Respondent had organization problems at his law office. He was unaware at most points in time what was in his IOLTA Account. He claimed he was unaware that money he was holding in trust was being put in his operating account to pay the cost of operating his business. (N.T. 68)

81. Respondent did not review bank statements to see what was in his various accounts.

82. Respondent admits that his law office was in a state of disarray.

III. CONCLUSIONS OF LAW

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

In the Ellen Cindric Matter:

1. RPC 1.15(a) (in effect prior to September 20, 2008) – 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.

2. RPC 1.15(b) (in effect on and after September 20, 2008) – 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.

3. RPC 1.15(b) (in effect prior to September 20, 2008) – 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. 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.

4. RPC 1.15(e) (in effect on and after September 20, 2008) – 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, 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.

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

In the Eduardo Alvendia Matter:

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

2. RPC 1.4(a)(4) – A lawyer shall promptly comply with reasonable requests for information.

3. RPC 1.15(b) (in effect on and after September 20, 2008) – 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.

4. RPC 1.15(d) (in effect on and after September 20, 2008) – Upon receiving Rule 1.15 Funds or property which are not Fiduciary Funds or property, a lawyer shall promptly notify the client or third person, consistent with the requirements of applicable law. Notification of receipt of Fiduciary Funds or property to clients or other

persons with a beneficial interest in such Fiduciary Funds or property shall continue to be governed by the law, procedure and rules governing the requirements of confidentiality and notice applicable to the Fiduciary entrustment.

5. RPC 1.15(e) (in effect on and after September 20, 2008) - 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, 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.

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

IV. DISCUSSION

This matter is before the Disciplinary Board for consideration of the charges against Respondent that he engaged in professional misconduct in two client matters. Evidence is sufficient to prove ethical misconduct if a preponderance of that evidence establishes the charged violations and the proof is clear and satisfactory. Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186 (Pa. 1994).

A Stipulation of Facts was entered into by the parties prior to the hearing. Respondent admitted the majority of the factual allegations, and further admitted that he violated Rules 1.15(a), 1.15(b), 1.15(d), 1.15(e), and 8.4(c).

The evidence of record demonstrates that in the Cindric matter, Petitioner clearly and satisfactorily proved that Respondent failed to hold separate from his own property the property of his client that was in his possession in connection with his representation of Mrs. Cindric in her divorce. He violated Rules 1.15(a) and 1.15(b). Petitioner proved by clear and satisfactory evidence that Respondent failed to promptly notify Mrs. Cindric that he had received property belonging to her in connection with the representation and that he failed to promptly deliver to Ms. Cindric the property she was entitled to receive. Respondent violated Rules 1.15(b) and 1.15(e). Finally, Petitioner proved that Respondent engaged in dishonest and deceitful conduct by converting to his own use, and without the authorization of his client, \$71,527.85 over a period in excess of one year, in violation of Rule 8.4(c).

In the Alvendia matter, Petitioner clearly and satisfactorily proved that Respondent failed to keep his client reasonably informed about the status of the matter and failed to promptly comply with Mr. Alvendia's reasonable requests for information, in violation of Rules 1.4(a)(3) and 1.4(a)(4). Respondent failed to hold all Rule 1.15 funds and property of his client separate from Respondent's own property, in violation of Rule 1.15(b). Respondent failed to promptly notify Mr. Alvendia of his receipt of Rule 1.15 funds, in violation of Rule 1.15(d). Respondent failed to promptly deliver to his client the funds with which Respondent was entrusted and which Mr. Alvendia was entitled to receive, in violation of Rule 1.15(e). Finally, Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation by making knowingly false statements of fact to his client about the status of his legal matter, and by converting to his own use, and

without authorization, the funds with which he was entrusted in the amount of \$3,293.98 from November 2008 until the present.

The Hearing Committee further found that Respondent ran a disorganized office and did not manage his financial affairs, including his IOLTA Account, as he should have. The record supports a finding that Respondent's private law practice was in a state of disarray. The Hearing Committee found that Respondent's treatment of Mrs. Cindric and Mr. Alvendia was unacceptable, but concluded that there was no evidence of willful misappropriation of their funds. The Committee has recommended a suspension of three years as a result of this conclusion and the further finding that Respondent reimbursed Mrs. Cindric (but not Mr. Alvendia).

Respondent agrees that discipline is appropriate and concurs with the recommendation of the Committee. Petitioner opposes a three year suspension and contends that Respondent's misconduct warrants disbarment.

The record is clear that over the course of one year, Respondent spent for his own benefit approximately \$75,000 that belonged to two of his clients. Respondent ultimately reimbursed Mrs. Cindric, but never bothered to reimburse Mr. Alvendia. He repeatedly misrepresented the status of Mr. Alvendia's case to him, causing his client to believe that his case was still ongoing, when in fact Respondent had settled it without authorization and the court granted a petition to enforce the settlement. Respondent attempts to use his lack of organizational skills as an excuse for his bad behavior, but this does not in any way justify his misappropriation of entrusted funds or his misrepresentations to his clients. He failed in his obligations to his clients and has shown little remorse.

While there is no per se rule for discipline in Pennsylvania, the Disciplinary Board and the Supreme Court have regarded misappropriation of entrusted funds as an extremely serious act of misconduct. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983). A review of cases indicates that the discipline to be imposed for charges such as these is very fact-specific. Aggravating and mitigating factors are considered by the Board. In re Anonymous No. 35 DB 1988, 8 Pa.D. & C. 4th 344 (1990).

Because of the wide variety of fact patterns involving commingling, conversion of funds, misrepresentation, and lack of diligence in handling a client's matter, sanctions have ranged from a short suspension to disbarment. Office of Disciplinary Counsel v. Karen G. Muir, 79 DB 2002, 891 Disciplinary Docket No. 3 (Pa. March 1, 2004) (three month period of suspension); Office of Disciplinary Counsel v. John T. Olshock, 28 DB 2002, 862 Disciplinary Docket No.3, (Pa. Oct. 24, 2003) (three year period of suspension); Office of Disciplinary Counsel v. Daniel Evans, 152 DB 2000, 810 Disciplinary Docket No. 3 (Pa. Feb. 28, 2003) (disbarment).

Case law supports a five year suspension in this matter. In Office of Disciplinary Counsel v. Anthony Dennis Jackson, No. 99 DB 2006 (2008), Mr. Jackson converted \$33,285.34 of funds belonging to the beneficiary of an estate for his own personal benefit. After a complaint was filed with the Office of Disciplinary Counsel, Mr. Jackson began to repay the funds he had misappropriated. Although Mr. Jackson expressed remorse, he also testified that he did not believe that the beneficiary was hurt by his actions because the funds were eventually repaid. The Supreme Court suspended Mr. Jackson for a period of five years.

Herein, Respondent did not present any mitigating factors. He has prior discipline consisting of a Private Reprimand imposed in 2004 for misconduct in three separate client matters. Respondent attempts to demonstrate his remorse by showing that he reimbursed Mrs. Cindric's funds, but the record is clear that he did not take any action until after he was notified by Petitioner of its investigation of his misconduct. The record is equally clear that Respondent still has not reimbursed Mr. Alvendia. Respondent claims that his misappropriation was unintentional and due to the disorganized state of his law practice; however, he put forth no evidence to support this claim, nor did he show any evidence of remedial actions taken to change the unsatisfactory way he operates his practice.

The instant matter is similar to the Jackson case cited above and warrants a similar result. Though the facts of this case are quite serious, the Board does not find this case to be a disbarment matter. Disbarment is the most severe form of discipline and must be reserved for the most egregious acts of misconduct. We conclude that the public will be protected and the confidence in the legal profession and judicial system preserved by Respondent's suspension of five years.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James Barnett Gefsky, be Suspended from the practice of law for a period of five 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: 

Sal Cognetti, Jr., Board Vice-Chair

Date: January 26, 2011

Mr. Baer did not participate in the adjudication.