

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 940, Disciplinary Docket No. 3
Petitioner	:	Supreme Court
	:	
v.	:	No. 175 DB 2003 – Disciplinary Board
	:	
Respondent	:	Attorney Registration No. 58106
RICHARD J. McCAGUE	:	(Allegheny 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 November 18, 2003, Office of Disciplinary Counsel filed a Petition for Discipline against Richard J. McCague, Respondent. The Petition charged Respondent

with professional misconduct arising out of his conviction in the Court of Common Pleas of Allegheny County of disorderly conduct. Respondent filed an Answer on January 15, 2004.

A hearing was held on April 28, 2004 before Hearing Committee 4.09 comprised of Chair Thomas W. King, III, Esquire, and Members Walter F. Wall, Esquire, and Robert O. Lampl, Esquire. Respondent was represented by Richard H. Lindner, Esquire. The Hearing Committee filed a determination on May 14, 2004 and Office of Disciplinary Counsel was directed to proceed under Rule 214(c) of the Pennsylvania Rules of Disciplinary Enforcement. On May 25, 2004, the certificate of conviction was sent to the Supreme Court of Pennsylvania. Respondent filed a Response to Certificate of Conviction on June 1, 2004. On July 29, 2004, the Supreme Court issued an Order referring the conviction to the Disciplinary Board for disposition pursuant to Rule 214(g), Pa.R.D.E.

Disciplinary hearings were held on November 1, November 12, and November 23, 2004 before Hearing Committee 4.09. Respondent was represented by Sumner Parker, Esquire.

The Hearing Committee filed a Report on May 10, 2005, finding that Respondent engaged in professional misconduct and recommending that he receive a public censure.

Petitioner filed a Brief on Exceptions on June 1, 2005, and requested oral argument .

Oral argument was held on July 7, 2005 before a three member panel of the Disciplinary Board chaired by Martin W. Sheerer, Esquire, with Members William A. Pietragallo, Esquire, and Nikki P. Nordenberg.

This matter was adjudicated by the Disciplinary Board at the meeting on July 16, 2005.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania 17101, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, 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 the aforesaid Rules.

2. Respondent, Richard J. McCague, was born in 1954 and was admitted to the practice of law in the Commonwealth of Pennsylvania in 1990. He maintains his office at Allegheny County Public Defender's Office, 542 Forbes Avenue, Pittsburgh PA 15219. He is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has a prior history of discipline consisting of an informal admonition in 2002.

4. At all times relevant hereto, Respondent was and currently is an Assistant Public Defender in Allegheny County.

5. On June 16, 2002, at approximately 4:30 p.m., Respondent entered the Allegheny County Jail to visit a private client, Jermaine Cook.

6. Respondent set off the metal detector at the jail and was asked by a corrections officer to remove the contents of his pockets.

7. At that time Respondent removed a pack of cigarettes.

8. Respondent passed through the metal detector for the second time and the alarm went off again. Respondent was asked by the corrections officer if there were anything else and was asked again to empty his pockets.

9. At that time Respondent took from one of his pockets a pack of cigars.

10. Respondent passed through the metal detector for a third time and the alarm went off again.

11. The corrections officer again asked Respondent if he had anything else on him.

12. Respondent then removed a rolled up package of cigarette tobacco from his waist band and placed that on the counter.

13. Respondent was then told by the corrections officer that, if Respondent had anything further, he should give it to them.

14. At that time Respondent removed packets of cigarette tobacco from both of his socks.

15. All of the items received from Respondent were searched and a bag of marijuana, totaling 9.843 grams, was found in the package that was removed from Respondent's waistband.

16. On the date of the incident, Respondent stated that:

i. He had "screwed up";

ii. A female by the name of Ann, whom he knew to be a friend of Jermaine Cook, was present outside of the jail and asked him to take items to Cook;

iii. He took and concealed the items because he was aware of the physical danger to Cook and that the items could be used by Cook to buy protection;

iv. He knew that bringing tobacco into the jail was against jail policy;

v. Respondent did not know of the presence of marijuana and would not have brought it into the jail if he had known.

17. Respondent was subsequently charged in the matter of Commonwealth v. Richard J. McCague with four criminal counts:

Count 1 – Contraband (18 Pa.C.S. §5123)

Count 2 – Violation of Controlled Substance, Drug, Device and Cosmetic Act - Possession with Intent to Deliver 35 P.S. § 780-113(a)(30);

Count 3 – Violation of Controlled Substance, Drug, Device and Cosmetic Act - Possession of Controlled Substance (35 P.S. §780-113(a)(16);

Count 4 – Criminal Conspiracy (18 P.S. §903).

18. During the course of the non-jury trial held on January 6 and 8, 2003, Respondent testified that:

a. A female by the name of Ann, whom Respondent knew to be a friend of Cook, was present outside the jail and asked Respondent to take three packets of name brand tobacco, name brand cigars, and a package of name brand cigarettes to Cook;

b. Cook had convinced him to bring something so that Cook could buy protection from persons in his jail pod;

c. Respondent knew that bringing tobacco in the jail was against the jail policy;

d. Respondent put the cigars and cigarettes in his pockets and walked into the jail also with the packets of tobacco, one in each sock and one behind his belt;

e. Respondent did not know of the presence of marijuana and would not have brought it into the jail if he had known.

19. On January 8, 2003, Judge Jeffrey Manning found Respondent not guilty as to all counts, but adjudged him guilty of the summary offense of disorderly conduct and fined him \$300 plus costs.

20. Respondent's arrest and conviction were extensively reported in local Pittsburgh newspapers.

21. M. Susan Ruffner, Esquire, was the Chief Public Defender at the time of Respondent's arrest and conviction.

22. Ms. Ruffner suspended Respondent without pay on June 17, 2002, the day after the incident. Respondent was reinstated to his position as Assistant Public Defender after the adjudication of the criminal charges.

23. Respondent was not permitted access to the Allegheny County Jail by administrative order of the warden, so the Public Defender's Office found it necessary to move Respondent to a unit where he would require less access to the jail. As of the date of the disciplinary hearing, Respondent was still denied access to the jail.

24. Ms. Ruffner was placed in a position of having to explain and defend the Public Defender's actions in this matter, as well as having to deal with the negative publicity generated by Respondent's misconduct.

25. Kathleen Cribbins, Esquire, Thomas Caulfield, Esquire, and Lawrence Kustra, Esquire, all worked for the Public Defender's Office at the time of Respondent's arrest and conviction and have known him through that employment. These witnesses testified to Respondent's thorough and conscientious work habits and his zealous advocacy on behalf of his clients.

26. J. Patrick Hatfield is a friend of Respondent's for the past ten years who has known people represented by Respondent. Respondent's reputation among his clients is that Respondent works hard for his clients.

27. Respondent expressed sincere remorse and admitted that what he did was "incredibly stupid and just plain wrong". (N.T. 11/23/04 p. 14,16)

III. CONCLUSIONS OF LAW

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

1. 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.

2. 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 matter is before the Disciplinary Board on a Petition for Discipline arising out of Respondent's conviction of a summary offense of disorderly conduct. The facts of this matter, as set forth above, clearly demonstrate that Respondent committed an act that reflects adversely on his fitness as a lawyer, and that his action was prejudicial to the administration of justice.

In analyzing the appropriate sanction for Respondent's misconduct, the Board must be mindful of any aggravating and mitigating circumstances.

Respondent has been practicing law since 1990 and has one prior discipline - an informal admonition in 2002 for his neglect of a divorce matter for a private client. The Board does not give this incident considerable weight in its consideration here.

In mitigation, the Board finds that Respondent has suffered much public humiliation for his actions, through the media coverage and by his suspension from his employment with the Public Defender. His testimony at the disciplinary hearing was sincere and credible. Respondent stated that the experience was very humbling and embarrassing, as well as being stressful for his family. He stated that he was extremely sorry about it. Nevertheless, it was Respondent's decided lack of judgment that led him to this problematic episode in his career. Respondent was asked four separate times by the corrections officer to remove items on his person. Each time he removed one thing until

finally he turned over everything he had on his person after he could not conceal it anymore. He knew that he was violating the rules of the Allegheny County Jail by bringing tobacco into the jail, and despite this knowledge, he went forward with his plan to give the contraband to his client. His reason for doing so was to help his client buy protection inside the jail; however, zealous advocacy certainly does not require violating jail policies on behalf of a client. Respondent was simply wrong to do what he did, and must be sanctioned for those actions.

The Hearing Committee recommended a public censure. The Board is persuaded that this is an appropriate sanction. While Respondent's actions did not injure clients, a more stringent sanction than private discipline is warranted, as Respondent was convicted of a criminal offense which received much public notoriety and demeaned the legal profession.

V. RECOMMENDATION

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

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: _____
Martin W. Sheerer, Board Member

Date: September 9, 2005

Board Members Newman, Suh and Nordenberg did not participate in the July 16, 2005 adjudication.

PER CURIAM:

AND NOW, this 1st day of December, 2005, upon consideration of the Report and Recommendations of the Disciplinary Board dated September 9, 2005, it is hereby

ORDERED that RICHARD J. McCAGUE be subjected to PUBLIC CENSURE by the Supreme Court.

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

Mr. Justice Saylor dissents in favor of a private reprimand.