

**IN THE SUPREME COURT OF PENNSYLVANIA**

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 2140 Disciplinary Docket No. 3
Petitioner	:	
	:	Nos. 21 & 150 DB 2013
v.	:	
	:	Attorney Registration No. 48490
KEVIN MARK KALLENBACH,	:	
Respondent	:	(Erie County)

**ORDER**

**PER CURIAM:**

**AND NOW**, this 11<sup>th</sup> day of May, 2015, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 26, 2015, it is hereby

ORDERED that Kevin Mark Kallenbach be suspended from the practice of law for a period of one year and one day, that the suspension be stayed in its entirety and that he be placed on probation for a period of two years, subject to the following conditions:

1. Patricia J. Kennedy, Esq., is hereby appointed to serve as Respondent's practice monitor.
2. The practice monitor shall do all of the following during the period of Respondent's probation:
  - a. Periodically examine Respondent's law office organization and procedures to ensure that Respondent has kept his clients informed about the status of their matters, has replied to client requests for information in a timely and honest manner, has worked on cases in a reasonably prompt and diligent manner, has

filed documents with the Court in a timely manner as required to protect his clients' interests, and has provided clients with written fee agreements as required by RPC 1.5(b).

b. Meet with Respondent at least monthly to examine Respondent's progress towards satisfactory and timely completion of clients' legal matters, verification of deadlines, progress on cases, and regular client contact;

c. File quarterly written reports on a Board approved form with the Secretary of the Board; and

d. Immediately report to the Secretary any violations of the terms and conditions of probation.

3. Respondent shall undergo a mental health evaluation and begin any treatment as indicated by such evaluation.

4. Respondent shall submit a copy of the mental health evaluation to the Secretary of the Board within five (5) days after receipt of the evaluation.

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

Justices Baer and Stevens dissent, and would suspend Respondent for 90 days for these disciplinary infractions, his third and fourth, to be followed by two years' probation with a practice monitor.

A True Copy Patricia Nicola  
As Of 5/11/2015

Attest:   
Chief Clerk  
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	Nos. 21 & 150 DB 2013
Petitioner	:	
	:	
v.	:	Attorney Registration No. 48490
	:	
KEVIN MARK KALLENBACH	:	
Respondent	:	(Erie 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

By Petition for Discipline at No. 21 DB 2013 filed on February 5, 2013, Office of Disciplinary Counsel charged Kevin Mark Kallenbach with violations of Rules of Professional Conduct 1.3, 1.4(a)(3), 8.4(d) and Rule of Disciplinary Enforcement 203(b)(7). Petitioner failed to file a response to Petition.

A disciplinary hearing was held on June 5, 2013, before a District IV Hearing Committee comprised of Chair Charles C. Gallo, Esquire, and Members Francis C. Rapp, Jr., Esquire and Phillip J. Murray, III, Esquire. Respondent appeared *pro se*.

On September 4, 2013, Petitioner and Respondent submitted to the Disciplinary Board a Joint Petition in Support of Discipline on Consent, concerning the matter at No. 21 DB 2013 and an additional complaint. By Order of September 17, 2013, the Disciplinary Board denied the Joint Petition for Consent Discipline.

On October 15, 2013, as to No. 21 DB 2013 and #C4-12-1049, Petitioner and Respondent filed with the Disciplinary Board a Joint Motion to Consolidate and Stipulation. By Order dated October 17, 2013, the Board granted the consolidation of the two matters and ordered that a Petition for Discipline be filed for the matter at #C4-12-1049 within 10 days of that Order. On October 28, 2013, Petitioner filed a Petition for Discipline. Respondent failed to file an Answer.

A hearing was held on June 26, 2014, before the same Hearing Committee that conducted the hearing on June 5, 2013.

Following the submission of a Brief by Petitioner, the Hearing Committee filed a Report on October 21, 2014, concluding that Petitioner violated the Rules as contained in the Petitions for Discipline and recommending that he be suspended for one year and one day, with the suspension stayed and two years of probation imposed.

No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on January 15, 2015.

## 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 Avenue, P.O. Box 62485, Harrisburg PA 17106, 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 is Kevin Mark Kallenbach. He was born in 1959 and was admitted to practice law in the Commonwealth of Pennsylvania in 1986. His attorney registration address is 333 State St., Suite 203, Erie, PA 16507. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has a prior record of discipline in Pennsylvania. He received a Private Reprimand in 2006 for violations of Rules of Professional Conduct 8.4(c) and 8.4(d). He received a Public Reprimand with probation in 2013 for violations of Rules of Professional Conduct 1.3, 1.4(a)(3), 1.5(b), 8.4(c) and 8.4(d).

#### **Eady Matter**

4. On or about August 25, 2011, a Criminal Information was filed against Doran C. Eady in the Court of Common Pleas of Erie County, in which he was charged with Indecent Assault, Indecent Exposure and Simple Assault. (PD 1, para. 3)

5. At about that time, Mr. Eady, through his fiancée, Shira Arrington, retained Respondent to represent him concerning the criminal charges filed against him. (PD 1, para. 4)

6. Respondent's fee to represent Mr. Eady for the entire matter, through any appeals, was \$1,500. (PD 1, para. 5)

7. Respondent's agreement to represent Mr. Eady was verbal. (PD 1, para. 6)

8. Respondent had never before represented Mr. Eady, and failed to communicate to Mr. Eady, or anyone on his behalf, in writing, the basis or rate of the fee which he was charging for the matter, either before or within a reasonable time after commencing the representation. (PD 1, para. 7, 8)

9. On September 23, 2011, Ms. Arrington paid Respondent \$700 toward his fee, and the balance was to be paid after trial commenced. (PD 1, para. 9)

10. Although the balance of his fee was never paid, Respondent appeared at trial on behalf of Mr. Eady. (PD 1, para. 10)

11. A jury trial in Mr. Eady's case began on January 19, 2012. (PD 1, para. 11)

12. Before his trial began, Mr. Eady told the Court that he wanted to fire Respondent, but the Court denied Mr. Eady's request to have Respondent removed as his counsel. (PD 1, para. 12)

13. Mr. Eady then refused to attend his trial. (PD 1, para. 13)

14. On January 25, 2012, after his jury trial, at which Respondent represented Mr. Eady and which Mr. Eady did not attend, Mr. Eady was convicted, *in absentia*, of all the charges against him. (PD 1, para. 14)

15. On March 14, 2012, Mr. Eady was sentenced to incarceration of a total of two and one half to five years. (PD 1, para. 15)

16. On or about April 13, 2012, Respondent filed a Notice of Appeal on behalf of Mr. Eady, which Notice was filed both in the Court of Common Pleas of Erie County and with the Superior Court of Pennsylvania. (PD 1, para. 16)

17. On April 17, 2012, the trial court ordered that Respondent file a Concise Statement of Matters Complained of on Appeal. (PD 1, para. 18)

18. By Order dated May 21, 2012, the Superior Court ordered compliance with Rule 3517, Pa.R.A.P., with regard to completing and filing a docketing statement which, by letter of the same date, it sent to Respondent. (PD 1, para. 19)

19. Respondent did not file a Concise Statement of Matters Complained of on Appeal on behalf of Mr. Eady, nor did he comply with Rule 3517, Pa.R.A.P. (PD 1, para. 20)

20. By Order dated June 11, 2012, the Superior Court dismissed the appeal for Respondent's failure to comply with Rule 3517, Pa.R.A.P., and stated therein that Respondent was to "file a certification with this court within 10 days of the date of this order, stating that the client has been notified of the entry of this order." (PD 1, para. 21)

21. By letter dated June 11, 2012, the Superior Court sent its June 11, 2012 Order dismissing Mr. Eady's appeal to Respondent. (PD 1, para. 22)

22. Respondent never informed Mr. Eady of the dismissal of his appeal. (PD 1, para. 23)

23. By letter of inquiry dated July 9, 2012, sent by regular and certified mail, Respondent was informed of the allegations in this matter. (PD 1, para. 24)

24. The July 9, 2012 letter of inquiry was received at Respondent's registration address on July 13, 2012. (PD 1, para. 25)

25. Despite reminders of his duty to respond to the inquiry in this matter, Respondent did not do so. (PD 1, para. 26)

**Spada Matter**

26. By at least May 26, 2011, in his capacity as an Assistant Public Defender in Erie, Respondent was acting as counsel for Zachary Spada concerning three criminal cases filed against him in the Court of Common Pleas of Erie County. (PD II, para. 3)

27. On August 24, 2011, while represented by Respondent, Mr. Spada entered pleas of guilty in all three matters before the Honorable Shad Connelly. (PD II, para. 4)

28. On about September 1, 2011, pursuant to a motion filed by Respondent, Mr. Spada was released on bail, on his own recognizance. Sentencing for Mr. Spada was scheduled for October 13, 2011. (PD II, para. 5)

29. On October 13, 2011, Mr. Spada did not appear on time for sentencing, and sentencing was imposed without his presence. Mr. Spada was sentenced to a total incarceration of 22 to 84 months. (PD II, para. 6)

30. On October 25, 2011, with regard to all three matters, Respondent filed motions for modification of sentence on behalf of Mr. Spada, which motions were denied on October 26, 2011, by the Honorable Ernest J. DiSantis, Jr. (PD II, para. 7)

31. On November 14, 2011, Respondent filed a Notice of Appeal on behalf of Mr. Spada, which appeal was docketed with the Superior Court. (PD II, para. 8)

32. On December 2, 2011, Respondent filed a Concise Statement of Matters Complained of on Appeal on behalf of Mr. Spada. (PD II, para. 9)



33. On December 8, 2011, Judge DiSantis filed his Memorandum Opinion in support of the denial of the Post-Trial Motions for Modification of Sentence which Respondent had filed on behalf of Mr. Spada. (PD II, para. 10)

34. On January 13, 2012, the trial court record was filed in the Superior Court and Respondent's brief on behalf of Mr. Spada was due for filing by February 22, 2012. (PD II, para. 11)

35. Respondent did not file a brief on behalf of Mr. Spada, nor did he request an extension of time to file a brief on behalf of Mr. Spada. (PD II, para. 12)

36. By Order dated March 21, 2012, the appeal which Respondent filed on behalf of Mr. Spada was dismissed for his failure to file a brief. (PD II, para. 13)

37. In the Superior Court's March 21, 2012 Order, the Superior Court ordered that Respondent file with the Superior Court, within ten days, a certification that his client was notified of the dismissal. (PD II, para. 14)

38. Respondent neither notified Mr. Spada of the dismissal, nor filed the required certification with the Superior Court. (PD II, para. 15)

39. On about May 29, 2012, Mr. Spada filed a *pro se* Motion for Modification of Sentence, which the court treated as a Petition for Relief pursuant to the Post Conviction Relief Act, and new counsel was appointed to represent Mr. Spada. (PD II, para. 16)

40. By Order dated July 24, 2012, Mr. Spada's rights to file an additional Post-Sentence Motion and direct appeal were reinstated, *nunc pro tunc*. (PE II, para. 17)

41. By Order dated August 2, 2012, Post-Sentence Motions filed on behalf of Mr. Spada were denied. (PD II, para. 18)

42. On April 5, 2013, the Superior Court affirmed the denial of Mr. Spada's Post- Sentence Motion. (PD II. para. 19)

43. By Petitioner's letter of inquiry dated January 4, 2013, sent by certified mail, return receipt requested, and regular first class mail, Respondent was informed of the allegations in this letter, which letter was received at his attorney registration address on January 9, 2013. (PD II, para. 20)

44. When no response to the January 4, 2013 letter of inquiry was received by Petitioner, by letter dated February 5, 2012, also sent certified mail and regular first class mail, which letter was received at his attorney registration address on February 7, 2013, Respondent was informed of the requirement that he respond to the letter of inquiry, and that his failure to do so could result in the imposition of discipline. (PD II para. 21)

45. Respondent did not respond to the January 4, 2013 letter of inquiry.

46. Respondent currently serves as a part-time Assistant Public Defender in Erie County and also conducts a private practice of law.

47. Respondent was able to clear his caseload at the Public Defender's Office and currently assists other public defenders to clear their caseloads. (N.T. 6/26/14 at 68, 69)

48. Since the events of his discipline, Respondent has become associated with a new law firm, which he describes as a better office environment for him, as the other lawyers engage in the same type of practice. Respondent has decreased his caseload in the private arena and has been more selective about his clientele. (N.T. 6/26/14 at 64- 66)

49. Respondent provided three letters attesting to his character and competence. Said letters were provided from Mary Alfieri Richmond, Esquire, and two were from Patricia J. Kennedy, Esquire. (RE 1, 2, and 3)

50. Ms. Richmond has been an attorney in Erie for nearly 30 years. She has served as both a divorce and custody master. Ms. Richmond has observed Respondent as a colleague, and Respondent has appeared before her in custody and divorce matters.

51. Ms. Kennedy is the Chief Public Defender of Erie County and is Respondent's direct supervisor in his capacity as an Assistant Public Defender.

52. Ms. Kennedy has served as Respondent's practice monitor for approximately one year and believes that Respondent "is capable of returning to the advocate he once was." (RE 3)

53. Ms. Kennedy is willing to continue serving as Respondent's practice monitor. (RE-3)

54. Respondent accepted responsibility for his actions, and expressed sincere remorse and embarrassment for the way his actions have impacted the profession. (N.T. 6/5/13 at 41, 42)

55. Respondent expressed his willingness to participate in a mental health evaluation and any treatment as a result of said evaluation. (N.T. 6/26/14 at 62, 63)

### III. CONCLUSIONS OF LAW

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

1. RPC 1.1 – A lawyer shall provide competent representation to a client.
2. RPC 1.3 – A lawyer shall act with reasonable diligence and promptness in representing a client.

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

4. RPC 1.5(b) – A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

5. RPC 8.1(b) – A lawyer in connection with a disciplinary matter shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.

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

7. Pa.R.D.E. 203(b)(7) – The following shall be grounds for discipline: failure by a respondent-attorney without good cause to respond to Disciplinary Counsel's request or supplemental request under Disciplinary Board Rule §87.7(b) for a statement of the respondent – attorney's position.

#### IV. DISCUSSION

This matter is before the Board for consideration of the allegations of misconduct brought against Respondent arising from his handling of two separate criminal matters. Petitioner bears the burden of proving professional misconduct by a preponderance of the evidence that is clear and satisfactory. Office of Disciplinary Counsel v. Grigsby, 425 A.2d 730 (Pa. 1981). Respondent failed to respond to the charges against him; therefore, the factual allegations are deemed admitted pursuant to Rule 208(b)(3), Pa.R.D.E. Given these admissions and the supporting documentary and testimonial evidence, the Board concludes that Petitioner has met its burden of proof.

Respondent's misconduct in the two matters before the Board consists of neglect of his clients and failure to communicate with them, as well as a failure to respond to Office of Disciplinary Counsel to provide an explanation of his behavior. Unfortunately, Respondent has a record of discipline. His prior history includes a Private Reprimand in 2006 for conduct that occurred in 2003. In that case, in representing a client in a divorce action, Respondent misled the opposing party into consenting to a divorce decree. Additionally, in 2013, Respondent received a Public Reprimand with probation and a practice monitor for one year after he was found to have misrepresented to a divorce client that his divorce was filed.

Mitigating factors include Respondent's acceptance of responsibility for his actions and remorse for his misconduct. Respondent has made efforts to remedy what he believes to be the underlying cause of his misconduct and to ensure diligence in his practice. He currently practices law with a new firm wherein the attorneys have similar practice areas to Respondent, and he has decreased his caseload and has been more selective in his clientele in that regard. As to his public defender practice, Respondent has also decreased his workload and has been reassigned to assist other public defenders in clearing their caseloads. Respondent is very satisfied with these changes to his law practice and is confident that he will be able to meet his ethical obligations.

Respondent has provided letters attesting to his character and competence. Said letters were sent from Mary Alfieri Richmond, Esquire, and Patricia J. Kennedy, Esquire. Ms. Richmond has known Respondent for many years, and she based her assessment on 30 years of familiarity with Respondent both personally and professionally.

Ms. Kennedy is the Chief Public Defender of Erie County and currently serves as Respondent's practice monitor. She expressed her willingness to continue to serve as a

practice monitor in the future, due to her belief that Respondent is “capable of returning to the advocate he once was.”

Attorneys with a record of discipline who have engaged in neglect of client matters have generally received discipline ranging from a private reprimand to suspension for one year and one day, depending upon the aggravating and mitigating circumstances. See In re Office of Disciplinary Counsel v. Edward C. Meehan, Jr., No. 26 DB 2006 (Pa. Sept. 18, 2006) (Public censure imposed for failing to act diligently in two criminal cases; prior discipline of informal admonition and private reprimand for similar misconduct; did not cooperate with Office of Disciplinary Counsel); Office of Disciplinary Counsel v. John Kasaback, No. 45 DB 2009 (Pa. Dec. 6, 2010) (Stayed suspension for three months and one year probation resulting from neglect of five matters; prior record of two informal admonitions and a private reprimand).

Despite a history of discipline, the Hearing Committee unanimously determined that Respondent is capable of diligently representing clients within the confines of a practice monitor to review Respondent’s case and report to the Disciplinary Board. The Board agrees with this assessment and concludes it is appropriate that Respondent receive a suspension for one year and one day, stayed in its entirety, with probation for a period of two years and a practice monitor.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Kevin Mark Kallenbach, be Suspended from the practice of law for a period of one year and one day; that the suspension be stayed in its entirety and that he be placed on Probation for a period of two years, subject to the following conditions:

1. Patricia J. Kennedy, Esq., shall be appointed to serve as Respondent's practice monitor.

2. The practice monitor shall do the following during the period of Respondent's probation:

a. Periodically examine the Respondent's law office organization and procedures to ensure that the Respondent has kept his clients informed about the status of their matters, has replied to client requests for information in a timely and honest manner, has worked on cases in a reasonably prompt and diligent manner, has filed documents with the Court in a timely manner as required to protect his clients' interests, and has provided clients with written fee agreements as required by RPC 1.5(b).

b. Meet with the Respondent at least monthly to examine Respondent's progress towards satisfactory and timely completion of clients' legal matters, verify deadlines, progress on cases, and regular client contact;

c. File quarterly written reports on a Board approved form with the Secretary of the Board; and

d. Shall immediately report to the Secretary any violations of the Respondent of the terms and conditions of probation.

3. Respondent is also directed to subject himself to a mental health evaluation and to begin any treatment as a result of said evaluation.

4. Respondent shall submit a copy of the mental health evaluation to the Secretary of the Board within five (5) days after receipt of the evaluation.

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: 

Stefanie B. Porges, Board Member

Date: February 26, 2015

Board Vice-Chair Todd recused in this matter.