

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2583 Disciplinary Docket No. 3
: :
Petitioner : No. 23 DB 2019
: :
v. : Attorney Registration No. 19667
: :
WILLIAM R. BALABAN, : (Dauphin County)
: :
Respondent :

ORDER

PER CURIAM

AND NOW, this 15th day of April, 2019, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board, the Joint Petition in Support of Discipline on Consent is granted, and William R. Balaban is suspended on consent from the Bar of this Commonwealth for a period of one year and one day. He shall comply with all the provisions of Pa.R.D.E. 217 and shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

Justice Baer did not participate in the consideration or decision of this matter.

A True Copy Patricia Nicola
As Of 04/15/2019


Attest:
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. <u>23</u> DB 201 8 ⁹
Petitioner,	:	
	:	Bd. File No. C3-17-771
v.	:	
	:	Attorney Reg. No. 19667
WILLIAM R. BALABAN,	:	
Respondent	:	(Dauphin County)

JOINT PETITION IN SUPPORT OF DISCIPLINE ON CONSENT
PURSUANT TO Pa. R.D.E. 215(d)

Petitioner, Office of Disciplinary Counsel (hereafter “ODC”) by Paul J. Killion, Chief Disciplinary Counsel, and Kristin A. Wells, Disciplinary Counsel, and Respondent, William R. Balaban, file this Joint Petition in Support of Discipline on Consent under Rule 215(d) of the Pennsylvania Rules of Disciplinary Enforcement (hereinafter “Pa.R.D.E.”) and in support thereof state:

1. ODC, whose principal office is located at the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62485, Harrisburg, PA 17106, is invested, pursuant to Pa.R.D.E. 207, 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, William R. Balaban, was born on February 4, 1949, and was admitted to practice law in Pennsylvania on October 21, 1974. Respondent is on active status. His registered address is Balaban & Coble, 27 North Front Street, Harrisburg, Pennsylvania 17101.

3. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of

FILED
02/08/2019
The Disciplinary Board of the
Supreme Court of Pennsylvania

the Supreme Court of Pennsylvania.

SPECIFIC FACTUAL ALLEGATIONS ADMITTED

4. Respondent's misconduct involves his misappropriation of \$75,000.00 that was to be held in trust for the benefit of a third-party, pending the outcome of civil litigation.¹

5. Respondent's firm, Balaban & Coble (hereinafter "B&C") represented Tracy Miller and Tweet, Inc. in a civil litigation regarding repayment of a promissory note held by Edward Nesbit, in addition to other matters.

6. The promissory note at issue was executed August 31, 2012, and secured by a lien in the amount of \$65,000.00 on a liquor license held by Tweet, Inc. Tracy Miller is the sole shareholder of Tweet, Inc.

7. Under the terms of the promissory note, Mr. Nesbit was entitled to 1% per month in interest following any default in repayment as well as reasonable attorney's fees required to collect any outstanding debt.

8. On or about October 7, 2014, Mr. Nesbit called the promissory note.

9. Ms. Miller and/or Tweet, Inc. failed to thereafter make any payments on the debt.

10. On or about May 26, 2015, B&C filed a request for declaratory judgment and accounting in the Dauphin County Court of Common Pleas, docketed at *Tweet, Inc. and Tracy A. Miller v. Edward Nesbit*, 2015-CV-4121-CV (Dauphin C.P.), seeking to have the promissory note invalidated and Mr. Nesbit's lien deemed void.

11. If this matter proceeded to hearing, Respondent would testify that B&C was advised by Ms. Miller that Mr. Nesbit's \$65,000.00 promissory note had been fully satisfied by the

¹ As discussed *infra*, after he was contacted by ODC concerning this investigation, Respondent admitted to his misappropriation of client funds, replenished the IOLTA account using his own funds, and fully cooperated with ODC's investigation. As this time, there is no evidence to suggest that any of Respondent's clients, including Tweet, Inc. and Ms. Miller, suffered a financial loss due to his misconduct.

proceeds Mr. Nesbit received from the October 7, 2014, sale of jointly held real estate, which totaled \$94,413.00. Ms. Miller further explained that Mr. Nesbit paid no consideration for his 50% interest in the real estate and that such interest was transferred to Mr. Nesbit as collateral for the promised \$65,000.00 loan from Mr. Nesbit.

12. In or about September 2016, while the Dauphin County litigation was still in discovery, B&C represented Ms. Miller and Tweet, Inc. relative to the sale of the liquor license for \$350,000.00.

13. The sale was subject to Mr. Nesbit's lien, which was fully disclosed to the liquor license purchaser.

14. The parties to the purchase agreed that, to protect the purchaser from potential liability under Mr. Nesbit's lien, \$75,000.00 of the purchase price would be escrowed with B&C, pending the outcome of the Dauphin County litigation.

15. Under cover letter dated September 4, 2016, B&C was provided with two checks for the liquor license sale:

- a. \$268,268.30, payable to Tweet, Inc., as full consideration for the liquor license; and
- b. \$75,000.00, payable to B&C, as funds to be held in escrow.

16. On or about September 15, 2016, Respondent deposited these funds into the B&C IOLTA account.

17. The following day, Respondent withdrew \$78,994.62 from the IOLTA account to cover B&C's fees and other expenses that had accumulated relative to their representation of Ms. Miller and Tweet, Inc, and disbursed the remaining sum of \$189,273.68 to Ms. Miller.

18. ODC's investigation revealed that, if called to testify, Ms. Miller would state that she never received a bill from B&C, despite her numerous requests for the same; she was orally

informed by Respondent that she owed between \$74,000.00 and \$75,000.00; she was aware that Respondent took fees out of the net received from the liquor license sale; and she assumed these fees would “cover everything.”

19. Respondent disputes Ms. Miller’s anticipated testimony, and instead claims that he kept Ms. Miller fully apprised of the cost associated with the litigation and at no point indicated that further work would be completed on a *pro bono* basis.

20. By April 2017, Respondent had misappropriated the entirety of the \$75,000.00 that he was to hold in trust, and used these funds for B&C’s business expenses.

21. Specifically, on the following dates, Respondent transferred the listed amounts from the B&C IOLTA account to the B&C operating account:

- a. December 14, 2016 - \$25,000.00;
- b. January 10, 2017 - \$5,000.00;
- c. March 13, 2017 - \$10,000.00;
- d. March 29, 2017 - \$10,000.00;
- e. April 6, 2017 - \$5,000.00; and
- f. April 21, 2017 - \$48,000.00.²

22. In his DB-7 response, Respondent, through counsel, stated that he used the funds based on his belief that the promissory note would not be deemed valid and enforceable against the liquor license sale, and the funds would then be “applied to a large overdue bill from Ms. Miller and Tweet, Inc.”

² The total of these transfers is \$103,000.00. On or about September 19, 2016, Respondent transferred \$28,500.00 into the IOLTA account from his operating account as “Reimbursement to IOLTA.” The listed transfers out of the IOLTA account include \$28,000.00 of this deposit.

23. In support, Respondent provided an invoice dated June 20, 2017, covering the period of September 7, 2016, through November 30, 2016, for \$87,482.48.³

24. Respondent further admitted to his violation of RPC 1.15(b) and (f) and assured ODC “that these violations have stopped and all the funds that should be in the account are in the account.”

25. By the time Respondent misappropriated the escrowed funds, B&C had purportedly billed 157.7 hours on this matter, for a total of \$47,310.00 in fees, which is \$27,690.00 less than the amount Respondent had misappropriated from the escrowed funds.

26. ODC’s investigation revealed that, if called to testify:

a. Ms. Miller would state that she did not give Respondent permission to take any portion of the \$75,000.00 as fee payments, was unaware that Respondent had failed to hold the funds inviolate, was unaware of any outstanding balance on her case following the \$78,994.62 that Respondent took in fees from the net amount received from the liquor license sale, and never saw a copy of the June 20th invoice; and

b. Counsel for the liquor-license purchaser would state that he did not give Respondent permission to take the \$75,000.00 and was unaware that Respondent had failed to hold the funds inviolate.

27. On May 10-11, 2017, a hearing was held in the Dauphin County matter.

28. By letter dated May 17, 2017, Attorney John Kerr, counsel for Mr. Nesbit, demanded that B&C provide an accounting of the \$75,000.00.

³ In total, B&C purportedly billed \$166,477.10 for their services related to the real estate sale, the \$65,000.00 promissory note, and the liquor license sale. The June 20th invoice was solely for services relating to the \$65,000.00 promissory note.

29. By letter dated June 2, 2017, Respondent refused to provide Attorney Kerr or Mr. Nesbit with the demanded accounting, claiming that he was under no duty to Mr. Nesbit.

30. Had an accounting been provided, it would have shown that Respondent had transferred the escrowed funds into the B&C operating account and spent them on business expenses.

31. Based on Respondent's refusal to account, Attorney Kerr filed a complaint with ODC, which initiated ODC's investigation of this matter.

32. By Order dated June 12, 2017, the Dauphin County Court held that the promissory note was enforceable against Tweet, Inc.

33. ODC's investigation revealed that, if called to testify, Ms. Miller would state that, following the hearing, at her next meeting with Respondent, he advised her that she owed an additional \$87,000.00 in fees. Ms. Miller was shocked as Respondent never advised her that she would incur additional fees beyond the amount Respondent took from the liquor license sale net proceeds. Further, she never received a copy of an invoice in support of these fees. Ms. Miller told Respondent that she could not afford to pay that amount, but gave him \$300.00. Respondent told Ms. Miller that he would not sue her for the outstanding bill, and she has received no further communication from Respondent concerning the \$87,000.00 she purportedly owed.

34. Respondent disputes Ms. Miller's anticipated testimony, and instead asserts that he kept Ms. Miller fully apprised of the cost associated with the litigation and at no point indicated that further work would be completed on a *pro bono* basis.

35. On or about June 21, 2017, B&C filed post-trial motions challenging the June 12th Order.

36. By Order dated September 13, 2017, B&C's post-trial motions were denied.

37. On or about October 16, 2017, B&C appealed the matter to the Superior Court.
38. On or about November 29, 2017, Respondent received a copy of ODC's DB-7 Request for Statement of Respondent's Position letter.
39. Respondent thereafter deposited \$58,000.00 into the B&C IOLTA account, as follows:
- a. December 13, 2017 - \$30,000.00 transferred from operating account; and
 - b. December 19, 2017 –
 - i. \$1,400.00 cash deposit; and
 - ii. \$26,600.00 check written on Respondent's wife's account.
40. The remainder of the \$75,000.00 came from an earned \$77,817.75 referral fee from an unrelated matter that Respondent improperly deposited into the IOLTA account on October 16, 2017.
41. These deposits brought Respondent's account balance above the amount he was to be holding for his clients.
42. On or about March 22, 2018, Mr. Nesbit filed a replevin action in the Cumberland County Court of Common Pleas, docketed at *Edward Nesbit v. Weis Markets, Inc.*, 2018-03063 (Cumberland C.P.), seeking to replevin the liquor license as security for the promissory note, which Mr. Nesbit claimed by then amounted to \$136,650.00. That sum included interest and attorneys fees, as provided by the promissory note.
43. On or about May 23, 2018, Mr. Nesbit amended his replevin claims to increase the amount to \$138,201.84.

44. By Confidential Settlement and General Release Agreement dated June 28, 2018, the parties resolved their disputes, including the issues related to the disposition of the misappropriated funds.

45. Based on this Agreement, on or about June 29, 2018, B&C filed an Application to Withdraw Appeal with the Superior Court.

46. By Order dated July 9, 2018, the Superior Court granted the Application to Withdraw Appeal.

SPECIFIC RULES OF PROFESSIONAL CONDUCT VIOLATED

47. By his conduct as alleged in paragraphs 4 through 47, above, Respondent violated the following Rules:

a. RPC 1.15(b), which states, “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[;]” and

b. RPC 1.15(f), which states, in pertinent part, “When in possession of funds or property in which two or more persons, one of whom may be the lawyer, claim an interest, the funds or property shall be kept separate by the lawyer until the dispute is resolved.”

SPECIFIC JOINT RECOMMENDATIONS FOR DISCIPLINE

Petitioner and Respondent jointly recommend that the appropriate discipline for Respondent is a one-year and one-day license suspension. This recommendation is consistent with prior decisions.

In *Office of Disciplinary Counsel v. John Richard Banke, II*, 58 DB 2012 (Bd. Rpt. 6/13/12) (S. Ct. Order 8/16/12), the Court approved a one-year and one-day license suspension on

consent. Banke misappropriated \$5,000.00 that was received in error from an insurance company as an overpayment of the amount due to his client. Banke failed to remit the funds despite repeated requests from the insurance company and his client. In mitigation, Banke admitted to his misconduct, showed remorse, made full restitution, and had no prior history of discipline in his approximately 22 years of practice.

In *Office of Disciplinary Counsel v. Wayne Anthony Rodney*, 59 DB 2005 (Bd. Rpt. 9/23/05) (S. Ct. Order 11/10/05), the Court approved a one-year and one-day license suspension on consent. Rodney engaged in the unauthorized practice of law while on inactive status and misappropriated \$6,587.46 in one client matter. In mitigation, Rodney admitted to his misconduct and made full restitution. In aggravation, Rodney had a prior history of discipline consisting of a one-year and one-day license suspension for the unauthorized practice of law, during the same time period at issue in the second case.

In *Office of Disciplinary Counsel v. James Lawrence Paz*, 97 DB 2010 (Bd. Rpt. 7/8/10) (S. Ct. Order 8/20/10), the Court approved a one-year and one-day license suspension on consent. Paz misappropriated \$3,953.06 entrusted to him from the proceeds of a real estate transaction. Paz used these funds to pay his overdue child support obligations and other bills. In addition, Paz commingled personal and client funds and failed to promptly disburse \$500.00 entrusted to him in another real estate transaction. Paz made full restitution for the misappropriated funds following contact from ODC. In mitigation, Paz admitted to his misconduct, showed remorse, and had no prior history of discipline in his approximately 23 years of practice.

In *Office of Disciplinary Counsel v. Jill A. Devine*, 183 DB 2007 (Bd. Rpt. 3/30/10) (S. Ct. Order 6/23/10), the Court imposed a one-year and one-day license suspension. Devine misappropriated \$2,081.00 in one client matter and neglected and failed to communicate in another

client matter. In mitigation, Devine had no prior history of discipline in her 21 years of practice, reimbursed the Client Security Fund for the principal amount paid out due to her misappropriation, and admitted to the misappropriation. Devine also presented evidence of her drug and alcohol addiction, but such evidence was deemed insufficient to meet the standard announced in *Office of Disciplinary Counsel v. Seymour H. Braun*, 553 A.2d 894 (Pa. 1989). In aggravation, Devine did not admit to her clear misconduct and showed no remorse for the second matter.

In *Office of Disciplinary Counsel v. Albert B. Mackarey*, 115 DB 2006 (Bd. Rpt. 10/10/06) (S. Ct. Order 11/21/06), the Court approved a one-year and one-day license suspension on consent. Mackarey procured \$10,000.00 from an elderly client without the client's consent through his use of a blank check signed by the client to facilitate Mackarey's payment of her third-party bills and made subsequent misrepresentations regarding the funds. The Client Security Fund approved a claim against Mackarey for the \$10,000.00; as of the date of the Board Report, Mackarey had not repaid those funds. In mitigation, Mackarey admitted to his misconduct, showed remorse, was 79 years old and in poor health, and had voluntarily ceased the practice of law. In aggravation, Mackarey had a prior history of discipline consisting of a three month suspension for related misconduct.

In *Office of Disciplinary Counsel v. Marvin F. Galfand*, 25 DB 2004 (Bd. Rpt. 10/19/05) (S. Ct. Order 2/7/06), the Court imposed a one-year and one-day license suspension. Galfand engaged in a fifteen-month pattern of mishandling client funds, which involved his misappropriation of approximately \$50,000.00 in three client matters to pay obligations in other client matters. In mitigation, Galfand expressed remorse, made full restitution, and had no prior history of discipline in his approximately 40 years of practice.

Respondent Balaban has practiced law for approximately 40 years with no history of

discipline. In addition, Respondent would present an extensive record of civic, charitable, and professional affiliations. By entering into this Joint Petition, Respondent has expressed recognition of his violations of the Rules of Professional Conduct and understanding of the need for discipline. It is respectfully submitted that a one-year and one-day license suspension is sufficient to protect the public. Respondent recently turned 70 years old and plans to retire. Should Respondent desire to resume active status in the future, he will be required to petition for reinstatement and prove his fitness to practice.

Respondent hereby consents to the discipline being imposed upon him. Attached to this Petition is Respondent's executed Affidavit required by Pa.R.D.E. 215(d), stating that Respondent consents to the recommended discipline and including the mandatory acknowledgements contained in Pa.R.D.E. 215(d)(1) through (4).

WHEREFORE, Petitioner and Respondent respectfully request that your Honorable Board:

- (a) Review and approve this Joint Petition and recommend that the Supreme Court of Pennsylvania enter an Order imposing a one-year and one-day license suspension;
and
- (b) Pursuant to Pa.R.D.E. 215(i), enter an order for Respondent to pay the necessary expenses incurred in the investigation and prosecution of this matter.

Respectfully submitted,

Date: 8 February 2019

By: Kristin A. Wells
Kristin A. Wells
Disciplinary Counsel
Attorney Registration No. 312080
601 Commonwealth Avenue, Suite 5800
P.O. Box 62675
Harrisburg, PA 17106-2675
Telephone (717) 772-8572

Date: 2/8/2019

By: Bill Balaban

William R. Balaban
Respondent
Attorney Registration No. 19667
Balaban & Coble
27 North Front Street
Harrisburg, PA 17101
Telephone: (717) 695-2901

Date: 2/8/2019

By: Ellen C. Brotman

Ellen C. Brotman, Esq.
Respondent's Counsel
Attorney Registration No. 71775
1 South Broad Street, Suite 1500
Philadelphia, PA 19107
Telephone: (215) 609-3247

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. ___ DB 2018
Petitioner,	:	
	:	Bd. File No. C3-17-771
v.	:	
	:	Attorney Reg. No. 19667
WILLIAM R. BALABAN,	:	
Respondent	:	(Dauphin County)

VERIFICATION

The statements made in the foregoing Joint Petition in Support of Discipline on Consent Pursuant to Pa.R.D.E. 215(d) are true and correct to the best of my knowledge, information, and belief. This statement is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Respectfully submitted,

Date: 8 February 2019

By: Kristin A. Wells
Kristin A. Wells
Disciplinary Counsel
Attorney Registration No. 312080
601 Commonwealth Avenue, Suite 5800
P.O. Box 62675
Harrisburg, PA 17106-2675
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By: Bill Balaban
William R. Balaban
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WILLIAM R. BALABAN,	:	
Respondent	:	(Dauphin County)

RESPONDENT’S AFFIDAVIT UNDER RULE 215(d) OF THE
PENNSYLVANIA RULES OF DISCIPLINARY ENFORCEMENT

I, William R. Balaban, Respondent in the above-captioned matter, hereby consent to the imposition of a one-year and one-day license suspension, as jointly recommended by the Petitioner, Office of Disciplinary Counsel, and myself, in a Joint Petition in Support of Discipline on Consent and further state:

1. My consent is freely and voluntarily rendered; I am not being subjected to coercion or duress; I am fully aware of the implications of submitting the consent;
2. I am aware there is presently pending a proceeding involving allegations that I have been guilty of misconduct as set forth in the Joint Petition;
3. I acknowledge that the material facts set forth in the Joint Petition are true;
4. I consent because I know that if the charges continued to be prosecuted in the pending proceeding, I could not successfully defend against them; and
5. I acknowledge that I am fully aware of my right to consult and employ counsel to represent me in the instant proceeding, and am represented by Ellen Brotman, Esq.

Date:

2/8/2019

By:

Bill Balaban

William R. Balaban

Respondent

Attorney Registration No. 19667

Balaban & Coble

27 North Front Street

Harrisburg, PA 17101

Telephone: (717) 695-2901

BEFORE THE DISCIPLINARY BOARD OF THE
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OFFICE OF DISCIPLINARY COUNSEL,	:	No. ___ DB 2018
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v.	:	
	:	Attorney Reg. No. 19667
WILLIAM R. BALABAN,	:	
Respondent	:	(Dauphin County)

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Disciplinary Board Rules and Procedures § 89.22 (service by a participant).

First Class Mail as follows:

William R. Balaban
c/o Ellen C. Brotman, Esq.
1 South Broad St., Suite 1500
Philadelphia, PA 19107

Date: 8 February 2019

By: Kristin A. Wells
Kristin A. Wells
Disciplinary Counsel
Attorney Registration No. 312080
601 Commonwealth Avenue, Suite 5800
P.O. Box 62675
Harrisburg, PA 17106-2675
Telephone (717) 772-8572

BEFORE THE DISCIPLINARY BOARD OF THE
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OFFICE OF DISCIPLINARY COUNSEL,	:	No. ___ DB 2018
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WILLIAM R. BALABAN,	:	
Respondent	:	(Dauphin County)

ORDER

PER CURIAM

AND NOW, this ___ day of _____, 2019, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board, the Joint Petition in Support of Discipline on Consent is granted, and William R. Balaban is suspended on consent from the Bar of this Commonwealth for a period of one-year and one-day.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Office of Disciplinary Counsel

Signature: Kristin A. Wells

Name: Kristin A. Wells

Attorney No. (if applicable): 312080