IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	No. 1634 Disciplinary Docket No. 3
	:	No. 35 DB 2009
v.	:	
	:	Attorney Registration No. 15709
PAUL ANTHONY KELLY, Respondent	:	(Susquehanna County)

ORDER

PER CURIAM:

AND NOW, this 28th day of October, 2010, upon consideration of the Report and Recommendations of the Disciplinary Board dated July 23, 2010, the Petition for Review and response thereto, it is hereby

ORDERED that Paul Anthony Kelly is suspended from the Bar of this Commonwealth for a period of eighteen months 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.

Mr. Justice McCaffery dissents and would follow the recommendation of the Disciplinary Board and impose a three-year suspension.

A True Copy Patricia Nicola
As of: October 28, 2010
Attest: Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL Petitioner	:	No. 35 DB 2009
v.	:	Attorney Registration No. 15709
PAUL ANTHONY KELLY Respondent	:	(Susquehanna 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 March 20, 2009, Office of Disciplinary Counsel filed a Petition for Discipline against Paul Anthony Kelly. The Petition charged Respondent with violations of Rules of Professional Conduct 1.7(a)(2), 3.1, 4.2, 4.4(a), 8.4(c) and 8.4(d) arising from actions he took in regard to a quarry lease. Respondent filed an Answer to Petition for Discipline on March 27, 2009.

A disciplinary hearing was held on June 10, 2009 with an additional hearing on July 15, 2009. A District III Hearing Committee presided with Chair Lindsay D. Baird, Esquire, and Members Suzanne C. Hixenbaugh, Esquire, and Jeffrey T. McGuire, Esquire. Respondent was represented by Laurence M. Kelly, Esquire.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on January 11, 2010 and concluded that Respondent violated the Rules of Professional Conduct as contained in the Petition for Discipline and recommended that Respondent be suspended from the practice of law for a period of three years.

Respondent filed a Brief on Exceptions on February 9, 2010 and requested oral argument before the Disciplinary Board.

Petitioner filed a Brief Opposing Exceptions on March 1, 2010.

Oral argument was held on April 8, 2010 before a three-member panel of the Disciplinary Board.

This matter was adjudicated by the Disciplinary Board at the meeting on April 14, 2010.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, 601 Commonwealth Ave., Suite 2700, Harrisburg, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, 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 Paul Anthony Kelly. He was born in 1946 and was admitted to practice law in the Commonwealth in 1972. He maintains his office at 25 Public Avenue, Montrose PA 18801. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has no record of prior discipline in Pennsylvania.

4. Joseph and Cynthia Oruska, husband and wife, own real estate in Susquehanna County that adjoins real estate that was, at all times in question, owned by Guy Vandermark or his heirs.

5. In August of 2003, the Oruskas entered into a five year quarry lease with Respondent.

6. The lease was drafted by Respondent and it permitted him to quarry a portion of a 16 acre tract of the Oruska land, under certain conditions.

7. Respondent took responsibility for obtaining the necessary permits from the Department of Environmental Protection (DEP) for what came to be known as the "Roberts Quarry." The quarry was divided by the property line between the Vandermark land and the Oruska land.

8. In its application for a mining permit for the "Roberts Quarry," Respondent submitted a professional survey by Joseph Kempa of the land included in the quarry. The survey showed the property line between Vandermark and Oruska running through the approximate center of the quarry.

9. In the summer of 2004, a dispute arose between Respondent and Oruska concerning Respondent's compliance with the terms and conditions of the quarry lease previously entered into by the parties in August of 2003.

10. The Oruskas initially hired Frederick Meagher, Esquire, to represent them in their negotiations with Respondent. When Mr. Meagher was unable to resolve the issues, the Oruskas hired Charles Watkins, Esquire.

11. In the middle of the negotiation process between the parties, Respondent filed a lawsuit on behalf of Guy Vandermark against the Oruskas in the nature of an ejectment action. The lawsuit claimed that approximately 16 acres of Oruska land were actually owned by Vandermark. This included the same piece of land Respondent had leased from Oruska. This was the same piece of land for which Respondent had filed the survey of Joseph Kempa with the DEP showing the Oruska-Vandermark property line running through the quarry land in question.

12. The lawsuit Respondent filed on behalf of Vandermark was filed eight days after Respondent had mailed a check to Attorney Watkins in the amount of $2,000 to resolve his differences with Oruska concerning the lease of land and before Mr. Watkins had responded to the offer.

13. Prior to filing the lawsuit on behalf of Vandermark, Respondent instructed Vandermark to obtain a survey of the boundary between his land and the neighboring Oruska property. The survey obtained by Vandermark was performed by Barry Wheaton.

14. The report by Mr. Wheaton stated, "I have examined the physical sight [sic] and the ancient maps...Due to the lack of precision in the descriptions, I am unable to form a professional opinion as to the exact location of the boundary."

15. Respondent disregarded the Kempa Survey and the Wheaton Survey in deciding to file the Vandermark lawsuit.

16. Included with the Vandermark lawsuit was a notice of deposition for Guy Vandermark. The deposition was set for August 25, 2004.

17. Respondent did not send a notice of the deposition to Attorney Watkins. However, Mr. Watkins learned of the deposition and by letter dated August 13, 2004, requested a different date from Respondent since Mr. Watkins had a previous commitment. Mr. Watkins offered several proposed alternatives.

18. Respondent ignored the request from Mr. Watkins for a different date for the Vandermark deposition. Respondent did not contact Mr. Watkins or the Oruskas and proceeded with the Vandermark deposition in the absence of counsel for Oruska. A misrepresentation was made on the record by co-counsel that there had been no correspondence received from Oruska or Mr. Watkins. Respondent did not correct this misrepresentation.

19. At the hearing, Respondent alleged that the reason he ignored the request for a different deposition date was the personal animosity that existed between him and Mr. Watkins. Respondent offered no evidence that Mr. Watkins acted in an unprofessional manner.

20. Respondent amended the Vandermark complaint three times. In each new version, Respondent changed the amount of land Vandermark was claiming belonged to Vandermark.

21. At no time did Respondent ever have an expert report or survey that would support his claims that Vandermark owned the land that Respondent had leased from Oruska. Further, no factual evidence substantiating Respondent's allegations in his lawsuits against Oruska was ever admitted into the record at trial.

22. On October 29, 2004, Respondent was disqualified from representing Vandermark by Judge Brendan Vanston.

23. Though subpoenaed to appear at the trial, Mr. Vandermark failed to appear and failed to offer any evidence as to the correctness of the claims he had made in all the variations of the lawsuits filed on his behalf by Respondent.

24. On January 30, 2006, Vandermark's claims against Oruska were dismissed with prejudice. Further, though characterized by the Court as a settlement, Vandermark received no benefit from the dismissal of the lawsuit.

25. Respondent continued to pursue enforcement of his lease with Oruska. After he was brought into the original Vandermark matter as a third party by Oruska, he counterclaimed against Oruska, seeking declaratory relief to the effect that Respondent had not violated the lease terms and the lease was valid.

26. Respondent's declaratory relief action was heard by Judge Vanston in a bench trial.

27. Judge Vanston ruled in favor of Oruska and held that Respondent had violated the terms of his quarry lease with Oruska. He further held that the Oruskas were

within their rights to terminate the lease. Judge Vanston found that rather than submit to an accounting, Respondent commenced a civil action on behalf of Vandermark.

28. After Respondent took an appeal to the Superior Court, Judge Vanston wrote a supplemental Opinion on August 11, 2006 to directly address the issues raised by Respondent in his appeal. Judge Vanston wrote:

> "Kelly has asked to apply "equitable considerations" in assessing whether he should be permitted to continue mining operations on Oruskas' land. While principles of law are sufficient to adjudicate this matter, if one were to apply equitable conditions here, they would not rebound [sic] to Kelly's favor. Filing an action to quiet title on behalf of Guy Vandermark, an elderly and frail man who died during the course of this litigation; presenting evidence so weak and spurious as would make one question whether it was pulled from thin air; in effect, leasing land from one person, then suing him to have the land declared to be owned by another person, all the while continuing to remove valuable stone from the leased premises-all these considerations, together with the Rules of Professional Conduct, militate against any presumption in Kelly's favor." (Emphasis added) (ODC Exhibit 22)

29. On February 20, 2007, more than a year after Respondent lost his declaratory judgment action against Oruska, a year and a half after Vandermark's ejectment action had been dismissed, and a year after he had signed and recorded a clarifying deed from himself and his wife to Oruska for the property in question, Respondent filed a Lis Pendens against the Oruska property.

30. On July 13, 2007, the Superior Court upheld Judge Vanston's findings of fact and conclusions of law in the Vandermark v. Oruska v. Kelly case.

31. On December 4, 2007, the Supreme Court denied Respondent's Petition for Allowance of Appeal in Vandermark v. Oruska v. Kelly.

32. On August 12, 2004, one day after the filing of the Vandermark v. Oruska lawsuit, Respondent filed a second lawsuit on behalf of Guy Vandermark, Ronald DeGraw, Joseph Roberts, James Donohue and himself alleging multiple causes of action. This lawsuit contained averments that Respondent's lease with Oruska was valid.

33. DeGraw, et. al. v. Oruska was amended several times.

34. At one point, Oruska sought injunctive relief in Vandermark v. Oruska v. Kelly. In order to obtain the relief against Respondent, the court required Oruska to post a $50,000 bond with the court. Anthony Oruska, brother of Joseph Oruska, loaned sufficient money to the Oruskas to permit them to file a bond with the court and obtain relief. Soon thereafter, Respondent filed an amended complaint in DeGraw et. al. v. Oruska and added Anthony Oruska as a defendant.

35. Respondent had no basis for filing a lawsuit against Anthony Oruska based upon his assistance to his brother in obtaining an injunction. Respondent offered no testimony or evidence of any kind that would support a claim against Anthony Oruska.

36. By the time DeGraw et. al. was listed for trial, Respondent and Vandermark were the only plaintiffs remaining in the lawsuit. Guy Vandermark died on February 14, 2006. Respondent discontinued the lawsuit.

37. On December 18, 2006, Respondent filed a complaint with the DEP. The complaint alleged illegal mining on the part of Oruska. Upon inspection by the DEP, no illegal mining was found to be taking place.

38. On June 15, 2007, Respondent filed another complaint against Oruska. Upon inspection by the DEP, no violations were noted.

39. On June 18, 2007, Respondent filed a third complaint with the DEP alleging illegal mining. The DEP inspection found no evidence of illegal mining.

40. On July 19, 2007, Respondent filed a formal complaint with the DEP via telephone, alleging that water was running off the Oruska property and flowing onto his quarry on the Vandermark property. Respondent also complained that DEP had issued permits to mine and bond the same area on Oruska land for which he had previously been granted a permit. Respondent claimed that the surface water created by the Oruska roadway was pouring onto his quarry and that there were erosion and sedimentation problems caused by the road built by Oruska.

41. By e-mail letter dated July 19, 2007, Respondent advised Attorney Ann Johnston of the DEP that he had reason to believe that a permit had been issued to Oruska. He listed nine objections to the issuance of the permit and requested that the DEP stop all quarrying taking place on the Oruska property. He also requested that Ms. Johnston consider his e-mail an appeal from the issuance of a permit if it had already been granted to Oruska.

42. On July 19, 2007, Respondent telephoned the DEP and complained that he and Oruska were both given mining permits for the same land. Respondent claimed that he was having erosion and sedimentation problems with the road which was being built by Oruska.

43. By e-mail dated July 24, 2007, Respondent advised Colleen Stutzman at the DEP that they must stop the runoff from the Oruska quarry into his quarry. He claimed Oruska failed to maintain reclamation equipment on his site at all times in violation of the mining regulations.

44. On or about July 26, 2007, Respondent met with various officials from DEP. At that time, Respondent alleged that Oruska had committed at least seven different violations of the mining regulations.

45. On July 23, 2007, Respondent filed a Notice of Appeal from a permit correction by the DEP for what had been known as the "Roberts Quarry." In that Notice of Appeal, Respondent listed 30 objections to the DEP's actions in correcting the permit for the Roberts Quarry.

46. After negotiations with Ann Johnston, Esquire, Respondent dropped 29 of his objections.

47. The remaining basis for Respondent's appeal was the inadequacy of the bond required by the DEP for the Oruska mining reclamation. The bond amount required of Oruska by the DEP was not substantially different from that required of Respondent for his mining operation on the Vandermark property, nor was it substantially different from that required by the DEP for the same property (the Oruska side of the quarry) when Respondent was operating the quarry. Respondent was willing to pay more to bond his side of the quarry if the DEP would require more from Oruska.

48. Number 30 in Respondent's list of objections to the permit corrections filed on July 23, 2007 quoted language from an order of Judge Vanston. At the time he quoted the language, nearly a year and one-half had passed since Judge Vanston had found Vandermark's ejectment action to be meritless. Judge Vanston's final decision vitiated any right Respondent may have temporarily had pursuant to the order he cited to the DEP.

49. By the time Respondent quoted the language of Judge Vanton's Order to the DEP, Judge Vanston had decided Respondent's declaratory judgment action, holding that Oruskas were entitled to terminate their lease with Respondent. The language of Judge Vanton's Order was no longer in effect. Nevertheless Respondent represented it to the DEP as a valid order of the court.

50. Further, Respondent had already signed and executed a quitclaim deed to Oruska transferring any interest he may have had in the 16 acres around the mining operations whose ownership had been questioned by the Vandermark suit against Oruska.

51. By letter dated July 30, 2007 to the DEP, Respondent sent photos of runoff from the Oruska quarry.

52. Respondent's personal hostility towards the Oruskas was so apparent that Ann Johnston, Esquire, perceived it as his motivation for the complaints and objections he was filing with the DEP.

53. None of the investigations of Oruska instigated by Respondent's complaints resulted in the imposition of sanctions against Oruska.

54. Throughout the period of 2007 and 2008, the DEP was actively enforcing the Noncoal Mining Regulations against real violators of those regulations. Approximately eight cease-and-desist orders were filed by the DEP against Herbert Kilmer, an associate of Respondent.

55. Throughout the proceedings between Respondent and Oruska, Respondent's one constant objective was to settle the disputes with Oruska in such a way as to enable him to keep mining stone from the quarry on Oruska property.

56. After Respondent filed the complaint in Vandermark v. Oruska, alleging that Vandermark owned the land Respondent had leased from Oruska, Respondent sent proposed new quarry lease agreements for that same land to Oruska through "his man" Joe Roberts, and to Attorney Watkins.

57. The proposed quarry lease agreements attempted to resolve the difficulties that had been articulated by Oruska with Respondent's compliance with the terms of the original lease agreement. The "new" proposed quarry lease agreements offered: to have Guy Vandermark execute a quitclaim deed to Oruska for the very property whose ownership Respondent had called into question in the lawsuit; to have Respondent pay $6,000 to Oruska as a signing bonus; to have all the monies presently in escrow with the Court be paid over to Oruska and that Respondent would provide load slips and a check within 24 hours of the removal of any stone from the quarry.

58. In addition, the settlement proposal that Respondent sent to Charles Watkins included discontinuance by all parties in the lawsuits Vandermark v. Oruska, and DeGraw, Kelly et. al. v. Oruska and a general release from all parties to all parties in Vandermark v. Oruska, along with a quitclaim deed from Guy Vandermark to Oruska, in addition to the "new" proposed quarry lease.

59. Guy Vandermark, the named plaintiff in the ejectment action filed by Respondent in Vandermark v. Oruska, was to receive no consideration as a result of this proposed settlement.

60. On May 25, 2005, Respondent sent a settlement proposal to Charles Watkins asking him how much the Oruskas would demand for the sale of their entire property that abutted Vandermark's property. Respondent indicated in the letter he would

lend "my man" Joe Roberts the money to purchase the land that was subject to the litigation.

61. As a direct result of Respondent's lawsuits, the Oruskas endured personal and financial hardships. The litigation cost them approximately $43,000 in legal fees, expert fees and other costs.

62. The Oruskas felt insecure as to whether they would be able to keep their home and feared going bankrupt.

63. The testimony of Joseph Oruska, Charles Watkins, and Ann Johnston was credible.

64. The testimony of Respondent was not credible.

65. Respondent showed no remorse or recognition of wrongdoing.

III. CONCLUSIONS OF LAW

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

1. RPC 1.7(a)(2) - A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

2. RPC 3.1 - A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

3. RPC 4.2 - In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by

another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

4. RPC 4.4(a) - In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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

6. 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

Before the Disciplinary Board is the matter of Paul A. Kelly, who has been charged with violations of the Rules of Professional Conduct arising from his handling of a dispute over a quarry lease. Extensive testimony was taken during a two-day disciplinary hearing. The matter was briefed by the parties and the Hearing Committee filed a detailed Report. Oral argument was held before a panel of this Board. This matter is ripe for adjudication. The charges against Respondent may be summarized as follows.

Respondent entered into a quarry lease with the Oruskas that permitted him to quarry stone from their land for a contractually determined fee. Within the first year, problems arose between the Oruskas and Respondent. The Oruskas hired an attorney to assist them. Respondent's actions that followed were taken in an effort to regain control of the quarry rights.

Respondent filed two complaints, each amended several times, and both were dismissed when called to trial without plaintiffs producing any evidence. In the one matter that did go to trial, Respondent's counterclaim against the Oruskas, the trial judge chastised Respondent for "filing an action to quiet title on behalf of Guy Vandermark, an elderly and frail man who died during the course of this litigation, presenting evidence so weak and spurious as would make one question whether it was pulled from thin air..." The Oruskas prevailed in Respondent's countersuit to enforce his quarry lease at the trial level. Respondent appealed and lost.

Respondent filed the second complaint on behalf of himself and various associates alleging multiple causes of action. He amended this complaint to include Anthony Oruska as a defendant for assisting his brother Joseph Oruska to post bond in the litigation as a security for an injunction.

Respondent made several offers to settle the Vandermark matter, some through intermediaries, even though the Oruskas were represented by Charles Watkins, Esquire, at the time. None of the settlement offers prepared and sent to the Oruskas by Respondent ever included any provisions of benefit to be received by Guy Vandermark, the plaintiff. When the litigation failed, Respondent changed his tactics, and filed several baseless complaints and objections to the Oruska mining permits, which ultimately made the operation of their quarry more difficult and expensive.

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). After careful and thorough examination of the record, and upon consideration of the arguments presented to the Board by the parties

at oral argument, the Board concludes that Petitioner met its burden of proof as to RPC 1.7(a)(2), 3.1, 4.2, 4.4(a), 8.4(c), and 8.4(d), as charged in the Petition for Discipline.

Respondent engaged in a violation of RPC 1.7(a) by representing Guy Vandermark against Oruska when Respondent had a concurrent personal conflict of interest. Respondent's lease with Oruska posed a significant risk that the representation of Vandermark would be materially limited by the personal interest of Respondent.

Respondent engaged in a violation of RPC 3.1 in that he presented no good faith argument on the merits of the ejectment action taken in Vandermark v. Oruska, nor did he present any good faith argument in support of an extension, modification or reversal of existing law. He had no factual support for the allegations that the boundary line between the Oruska and Vandermark properties was not properly categorized.

Respondent engaged in a violation of RPC 4.2 as he was aware that Respondent was represented by Charles Watkins in the ejectment action. Respondent was professionally obligated to run all communications regarding the litigation with Oruska through Attorney Watkins, rather than communicating with Oruska directly, even though Respondent claimed a personal animosity toward Mr. Watkins.

Respondent engaged in a violation of RPC 4.4(a) as he filed multiple baseless lawsuits and made several baseless complaints to the DEP. These actions were taken to allow Respondent to continue operating his mine and to burden the Oruskas.

Respondent engaged in a violation of RPC 8.4(c) as he misrepresented the status of a court order to Ann Johnston, Esquire, of the DEP. Additionally, Respondent filed three different descriptions of the boundary line in the Vandermark v. Oruska suit with no supporting survey or professional opinion.

Finally, Respondent violated RPC 8.4(d) as he filed the initial complaint in Vandermark v. Oruska without researching the boundary, and he amended the complaint with three different descriptions of the boundary with no supporting survey or professional opinion to support his contentions. Respondent made numerous complaints to the DEP which were prejudicial to the administration of justice.

Respondent's conduct in his dealings with the Oruskas is the antithesis of the manner in which a professional and responsible attorney must approach the practice of law. Respondent's method of practicing law caused disrepute to the legal and judicial system of the Commonwealth. Respondent's testimony regarding these events was found by the Hearing Committee to be not credible. The Board finds no reason of record to overturn this credibility finding.

The Hearing Committee recommended a suspension of three years, reasoning that Respondent's lengthy and repeated misbehavior in the Oruska matter, his failure to acknowledge his actions or take responsibility for them, and his lack of credibility necessitated a lengthy suspension.

The Board is equally persuaded that a three year suspension is appropriate. In the matter of Office of Disciplinary Counsel v. Feingold, No. 93 DB 2003, 1093 Disciplinary Docket No. 3 (Pa. 2005), Mr. Feingold was found to have filed a baseless lawsuit and did not accept responsibility for his conduct. He engaged in dishonest and deceitful practices and used improper delay tactics. Mr. Feingold was suspended for three years. In the instant matter, a three year suspension will impress upon Respondent the gravity of his misconduct and require him to demonstrate his fitness through the reinstatement process.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Paul Anthony Kelly 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: July 23, 2010

Board Vice-Chair Cognetti recused in this matter.