

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2184 Disciplinary Docket No. 3  
Petitioner :  
v. : No. 71 DB 2014  
: Attorney Registration No. 83246  
JAMES PAUL CARBONE :  
Respondent : (Venango County)

ORDER

PER CURIAM:

AND NOW, this 12<sup>th</sup> day of August, 2015, upon consideration of the Report and Recommendations of the Disciplinary Board dated June 17, 2015, it is hereby

ORDERED that James Paul Carbone is disbarred from the Bar of this Commonwealth and he shall comply with all the provisions of Pa.R.D.E. 217.

It is further ORDERED that Respondent shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

A True Copy Patricia Nicola  
As Of 8/12/2015

Attest:   
Chief Clerk  
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 71 DB 2014
Petitioner	:	
	:	
v.	:	Attorney Registration No. 83246
	:	
JAMES PAUL CARBONE	:	
Respondent	:	(Venango 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 filed on May 14, 2014, Office of Disciplinary Counsel charged Respondent, James Paul Carbone, with violations of the Rules of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement arising out of his conduct in three separate matters. Respondent did not file an Answer to Petition.

A disciplinary hearing was held on October 21, 2014, before a District IV Hearing Committee comprised of Chair Betsy A. Zimmerman, Esquire and Members

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A disciplinary hearing was held on October 21, 2014, before a District IV Hearing Committee comprised of Chair Betsy A. Zimmerman, Esquire and Members

Julie W. Meder, Esquire and Richard T. Ting, Esquire. Respondent did not appear. Petitioner offered six Exhibits, which were admitted as evidence at the hearing.

Following the submission of a brief by Petitioner, the Hearing Committee filed a Report on February 5, 2015, concluding that Respondent violated the Rules as charged in the Petition for Discipline and recommending that he be disbarred.

No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on April 23, 2015.

## II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, Office of Disciplinary Counsel, whose principal office is located at 601 Commonwealth Avenue, Suite 2700, Harrisburg, Pennsylvania, 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 James Paul Carbone. He was born in 1961 and was admitted to practice law in the Commonwealth of Pennsylvania in 1999. His attorney registration mailing address is 1180 Elk Street, 2<sup>nd</sup> Fl., Franklin, PA 16323. Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

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

4. On May 14, 2014, a Petition for Discipline was filed against Respondent in this matter.

5. On June 26, 2014, Respondent was personally served with the Petition for Discipline. (PE 3)

6. Respondent did not file an Answer to the Petition for Discipline within 20 days of service thereof, or anytime thereafter, nor did he request an extension of time to provide an Answer.

7. All factual allegations in the Petition are deemed admitted and are set forth below.

**Charge I: Anderson**

8. In April 2000, the Venango County District Attorney's Office charged David W. Anderson with multiple counts of Involuntary Deviate Sexual Intercourse (IDSI) and Indecent Assault. Petitioner's Exhibit (PE) 1, para. 3.

9. On June 30, 2000, during the preliminary hearing on the charges, District Justice Douglas Gerwick ruled that one of the alleged victims, "D.M.," was incompetent to testify and dismissed the charges concerning him. PE 1, para. 4.

10. With regard to the two other alleged victims, "T.C." and "J.L.," the charges were held for court. PE 1, para. 5.

11. On October 20, 2000, District Justice Gerwick again found that "D.M." was incompetent to testify, and for the second time dismissed the charges concerning him. PE 1, para. 6.

12. After charges concerning "D.M." were refiled, on January 31, 2001, a third preliminary hearing was held, and the charges concerning "D.M." were held for court. PE 1, para. 7.

13. On February 5, 2001, in the Court of Common Pleas of Venango County, a trial concerning all three victims began, at which Respondent was the prosecutor. PE 1, para. 8

14. On February 13, 2001, with regard to "D.M.," Mr. Anderson was found guilty of one count of Indecent Assault and not guilty of one count of IDSI. With regard to "J.L.:" and "T.C.," the jury was deadlocked and a mistrial was declared as to the charges concerning those alleged victims. PE 1, para. 9.

15. On March 26, 2001, for the conviction of Indecent Assault concerning "D.M.," Mr. Anderson was sentenced to incarceration of three to 24 months less one day in the Venango County Jail. PE 1, para. 10.

16. Beginning in early or mid-September 2001, Mr. Anderson was retried for the charges relating to "J.L." and "T.C." PE 1, para. 11.

17. On September 17, 2001, Mr. Anderson was found guilty of one count of Indecent Assault concerning "T.C." and one count of IDSI and two counts of Indecent Assault concerning "J.L." PE 1, para. 12

18. Mr. Anderson filed timely appeals with the Superior Court concerning the convictions as to "D.M.," "T.C." and "J.L." PE 1, para. 13.

19. By an Opinion dated April 21, 2004, a panel of the Superior Court determined that the convictions concerning "T.C.," "J.L." and "D.M." should be reversed. PE 1, para. 14

20. The convictions concerning "J.L." and "T.C" were reversed because of Respondent's misconduct in closing arguments, including "utilizing intemperate language and making an [obscene] hand gesture." PE 1, para. 15.

21. The conviction concerning "D.M." was reversed because of late amendment of the Criminal Information, and Mr. Anderson was discharged as to that matter. PE 1, para.16

22. On about July 31, 2004, Respondent filed on behalf of the Commonwealth a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania concerning the decision of the Superior Court which Petition was denied on February 22, 2005. PE 1, para.17

23. On September 6, 2005, jury selection was conducted for the retrial of Mr. Anderson on the matter concerning "T.C." and "J.L." PE 1, para 18.

24. Following jury selection, the Court found "T.C." and "J.L." incompetent to testify and dismissed the jury. PE 1, para.19.

25. On March 8, 2007, pursuant to an appeal filed by Respondent on behalf of the Commonwealth, the Superior Court reversed and remanded the matter for trial. PE 1, para. 20.

26. On September 26, 2007, a Motion for a Competency Hearing for "T.C." and "J.L." was filed on behalf of Mr. Anderson. PE 1, para. 21.

27. The Motion alleged that Respondent, as counsel for the Commonwealth, had improperly "coached" "T.C." and "J.L." before hearings, and the defense requested a new competency hearing for those individuals. PE 1, para.22.

28. On September 26, 2007, the trial court granted the Motion for a new competency hearing. PE 1, para. 23.

29. On October 29, 2007, the trial court ordered among other things, that Respondent was not to interview any of the witnesses whose competency was to be determined without the presence of the psychologist from Polk Center who had been a counselor for those witnesses, or another responsible person from Polk Center. PE 1, para. 24.

30. Pursuant to the October 29, 2007 Order, Respondent was to keep a log showing when interviews occurred and who was present, as well as to deliver to defense counsel any assessments of the witnesses conducted by the Polk Center after January 1, 2004, and to provide a witness list to opposing counsel at least two weeks before jury selection. PE 1, para. 25.

31. On November 8, 2007, the court scheduled the competency hearing for "T.C." and "J.L." for February 1, 2008. PE 1, para. 26. The hearing was continued several times until June 6, 2008. PE para. 27, 28

32. Six days prior to the June 6, 2008 competency hearing, Respondent met with "J.L." for several hours and, among other things told him the questions which would be asked of him, along with the answers. PE 1, para. 29

33. Respondent did not have any other individual present with him when he interviewed "J.L.," in violation of the court's October 29, 2007 Order. PE 1, para. 30.

34. At the hearing on June 6, 2008, Respondent asked "J.L." the questions for which he had prepared him. PE 1, para. 31.

35. Also at the hearing, Respondent repeatedly misrepresented to the Court his contact with "J.L." prior to the hearing. PE 1, para. 32.



36. Respondent failed to keep a log of his meetings with the prospective witnesses in further violation of the Court's Order of October 29, 2007. PE 1, para. 33.

37. Because of Respondent's violation of the October 29, 2007 Order, the Court rescheduled the competency hearing for July 3, 2008. PE 1, para. 34.

38. On July 16, 2008, the defense filed several motions to dismiss, including one on double jeopardy grounds in which specific instances of Respondent's alleged misconduct was cited. PE 1, para. 35.

39. On September 30 and 31, 2008, the Court conducted hearings on the Motions to Dismiss and then ordered the parties to submit briefs concerning the Motion to Dismiss on double jeopardy grounds. PE 1, para. 36.

40. After considering briefs by the parties, by Opinion and Order dated February 6, 2009, the Court dismissed the matters on double jeopardy grounds. PE 1, para. 37.

41. On March 3, 2009, Respondent filed a Notice of Appeal to the Superior Court on behalf of the Commonwealth. PE 1, para. 38.

42. On October 22, 2010, a panel of the Superior Court reversed (with one dissent) and remanded the matter for trial. PE 1, para. 39.

43. On January 6, 2010, the Superior Court granted Mr. Anderson's request for reargument before the court *en banc*. PE 1, para. 40.

44. By Majority Opinion and Order dated November 3, 2011, the Superior Court determined that, based on a pattern of intentional prosecutorial misconduct by Respondent, the charges against Mr. Anderson concerning "T.C." and

"J.L." should be dismissed and Mr. Anderson deemed acquitted pursuant to double jeopardy consideration. PE 1, para. 41.

45. While the minority found that double jeopardy should not attach, it also found that Respondent had engaged in the alleged misconduct concerning "J.L." PE 1, para. 42.

46. Because of Respondent's conduct, the Commonwealth can no longer try Mr. Anderson for the charges concerning "T.C." and "J.L." PE 1, para. 43.

**Charge II: Culver**

47. On February 13, 2009, a Criminal Information was filed against Ryan Culver in the Court of Common Pleas of Venango County. PE 1, para. 45.

48. Mr. Culver was charged with one count each of endangering the welfare of children, aggravated assault actually causing serious bodily injury, and aggravated assault attempting to cause serious bodily injury. PE 1, para. 46.

49. At all times relevant thereto, Respondent was the prosecuting attorney representing the Commonwealth with regard to the criminal charges filed against Mr. Culver. PE 1, para. 47

50. On March 22, 2010, following a jury trial, Mr. Culver was convicted of endangering the welfare of children and aggravated assault (actually causing bodily injury) and not guilty of aggravated assault (attempting to cause bodily injury). PE 1, para. 48.

51. During the trial, Respondent made comments expressing his personal opinion about the truthfulness of Mr. Culver. PE 1, para. 49.

52. Respondent also, *inter alia*, misrepresented during his opening statement the evidence which he was presenting to the jury including evidence which did not exist. PE 1, para. 50.

53. Respondent's misrepresentations included, but were not limited to, the fact that doctors would testify that they had reviewed Mr. Culver's version of how the minor child involved was injured, and that Mr. Culver's version was not consistent with those injuries. PE 1, para. 51.

54. During the trial, Respondent also engaged in intimidating conduct to the defendant and his counsel when he "repeatedly yelled, menaced and pointed in the faces of the defendant and defense counsel." PE 1, para. 52.

55. Respondent, during closing arguments, mischaracterized evidence presented by expert witnesses. PE 1, para. 53.

56. Because of Respondent's misconduct, the trial court granted the defendant's motion for a new trial, but denied the defense motion for dismissal on double jeopardy grounds. PE 1, para. 54

57. Both Respondent and the defense filed timely appeals of the trial court's decision to the Superior Court. PE 1, para. 55

58. In its Opinion, dated August 21, 2012, the panel of the Superior Court unanimously affirmed the trial court's decision that Respondent had engaged in prosecutorial misconduct and ordered a new trial for Mr. Culver. PE 1, para. 56.

59. Shortly after the Opinion was filed, Respondent was terminated from his position by the District Attorney's Office and another prosecutor was assigned to the case. PE 1, para. 57.

60. Mr. Culver later entered a plea of guilty to the charge of endangering the welfare of a child and the other charges were dismissed. PE 1, para. 58.

### **Charge III: Sundol**

61. On or about August 20, 2010, a criminal complaint was filed against Beverly Sundol, charging her with three counts of burglary, one count of theft by unlawful taking, and one count of conspiracy to commit burglary. PE 1, para. 60.

62. On September 1, 2010, a preliminary hearing was held concerning the criminal charges filed against Ms. Sundol, at which Respondent was the attorney for the Commonwealth and Ms. Sundol was represented by Lorraine A. Smith, Esquire after which all charges were held for court. PE 1, para. 61.

63. On October 8, 2010 without the knowledge or permission of Ms. Smith, Respondent picked up Ms. Sundol at the Titusville Police Station, to transport her to the Venango County Courthouse to testify against her co-defendant in a "Gagnon 1" hearing. PE 1, para. 62.

64. While Respondent was transporting Ms. Sundol, and while they were awaiting the "Gagnon 1" hearing, he discussed with Ms. Sundol the case for which he was prosecuting her and for which Ms. Smith was representing her. PE 1, para. 63.

65. Respondent did not inform Ms. Smith of his discussion with her client, Ms. Sundol, and did not have her permission to discuss the matter with Ms. Sundol. PE 1, para 64.

66. After Ms. Smith became aware of Respondent's discussion with Ms. Sundol, on November 15, 2010, she filed a motion with the Court requesting Respondent's disqualification as counsel for the Commonwealth. PE 1, para. 65.

67. After a hearing, by an Opinion and Order dated December 16, 2010, Respondent was disqualified from representing the Commonwealth in the Venango County prosecution of Ms. Sundol. PE 1, para. 66.

**Charge IV: Failure to Respond**

68. By letter of inquiry dated September 24, 2012, Petitioner informed Respondent of the allegations against him in the Anderson and Culver matters. PE 1, para. 68.

69. The certified mail for that letter was returned unclaimed. PE 1, para. 69.

70. On November 19, 2012, Respondent was personally served with the September 24, 2012 letter of inquiry. PE 1, para. 70.

71. By letter dated December 16, 2012, hand-delivered to Respondent, Respondent requested an additional 10 days to respond to the September 24, 2012 letter of inquiry. PE 1, para. 71.

72. By letter dated December 19, 2012, Petitioner agreed to an extension to January 9, 2013. PE 1, para. 72.

73. Respondent did not respond to the September 24, 2012 letter of inquiry. PE 1, para. 73.

74. By letter dated March 15, 2013, sent by certified mail, return receipt requested, Respondent was informed of the requirement that he respond, and that his failure to do so would be a violation of Rule 203(b)(7), Pa.R.D.E., and also a violation of Rule of Professional Conduct 8.1(b). PE 1, para. 74.

75. The March 15, 2013 certified mail was returned unclaimed, and was personally served on Respondent on May 26, 2013. PE 1, para. 75.

76. Respondent still did not respond. PE 1, para. 76.

77. The Disciplinary Board provided Respondent with notice, by mail, sent to the attorney registration address which Respondent had provided of the date, time, and place of the prehearing conference and hearing in this matter. PE 5; N.T. 5.

78. The mailing to Respondent of the Notice of Prehearing Conference and Hearing was not returned to the Disciplinary Board.

79. Respondent did not appear for the prehearing conference or the hearing. PE 6; N.T. 5.

### 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 3.3(a)(1) – A lawyer shall not knowingly make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

2. RPC 4.2 – In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 to do so by law or a court order.

3. 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.

4. 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.

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.

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

Disciplinary proceedings against Respondent were instituted by Office of Disciplinary Counsel by way of a Petition for Discipline filed on May 14, 2014. The Petition charged Respondent with violating multiple Rules of Professional Conduct and one Rule of Disciplinary Enforcement arising out of allegations of prosecutorial misconduct. Respondent failed to file an Answer to Petition for Discipline; the factual allegations contained in the Petition are deemed admitted. Rule 208(b)(3), Pa.R.D.E. Respondent failed to participate in the prehearing conference or attend the disciplinary hearing. The record demonstrates that he was personally served with the Petition and had notice of the date, time, and place of the prehearing conference and disciplinary hearing. Petitioner has established by a preponderance of clear and satisfactory

evidence that Respondent's actions constitute professional misconduct. *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441,444 (Pa. 2000)

Respondent was an Assistant District Attorney in Venango County during the time frame of the misconduct. In three separate cases, he engaged in various forms of prosecutorial misconduct. During the prosecution of Anderson, Respondent violated a court order by interviewing one of the alleged victims without the presence of a responsible person from the Polk Center. He then misrepresented to the court his contact with that alleged victim. Respondent utilized intemperate language and made a profane hand gesture during the closing argument in the second trial of Anderson, resulting in reversal of Anderson's conviction. Respondent's conduct was particularly harmful for the Commonwealth and for two alleged victims, as the charges against Anderson as to those alleged victims were dismissed on the basis of double jeopardy.

During the prosecution of Culver, Respondent made misrepresentations during his opening statement as to the evidence, including evidence that did not exist. During closing argument, Respondent mischaracterized the existence of expert witnesses. Respondent attempted to intimidate the defendant and his counsel by repeatedly yelling, menacing, and pointing in their faces.

In the Sundol prosecution, Respondent discussed Sundol's case with her, without the knowledge or consent of Sundol's counsel, resulting in the Court disqualifying Respondent as counsel for the matter.

Having concluded that Respondent violated the Rules, this matter is ripe for the determination of discipline. Office of Disciplinary Counsel and the Hearing Committee have recommended that Respondent be disbarred. After considering the nature and gravity of the misconduct as well as the presence of aggravating or



mitigating factors, *Office of Disciplinary Counsel v. Gwendolyn Harmon*, 72 Pa. D. & C. 4th 115 (2004), we recommend that Respondent be disbarred.

Respondent's actions constitute serious misconduct. While there is no *per se* discipline in Pennsylvania, prior similar cases are instructive and are suggestive of the most severe sanction when, as here, an attorney engages in repeated dishonest conduct, misrepresentation to the court and lack of respect for the court in his capacity as a prosecutor. *Office of Disciplinary Counsel v. Lucarini*, 472 A.2d 186, 189-91 (Pa. 1983). In *Office of Disciplinary Counsel v. Holston*, 619 A.2d 1054 (Pa. 1983), the respondent-attorney Holston forged a court order and lied to the court when questioned about the order. The Supreme Court disbarred Holston, explaining that lying to a court is "an egregious species of dishonesty." *Id.* at 1056. Respondent's position as a prosecutor is an aggravating factor, because misconduct by a public officer is particularly harmful to the public's confidence in the integrity of the legal system. *Office of Disciplinary Counsel v. Cappuccio*, 48 A.3d 1231, 1240 (Pa. 2012) ("[T]he fact that a lawyer holds a public office, or serves in a public capacity, as here, is a factor that properly may be viewed as aggravating the misconduct in an attorney disciplinary matter.")

We find Respondent's failure to participate in the disciplinary process a significant aggravating factor. This lack of involvement began with Respondent's failure to respond to the letter of inquiry sent by Petitioner in the Anderson and Culver matters, and continued with Respondent's failure to participate in any fashion in the formal proceedings which were filed against him, despite his knowledge of the existence of these proceedings. This failure to respond and appear demonstrates Respondent's lack of remorse and failure to accept responsibility for his actions. It further denotes a

pointed lack of interest in preserving his privilege to practice law. *Office of Disciplinary Counsel v. Licari*, 111 DB 2011 (2012).

The primary purpose of the disciplinary system in Pennsylvania is to protect the public from unfit attorneys and to preserve public confidence in the legal system. *Office of Disciplinary Counsel v. Stern*, 526 A.2d 1180 (1987). The evidence produced by Petitioner convincingly proved that Respondent is a danger to the public and the profession.


V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, James Paul Carbone, be Disbarred from the practice of law.

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 E. Schwager, Board Member

Date: June 17, 2015