

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 345, Disciplinary Docket
Petitioner : No. 3 - Supreme Court
:
:
v. : No. 75 DB 1995 - Disciplinary
:
:
:
[ANONYMOUS], : Attorney Registration No. []
:
Respondent : ([] 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 July 20, 1995, the matter was referred to Hearing
Committee [], consisting of [], Esquire, Chairman, [], Esquire and
[], Esquire, members.

On October 2, 1995, the Disciplinary Hearing was held and on June 18, 1996, a Dispositional Hearing was held.

On August 7, 1996, the Hearing Committee Report was filed recommending a three (3) month suspension.

On September 5, 1996, a Brief on Exceptions was filed by Counsel for Respondent requesting an Oral Argument.

On September 23, 1996, a Brief Opposing Exceptions was filed by Petitioner.

On October 9, 1996, a Brief Opposing Exceptions was filed by Counsel for Respondent.

On January 24, 1997, Oral Argument was heard by a Panel consisting of Robert N. C. Nix, III, Esquire, Chairperson, Leonard A. Sloane, Esquire and Gregory P. Miller, Esquire, members.

This matter was adjudicated at the January 29, 1997 meeting of the Disciplinary Board.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is now located at Suite 3710, One Oxford Centre, Pittsburgh, Pennsylvania, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement (hereafter Pa.R.D.E.), 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 an attorney admitted to practice law in the Commonwealth of Pennsylvania, having been admitted to practice on or about October 23, 1974. Respondent maintains an office at []. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent represented [A] with respect to criminal charges against him in the case of Commonwealth v. [A], docketed at [] in the [] County Court of Common Pleas.

4. [A] was charged with drug related offenses.

5. [A] was convicted of the crimes in the [] County Court of Common Pleas on September 12, 1991.

6. On May 8, 1992, [A] was sentenced by the [] County Court of Common Pleas.

7. Subsequent thereto Respondent prepared a Petition for Bail. This was presented to the trial judge who indicated to Respondent the Court would not entertain the bail petition.

8. Respondent appealed [A's] conviction to the Pennsylvania Superior Court.

9. The judgment of the [] County Court of Common Pleas was affirmed on January 12, 1993 by the Superior Court.

10. On January 14, 1993, Respondent transmitted a letter to [A] advising him that his conviction was affirmed, that there was a thirty day period in which to file an appeal with the Supreme

Court, that the issues preserved for appeal were "good issues" and that a \$2,500 fee for the appeal to the Supreme Court would have to be paid in advance.

11. Sometime between January 14, 1993 and February 11, 1993, [B] spoke with Respondent by telephone. During their conversation, [B] advised Respondent that a check for \$2,500 would be forthcoming.

12. On February 4, 1993, [A] transmitted a letter to Respondent discussing various issues on his case. This letter stated "I would like to hear from you as soon as possible. My brother, [B], said he had talked to you and that you had filed everything already". This letter also requests a copy of the search warrant and confiscation sheet.

13.. On or about February 14,1997, the deadline to file the appeal passed.

14. On or about February 15th, Respondent sent [A] the search warrant and confiscation sheet requested.

15. On February 17, 1993, a check for \$2,500 was sent from [C] to the Respondent. The reference on the check was "[A]". Respondent negotiated the check.

16. [D] transmitted letters to Respondent on February 24, 1993 and March 2, 1993 with copies of opinions which she felt would be useful in prosecuting [A's] further appeal.

17. Respondent never advised [D] after receiving these opinions that an appeal had not been filed.

18. On March 19, 1993, [A] transmitted another letter to Respondent regarding points he wanted raised on his appeal to the Supreme Court.

19. After [A] learned that the appeal documents had not been filed with the Pennsylvania Supreme Court, he transmitted a letter on June 23, 1994 to Respondent requesting a refund of the \$2,500.

20. Respondent never filed a Petition for allocatur or any other document with the Pennsylvania Supreme Court appealing the Order of the Pennsylvania Superior court affirming the conviction of [A], and Respondent retained the \$2,500 fee.

21. Respondent never advised [A] that this appeal was not filed, or his reasons for not doing so. This information was absent from Respondent's correspondence to [A] on February 15, 1993 enclosing the search warrant and confiscation sheet.

22. Respondent received an Informal Admonition on June 25, 1996 for violations of Disciplinary Rules 1-102(a)(4), (5), (6); 6-101(a)(3), and 7-101(a)(1), (2) and (3) of the Code of Professional Responsibility. Respondent was found in that instance to have neglected a legal matter and was further found to have engaged in deceit and misrepresentation by making false representa-

tions to his client that he had undertaken action which in fact he had not.

23. Respondent further received a Private Reprimand on April 5, 1990 for violations of Disciplinary Rules 6-101(a)(3) and 7-101(a)(2) and (3). In that instance Respondent neglected a legal matter resulting in the case being dismissed for lack of activity.

III. CONCLUSIONS OF LAW

Respondent violated RPC 1.4(a) by failing to keep his client advised about the status of his appeal.

Respondent violated RPC 8.4(c) by accepting a \$2,500 check without advising his client that it would be applied against past due fees and not for the pursuit of an appeal.

IV. DISCUSSION

The issue before this Board is a determination of what constitutes appropriate discipline in the matter before us. The Respondent represented [A] in a criminal proceeding in [] County.

The proceedings involved the illegal use of drugs. Although his client was found guilty of the charges, there is no question that the Respondent provided his client with competent representation at trial at the Petition for Bail before the Trial Court and through the appeal process to the Pennsylvania Superior Court.

The Respondent's conduct after the Superior Court's affirmance of the Trial Court's findings is what is in question and this is where the issue of credibility becomes important. On January 14, 1993, Respondent wrote to [A] advising him that he had thirty (30) days to file an appeal to the Supreme Court and that Respondent would not proceed without receiving a retainer of \$2,500

("Retainer"). There is contradictory evidence concerning the Respondent's representations to [A], and it is this Board's opinion that the testimony of Respondent is credible, even though in a case where the credibility of witnesses is an issue, the Hearing Committee's findings serve as guidelines to this Board in its review de novo. Office of Disciplinary Counsel v. Ewing, 496 Pa. 35, 436 A.2d 139 (1981) and In re Anonymous 25 DB 84, 36 D & C. 3d 637 (1985)

It has always been Disciplinary Counsel's burden to prove misconduct by a preponderance of the evidence with proof that is clear and satisfactory. Office of Disciplinary Counsel v. Keller, 509 Pa. 573, 506 A.2d 872, 875 (1986); Office of Disciplinary Counsel v. Wittmaack, 513 Pa. 609, 522 A.2d 522 (1987). It is this Board's opinion that Disciplinary Counsel has met this burden.

It is obvious to this Board that the Respondent misled [A]. Clearly [A] believed that the Respondent was pursuing his appeal. By failing to advise [A] of his intent not to proceed, the Respondent failed in his duty to keep his client informed about the status of the appeal.

In addition, the Respondent accepted a \$2,500.00 retainer from [A's] brother which was designated "[A]" after the deadline for

filing the appeal. Not only did Respondent fail to advise [A] that the deadline for appeal had passed and return the retainer, he also failed to advise his client as to the application of this Retainer. These acts clearly constitute misconduct.

Having decided that Disciplinary Counsel has proved that Respondents actions amount to misconduct, an appropriate discipline must be derived. The Hearing committee recommended a three (3) month suspension based on Respondent's prior disciplinary history.

The Respondent's current misconduct includes the neglect of a client's matter which actions are similar to those that are the basis of his prior conduct. This Board feels that were there no prior transgressions by the Respondent, private discipline would be appropriate. Unfortunately, this is not the case. It is this Board's responsibility to maintain the public's confidence in the legal profession, In re Leopold, 469 Pa. 384, 366 A. 2d 227 (1976), and to this end, the imposition of public discipline is clearly warranted.

This Board continues to be troubled by the Respondent's failure to acknowledge his misconduct. We understand that an attorney who is defending a charge against him, in the first instance, may not feel that he has erred and would therefore not

exhibit any remorse. However, the present Respondent has a history of similar misconduct and his counsel admitted during oral argument that Respondent might not have appropriately handled the receipt of the retainer. In this case, the Respondent's failure to show remorse is misguided and clearly inappropriate.

In making its recommendation, had this Board possessed the authority to grant a Public Censure with conditions, this would be the appropriate situation. This Board feels strongly that [A~~3~~] request that Respondent refund the \$2,500.00 retainer be honored and that would be our recommended condition in this matter. Clearly, such an undertaking by the Respondent would resolve any issues of remorse and of his handling of the retainer. This Board would hope that this condition, although not a part of our Recommendation, will be taken under consideration and perhaps addressed by our Supreme Court.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, [], be subjected to a Public Censure.

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: _____
Robert N.C. Nix, III, Member

Date: June 2, 1997

Board Members Witherel and Marroletti recused themselves.

Board Member Kerns dissented for a three (3) month Suspension.

O R D E R

PER CURIAM:

AND NOW, this 29th day of July, 1997, upon consideration of the Report and Recommendations of the Disciplinary Board dated June 2, 1997, it is hereby

ORDERED that [RESPONDENT] be and he is SUSPENDED from the Bar of this Commonwealth for a period of three months and he shall comply with all the provisions of Rule 217 Pa.R.D.E. It is further ORDERED that respondent shall refund the \$2,500.00 retainer and, pursuant to Rule 208(g), Pa.R.D.E., he shall pay costs to the Disciplinary Board.