

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 38 Disciplinary
Petitioner : Docket No. 3
: :
: No. 95 DB 1992
v. : :
: Attorney Registration No.
: []
[ANONYMOUS] : :
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 September 23, 1992, a Petition for Discipline
was filed against [] (hereinafter "Respondent") pursuant to
three charges involving lack of diligence and promptness;
conduct involving dishonesty, fraud, deceit and misrepresen-
tation; and conduct prejudicial to the administration of
justice.

The matter was referred to Hearing Committee [],

chaired by [], Esquire, and which included Members [], Esquire and [], Esquire. The hearing was originally scheduled for January 7, 1993, but was not held until January 15, 1993. At this time, Charge III of the Petition for Discipline was withdrawn by the Petitioner. The Committee filed a report on May 15, 1993 and recommended a public censure and a three month suspension.

The Office of Disciplinary Counsel did not file a brief on exceptions. Respondent, however, requested an extension of time in which to file a Brief on Exceptions and the request was granted on June 3, 1993. On June 23, 1993, Respondent filed his Brief on Exceptions, and Petitioner filed its Brief Opposing Exceptions on July 8, 1993.

Oral argument was requested by the Respondent and was heard on August 6, 1993, by a panel of Board Members consisting of James J. Powell, Esquire, Robert J. Kerns, Esquire and Leonard A. Sloane, Esquire. The matter was adjudicated at the meeting of the Board on August 27, 1993.

II. FINDINGS OF FACT

1. Petitioner, whose principal office is now located at Suite 400, Union Trust Building, 501 Grant Street, 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 was born in 1955 and was admitted to practice law in the Commonwealth of Pennsylvania on November 26, 1980. He maintains his office at [].

CHARGE I: [A] MATTER

3. Respondent was retained by Complainant, [A], on February 23, 1988, to continue divorce proceedings which she commenced in 1986 against [B].

4. The divorce proceedings continued for the next two years under the court-appointed Master, [C], Esquire.

5. The principal issue focused on whether Complainant was bound by an oral agreement, later reduced to writing, that the parties entered into while they were in the Master's office awaiting a hearing in 1986 (N.T. 10-11). The agreement involved disposition of the marital property.

6. Complainant refused to sign the written agreement on the grounds that it differed materially from the oral argument.

7. The parties were separated in October 1985, and a non-consensual divorce was not possible until October 1988, at the earliest.

8. Respondent advised Complainant's former counsel, [D], by letter of February 23, 1988, that he was now representing her, as she wanted an attorney from her local area and that she had differences with Attorney [D] (P-2, P-3). Respondent also requested that Attorney [D] turn over Complainant's file.

9. Attorney [D] advised the Master that Respondent would be entering his appearance, and that he would be withdrawing by letter dated March 10, 1988 (P-7).

10. On March 16, 1988, [E], Esquire, attorney for Complainant's husband, wrote to the Master indicating that he had never been contacted by Respondent (P-9).

11. On March 24, 1988, Respondent wrote to Attorney [D] and sent a Praecipe for withdrawal and substitution of appearances (P-11).

12. Also on March 24, 1988, Attorney [E] received a letter from Respondent announcing his substitution of appearance (P-12).

13. The Master wrote to Respondent on March 24, 1988, inquiring whether he would be appearing for Complainant and whether she would consent to the divorce. Respondent never responded to this letter (P-13, 27).

14. Attorney [D] returned the Praecipe to Respondent along with a letter dated April 7, 1988. Respondent neither filed nor executed the substitution (P-14,

25).

15. The Master wrote to Respondent again to request a reply to his letter of March 24, 1988 (P-15). Respondent never replied (P-27).

16. On May 5, 1988, the Master was granted his request for withdrawal of his appointment (P-27).

17. A support hearing was held in July 1988. Respondent represented Complainant.

18. On August 19, 1988, Respondent wrote Attorney [E] to advise him that Complainant would like to negotiate a final resolution of all issues (P-17).

19. On or about November 4, 1988, Attorney [E] filed an Affidavit under §203(d) of the Divorce Code, asking that Attorney [C] be reappointed as Master (P-19).

20. Attorney [C] was reappointed as Master. On December 30, 1988, he sent notice of a hearing date set for January 31, 1989, to all parties, including Attorney [D] and Respondent (P-27).

21. When Attorney [E] decided that he needed Attorney [D] for his testimony as to the validity of the alleged prior agreement of 1986, he tried to reach Respondent three (3) times by phone to obtain his agreement to depose Attorney [D] in lieu of requesting his live testimony. Respondent failed to return these calls (N.T. 59-60, P-22).

22. On or about January 17, 1989, Attorney [E]

sent Respondent a Notice to Take Deposition of Attorney [D], scheduled for January 20, 1989 (N.T. 60). Respondent did not deny receipt of this notice (P-23).

23. The deposition was held on January 20, 1989. Respondent failed to attend, and did not object (N.T. 121).

24. Complainant testified that she had contacted Respondent four to five days before the Master's hearing scheduled for January 31, 1989. Respondent told her that the hearing was cancelled because he was unavailable that day, and that he would advise her when he obtained another hearing date (N.T. 20).

25. The Master's hearing was held as scheduled on January 31, 1989. Neither Complainant nor Respondent were in attendance (P-27).

26. On February 1, 1989, Complainant learned through a conversation with her husband that the hearing was held (N.T. 21).

27. On February 2, 1989, Complainant contacted Respondent and inquired about his failure to attend the hearing. Respondent told her that the hearing had been cancelled and that her husband was just trying to "get him going" (N.T. 21).

28. Respondent testified that he failed to attend the Master's hearing because he was in court that day. He further testified that he had contacted someone from the

Master's office and advised them of his situation (N.T. 95).

29. On February 24, 1989, Respondent wrote to the Master to request a rescheduled hearing date (P-24).

30. The Master replied in writing on February 28, 1989, to inform Respondent that he would not hold another hearing and was in the process of drafting his Report and Recommendation (P-25).

31. Toward the middle of March 1989, Complainant testified that she had called Respondent about the status of the matter, and he replied that he had not received word about the matter (N.T. 21).

32. On April 3, 1989, a Notice of Filing of Master's Report and the report itself was served upon all counsel (P-27).

33. The Master's Report stated that:

- a) the divorce would be granted;
- b) the alleged oral agreement would be enforced; and,
- c) Complainant would be required to pay attorney fees to her husband in the amount of \$1,977.40 (P-27).

34. Complainant contacted Respondent upon receipt of her copy of the Master's Report (P-23; N.T. 98).

35. Respondent filed Exceptions to the Report; however, he mailed the exceptions and they were received one day late (P-28). He also notified Complainant by letter dated April 17, 1989, that he filed the exceptions and that

he would contact her once he received notification regarding the assignment of a judge (P-30).

36. On May 1, 1989, Respondent wrote to Complainant to advise her that the exceptions had been assigned to Judge [F] and that Respondent would notify her of the procedure once it was determined (P-32).

37. Attorney [E] filed a Motion to Strike the Exceptions for lack of timely filing. A Rule to Show Cause why the Motion should not be granted was issued on May 4, 1989, returnable ten (10) days from service (P-33).

38. Respondent failed to respond to the Rule, and Attorney [E] moved on May 31, 1989, that the Rule to Show Cause be made absolute (P-35).

39. On June 2, 1989, Judge [F] entered an Order striking the exceptions on the basis that Respondent failed to oppose the motion (P-35).

40. On June 7, 1989, the recommendations of the Master's Report was granted and a Decree of Divorce was entered (P-36).

41. Respondent testified that Complainant terminated his services sometime between April and May 1989 (N.T. 96-97).

42. In late June 1989, Respondent advised Complainant that the hearing on the exceptions was scheduled for June 26, 1989. Respondent directed her to appear at his

office on that date, but when she arrived, he was not there. Respondent's secretary attempted to reach him, but was unsuccessful (N.T. 26-27).

43. Complainant then contacted [] County Court and learned for the first time that the exceptions had been dismissed (N.T. 27, 28).

44. After numerous attempts to contact Respondent during the next two days, Complainant finally reached him at his home on or about June 28, 1989. At this point Respondent advised her that the hearing had been cancelled, but that he would file something else to help her case (N.T. 29).

45. Complainant was not aware that the Divorce Decree had been entered until she received a copy from the Court in the mail on or around June 28, 1989 (N.T. 31).

46. On or around July 14, 1989, Complainant terminated Respondent's services (N.T. 32).

47. Complainant hired other counsel who filed a Motion to Vacate or Set Aside the Divorce Decree (N.T. 32-33; P-37).

48. On advice of counsel, Complainant decided to forego pursuit to re-open the divorce litigation due to the risk that she would have to pay additional counsel fees. Instead, she filed a civil action against Respondent which is pending (N.T. 34-35).

CHARGE II: [G] MATTER

49. Complainant, [G], suffered an injury to the knee while working for the [H] Company ("[H]") in or around June 1988.

50. In June 1989, Complainant underwent knee surgery and received workers' compensation. Complainant's treating physician was Dr. [I].

51. On March 19, 1990, [H] filed a petition to terminate Complainant's workers' compensation benefits, alleging that Complainant was capable of performing his job once again. A pre-hearing conference was scheduled for May 29, 1990.

52. In or around the beginning of April 1993, Complainant contacted Respondent regarding the continued receipt of his benefits (N.T. 146).

53. Complainant testified that Respondent agreed to represent him for a fee of \$500 or \$600, but that Respondent never executed a written fee agreement (N.T. 146-147).

54. Respondent also agreed to obtain medical information from Dr. [I] and the employer's physician, Dr. [J] (N.T. 180-181).

55. At the pre-hearing conference, held on May 29, 1990, Respondent appeared on behalf of Complainant and stated that he had yet to obtain medical information from the physicians, even though he had made requests for it (P-40,

P.5).

56. Respondent failed to attend the deposition of Dr. [J], which was held on June 15, 1990 (Stip. 5).

57. Respondent entered into a stipulation that he did not contact Dr. [I] for information about Complainant's condition at anytime between March and November 1990 (Stip. 4).

58. Respondent testified that Complainant had never executed the medical authorizations that Respondent sent to him; hence, he was not able to request any medical information (N.T. 181).

59. On September 5, 1990, Respondent allegedly advised Complainant by letter that he would no longer represent him, and also advised the referee (R-1; N.T. 183-185).

60. On October 12, 1990, the referee issued a Notice of Hearing, a copy of which was sent to both Complainant and Respondent (P-41).

61. Respondent testified that he sent a second letter to Complainant on October 16, 1990, and enclosed the Notice of Hearing and advised Complainant to secure other counsel (R-2; N.T. 183-185).

62. Complainant testified that he was unable to identify either of the letters. Neither one bore the initials of a typist (N.T. 183-184).

63. Complainant also testified that he met with Respondent one week prior to the scheduled hearing date, and Respondent advised him that he had still not secured the necessary medical testimony, but that he would do so prior to the hearing (N.T. 152).

64. Complainant further testified that at 9:45 a.m. on the morning of the hearing, Respondent contacted him and told him not to go to the hearing because it was continued (N.T. 154).

65. Approximately an hour later, Complainant called Respondent and was again advised that he was not required to attend the hearing, and that Respondent had spoken to the referee and that the hearing had been rescheduled (N.T. 155).

66. The hearing was conducted as scheduled on November 27, 1990 (N.T. 155).

67. On November 30, 1990, the referee issued the decision terminating Complainant's workers' compensation benefits (P-42).

68. It was stipulated that the referee, if called, would testify, without contradiction, that he did not have any recollection of having received any letter from the Respondent or have any copy of any letter addressed to Complainant stating that Respondent would not represent Complainant; that Respondent did not appear at the hearing on

November 23, 1990; that he issued a decision to terminate Complainant's benefits on November 30, 1990; and, that he first learned that Respondent was not representing Complainant after his decision was issued (Stip. 6).

69. On or about December 3, 1990, Complainant received a letter from the Bureau of Workers' Compensation enclosing the referee's decision (N.T. 155).

70. Complainant testified that he immediately called Respondent upon receipt of the letter and that Respondent said that he would check into the matter and that Complainant should call him back at 4:00 p.m. (N.T. 157).

71. When Complainant called back, he was told by Respondent's secretary that Respondent had left the office and would not return that day (N.T. 157).

72. Complainant then contacted the referee. At that time, the referee called Respondent's office and was advised that Respondent was not representing Complainant (Stip. 6e).

73. Complainant testified that he first learned that Respondent was no longer representing him when Respondent conveyed his information to the referee (N.T. 158).

74. Complainant then called Respondent and related his conversation with the referee. Respondent claimed that the situation was a misunderstanding and that he

would call the referee to straighten out the matter. Respondent suggested that Complainant call him back at approximately 2:00 p.m. that day (N.T. 158).

75. When Complainant called back as requested, he was informed that Respondent was not in the office (N.T. 158).

76. On or about December 4, 1990, Complainant consulted another attorney to inquire about the termination of workers' compensation benefits (N.T. 159).

77. Upon the advice of the other attorney, Complainant met with Respondent at his office on December 6, 1990. Respondent advised him that he was still handling the workers' compensation matter and that the hearing of November 27, 1990, should have been continued. Respondent further advised that he had an appointment with the referee the following day, December 7, 1990 (N.T. 159).

78. On December 7, 1990, Complainant went to the referee's office and was informed that the referee did not have an appointment with Respondent (N.T. 160).

79. At approximately 1:20 p.m., on December 7, 1990, Complainant called Respondent, whose secretary advised Complainant that Respondent was not in the office (N.T. 160).

80. Upon the advice of the referee and because he was unable to find another attorney to represent him, Complainant filed an appeal pro se on December 11, 1990 (P-

43).

81. In an opinion dated April 1, 1991, Commissioner [K] reversed the decision of the referee and granted Complainant a new hearing (P-44).

82. Complainant's case remains under litigation.

83. Respondent has a prior disciplinary record consisting of two Informal Admonitions, which were administered in 1985 and 1987, and a Private Reprimand, administered in 1988. All involved charges of neglect, failure to fulfill client obligations, and misrepresentation.

III. CONCLUSIONS OF LAW

By his conduct in Charge I, the [A] matter, Respondent has violated the following Rules of Professional Conduct:

a) RPC 1.3, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client.

b) RPC 1.4(a), which provides that a lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.

c) RPC 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

d) RPC 8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

By his conduct in Charge II, the [G] matter, Respondent has violated the following Rules of Professional Conduct:

a) RPC 1.3, which provides that a lawyer shall act with reasonable diligence and promptness in representing a client.

b) RPC 3.3(a)(1), which provides that a lawyer shall not knowingly make a false statement of material fact or law to a tribunal.

c) RPC 8.4(c), which provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

d) RPC 8.4(d), which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. DISCUSSION

Each disciplinary matter must be decided upon the totality of the given facts. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186, 190 (Pa. 1983). To determine the proper sanction, the Pennsylvania Supreme Court (hereinafter Court) has imposed a balancing test which weighs a concern for the welfare of the public with respect for the substantial interest of the attorney in continuing the practice of law. Office of Disciplinary Counsel v. Kanuck, 535 A.2d 69, 74 (Pa. 1987). The primary purpose of the disciplinary system is not to punish, but only to protect the public from unfit attorneys and maintain the integrity of the legal system. Office of Disciplinary Counsel v.

Stern, 526 A.2d 1180, 1186 (Pa. 1987). Hence, the Board attempts to tailor the discipline to the correct behavior which led to the violations.

The violations in the instant matters result primarily from neglect. In addition, the two Informal Admonitions and Private Reprimand previously received by Respondent also resulted from neglect. Therefore, the Board concluded that the appropriate sanction would have to be greater than a Private Reprimand, but that a Private Reprimand with Conditions would not solve the problem. The prior Private Reprimand failed to correct Respondent's behavior.

The Board has concluded that some form of public discipline is appropriate because Respondent's numerous disciplinary violations indicate a chronic problem. A Private Reprimand might not prevent such conduct in the future, yet the Public Censure plus a Suspension, recommended by the Hearing Committee, is too severe. The Board notes that Respondent manages both a private practice and has served as conflicts counsel for [] County for the past eight (8) years. The Board recognizes the demands placed upon Respondent by the latter position, and is impressed by Respondent's ability to hold such a position, plus maintain a solo practice for that length of time.

Disciplinary cases generally hold that Public Censure is the appropriate public discipline to be imposed for cases involving neglect. Public Censure is recommended especially for

cases of neglect which involved misrepresentation, such as the instant matter. In Re Anonymous No. 12 DB 76, D. & C. 3d 294 (1977). Another case involved neglect and unavailability to the client, even though an Informal Admonition had been administered for similar violations. The Court determined Public Censure to be the proper sanction for such a case. In Re Anonymous No. 32 DB 77, 9 Pa. D. & C. 3d 451 (1979).

Only in cases involving extreme deception and lack of communication to a series of clients has the court deemed the higher sanction of suspension to be appropriate. In Re Anonymous No. 92 DB 86 and 59 DB 87, 5 Pa. D. & C. 4th 225 (1989). A suspension of one year or more would require Respondent to notify his clients, and the Board notes that imposition of such discipline might result in irreparable harm to Respondent, considering his unique occupation. See Pa.R.D.E. 217(a). Furthermore, an attorney who is suspended for a period of time greater than one year may not resume practice until the attorney files a petition and is reinstated by Order of the Court. Pa.R.D.E. 218. Again, Respondent might suffer financial ruin if such a discipline were imposed. Hence, the Board concludes that the gravity of Respondent's violations, when taken into consideration with his current occupation, warrant imposition of a Public Censure.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsyl-

vania respectfully recommends that Respondent, [], be subjected to a Public Censure.

It is further recommended that the Court direct that Respondent pay all of the necessary expenses incurred in the investigation and processing of this matter pursuant to Rule 208(g), Pa.R.D.E.

Respectfully submitted,

THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

By: _____
James J. Powell, Member

Date: December 6, 1993

Messrs. Hill, Paris, Sloan, Saltz and Dean Carson did not participate in the adjudication.

PER CURIAM:

AND NOW, this 16th day of May, 1994, upon consideration of the Report and Recommendations of the Disciplinary Board dated December 6, 1993, it is hereby

ORDERED that [Respondent] be subjected to PUBLIC CENSURE by the Supreme Court.

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

Senior Justice Montemuro dissents.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.