

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1737 Disciplinary Docket No. 3
Petitioner :
 : No. 17 DB 2010
v. :
 : Attorney Registration No. 83720
DAVID M. GILLILAND, :
Respondent : (Allegheny County)

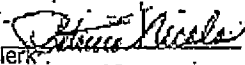
ORDER

PER CURIAM:

AND NOW, this 1st day of March, 2012, a Rule pursuant to Rule 208(h), Pa.R.D.E., having been entered upon respondent by this Court on January 25, 2012, to show cause why the Order of this Court entered September 8, 2011, imposing probation should not be modified as set forth in the Report and Recommendation of the Designated Member of the Disciplinary Board dated December 21, 2011, and no response having been filed, it is hereby

ORDERED that the Rule is made absolute; respondent is suspended from the Bar of this Commonwealth for a period of three years; and he shall comply with all the provisions of Rule 217, Pa.R.D.E. It is further ORDERED that respondent shall pay the expenses incurred as a result of the probation revocation proceedings pursuant to Rule 208(g), Pa.R.D.E.

A True Copy Patricia Nicola
As of 3/1/2012

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 1737, Disciplinary Docket
Petitioner	:	No. 3—Supreme Court
	:	
v.	:	No. 17 DB 2010—Disciplinary
	:	Board
DAVID M. GILLILAND,	:	
Respondent	:	Attorney Registration No. 83720
	:	(Allegheny County)

REPORT AND RECOMMENDATION OF DESIGNATED BOARD MEMBER

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES
OF THE SUPREME COURT OF PENNSYLVANIA:

Pursuant to Rule 208(h) of the Pennsylvania Rules of Disciplinary Enforcement, the undersigned herewith submits this report and recommendation concerning the Petition for finding of probation violation filed by the Office of Disciplinary Counsel:

I. Procedural History of the Case

This matter comes before the Board following a Petition to Schedule a Probation Violation Hearing filed by Office of Disciplinary Counsel (“ODC”), dated December 6, 2011. By Order of the Board Chair dated December 8, 2011, the undersigned was designated as the Member of the Disciplinary Board before whom a hearing was to be held to consider ODC’s Petition. The hearing was scheduled, and held, commencing at 11:00 am on December 16, 2011. Present were Respondent (who appeared without counsel) and counsel for ODC.

The Petition filed by ODC was based upon the Court’s Order dated September 8, 2011, which had suspended Respondent from the practice of law for a period of three years, the suspension being stayed in its entirety; additionally, Respondent was placed on probation for a period of three years, subject to the following conditions:

1. Respondent was required to select a practice monitor subject to the approval of the Office of Disciplinary Counsel;

2. The practice monitor was required to do the following during the period of Respondent's probation:
 - a. meet with Respondent at least monthly to examine his progress towards satisfactory and timely completion of client legal matters, including regular communication with clients in returning telephone calls and responding to written correspondence;
 - b. periodically review all new client files, if applicable, to ensure that written fee agreements are being provided to all new clients Respondent has not regularly represented;
 - c. periodically examine Respondent's law office organization and procedures to ensure that he is maintaining an acceptable tickler system, filing system, and other administrative aspects of his practice;
 - d. file quarterly written reports on a Board-approved form with the Secretary of the Board; and
 - e. immediately report to the Secretary any violations by Respondent of the terms and conditions of probation.

Finally, it was ordered that Respondent pay the expenses incurred in the investigation and prosecution of the underlying disciplinary matter.

At the hearing held in this matter on December 16, 2011, ODC introduced a series of documentary exhibits (Exhibits A through E) without objection. Respondent testified briefly. He, too, introduced an exhibit (Exhibit F) which was admitted without objection. The undersigned marked the order scheduling the hearing as Exhibit G. At the conclusion of the hearing, Respondent issued a check payable to "PA Disciplinary Board" in the amount of \$1,521.42, representing the expenses incurred in the investigation and prosecution of the underlying proceedings (Exhibit H). The record was closed at that time.

II. The Underlying Charges

The charges that lead to the imposition of discipline stemmed from a series of events involving neglect of client matters, failure to return client files, failure to provide a written fee agreement and placing client assets at risk. In its Report and

Recommendation to the Court dated April 27, 2011, the Board determined that Respondent had violated RPC 1.3, RPC 1.4(a)(3), RPC 1.4(a)(4), RPC 1.5(b) and RPC 1.16(d).

The Board also noted that this was not Respondent's first brush with the disciplinary system: in 2004 he received an Informal Admonition for his failure, for nearly two years, to return funds to his client. He returned the money only after repeated requests from his client and the receipt of a letter of inquiry from ODC. In its Report, the Board noted: *"This previous encounter with the disciplinary system does not appear to have transformed Respondent's methods of practicing law, as the misconduct in the instant matter is so similar."*

Nevertheless, the Board made particular note of evidence presented to the Hearing Committee that showed Respondent was making a valuable contribution of services to the Juvenile Court Project and that he was doing good work for that entity. The Board's Report concluded that *"[w]e are persuaded that the sanction imposed should permit Respondent the opportunity to continue his work, with the recognition that any missteps will result in further involvement in the disciplinary system."*

The Report and Recommendation of the Board to impose the three year suspension, stayed upon the conditions noted above, was approved by the Court pursuant to the above-referenced Order. In their Petition, ODC seeks to have the stay lifted and the three year suspension put into effect.

III. Factual Determinations

As noted above, only Respondent presented testimony at the hearing. His testimony (which is found to be mostly credible, but not persuasive) established that by October 5, 2011 he was in receipt of the Court's Order, as evidenced by his written Agreement, signed and dated October 6, 2011 (Exhibit A-3); that he signed the Agreement acknowledging his duty to have a practice monitor appointed and to pay the costs of prosecution (Id.); that he wrote to ODC on October 6, 2011 enclosing the Agreement and a check, and stating that *"I have not yet been able to reach the attorney whom I would like to suggest as my mentor. I will continue to attempt to reach him today. His name is John B. Hayes...To be clear, I have had no conversation with him as*

of today, but I will do so as soon as I can. If he does not agree to the position, I do have others to contact.” (Exhibit A-5).

On October 12, 2011, Elaine M. Bixler, Secretary to the Board, wrote to Respondent advising that there was a discrepancy in the check issued in that the numerical dollar amount on the check did not match the written dollar amount; and returning the check to Respondent. (Exhibit A-6). In his testimony, Respondent denied having received the returned check (NT 13); however, did admit that by November he was aware of the discrepancy, and that the check had been returned. (Id.).

Respondent further admitted that even as of the date of the December 16th hearing, he still had not, as yet, made any contact whatsoever with the attorney he proposed to be his “mentor” (NT 16); nor had he made other than a general inquiry of another (unnamed) attorney to serve in that role. According to Respondent, that individual declined to serve. (NT 16). It is noted that there was no mention of this individual—or of outreach to any other individual—in Respondent’s October 6th letter (Exhibit A-5) or in Respondent’s testimony.

Thus, even assuming the veracity of Respondent’s representation that he received the Court’s Order by no later than October 5, 2011 (see Exhibits A-4 and A-5), it is clear that for the ensuing period up to and including the date of the violation hearing Respondent made no genuine effort to comply with the Court’s Order in terms of securing the services of a practice monitor.

It is also clear that even after being apprised of the check discrepancy in November, 2011, he made no effort to issue a corrected check until the very date of the hearing, despite having the funds present in his account to be able to do so. (See Exhibit F).

It warrants mention that on no less than two occasions (October 21 and November 22, 2011) ODC wrote to Respondent reminding him of the requirement to appoint a practice monitor and that the monitor must be approved by ODC (see Exhibits A-7 and A-8). The first letter was sent both certified mail, return receipt requested, and by first class mail. The certified mail was “unclaimed” but the first class letter was not returned. The second letter was personally served on Respondent on November 22, 2011 by the constable (See Exhibit A-9). Both letters referenced the fact that failure to have a

practice monitor approved would lead to a petition for finding of a violation of probation. It also bears noting that the letters referenced multiple fruitless attempts to contact the Respondent by telephone. No testimony was presented by Respondent to the effect that he made any attempt to either return the calls or to respond in any way to the letters.

Respondent's testimony was that he was "pretty depressed" (NT 11) and that he spent "*little time at my apartment. That's the problem with delivering things to me, I'm probably there three or four days a month. I go to my sister's place in Erie, I go to my sister's place in Houston, Texas, I go to my daughter's in North Carolina. I afforded traveling that way to those places going to truck stops and getting rides with truck drivers and things of that nature.*" (NT 11-12). When asked about treatment for his depression, he advised that he was not in treatment because "*[q]uite frankly, I can't afford any treatment.*"

But perhaps most significant in the context of the present Petition is the fact that Respondent is no longer employed in any fashion, and has not been since July, 2011 when he was laid off from his position with the juvenile project. (NT 20). This is critical to the matter because it was this very work that led the Board to a recommendation of leniency in the first place. Respondent's work with juveniles was cited as the key reason why imposition of immediate suspension should not be imposed.

When questioned about this aspect of the matter, Respondent candidly admitted that he has not even sought employment since the layoff, since it would negatively impact on his receipt of unemployment compensation benefits—which he cited as his sole source of income. (NT 18). In point of fact, he admitted that he did not even maintain a law office "*since the way I read the materials on unemployment is that if I put out a phone number and a fax number and say that I have a law office, I'm at that point presenting myself as an employed person, self-employed person, practicing law.*" (NT 24).

Respondent was pointedly questioned what impact a suspension would have on him, at present and in the foreseeable future. He responded:

Well, in terms of the way it's been for the last five months, very little difference, *because I'm not practicing.* I feel cornered, I guess, in that I cannot do anything whatsoever.

I've been approached by a couple of the non-profit organizations to help them with a couple of matters, which I would love to help them with, but I feel, you know, even on that, if they were to compensate me, I've got a problem as far as putting myself out as a sole practitioner, and then continuing to submit a report every two weeks to the unemployment board saying that I'm employed. I can't do that. (NT 20-21) (emphasis added).

At the conclusion of the hearing, Respondent did issue a check to the Board for the full amount of the costs imposed in the original order. (Exhibit H). He then requested another week's extension to secure the appointment of a practice monitor. Discussion ensued concerning Respondent's lack of an accessible, reliable telephone (NT 25) and the need for a "good" address for ODC to contact him. (Id.). The hearing ended with counsel for ODC expressing concerns regarding extending the time to appoint a practice monitor, and the need for ODC's approval of a monitor should one even be named. (NT 27-28).

Based upon the record, several points became apparent to this Board Member:

1. Respondent is not now, nor will he in the foreseeable future, be in the active practice of law; nor does he have any present intent to engage in that practice for the foreseeable future;
2. Respondent's transient lifestyle makes it difficult, if not nearly impossible, to reliably contact him or to monitor his practice, even if he had a practice monitor;
3. Respondent evidences the very same lackadaisical and neglectful conduct that lead to his Informal Admonition in 2004 and to his current brushes with the disciplinary system;
4. Respondent has learned little, if anything, from the current round of disciplinary proceedings, as he has failed to grasp the fact that he was already given a "second chance" at rehabilitation;
5. Respondent has not made any serious effort to secure the services of a practice monitor, as required by the Order of the Supreme Court of Pennsylvania; and
6. any additional delay in implementation of the directives of the Court would simply signal that dilatory and neglectful behavior is acceptable and will be rewarded.

IV. Recommendation

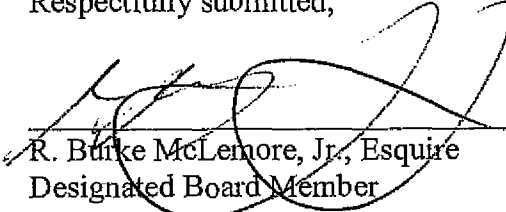
It is difficult not to sympathize with Respondent. In the proceedings before the Hearing Committee in the underlying case he blamed many of his problems on heart surgery in 2008, and upon pending divorce proceedings commenced in 2010. (See Findings of Fact 44 and 45). He does not appear to be a malicious or ill-intentioned individual. He says he is still depressed, and the undersigned Board Member has no reason to disagree with that.

The fact remains, however, that the practice of law requires attention to detail, accessibility by clients (and in this particular case, to ODC and the Board), and a modicum of discipline so that important matters are neither ignored nor overlooked. Here it cannot reasonably be questioned that Respondent simply did not do what was required of him in order to keep his license out of suspension status. There is no question that he knew what he had to do; and there is also no question that he did not do it. Whether that is due to neglect or intent would seem irrelevant: the fact remains that he unquestionably offered no legitimate excuse for non-compliance with the Court's Order. Then, of course, there was the delay until the day of the hearing to make payment of the expenses for the underlying proceedings, despite being aware nearly a month before of the discrepancy in the check (a discrepancy that in and of itself indicates a lack of attention to detail). Finally, there is no question that the reason for the Board's recommended stay of suspension no longer exists, since Respondent is no longer employed in any fashion, much less in service to the Juvenile Court Project. Thus, further delay in implementation of the Order would appear to be without corresponding benefit.

Accordingly, the undersigned Board Member respectfully submits that the Probation violation has been established; and further recommends that the stay be lifted and that the suspension order go into effect.

Respectfully submitted,

Date: 12/21/11


R. Burke McLemore, Jr., Esquire
Designated Board Member