

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL,	:	No. 1969 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 54 DB 2014
v.	:	
	:	Attorney Registration No. 74365
BASIL DAVID MARCIAL,	:	
Respondent	:	(Philadelphia)

ORDER

PER CURIAM:

AND NOW, this 30th day of September, 2014, upon consideration of the Recommendation of the Three-Member Panel of the Disciplinary Board dated May 13, 2014, the Joint Petition in Support of Discipline on Consent is hereby granted pursuant to Rule 215(g), Pa.R.D.E., and it is

ORDERED that Basil David Marcial is suspended on consent from the Bar of this Commonwealth for a period of one year and one day, the suspension is stayed in its entirety, and he is placed on probation for a period of two years with a sobriety monitor, subject to the following conditions:

1. Respondent shall abstain from drinking alcohol and using all mind-altering chemicals, except as prescribed by licensed medical providers;
2. Respondent shall attend Narcotics Anonymous Meetings on a weekly basis;
3. A sobriety monitor shall be appointed to monitor respondent in accordance with Disciplinary Board Rule §89.293(c);

4. Respondent shall immediately notify his sobriety monitor if he no longer resides in a sober-living facility and shall furnish the monitor with his new address;
5. Respondent shall furnish to the Office of Disciplinary Counsel his sobriety monitor's name, address and telephone number;
6. Respondent shall establish his weekly attendance at sobriety meetings by providing written verification to the Board on a Board-approved form on a quarterly basis;
7. Respondent shall undergo any counseling, or out-patient or in-patient treatment, prescribed by a mental health professional;
8. With the sobriety monitor, respondent shall:
 - a) meet at least twice a month;
 - b) maintain weekly telephone contact;
 - c) provide the necessary properly executed written authorizations to verify his compliance with the required substance abuse treatment;
and
 - d) cooperate fully.
9. The appointed sobriety monitor shall:
 - a) monitor respondent's compliance with the terms and conditions of the order imposing probation;
 - b) assist respondent in arranging any necessary professional or substance abuse treatment;
 - c) meet with respondent at least twice a month and maintain weekly telephone contact with him;
 - d) file quarterly written reports with the Secretary of the Board; and

- e) immediately report to the Secretary of the Board any violations by respondent of the terms and conditions of the probation.
10. Respondent shall not violate the Rules of Professional Conduct, the Pennsylvania Rules of Disciplinary Enforcement, or any state or federal law.

A True Copy Patricia Nicola
As Of 9/30/2014

Attest: 
Chief Clerk
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

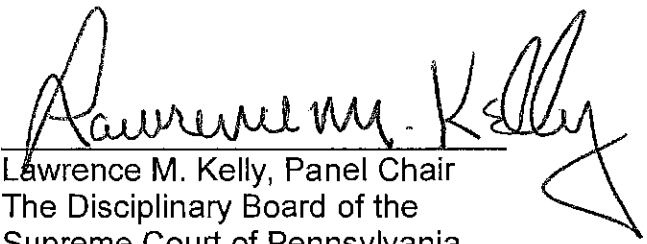
OFFICE OF DISCIPLINARY COUNSEL : No. 1969 Disciplinary Docket No. 3
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v. :
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BASIL DAVID MARCIAL :
Respondent : (Philadelphia)

RECOMMENDATION OF THREE-MEMBER PANEL
OF THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

The Three-Member Panel of the Disciplinary Board of the Supreme Court of Pennsylvania, consisting of Board Members Lawrence M. Kelly, Stephan K. Todd, and David E. Schwager, has reviewed the Joint Petition in Support of Discipline on Consent filed in the above-captioned matter on April 11, 2014.

The Panel approves the Petition consenting to a one year and one day suspension to be stayed in its entirety and a two year period probation subject to the conditions set forth in the Joint Petition and recommends to the Supreme Court of Pennsylvania that the attached Joint Petition be Granted.

The Panel further recommends that any necessary expenses incurred in the investigation and prosecution of this matter shall be paid by the respondent-attorney as a condition to the grant of the Petition.


Lawrence M. Kelly, Panel Chair
The Disciplinary Board of the
Supreme Court of Pennsylvania

Date: May 13, 2014

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, :
Petitioner : 54 DB 2014
:
v. : ODC File Nos:
: C1-13-433; C1-13-415;
: C1-13-612; and C1-13-742
:
: Atty. Reg. No. 74365
BASIL DAVID MARCIAL, :
Respondent : (Philadelphia)

JOINT PETITION IN SUPPORT OF DISCIPLINE
ON CONSENT UNDER Pa.R.D.E. 215(d)

Petitioner, Office of Disciplinary Counsel ("ODC"), by Paul J. Killion, Chief Disciplinary Counsel, and Harriet R. Brumberg, Disciplinary Counsel, and by Respondent, Basil David Marcial, Esquire, and Respondent's attorney, Samuel C. Stretton, Esquire, file this Joint Petition In Support of Discipline on Consent under Pennsylvania Rule of Disciplinary Enforcement (Pa.R.D.E.) 215(d), and respectfully represent that:

I. BACKGROUND

1. Petitioner, whose principal office is located at PA Judicial Center, 601 Commonwealth Avenue, Suite 2700, P.O. Box 62625, Harrisburg, PA 17106-2625, is invested pursuant to Pa.R.D.E. 207, with the power and duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of

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Office of the Secretary
The Disciplinary Board of the
Supreme Court of Pennsylvania

Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of said Rules of Disciplinary Enforcement.

2. Respondent, Basil David Marcial, was admitted to practice law in the Commonwealth on January 4, 1995.

3. Respondent maintains an office for the practice of law at 802 Sansom Street, Suite 3A, Philadelphia, PA 19107.

4. Pursuant to Pa.R.D.E. 201(a)(1), Respondent is subject to the disciplinary jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

II. FACTUAL ADMISSIONS AND VIOLATIONS OF RULES OF PROFESSIONAL CONDUCT

5. Respondent specifically admits to the truth of the factual allegations and conclusions of law contained in paragraphs 1 through 81.

III. CHARGES

Charge I: Criminal Contempt of Court

6. On May 6, 2013, the Honorable Stephen B. Lieberman of the Court of Common Pleas, Berks County, found Respondent guilty of one count of direct criminal contempt.

7. The punishment for direct criminal contempt is a fine, imprisonment, or both, at the sound discretion of the court.

8. Judge Lieberman imposed a sentence of fines and court costs totaling \$1,000.

9. Respondent failed to report his conviction to the Office of Disciplinary Counsel, as mandated by Pa.R.D.E. 214(a).

10. By his conduct as alleged in paragraphs 6 through 9 above, Respondent violated the following Rule of Professional Conduct and Pennsylvania Rules of Disciplinary Enforcement:

- a. RPC 8.4(b), which states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- b. Pa.R.D.E. 203(b)(1), which states that conviction of a crime shall be grounds for discipline;
- c. Pa.R.D.E. 203(b)(3), which states that wilful violation of any other provision of the Enforcement Rules, shall be grounds for discipline; and
- d. Pa.R.D.E. 214(a), which states that an attorney convicted of a crime shall report

the fact of such conviction within 20 days to the Office of Disciplinary Counsel. The responsibility of the attorney to make such report shall not be abated because the conviction is under appeal or the clerk of the court has transmitted a certificate to Disciplinary Counsel pursuant to subdivision (b) [of Rule 214].

Charge II: Jesus Omar Ortiz

11. Respondent was retained to represent Jesus Omar Ortiz in three separate, drug-related cases in the Berks County Court of Common Pleas.

a. The cases were docketed at CP No. 06-CR-0003951-2011, CP No. 06-CR-0001774-2012, and CP No. 06-CR-0001777-2012.

12. The Berks County Court of Common Pleas consolidated the three cases for a jury trial and scheduled the trial to begin at 9:30 a.m. on Monday, May 6, 2013, before the Honorable Stephen B. Lieberman.

13. Respondent received notice that Mr. Ortiz's three drug cases were consolidated for a jury trial scheduled to begin on May 6, 2013.

14. On March 19, 2013, Judge Lieberman issued an order scheduling a pretrial conference to handle pretrial motions on Friday, May 3, 2013.

15. On the morning of May 3, 2013, Respondent called Judge Lieberman's chambers and said there had been a "death in the family" and requested that the pretrial motions be heard prior to trial on May 6, 2013.

16. Judge Lieberman granted Respondent's request and rescheduled the hearing on pretrial motions for 9:00 a.m. on May 6, 2013.

17. At approximately 9:00 a.m. on May 6, 2013, Judge Lieberman empanelled a potential jury of 45 persons.

18. Respondent failed to appear at 9:00 a.m. in Judge Lieberman's courtroom for the pretrial motions and jury trial.

19. At 9:45 a.m., Judge Lieberman:

- a. excused the jury;
- b. issued a bench warrant for Respondent's arrest; and
- c. issued a bench warrant for Mr. Ortiz's arrest.

20. Respondent and Mr. Ortiz did not arrive in Judge Lieberman's courtroom until later in the morning of May 6, 2013, at which time Judge Lieberman:

- a. forfeited Mr. Ortiz's bail and placed him into custody;
- b. charged Respondent with direct criminal contempt (*Commonwealth v. David Marcial*, CP-06-MD-0000828-2013) and placed Respondent into custody; and
- c. scheduled Respondent's contempt trial for 1:30 p.m. the same day.

21. At Respondent's direct criminal contempt trial:

- a. Respondent waived his right to a formal contempt trial;
- b. Respondent waived representation by counsel;
- c. Judge Lieberman found Respondent guilty of direct criminal contempt;
- d. Judge Lieberman imposed a \$1,000 fine; and
- e. Judge Lieberman rescheduled Mr. Ortiz's jury trial for August 12, 2013.

22. By his conduct as alleged in paragraphs 11 through 21 above, Respondent violated the following Rules of Professional Conduct:

- a. RPC 1.3, which states that a lawyer shall act with reasonable diligence and promptness in representing a client;

- b. RPC 8.4(b), which states that it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; and
- c. RPC 8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Charge III: Angel Suarez

23. On or before November 2, 2011, Angel Suarez retained Respondent to represent him on charges of third degree murder and related offenses.

24. On November 2, 2011:

- a. Respondent entered his appearance in the Court of Common Pleas of Philadelphia County in the case of *Commonwealth v. Angel Suarez*, CP-51-CR-0010664-2011;
- b. Respondent requested a continuance for further investigation;
- c. Respondent received discovery from the Assistant District Attorney Mark Cipolletti; and

- d. the Honorable Benjamin Lerner continued **Suarez** until December 8, 2011.
25. On December 8, 2011:
- a. Respondent was on trial elsewhere;
 - b. Judge Lerner permitted Respondent to withdraw from the **Suarez** case and ordered Respondent to return the discovery Respondent had received;
 - c. Judge Lerner continued the case until January 10, 2012; and
 - d. Judge Lerner appointed Lee Mandell, Esquire, to represent Mr. Suarez.
26. On January 10, 2012, Judge Lerner:
- a. permitted Mr. Mandell to withdraw from **Suarez**;
 - b. permitted Respondent to enter his appearance in **Suarez** "with the Court's condition" and Respondent's "knowledge that" he must remain on the case through trial; and
 - c. continued **Suarez** until February 8, 2012.
27. On February 8, 2012, Respondent requested a final pretrial conference and the Court continued **Suarez** until February 29, 2012; on February 29, 2012, Respondent requested a continuance so that he could have further

discussions with the Commonwealth and the Court continued **Suarez** until March 30, 2012.

28. On May 11, 2012:

- a. all discovery was exchanged;
- b. Respondent informed Judge Lerner that Respondent was ready to proceed to trial;
- c. Judge Lerner ordered that all pretrial motions be filed prior to August 17, 2012;
- d. Judge Lerner continued **Suarez** until August 17, 2012;
- e. Judge Lerner scheduled **Suarez** for a jury trial to begin on December 3, 2012; and
- f. Judge Lerner attached Respondent and Mr. Cipolletti for trial.

29. On August 17, 2012, the Honorable Sandy L.V. Byrd listed Mr. Suarez's motion to suppress for a hearing on November 30, 2012, and confirmed that Mr. Suarez's trial date would stand at December 3, 2012.

30. During the week prior to November 28, 2012, Respondent met with Judge Lerner and:

- a. Respondent requested the addresses of the Commonwealth's witnesses as the addresses had been redacted from the discovery

Respondent had previously received from the District Attorney's Office;

- b. Respondent informed Judge Lerner that Respondent would not ask for a continuance and would be ready for trial the following week if Judge Lerner granted Respondent's request for the witness addresses;
- c. Judge Lerner granted Respondent's request for the addresses of the Commonwealth witnesses, but ordered Respondent not to disclose the information to anyone other than Respondent's investigator; and
- d. Respondent agreed with Judge Lerner that he would not make the addresses of the Commonwealth witnesses publically available to anyone other than Respondent's investigator.

31. Respondent failed to act with reasonable diligence in preparing for Mr. Suarez's homicide trial and promptly ascertain that he had not previously obtained all of the necessary discovery, including the addresses of the Commonwealth witnesses.

32. On November 28, 2012, Respondent appeared before Judge Byrd and:

- a. Respondent requested a continuance so that he could obtain additional discovery and further investigate Mr. Suarez's case;
- b. Judge Byrd denied Respondent's motion for a continuance; and
- c. Judge Byrd scheduled the motion to suppress hearing for December 3, 2012, and jury selection for December 4, 2012.

33. On November 30, 2012, Respondent filed in the Supreme Court of Pennsylvania a "Motion for Writ of Mandamus Requesting a Continuance" and "Motion for Special Relief for Continuance Due to Incomplete Discovery and Required Investigation by the Defense"; Respondent's motions:

- a. alleged that Respondent had not received the addresses of the Commonwealth's witnesses until November 29, 2012;
- b. stated that the defense needed additional time to investigate and prepare the matter for trial;
- c. improperly attached a document containing the addresses of the Commonwealth's witnesses; and

d. claimed that Mr. Suarez would be prejudiced unless a continuance was granted.

34. Respondent's motions to the Supreme Court:

a. were in direct violation of Judge Lerner's order not to disclose the addresses of the Commonwealth witnesses to anyone other than Respondent's investigator;

b. were in direct violation of Respondent's agreement with Judge Lerner that Respondent would not request a continuance if he granted Respondent's request for the addresses of the Commonwealth's witnesses; and

c. were purely frivolous and had no basis in law.

35. The Supreme Court refused to accept Respondent's motions for filing.

36. On December 3, 2012:

a. the Commonwealth was ready to proceed to trial;

b. Respondent requested a continuance for further preparation of the **Suarez** case;

- c. Judge Byrd continued the **Suarez** case for seven months, until July 1, 2013, which was the earliest possible date; and
- e. Judge Byrd attached Respondent and Mr. Cipoletti for trial.

37. On December 7, 2012, Judge Byrd filed a Motion for Finding of Contempt based on Respondent's conduct in disclosing the names of the Commonwealth's witnesses and requesting a continuance of the **Suarez** case.

- a. Judge Byrd scheduled a contempt hearing for January 4, 2013.

38. Respondent's conduct in the handling of the **Suarez** case was prejudicial to the administration of justice in that Respondent's conduct was harmful to the Commonwealth, delayed the disposition of Mr. Suarez's criminal case, and needlessly expended the limited resources of the criminal justice system.

39. By his conduct as alleged in paragraphs 23 through 38 above, Respondent violated the following Rules of Professional Conduct:

- a. RPC 1.1, which states that a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and

preparation reasonably necessary for the representation;

- b. RPC 1.3, which states that a lawyer shall act with reasonable diligence and promptness in representing a client;
- c. RPC 3.1, which states that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established; and
- d. RPC 8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Charge III: Alexis Orona

40. On November 9, 2012, Respondent received a \$5,000 money order from Mr. Alexis Orona, in partial payment of Respondent's \$25,000 fee to represent Mr. Orona on charges of murder and possession of an instrument of crime.

a. Respondent gave Mr. Orona a receipt for the \$5,000.

41. Respondent failed to give Mr. Orona a fee agreement that set forth the basis or rate of his fee.

42. On November 30, 2012, Respondent entered his appearance in the Court of Common Pleas of Philadelphia County in the case of *Commonwealth v. Alexis Orona*, CP-51-CR-0009395-2012.

43. On December 5, 2012, Respondent appeared before Judge Lerner and requested a continuance for further investigation.

a. Judge Lerner granted Respondent's request and continued *Orona* until December 19, 2012.

44. On December 10, 2012, Respondent received an additional \$400 to represent Mr. Orona.

a. Respondent gave Mr. Orona a receipt for the \$400.

45. On December 19, 2012, Respondent attended a prehearing conference in **Orona**, during which time Judge Lerner:

- a. explained that he had brought Mr. Orona down from the prison for the prehearing conference (N.T. p. 3);
- b. reminded Respondent that on January 4, 2013, Respondent was scheduled for a contempt hearing in the **Suarez** case regarding Respondent's: improper filing with the Supreme Court in an attempt "to obtain a last minute continuance of the trial"; wrongly disclosing the addresses of Commonwealth witnesses after Respondent agreed to share the addresses only with Respondent's investigator; failing to request the addresses of the Commonwealth's witnesses "until the eve of trial despite the fact that the case was in the calendar room for several months before that"; and requesting a continuance of the homicide trial before Judge Byrd contrary to Respondent's prior reassurance to Judge

Lerner that Respondent would be ready for trial (N.T. pp. 3-5); and

- c. informed Respondent that Mr. Orona had the "right to know" how Respondent handled the **Suarez** case so that Mr. Orona could make an informed decision whether he wanted to retain Respondent as trial counsel. (N.T. p. 5)

46. In response to the foregoing, Respondent:

- a. admitted that Judge Lerner had ordered Respondent not to reveal the addresses of the Commonwealth's witnesses (N.T. p. 6);
- b. stated that the "Supreme Court never accepted" his appeal and Respondent received his documents back from the Court (N.T. p. 6);
- c. explained that since Mr. Cipolletti requested that Judge Byrd seal the record, the addresses of the Commonwealth's witnesses had not been shared outside of the courtroom (N.T. pp. 6-7); and
- d. claimed that Respondent's disclosure of the addresses was "an inadvertent act" and an "oversight." (N.T. p. 7)

47. Judge Lerner advised Respondent that Mr. Orona had a right to know that "as a result of" Respondent's "failure to prepare" and Respondent's "last-minute request for a continuance," Mr. Suarez did not have his scheduled trial and is "waiting in custody an additional period of time before he gets his day in court." (N.T. p. 9)

48. In response, Respondent admitted that he:

- a. did not realize that he had not received the ballistics report until two days before the **Suarez** case was listed for trial, even though Respondent had the case when it was in the calendar room; and
- b. did not realize that he had received only a partial autopsy report until the pretrial conference.

49. Judge Lerner admonished Respondent that:

- a. based on Respondent's "last several appearances in this court and discussions that we have had, . . . about particularly [Respondent's] preparation in the **Suarez** case, that Respondent [has] no business representing defendants in serious criminal cases, particularly homicide cases at this time" (N.T. p. 13);

- b. "no judge in this homicide program is going to tolerate the kind of ineffective representation, lack of preparation, and simple inability to represent a client effectively that [Respondent has] been showing" (N.T. p. 14); and
- c. the court will "protect defendants' rights to have effective assistance of counsel the first time around so these cases aren't either indefinitely delayed as far as trial or coming back years later on post-conviction proceedings." (N.T. p. 14)

50. Respondent advised Judge Lerner that he understood him "totally." (N.T. p. 14)

51. When Mr. Orona was brought into the courtroom, Judge Lerner:

- a. informed Mr. Orona about Respondent's conduct in the **Suarez** case, which resulted in extending the time Mr. Suarez was being held in custody prior to trial;
- a. requested that Mr. Orona think about whether he wanted Respondent to continue to represent him in light of what transpired in **Suarez**; and

b. advised Mr. Orona that he would be brought down the following week, on December 26, 2012, at which time Mr. Orona could inform the Court whether he wanted new counsel.

52. On December 26, 2012, Mr. Orona:

a. requested that Respondent be removed from his case so that he could retain new counsel; and

b. requested that Respondent refund his unearned fee.

53. Judge Lerner ordered Respondent to provide an accounting of his legal services for Mr. Orona on or before January 8, 2013.

54. By letter dated January 8, 2013, from Respondent to Judge Lerner, with a carbon copy to Mr. Orona, Respondent:

a. attached an itemized invoice for his pretrial legal services from November 9 to December 26, 2012, in which Respondent charged \$300 an hour for 17 hours of purported legal work;

b. advised Judge Lerner that his total bill was \$5,100 and he would refund \$300 of the \$5,400 fee he had received; and

c. asked Judge Lerner to consider that the matter be resolved by the Fee Dispute Committee of the Bar Association or a court of law.

55. Upon receipt of Respondent's letter, Judge Lerner requested that on or before February 7, 2013, Respondent provide support for the pretrial legal work Respondent purportedly performed for Mr. Orona.

56. Respondent failed to obey Judge Lerner's order and provide the requested support.

57. From time to time thereafter, Mr. Orona and his family called Respondent's office and left messages for Respondent regarding the refund of Respondent's unearned fee.

58. Respondent failed to return the telephone calls or refund Respondent's unearned fee.

59. By his conduct as alleged in paragraphs 40 through 58 above, Respondent violated the following Rules of Professional Conduct:

a. RPC 1.5(b), which states that when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation;

- b. RPC 1.16(d), which states that upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law; and
- c. RPC 8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

Charge IV: Ahmed Alicia

60. On August 16, 2011, Ahmed Alicia ("Mr. Alicia") was arrested on drug related charges.

61. On or before October 11, 2011, Mr. Alicia retained Respondent to represent him at his preliminary hearing in the Municipal Court of Philadelphia.

- a. Respondent failed to provide Mr. Alicia with a written fee agreement that set forth the basis or rate of Respondent's fee.

62. The Municipal Court continued Mr. Alicia's preliminary hearing on:

- a. October 11, 2011, based on Respondent's request for further investigation;
- b. November 23, 2011, because Respondent was ill and unavailable;
- c. January 4, 2012, because Respondent failed to appear;
- d. March 7, 2012, because Respondent was on vacation; and
- e. April 19, 2012, because Respondent was on trial in the Court of Common Pleas.

63. On September 12, 2012, Mr. Alicia was held for trial on all charges.

64. The Court of Common Pleas docketed Mr. Alicia's case at CP-51-CR-0010866-2012.

65. On January 17, 2013:

- a. Mr. Alicia retained Respondent to represent him at the trial of his drug case in the Court of Common Pleas;
- b. Respondent entered his appearance;

- c. Respondent failed to provide Mr. Alicia with a written fee agreement that set forth the basis or rate of his fee;
- d. Respondent requested a continuance because he was "just retained"; and
- e. the Honorable Frank Palumbo relisted the **Alicia** case for February 21, 2013.

66. On February 21, 2013, Judge Palumbo granted Respondent's request for a continuance to convey an offer for a nontrial disposition; on March 14, 2013, the Commonwealth rejected the offer and Judge Palumbo relisted the case for a waiver trial on April 15, 2013.

67. On April 15, 2013:

- a. the Commonwealth was ready to proceed with the waiver trial;
- b. Respondent requested a continuance because he was purportedly ill; and
- c. the Honorable Carolyn H. Nichols continued the **Alicia** case until May 21, 2013.

68. As of April 18, 2013, Respondent had failed to:

- a. meet or consult with Mr. Alicia about his case; and
- b. provide Mr. Alicia with any documents, transcripts, or pretrial discovery.

69. From time to time, members of Mr. Alicia's family would call Respondent's office to obtain information regarding the status of Mr. Alicia's case.

- a. Respondent failed to answer the telephone calls and provide the requested information.

70. On May 21, 2013:

- a. the Commonwealth was ready on call;
- b. Mr. Alicia was brought down from prison for his trial;
- c. Respondent requested a continuance;
- d. Judge Nichols ordered that Mr. Alicia's case must be tried at the next listing and no further continuances would be granted; and
- e. Judge Nichols ordered that Respondent be attached for trial on July 16, 2013.

71. Respondent received notice that the case was marked "must be tried" and that no further continuances would be granted.

72. On July 16, 2013:

- a. the Commonwealth was ready on call;
- b. Respondent requested a continuance alleging that he was unaware that **Alicia** was listed for trial, despite the fact that on May 21,

2013, Respondent had been attached for trial and the case was marked "must be tried";

c. Judge Nichols ordered that the case must be tried at the next listing and no further defense continuances would be granted; and

d. Judge Nichols attached Respondent for trial on August 15, 2013.

73. On August 15, 2013, Respondent was present in court and ready to proceed, but a necessary Commonwealth witness was unavailable; the case was continued to October 10, 2013, and marked "must be tried both."

74. By his conduct as alleged in paragraphs 60 through 73 above, Respondent violated the following Rules of Professional Conduct:

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

b. RPC 1.4(a)(2), which states that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished;

c. RPC 1.4(a)(4), which states that a lawyer shall promptly comply with reasonable requests for information;

- d. RPC 1.5(b), which states that when the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation; and
- e. RPC 8.4(d), which states that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

IV. JOINT RECOMMENDATION FOR DISCIPLINE

75. Petitioner and Respondent jointly recommend that the appropriate discipline for Respondent's admitted misconduct is a suspension of one year and one day, stayed in its entirety, and two years of probation with conditions, including the appointment of a sobriety monitor.

76. Respondent hereby consents to the discipline being imposed by the Supreme Court of Pennsylvania. Attached to this Petition is Respondent's executed Affidavit required by Pa.R.D.E. 215(d), stating that he consents to the recommended discipline and including the mandatory acknowledgements contained in Pa.R.D.E. 215(d)(1) through (4).

77. Petitioner and Respondent respectfully submit that there are the following aggravating factors:

- a. ***Commonwealth v. David Marcial, Esquire***, MC-51-CR-0606161-20000, Municipal Court of Philadelphia County. On June 9, 2000, Respondent was charged with Contempt of Court; on February 20, 2001, the court dismissed the charges;
- b. ***Commonwealth v. David Marcial***, CP-06-MD-0001568-2007, Berks County Court of Common Pleas. On October 15, 2007, Respondent was found guilty of contempt of court; on October 16, 2007, the court vacated the judgment and ordered Respondent to pay an \$800 fine within 60 days;
- c. ***Commonwealth v. Basil Marcial***, MC-51-CR-0007050-2008, Municipal Court of Philadelphia County. On February 8, 2008, Respondent was arrested for Driving Under the Influence, First Offense; on January 23, 2009, Respondent was placed into ARD, required to attend Safe Driving School, and ordered to pay \$445.58 in costs. Respondent is currently delinquent for failing to pay all costs;

- d. Respondent has seven open liens, totaling over \$27,000; five of Respondent's open liens are for unpaid city, state, or federal taxes; and
- e. Respondent was on administrative suspension, from October 18 to 28, 2013, for failing to timely complete his attorney registration form and pay his annual fee.

78. Respondent and ODC respectfully submit that there are the following mitigating factors:

- a. Respondent has no discipline of record;
- b. Respondent has cooperated with ODC's investigation and prosecution;
- c. By virtue of Respondent's signing this Discipline on Consent, Respondent has expressed recognition of his violations of the Rules of Professional Conduct; and
- d. Respondent has undergone treatment for substance abuse problems, currently resides in a sober living community, and attends Narcotics Anonymous meetings on a daily basis. (See letters from the Executive Director and Program Director of Solution House, attached hereto as Exhibit A. In his DB-7 Answer, Respondent, through counsel, represents:

[A]t one point in his life [Respondent] had a cocaine and heroin problem. That problem reappeared sometime in 2011 or early 2012. The Respondent sought help for his addiction and now lives in a treatment house, which is called Solution House, at [address redacted]. The Respondent has lived there since 2012 and has been totally sober. He also attends NA meetings every day.

79. A suspension of one year and one day, stayed in its entirety, with two years of probation and a sobriety monitor, is the appropriate quantum of discipline to be imposed based on the relevant precedent applied to the totality of facts and circumstances.

Attorneys who are convicted of criminal contempt of court or sanctioned for violating court orders may receive discipline ranging from a public censure to a suspension of one year and one day. Precedent reveals that greater discipline is reserved for attorneys who engage in multiple instances of contempt or who commit misconduct in addition to criminal contempt. See *Office of Disciplinary Counsel v. Mark Alan Weinberg*, No. 30 DB 2011, D.Bd. Rpt. 4/15/2011 (Sup. Ct. Order 7/12/2011) (Weinberg, who was sanctioned and fined \$1,000 by the court for violating a court order requiring him to obtain leave of court if he were going to cancel a deposition, received a public censure on consent); *Office of Disciplinary Counsel v. Gary Scott Silver*, Nos.

56 DB and 178 DB 2003, D.Bd. Rpt. 1/7/2005 (S.Ct. Order 4/6/2005) (Supreme Court imposed a six-month suspension followed by twelve months of probation with a practice monitor on Silver, who was found guilty of criminal contempt for failing to comply with three court orders and also misused client funds); and **Office of Disciplinary Counsel v. Jarett Rand Smith**, No. 4 DB 2011, D.Bd. Rpt. 3/7/2011 (S.Ct Order 5/4/2011) (Smith, who was convicted of two counts of criminal contempt and two counts of civil contempt and made misrepresentations to the court in a fifth matter, received on consent a suspension of one year and one day, stayed, with three years of probation with conditions, including undergoing a mental health evaluation and treatment if recommended by the evaluator).

Attorneys who engage in serial neglect may likewise receive discipline ranging from a public censure to a suspension of one year and one day. The quantum of discipline imposed may be dependent on: the number of client matters involved, **Office of Disciplinary Counsel v. Neil Jokelson**, Nos. 58 and 102 DB 1998, D.Bd. Rpt. 12/22/2000 (S.Ct. Order 2/26/2001) (Jokelson, who failed to act diligently and communicate with his clients in two matters, received a public censure and three years of probation with a practice monitor); youth and inexperience,

Office of Disciplinary v. Michael S. Geisler, 532 Pa. 56, 614 A.2d 1134 (1992) (Supreme Court imposed a six-month suspension and one year of probation with a practice monitor on Geisler, who was a young, inexperienced attorney who neglected multiple client matters in a high volume, low cost divorce and bankruptcy practice); or whether an attorney's serial neglect has a negative impact on an attorney's clients' cases, *Office of Disciplinary Counsel v. Howard Goldman*, 157 DB 2003 (D.Bd. Rpt. 5/20/05) (S.Ct. Order 8/30/05) (Goldman, whose neglect resulted in one client losing the opportunity to obtain custody of his child, the running of the statute of limitations on another client's case, and the imposition of sanctions on a third client due to Goldman's failure to comply with a court order, received a suspension of one year and one day).

80. Respondent was convicted of a single count of criminal contempt, which, standing alone, would likely have resulted in a public censure. See *Weinberg*, *supra*. But a review of the aggravating factors reveals that Respondent had been charged with criminal contempt of court on two prior occasions, one of which required Respondent to pay an \$800 fine. In addition, while the docket entries reflect that the *Suarez* court scheduled a contempt of court hearing as a result of Respondent's violating a court order and

revealing the contact information for the Commonwealth's witnesses, the court resolved the matter informally and no such hearing took place.

Respondent engaged in misconduct in addition to his contempt of court conviction. Respondent mishandled four criminal cases wherein he failed to communicate with his clients and diligently pursue their cases. Respondent's misconduct delayed his clients' trials and burdened the criminal court system. Standing alone, Respondent's mishandling of the four criminal cases would have resulted in at least a public censure. See *Jokelson, supra*.

81. The totality of Respondent's misconduct most resembles the totality of the attorney's conduct in *Smith, supra*, where the attorney engaged in multiple instances of contempt of court and made misrepresentations to a trial judge. The Supreme Court imposed a suspension of one year and one, stayed in its entirety, and placed Smith on three years of probation with conditions.

Notably, Jokelson, Geisler, and Silver all received practice monitors as conditions of their discipline. In *Smith*, the attorney was required to undergo a mental health evaluation and abide by any treatment recommended by the evaluator. Respondent, with an admitted history of

substance abuse, would benefit most from a sobriety monitor.

Accordingly, ODC and Respondent jointly request that, for Respondent's conviction for criminal contempt and mishandling of four client matters, Respondent receive a suspension of one year and one day, stayed in its entirety, and that Respondent be placed on two years of probation with a sobriety monitor. This recommended discipline would ensure that Respondent gets the treatment that he needs and would protect the public should Respondent not comply with the terms of his probation.

WHEREFORE, Petitioner and Respondent respectfully request that:

- a. Pursuant to Pa.R.D.E. 215(e) and 215(g), the three-member panel of the Disciplinary Board review and approve the Joint Petition in Support of Discipline on Consent and file its recommendation with the Supreme Court of Pennsylvania recommending that the Supreme Court enter an Order that Respondent receive a suspension of one year and one day, stayed in its entirety, and that Respondent be placed on two years of probation with a

sobriety monitor, subject to the following conditions:

1. Respondent shall abstain from drinking alcohol and using all mind altering chemicals, except as prescribed by licensed medical providers;
2. Respondent shall regularly attend Narcotics Anonymous meetings;
3. A sobriety monitor shall be appointed to monitor Respondent in accordance with Disciplinary Board Rule §89.293(c);
4. Respondent shall immediately notify his sobriety monitor if he no longer resides in a sober living facility and shall furnish the monitor with Respondent's new address;
5. Respondent shall furnish Office of Disciplinary Counsel with his sobriety monitor's name, address, and telephone number;
6. Respondent shall establish his weekly attendance at sobriety meetings by providing written verification to the

Board on a Board approved form on a quarterly basis;

7. Respondent shall undergo any counseling, or out-patient or in-patient treatment, prescribed by a mental health professional;

8. With the sobriety monitor, Respondent shall:

i) meet at least twice a month;

ii) maintain weekly telephone contact;

iii) provide the necessary properly executed written authorizations to verify his compliance with the required substance abuse treatment; and

iv) cooperate fully.

9. The appointed sobriety monitor shall:

i) monitor Respondent's compliance with the terms and conditions of the order imposing probation;

ii) assist Respondent in arranging any necessary professional or substance abuse treatment;

- iii) meet with Respondent at least twice a month and maintain weekly telephone contact with Respondent;
- iv) file with the Secretary of the Board quarterly written reports; and
- v) immediately report to the Secretary of the Board any violation by the Respondent of the terms and conditions of the probation.

10. Respondent shall not violate the Rules of Professional Conduct, Rules of Disciplinary Enforcement, or any state or federal law.

- b. Pursuant to Pa.R.D.E. 215(i), the three-member panel of the Disciplinary Board enter an Order for Respondent to pay the necessary expenses incurred in the investigation and prosecution of this matter as a condition to the grant of the Petition, and that all expenses be paid by Respondent before the imposition of discipline under Pa.R.D.E. 215(g).

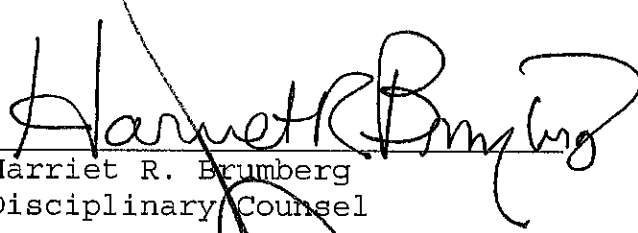
Respectfully and jointly submitted,

OFFICE OF DISCIPLINARY COUNSEL

PAUL J. KILLION
CHIEF DISCIPLINARY COUNSEL

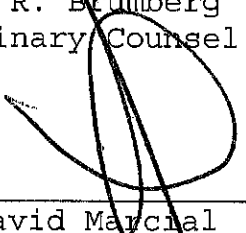
2/7/2014
Date

By


Harriet R. Brumberg
Disciplinary Counsel

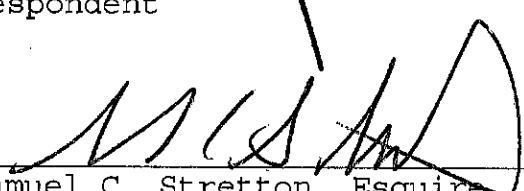
4/3/14
Date

By


Basil David Marcial
Respondent

4/3/14
Date

By


Samuel C. Stretton, Esquire
Counsel for Respondent

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

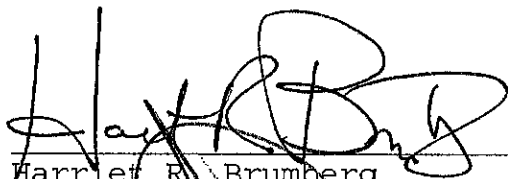
OFFICE OF DISCIPLINARY COUNSEL, :
Petitioner :
:
v. : ODC File Nos:
: C1-13-433; C1-13-415;
: C1-13-612; and C1-13-742
:
: Atty. Reg. No. 74365
BASIL DAVID MARCIAL, :
Respondent : (Philadelphia)

VERIFICATION

The statements contained in the foregoing Joint Petition In Support Of Discipline On Consent Under Pa.R.D.E. 215(d) are true and correct to the best of our knowledge, information and belief and are made subject to the penalties of 18 Pa.C.S. §4904, relating to unsworn falsification to authorities.

2/7/2014

Date

By 

Harriet R. Brumberg
Disciplinary Counsel

4/3/14

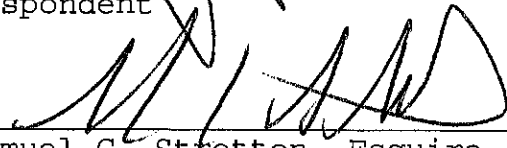
Date

By 

Basil David Marcial
Respondent

4/3/14

Date

By 

Samuel C. Stretton, Esquire
Counsel for Respondent

SOLUTION HOUSE
215-798-0094

DATE: 4/7/14

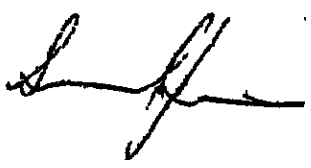
To Whom It May Concern,

This is to verify that DAVID MARCIAL currently resides in our housing program. His/her address is 6364 Marsden St, Philadelphia, Pa 19135.

His/her rent is ~~\$500~~^{\$1250} week and must purchase and prepare his/her own food via their food stamp provisions.

Any questions or concerns, please feel free to contact me.

Sincerely,



Samuel Jones
Program Director

*Said Client is doing very well
no problems at all*

Handwritten signature
215 8683983
Home Manager

Solution House
888-316-2902
215-798-0094



Info@solutionhouse.org

September 30, 2013

RE: David Marcial

To whom it may concern;

This letter is to confirm that David Marcial currently resides in our Sober Living Program. Mr. Marcial has not received an incident report since his last progress report. Mr. Marcial is subject to random urine monitoring, and has been negative for any substance abuse since his last progress report. Mr. Marcial continues to be proactive in his efforts to maintain sobriety, and to encourage others to do the same. We recommend his continued participation in the program.

Please feel free to call me if you have any questions or concerns.

Thank you,

Sincerely,

A handwritten signature in black ink, appearing to read 'M. Fisher'.

Martin Fisher
Executive Director
888-316-2902 Ext. 201

SOLUTION HOUSE
215-798-0094

DATE: 10/14/13

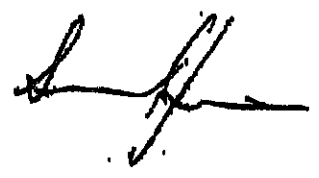
To Whom It May Concern,

This is to verify that B. DAVID MARCIAL currently resides in our housing program. His/her address is [address redacted].

His/her rent is \$50.00/week and must purchase and prepare his/her own food ~~via their food stamp provisions.~~

Any questions or concerns, please feel free to contact me.

Sincerely,



Samuel Jones
Program Director

Also feel free to contact House Manager
Henry Halling at 215 868 3983
Thank You.

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, :
Petitioner :
:
v. : ODC File Nos:
: C1-13-433; C1-13-415;
: C1-13-612; and C1-13-742
:
: Atty. Reg. No. 74365
BASIL DAVID MARCIAL, :
Respondent : (Philadelphia)

AFFIDAVIT UNDER RULE 215(d), Pa.R.D.E.

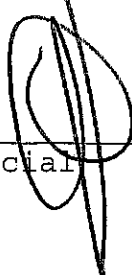
Respondent, Basil David Marcial, hereby states that he consents to the imposition of a suspension of one year and one day, stayed in its entirety, and that Respondent be placed on two years of probation with a sobriety monitor, subject to conditions as specified and as jointly recommended by Petitioner and Respondent in the Joint Petition in Support of Discipline on Consent, and further states that:

1. His consent is freely and voluntarily rendered; he is not being subjected to coercion or duress; he is fully aware of the implications of submitting the consent; and he has consulted with Samuel C. Stretton, Esquire, in connection with the decision to consent to discipline.

2. He is aware that there is presently pending an investigation involving allegations that he has been guilty of misconduct as set forth in the Joint Petition.

3. He acknowledges that the material facts set forth in the Joint Petition are true.

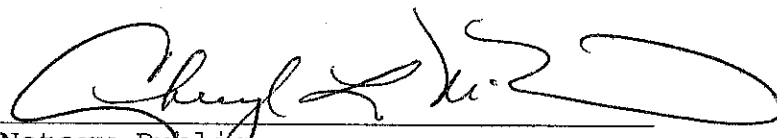
4. He consents because he knows that if Petitioner filed charges predicated upon the matters under investigation, he could not successfully defend against them.



Basil David Marcial
Respondent

Sworn to and subscribed

before me this 3
day of April, 2014.



Notary Public

