

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1556 Disciplinary Docket No. 3
Petitioner :
 : No. 135 DB 2008
v. :
 : Attorney Registration No. 66420
ANDREW J. OSTROWSKI, :
Respondent : (Dauphin County)

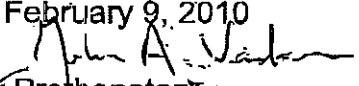
ORDER

PER CURIAM:

AND NOW, this 9th day of February, 2010, upon consideration of the Report and Recommendations of the Disciplinary Board dated October 30, 2009; the Petition on Objections and Exceptions, Petition for Review and Request for Oral Argument and response thereto; and the Petition to Remand Case for Further Evidence and response thereto, the Request for Oral Argument and Petition to Remand Case for Further Evidence are denied, and it is hereby

ORDERED that Andrew J. Ostrowski is suspended from the Bar of this Commonwealth for a period of one year and one day and he shall comply with all the provisions of Rule 217, Pa.R.D.E.

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

A True Copy John A. Vaskov
As of: February 9, 2010
Attest: 
Deputy Prothonotary
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 135 DB 2008
Petitioner	:	
	:	
v.	:	Attorney Registration No. 66420
	:	
ANDREW J. OSTROWSKI	:	
Respondent	:	(Dauphin 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 August 26, 2008, Office of Disciplinary Counsel filed a Petition for Discipline against Andrew J. Ostrowski, Respondent. The Petition charged Respondent with violations of the Rules of Professional Conduct and Rules of Disciplinary Enforcement based on allegations of misconduct in a client matter.

Respondent filed an Answer to Petition for Discipline on October 7, 2008.

A Joint Petition for Discipline on Consent was filed with the Disciplinary Board on November 25, 2008. On December 12, 2008, the Joint Petition for Discipline on Consent was denied by a Three-Member Panel of the Disciplinary Board.

A disciplinary hearing was held on January 26, 2009, before a District III Hearing Committee comprised of Chair Jeffrey B. Rettig, Esquire, and Members Jason J. Legg, Esquire, and Richard B. Henry, Esquire. Respondent appeared pro se. Petitioner offered six exhibits and the testimony of one witness. Respondent testified on his own behalf.

The Hearing Committee filed a Report on May 21, 2009, concluding that Respondent violated the Rules of Professional Conduct and Rules of Disciplinary Enforcement as contained in the Petition for Discipline, and recommending that Respondent be suspended for a period of six months, the suspension be stayed in its entirety and 12 months of probation with conditions.

No Briefs on Exceptions were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on July 18, 2009.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Pennsylvania Judicial Center, 601 Commonwealth Ave., Suite 2700, P.O. Box 62485, Harrisburg, Pennsylvania

17106, is invested, pursuant to Rule 207 of the Pennsylvania Rules of Disciplinary Enforcement, with the power and the duty to investigate all matters involving alleged misconduct of an attorney admitted to practice law in the Commonwealth of Pennsylvania and to prosecute all disciplinary proceedings brought in accordance with the various provisions of the aforesaid Rules.

2. Respondent is Andrew J. Ostrowski. He was born in 1965 and was admitted to the practice of law in this Commonwealth in 1992. His registered office address is 4311 North Sixth St., Harrisburg, PA 17110. He is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has a record of prior discipline. He received an Informal Admonition in 2004 for failing to pursue the claims of his client, failing to communicate with his client, and failing to keep his client advised as to the status of his matter. He also failed to send his client her file after she terminated representation. Respondent received an Informal Admonition in 2006 for failing to take action on a matter and failing to keep his client advised of the status of his matter and communicate with the client.

4. The instant matter involves one client, Aaron Chambers. Beginning in 1985, Mr. Chambers worked for the Pennsylvania Department of General Services. He became a union steward in 1993 and was promoted to Mechanical Supervisor in 1994 or 1995.

5. Purportedly as a result of incidents occurring in August 2002, by letter dated September 10, 2002, Mr. Chambers was notified that he was suspended for five days without pay and demoted to Refrigerator Mechanic.

6. Mr. Chambers believed the sanctions were in retaliation for his activities as an outspoken union steward.

7. On or about September 10, 2002, Mr. Chambers retained Respondent and paid him a retainer of \$750.

8. Mr. Chambers was later advised that Respondent was ill and could no longer represent him. Mr. Chambers requested a refund and was given \$500.

9. In March 2004, Mr. Chambers again contacted Respondent about the retaliation matter and paid him a \$3,000 retainer as requested.

10. On March 24, 2004, Mr. Chambers signed a Retainer Agreement retaining Respondent and agreeing to pay him a flat fee of \$3,000 and one-third of the gross sum recovered by settlement or 40% after judgment. The Retainer Agreement did not specify that the \$3,000 flat fee was non-refundable or considered earned upon receipt. Mr. Chambers did not understand that the fee was non-refundable.

11. Respondent treated the \$3,000 flat fee as his own and did not deposit it into a trust account.

12. Mr. Chambers sent a written correspondence to Respondent seeking clarification as to the \$3,000 flat fee.

13. While not responding in writing, Respondent did orally explain to Mr. Chambers that the flat fee was nonrefundable.

14. If Respondent had been billing Mr. Chambers at an hourly rate, there is no dispute that Mr. Chambers received at least \$3,000 worth of legal services from Respondent.

15. On April 2, 2004, Respondent filed a complaint on behalf of Mr. Chambers in the United States District Court for the Middle District of Pennsylvania against the Department of General Services and nine supervisory personnel in their individual and official capacities.

16. On September 10, 2004, Respondent filed an amended complaint and on December 13, 2004, he filed a second amended complaint.

17. At various times, Mr. Chambers provided witness names to Respondent that he wanted interviewed in preparation for the case, and Respondent did not disclose those witnesses to the defendants.

18. When the defense commenced discovery and depositions, Respondent was unavailable and Sheri Coover, Esquire, represented Mr. Chambers. Respondent paid Attorney Coover to fill in for him at no cost to Mr. Chambers.

19. On December 28, 2006, the defendants' motion for summary judgment was granted in part with the only claims remaining for trial those alleging violations of Mr. Chambers' First and Fourteenth Amendment rights brought under 42 U.S.C. Sections 1981 and 1983.

20. Trial was scheduled for June 2007.

21. On or about May 5, 2007, Respondent provided the defendants with a list of potential witnesses in preparation for trial.

22. On May 7, 2007, the defendants filed a motion in limine seeking to preclude Mr. Chambers from presenting his newly disclosed witness testimony based upon the alleged failure of Respondent to timely identify those witnesses under the applicable federal rule.

23. The June 2007 trial was continued.

24. On or about May 10, 2007, Mr. Chambers paid Respondent an additional \$500 that had been requested for "trial related costs" and those funds were deposited into Respondent's IOLTA account.

25. By Order of the Supreme Court dated July 18, 2007, Respondent was transferred to inactive status, effective August 17, 2007, and directed to comply with the provisions of Pa.R.D.E., for his failure to comply with his Continuing Legal Education obligations. By letter dated July 18, 2007, Elaine Bixler, Secretary to the Disciplinary Board, provided Respondent with copies of the Court's Order, Pa.R.D.E. Rule 217, Disciplinary Board Rules, Standard Guidance Notices, and a Statement of Compliance.

26. Within ten days of the date of the transfer, Respondent was to file his Statement of Compliance with the Office of the Secretary, along with copies of his Notification to clients of his transfer to inactive status and inability to continue to represent them.

27. Respondent failed to file his Form DB-25(i) Statement of Compliance or copies of Forms DB-23(i) and DB-24(i) notices.

28. On July 27, 2007, the federal court granted in part the defendants' motion in limine and precluded Mr. Chambers from calling 12 witnesses at trial.

29. On July 30, 2007, Respondent notified Mr. Chambers that they would be precluded from presenting the witnesses' testimony.

30. After not receiving any return calls from Respondent, Mr. Chambers went to Respondent's office and learned that Respondent had "disappeared."

31. Respondent left a hand-written note in Mr. Chambers' file, which read: "I have committed extreme neglect in the handling of Aaron Chambers' case. He should be permitted full and adequate relief with all his witnesses - who I neglected to identify because I knew this was going to happen to me. He should prevail. Judge Kane should know of this. AJO."

32. Mr. Chambers then wrote a personal letter to Judge Kane seeking a continuance of his trial date as he did not have legal counsel. The continuance was granted to December 3, 2007.

33. On August 3, 2007, Mr. Chamber met with Attorney Douglas Goldhaber, who entered his appearance for Mr. Chambers in the action. Mr. Chambers eventually lost his case against the Department of General Services and the other defendants.

34. By handwritten note dated August 22, 2007 to Respondent, Mr. Chambers requested an accounting of the funds that he had paid to Respondent in connection with his federal civil rights action.

35. By letter dated January 10, 2008, the Disciplinary Board was notified by the Continuing Legal Education Board that Respondent was in compliance with their rules and regulations.

36. By letter from Suzanne E. Price, Attorney Registrar, dated January 1, 2008, Respondent was notified that he had to complete and return the enclosed 2007-2008 PA Attorney Annual Fee Form, along with a check for \$175, which he subsequently did. Despite the fact that Respondent never complied with Rule 217, Pa.R.D.E., he was transferred back to active status as of January 14, 2008.

37. By letter to Mr. Chambers dated February 25, 2008, Respondent advised Mr. Chambers that Respondent still had some of Mr. Chambers' money in escrow and enclosed a check for \$119.60, the unexpended balance of the \$500 Respondent had been paid on May 10, 2007. These monies were refunded only after Respondent had been contacted by Office of Disciplinary Counsel relative to the complaint filed by Mr. Chambers.

38. Respondent testified on his own behalf.

39. Respondent expressed sincere remorse for his actions toward Mr. Chambers, as well as his embarrassment and humiliation.

40. Respondent experienced problems with substance use on and off during the period of Mr. Chambers' case. He has been through substance abuse inpatient treatment on two occasions, once in 2003 and once in 2005, and has had relapses. Respondent voluntarily entered a psychiatric facility in Lancaster County in August 2007 for a period of seven to ten days. Respondent does not attend Alcoholics Anonymous or participate in Lawyers Concerned for Lawyers.

41. Respondent did not offer expert testimony in regard to the substance abuse issues.

42. Respondent alluded to other personal problems during the time frame of the misconduct but did not offer details.

III. CONCLUSIONS OF LAW

By his conduct as set forth above, Respondent violated the following Rules of Professional Conduct and Rules of Disciplinary Enforcement:

1. RPC 1.1 - A lawyer shall provide competent representation to a client.
2. RPC 1.3 - A lawyer shall act with reasonable diligence and promptness in representing a client.
3. RPC 1.15(a) - A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

4. RPC 1.15(b) - Except as stated in this Rule or otherwise permitted by law or by agreement with the client a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon requests by the client or third person, shall promptly render a full accounting regarding such property.

5. RPC 1.16(d) - 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 or 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.

6. Pa.R.D.E. 217(e) - Within ten days after the effective date of the disbarment, suspension or transfer to inactive status order, the formerly admitted attorney shall file with the Board a verified statement showing: (1) that the provisions of the order and these rules have been fully complied with, and (2) all other state, federal and administrative jurisdictions to which such person is admitted to practice. Such statement shall also set forth the residence or other address of the formerly admitted attorney where communications to such person may thereafter be directed.

Respondent did not prove by clear and convincing evidence that he suffers from a psychiatric disorder that caused his misconduct. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989).

IV. DISCUSSION

Respondent is charged with violations of the Rules of Professional Conduct and Rules of Disciplinary Enforcement arising out of allegations that he mishandled the matter of his client, Aaron Chambers. Office of Disciplinary Counsel must establish a charged violation by a preponderance of the evidence that is clear and satisfactory. Office of Disciplinary Counsel v. Jackson, 637 A.2d 615 (Pa. 1994).

Respondent stipulated to violations of Rules 1.1, 1.3, 1.15(a), and 217(e). He admitted his failure to provide competent representation to Mr. Chambers in that he did not prepare for trial, failed to follow appropriate federal rules for disclosure of witnesses, and disappeared mere days prior to the scheduled trial date. He left a handwritten note admitting his "extreme neglect" in the handling of the Chambers case. He then failed to provide an accounting to Mr. Chambers or refund the unearned fees until contacted by Office of Disciplinary Counsel. Furthermore, he did not stay current with CLE credits and was transferred to inactive status. He did not meet his obligation to file a Statement of Compliance with the Board.

Respondent did not stipulate that he violated Rules 1.15(a) and 1.15(b) as to the \$3,000 flat fee retainer. His position is that Mr. Chambers understood that the \$3,000 was a nonrefundable retainer earned upon receipt. The Board's review of the record demonstrates that Respondent's contention as to the flat fee retainer is not merited. The retainer agreement failed to specify that the funds were nonrefundable and earned upon

receipt. The mere language that the \$3,000 was a “flat fee” is insufficient to transform the retainer automatically into Respondent’s personal property. Respondent should have deposited the funds into a trust account. It is crucial that a client understand how money is handled by the attorney. Respondent did not provide a written accounting to Mr. Chambers as to how the \$3,000 had been applied. Respondent violated Rules 1.15(a) and (b).

Respondent appeared pro se and offered little defense to his conduct. He provided some testimony as to personal difficulties he experienced with a substance abuse problem, and his personal decision to commit himself to a psychiatric facility for a short period of time. He did not testify that any of his difficulties were the cause of his professional misconduct. He did not present any expert evidence as to his substance abuse problem and its impact on his law practice. The evidence is not sufficient to mitigate the sanction. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989).

The instant matter marks Respondent’s third encounter with the disciplinary system. He received Informal Admonitions in 2004 and 2006 for similar misconduct. He failed to pursue cases in a diligent manner and failed to communicate with his clients. He engaged in misrepresentations to a client and failed to return a client’s file after his representation was terminated. Case law is clear that prior discipline is an aggravating factor. Office of Disciplinary Counsel v. Antoinette M.J. Bentivegna, 88 DB 2005, 1218 Disciplinary Docket No. 3 (Pa. Jan. 26, 2007).

The Hearing Committee has recommended that Respondent be suspended for a period of six months, with the suspension stayed and probation imposed for twelve months with conditions. Petitioner did not take any exceptions to this recommendation and concurs with it. Clearly the Committee and Petitioner are attempting to preserve Respondent's ability to practice law. However, considering the fact that Respondent has revealed he has a substance abuse problem, but does not attend any 12-step program or Lawyers Concerned for Lawyers, the Board is reluctant to impose probation. The facts of record provide no assurance that Respondent will be able to adhere to the condition of refraining from the use of alcohol or drugs. Probation should not be imposed on Respondent when the facts of record do not support a finding that Respondent has the ability to comply.

Instead, the Board recommends a suspension of one year and one day. There is no doubt that the loss of his law license will be a hardship to Respondent, but we are cognizant that Respondent is not our sole concern. The Board is tasked with the responsibility to consider the needs of the public. Office of Disciplinary Counsel v. Stern, 526 A.2d 1180 (Pa. 1987). In this particular matter and the two prior disciplines, clients were harmed. For the protection of the public, Respondent must be removed from the practice of law at the current time and must petition for reinstatement in the future to demonstrate his fitness.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, Andrew J. Ostrowski, be Suspended from the practice of law for a period of one year and one day.

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: 

Mark S. Baer, Board Member

Date: October 30, 2009

Board Members Buchholz, Bevilacqua and Lawrence recused in this matter.

Board Members Pietragallo, Cohen and McLemore dissented for a six month suspension, followed by twelve months probation, with the conditions recommended by Office of Disciplinary Counsel and added substance abuse probation with a sobriety monitor.