

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1585 Disciplinary Docket No. 3  
Petitioner :  
 : No. 29 DB 2009  
v. :  
 : Attorney Registration No. 30446  
DAVID C. WINTERSTEIN, :  
Respondent : (Tioga County)

ORDER

PER CURIAM:

AND NOW, this 17<sup>th</sup> day of May, 2010, upon consideration of the Report and Recommendations of the Disciplinary Board dated February 24, 2010, it is hereby

ORDERED that David C. Winterstein 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 Patricia Nicola

As of: May 17, 2010

Attest:

Chief Clerk

Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 29 DB 2009
Petitioner	:	
	:	
v.	:	Attorney Registration No. 30446
	:	
DAVID C. WINTERSTEIN	:	
Respondent	:	(Tioga 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 March 3, 2009, Office of Disciplinary Counsel filed a Petition for Discipline against David C. Winterstein. The Petition charged Respondent with violations of the Rules of Professional Conduct in two separate client matters. Respondent did not file an Answer to Petition.

A disciplinary hearing was held on July 13, 2009, before a District III Hearing Committee comprised of Chair Howard A. Rothenberg, Esquire, and Members Richard G. Fine, Esquire, and Philip H. Spare, Esquire. Respondent was represented by William A. Hebe, Esquire.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on December 7, 2009, finding that Respondent violated the Rules of Professional Conduct as contained in the Petition for Discipline, and recommending that Respondent be suspended for a period of six months.

No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on January 20, 2010.

## 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 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 said Rules of Disciplinary Enforcement.

2. Respondent is David C. Winterstein. He was born in 1954 and was admitted to practice law in the Commonwealth in 1979. He maintains his office at 41-42 Water Street, P.O. Box 55, Wellsboro, Tioga County, Pennsylvania 16901, and is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has a history of professional discipline. In 1987, he received a Private Reprimand for neglecting a legal matter. In 1992, he received a Private Reprimand for misconduct in three separate client matters. In 1996, Respondent received a Public Censure and was placed on probation for one year after he failed to file a divorce complaint in two cases and never refunded unearned fees.

4. Respondent did not answer the Petition for Discipline in the instant matter. All allegations in the Petition are deemed admitted pursuant to Pa.R.D.E. 208(b)(3).

John Barr Matter

5. John Barr and his wife retained Respondent in November 2006 to file a Chapter 7 Bankruptcy.

6. Mr. Barr paid Respondent \$1,300 shortly after the initial meeting and within two weeks of this meeting provided Respondent with all paperwork needed to file the bankruptcy.

7. There was no written fee agreement between the parties and Respondent had not previously represented Mr. Barr. Mr. Barr completed the mandatory credit counseling program at his own expense as a prerequisite to his bankruptcy.

8. In April 2007, after several months of inactivity, Mr. Barr called Respondent's office to inquire about the status of his case. Mr. Barr was informed for the first time that he and his wife would not jointly qualify for a Chapter 7 bankruptcy and Mr. Barr should file by himself, because the credit card debt the couple incurred was in his name only. Respondent then requested Mr. Barr to re-sign and update his information on all of the forms, which Mr. Barr promptly did.

9. From April 2007 to September 2007, Mr. Barr continued to call Respondent's office to monitor the status of his case. Respondent did not provide Mr. Barr with any information. On September 14, 2007, almost ten months after Respondent was first retained, he filed Mr. Barr's bankruptcy.

10. On September 17, 2007, the Clerk of the U.S. Bankruptcy Court notified Respondent and Mr. Barr that the Schedules submitted by Respondent were deficient or incomplete and had to be resubmitted.

11. Respondent never corrected the deficient documents. Mr. Barr's bankruptcy was dismissed on November 1, 2007 as a direct result of Respondent's failure to properly file the required documents.

12. On December 6, 2007, Respondent filed another bankruptcy petition on behalf of Mr. Barr. When Respondent filed the petition he identified himself on the

paperwork as working for the law firm of Banik & Winterstein. At the time of the filing, Respondent's law partner, Stephen J. Banik, was suspended from the practice of law by a Pennsylvania Supreme Court Order dated September 17, 2007.

13. Mr. Barr was forced to take the mandatory credit counseling program a second time at his own expense.

14. Respondent failed to file the necessary paperwork with the Bankruptcy Court. On December 9, 2007, the Clerk sent a notice to Respondent and Mr. Barr indicating that the Schedules were deficient or incomplete and had to be refiled.

15. When Mr. Barr received his notice and called Respondent's office, he was assured by Respondent that he would correct the problems and submit the required documents.

16. Over the next several weeks, Mr. Barr continued to call Respondent about his case and Respondent continued to inform him the necessary documents would be submitted in a timely manner.

17. Respondent did not submit corrected documents to the Court.

18. On January 4, 2008, the Bankruptcy Judge dismissed Mr. Barr's bankruptcy for failing to file the required documents in a timely fashion. Respondent received an e-mail notification of the dismissal that same day.

19. On January 25, 2008, Mr. Barr telephoned Respondent's office to make sure everything was in order and Respondent repeated his assurance that everything was in order, even though he knew that the case was dismissed.

20. On January 28, 2008, Mr. Barr received his notice by mail that his bankruptcy case was dismissed due to Respondent's failure to file the requested documents. Mr. Barr subsequently wrote to the Judge and required a hearing on his dismissed bankruptcy.

21. A hearing was held on February 8, 2008. The Judge issued an Order for Respondent to reimburse Mr. Barr his legal fees.

22. Another hearing was held on March 14, 2008. The Judge allowed Mr. Barr to re-file his case with a different counsel and entered an Order requiring Respondent to pay Mr. Barr the sum of \$1,070 to reimburse him for the cost of appraisals, transportation and credit counseling services. This sum included a monetary sanction of \$500 against Respondent for inappropriate conduct.

#### Dennis Hogan Matter

23. Dennis Hogan is the grandson of Clarence J. Every, who devised a 183-acre parcel of property to his four surviving children: Joseph, James, Francis and Betty. Betty Hogan was Mr. Hogan's mother. After Betty Hogan died, her share of land was inherited by Mr. Hogan.

24. Mr. Hogan was named executor of the will of James Every, his uncle. James Every died on April 9, 2006. His brother Joseph Every died the previous year on September 8, 2005. Joseph Every's estate was valued at \$3 million and Citizens and Northern Bank (the Bank) was named the executor of the Joseph Every Estate.

25. After the death of Joseph Every, Mr. Hogan entered onto the property of Joseph Every to remove property such as a backhoe and furniture from the house. The Bank, as executor of the estate, took exception to Mr. Hogan removing items and threatened legal action if he did not return the items.

26. At the same time, the Bank filed a lawsuit on behalf of the Joseph Every Estate to force a partition of the 183-acre parcel Clarence Every devised to his heirs. Mr. Hogan opposed the partition.

27. In May 2006, Mr. Hogan paid Respondent \$2,000 to represent him in the trespass and partition cases. There was no written fee agreement between Respondent and Mr. Hogan. Mr. Hogan was not a client whom Respondent had previously represented.

28. In May 2007, Mr. Hogan also retained Respondent to represent him in his capacity as executor for the Estate of James Every. As executor to the Estate, Mr. Hogan wanted to sue the Estate of Joseph Every for the Estate's alleged failure to honor a \$1,748 check written to Mr. Hogan and to pay a \$25,000 promissory note that Joseph Every allegedly wrote to James Every before his death.

29. Mr. Hogan paid Respondent at least another \$1,000 to file this lawsuit. Respondent wrote Mr. Hogan a receipt for his money but did not provide him with a written fee agreement.

30. A hearing was held on September 20, 2007 to determine the issue of whether the Estate of Joseph Every should honor the check written to Mr. Hogan and the

\$25,000 promissory note. A decision was rendered against Mr. Hogan on November 17, 2007.

31. Respondent did not inform Mr. Hogan about the adverse decision. Mr. Hogan called Respondent's office repeatedly after the hearing and Respondent ignored his telephone calls.

32. Mr. Hogan received a copy of the ruling on March 14, 2008, four months after the decision was rendered. Mr. Hogan paid Respondent's office \$750 to receive a copy by signing over a check that Respondent's law firm was holding for him. Subsequent to receiving a copy of the ruling, Mr. Hogan called Respondent's office repeatedly requesting an accounting of his advanced fees but received no response.

33. Respondent testified on his own behalf at the disciplinary hearing.

34. Respondent described personal problems with his family and problems with his law partner that were ongoing during the time frame of his misconduct.

35. Respondent did not present evidence that these issues caused his misconduct.

36. Respondent outlined ways he would deal with client issues in the future, including putting into place a system so that he doesn't miss deadlines.

III. CONCLUSIONS OF LAW

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

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 1.4(a) – A lawyer shall keep a client informed about the status of a matter and promptly comply with reasonable requests for information.
4. RPC 1.4(a)(3) – A lawyer shall keep a client reasonably informed about the status of the matter.
5. RPC 1.4(a)(4) – A lawyer shall promptly comply with reasonable requests for information.
6. RPC 1.4(b) – A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
7. RPC 1.5(b) – 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.
8. RPC 1.15(b) – Upon receiving property of a client or third person in connection with a client-lawyer relationship, a lawyer shall promptly notify the client or third person. Except as stated in the Rule or otherwise permitted by law or by agreement with the client or third person, a lawyer shall promptly deliver to the client or third person, any

property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

9. RPC 7.5(a) – A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1.

10. RPC 7.5(d) – Lawyers shall not state or imply that they practice in a partnership or other organization unless that is the fact.

#### IV. DISCUSSION

This matter is before the Disciplinary Board for consideration of the charges contained in a Petition for Discipline filed against Respondent. Respondent did not answer the Petition and all allegations contained therein are deemed admitted. Pa.R.D.E. 208(b)(3).

Petitioner must prove by a preponderance of the evidence that is clear and satisfactory that Respondent violated the Rules of Professional Conduct. Office of Disciplinary Counsel v. Duffield, 644 A.2d 1186 (Pa. 1994). The record demonstrates that Petitioner has met its burden.

In the Barr matter, Respondent failed to timely file the bankruptcy petition of his client and failed to keep his client informed of the status of his matter. Respondent went so far as to misrepresent the status of the matter to his client at a time when he knew the petition had been dismissed. Additionally, Respondent identified himself in his

paperwork as being in partnership with an attorney who had been suspended. In the Hogan matter, Respondent failed to provide his client with a written fee agreement, failed to keep his client reasonably informed as to his matter and failed to respond to reasonable requests for information.

Respondent has engaged in this type of misconduct in the past. Respondent's prior discipline consists of a Private Reprimand in 1987, a Private Reprimand in 1992, and a Public Censure with one year of probation in 1996. The acts that formed the basis of the private discipline involved failing to take action on matters and failing to communicate with clients. The public censure involved Respondent's failure to file divorce complaints in two matters and failure to refund unearned fees. Although this misconduct is removed in time from the instant misconduct, the repetitive nature suggests that Respondent has unresolved practice issues which have lead to client neglect and which must be resolved.

Respondent offered testimony that he was experiencing stressful situations with his law partner and his family during the time frame in question. Respondent did not specifically link these factors to his misconduct, and as such they are entitled to limited value.

The Hearing Committee has recommended a suspension for a period of six months. The Board is persuaded that the evidence of record supports a longer suspension. Respondent mishandled two matters in the instant case, and has a history of many other mishandled matters. The public deserves to be protected from this type of

lawyer for longer than six months. It is the Board's unanimous recommendation that Respondent be suspended for a period of one year and one day. This length of time will fulfill the Board's obligation to the public and give Respondent the opportunity to show the Board at the time of reinstatement what steps he will take to resolve his practice issues.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, David C. Winterstein, 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: *Gabriel Bevilacqua*  
Gabriel L. Bevilacqua, Board Member

Date: February 24, 2010

Board Member Momjian did not participate in the adjudication of this matter.