

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 1369 Disciplinary Docket No. 3
Petitioner :
 : No. 46 DB 2007
v. :
 : Attorney Registration No. 53323
JOHN F. MIZNER, :
Respondent : (Erie County)

ORDER

PER CURIAM:

AND NOW, this 29th day of August, 2008, upon consideration of the Report and Recommendations of the Disciplinary Board dated March 14, 2008, it is hereby

ORDERED that John F. Mizner is suspended from the practice of law in this Commonwealth for a period of five years, the suspension is stayed in its entirety, and he is placed on probation for a period of five years, subject to the following conditions:

1. Respondent shall continue treatment for mental health purposes with Ann R. McAllister, M.D., or another physician qualified as a psychiatrist, who is to direct and supervise Respondent's activities therein.

2. Respondent shall cooperate with directions of the psychiatrist supervising his treatment, take medications as prescribed and engage in therapy and counseling sessions as directed.

3. Respondent shall cause the psychiatrist supervising his treatment to

make written reports directed to the Secretary of the Board on a quarterly basis for the first two years of the probation and on a semi-annual basis for the balance of the probation.

4. The written reports shall include the identity and dosage of medications being currently prescribed, the nature and frequency of therapy sessions engaged in since any prior report, the identity of the health services agency or agent providing the same, and an assessment of Respondent's mental condition at that time in regard to his mental fitness to engage in the practice of law.

5. Respondent shall immediately authorize and redirect Dr. McAllister, and any substitute or successor supervising psychiatrist, to immediately furnish a written report of facts and circumstances to the Secretary of the Board at any time when, in the estimation of the supervising psychiatrist, Respondent's behavior or material failure to conduct himself in cooperation with any aspect of his prescribed treatment regimen indicates that he is, or may be, in jeopardy of shortly becoming mentally unfit to engage in the practice of law.

6. If, for any reason, Respondent severs his present relationship with Dr. McAllister, he shall immediately make written report to the Secretary of the Board of that fact and the circumstances causing the same, together with the identification and location of another physician qualified as a psychiatrist who has been fully informed of the terms of this probation and has agreed to serve as a successor supervising psychiatrist in accordance with the same.

7. Respondent shall furnish, at any time it may reasonably be requested, his written authorization for any health care agency or agent to furnish to the Secretary of the Board complete records of and information as to any mental health or underlying

medical care services which may have been provided to him.

8. At the conclusion of the prescribed period of probation, Respondent shall apply for termination of probation in accordance with §89.294 of the Disciplinary Board Rules.

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: August 29, 2008

Attest:


Deputy Prothonotary

Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE
SUPREME COURT OF PENNSYLVANIA

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|--------------------------------|---|---------------------------------|
| OFFICE OF DISCIPLINARY COUNSEL | : | No. 46 DB 2007 |
| Petitioner | : | |
| | : | |
| v. | : | Attorney Registration No. 53323 |
| | : | |
| JOHN F. MIZNER | : | |
| Respondent | : | (Erie 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 April 3, 2007, Office of Disciplinary Counsel filed a Petition for Discipline against John F. Mizner, Respondent. The Petition charged Respondent with professional misconduct arising from allegations that he submitted false claims to his law firm for reimbursement for travel expenses. Respondent filed an Answer to Petition on May 1, 2007.

A disciplinary hearing was held on July 19, 2007, before a District IV Hearing Committee comprised of Chair Joseph M. Gaydos, Esquire, and Members Susan M. Key, Esquire, and David S. Posner, Esquire. Respondent was represented by John E. Quinn, Esquire.

Following the submission of briefs by the parties, the Hearing Committee filed a Report on November 20, 2007, finding that Respondent engaged in professional misconduct and recommending that he receive a two year stayed suspension with probation, which would require ongoing mental health treatment and a practice monitor.

Petitioner filed a Brief on Exceptions on December 10, 2007.

Respondent filed a Brief Opposing Exceptions on December 28, 2007, and requested oral argument before the Disciplinary Board.

Oral argument was held on January 24, 2008, before a three member panel of the Disciplinary Board.

This matter was adjudicated by the Disciplinary Board at the meeting on January 30, 2008.

II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania, 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 John F. Mizner. He was born in 1963 and was admitted to practice law in the Commonwealth of Pennsylvania in 1988. His current attorney registration mailing address is Conner & Riley, 17 W. 10th Street, P.O. Box 860, Erie PA 16512-0860. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. Respondent has no history of discipline.

4. At all times relevant hereto prior to September 2006, Respondent was a member of the law firm of MacDonald, Illig, Jones & Britton, LLP.

5. From February 1, 2006 through August 23, 2006, Respondent submitted to the firm 34 false travel expense vouchers whereby he purchased airfare for alleged business trips, obtained a receipt, then cancelled the trip but submitted the receipt for reimbursement.

6. Pursuant to his false claims for reimbursement for travel expenses, Respondent received from the firm a total of \$69,868.69 as purported reimbursement for expenses which he had not incurred.

7. In early September 2006, after the firm discovered the false claims, Respondent resigned from the firm.

8. Respondent reported his misconduct to the Office of Disciplinary Counsel.

9. Ann R. McAllister specializes in forensic psychiatry and is board certified by the American College of Psychiatry and Neurology.

10. Dr. McAllister met with Respondent on December 15, 2006 for four and one-half hours and again on January 12, 2007 for four hours. She met with Respondent on March 2, April 20, May 25 and June 6, 2007 for two hour sessions. Dr. McAllister talked with Respondent by telephone for 30 minutes on January 12, 2007. In addition, Respondent's wife and employer each joined a session between Dr. McAllister and Respondent. Dr. McAllister authored a report dated March 21, 2007 and a supplemental report dated July 6, 2007.

11. Dr. McAllister diagnosed Respondent as suffering from an obsessive compulsive disorder, particular subtype of symmetry and ordering which, at the time of diagnosis, was severe and untreated. Dr. McAllister opined that in her experience Respondent suffered from the most severe case of this type of obsessive compulsive disorder that she had witnessed.

12. Respondent's clinical symptomology is one of symmetry and ordering/arranging, which are often combined with repeating rituals. People with these symptoms are completely over burdened and over concerned with perfectionism.

13. Respondent's case included an attempt to "perfect" the outside of his house starting with the trees all the way down to weeds growing in newly planted grass. Dr. McAllister described Respondent as ego syntonic, meaning that he completely lacked insight and did not think there was anything wrong with his ordering and symmetry.

14. Dr. McAllister opined that Respondent has suffered from the illness since at least college, if not high school. Symptoms of Respondent's disorder include:

a. constantly vacuuming and organizing his college dorm room, making his bed military style, and meticulously laundering and organizing his clothes in a specific manner.

b. purchasing the exact make, model and color of vehicle since his first car in 1988, and washing it two or three times a week.

c. taking three hours to mow a small yard at his first home in a specific pattern every time.

d. burning out one-half of the grass of the first home because it appeared darker than the other half and re-seeding the whole lawn.

e. organizing his hanging clothes by specific hues and shades and hanging striped shirts from left to right with thinner stripes proceeding to wider stripes, each hung with a distance of two fingers between each hanger.

f. showering himself in a certain order every time and shaving and brushing his teeth in the shower to avoid a mess in the sink.

g. becoming anxious when his children's toys are on the floor.

h. removing all of the wallpaper in the house because the seams made him anxious.

i. carrying a level around the house and keeping a level at the office to adjust any picture or frame that was not level.

j. having three mature pine trees cut down and replacing them with five different pine trees because five was more symmetrical; then, after the five trees were planted, having the trees dug up, moved two inches and replanted because the trees did not appear equally spaced.

15. In 2001, Respondent was working on a case in California. Respondent was often away from his family for extended periods of time and had a great deal of guilt concerning the excessive amount of hours he was working. The guilt, according to Dr. McAllister, was a tipping point for the obsessive-compulsive disorder to become more severe.

16. Dr. McAllister opined that there was a direct causal relationship between Respondent's obsessive-compulsive disorder and the misconduct. During the time of the misappropriation, Respondent was "about as sick as he could be. It was a natural progression. His anxiety, I couldn't even estimate how high it was... he was highly anxious and he was very sick." According to Dr. McAllister, Respondent experienced "a quick buildup of intensely intrusive thoughts, which quickly led to frankly irrational compulsive behavior." (N.T. p. 170)

17. Dr. McAllister explained that the hallmark feature of Respondent's disorder is the unrelenting need to quash the obsessive elements, only to create new opportunities for triggers to enter and perpetuate the relentless cycle.

18. In 2006, the case in California settled, causing Respondent to become more focused on his yard. Melissa Mizner, who is Respondent's wife, described her husband's intensity level as increasing dramatically at that time.

19. During this time, Respondent handled all of the family finances and, unbeknownst to his wife, he incurred a significant amount of debt to pay for the landscaping. Respondent was in financial distress by early 2006 when the misconduct began.

20. In 2006, Respondent paid \$69,000 to Winschel Brothers Landscaping for outside work, a significant increase over the \$28,000 he spent in 2005. Respondent funded these expenses through his earnings, then by credit cards or lines of credit, then by submitting false travel vouchers between February 2006 and August 2006.

21. The travel vouchers were charged against a fee of between \$150,000 and \$200,000 that Respondent and his partner earned the year before and which would have been allocated equally to Respondent and his partner at the end of the year. Respondent intended to repay the misappropriated funds by borrowing the money from a friend.

22. Before Respondent repaid the money, the law firm asked him about the vouchers and he immediately accepted responsibility. On that very day he gave the firm a check in the amount of \$15,000. He resigned from the firm, liquidated his partnership interest, sold his office furniture and paid another \$15,000 to the firm within one week after resigning. Respondent paid the remaining amount within two weeks after liquidating a portion of his pension at a considerable tax penalty. Full restitution was made by October 2, 2006.

23. Respondent testified on his own behalf. He accepts the diagnosis of obsessive compulsive disorder and is trying to live in a way that minimizes the impact the disorder has on his life.

24. Respondent takes the medication Luvox and attends behavioral therapy sessions with Dr. McAllister as well as George Dowd, who is a psychologist. This combination helps him to focus on client matters and develop balance in his family life.

25. Respondent is employed as an associate attorney at Conner Riley Friedman and Weichler, an Erie law firm. He was hired at the firm shortly after he resigned from MacDonald Illig. The partners at Conner & Riley received full disclosure of all details of Respondent's misconduct. Respondent has no control over any of the client or firm accounts.

26. Respondent expressed sincere remorse for his misconduct and the negative impact it had on his law firm and his family.

27. Dr. McAllister opined that Respondent is responding to the medication in an appropriate way and his prognosis is good. She also noted the positive support Respondent is receiving from his family and colleagues and feels that it is very helpful to his recovery.

28. Dr. McAllister does not believe that Respondent is a threat to the public and to his clients in particular.

29. In addition to Dr. McAllister and Respondent's wife, twelve witnesses testified on behalf of Respondent at the disciplinary hearing.

30. Owen McCormick is the President of Joseph McCormick Construction Company. He has known Respondent for over a decade and in 1999 appointed him chief counsel for the company. Mr. McCormick described Respondent's legal services as excellent. Mr. McCormick further described Respondent's reputation in the community as a

man of high integrity. Even after Respondent told Mr. McCormick about his misconduct Mr. McCormick continued to employ Respondent because of his excellent legal skills.

31. Charles Campagne is the President of Career Concepts Staffing Service in Erie. Respondent was the attorney for Career Concepts and then became Mr. Campagne's personal attorney in the late 1990's. Mr. Campagne described Respondent's reputation for integrity and honesty as excellent. Mr. Campagne still utilizes Respondent's legal service and refers others to him.

32. Susan Reiter is an attorney who was admitted to practice law in 1985 and is partner at MacDonald Illig. She has always been impressed with Respondent's work, his success at trial and his loyalty to clients. She was shocked by his misconduct and felt it was very out of character.

33. John Onorato is an attorney who was admitted to practice in 1990. He is general counsel of the Manufacturer's Association of Northwest Pennsylvania and is an adjunct professor at Gannon University. He described Respondent's reputation for integrity and honesty as being of the highest caliber.

34. David Ridge is an attorney who was admitted to practice in 1985 and has served on a Disciplinary Board Hearing Committee. He believes Respondent enjoys a sterling reputation for integrity and honesty in the community.

35. Phillip Friedman has practiced law since 1978 and was the Chair of the Disciplinary Board in 1995. He has known Respondent for 15 or 20 years and stated that Respondent enjoyed an excellent reputation in the legal community and was an extremely effective advocate for his clients.

36. Patrick Delaney is an attorney admitted to practice in 1976 and is a partner at MacDonald Illig. He previously served on a Disciplinary Board Hearing Committee. Mr. Delaney thought Respondent was a very good lawyer and his misconduct was totally out of character.

37. William T. Brown has practiced law since 1973, is a partner at MacDonald Illig and worked closely with Respondent. He believes Respondent is one of the best lawyers in Erie County.

38. Steven E. Riley, Jr., is an attorney since 1978 and is a partner at Conner Riley Friedman and Weichler. He described Respondent as having a very good reputation for integrity.

39. Kristin Grande worked as a paralegal for Respondent from 1994 until December 2006. She described him as detail oriented and very precise, qualities she believed made him an excellent attorney.

40. Monsignor Robert Brugger is the pastor of St. Jude the Apostle Church in Erie and has known Respondent and his family for nine years. He is aware that Respondent's reputation in the community for integrity and honesty is very good.

III. CONCLUSIONS OF LAW

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

1. RPC 8.4(b) - 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.

2. RPC 8.4(c) - It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

Respondent presented clear and convincing evidence that he suffers from a psychiatric disorder which substantially caused his misconduct. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989)

IV. DISCUSSION

This matter is before the Disciplinary Board for consideration of the charges against Respondent who, after 18 years as a member of the bar and contrary to his otherwise good reputation, engaged in misappropriation of law firm funds through his act of submitting false claims for reimbursement for travel expenses on 34 occasions over a period of six or seven months. The misappropriation totaled approximately \$69,868.69. Respondent admitted his misconduct and cooperated with Petitioner's investigation.

At the disciplinary hearing, Respondent presented evidence, by way of expert testimony from Dr. Ann McAllister, that he suffers from a type of obsessive compulsive disorder which substantially caused his misconduct. The Supreme Court of Pennsylvania has held that where the evidence of record supports the finding that a mental disorder was a substantial factor in causing professional misconduct, such evidence may be considered in mitigation of discipline. Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989).

Dr. McAllister's testimony was credible, persuasive and unequivocal that at the time of the misconduct, Respondent suffered from an undiagnosed, untreated and severe form of obsessive compulsive disorder, the type being order and symmetry. According to Dr. McAllister, Respondent exhibited his mental disorder through an obsession with landscaping, which culminated in such financial distress that Respondent misappropriated funds from his law firm to pay for the landscaping expenses. The evidence of record demonstrates that Respondent is treating his illness using a combination of prescription medication and behavioral therapy, and his prognosis for recovery is good. Dr. McAllister opined that Respondent is not a threat to the public. The Board concludes that Respondent is entitled to mitigation.

The remaining issue before the Board is the appropriate discipline to address Respondent's misconduct. Respondent's theft from his law firm is criminal conduct which reflects adversely upon his fitness to practice law, in violation of Rule of Professional Conduct 8.4(b). It is also dishonest conduct, in violation of Rule of Professional Conduct 8.4(c). While there is no per se discipline in Pennsylvania, the mishandling of funds is determinatively held to be a serious offense. Office of Disciplinary Counsel v. Lucarini, 472 A.2d 186 (Pa. 1983). Here, the breach of trust was not directed at clients, but at Respondent's own firm. While this fact spares harm to the public and lessens embarrassment to the profession, the mishandling of non-client funds remains a serious offense. In re Anonymous No. 32 DB 89, 13 Pa. D. & C. 4th 478 (1992). A range of discipline has been imposed on attorneys who engage in such misconduct. In the above cited matter, the attorney was suspended for three years after taking \$7,500 in fees over a period of three years by failing to remit to his firm cash payments and checks received.

Similar discipline was imposed in the case of an attorney who misapplied client funds. See, In re Anonymous Attorney 67 DB 92, 27 Pa. D. & C. 4th 202 (1994). In a very egregious matter wherein the attorney took \$350,000 from his firm over a three month time frame to fund a gambling addiction, the attorney was suspended for five years, even in light of Braun mitigation. In re Anonymous No. 89 DB 1997, 44 Pa. D. & C. 4th 265 (1999).

The Board has concluded that Respondent is entitled to Braun mitigation. Other mitigating factors in Respondent's favor are that he has no prior history of discipline, he is remorseful for his conduct and promptly made full restitution to his law firm. He self-reported his conduct to the Disciplinary Board. Respondent remains an active member of his community. Many members of the community came to the disciplinary hearing and spoke highly of Respondent's very good reputation for integrity and honesty. Business people who had used Respondent's legal services in the past expressed their faith in Respondent and their intent to continue seeking his legal advice. Members of the legal profession expressed their belief that Respondent is an extremely competent lawyer. These witnesses all support Respondent in his recovery. There are no aggravating factors.

The Hearing Committee has recommended a two year period of suspension, stayed in its entirety, with a two year period of probation, ongoing mental health treatment and a practice monitor. Petitioner disagrees with this recommendation and contends that the record does not support the conclusion that Respondent met his burden of proving his mental illness was a causal factor in his misconduct. Therefore, Petitioner does not support a stayed suspension. The Board has carefully reviewed the record in this matter and finds no basis for Petitioner's argument. The evidence is very clear that Respondent's

mental illness substantially caused his misconduct. Dr. McAllister's testimony, coupled with the testimony of various witnesses and that of Respondent himself, is more than ample to allow the Board to make a Braun finding. Petitioner put forth no evidence to refute any aspect of Dr. McAllister's testimony.

Respondent's mitigating evidence, while compelling, does not justify or excuse his misconduct. The amount of money misappropriated, the amount of time that the conduct continued and the fact that Respondent prepared 34 fraudulent vouchers constitutes egregious conduct. The Board is persuaded by the evidence of record that Respondent should be suspended for a period of five years, with the suspension stayed in its entirety, and probation imposed for five years. This probation period will entail continuation of Respondent's mental health treatment, with regular reports from Respondent's treating professional submitted to the Board every quarter for the first two years and semi-annually for the next three years. These reports shall remain confidential. This sanction recognizes the very serious nature of the conduct while affording Respondent mitigation for his equally serious mental disorder. The strict probation requirements during the five year time frame ensure that the Board will be notified if Respondent falters in his recovery.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, John F. Mizner, be Suspended from the practice of law for a period of five years, that the suspension be stayed in its entirety, and that he be placed on Probation for a period of five years, subject to the following Conditions:

1. Respondent shall continue treatment for mental health purposes with Ann R. McAllister, M.D., or another physician qualified as a psychiatrist, who is to direct and supervise Respondent's activities therein.

2. Respondent shall cooperate with directions of the psychiatrist supervising his treatment, take medications as prescribed and engage in therapy and counseling sessions as directed.

3. Respondent shall cause the psychiatrist supervising his treatment to make written reports directed to the Office of the Secretary, on a quarterly basis for the first two years of the probation and on a semi-annually basis for the balance of the probation.

4. The written reports shall include the identity and dosage of medications being currently prescribed, the nature and frequency of therapy sessions engaged in since any prior report, and the identity of the health services agency or agent providing the same, and an assessment of Respondent's current mental condition at that time, in regard to his mental fitness to engage in the practice of law.

5. Respondent shall immediately authorize and redirect Dr. McAllister, and any substitute or successor supervising psychiatrist, to immediately furnish a written report of facts and circumstances to the Office of the Secretary at any time when, in the estimation of the supervising psychiatrist, Respondent's behavior or material failure to conduct himself in cooperation with any aspect of his prescribed treatment regimen indicates that he is, or may be in jeopardy of shortly becoming mentally unfit to engage in the practice of law.

6. If, for any reason, Respondent severs his present relationship with Dr. McAllister, he shall immediately make written report to the Office of the Secretary of that

fact and the circumstances causing the same, together with the identification and location of another physician qualified as a psychiatrist who has been fully informed of the terms of this probation and has agreed to serve as a successor supervising psychiatrist in accordance with the same.

7. Respondent shall furnish, at any time it may reasonably be requested, his written authorization for any health care agency or agent to furnish to the Office of the Secretary complete records of and information as to any mental health or underlying medical care services which may have been provided to Respondent.

8. At the conclusion of the prescribed period of probation, Respondent shall apply for termination of probation, in accordance with §89.294, Disciplinary Board Rules.

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: 
Gary G. Gentile, Board Member

Date: March 14, 2008

Board Members Newman, Wright and Buchholz recused in this matter.

Board Member Jefferies did not participate in the adjudication.