

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 1199 Disciplinary Docket No. 3
Petitioner	:	
	:	No. 63 DB 2005
v.	:	
	:	Attorney Registration No. 22534
JOHN A. LEE	:	
Respondent	:	(Allegheny 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 May 6, 2005, Office of Disciplinary Counsel filed a Petition for Discipline against John A. Lee, Respondent. The Petition charged Respondent with violations of Rules of Professional Conduct 1.3, 1.4(a), 1.15(a), 1.16(d) and 8.4(c) arising out of his representation of a client. Respondent filed an Answer to Petition for Discipline on June 28, 2005.

A disciplinary hearing was held before a District IV Hearing Committee comprised of Chair Frederick C. Leech, Esquire, and Members James T. Marnen, Esquire, and Jan C. Swensen, Esquire. Respondent appeared pro se.

The Hearing Committee filed a Report on March 20, 2006, finding that Respondent engaged in professional misconduct and recommending that he be subjected to a Public Censure with the condition that he return to his client \$1,000 of funds.

Petitioner filed a Brief on Exceptions on April 6, 2006.

This matter was adjudicated by the Disciplinary Board at the meeting on July 15, 2006.

## II. FINDINGS OF FACT

The Board makes the following findings of fact:

1. Petitioner, Office of Disciplinary Counsel, whose principal office is located at Suite 1400, 200 North Third Street, Harrisburg, Pennsylvania 17101, 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, John A. Lee, was born in 1950. He was admitted to practice law in the Commonwealth in 1976. Respondent's registration address is 1040 Fifth Avenue, Pittsburgh PA 15219. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court.

3. Respondent has a history of private discipline. He received a private reprimand in 1997, an informal admonition in 1998, and a private reprimand in 2006.

4. On August 24, 2002, Henry C. Koehnke, Jr., retained Respondent to represent him in an unemployment discrimination/Family Medical Leave Act (FMLA) action.

5. Respondent provided Mr. Koehnke with a fee agreement which specified that:

a. Mr. Koehnke was to pay Respondent an initial nonrefundable \$1,000 retainer fee; and,

b. A second nonrefundable \$3,000 retainer would be due in advance of the filing of a complaint in federal court with respect to his case.

6. On August 24, 2002, Mr. Koehnke signed the fee agreement and paid Respondent a retainer fee of \$1,000, by check number 1290.

7. Respondent caused check number 1290 to be negotiated on or about August 26, 2002.

8. On September 14, 2002, Respondent filed a formal complaint with the Pennsylvania Human Relations Commission (PHRC) on behalf of his client.

9. On September 21, 2002, Mr. Koehnke paid Respondent \$300 by check number 1299 and Respondent caused check number 1299 to be negotiated on or about September 21, 2002.

10. On November 14, 2002, Mr. Koehnke paid Respondent \$1,000 by check number 1319 and Respondent caused check number 1319 to be negotiated on or about November 15, 2002.

11. On November 20, 2002, Mr. Koehnke paid Respondent \$500 by check number 1325 and Respondent caused check number 1325 to be negotiated on or about November 20, 2002.

12. On November 26, 2002, Respondent represented Mr. Koehnke at a PHRC fact finding conference.

13. At the conference Respondent provided oral case citations and EEOC guidelines to the PHRC representative, David Thomas.

14. On January 25, 2003, Mr. Koehnke paid Respondent \$500 by check number 1361 and Respondent caused check number 1361 to be negotiated on or about January 27, 2003.

15. On May 19, 2003, Mr. Koehnke paid Respondent \$500 by check number 1420 and Respondent caused check number 1420 to be negotiated on or about May 19, 2003.

16. On June 5, 2003, Mr. Koehnke paid Respondent \$500 by check number 1428 and Respondent caused check number 1428 to be negotiated on or about June 6, 2003.

17. On July 25, 2003, Mr. Koehnke paid Respondent \$300 by check number 1446 and Respondent caused the check to be negotiated on or about July 25, 2003.

18. On August 7, 2003, Mr. Koehnke paid Respondent \$400 by check number 1453 and Respondent caused the check to be negotiated on or about August 8, 2003.

19. Mr. Koehnke made these periodic payments to Respondent but lost track of the total amount he had paid to Respondent; ultimately he paid Respondent \$1,000 more than the amount agreed upon in the fee agreement.

20. Mr. Koehnke's written fee agreement with Respondent was never modified and Mr. Koehnke never gave Respondent authority to utilize the extra \$1,000 paid to him.

21. On September 8, 2003, the PHRC rendered its Findings of the Investigation to Mr. Koehnke's complaint, in which the PHRC found that there was insufficient evidence of an unlawful act of discrimination.

22. In response to these Findings of the Investigation, Respondent filed an Amended Complaint with the PHRC on October 6, 2003, which named David Whitehead as a respondent.

23. On or about October 17, 2003, George Simmons, Regional Director of the PHRC, sent to Respondent a copy of a letter addressed to Mr. Koehnke stating that the PHRC was refusing to accept the Amended Complaint because the allegations contained in it were “insufficient to make a claim for relief against named individual”.

24. In response to the PHRC’s refusal, Mr. Koehnke, upon receipt of the October 17, 2003 letter, talked with Respondent by telephone and requested that Respondent contact Mr. Simmons in order to obtain further explanation for this action. Respondent told Mr. Koehnke that there was no need to do so.

25. On December 10, 2003, Mr. Koehnke called and spoke with Respondent in regard to filing a federal complaint in his case. Mr. Koehnke understood Respondent to have told Mr. Koehnke that a copy of the federal complaint was in the mail and that Respondent would discuss it with Mr. Koehnke no later than December 12, 2003.

26. On December 12, 2003, Mr. Koehnke called Respondent’s office and left a message for Respondent stating that he had not received the federal complaint he believed Respondent said he had mailed to him.

27. On December 13, 2003, Mr. Koehnke again called Respondent’s office and left a message to inquire about meeting with Respondent to discuss the complaint.

28. Respondent did not return his client’s calls.

29. In a letter dated December 30, 2003, and sent by certified mail, Mr. Koehnke informed Respondent of his dissatisfaction with Respondent’s lack of

communication with him. Mr. Koehnke requested that Respondent respond to his letter by January 8, 2004.

30. Respondent did not respond to this letter or otherwise communicate with Mr. Koehnke.

31. At Mr. Koehnke's request, in early January 2004, Attorney Richard Lindner left a voice mail message at Respondent's office asking that Respondent call him about the status of Mr. Koehnke's case.

32. Respondent returned Attorney Lindner's call and left him a voice mail message telling him, inter alia, that:

- a. Respondent met with Mr. Koehnke "about 50 times out of the last 55 weeks and every week for 14 to 15 months."
- b. Mr. Koehnke's federal case is "ready to go."
- c. Mr. Koehnke's case is "fine."
- d. The case was "frozen until the [Pennsylvania Human Relations] Commission had it for a year".

33. Respondent did not file a complaint in federal court on behalf of Mr. Koehnke but did invest work in the preparation of such complaint.

34. On or about April 14, 2004, David Thomas sent to Respondent a copy of a letter addressed to Mr. Koehnke, in which he stated that the Amended Complaint still did not provide sufficient evidence to show unlawful discrimination and that, "despite several requests for cites of case law which would verify repeated assertions by your

counsel that actions taken by the respondent were per se violations of the Act, none have ever been provided.”

35. Respondent did not reply to the April 14, 2004 letter. Respondent believed he already verbally gave citations to Mr. Thomas at the conference on November 26, 2002.

36. On or about April 21, 2004, Homer C. Floyd, Executive Director, Pennsylvania Human Relations Commission, sent to Respondent a copy of a letter addressed to Mr. Koehnke advising him of his rights related to the dismissal of his complaint.

37. In a letter dated April 22, 2004, sent by certified mail, and addressed to Respondent, Mr. Koehnke:

a) Informed Respondent again of his dissatisfaction with Respondent’s “professional services” and terminated the professional relationship with Respondent by stating expressly that Respondent’s “actions and lack thereof” constituted a “breach of our contract”; and,

b) Requested that Respondent refund \$4,000 to him (\$5,000 total that he paid to Respondent minus the initial \$1,000 nonrefundable retainer fee) by May 7, 2004, on the basis that Respondent did not perform the services for which he paid him this money, namely no drafting or filing a federal complaint in Mr. Koehnke’s case.

38. Respondent responded to Mr. Koehnke's April 22, 2004 letter via a letter of April 27, 2004 and did not return any of the monies paid to him by Mr. Koehnke.

39. Luke Kelly, Esquire, and John Mulroy, Esquire, testified on behalf of Respondent as to his good character. Neither witness was knowledgeable as to the facts of Respondent's misconduct.

40. Respondent testified on his own behalf. He expressed remorse for his actions and has learned from his mistakes. He learned that when he works extensively with people he needs to create a paper record of correspondence and telephone calls.

### III. CONCLUSIONS OF LAW

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

1. 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.

2. 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. Other property shall be identified as such and appropriately safeguarded.

Complete records of such account funds and other property shall be preserved for a period of five years after termination of the representation.

3. 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 of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Petitioner failed to meet its burden of proof by clear and satisfactory evidence that Respondent violated RPC 1.3 and RPC 8.4(c).

#### IV. DISCUSSION

This matter is before the Board on a Petition for Discipline charging Respondent with misconduct involving the representation of a client in an employment discrimination/Family Medical Leave Act matter. Respondent was charged with violating Rules of Professional Conduct 1.3, 1.4(a), 1.15(a), 1.16(d), and 8.4(c). Petitioner bears the burden of proof by a preponderance of the evidence which is clear and satisfactory that Respondent engaged in the above violations. Office of Disciplinary Counsel v. Surrick, 749

A.2d 441 (Pa. 2000). After de novo review of the record, the Board concludes that Petitioner met its burden as to Rules 1.4(a), 1.15(a), and 1.16(d), but failed to meet its burden as to Rules 1.3 and 8.4(c).

The documentary evidence and testimony presented by Petitioner show that Respondent did not communicate with his client, Mr. Koehnke, after December 10, 2003. Even after being contacted by another lawyer to find out the status of the case, Respondent did not take affirmative steps to contact his client or to speak to him. While Respondent's April 27, 2004 letter to his client is a communication, it is an ineffective response to the series of requests made by Mr. Koehnke to Respondent in his efforts to ascertain information about the status of his legal matter. This failure to communicate is a violation of RPC 1.4(a).

It is uncontroverted that all funds paid by Mr. Koehnke to Respondent were not were held in trust. Specifically, the \$1,000 overpayment made by Mr. Koehnke to Respondent, which was entrusted monies, was not held separately and apart from Respondent's own property. Respondent's actions constitute a violation of RPC 1.15(a).

By letter of April 22, 2004, to Respondent, Mr. Koehnke terminated the professional relationship with Respondent and requested a return of his monies. The \$1,000 overpayment made to Respondent represents a fee that has not been earned and Respondent's failure to return that \$1,000 constitutes a violation of RPC 1.16(d). It is alleged that \$3,000 of fees was unearned by Respondent and subject to return to Mr. Koehnke; however, the Board finds that Petitioner did not prove that such fees had not

been earned. It appears to the Board that such sum is properly the subject of a fee dispute resolution.

Although charged in the Petition for Discipline with violations of RPC 1.3 and RPC 8.4(c), the evidence of record is not sufficient to find that Respondent engaged in such violations. Respondent did not fail to act with reasonable diligence and promptness, as required by RPC 1.3. Petitioner's allegations centered on Respondent's alleged failure to provide requested case law citations to the Pennsylvania Human Relations Commission pertaining to his client's case. The evidence supports a finding that Respondent did provide relevant legal authority and did discuss the nature of legal authority relevant to Mr. Koehnke's case. Likewise, Respondent did not engage in dishonest conduct or misrepresentation in violation of RPC 8.4(c). Petitioner alleged that Respondent misrepresented to Mr. Koehnke that he sent citations to the Human Relations Commission when he had not, and that a federal complaint had been prepared and mailed to Mr. Koehnke when one had not, and finally that Respondent utilized \$1,000 in funds entrusted to Respondent by Mr. Koehnke's overpayment. The evidence of record shows that Respondent did provide relevant case authority, and he did not report to his client that he prepared and sent a federal complaint, but rather that he was working on the federal complaint. As to the \$1,000, there is insufficient evidence to support a finding that he acted dishonestly in regard to the monies, although it is clear that he did not place the funds in escrow.

Respondent's professional misconduct must be considered in light of the goals of the lawyer disciplinary system to protect the public and courts from unfit lawyers, as well as in context with his prior history of discipline. Respondent received a private reprimand in 1997 for violations of Rules of Professional Conduct 1.3, 1.16(d) and 8.4(d). Respondent failed to communicate with a client and failed to refund unearned fees. He issued personal checks for filing fees in the U.S. District Court and the checks were twice returned for insufficient funds. In 1998 Respondent received an informal admonition for failing to deposit checks from a client into an escrow account. In January 2006 Respondent received a private reprimand for violations of RPC 1.3, 1.4(a), and 1.4(b) in two separate matters, both involving lack of communication with clients and failing to timely file pleadings. Respondent's recidivism necessitates that the instant matter be resolved with public discipline, as private discipline has failed to impress upon Respondent the flaws in his methods of practicing law.

Respondent testified on his own behalf and presented two character witnesses. The testimony provided by the witnesses was not compelling, especially as neither witness was familiar with the facts of Respondent's misconduct. Respondent expressed remorse and indicated that he had given the matter a lot of thought after the fact to ascertain where he went wrong. He further indicated that he has learned from his mistakes in the matter and will keep better records of communication with clients in the future.

The Hearing Committee recommended a public censure to resolve this matter. While the Hearing Committee is correct in its conclusion that public discipline is warranted, the Board is persuaded that a short suspension better addresses the instant misconduct and the past history of three disciplinary sanctions. In a similar matter, an attorney was suspended for six months following his failure to hold client funds inviolate, failure to maintain complete records, and failure to promptly distribute client funds. Office of Disciplinary Counsel v. Gary Scott Silver, Nos. 56 and 178 DB 2003, 998 Disciplinary Docket No. 3 (Pa. April 6, 2005).

The Board recommends that Respondent be suspended for a period of six months and that he return \$1,000 to his client, which represents an overpayment by Mr. Koehnke and a fee that was not earned by Respondent. Furthermore, Respondent must agree to go to fee dispute resolution regarding the disputed \$3,000.

V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania recommends that the Respondent, John A. Lee, be suspended from the practice of law for a period of six months, return \$1,000 to his client and submit himself to the Allegheny County fee dispute committee.

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: \_\_\_\_\_  
Francis X. O'Connor, Board Member

Date: August 25, 2006

Board Member Newman did not participate in the adjudication.

Board Members Teti and Brown dissented and would recommend a one year suspension.

O R D E R

PER CURIAM:

AND NOW, this 14<sup>th</sup> day of December, 2006, upon consideration of the Report and Recommendations of the Disciplinary Board dated August 25, 2006, the Petition for Review and response thereto, it is hereby

ORDERED that John A. Lee be and he is suspended from the Bar of this Commonwealth for a period of six months, 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.