

IN THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, : No. 2241 Disciplinary Docket No. 3  
Petitioner :  
 : No. 156 DB 2014  
v. :  
 : Attorney Registration No. 03196  
MALCOLM P. ROSENBERG, :  
Respondent : (Philadelphia)  
:

ORDER

PER CURIAM

AND NOW, this 17<sup>th</sup> day of March, 2016, upon consideration of the Report and Recommendations of the Disciplinary Board, Malcolm P. Rosenberg is suspended from the Bar of this Commonwealth for a period of three years, and he is directed to comply with all the provisions of Pa.R.D.E. 217. Respondent shall pay costs to the Disciplinary Board pursuant to Pa.R.D.E. 208(g).

A True Copy Patricia Nicola  
As Of 3/17/2016

Attest:   
Chief Clerk  
Supreme Court of Pennsylvania

BEFORE THE DISCIPLINARY BOARD OF THE  
SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL	:	No. 156 DB 2014
Petitioner	:	
	:	
v.	:	Attorney Registration No. 03196
	:	
MALCOLM P. ROSENBERG	:	
Respondent	:	(Philadelphia)

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

By Petition for Discipline filed on October 14, 2014, Office of Disciplinary Counsel charged Malcolm P. Rosenberg with violations of Rules of Professional Conduct and Rules of Disciplinary Enforcement arising out of allegations that Respondent engaged in the unauthorized practice of law and made misrepresentations to the court. Respondent filed an Answer to Petition on November 14, 2014.

A disciplinary hearing was held on March 9, 2015, before a District I Hearing Committee comprised of Chair Kevin E. Raphael, Esquire, and Members

Stephanie Sprenkle, Esquire and Josh J.T. Byrne, Esquire. Respondent appeared *pro se*.

Following the submission of Briefs by the parties, the Hearing Committee filed a Report on August 26, 2015, concluding that Respondent violated the Rules as charged in the Petition for Discipline and recommending that he be suspended for a period of three years.

No Briefs on Exception were filed by the parties.

This matter was adjudicated by the Disciplinary Board at the meeting on October 22, 2015.

## II. FINDINGS OF FACT

The Board makes the following findings:

1. Petitioner, whose principal office is located at the Pennsylvania Judicial Center, 601 Commonwealth Avenue, Suite 2700, Harrisburg, Pennsylvania 17106, is invested, pursuant to Rule 207, Pa.R.D.E., 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 Malcom Rosenberg. He was admitted to practice law in the Commonwealth of Pennsylvania in 1962. His attorney registration address is 603 Laramie Place, Philadelphia, PA 19115. Respondent is subject to the jurisdiction of the Disciplinary Board of the Supreme Court of Pennsylvania.

3. By Order dated July 1, 1996, the Pennsylvania Supreme Court suspended Respondent from the practice of law for one year and one day, retroactive to June 30, 1993, the date of Respondent's temporary suspension from the practice of law. Respondent's suspension was based on his failure to promptly distribute client funds in the amount of \$30,000. Respondent did not distribute the funds until ordered to do so by the Philadelphia Court of Common Pleas approximately 15 months after receipt of the funds. ODC-1.

4. Respondent received notice of his suspension by certified and regular mail. N.T. 18-21.

5. Respondent has not been reinstated to the practice of law in the Commonwealth of Pennsylvania.

6. On or about June 28, 2012, Veronica Willard and Paul Silvestri, co-owners of property located at 17 Michael Road, Southampton, Bucks County, Pennsylvania 18966, were involved in a dispute over the allocation of the net proceeds of the sale of the property. ODC-4; N.T. 31-33.

7. By email dated June 28, 2012 at 10:14 p.m., Ms. Willard told Mr. Silvestri that "[Willard had] offered to compromise. [Willard] offered to have Deb [Mr. Silvestri's mother] as the mediator. But [Silvestri has] refused all efforts to work this out agreeably. [Willard is] fed up. [Willard is] lawyering up." ODC-4; N.T. 32-33.

8. Paul Silvestri testified at the disciplinary hearing on March 9, 2015. He testified credibly that:

a. Respondent introduced himself at the Michael Road closing as "Veronica's lawyer, as her counsel" (N.T. 34) and provided a business card (ODC-5) to Mr. Silvestri's real estate agent (N.T. 34-35);

b. Respondent was named as the escrow agent in the Escrow Agreement (ODC-26) to hold the net proceeds of approximately \$37,000 from the Michael Road closing (N.T. 36-37);

c. Mr. Silvestri believed Respondent could hold the check representing the net proceeds because Respondent “does have the ability to deposit a check, considering – if there is an IOLTA account or some sort of an account in place where that’s the norm” (N.T. 37);

d. Mr. Silvestri felt “muscled into essentially just handing the check over” (N.T. 37) because “Veronica refused to sign the closing papers for the house if she wasn’t walking with the check” (N.T. 37-38);

e. Respondent engaged in discussions and conferred with Ms. Willard during the course of the closing (N.T. 38);

f. Following the Michael Road closing, Mr. Silvestri negotiated with Respondent over several months through an exchange of emails (ODC-6, ODC-7, ODC-8; N.T. 39-42);

g. Emails between Mr. Silvestri and Respondent were received or sent to Respondent’s email address at [LawMpr@aol.com](mailto:LawMpr@aol.com) (ODC-6; ODC-7; ODC-8; N.T. 39-42);

h. Respondent’s emails to Mr. Silvestri included a footer suggesting the content of the email could include content “that is confidential or privileged and exempt from disclosure under applicable law.” (ODC-6, ODC-7, ODC-8);

i. Following Mr. Silvestri’s email dated September 4, 2012 at 4:16 p.m. (ODC-8), Mr. Silvestri retained the services of Attorney

Breandan Q. Nemecc to negotiate on his behalf with Respondent (N.T. 42-43);

j. After retaining Mr. Nemecc, Mr. Silvestri had no further interactions with Respondent (N.T. 43);

k. Mr. Silvestri believed Respondent was an attorney, but "it just didn't feel right from the beginning." N.T. 43.

9. At the disciplinary hearing on March 9, 2015, Mr. Nemecc testified credibly that:

a. He has been a member of the Pennsylvania bar since 2008 (N.T. 83);

b. He was retained to represent Mr. Silvestri to resolve a dispute over the disbursement of the net proceeds from the Michael Road closing (N.T. 83);

c. Mr. Silvestri told him Respondent was representing Ms. Willard and provided Mr. Nemecc with Respondent's contact information (N.T. 84);

d. Mr. Nemecc contacted Respondent to negotiate a settlement of the dispute over the division of the net proceeds from the Michael Road closing (N.T. 85, 87-88);

e. Mr. Nemecc's contacts with Respondent involved telephone conversations, letters and email communications to Respondent (N.T. 85-101);

f. Mr. Nemecc sent Respondent a letter dated October 17, 2012, setting forth Mr. Silvestri's demands and addressed the letter to

Respondent with the appellation “Esquire” after Respondent’s name, because Mr. Nemeč believed Respondent was an attorney eligible to practice law in the Commonwealth (ODC-10; N.T. 89-92);

g. Mr. Nemeč sent Respondent a letter erroneously dated as September 27, 2012 and emailed to Respondent on October 23, 2012 at 4:08 p.m., in which Mr. Nemeč stated, “It has come to my attention that your license to practice law has been suspended” and that “I would request that you permit me to place the funds in my attorney IOLTA account.” (ODC-13, 13(a); N.T. 93-94);

h. Respondent did not reply to the email;

i. Mr. Nemeč instituted an equity action in the Philadelphia Court of Common Pleas under caption of *Silvestri v. Rosenberg*, which consisted of a motion for injunctive relief and a complaint in equity (N.T. 97-99); and

j. Respondent filed an answer to the Motion (“Answer I”) and a separate answer to the Complaint (“Answer II”). ODC-19, N.T. 101-103.

10. Respondent “signed” each of his emails to Mr. Silvestri and Mr. Nemeč with the appellation “Esq.” after his name. ODC-6, ODC-7, ODC-8.

11. In his Answer I, Respondent averred, *inter alia*:

“[Respondent DENIES] the allegations set forth therein with the exception of an admission that [Respondent was] suspended from the practice of law in Pennsylvania for one (1) year and one (1) day beginning 6/30/1993. The suspension was voluntarily submitted to by [Respondent] for inattention to client matters, and for missing five (5) Hearing dates, as well as for lack of response to client requests.” Answer I at ¶1.

12. Respondent knew that the temporary suspension was not voluntary when he filed Answer I.

13. Respondent knew that in addition to “inattention to client matters, and for missing five (5) Hearing dates, as well as for lack of response to client requests”, discipline was imposed for: 1) Failure to provide competent representation; 2) failure to promptly deliver fiduciary funds belonging to a client or third person; 3) failure to take steps to protect a client’s interests upon termination of respondent’s representation; 4) engaging in conduct disruptive to a tribunal; and 5) conduct that was prejudicial to the administration of justice. ODC-1 at 23-25.

14. Respondent made a false assertion in Answer I that the suspension was voluntary. ODC-1 at 23-25.

15. In Answer II, Respondent denied he was engaged in the unauthorized practice of law, and averred he “has been, semi-retired, and engaged in lawful activity.” Answer II at ¶3.

16. Respondent reasserted his false contention that the suspension was voluntary, asserted he did not misappropriate client funds, and asserted the suspension was “based upon inattention to client matters and failing to appear at several hearings, all of which was caused by illness.” Answer II at ¶7.

17. At the time that Respondent filed Answer II, he knew the suspension was not voluntary, and his assertion to the contrary was false. ODC-1, ODC-22, ODC-23, ODC-24, ODC-25.

18. Respondent didn’t testify at the disciplinary hearing on March 9, 2015.



19. In his opening, Respondent set forth his contention that he merely agreed to do a “favor” for a friend and “present myself along so that there would not be a physical or emotional confrontation between Mr. Silvestri and [Ms. Willard].” N.T. 171.

20. Respondent acknowledged that his card had the term “Esq.” on it and he has used the term in the past. N.T. 173.

21. Respondent asserted he believed his use of “Esq.” was appropriate because he received correspondence from the Disciplinary Board which referred to him as “Esq.” N.T. 173.

22. Respondent continued to assert that his suspension imposed in 1996 was not related to improper handling of client funds. N.T. 174-175.

23. Respondent attempted to shift blame for his past errors to other attorneys who worked with him. N.T. 175.

24. Respondent presented two witnesses, Jay Starr, Esquire and Lawrence Hambrecht, Esquire.

25. Both of Respondent’s witnesses testified credibly.

26. Mr. Starr represented Ms. Willard in negotiating a settlement with Mr. Silvestri after Mr. Nemeč brought Respondent’s suspension to light, and drafted a release with input from Mr. Nemeč and Respondent. N.T. 150, 155, 180-181.

27. Mr. Starr has known Respondent for forty (40) years and knows Respondent to have an excellent reputation. N.T. 190-191.

28. Mr. Hambrecht knows Respondent to have a reputation for being truthful and honest in his community. N.T. 202-203.

29. Respondent was forthright with Mr. Hambrecht about the fact that he was no longer practicing law. N.T. 202-203.

30. Ms. Willard did not testify but an affidavit authored by her was submitted as an exhibit to Respondent's response to Mr. Silvestri's motion for a preliminary objection. ODC-18.

31. The affidavit asserted Respondent informed her he was not licensed to practice law in Pennsylvania during their first conversation. ODC-18.

32. Respondent has not accepted responsibility for his misconduct.

33. Respondent has not shown he understands that any of his actions were wrong.

34. Respondent has not shown remorse for his actions and omissions.

### 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 1.16(a)(1) – A lawyer shall not represent a client if the representation will result in a violation of the Rules of Professional Conduct.

2. RPC 3.3(a)(1) – A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.

3. RPC 4.1(a) – In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

4. RPC 5.5(a) – A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

5. RPC 7.1 – A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

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

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

8. RPC 8.4(d) – It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

9. Pa.R.D.E. 203(b)(3) – Willful violation of any other provision of the Enforcement Rules shall be grounds for discipline, *via* the Enforcement Rules below:

a. Pa.R.D.E. 217(c)(1) – A formerly admitted attorney shall promptly notify, or cause to be promptly notified, of the suspension, all persons or their agents or guardians to whom a fiduciary duty is or may be owed at any time after the suspension;

b. Pa.R.D.E. 217(c)(2) – A formerly admitted attorney shall promptly notify, or cause to be notified all other persons with whom the formerly admitted attorney may at any time expect to have professional contacts under circumstances where there is a reasonable probability that they may infer that he or she continues as an attorney in good standing;

c. Pa.R.D.E. 217(d) – A formerly admitted attorney, following an order imposing suspension, shall not accept any new retainer or engage as an attorney for another in any new case or legal matter of any nature;

d. Pa.R.D.E. 217(j)(1) – All law-related activities of the formerly admitted attorney shall be conducted under the supervision of a member in good standing of the Bar of this Commonwealth who shall be

responsible for ensuring that the formerly admitted attorney complies with the requirements of this subdivision (j). If the formerly admitted attorney is engaged by a law firm or other organization providing legal services, whether by employment or other relationship, an attorney of the firm or organization shall be designated by the firm or organization as the supervising attorney for purposes of this subdivision;

e. Pa.R.D.E. 217(j)(2) – For purposes of this subdivision (j), the only law-related activities that may be conducted by a formerly admitted attorney are the following: (i) legal work of a preparatory nature, such as legal research, assembly of data and other necessary information, and drafting of transactional documents, pleadings, briefs, and other similar documents; (ii) direct communication with the client or third parties to the extent permitted by paragraph (3); and (iii) accompanying a member in good standing of the Bar of this Commonwealth to a deposition or other discovery matter or to a meeting regarding a matter that is not currently in litigation, for the limited purpose of providing clerical assistance to the member in good standing who appears as the representative of the client;

f. Pa.R.D.E. 217(j)(3) – A formerly admitted attorney may have direct communications with a client or third party regarding a matter being handled by the attorney, organization or firm for which the formerly admitted attorney works only if the communication is limited to ministerial matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages. The formerly admitted

attorney shall clearly indicate in any such communication that he or she is a legal assistant and identify the supervising attorney; and

g. Pa. R.D.E. 217(j)(4) – A formerly admitted attorney may not engage in any form of law-related activities in this Commonwealth except in accordance with the following requirement: Without limiting the other restrictions in this subdivision (j), a formerly admitted attorney is specifically prohibited from engaging in any of the following activities: (ii) performing law-related services from an office that is not staffed by a supervising attorney on a full time basis; (iv) representing himself or herself as a lawyer or person of similar status; (v) having any contact with clients either in person, by telephone, or in writing, except as provided in paragraph (3); (vi) rendering legal consultation or advice to a client; (ix) negotiating or transacting any matter for or on behalf of a client with third parties or having any contact with third parties regarding such a negotiation or transaction; and (x) receiving, disbursing or otherwise handling client funds.

IV. DISCUSSION

Disciplinary proceedings were instituted against Respondent by Office of Disciplinary Counsel by way of a Petition for Discipline filed on October 14, 2014. The Petitioner charged Respondent with violating multiple Rules of Professional Conduct and Rules of Disciplinary Enforcement arising from allegations that he engaged in the unauthorized practice of law and made misrepresentations to the court. Respondent filed an Answer on November 14, 2014, in which he denied engaging in any

misconduct. Under the circumstances we find that Petitioner established by a preponderance of clear and satisfactory evidence, that Respondent's actions constitute professional misconduct. *Office of Disciplinary Counsel v. Surrick*, 749 A.2d 441, 444 (Pa. 2000).

Petitioner produced a comprehensive set of exhibits and the testimony of two witnesses, Paul Silvestri and Breandan Q. Nemec, Esquire. Respondent did not offer his own testimony, but produced two exhibits and the testimony of two witnesses, Jay Starr, Esquire and Lawrence Hambrecht, Esquire. The evidence shows that Respondent illegally practiced law in this Commonwealth for a period of approximately four months. In connection with his unauthorized practice, Respondent engaged in misrepresentations to the court, third parties and opposing counsel.

The record reveals that Respondent is currently a suspended attorney ineligible to practice law in Pennsylvania. On July 1, 1996, he was suspended by Order of the Supreme Court for a period of one year and one day, retroactive to the date of temporary suspension on June 30, 1993. Respondent has been continuously suspended from the practice of law since that date. Respondent acknowledged his ongoing suspension at the time of the disciplinary hearing.

The facts pertaining to the instant matter began on June 29, 2012, when Respondent appeared at a real estate closing on behalf of Veronica Willard, who was involved in a dispute with her ex-fiancé, Mr. Silvestri, concerning the net proceeds of the sale of the property. Ms. Willard had informed Mr. Silvestri prior to the closing that she was "lawyering up." Respondent appeared with Ms. Willard and identified himself as "Veronica [Willard's] lawyer, her counsel." Respondent provided to Mr. Silvestri, through the real estate agent, a business card which carried the appellation "Esq.,"

Respondent's e-mail address, [LawMpr@aol.com](mailto:LawMpr@aol.com), and an office address in Philadelphia. Respondent was named as the escrow agent of the net proceeds. Respondent communicated on a fairly regular basis with Mr. Silvestri and Mr. Nemec regarding settlement of the dispute. Mr. Nemec believed Respondent was eligible to practice law in Pennsylvania, as all email exchanges contained the appellation "Esq." after Respondent's name. Until on or about October 23, 2012, Mr. Silvestri and Mr. Nemec believed that they were negotiating with Respondent as Ms. Willard's attorney. Mr. Nemec filed suit against Respondent and in response, Respondent made misrepresentations within his answers regarding the outcome of his 1993 disciplinary matter.

The evidence establishes that Respondent held himself out as an attorney eligible to practice law and engaged in the unauthorized practice of law, thereby violating RPC 1.16(a)(1), 4.1(a), 5.5(a), 7.1, 7.5(a), 8.4(c), and Pa.R.D.E. 203(b)(3), *via* Pa.R.D.E. 217(c)(1), 217(c)(2), 217(d), 217(j)(1), 217(j)(2), 217(j)(3), 217(j)(4)(ii), and 217(j)(4)(iv, v, vi, ix, and x).

In addition to committing the above violations, Respondent also made knowing misrepresentations to the court in his pleadings in the action initiated by Mr. Nemec on behalf of Mr. Silvestri. The statements included, *inter alia*, that Respondent was semi-retired; voluntarily suspended; and, not engaged in the unauthorized practice of law. Respondent's misrepresentations violated RPC 3.3(a)(1) and 8.4(c).

Having concluded that Respondent violated the Rules, this matter is ripe for the determination of discipline. Petitioner seeks a suspension for not less than four years. Respondent seeks dismissal of this matter. The Hearing Committee recommended a suspension for three years.

After reviewing the parties' recommendations as well as the Committee's Report and recommendation, and after considering the nature and gravity of the misconduct as well as the presence of aggravating or mitigating factors, *Office of Disciplinary Counsel v. Gwendolyn Harmon*, 72 Pa.D. & C. 4<sup>th</sup> 115 (2004), we recommend that Respondent be suspended from the practice of law for a period of three years.

Respondent's actions constitute serious misconduct. While there is no *per se* discipline in Pennsylvania, prior similar cases are instructive and are suggestive of a lengthy sanction when, as here, an attorney's unauthorized practice of law and related misconduct would likely pose a danger to the public. *Office of Disciplinary Counsel v. Lucarini*, 472 A.2d 186, 189-91 (Pa. 1983).

In general, attorneys who practice law while on suspended status are subject to strict discipline. In *Office of Disciplinary Counsel v. Thomas J. Turner III*, 136 DB 2008 (2009), the Board recognized the significance of the respondent's continued practice of law while under a previous and existing order of suspension when it disbarred Turner, noting that a further suspension would not have much impact on the respondent. *See also, e.g., Office of Disciplinary Counsel v. Ivan Wille*, 183 DB 2011 (2013); *Office of Disciplinary Counsel v. Herman*, 426 A.2d 101 (Pa. 1981).

Disbarment has not always been the ultimate discipline meted out where an attorney was practicing law while under an existing order of suspension. In *Office of Disciplinary Counsel v. Ronald I. Kaplan*, 217 DB 2010 (2012), the Court imposed a suspension of five years. Kaplan engaged in the unauthorized practice of law during his suspension by representing a client before a Master in a custody proceeding. In connection with this matter, Kaplan forged an entry of appearance form and



misidentified himself to the Master. Despite the serious nature of Kaplan's misconduct, the Board noted that Kaplan's unauthorized practice was limited to a single appearance on behalf of an individual who was fully aware of Kaplan's status and had not paid for the legal services.

In the case of *Office of Disciplinary Counsel v. Louis S. Criden*, 48 DB 1997, 42 Pa. D. & C. 4<sup>th</sup> 254 (1998), Criden continued to engage in the practice of law following a suspension for three years. Although the matter involved one long-standing client, the representation lasted for approximately twelve months. Criden continued to receive fees, held himself out to other parties as an attorney and filed documents with the Internal Revenue Service. He failed to notify opposing counsel that he was suspended or correct the use of "Esquire" following his name. Criden was suspended for a period of four years consecutive to the original period of suspension.

Several aggravating factors support a lengthy term of suspension. Respondent has not accepted responsibility for his misconduct and has shown no remorse. Despite his protestations that he was merely doing a "favor" for a friend and not actually practicing law, his total course of conduct renders these assertions unbelievable. Respondent's efforts to convince the opposing party he was a practicing attorney show a total disregard for the integrity of the legal system.

We have carefully examined the particular circumstances of this matter in the context of the relevant decisional law in Pennsylvania. We find Respondent's conduct to be less egregious than the conduct in *Kaplan* and *Criden*, as Respondent engaged in the unauthorized practice in a single representation over a short period of time. These facts persuade the Board that the Hearing Committee's recommendation of a suspension for three years is appropriate.


V. RECOMMENDATION

The Disciplinary Board of the Supreme Court of Pennsylvania unanimously recommends that the Respondent, Malcolm P. Rosenberg, be Suspended from the practice of law for a period of three years.

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:   
Lawrence M. Kelly, Board Member

Date: January 19, 2016

Board Members Porges and Cordisco did not participate in the adjudication.