

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In the Matter of a Member of the Bar	§	
of the Supreme Court of the State of	§	
Delaware,	§	No. 160, 2010
	§	
HERBERT G. FEUERHAKE,	§	Board Case Nos. 2009-0319-B,
	§	2009-0407-B, 2009-0408-B
Respondent.	§	

Submitted: May 17, 2010

Decided: July 13, 2010

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 13th day of July 2010, the Court having reviewed the Report of the Board of Professional Responsibility, the Objections of the Office of Disciplinary Counsel and Respondent's response to objections of the Office of Disciplinary Counsel, it appears to the Court that:

1. On March 23, 2010, the Board of Professional Responsibility ("Board") filed a Report and Recommendation of Sanction in this disciplinary matter. The Board recommended that the respondent, Herbert G. Feuerhake ("Respondent"), be suspended from engaging in the practice of law for a period of two years, with conditions, and with permission to apply for reinstatement after 18 months, pursuant to the requirements of Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure.

2. On April 26, 2010, Respondent waived his right to file objections to the Board Report and Recommendation. Respondent conveyed his sincere remorse for his actions and his sincere commitment to complete his course of treatment and rehabilitation while complying with the sanction and conditions to be imposed by this Court. That same day, the Office of Disciplinary Council (“ODC”) filed an objection to the Board’s recommendation, seeking instead a suspension of no less than two years with eligibility to apply for reinstatement only at the conclusion of the full suspension period.

3. On May 17 2010, Respondent filed a response to the ODC’s objection, contending that the objection should be denied. Respondent argues that the Board did not recommend a reduction in the sanction, but instead recommended that Respondent be permitted, subject to certain conditions, to initiate the reinstatement process early, by applying for reinstatement after the initial 18 months of the proposed two year suspension term expired.

4. Respondent was admitted to the Bar in 1987. He has also been a member of the Connecticut Bar since 1982. At all relevant times, Respondent was engaged in the private practice of law as a sole practitioner, without staff support, in Wilmington, Delaware. Respondent has no prior disciplinary complaints in Connecticut or Delaware.

5. In September 2007, Respondent underwent surgery to repair a detached retina. Because the surgery was not entirely successful, in June 2008 a second laser procedure on his eye was required. On June 25, 2008, Respondent learned that his half brother, with whom he was very close, had died suddenly and unexpectedly.

6. In April 2006, Respondent agreed to represent Ronald C. Warne in a lawsuit against Kentmere Nursing Care Center (“Kentmere”). Warne paid Respondent legal fees totaling \$9,050. On December 19, 2007, Respondent filed a wrongful termination suit against Kentmere in the United States District Court for the District of Delaware (“District Court”). Kentmere moved to dismiss the complaint for failure to state a claim. Respondent did not respond to two motions to dismiss filed by Kentmere, or to the District Court’s order that Respondent show cause why the suit should not be dismissed. On August 15, 2008, the matter was dismissed based on Respondent’s failure to prosecute. Respondent did not respond to numerous communications from his client, Mr. Warne, and also failed to notify Warne about the dismissal.

7. In October 2006, Respondent agreed to represent Patricia Ward in a discrimination matter against the Catholic Diocese of Wilmington. Ward paid Respondent legal fees totaling \$7,500. On November 2, 2007, Respondent filed a complaint against the Diocese in the United States District Court. Respondent

failed to respond to the Diocese's motion to dismiss the complaint. The matter was dismissed. Respondent did not respond to numerous communications from Mr. Ward and failed to notify Ward about the dismissal.

8. On March 23, 2007, Respondent filed a complaint in the United States District Court on behalf of Janet Porter against Stanley Taylor and certain other defendants. On February 2, 2009, the District Court granted Taylor's motion for summary judgment after Respondent failed to file an answering brief. Respondent also failed to show cause regarding why the remaining defendants should not be dismissed. On April 22, 2009, the District Court dismissed the remaining defendants based on Respondent's failure to prosecute.

9. On November 20, 2007, Respondent filed a complaint in the United States District Court on behalf of Michele Covais against New Castle County. Respondent failed to submit a scheduling order as tasked by the District Court. Respondent also failed to submit a brief in response to a motion to dismiss Covais' complaint. On July 8, 2009, the District Court granted New Castle County's motion to dismiss after Respondent failed to appear and show cause why the case should not be dismissed for failure to prosecute.

10. On March 20, 2009, Respondent filed an appeal on behalf of Janet Jeffries in the United States Court of Appeals for the Third Circuit from a United States District Court order granting the Postmaster General summary judgment.

On June 22, 2009, the matter was dismissed based on Respondent's failure to file an opening brief.

11. In March of 2008 or 2009, Respondent filed an appeal on behalf of Nancy Santana in the United States Court of Appeals for the Third Circuit from a United States District Court order granting summary judgment for the Delaware Department of Health. That matter was dismissed based on Respondent's failure to file an appearance form, a civil information statement, and a concise summary of the case, as required by the Rules of that Court.

12. A Petition for Discipline of Respondent was filed on November 4, 2009. Respondent filed an answer in which he admitted all but three allegations in the Petition. Respondent also admitted that he violated multiple Rules of Professional Conduct as alleged in the Petition, with one minor exception. Those violations included failures to: (a) represent clients' interests with the thoroughness and/or preparation necessary (Rule 1.1); (b) act with reasonable diligence and promptness in representing clients (Rule 1.3); (c) comply with clients' reasonable requests for information and/or reasonably inform clients about the status of their matter (Rule 1.4); (d) comply with Rules to Show Cause orders (Rule 8.4); and (e) prosecute matters after collecting fees from clients (Rule 1.5). The Board accepted Respondent's admissions to the alleged professional misconduct.

13. After hearing testimony from Respondent and from his treating psychologist, the Board considered the ABA Standards for Imposing Lawyer Sanctions, and conducted the four factor analysis established by those standards and decisions of this Court.¹ Those factors are: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the extent of the actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating factors.²

14. The ethical duties violated by Respondent have previously been discussed. Respondent failed to: bring his professional expertise to bear in the cases; diligently prosecute cases, keep clients informed of the status of their cases and respond to reasonable requests for information. He charged unreasonable fees, and engaged in conduct prejudicial to the administration of justice by failing to respond to orders from the United States District Court.

15. The Board concluded the Respondent's mental state was "knowing"—that is, Respondent was consciously aware of the attendant circumstances of his conduct, but was not trying to accomplish a particular result. The Board also concluded that each client in this matter suffered actual injury that was serious in nature and was caused directly by Respondent's misconduct. In each of the cases, Respondent completed the necessary work to initiate the proceeding in the

¹ *In re Bailey*, 821 A.2d 851, 866 (Del. 2003).

² *Id.*

appropriate court, but failed to prosecute the case any further, causing each case to be dismissed. In at least two cases, clients paid significant sums of money to the Respondent.

16. After considering the mitigating and aggravating circumstances listed in ABA Standard 9.22, the Board found three aggravating circumstances: (1) Respondent engaged in a “pattern of misconduct;” (2) Respondent committed multiple offenses (fourteen violations involving six clients); and (3) Respondent had substantial experience in the practice of law.

17. The Board also found six mitigating factors: (1) Respondent had no prior disciplinary record; (2) Respondent exhibited no dishonest or selfish motives; (3) Respondent was suffering from personal and emotional problems; (4) Respondent’s character is positive (*e.g.*, he had a history of participating in local politics, running for the state legislature in Connecticut and participating in civic associations); (5) at all relevant times Respondent was suffering from a physical disability associated with his deteriorated eyesight, which contributed to his major depressive disorder; and (6) Respondent is remorseful.

18. The parties here agree that suspension is an appropriate sanction. The Board accepted the ODC’s argument that a two year suspension is appropriate in order to protect the public. The Board, therefore, recommended that Respondent be suspended from engaging in the practice of law for a period of two years and

that if respondent complies with all of the other terms and conditions of this Court's order, he be permitted to apply for reinstatement after 18 months, pursuant to Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure.

19. In its objection to the Board's report, the ODC claims that the Board recommended that Respondent's two year suspension be reduced to 18 months, which would be inconsistent with Delaware's disciplinary precedent and would not provide adequate protection for the public. Respondent replied that the ODC mischaracterized the Board's recommendation, because that recommendation was for a two year suspension as advocated by the ODC. Subject to certain conditions, Respondent will be allowed to "apply for reinstatement" after 18 months. That means he will be entitled to commence the process for reinstatement but will still be suspended for the entire two year suspension term. We agree. The Board's recommendation cannot be reasonably read as a recommendation for suspension subject to reduction.

NOW THEREFORE, IT IS ORDERED that:

1. Respondent is suspended from engaging in the practice of law in the State of Delaware for a period of two years from the date of this Order.

2. If Respondent complies with all terms and conditions of this Order, he will be permitted to apply for reinstatement after 18 months, pursuant to the requirements of Rule 22 of the Delaware Lawyers' Rules of Disciplinary

Procedure. Any such application would be strengthened if Respondent were to show a commitment to practice law in an arrangement other than as a solo practitioner.

3. During the period of suspension, Respondent shall conduct no act directly or indirectly constituting the practice of law, including the sharing or receipt of any legal fees, except that Respondent shall be entitled to any legal fees earned before the date of this Order.

4. Respondent shall be prohibited from having contact with clients or prospective clients, witnesses, or prospective witnesses when acting as a paralegal, legal assistant, or law clerk under the supervision of a member of the Delaware Bar or otherwise.

5. The ODC shall file a petition for the appointment of a receiver for Respondent's law practice. Respondent shall assist the receiver in following the directives of the Delaware Lawyers' Rules of Disciplinary Procedure. The receiver shall make arrangements as may be necessary to protect the interests of any of Respondent's clients.

6. Respondent shall pay the costs of the disciplinary proceedings in accordance with the Delaware Lawyers' Rules of Disciplinary Procedure, promptly when presented with a statement of costs by the ODC.

7. Respondent shall pay any claims paid by the Lawyer's Fund for Client Protection that were paid as a result of Respondent's misconduct.

8. Respondent shall fully cooperate with the ODC in any efforts to monitor his compliance with this Order.

BY THE COURT:

/s/ Jack B. Jacobs
Justice