BEFORE THE DISCIPLINARY BOARD OF
THE SUPREME COURT OF PENNSYLVANIA

OFFICE OF DISCIPLINARY COUNSEL, Petitioner	:	
	:	No. 17 DB 2023
v.	:	
	:	Atty. Reg. No. 63600
ROBERT SCOTT CLEWELL, Respondent	:	(Philadelphia)

BRIEF OF OFFICE OF DISCIPLINARY COUNSEL OPPOSING RESPONDENT'S EXCEPTIONS TO THE REPORT AND RECOMMENDATION OF THE HEARING COMMITTEE

OFFICE OF DISCIPLINARY COUNSEL

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I hereby certify that I have this day served by E-mail and/or First-Class Mail the within document upon all parties of record in this proceeding in accordance with the requirements of 204 Pa. Code § 89.22.

February 23 /2024

Counsel for Petitioner

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METHOD OF CITATION USED

Numbers and letters in parentheses indicate documents and location as follows:

HC Rpt. __ refers to a page or pages of the January 25, 2024, Report and Recommendation of the Hearing Committee;

N.T. _ refers to a page or pages of notes of testimony of the September 19, 2023, disciplinary hearing;

BOE __ refers to a page or pages of the Brief on Exceptions, filed by Respondent on February 14, 2024.

TABLE OF AUTHORITIES

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Rules

I. STATEMENT OF THE CASE

This matter is before the Disciplinary Board on Respondent's Brief on Exceptions, in which he challenges the Report and Recommendation of the Hearing Committee. The Committee recommended a two-year suspension based upon Respondent's misconduct in representing three clients, as well as his disciplinary record and other aggravating circumstances. Respondent presents one claim, arguing that the Committee erred in declining to find his testimony regarding his mental health to be mitigating, where he presented no expert opinions to satisfy the requirements of Office of Disciplinary Counsel v. Braun, 553 A.2d 894 (Pa. 1989). He offers no legal support for his position and it is contrary to Supreme Court precedent. The Committee properly rejected it.

The disciplinary hearing in this case was held on September 19, 2023. To establish Respondent's ethical violations, ODC presented Joint Stipulations of Fact and Law, in which he admitted to the factual averments and violations of ethical rules set forth in the Petition for Discipline. (N.T. 17-18) ODC also introduced exhibits ODC-1 through ODC-51. (Id.)

In its case pursuant to D.Bd. Rules § 89.151, ODC presented testimony from the three Complainants, Brian Turner, Michael Cifone, and Paul Kollhoff, regarding the negative impact Respondent's conduct had on

them and their view of the legal profession. (Id., 25-60) ODC also presented exhibits ODC-52 through 59, which established additional aggravating factors, including:

- Respondent's disciplinary history, which included an informal admonition imposed shortly before he went on to commit similar—and more egregious—misconduct in the instant matters (ODC-52 through ODC-54; N.T. 92-108);
- a legal malpractice action that resulted in a judgment against Respondent in May 2023 (ODC-59; N.T. 108-118); and
- Respondent's lack of fiscal responsibility, including open judgments against him and a bankruptcy petition that was dismissed due to his failure to make required payments (ODC-55 through ODC-58).

Respondent declined to cross-examine the witnesses ODC presented and offered no objections to ODC's exhibits.

Respondent testified on his own behalf, noting that he was "embarrassed" and "ashamed" of his actions. (N.T. 77-78). Relevant to his exceptions, he testified about his mental state during the period of his misconduct, asserting that:

- "for the better part of 10 to 15 years" he had been having issues with his mental health (Id., 83, 129);
- the issues involved "feeling depression and anxiety" (Id., 84-85);
- over the "last four to five years," he felt "sadness [and] despair" on most days (Id., 85); and

- he was subject to "[p]rocrastination beyond belief," had "piles of mail that [were] still not opened" because he did not "want to deal with it," and "avoid[ed] approaching these situations" (Id., 88).

Respondent offered no expert witnesses, treatment records, or other evidence to corroborate his testimony or to establish a causal relationship between any alleged impairment and his misconduct.

Respondent further testified to the limited steps he had purportedly taken with respect to his mental health. He claimed that, in the past, he had obtained prescriptions for medication, but that "none of them have worked" and he "went off of them essentially in short order." (N.T. 83-84) He further claimed that "[o]ver the last year or so ... he ha[d] begun to seek out professional help," and had seen a counselor for "a few sessions." Rather than have regularly-scheduled visits, however, he merely made appointments with the counselor "every few weeks or so," when he felt it was necessary. (Id., 84, 87, 127-29) Respondent also said that he had tried "some white, some soft light therapy," had been taking vitamins, and was trying to improve his diet. (Id., 90-91)

Respondent testified that he had taken a position working "behind the scenes" at a law firm, but was also representing "a few" of his own clients. (Id., 121-22) In response to cross-examination, he acknowledged that he has problems with "procrastination," "not getting things done," "avoiding

difficult situations," "extreme mental and physical fatigue," "severe approach avoidance of anything confrontational," a "lack of mental focus and sharpness," and "mental paralysis." (Id., 124-25) He conceded that these are not characteristics of a good attorney, and that he is "not fit" to practice law. (Id., 114, 125) This lack of fitness was demonstrated in his handling of his own professional affairs, in which Respondent admitted that he would leave mail in important matters unopened on his desk, including with respect to a claim filed against him with the Lawyers Fund for Client Security and a legal malpractice suit. (Id., 110, 119-21) Respondent presented no other witnesses and offered no exhibits on his own behalf.

ODC requested that the Committee recommend a suspension of at least two years. (Brief of Office of Disciplinary Counsel to Hearing Committee, filed 11/16/23, pp. 41-42) In apparent recognition that he is not fit to practice, Respondent requested that the Committee recommend "a suspension of no less than one (1) year and a day." (Brief of Respondent, Robert Scott Clewell, To Hearing Committee, filed 12/18/23, p.7)

With one limited exception—the rejection of the parties' stipulation that Respondent had violated RPC 3.3(a)(1)[1]—the Committee adopted the Joint

[1] The Committee found Rule 3.3(a)(1) inapplicable because, when Respondent made a misrepresentation to a court, he was acting "in his capacity as a client of another lawyer," rather than in his capacity as an

Stipulations of Fact and Law, set forth findings regarding Respondent's serial neglect of three clients, his dishonest behavior, and his retention of unearned fees, and found multiple violations of the ethical rules. (HC Rpt., pp. 3-37, 46-48) The Committee also made detailed findings regarding the aggravating circumstances ODC had presented (id., 37-44), as well as Respondent's testimony. (Id., 44-46) Following a discussion of relevant precedent, the Committee recommended that Respondent be suspended for a period of two years. (Id., 48-53)

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attorney. (HC Rpt., 48 n.6) As addressed in ODC's letter, dated February 7, 2024, the Committee's narrow interpretation of Rule 3.3 is inconsistent with the Board's prior decision in Office of Disciplinary Counsel v. Anonymous, No. 94 DB 2008 (11/30/10).

II. SUMMARY OF OFFICE OF DISCIPLINARY COUNSEL'S POSITION

The Committee properly declined to consider Respondent's testimony regarding his mental health as mitigation where he presented no expert opinions to satisfy the requirements of Office of Disciplinary Counsel v. Braun, supra. While Respondent challenges the Committee's decision, he cites no legal authority for his position. His contention is, moreover, contrary to controlling precedent.

Mental illness may be deemed mitigating where a respondent proves, by clear and convincing evidence, that it "was a causal factor in producing the several elements of his professional misconduct." Braun, 553 A.2d at 895-96; see also Office of Disciplinary Counsel v. Pozonsky, 537 A.3d 830, 845 (Pa. 2018). The Supreme Court has stressed the need for expert testimony to satisfy this heavy burden, noting that it "has never held that lay opinions alone" are sufficient. Id. To the contrary, both the Court and this Board have declined to find alleged mental health issues mitigating in the absence of expert testimony. See, e.g., id., at 844-46; Office of Disciplinary Counsel v. Peter Jude Caroff, No. 42 DB 2019 (D.Bd. Rpt. 2/25/20) (S.Ct. Order 6/5/20).

The Committee properly applied this authority and declined to treat Respondent's unsupported assertions of mental illness as mitigation.

III. ARGUMENT

THE HEARING COMMITTEE CORRECTLY FOUND THAT RESPONDENT'S CLAIM OF MENTAL HEALTH ISSUES—UNSUPPORTED BY ANY EXPERT TESTIMONY—DID NOT SATISFY THE REQUIREMENTS FOR MITIGATION UNDER OFFICE OF DISCIPLINARY COUNSEL v. BRAUN, AND ITS PROGENY.

In his Brief on Exceptions, Respondent argues that the Committee erred in declining to find his testimony regarding his mental health as a mitigating factor where he presented no expert opinions to satisfy the requirements of Office of Disciplinary Counsel v. Braun, supra, and its progeny. His argument is contrary to controlling authority. The Committee correctly rejected it.

In Braun, the Supreme Court held that a respondent's mental illness could properly be deemed mitigating where it "was a causal factor in producing the several elements of his professional misconduct." 553 A.2d at 895-96. As later decisions construing Braun have held, for evidence of mental illness to be deemed mitigating, the respondent must prove, by clear and convincing evidence, that the condition was a causal factor in the misconduct he committed. Office of Disciplinary Counsel v. Pozonsky, 537 A.3d 830, 845 (Pa. 2018); Office of Disciplinary Counsel v. Quigley, 161 A.3d 800, 808 (Pa. 2017); Office of Disciplinary Counsel v. Monsour, 701 A.2d 556, 559 (Pa. 1997).

In this case, Respondent did not proffer any expert witnesses to testify regarding his purported mental illness or its impact on his conduct. Instead, he asked the Committee to rely on its own "'common sense assumptions'" regarding his alleged condition, and to give his testimony "whatever weight it deem[ed] proper." (HC Rpt., 52 [citing Respondent's Brief to the Hearing Committee, p. 7]) The Committee, however, declined to treat Respondent's testimony as mitigation, finding that Braun requires more than a respondent's own testimony and purported "'common sense assumptions.'" (Id.)

The Committee's conclusion was consistent with controlling Supreme Court precedent. As the Court has stressed, expert testimony is "critical" to establishing a causal link between any alleged mental illness and a respondent's misconduct:

> Our Court has never held that lay opinions alone, are sufficient to establish that an addiction or mental illness was the cause of an attorney's misconduct. Indeed, recent decisions of our Court have emphasized the critical role of expert testimony in establishing such a causal link.

Pozonsky, 537 A.3d at 845 (citing authority). Consistent with this standard, both the Supreme Court and this Board have found that respondents failed to carry their burden of proof under Braun where they failed to present expert testimony establishing the necessary causal connection. See Pozonsky, 537 A.2d at 844-46 (Pozonsky's presentation of lay witnesses failed to satisfy

his burden of proving that his addiction caused the misconduct for which he was being disciplined); Quigley, 161 A.3d at 808-809 (evidence of psychiatric condition was not mitigating where expert witness testified, but failed to establish that the condition was a causal factor in Quigley's misconduct); Office of Disciplinary Counsel v. Daniel Michael Dixon, No. 174 DB 2020 (D.Bd. Rpt. 12/8/21, pp. 36-37) (S.Ct. Order 3/4/22) (Dixon was not entitled to mitigation under Braun, where he failed to put forth "expert evidence" necessary to prove that a psychiatric disorder caused his misconduct); Office of Disciplinary Counsel v. Peter Jude Caroff, No. 42 DB 2019 (D.Bd. Rpt. 2/25/20, pp. 17-18) (S.Ct. Order 6/5/20) (Caroff not entitled to mitigation under Braun, where he testified regarding his mental health problems, but failed to "put forth the expert evidence necessary to make th[e] determination" that a psychiatric disorder caused the misconduct he committed).

Respondent concedes, as he must, that "Braun and related cases" require expert testimony to establish a causal link between alleged "mental issues" and misconduct. (BOE, 2) He nonetheless argues that expert testimony was not required here because the testimony at issue was offered "by Respondent himself" and concerned what, in his opinion, were "credible mental health issues." (Id., 2-3) The argument is completely without merit.

Initially, Respondent did not offer any admissible evidence that he even suffers from a diagnosed mental illness.[2] Moreover, as the Supreme Court observed in Pozonsky, laymen are "manifestly unqualified to render ... a professional opinion" that a psychiatric condition was a causal factor in the misconduct for which an attorney is being disciplined. 177 A.3d at 846. It is for that reason that guidance from an expert witness is required. Regardless of whether lay testimony is provided by a respondent's friends and acquaintances (as in Pozonsky) or the respondent himself (as in Caroff, Dixon, and the instant matter), neither a Hearing Committee nor the Board are qualified to render a professional opinion—without expert guidance—as to whether a respondent even has a purported mental health impairment, let alone whether the alleged impairment was a causative factor in the misconduct the respondent committed.

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[2] Respondent testified that during a "Zoom hour session" a counselor diagnosed him with a "major depressive disorder." (N.T. 79-80) The Chair properly excluded this inadmissible hearsay. See, e.g., Commonwealth v. DiGiacomo, 345 A.2d 605, 608 (Pa. 1975) (medical opinion reflected in hospital record not admissible where expert who allegedly offered the opinion was not available for cross-examination); Lira v. Albert Einstein Medical Center, 559 A.2d 550, 554-55 (Pa. Super. 1989) (testimony that examining physician had asked patient who had "butchered" her was inadmissible hearsay and ran afoul of the "rule which holds that expressions of medical opinions are generally inadmissible unless the physician expressing the opinion is available for cross-examination").

In the course of his argument, Respondent briefly references his testimony that he "s[ought] help from mental health professionals" and made unsuccessful attempts to use medication for depression and anxiety. (BOE, p. 3). He fails, however, to offer any argument regarding the significance of this testimony or the weight, if any, he believes his alleged efforts should be given as mitigation.

In any event, even crediting Respondent's uncorroborated testimony, his efforts to address his purported impairment were exceedingly limited. According to Respondent, he has had issues with his mental health for the "better part of 10 to 15 years," including "feeling depression and anxiety," and his symptoms have gotten worse over the past four to five years. (N.T. 83-86, 129-30) He also testified that at some point in the past he took prescription medications, but "went off of them in short order" because of the way he felt when using them and because "none of them ... worked." (Id., 83-84) Yet despite the alleged issues, and his purported unsuccessful efforts to address them with medication, he continued to practice law and represent clients for years, placing their interests in jeopardy.

Respondent further testified that "[o]ver the last year or so," he began "to seek out professional help." (Id., 84) He claimed that as of the hearing, he was seeing a counselor, but conceded that he had only had "a few

sessions" with her and that she did not provide him with "a strategy" for addressing his issues. He did not even have regular appointments, testifying that he saw the counselor only when he deemed it necessary. (Id., 87, 91, 127-29) Respondent also claimed to have taken informal steps, including "light" therapy, taking vitamins, and improving his diet. (Id., 90-91) In the absence of any expert testimony, it cannot be discerned if the limited, belated steps Respondent claims to have taken offer any reasonable likelihood of resolving his purported issues. His testimony regarding these alleged steps does not remotely offset the overwhelming evidence that he is not fit to practice law and that his actions have harmed multiple clients and damaged their view of the legal profession. The testimony is due little, if any, weight.

For each of these reasons, Respondent's challenge to the Committee's treatment of his claim of purported mental health issues is without merit.

IV. CONCLUSION

Wherefore, ODC respectfully requests that the Disciplinary Board reject Respondent's exceptions, adopt the Hearing Committee's Findings of Fact and Conclusions of Law, and recommend that the Supreme Court suspend Respondent from the practice of law for a period of not less than two years.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

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By _____
Jeffrey M. Krulik
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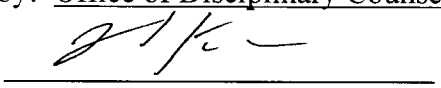
CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania*: *Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Office of Disciplinary Counsel

Signature: 

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