SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-025

IN THE MATTER OF

ERNEST DeSTEFANO,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 18, 1994

Decided: July 25, 1994

Paul E. Latterman appeared on behalf of the District I Ethics Committee.

Peter L. Bruso appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This disciplinary matter arose from a complaint charging respondent with violations of RPC 1.1(a), RPC 1.3 and RPC 1.4(a) and (b) in connection with his representation of Rose Pfeffer in a bankruptcy matter (first count); violation of RPC 1.1(b) (pattern of neglect), for his conduct in the within matter and similar conduct exhibited in a prior matter that resulted in a private reprimand (second count); and violations of RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), for having misrepresented the status of the matter to his client (third and fourth counts).

On February 1, 1993, respondent was privately reprimanded for failure to pursue the foreclosure of two tax sale certificates for

a period of two years, in violation of RPC 1.3.

Respondent was admitted to the New Jersey bar in 1980. He maintains a law office in Hammonton, New Jersey.

In August 1990, Rose Pfeffer retained respondent's law firm to represent her in connection with a bankruptcy proceeding. Mrs. Pfeffer's initial meeting was with Ric Futerfas, Esq., a junior member of respondent's firm. Mrs. Pfeffer was accompanied at that meeting by her daughter and also by her son, John Pfeffer, who resided with her and who acted as her representative in the matter for which respondent's office had been engaged. Mr. Pfeffer himself had filed for bankruptcy sometime before and was, therefore, fairly familiar with the proper proceeding. In fact, it was he who suggested to his mother that she file for bankruptcy when, after the demise of Mrs. Pfeffer's husband, on July 17, 1990, it was discovered that the elder Mr. Pfeffer had left considerable debts in excess of the existing assets.

The Pfeffers had been referred to respondent's law firm by another party and did not know respondent or Mr. Futerfas personally. According to respondent, the initial meeting had been scheduled with Mr.Futerfas because, at the time, he was the attorney who handled bankruptcy cases in behalf of the firm. Respondent testified that he had done some bankruptcy cases before, but he was trying to reduce his workload because of his heavy trial schedule and because of several personal problems that beset him at the time, including a bitter divorce from his wife. According to respondent, Mr. Futerfas was familiar with bankruptcy proceedings,

although he might not have been as familiar as he, respondent.

Mr. Pfeffer, however, testified that, at his initial meeting with Mr. Futerfas, he was advised that Mr. Futerfas did not do bankruptcy matters. He was further advised that respondent was the attorney in charge of such matters. Accordingly, an appointment was scheduled for the Pfeffers to see respondent the following week. At that meeting with respondent, as with the initial meeting with Mr. Futerfas, the Pfeffers made it clear that their objective was to extinguish all of the debts and to keep Mrs. Pfeffer's house in Williamstown free of any liens and encumbrances arising from such outstanding debts.

At this juncture, the testimony of the parties was at variance with regard to the specific procedure to be followed in pursuing the Pfeffers' stated objectives. While both Rose and John Pfeffer testified that they had directed respondent to file for bankruptcy under Chapter 7, respondent claimed that he had explained to the Pfeffers that, depending on the circumstances of the petitioner, it might not possible to file for bankruptcy. According to respondent, he advised the Pfeffers about alternative arrangements, such as, for example, the payment of a percentage of the debts, instead of bankruptcy. In connection therewith, respondent continued, he had informed the Pfeffers that the proper course of action was, first, to contact the creditors to attempt to work out an arrangement for payment. If such attempts proved unsuccessful, then respondent would file for bankruptcy under Chapter 7.

With regard to whether the Pfeffers provided respondent with

sufficient information to proceed under either a bankruptcy plan or alternative arrangements, the testimony of the parties, too, differed considerably. Mr. Pfeffer testified that, both at his initial meeting with Mr. Futerfas and at the subsequent meeting with respondent, he had brought with him a list of all outstanding debts and that respondent had not requested additional information at any time. Respondent, in turn, claimed that additional documents and information were required in order to proceed with the representation.

It is undisputed, however, that at the end of the meeting with respondent, Mrs. Pfeffer paid him a $1,000 retainer. Respondent explained that, ordinarily, he would charge $500-$750 to file a petition under Chapter 7. He added that the extra money was necessary to see if he could work out payment arrangements with the creditors.

Also at issue in this matter was whether Mr. Futerfas or respondent had primary responsibility for the file. According to Mr. Pfeffer, at the meeting with respondent, the latter indicated that he would personally handle the matter; respondent had made no mention whatsoever of the fact that Mr. Futerfas would be in charge of the file. Respondent, in turn, vigorously claimed that the matter had been assigned to Mr. Futerfas. Because Mr. Futerfas did not testify at the DEC hearing and because some of the letters in evidence were written under Mr. Futerfas' name and others under respondent's name, it is not entirely clear which attorney was primarily responsible for the file. Nevertheless, respondent

conceded that, as a senior member of the firm, he had supervisory responsibility for Mr. Futerfas. In fact, in his letter to the DEC investigator, dated September 15, 1992, respondent accepted full responsibility for the mishandling of the matter. It is also unquestionable that, on at least four occasions, respondent met with Mrs. Pfeffer and Mr. Pfeffer jointly or with Mr. Pfeffer alone to discuss the matter.

Mr. Pfeffer testified that, following his initial meeting with respondent, he heard nothing further. Accordingly, in or about November 1990, he telephoned respondent's office, leaving a message with respondent's secretary for a return telephone call. Respondent did not call him back. One or two weeks later, Mr. Pfeffer stopped by respondent's office. At that time, according to Mr. Pfeffer, respondent informed him that the matter would be completed in a few months. When Mr. Pfeffer notified respondent that the bill collectors were dunning Mrs. Pfeffer, respondent allegedly advised Mr. Pfeffer to have the creditors call him.

Early in 1991, not having heard from respondent, Mr. Pfeffer again stopped by his office to obtain information about the matter. At that time, Mr. Pfeffer turned over to respondent certain Discover credit card bills. Mr. Pfeffer testified that the first piece of correspondence he received from respondent's office was a copy of a letter that respondent had sent to Discover. In fact, the Pfeffers testified that they had received only two pieces of correspondence from respondent's office. One was a copy of a letter, dated August 26, 1991, sent to the attorney for one of the

creditors. Exhibit C-2. The other was a letter addressed to Mrs. Pfeffer, dated December 12, 1991, asking her to call the office to set up an appointment to finalize the documentation concerning the bankruptcy. Exhibit C-3. The other nine letters (Exhibits C-5, C-6, C-8 through C-12, C-14 and C-15) were incorrectly addressed to 300 Cedar Lake Drive, instead of 302 Cedar Lake Drive, and, according to the Pfeffers, were never delivered to them. The Pfeffers testified that, although the 300 Cedar Lake address is the house next door to theirs, which was abandoned at the time, the mail carrier did not place the letters in their mailbox, apparently being guided by the address, instead of by the name of the addressee. The purpose of those letters was to request additional information from the Pfeffers, which either Mr. Futerfas or respondent deemed necessary to file the bankruptcy petition.

According to Mr. Pfeffer, throughout 1991, he telephoned respondent's office or stopped by from time to time to find out about the progress of the case and, more specifically, about a court date; respondent invariably replied that the matter would be completed pretty soon and that it was proceeding apace. Mr. Pfeffer denied that respondent or anyone else from his office had ever requested additional information to complete the matter.

Mr. Pfeffer further testified that, in March 1992, he telephoned respondent to ask why the matter was being delayed. Respondent instructed him to call him back in a few days to advise him of a court date. When Mr. Pfeffer telephoned respondent again, respondent informed him that he had a court date and that Mr. and

Mrs. Pfeffer should meet respondent at his office at 8:00 a.m. on March 5, 1992, in order to go to court. Mr. Pfeffer never asked respondent when the bankruptcy petition had been filed. Although he knew that his mother had not signed any papers, he assumed that the papers could be signed just before she went to court.

On March 3, 1992, at 8:00 a.m., Mr. and Mrs. Pfeffer went to respondent's office. They waited for respondent in the parking lot. According to Mr. Pfeffer, when respondent arrived, his first question was whether his secretary had telephoned the Pfeffers the day before to tell them not to come to respondent's office. Respondent explained that he had had a couple of other bankruptcy matters on March 2, 1992 and that he had taken care of their matter as well. He added that he would be sending some paperwork to Mrs. Pfeffer soon. According to Mr. Pfeffer, he thought that respondent's statement was odd because he, Mr. Pfeffer, had gone through a bankruptcy himself in 1980 and knew that the petitioner had to appear in court. Accordingly, two or three weeks later, Mr. Pfeffer telephoned the court, at which time he discovered that a petition had never been filed. Armed with this information, Mr. Pfeffer called respondent and "read him the riot act." T10/21/1993 121-122. According to Mr. Pfeffer, however, he did not share with respondent his knowledge that the petition had not been filed. He only asked him where the promised paperwork was and complained that nothing had been done to advance the matter. That same afternoon, respondent called Mr. Pfeffer and indicated that he did not "want any angry customers." He would, therefore, be refunding half of

the retainer, or $500, to Mrs. Pfeffer.

On May 5, 1992, Mr. Pfeffer went to respondent's office to pick up the $500 check. At that time, according to Mrs. Pfeffer, respondent tried to blame Mr. Futerfas for the delay in the matter. By then, Mr. Pfeffer had already contacted the district ethics committee to ask for a grievance form. He had not, however, filled it out and turned it in. At that meeting, Mr. Pfeffer still did not disclose to respondent his knowledge that the petition had not been filed because, in his own words, "I am not real good at confronting people." T10/21/1993 164. Although Mr. Pfeffer was bothered by his knowledge that respondent had lied to him and to his mother, he was, nevertheless, hopeful that respondent would get the matter resolved once and for all. Accordingly, they made no decision to terminate respondent's representation at that meeting. According to Mr. Pfeffer, respondent assured them, at that time, that he would personally file the petition and also instructed Mr. Pfeffer to call him in a couple of days. Mr. Pfeffer testified that, when he called respondent a couple of days later, respondent informed him that the matter would be resolved in two to three months and that he had personally filed the petition. Mr. Pfeffer then waited one month to call the court. Again, he was informed that the petition had not been filed. On June 11, 1992, Mrs. Pfeffer filed a grievance with the DEC.

A few weeks later, respondent called Mr. Pfeffer and admitted that nothing had been done on the matter, citing his own matrimonial problems. He instructed the Pfeffers to come to his

office for a refund of the balance of the retainer. The Pfeffers had not apprised respondent of the filing of the grievance. Similarly, respondent said nothing to the Pfeffers about whether he had received notice of the grievance from the DEC.

At that June 1992 meeting, respondent refunded the $500 balance to Mrs. Pfeffer and apologized for the mishandling of the matter. At that time, Mr. Pfeffer testified, he considered respondent's representation terminated. When Mr. Pfeffer later looked at the check, he noticed that it was predated by one month, bearing a May 23, 1992 date.

Subsequently, the Pfeffers went to another attorney, who was able to complete the bankruptcy matter in four to five months.

Respondent's version of the events differed from the Pfeffers'. Although respondent admitted that very little work had been done on the file — respondent sent three letters to certain creditors and Mr. Futerfas substantially completed the drafting of the bankruptcy petition — respondent explained that both he and Mr. Futerfas were concerned because Mr. Pfeffer kept insisting that they file for bankruptcy to get rid of the debts, notwithstanding their explanation that some of the debts would have to be repaid. Having sent numerous letters to Mrs. Pfeffer seeking additional documentation or information, respondent and Mr. Futerfas were awaiting the receipt of that information in order to finalize the petition. Respondent testified that Mr. Pfeffer had a "pre-conceived notion" on how to do bankruptcies because of his own prior experience, making respondent's exchanges with Mr. Pfeffer

difficult. According to respondent, Mr. Pfeffer would constantly argue with him because, when respondent would inform him that certain information was missing, such as, for example, a list of the assets, income and monthly expenses, Mr. Pfeffer would reply that such information was not necessary and that respondent could file the petition listing only the outstanding debts.

With regard to the March 5, 1992 meeting in the parking lot of respondent's office, respondent testified that, several weeks before March 5, 1992, he had reviewed his March calendar and had seen a handwritten notation by his secretary for a court appearance, on that date, on a matter titled Phifter. Believing that Mr. Futerfas, prompted by respondent's repeated demands that he complete the matter, had finally filed the bankruptcy petition and believing further that the matter listed for a hearing was the Pfeffer matter, respondent telephoned the Pfeffers and told them to meet him at his office on March 5, 1992 to go to court. In the interim, however, i.e., between the time of respondent's telephone call to the Pfeffers and March 5, 1992, respondent realized that the matter listed for trial was the Phifter matter, not the Pfeffer matter. When he discovered the mistake, he made a note to call the Pfeffers, but forgot to do so. When he saw the Pfeffers in the parking lot, on March 5, 1992, he immediately realized that he had forgotten to call them. He apologized to them and further told them ". . . that the matter was -- that they did not have to go to bankruptcy court that day. I had not even looked at their file to know when they had to go, except I do recall saying something to

the effect that Mr. Futerfas had been down the day before doing bankruptcies. They should check with them [sic]." T11/5/1993 28. Respondent vehemently denied telling the Pfeffers that he had been to court the preceding day to take care of their matter. He explained that he had merely indicated to them that either he, respondent, would talk to Mr. Futerfas to see if the matter had been completed or that the Pfeffers should do so. Respondent added that he had "been on Mr. Futerfas' back" to complete the matter and that he was unaware that the petition still had not been filed. Respondent believed that it was possible that, prior to that date, the Pfeffers had come in to sign the petition and that Mr. Futerfas, acting on respondent's constant prodding, had finally filed it.

Respondent further testified that, motivated by Mr. Pfeffer's telephone call complaining that nothing had been done on the matter, he had sent the Pfeffers a letter the following day, March 6, 1992, the contents of which read as follows:

> Dear Rose,
>
> Please accept my apologies for the confusion which was totally my fault. I had looked on the calendar and noticed the name J. Fifter penciled and mistook it for your matter. I then called John and told him to meet me at the office to go to bankruptcy court, when in fact, it was a totally different situation. I did realize the mistake about a week later when Mr. Fifter came to my office to review his file. I had made a note to call you but I completely forgot. When you arrived at my office I didn't mean to leave you with the impression that I done your matter the day before. I had done Mr. Fifters [sic] matter. In any event it is totally my fault and I apologize. I have been running around going crazy trying to handle my schedule and dealing with some other personal matters. Of course, all of this is not your problem and I truly apologize. I know it must have been

an inconvenience for you. The only thing I can say is that I am sorry.

You still must come in to sign the paperwork and give me information for your bankruptcy. If you will get in I will make sure it is hand delivered to the bankruptcy court, even if I have to do it myself. I know you want to get this concluded and I would like the same, but I do need the previously requested information.

Again, my apologies.

[Exhibit C-14]

Mrs. Pfeffer denied having received this letter, which was addressed to 300 Cedar Lake Drive, instead of 302 Cedar Lake Drive.

At the DEC hearing, respondent was asked why he had inserted in the letter the language "I didn't mean to leave you with the impression that I had done your matter the day before," if it was his testimony that he had not misrepresented to the Pfeffers that he had handled the matter on the prior day. Respondent replied that, upon returning to the office late in the afternoon of March 5, 1992, after several court appearances, he had retrieved a telephone message from Mr. Pfeffer, informing respondent that he had telephoned the court and had discovered that there was no record of the filing of the bankruptcy petition. That phone call had prompted the above disclaiming language. Respondent denied having ever told the Pfeffers that the petition had been filed.

With respect to the refund of the initial $500, respondent testified that, upon reviewing the file, he had noticed that, aside from some correspondence to certain creditors, no substantial amount of work had been performed. Because ordinarily he would

charge $500-$750 for a Chapter 7 proceeding, respondent determined that it would be fair to return $500 to the Pfeffers, not only because of the insubstantial amount of work completed, but also because of the delay in resolving the matter. Accordingly, respondent called Mr. Pfeffer, after Mr. Pfeffer "read him the riot act," to inform him that he would be refunding Mrs. Pfeffer the amount of $500. On May 5, 1992, respondent had a meeting with the Pfeffers. He refunded to them the promised $500. He also assured them that he would personally take on the representation of the matter, subject to the Pfeffers' cooperation in providing the required information to complete the petition. According to respondent, the Pfeffers promised that they would cooperate. Respondent testified that, in fact, at that time he had given Mrs. Pfeffer some "work pages" from a bankruptcy petition to be filled out. According to respondent, she never returned the forms to him. On May 23, 1992, however, having just had an argument with Mr. Pfeffer and being angered thereby, respondent wrote a check for $500, representing the balance of the retainer, and placed it in the file with the intent to send it back to the Pfeffers and to terminate his representation. Having put the check in the file, instead of mailing it immediately to Mrs. Pfeffer, as respondent later conceded he should have done, respondent forgot about the $500 refund.

It was only weeks later, by the end of June 1992, that respondent finally met with the Pfeffers to return the $500 balance of the retainer. Respondent testified that he had telephoned Mr.

Pfeffer to come to his office to pick up the check personally. Respondent added that the reason for the personal meeting was his wish to explain to the Pfeffers why he no longer wanted to handle the matter and also to return to them any documents that they might need to pursue the bankruptcy. Respondent denied that he had written the check in June 1992, after being apprised of the filing of the grievance. In fact, he produced a copy of his checkbook stubs, showing that the check to Rose Pfeffer, numbered 157, had been written on May 23, 1992. Exhibit R-5.

Respondent categorically denied being aware of the filing of the grievance (June 11, 1992) before he tendered the check to the Pfeffers. He testified that he had received a telephone call from the DEC secretary, advising him that a grievance had been filed. He asserted, however, that, although he could not remember the date of that telephone call, it had taken place well after he had given the second $500 check to Mrs. Pfeffer. Respondent denied having received a letter from the DEC secretary postmarked April 12, 1992. Exhibit R-6. (That letter appears to have been returned to the sender on April 28, 1992, although it bears respondent's correct address). Respondent had no recollection of having seen that envelope before or having knowledge of its contents. In fact, respondent continued, he first found out about the filing of the grievance when he received a telephone call from the DEC investigator, on September 15, 1992. The purpose of the call was to inquire when respondent would be submitting a reply to the investigator's letter of July 17, 1992. During that phone

conversation, respondent informed the investigator that he had not received his July 17, 1992 letter and requested that the investigator fax him a copy of that correspondence. See Exhibit C-1. Respondent, denied, thus, that the return of the balance of the retainer to the Pfeffers had been motivated by his awareness of the filing of the grievance against him.

* * *

At the conclusion of the ethics hearing, the DEC found that the failure to complete the necessary paperwork to file the bankruptcy petition, for which respondent assumed full responsibility as a senior member of the law firm, had been a violation of RPC 1.1(a). The DEC also found that respondent had violated RPC 1.3 for his failure to file the bankruptcy petition for a period of almost two years, and RPC 1.4(a), because "the various letters sent to the grievant's wrong address [were] insufficient to keep the grievant reasonably informed about the status of the bankruptcy." The DEC did not find a violation of RPC 1.4(b), as charged in the complaint. Similarly, the DEC did not find that respondent's conduct in the within matter, taken together with the conduct exhibited in a prior matter that resulted in a private reprimand, constituted a pattern of neglect.

With respect to the third count of the complaint, the DEC concluded that there was no clear and convincing evidence that respondent had misrepresented to the Pfeffers that he had completed

their matter on March 2, 1992, in light of "the conflicting testimony about this ambiguous situation." Although the DEC found that the exculpatory language contained in respondent's letter of March 6, 1992 could lead to the conclusion that respondent deliberately left the Pfeffers with a false impression to avoid further confrontation, it dismissed that count for lack of clear and convincing evidence of misrepresentation. Lastly, the DEC dismissed the fourth count of the complaint, finding that Mr. Pfeffer's testimony that respondent had told him, on May 8, 1992, that a bankruptcy petition had been filed, was not worthy of belief.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent acted unethically is fully supported by clear and convincing evidence. The Board also agrees with the DEC's finding that there is insufficient evidence to establish violations of RPC 1.4(b), RPC 1.1(b) and RPC 8.4(c) (third and fourth counts).

The Board is unable to agree, however, with the DEC's conclusion that respondent violated RPC 1.4(a), by failing to keep the Pfeffers apprised of the status of the matter. The record is clear that respondent wrote numerous letters to the Pfeffers, albeit misaddressed. Furthermore, in the Board's view, it is somewhat incredible that the Pfeffers did not receive the nine

letters addressed to the house next door, which was then abandoned. The Board recommends that the charge of a violation of RPC 1.4(a) be dismissed.

There is no question, however, that respondent violated RPC 1.3 and 1.1(a) in handling the Pfeffer matter. In addition, this is not respondent's first brush with the disciplinary system. In 1993, he received a private reprimand for failure to pursue the foreclosure of two tax sale certificates for two years.

Accordingly, the Board unanimously recommends that respondent receive a public reprimand. Two members did not participate. One member recused herself.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 7/25/94

By:
Raymond R. Trombadore
Chair
Disciplinary Review Board