SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 94-288

IN THE MATTER OF

MARC J. GORDON,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: October 19, 1994

Decided: December 7, 1994

Patricia F. Hernandez appeared on behalf of the District XII Ethics Committee.

Peter N. Gilbreth appeared on behalf of respondent.

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

This matter was before the Board on a recommendation for public discipline filed by the District XII Ethics Committee ("DEC"). The formal complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 (failure to act with reasonable diligence and promptness) and RPC 1.4(a) (failure to keep client informed) in each of two unrelated cases.

The conduct in the Badida matter involved respondent's failure to notify the client of dismissal of a tort action. The Keiper matter involved respondent's failure to file a caveat in a will contest or to take other action in an estate matter.

Respondent was admitted to practice in New Jersey in 1959. His firm's main office is in Springfield (Union County) with a

second office in Washington (Warren County). He received a public reprimand in 1990 for conduct similar to that displayed in these matters and for misrepresentation. In re Gordon, 121 N.J. 400 (1990). In those prior matters, between 1985 and 1987 respondent did not inform his clients that their complaints had been dismissed for failure to provide answers to interrogatories. He was found guilty of gross neglect, pattern of neglect, failure to inform clients about the status of their matters and failure to turn over files to them. Respondent also misrepresented the status of a proceeding, in violation of RPC 8.4(c). The Board hearing on those matters was held in March 1990. Accordingly, at the time that the present ethics infractions began, January 1990, respondent was on notice that the DEC had found his prior conduct unethical and had recommended public discipline. The present ethics proceeding arises from a complaint dismissed in January 1990 for respondent's failure to answer interrogatories and from respondent's failure to file a complaint in 1991.

A. THE BADIDA MATTER

Eva Badida retained respondent in 1988 to sue a manufacturer (third-party defendant) for an industrial accident resulting in traumatic amputation of her left hand on June 7, 1987. 1T521. Respondent filed a complaint in 1989, but it was dismissed on January 9, 1990 for failure to answer interrogatories. Badida testified that she tried unsuccessfully to discuss the case with respondent by telephone for two years. Respondent did not inform

her of the dismissal of her action. Instead, she heard about it from John Nemergut, Esq., the attorney who handled her workers' compensation claim.

Badida met with Michael J. Grimaldi, Esq., on March 24, 1992, to take over the personal injury case. She authorized him, in writing, to request and receive the file from respondent. Grimaldi wrote to respondent, requesting the file and providing the authorization, on April 3, 1992, May 27, 1992, January 20, 1993 (by certified mail return receipt requested) and February 10, 1993. The only reaction Grimaldi received from respondent was one telephone message, returning a call on February 10, 1993. On April 22, 1993, Badida filed an ethics grievance against respondent.

Respondent acknowledged that he filed the complaint and did not answer the interrogatories. In fact, he stated that he "put it on the back burner," that he was "very busy with a volume practice" and that he "should have been more prudent." 1T114-115,[1] 119. However, respondent contended that there were mitigating circumstances that should be considered, such as whether the case was weak. He cited the fact that several attorneys with whom Badida had previously consulted had declined or withdrawn from representation. One such attorney had written letters on her behalf on November 4, 1987. According to respondent, he took the case as an accommodation to Badida, noting that the case was weak on liability, not on damages, because the manufacturer might be

[1] 1T denotes the transcript of the DEC hearing on December 3, 1993. 2T denotes the transcript of the DEC hearing on April 22, 1994.

deemed to be the employer during buy-out negotiations. Respondent added that any recovery would be applied first to the compensation carrier, which had put a lien on the proceeds. According to respondent, he discussed the lien situation with grievant. He knew that he could have tried to set aside the order of dismissal. The problem was "nothing except procrastination." 1T135.

Respondent offered into evidence his typed file memos dated January 13, 1989 (on his next appointment to meet Badida), April 24, 1989 (on a possible expert witness and on the corporate history) and August 21, 1989 (on his telephone conversation with Badida's workers' compensation attorney). He also submitted his letter dated December 27, 1989 to Badida (enclosing the interrogatories to answer). Exhibits D-2, D-3, D-6 and D-10. Thus, he took appropriate action on the file until it was time for him to provide answers to interrogatories, just as he had dropped the ball on the cases in the prior ethics matters.

B. THE KEIPER MATTER

Although some of the facts in the following recitation may not be crucial to this proceeding, they may be helpful to put respondent's conduct and relationship with this grievant in proper context.

Rose Keiper had known respondent about eighteen years. She had retained him in the 1980s on a contingency basis, to handle an automobile accident case. He had also handled at least one other matter for her at no charge. 2T5, 32-39.

In 1988, Keiper discussed with respondent the preparation of a power-of-attorney for Earl E. Egbert, age seventy-one, to name her as attorney-in-fact. Keiper provided twenty-four-hour care to Egbert for about four years and had known him for about twenty-five to thirty years, perhaps most of her life. 2T6-7, 44-46. Respondent's file contained handwritten and typed file memos, dated April 25, 1988 and May 2, 1988, about preparing the document. The file also contained a rough draft of the power-of-attorney, indicating "1988" as the year to be signed. Exhibits R-3, R-4 and R-5. There is nothing in the record to indicate that the document was ever signed. However, Keiper testified that she had power-of-attorney by a document prepared by another attorney, for which she thought she paid $30 and was reimbursed by Egbert. 2T93.

On February 28, 1991, as respondent's handwritten and typed memos on that date show, Keiper called respondent to advise him that Egbert had died on February 9, 1991, at age seventy-four. Egbert was widowed, had no children and had two brothers. (The record is not clear whether any brothers survived him). He lived in a mobile home on property of under one acre, with a total value of about $57,000 before a possible lien or mortgage for improvements. Egbert's will, executed on June 20, 1990, and witnessed by Arthur L. Alexander, Esq., named his "friend, Carl Nelson," as executor and residuary beneficiary, with Carl's wife, Mary, named as substitute executor and residuary beneficiary. Exhibit R-2. The Nelsons were Keiper's aunt and uncle. According

to Keiper, the Nelsons only went to see Egbert "once in a while." 2T8.

Keiper claimed an oral contract with the decedent to compensate her for services by providing for her in his will. She contended that she retained respondent to challenge the probated will or to file a claim against her aunt and uncle. She did not sign any retainer agreement and claimed there was an oral contingent agreement. In contrast, respondent stated "all I did was open a file and continue to look at it." 2T157.

Keiper asserted that a prior will had been drawn for the decedent by Arthur Alexander, Esq., leaving everything to her if she survived Egbert or, if not, to her son. 2T61-62. Keiper testified that she was at Alexander's office when the will was signed in 1988 or 1989, although she was not in the room for the signing. She remembered seeing the will when Egbert and Alexander came out of the room. 2T79, 98. Keiper stated that Alexander had represented Egbert previously and had known him for many years. 2T85.

Ultimately, friction developed between Keiper and Egbert, which she attributed to the Nelsons' telling Egbert that she was putting "stuff in his food." Keiper then left Egbert's house and moved back to her mother's house about six to eight months before he died. (The probated will was executed seven and one-half months before the date of death.)

Thereafter, Keiper saw respondent at his office about every two or three weeks. According to Keiper, a "personal, romantic

relationship" existed between them. She testified that she had known respondent for eighteen years, and at least eleven years before their romantic relationship began. Respondent, too, described their relationship as personal, social and romantic. 2T122.

After about six or seven months, Keiper had difficulty getting through to respondent by telephone. When she did, he put off discussing the case. 2T15. Keiper then contacted Richard D. Fifield, Esq. about pursuing the will matter. Fifield wrote to respondent on July 12, 1993, advising him that Keiper had asked Fifield to "take this matter over" and to obtain the file. Exhibit R-10. Respondent sent the materials to Fifield on July 27, 1993. Shortly thereafter, Keiper filed an ethics grievance against respondent.

* * *

The DEC found clear and convincing evidence that respondent's actions in Badida violated RPC 1.3 (lack of diligence) and 1.4(a) (keeping client reasonably informed about status of the matters), but not 1.1(a) (gross negligence). In Keiper, the DEC found only violation of RPC 1.3.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board concludes that respondent violated RPC 1.3 and RPC 1.4(a) in the Keiper matter. In

Badida, respondent acknowledged that he procrastinated in the handling of, and did not take steps to reinstate, the dismissed complaint. He contended, however, that such conduct was mitigated by the weakness of the liability issue and the slim likelihood of worthwhile recovery after reimbursement of the workers' compensation lien. Nevertheless, his view of a possible unfavorable outcome hardly justified his lack of diligence and failure to explain the matter to his client so that she could make an informed decision as to the proper course to follow.

Although respondent was not charged with violation of RPC 1.16(d) in the complaint, sufficient evidence was adduced at the DEC hearing to support a finding of failure to return the file to his client.

Likewise, the evidence clearly supports a finding of violations of RPC 1.3 (reasonable diligence and promptness), RPC 1.1(a) (gross negligence) and RPC 1.4(a) (failure to keep client reasonably informed about the status of the matter.)

In sum, respondent allowed the complaint to be dismissed for failure to supply answers to interrogatories, did not inform his client of the dismissal of the complaint, did nothing to have the complaint reinstated and failed to return her file despite her new attorney's several requests made over a period of ten months. That he believed Badida's case to be weak is no excuse. Once retained, he had an obligation to represent her interests diligently and responsibly, regardless of how weak or strong her claim was.

In light of respondent's public reprimand in 1990 for similar improprieties, at the time that he mishandled the Badida matter — from 1988 to 1992 — he knew that his conduct was unethical and deserving of public discipline. The conclusion is, thus, unavoidable that this respondent did not learn from his prior mistakes.

A review of recent cases shows that the Court has imposed discipline ranging from a public reprimand to a term of suspension where the ethics violations have been a mixed combination of gross neglect, pattern of neglect, failure to communicate and misrepresentation. In some cases, two or three of these violations are present, either alone or coupled with a different violation, such as failure to cooperate with the DEC or failure to keep proper trust account records. See, e.g., In re Chatburn, 127 N.J. 248 (1992) (pattern of neglect in three matters, failure to communicate, previous private reprimand); In re Mahoney, 120 N.J. 155 (1990) (gross neglect in four matters, pattern of neglect, lack of diligence in one of the four matters, failure to communicate in two of the matters, failure to maintain trust account records in one of the matters, misrepresentation in one of the matters); In re Clark, 118 N.J. 563 (1990) (lack of diligence in four matters, failure to communicate in the same four matters, failure to return retainer, despite promises to grievant and request by new counsel); In re Marlowe, 121 N.J. 236 (1990) (three-month suspension for gross neglect in two cases, failure to communicate in the same two cases, lack of diligence, pattern of neglect, misrepresentation of

case status in one matter, lack of cooperation with the DEC and prior public reprimand taken into consideration); In re Albert, 120 N.J. 698 (1990) (three-month suspension for lack of diligence, neglect, failure to communicate in two matters, improper withdrawal of a fee from an escrow account without prior consent of the client, failure to cooperate with the DEC and the Board previous private reprimand).

After a consideration of the relevant circumstances, four members of the Board recommend a public reprimand. Two members would recommend a three-month suspension, taking into account that respondent received a public reprimand in 1990 for similar conduct and obviously has not learned from his prior discipline. Three members did not participate.

The Board further recommends that respondent reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 12/7/94

By: 
RAYMOND R. TROMBADORE, ESQ.
Chair
Disciplinary Review Board