

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-203

IN THE MATTER OF :
DAVID P. HURWITZ, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 8, 1993

Decided: November 1, 1993

Carolyn R. Kristal appeared on behalf of the District IIB Ethics Committee.

Respondent appeared pro se.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District IIB Ethics Committee (DEC). The DEC considered five matters charging respondent with the following violations: RPC 1.1(a) (gross neglect), RPC 1.2(a) (failure to abide by a client's decision), RPC 1.3 (lack of diligence), RPC 1.4(a) and (b) (failure to communicate) and RPC 1.16(d) (failure to protect a client's interests). Respondent was also charged with a violation of RPC 1.1(b) (pattern of neglect) in Count One, the Tsuji matter. A sixth count charged respondent with a violation of RPC 8.1 (failure to cooperate with the DEC). Respondent neither filed an answer to the complaint nor appeared at the DEC hearing.

Respondent was admitted to the practice of law in New Jersey and New York in 1986 and 1988, respectively. He maintains an office in Fort Lee, Bergen County, New Jersey.

The Tsuji Matter (District Docket No. IIB-92-9E)

In 1989, Naoki Tsuji retained respondent to obtain permanent resident status for himself, his wife and his children. Tsuji paid respondent \$2,500 and provided him with the necessary documents. Thereafter, Tsuji made numerous attempts to contact respondent by telephone, leaving messages on his answering machine at his home and office. Tsuji also went to respondent's office to attempt to see him, to no avail. He finally spoke with respondent on September 22, 1991. Respondent informed Tsuji that a petition had been filed in his behalf with the Immigration and Naturalization Service (INS), in September 1990. During the telephone conversation, respondent told Tsuji that he would meet him at Tsuji's office to explain the status of the matter to him. Respondent failed to appear. On September 23, 1991, respondent forwarded a copy of the petition to Tsuji. Although respondent's cover letter to Tsuji promised that he would contact him later that week, no such call was made. Respondent also failed to inform Tsuji of the status of the petition and the receipt number used by INS.

In 1991, Tsuji asked William Saltzman, Esq., an attorney in the corporation where Tsuji is employed, to assist him. After Saltzman contacted INS, he was advised that no record of a petition in Tsuji's behalf could be located. Saltzman attempted to contact

respondent, by letter and by leaving numerous messages on his answering machine, requesting the return of Tsuji's documents and of the paid retainer. Respondent never replied to Saltzman or complied with his requests. Saltzman thereafter referred Tsuji to another attorney, who was paid \$2,500 and was able to have Tsuji's visa renewed (T41).

The Rodal Matter (District Docket No. IIB-92-11E)

In early 1991, Monica Rodal, Esq., counsel for Tektronix, an Oregon corporation, consulted with respondent in Tektronix' behalf about the enforcement of a California judgment against personal property located in New Jersey and the return to Tektronix of \$10,000 being held by the United States Marshall in Newark. A retainer agreement was signed in March 1991 and respondent was paid \$500. Respondent corresponded with Rodal and appeared to be pursuing the matter. After July 2, 1991, however, respondent failed to communicate with Rodal, despite telephone messages left on his answering machine on October 18, 22, 24, and 29, and November 8, 1991 and faxes transmitted on September 25 and October 16, 1991. In addition, Rodal sent a certified letter, dated December 6, 1991, to both respondent's home and office. Rodal advised respondent that the U.S. Marshall was threatening to claim the money in a forfeiture action and that, if respondent did not reply immediately, she would file an ethics grievance. The green return receipt cards on both copies of the letters were signed and returned. The signature on the card addressed to respondent's home

clearly reads "David Hurwitz"; the signature on the card addressed to his office is indecipherable (Exhibit C-2). As a result of respondent's failure to pursue the matter, Tektronix' claim was prejudiced. Tektronix has been unable to claim the assets in question (T60).¹

The Positino Matter (District Docket No. IIB-92-25E)

In May 1991, Michael Positino retained respondent to pursue a divorce matter. Positino gave respondent \$1,555 in three payments. Positino signed a complaint, dated February 28, 1991, which respondent filed on March 8, 1991. However, respondent failed to file a Case Information Statement (CIS) or respond to a pendente lite application filed by Positino's wife. During a meeting in respondent's office in June 1991, respondent went over the CIS with Positino (T25). Respondent advised Positino that, due to the court's backlog and summer recess, he would not hear anything until the Fall. In early October, Positino was advised by one of his daughters that his wife had been awarded pendente lite support in the amount of \$250 per week. Positino had no knowledge of his wife's application. Positino testified that, in early October, he left eighteen messages on respondent's answering machine. Respondent never returned his calls.

On October 29, 1991, Positino retained Frank Sproviero, Esq., paying him \$500. After Sproviero was appointed to the bench,

¹ T refers to the transcript of the hearing before the DEC on March 26, 1993.

Positino was represented by his son, Scott Sproviero, Esq. Positino later became dissatisfied with that representation and retained Michael Farhi, Esq. Despite many attempts by each of these attorneys, respondent continued to fail to turn over the file or to respond to requests for the file and for the retainer.

According to Farhi's testimony, the divorce proceeding was conducted over a three-day period, whereupon a judgment of divorce was entered. As of the date of the DEC hearing, Farhi and Positino were determining whether either a motion for reconsideration of the equitable distribution and support, or an appeal of the judgment, was appropriate (T47). Farhi testified that respondent's failure to oppose Mrs. Positino's motion for pendente lite support prejudiced Positino. Farhi also testified that Positino told him that he had gone to respondent's office, had signed both a CIS and a certification in opposition to the motion, but, for some reason, they were never filed (T48). Both Farhi and Frank Sproviero filed motions for reconsideration, but both were denied as being untimely under R.4:49. Farhi opined that, had the opposition papers been timely filed, there would have been a different outcome on the motion (T48). Farhi explained that, although he was able to piece together much of the file from various sources, certain financial information that, he suspects, respondent had in his file was not otherwise available (T49).

The Corcoran Matter (District Docket No. IIB-92-26E)

On March 8, 1990, Sheila Corcoran retained respondent to obtain permanent resident status. Corcoran paid respondent \$1,237.92 as a retainer and to cover filing and publication fees. Corcoran was employed as a teacher at a private school. Her ability to obtain a green card was premised on that employment (T11), and her application had to be processed through the New Jersey Department of Labor (DOL). The record contains correspondence from respondent to Corcoran and her employer, which indicates that he did file certain documents in her behalf. However, respondent failed to respond to the DOL's requests for information. The record contains the DOL's Notice of Cancellation or Withdrawal to respondent, dated November 25, 1991, stating that his failure to comply with a June 14, 1991 communication, which required that he file a complete response by November 8, 1991, had resulted in the closing of Corcoran's file. Respondent did not notify Corcoran of this result. Rather, Corcoran learned that her file was closed in April 1992, when she made inquiry of the DOL on her own.

According to Corcoran's grievance, dated May 1, 1992, respondent failed to return her telephone calls beginning in January 1992. The record contains a letter to her from respondent, dated April 18, 1992, acknowledging her calls and stating that he would telephone her in May 1992. Corcoran testified that she sent letters, left numerous telephone messages for respondent and also had her fiancé and his mother attempt to contact him, to no avail.

Corcoran testified that, on one occasion, she met respondent in a restaurant by coincidence and asked about the status of her application. Respondent took her telephone number and promised to call her. (T21).

Corcoran ultimately married an American citizen, a development that facilitated the issuance of a green card.

The Kawashima Matter (District Docket No. IIB-92-49E)

In 1990, Kenichiro Kawashima retained respondent to assist him in changing his visa status. Respondent did so. Thereafter, in February 1991, Kawashima retained respondent to assist him and his wife in obtaining permanent resident status, paying him \$750. The record contains correspondence to Kawashima as well as documents prepared by respondent in his behalf. However, respondent failed to adequately pursue the matter.

Throughout 1992, Kawashima attempted to communicate with respondent by leaving messages on his answering machine, by fax and by letter dated September 17, 1992. In that letter, Kawashima complained that he had been telephoning respondent for six months. Kawashima's employer also attempted to contact respondent, to no avail. Kawashima testified that he never requested the return of his money and documents but, rather, only wanted information on the status of his application (T54-55). Respondent failed to reply to any of these requests for information.

In February 1993, Kawashima retained another attorney to pursue his application. Kawashima was unaware of any attempts his

new counsel had made to contact respondent. As of the date of the DEC hearing, Kawashima was waiting for information on his matter (T56-57).

Failure to Cooperate

The sixth count of the complaint charged respondent with failure to reply to the DEC investigator's requests for information. The only documents in evidence on this charge are marked as Exhibit C-6. The record contains one letter in the Positino and Corcoran matters, dated June 3, 1992, which refers to a prior letter dated May 26, 1992, and states that no reply was filed in the Rodal and Tsuji matters. In addition, the letter advises respondent that the failure to file an answer violates the Rules of Professional Conduct. The green return card on the letter is part of the record (the signature is different from the two contained in Exhibit C-1.) In addition to the June 3, 1992 letter, the record contains the cover letter to the formal complaint, dated January 22, 1993 and a follow-up letter, dated February 3, 1993, noting respondent's failure to file an answer. Respondent did not appear at the DEC hearing.

* * *

The DEC found respondent guilty, in five matters, of gross neglect, lack of diligence and failure to communicate in violation of RPC 1.1(a), RPC 1.3 and RPC 1.4(a). In addition, there was a finding of failure to return client property, in violation of RPC

1.16(d), in the Positino matter. The DEC also found respondent guilty of a pattern of neglect, in violation of RPC 1.1(b), as charged in the Tsuji matter. Violation of RPC 8.1(b) was also found. The DEC did not find clear and convincing evidence of the alleged violations of RPC 1.2(a) and RPC 1.4(b) in any of the counts.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent is guilty of unethical conduct is fully supported by clear and convincing evidence. Respondent was guilty of gross neglect, lack of diligence and failure to communicate in five matters. He was also guilty of a pattern of neglect and failure to cooperate with the DEC. The DEC also found that respondent failed to return his client's property in the Positino matter. The Board agrees. In addition, the Board finds the same violation in the Tsuji matter, based upon Saltzman's testimony that he requested the return of Tsuji's file, without success.

As the foregoing shows, respondent's neglect of his clients' interests was pervasive and indicative of a pattern of serious misconduct. Respondent not only failed to safeguard the interests of his clients; he abandoned them. Respondent's breach of his clients' trust and the resulting infliction of emotional harm on them are inexcusable. His actions reveal a disturbing lack of concern for his clients' welfare, the likes of which this Board

rarely encounters. This is all the more egregious when it is considered that several of respondent's clients were newcomers to this country, unfamiliar with our laws and seeking their protection.

Numerous cases of unethical acts, including neglect which rises to abandonment and failure to cooperate, have led to either suspension for a significant term or disbarment. In re Mintz, 126 N.J. 484 (1992), (where the attorney was suspended for two years following findings that he had engaged in a pattern of neglect and abandonment in four cases, failed to maintain a bona fide office and failed to cooperate with disciplinary authorities) and In re Spagnoli, 115 N.J. 504 (1989), (where the attorney, who had previously been publicly reprimanded, was disbarred for accepting retainers from fourteen clients over a three-year period without any intention of representing them. Further, Spagnoli lied to the court in order to excuse his failure to appear and failed to cooperate with the disciplinary authorities).

The Board is of the opinion that respondent's misconduct does not rise to the level of that seen in Spagnoli and, accordingly, does not warrant disbarment. While there is no question that respondent abandoned his clients and that his conduct toward them was appalling, Spagnoli presents an even more egregious situation, since Spagnoli defrauded his clients by accepting retainers without ever intending to pursue their interests. Here, respondent took some early steps in each matter. There is nothing in the record to

indicate that respondent's original intent was to defraud his clients.

While the Board was concerned by respondent's failure to cooperate with the DEC, it is of the opinion that it was not due to indifference but, rather, to respondent's inability to cope with the situation in which he found himself. During the Board hearing, respondent was questioned about his failure to reply to the DEC and to appear at the hearing. Respondent stated that he was "unable to respond." Although pressed by the Board for a further explanation, respondent had none. Respondent spoke to feelings of isolation as a sole practitioner and further stated that he had, for a time, sought psychological treatment.

This is not respondent's first brush with the disciplinary system. Respondent was suspended indefinitely in New York for misconduct in one matter, similar to that in the within cases. The Board recently recommended that reciprocal discipline be imposed, and that respondent be suspended and remain ineligible for restoration to practice until reinstated in New York. The Court has issued an order to show cause why respondent should not be suspended or otherwise disciplined.

As to the appropriate measure of discipline, it is unquestionable that respondent's offenses rise to a level that requires a lengthy term of suspension. Indeed, by the abandonment of his clients, respondent's unethical derelictions significantly transcended those that require, at most, a short-term suspension. However, the Board majority is of the opinion that disbarment is

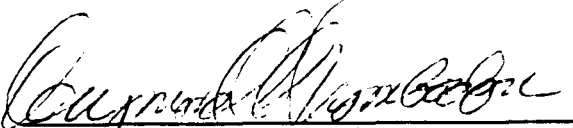
not warranted. Accordingly, the Board recommends that respondent be suspended for a period of three years. Additionally, the Board recommends that, during the period of his suspension, respondent seek psychiatric treatment by a psychiatrist approved by the Office of Attorney Ethics, and provide quarterly reports to that office. The Board also recommends that, prior to reinstatement, respondent demonstrate that he is fit to practice law, as determined by a psychiatrist approved by the Office of Attorney Ethics. Moreover, he is to practice under the supervision of a proctor for an indefinite period of time. Lastly, respondent is not to be reinstated unless and until he is reinstated in New York. One member disagreed with the Board's requirement of psychiatric treatment during the time of suspension. In that member's view, respondent should simply be required to show fitness to practice upon reinstatement. Three members dissented, voting for disbarment.

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

Dated: _____

11/1/93

By: _____


Raymond R. Trombadore
Chair
Disciplinary Review Board