

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-138

IN THE MATTER OF :
GEORGE N. POLIS, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 21, 1993

Decided: February 28, 1994

Joseph Sayegh appeared on behalf of the District I Ethics Committee.

Cosmo A. Giovinazzi, III 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 based upon a recommendation for public discipline filed by the District I Ethics Committee (DEC). The formal complaint charged respondent with a violation of RPC 1.7(b) (conflict of interest), RPC 1.8(c) (business transactions with clients) and RPC 3.3(a)(5) (candor toward a tribunal). In his answer, respondent admitted a violation of RPC 1.8(c).

Respondent was admitted to the New Jersey bar in 1984 and is engaged in practice in Atlantic City, Atlantic County. He has no history of discipline.

In late March 1990, Annette Kabierske, then in her late seventies, consulted with respondent about certain matters arising

from the death of her husband, Alexander, on January 18, 1990. A retainer agreement was signed on or about April 2, 1990. At the time that Mrs. Kabierske retained respondent, his sole employee was his sister, Sophia Basdekis, who worked as his secretary. Before being retained, neither respondent nor Basdekis had been acquainted with Mrs. Kabierske.

With regard to Mrs. Kabierske's physical and mental condition, respondent testified that, when she first came to his office, "she seemed on the thin side" (2T 6)¹. He also stated that "she made responses to the questions but she had difficulty with specifics" (2T 7). He later testified that he "didn't think she was 100 percent at all times. There were better days than others;" also, Mrs. Kabierske had become "more forgetful" (2T 51-52).

Shortly after respondent was retained to handle the estate of Alexander Kabierske, he and Basdekis became aware that he had left an estate of approximately \$200,000. During his testimony, however, respondent denied knowledge of Mrs. Kabierske's personal assets (2T 32, 42-43). Although Basdekis stated that she was aware that Alexander Kabierske had left an estate of \$200,000, she did not recall if she knew that Mrs. Kabierske had \$300,000 of her own (1T 226). Despite this testimony, the DEC found that respondent and Basdekis also became aware that Mrs. Kabierske had assets of her own of approximately \$300,000.

¹ 1T refers to the transcript of the hearing before the DEC on February 17, 1993. 2T refers to the transcript of the hearing before the DEC on February 18, 1993.

Mrs. Kabierske had four sisters, only one of whom, Mary Infante - the grievant herein - lived in New Jersey and visited Mrs. Kabierske approximately twice per year; the other sisters did not visit Mrs. Kabierske. Respondent and Basdekis learned of the existence of Mrs. Kabierske's sisters subsequent to their first meeting with her. Respondent also learned that Mrs. Kabierske had a stepdaughter of whom she was not "very fond" (2T 11).

After retaining respondent, Mrs. Kabierske began to visit his office almost every day (1T 208). During that time, Mrs. Kabierske would read magazines in the waiting area and talk to respondent and Basdekis. Their conversation was largely unrelated to the legal services for which respondent had been retained. Mrs. Kabierske and Basdekis also had lunch together on numerous occasions (1T 209). Respondent testified that the two became "good friends" (2T 9). In fact, although Basdekis left respondent's office in late June 1990, she continued to see Mrs. Kabierske (1T 210). Basdekis testified that Mrs. Kabierske came to her house approximately four or five times and that she went to Mrs. Kabierske's apartment approximately every week or two weeks, her visits lasting for one-half to one hour (1T 233). Basdekis testified that, on one occasion, Mrs. Kabierske gave her \$100 as a gift and that she spent the money on food and clothing for Mrs. Kabierske (1T 212). Basdekis also stated that she assisted Mrs. Kabierske in paying her bills (1T 213). With regard to Mrs. Kabierske's condition, the following exchange took place:

Q. How would you describe Mrs. Kabierske's condition during the course of the summer and into the fall of 1990?

A. Well, she was coming in to [sic] the office, she was looking better and happier all the time. She was smiling and joking around.

Q. Let me ask you this question --

A. Fixing herself up.

Q. When she first came in to the office how did she look?

A. She looked like she was depressed and sad.

Q. Did you notice a change in her after you started seeing her in the office?

A. Yes.

Q. What was that change?

A. She would fix herself up and put lipstick on and she would smile.

Q. How about later on after you left the law office when you saw her either you would visit her the few times she visited you [sic]?

A. She seemed to be happy. Whenever I went to her apartment she would be waiting up on her window waiting because I would call and tell her I was coming and she seemed like she was happy.

[1T 215-216].

Later in the proceeding, Basdekis stated that, after Mrs. Kabierske fell and broke her wrist, on October 3, 1990, she seemed to be less happy than she had been (1T 223). Basdekis further stated that Mrs. Kabierske appeared to be in complete control of her mental faculties until the time of her injury (1T 233). Respondent also testified that he noticed that Mrs. Kabierske became more forgetful after her fall and took a "down turn overall" (2T 24).

The record reveals that, at the time that she retained respondent, Mrs. Kabierske's mental condition was deteriorating. During telephone conversations and visits with Mrs. Kabierske prior to the summer of 1990, Mrs. Kabierske's sister, Mary Infante, began to question her mental health. She also noticed that Mrs. Kabierske looked thin (1T 130-134). On August 13, 1990, Infante and several other family members visited Mrs. Kabierske. It was their opinion that she was not well (1T 135). On August 30, 1990, Infante and her son, Mark Infante, Esq., visited Mrs. Kabierske. Mark Infante testified that Mrs. Kabierske looked very thin and that she did not recognize him or his mother. He stated that the only food in her refrigerator was two glasses of water and one-half sandwich (1T 91). Further, Mrs. Kabierske believed that someone had entered her apartment and stolen her shoes. As Mark Infante testified:

I asked her how she was she was, at that point I was kind of concerned about if she was even oriented to reality at all. So I asked general questions that sometimes in my practice when people come to make wills I ask. I asked if she knew who the president was, I asked her something about Atlantic City whether she had been to the casino, she wasn't answering anything. In fact, she didn't even know her age. She didn't know what year it was. She didn't know who the president was. She said she worked at -- in fact, I recall specifically I said have you ever been to the casinos. She said there's no casinos, I work at Haddon Hall. For years she had worked as a waitress what [sic] is now Resorts, I don't know the numbers, but many years.

[1T 89-90]

Later that same day, August 30, 1990, Mary and Mark Infante met with respondent to discuss Mrs. Kabierske's mental and physical condition. Infante had learned of respondent's involvement through

a relative of Alexander Kabierske, who also told him about Basdekis. Further, according to Mary Infante, Mrs. Kabierske had mentioned Basdekis, believing that she was respondent's wife (1T 141). According to Mark Infante, during the meeting, he told respondent that they "had just met with [Mrs. Kabierske] and [they] were quite concerned over her appearance, her physical appearance and also her mental condition" (1T 94). Mark Infante testified that, during this meeting, respondent did not tell him that Basdekis was his sister; rather, respondent stated that Basdekis had worked in his office (1T 95). Mary Infante, however, testified that she had asked respondent if Basdekis was his wife and that he explained that she was his sister (1T 141).

Respondent testified that, at that meeting, they discussed the fact that Mrs. Kabierske was thin. He further testified that he suggested that one of the sisters take care of Mrs. Kabierske, or that an incompetency proceeding be instituted so that she could be involuntarily placed in a nursing home, if she was unable to feed herself (apparently Mrs. Kabierske believed that her husband had been mistreated in a nursing home and was suspicious of them (2T 97-98).) During the DEC hearing, respondent was asked if the Infantes had told him that Mrs. Kabierske was "confused and disoriented." Respondent replied, "[w]ell I don't recall if they used those terms. I believe she was forgetful, but I don't know if they used the specific disoriented" (2T 14). The DEC concluded that, after this meeting, respondent knew of the Infantes' concern for Mrs. Kabierske's well-being.

The DEC found that Basdekis, "with the knowledge of Respondent, engaged in a course of conduct to befriend Annette Kabierske and to gain her trust by doing errands for her, having lunch with her, visiting her apartment, inviting Annette Kabierske to Sophia's residence, occasionally doing her laundry and shopping, and the like." (Panel Report at 4). The DEC further found that respondent and Basdekis knew or should have known that Mrs. Kabierske's mental faculties were questionable and that she lacked the competence to make proper decisions as to both her financial affairs and physical well-being.

On September 21, 1990, Mrs. Kabierske signed a will, prepared by respondent, in which she left nothing to her stepdaughter, \$2,000 to each of her four sisters, and the residuary estate, approximately \$500,000, to Basdekis. Basdekis testified that Mrs. Kabierske never informed her that she was named in her will and that the two never discussed Mrs. Kabierske's will. Rather, Basdekis stated that she learned that fact from JoAnn Gramm, Esq., the court-appointed attorney for Mrs. Kabierske (see discussion, infra.) (1T 219). Later in her testimony, however, Basdekis stated that she might have learned of the bequest from respondent (1T 231).

Respondent testified that he did not tell Basdekis about the will because it was a confidential matter between himself and Mrs. Kabierske (2T 23). He later testified that the topic never came up and that he and Basdekis are "not that close" (2T 48-50).

According to respondent, Mrs. Kabierske first raised the topic of drafting a will in mid-August 1990, after her stepdaughter visited her. Respondent explained that Mrs. Kabierske did not want the stepdaughter to receive any of her estate (2T 16). Respondent stated that Mrs. Kabierske wanted to leave the bulk of the estate to Basdekis because Basdekis "was the only one that paid any attention to her" (2T 17).

Respondent stated that he had explained the conflict of interest to her regarding his sister and that he believed that she had understood it (2T 21-22). He testified that he had informed Mrs. Kabierske on three or four occasions that he could not draft the will because of his relationship with Basdekis and that the will would be challenged by the sisters. He contended that he further advised her to consult with another attorney. According to respondent, Mrs. Kabierske replied that her sisters could fight the will (2T 17-18). Respondent drafted the will, despite his alleged concerns over the conflict of interest, because that was what Mrs. Kabierske wanted (2T 19, 80). Respondent also explained that, once the will was drafted, he gave it to Mrs. Kabierske to review it overnight. She signed the will in his office on the following day, September 21, 1990.

Respondent disagreed with the Infantes' assessment that Mrs. Kabierske lacked capacity:

My understanding was with regard to one's testamentary capacity, you don't need to have 100 percent you don't have to be an Einstein as long as you are aware of what you are doing, what you intend to do, who your relatives are, who the individuals are. There was a very low

threshold of testamentary capacity and I believe she had that.

[2T 21].

He explained that he was "stunned" when he later saw doctors' reports stating that Mrs. Kabierske was incompetent (2T 25).

Margaret A. Fessman, who replaced Basdekis as respondent's secretary and also witnesses Mrs. Kabierske's will, testified before the DEC. She stated that she spoke with Mrs. Kabierske when she came to the office and that they had had lunch together. According to Fessman, on September 20, 1990, the day before the will was signed, respondent and Mrs. Kabierske had a discussion about it, wherein he went over the specific bequests to her family and the disinheritance of her stepdaughter, to ensure that she was certain about her wishes (1T 249-250). Fessman also heard him warn Mrs. Kabierske that, because Basdekis was his sister, there might be a conflict of interest; he suggested that she obtain another attorney. According to Fessman, Mrs. Kabierske said that she did not want another attorney (1T 251). Fessman was of the opinion that Mrs. Kabierske understood what respondent had explained to her (1T 251). Fessman saw respondent sending Mrs. Kabierske home with the will to review it overnight. The will was signed the next day, September 21, 1990, after respondent went over it with Mrs. Kabierske again, including the conflict of interest issue (1T 252). According to Fessman, respondent did not explain what he meant by the word "conflict" (1T 282). (Respondent testified that he intentionally left his door open during his conversations with Mrs. Kabierske so that Fessman could hear it (2T 87)).

With regard to Mrs. Kabierske's competence, Fessman stated that, on more than one occasion, Mrs. Kabierske thought that Basdekis was respondent's wife (1T 253). In addition, the following exchange took place between the presenter and Fessman:

Q. Are you aware that the day before this will was signed there has been testimony in this hearing that [Mrs. Kabierske] was found to be practically incoherent and that she was disoriented as to time and place and didn't recognize people on the very same day she was in your office when she took --

A. Absolutely positively not.

Q. There's no way that that happened?

A. No, there is no way.

Q. Did there ever come a time in your knowledge of [Mrs. Kabierske] that she was not competent?

A. You know, the last time I saw her I was worried about her, she looked upset, she looked frazzled.

Q. Let's get a date on that.

A. That was in September, that was like the end of September.

Q. This was signed September 21st?

A. All right, then it was the end of October, I know it was just before I was leaving his office.

Q. When did you leave his office.

A. I think it was November but we haven't [sic] seen her for a couple weeks before I left.

Q. Okay. And what you are saying is right before you left you saw her and that's the first time you noticed?

A. Yes.

Q. What was it, unhappy?

A. She looked frazzled, stressed out.
[1T 266-267].

During the early Fall of 1990, Mrs. Kabierske's mental condition worsened and Infante retained an attorney to begin incompetency proceedings. The proceedings were commenced by order to show cause, dated November 13, 1990. Two physicians who examined Mrs. Kabierske, in November 1990, found her to be incompetent. By virtue of the foregoing order, JoAnn Gramm, Esq. was appointed to represent Mrs. Kabierske and to investigate whether she was incompetent and whether there had been a misappropriation of Alexander Kabierske's estate assets (1T 26). Gramm made a detailed investigation and report to the court. Her report recommended that Mrs. Kabierske be adjudged incompetent and that Infante be appointed as her guardian. During the course of her investigation, Gramm interviewed several individuals, including respondent and Basdekis. According to Gramm, it was clear to respondent that she was investigating the matter on behalf of the court (1T 28). Gramm's notes from her interviews indicate that she learned through an interview with the manager of Mrs. Kabierske's apartment building, Christy Thrasher (Hickey), that Basdekis was respondent's sister (1T 48). Gramm's report revealed that Basdekis confirmed that she was respondent's sister (1T 47-48). However, Gramm testified that respondent did not reveal his connection with Basdekis, although he did disclose that they had an employer/employee relationship (1T 29, 64-65).

During his testimony, respondent stated that he did, in fact, inform Gramm that Basdekis was his sister (2T 27-28). He also testified that Gramm advised him that Mrs. Kabierske's sisters

would contest the will. Respondent replied to Gramm that Mrs. Kabierske had told him to "let them fight it" (2T 27).

Gramm testified that, during the course of her investigation, she met with Mrs. Kabierske on November 16 and 27, 1990. During the first interview, Mrs. Kabierske did not recognize respondent's name, but did recognize Basdekis' name. At that time, Mrs. Kabierske also stated that she had no sisters (1T 51). By the date of the second interview, a nurse had been hired to care for Mrs. Kabierske. Although her physical condition appeared improved and Mrs. Kabierske knew two of her sisters, she did not know Mary Infante, the grievant herein (1T 50-53).

Christie Thrasher testified before the DEC that, in the early part of 1990, she noticed that Mrs. Kabierske exhibited confusion. In the Summer of 1990, Thrasher noticed Mrs. Kabierske's condition worsen (1T 172). For example, Mrs. Kabierske would be unable to locate her apartment, could not unlock her door and, on more than one occasion, was found walking naked in the apartment building (1T 173). In late October 1990, Mrs. Kabierske was served with a notice to cease by her landlord. Respondent testified that he was not aware of that action (2T 25). Thrasher also testified that it was obvious that Mrs. Kabierske was not receiving any nourishment (1T 175). Mrs. Kabierske told Thrasher that Basdekis was from respondent's office and that the two had had lunch together (1T 194). Thrasher testified that, on one occasion, she met Basdekis bringing a money order to pay Mrs. Kabierske's rent and, on

another, bringing food to Mrs. Kabierske and planning to help her with her laundry (1T 179).

Testimony was offered by Stephanie Clapp, an employee of the Atlantic County Department of Social Services. On November 7, 1990, Clapp met with Mrs. Kabierske. Clapp testified that Mrs. Kabierske appeared "very confused and disoriented" (1T 73). Mrs. Kabierske did not have an understanding of her finances and was uncertain as to whether she had relatives or children. There was no food in Mrs. Kabierske's apartment and both her apartment and her person were unkempt. In addition, Clapp noticed the injury to Mrs. Kabierske's wrist. Mrs. Kabierske was uncertain as to what had happened to it (1T 73-76).

On or about December 17, 1990, Mrs. Kabierske was adjudged to be incompetent. Respondent was directed to turn over all funds in the estate of Alexander Kabierske, as well as the assets of Mrs. Kabierske, to her appointed guardian. The order also provided that the guardian was to take all steps necessary to address the issues raised by Mrs. Kabierske's will. On May 14, 1991, the Honorable Michael R. Connor, J.S.C., declared that Mrs. Kabierske lacked testamentary capacity at the time the will was signed and that, consequently, the will drafted by respondent was null and void.

In his answer to the formal ethics complaint and during his testimony, respondent admitted that he violated RPC 1.8(c). Respondent also admitted that, at the time he prepared the will, he was aware that his specification of Basdekis as the primary

beneficiary of the will created a conflict of interest. He also testified that he was aware that his preparation of the will might subject it to a future challenge and could potentially frustrate the intent of Mrs. Kabierske. He contended that, nevertheless, it was her desire that he proceed.

The DEC found that, as admitted, respondent had violated RPC 1.8(c). The DEC also found that respondent violated RPC 1.7(b)(1) by preparing the will, if he was aware that his relationship to the potential beneficiary could result in a challenge to the will and frustrate Mrs. Kabierske's intent. The DEC further found that, because Mrs. Kabierske lacked the requisite testamentary capacity on September 21, 1990, she could not have validly consented to respondent's representation of her interests in preparing a will naming his sister as beneficiary and could not have understood the ramifications of the matter, despite full disclosure by respondent, who should have known of Mrs. Kabierske's condition. The DEC concluded that respondent violated RPC 1.7(b)(2).

The DEC did not find clear and convincing evidence of a violation of RPC 3.3(a)(5), in that there was a conflict in the testimony of respondent and Gramm with regard to whether he had informed her that Basdekis was his sister. Therefore, the DEC did not reach the issue of whether Gramm was a "tribunal," as contemplated by this rule.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Respondent admitted his violation of RPC 1.8(c), but argued that, at the time of his action, he was unaware of the existence of the rule. It is well-settled, however, that ignorance of the rules is no excuse. Accordingly, the Board agrees with the finding of the DEC that respondent violated RPC 1.8(c), in that he drafted an instrument giving his sister a testamentary gift from a client.

The Board also agrees with the DEC's disposition of the alleged violation of RPC 3.3(a)(5). The record does not reveal clear and convincing evidence that respondent failed to tell Gramm that Basdekis was his sister. Therefore, the issue of whether Gramm was a tribunal for the purposes of this rule need not be reached.

The Board, however, disagrees with the DEC's findings on the alleged violations of RPC 1.7(b)(1) and (2). The Board is unable to conclude, based upon the record before it, that respondent's belief as to Mrs. Kabierske's testamentary competence was unreasonable. Although respondent apparently suspected that the will would be overturned and that Mrs. Kabierske's wishes would not be carried out, his actions did not constitute a conflict of interest because of his reasonable belief that Mrs. Kabierske was

competent to understand the consequences of his representation and to give a valid consent thereto. In addition, although the Board harbored a strong suspicion that respondent encouraged the relationship between Mrs. Kabierske and his sister to such an extent that it raised serious questions of undue influence, the Board was unable to find clear and convincing evidence of overreaching. Accordingly, the sole violation before the Board is of RPC 1.8(c), in that respondent drafted an instrument in which a bequest was made to his sister.

A violation of RPC 1.8(c), preparation of a testamentary instrument wherein the attorney's close relative received a substantial gift, is a conflict of interest scenario that gives rise to serious questions of undue influence. This is particularly so where the testator is an elderly widow, helpless and there are serious doubts as to her competence. Respondent should have refused to draft the will. At a minimum, his actions created a strong appearance of impropriety that should have been avoided.

This is serious misconduct, akin to that displayed by other attorneys who have been disciplined for entangling their business concerns with helpless clients. See In re Humen, 123 N.J. 289 (1991) (where an attorney received a two-year suspension for improperly engaging in numerous business transactions with an elderly client). Attorneys have also been disciplined for representing clients in situations that benefitted either the attorney or persons close to him. See In re Hurd, 69 N.J. 316 (1976) (where the attorney arranged a loan transaction whereby real

property would be transferred from a longtime friend and neighbor, unsophisticated in business affairs, to Hurd's sister, for approximately twenty percent of its value).

This respondent's infractions are not as severe as Hurd's. Despite the existence of a strong appearance of impropriety, the record does not reveal clear and convincing evidence that respondent engaged in the sort of deceptive self-dealing that characterized Hurd's misconduct. Further, Hurd's actions were made more egregious by the long-term relationship between his family and that of his client, who had reason to rely on Hurd's integrity. Importantly, in this matter, there was no harm to Mrs. Kabierske. Respondent's actions were, nevertheless, reprehensible. Accordingly, the Board majority recommends that respondent be publicly reprimanded for his violation of RPC 1.8(c).

Two members dissented from the majority's view, believing that respondent should received a one-year suspension. Those members are of the opinion that respondent encouraged Basdekis' relationship with Mrs. Kabierske for the benefit of Basdekis and that he engineered a scheme to obtain Mrs. Kabierske's money. Two members did not participate.

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

Dated: 2/28/74

By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board