SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 95-419

IN THE MATTER OF	:
DOUGLAS R. SMITH,	:
AN ATTORNEY AT LAW	:

Decision

Argued: January 31, 1996

Decided: September 18, 1996

C. Boyd Cote appeared on behalf of the District IIA Ethics Committee.

Respondent did not appear, despite notice by publication in the New Jersey Law Journal and the Bergen County Record.

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

This matter was before the Board based on a recommendation for discipline filed by the District IIA Ethics Committee (DEC) arising out of respondent's handling of a foreclosure proceeding. Specifically, the complaint charged respondent with a violation of RPC 1.1(a) and (b) (gross neglect and pattern of neglect) (the complaint referred to a pattern of neglect, but did not cite the specific rule), RPC 1.2 (scope of representation), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.16(d) (failure to turn over a client's file) (mistakenly cited as RPC 1.6(d)), RPC 3.2 (failure to expedite litigation), RPC 8.1(b) (failure to cooperate with the DEC) and RPC 8.4(b) and (c) (criminal act and conduct involving dishonesty, fraud, deceit or misrepresentation).

Respondent did not comply with the DEC's requests for information, did not file an answer to the complaint and did not appear at the DEC hearing.[1]

Respondent was admitted to the New Jersey bar in 1974. During the time relevant to the within matter, he was engaged in the practice of law in Fair Lawn, Bergen County.

By Order dated May 18, 1995, respondent was suspended for six months for lack of diligence in connection with an appellate matter and failure to cooperate with the disciplinary authorities. In re Smith, 140 N.J. 212 (1995). That suspension was to be consecutive to respondent's previous one-year suspension, imposed by Order dated March 14, 1994. In that case, respondent was found guilty of gross neglect, pattern of neglect, lack of diligence, misrepresentation and entering into a business relationship with a client without first advising the client to seek independent counsel. In re Smith, 135 N.J. 122 (1994). Respondent did not apply for reinstatement to the practice of law. Furthermore, respondent was privately reprimanded by letter dated November 23, 1993, for representing clients with adverse interests without disclosing the multiple representations to the clients and without obtaining their consent thereto. Respondent also failed to file an answer to the formal ethics complaint.

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[1] The presenter stated that respondent had been informed by letter of the date and location of the hearing. There is no information in the record as to the date of that letter or whether it was sent to respondent via certified and/or regular mail or if it was returned undelivered.
For unknown reasons, the witnesses testified by telephone.

On or about August 5, 1991, Martin Alliger, in behalf of himself and other members of his family, retained respondent to pursue a foreclosure proceeding against an entity known as Washcross Development Corp. ("Washcross") and a number of individual defendants. Respondent had previously prepared the mortgage documents when Mr. Alliger had sold the property in question. On August 9, 1991, Mr. Alliger paid respondent a $750 retainer fee and advanced $250 for costs.

During conversations beginning in 1991, respondent told Mr. Alliger that he had filed a complaint and had caused it to be served on the defendants. Thereafter, throughout the period of the representation, respondent continually informed Mr. Alliger that the matter was progressing but that, due to the court's backlog, it would take at least two years to be finalized. Mr. Alliger asked respondent to forward a copy of the complaint, which respondent failed to do. Mr. Alliger received no written communications from respondent.

In fact, respondent did not file a complaint until May 28, 1993. In addition, there is no indication in the court's record that the defendants were ever served with the complaint. (Respondent's file in this matter is not a part of the record).

Mr. Alliger testified that, between August 1991 and early 1994, he had difficulty communicating with respondent, describing the contact as "very sparse." According to Mr. Alliger, he made numerous calls to respondent, leaving messages with his secretary, to no avail. Mr. Alliger and respondent did, however, speak on at

least six occasions in 1991 and on eight to ten occasions in 1992. (The record does not clearly reveal the number of conversations in 1993 and 1994, but it was apparently considerably less than in the preceding years). Mr. Alliger also attempted to contact respondent at his house on several occasions in 1993 or 1994. He spoke on two occasions with respondent's son, who was unable to give any information about his father.

Eventually, Mr. Alliger became dissatisfied with respondent's representation and with the lack of communication between them. By letter dated April 26, 1994, Mr. Alliger terminated respondent's services and requested that the file be forwarded to his new attorney, Kenneth D. Wolfe, Esq., of the law firm of Cooper, Perskie, April, Niedelman, Wagenheim & Levinson ("Cooper, Perskie"). Respondent did not reply to the letter or comply with Mr. Alliger's request. By letter dated May 17, 1994, Mr. Alliger once more requested that respondent turn over his file to Mr. Wolfe. Again, respondent did not reply.

By letter dated May 9, 1994, Mr. Wolfe also attempted to retrieve Mr. Alliger's file from respondent, unsuccessfully. On May 26, 1994, Mr. Wolfe received a "fax" from an individual, apparently respondent's secretary, stating that, pursuant to Mr. Wolfe's telephone instructions, respondent would forward the file and would execute a substitution of attorney on May 27, 1994, when he returned from out of town. Neither the substitution of attorney nor the file was forthcoming. By letter dated June 30, 1994, Mr. Wolfe again attempted to obtain the file, to no avail.

Thereafter, on or about September 13, 1994, Cooper, Perskie filed a motion to compel respondent to return Mr. Alliger's file and to execute a substitution of attorney or, in the alternative, to obtain an order substituting Cooper, Perskie as counsel for Mr. Alliger and for the other plaintiffs. The motion was sent to respondent via regular and certified mail. The record does not show if either letter was returned as undelivered or if respondent filed a reply. It is presumed that he did not.

On October 3, 1994, the Honorable Philip S. Carchman, J.S.C., granted Cooper, Perskie's motion, substituted the firm as counsel for Mr. Alliger and for the other plaintiffs and ordered respondent to turn over the file to Cooper, Perskie within ten working days. By letter dated October 6, 1994, Scott R. Silverman, Esq., an associate with Cooper, Perskie forwarded a copy of the court's order to respondent at two addresses, via "fax", regular and certified mail. Only the certified mail was returned as undelivered. On October 11, 1994, Mr. Silverman re-sent the letter to what was believed to be a more current address for respondent, again forwarding it via "fax", regular and certified mail. As before, only the certified mail was returned as undelivered.[2] Mr. Silverman also tried to reach respondent by telephone at his house and office, leaving messages on his answering machine at his house. Respondent did not reply or forward the file.

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[2] The information about mailing of the court's order is in a certification Mr. Silverman prepared in connection with the proceedings before the court, Exhibit C-2C, and differs somewhat from his testimony before the DEC. See T2/7/95 34. Given the passage of time, it is assumed that the information in the certification is more accurate.

Thereafter, Cooper, Perskie filed a motion to enforce the court's order and to hold respondent in contempt. On December 6, 1994, the court issued an order to show cause. An investigator for Cooper, Perskie personally served a copy of the order to show cause on respondent on December 9, 1994. Respondent did not appear or reply. According to Mr. Silverman's testimony, the motion was granted, finding respondent in contempt, ordering his incarceration and assessing monetary damages against him. The record is silent about what occurred thereafter.

Cooper, Perskie is currently handling the case in Mr. Alliger's behalf. To date, respondent has not returned the file, thereby hindering Cooper, Perskie's representation.

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By letter dated June 10, 1994, the DEC investigator asked respondent to reply to the allegations in Mr. Alliger's grievance. Respondent did not reply. The investigator sent respondent a second letter on July 20, 1994, which was also ignored. On August 1, 1994, the investigator again forwarded correspondence to respondent at his house and office, to no avail. The investigator also left numerous messages on respondent's answering machine at his office and at his house. They were all ignored.

The formal ethics complaint was filed on December 13, 1994. As noted above, respondent did not file an answer or appear at the DEC hearing.

* * *

The DEC determined that respondent violated RPC 1.1(a), RPC 1.3, RPC 1.4, RPC 1.16(d) and RPC 8.4(c), basing the latter violation on respondent's "dealings" with Mr. Alliger. (The DEC did not detail the conduct. Presumably, the DEC based its findings on respondent's misrepresentations to Mr. Alliger about the status of the case). As to the allegations of violations of RPC 1.2 and RPC 3.2, the DEC found that they were more properly merged with the violations of RPC 1.4 and RPC 1.1 (a), respectively.

The DEC did not find a violation of RPC 1.1(b), citing the lack of specificity of the complaint. Similarly, the DEC found no violation of RPC 8.4(b) or RPC 8.1(b). Apparently misinterpreting the rules, the DEC stated that "... the rule does not require the filing of an answer and simply the failure to file an answer is not in and of itself a violation of the rule. There was not a demand for information such as a subpoena."

* * *

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

The DEC properly found that respondent was guilty of gross neglect, lack of diligence, failure to communicate, failure to turn over a file and misrepresentation about the status of the case. The DEC did not find respondent guilty of a violation of the rule governing the scope of representation, RPC 1.2, or of a failure to expedite litigation, RPC 3.2, believing that those violations

should merge into others. Generally, however, disciplinary violations are not merged and they can and do stand on their own.

Respondent's misconduct in connection with his representation of Mr. Alliger, without more, would be deserving of a reprimand. See In re Weber, 138 N.J. 35 (1994) (where an attorney was publicly reprimanded for allowing an appeal to be dismissed without communicating with his client and deceiving the client for over one year that the case had been decided on the merits).

Respondent is, however, guilty of an additional violation. The DEC found that respondent was not guilty of failure to cooperate with the disciplinary authorities. Given that respondent not only failed to cooperate with the DEC, but also failed to file an answer and to appear at the hearing, the DEC's conclusion is unwarranted. Significant is the fact that, in two of his three previous disciplinary proceedings, respondent also failed to cooperate with the DEC. Here again he has shown indifference and disrespect for the system by failing to appear at the DEC hearing. Respondent's continued contemptuous attitude toward the disciplinary system, further evidenced by his failure to appear before the Board, should and does elevate the level of discipline appropriate in this matter to a suspension.

Additionally, respondent has an extensive disciplinary history. He has been privately reprimanded and has also been the subject of two additional disciplinary proceedings that resulted in the imposition of a six-month suspension and a one-year suspension. Furthermore, at the time of the within misconduct, respondent had

already received a private reprimand and was on notice that his actions in the matters that led to his one-year suspension and his six-month suspension were being questioned by disciplinary authorities. (Indeed, respondent's one-year suspension was in place at the tail-end of his involvement in this matter). Respondent's failure to amend his practices in the face of past and pending disciplinary proceedings is a serious aggravating factor, showing that he has refused to learn from his prior mistakes.

One additional issue must be addressed. Mr. Alliger testified that respondent never informed him that he had been suspended from the practice of law. The Order of suspension was dated March 14, 1994; Mr. Alliger did not terminate respondent's representation until April 26, 1994. Although this dereliction was mentioned in the complaint, respondent was not charged with a specific rule violation in this regard. Given that this is a serious allegation, see In re Foley, 138 N.J. 50 (1994), which was not specifically charged, the Board made no finding in this regard.

As noted above, the misconduct in the Alliger matter, standing alone, would warrant a reprimand. The aggravating factors, however, raise it to the level of a lengthy suspension and also raise grave concerns about respondent's fitness to practice law.

In In re Brown, 141 N.J. 13 (1995), a three-year suspension was imposed where the attorney, in three client matters, engaged in gross neglect, a pattern of neglect, failed to consult with a client prior to settling a case, failed to communicate with a

client and charged an unreasonable fee. The attorney had previously been suspended for a period of six months.

In the case at bar, although only one client matter is involved, respondent's other violations counterbalance the lack of additional harm to clients. Respondent, after so many appearances before the disciplinary system, still refuses to cooperate with the ethics authorities, including this Board. Respondent's wilful indifference toward the system cannot be countenanced. "Disrespect to an ethics committee agent constitutes disrespect to this Court, as such a committee is an arm of the Court." In re Grinchis, 75 N.J. 495, 496 (1978).

A majority of the Board determined that respondent should be suspended for a period of three years. That suspension is to run consecutively to respondent's current suspension. (Although the period of respondent's current six-month suspension, imposed in May 1995, lapsed, he never applied for reinstatement and remains suspended). Respondent shall not file for reinstatement to the practice of law until all ethics cases pending against him have been concluded. Prior to restoration, respondent is to present proof of his fitness to practice law. He is also to complete the basic skills and methods core courses offered by the Institute for Continuing Legal Education. Furthermore, upon reinstatement, respondent is required to practice law under the supervision of a proctor for two years.

Two members disagreed with the Board's majority, believing that respondent should be disbarred. One member did not participate.

The Board further required respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 9/18/96

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board