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SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-394

IN THE MATTER OF :
:
IGNACIO SAAVEDRA, :
:
AN ATTORNEY AT LAW :
:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: December 16, 1992

Decided: February 7, 1993

John J. Hughes appeared on behalf of the District VI 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 on a recommendation for public discipline filed by the District VI Ethics Committee ("DEC"). The formal complaint charged respondent with gross neglect in the handling of a matrimonial action (Sanchez - First Count); failure to communicate with his client (Sanchez - Second Count); failure to cooperate with the DEC (Sanchez - Third Count); gross neglect (Mercado - First Count); failure to return unearned fees to clients (Mercado - Second Count); promise to pay a referral fee without being a certified trial attorney (Mercado - Third Count); the making of a knowingly false material statement to a tribunal (Mercado - Fourth Count); and failure to cooperate with the DEC (Mercado - Fifth Count).

Respondent was admitted to the New Jersey bar in 1972. He maintains a law office in Union City, Hudson County. The facts of these two disciplinary matters are as follows:

THE SANCHEZ MATTER

In May or June 1989, respondent filed a complaint for divorce on behalf of Aleida Sanchez. The complaint did not seek equitable distribution or support, only the dissolution of the marriage. Mrs. Sanchez paid respondent a \$300 retainer, the remaining \$300 of the total fee of \$600 to be paid at the conclusion of the matter.

According to respondent, he experienced difficulty in serving Mrs. Sanchez' husband with the complaint because his home address was unknown, a contention supported by the handwritten notes of respondent's secretary, taken during the interview with Mrs. Sanchez. Exhibit R-7. Mr. Sanchez had supposedly agreed to come to respondent's office to acknowledge service of the summons and complaint or, in the alternative, to give Mrs. Sanchez a good address. Respondent testified that his secretary had telephoned Mr. Sanchez reminding him of his promise, but that some time had elapsed before Mr. Sanchez had complied therewith. Respondent went on to say that, even then, when Mr. Sanchez appeared at his office, Mr. Sanchez took the complaint with him to have his signature notarized, which also took an inordinate length of time. In any event, on November 6, 1989, five or six months after the filing of the complaint, respondent finally obtained Mr. Sanchez' acknowledgement of service of the complaint. Exhibit R-1.

Thereafter, on January 5, 1990, respondent received from the court a notice of dismissal for lack of prosecution, pursuant to R. 1:13-7. The dismissal date had been set for January 30, 1990. Respondent did not file a written objection thereto. In the interim, however, respondent had requested and obtained the entry of a default on January 19, 1990, as a result of Mr. Sanchez' failure to answer the complaint. Despite the entry of a default, when the court did not receive from respondent a written objection to the dismissal of the complaint, it entered an order of dismissal on January 30, 1990, eleven days after the entry of the default.¹

On February 28, 1990, respondent filed a motion to reinstate the complaint, which motion was returnable on March 16, 1990. That motion was denied, supposedly (as speculated by the DEC investigator) because of respondent's failure to strictly follow R. 5:7-7. That rule provides for the submission of an affidavit stating the reason for the delay in prosecuting the matter, the relations of the parties toward each other since the commencement of the action, and any agreements or understandings between them.² Respondent did not inform Mrs. Sanchez that the complaint had been dismissed.

¹ There is no explanation in the record as to why the court dismissed the complaint when default had been entered eleven days before.

² It is not known why the court did not give respondent the opportunity to submit a proper certification in support of his motion to reinstate the complaint, after he did not comply with the formalities of R. 5:7-7. The dismissal of the matrimonial matter in which respondent was supposed to appear on the day of the DEC hearing, if true, was also troubling.

On April 29, 1991, respondent prepared and forwarded to Mrs. Sanchez a new complaint. He also asked for the payment of a \$75 filing fee. Respondent did not explain to Mrs. Sanchez why it was necessary to file a new complaint.³ Puzzled by this recent development in the matrimonial action, Mrs. Sanchez consulted with her nephew, a Florida attorney, who telephoned respondent to discuss the status of the case and the propriety of charging Mrs. Sanchez a filing fee. According to the testimony of Mrs. Sanchez' nephew, respondent replied that, if Mrs. Sanchez did not pay the filing fee, they would not "be doing business together."

On July 1, 1991, Mrs. Sanchez referred this matter to the DEC.

At the conclusion of the ethics hearing, the DEC found that respondent had grossly neglected the handling of the Sanchez matter and had failed to keep his client reasonably informed about its status, in violation of RPC 1.1(a) and 1.4(a).

THE MERCADO MATTER

Respondent represented the plaintiff in a federal lawsuit captioned Juan Mercado v. Hudson County Chief of Police, et al. According to respondent, he did not list, on plaintiff's answers to interrogatories, all of the witnesses whom he intended to call for testimony, some of which was essential to his client's case. Respondent added, however, that the pre-trial order did contain the

³ There is no allegation that respondent affirmatively misrepresented to Mrs. Sanchez the status of the lawsuit.

names of those witnesses. At the trial, nevertheless, respondent's adversary objected to those witnesses' being called to testify, on the basis that they had not been mentioned in the answers to the interrogatories. When the judge ruled in favor of his adversary, respondent made an unusual motion for a mistrial on the ground that he was incompetent to represent his client. That motion was denied. Ultimately, the jury returned no cause of action in the matter. Thereafter, the federal judge referred the matter to the DEC, not because of respondent's motion, but because of certain concerns about a certification that respondent had filed with the court. Specifically, the certification stated that respondent owed monies to clients and "refund fees" to three attorneys, but that he had been unable to meet those financial obligations because he was in dire financial straits. Thereafter, an audit of respondent's attorney records was conducted, but disclosed no improprieties. Similarly, the DEC found no clear and convincing evidence that respondent had paid referral fees to the three named attorneys, which fees respondent mistakenly termed "refund fees", but, rather, that respondent had felt morally obligated to compensate those attorneys for cases that they had referred to him.

At the conclusion of the DEC hearing, the panel found that respondent had grossly neglected the handling of the Mercado matter, in violation of RPC 1.1(a), and that he had failed to return earned fees to clients, in violation of RPC 1.16(d). The panel so found, notwithstanding the fact that the issue of failure to return retainers to clients was not litigated at the hearing and

that no evidence that respondent had grossly neglected the Mercado matter was adduced. The panel's conclusion that respondent had been grossly negligent was based solely on the fact that respondent had "virtually admitted his gross negligence in handling the Juan Mercado case on the record in Judge Ackerman's court room." Hearing Panel Report at 9.

FAILURE TO COOPERATE

On July 23, 1991, the DEC investigator, Richard Feinberg, wrote to respondent apprising him of the filing of the Sanchez grievance. In that letter, the investigator did not ask respondent to supply information about the matter but, rather, advised him that a follow-up letter would be forthcoming. Indeed, on August 5, 1991, the investigator wrote to respondent requesting that he call the investigator's office to schedule an appointment to discuss the matter. Respondent did not call the investigator's office. On August 13, 1991, the investigator sent a letter to respondent confirming a telephone conversation between them on that date and the scheduling of an appointment for September 11, 1991. On that date, however, respondent telephoned the investigator's office to advise that he was unable to keep the appointment. On September 19, 1991, the investigator telephoned respondent to set up another date on which they could meet. They rescheduled the appointment for September 19, 1991 at 3:30 p.m. Respondent did not appear on that date. Another appointment was, therefore, set up for September 26, 1991 at 10:00 a.m. At 10:15 a.m., respondent

telephoned the investigator's office to inform him that would not be able to keep the appointment because he had staff problems and because he would have to appear in court. When respondent requested an appointment for the following week, the investigator declined. Thereafter, the DEC filed a formal ethics complaint against respondent.

Similarly, in connection with the Mercado matter, the investigator wrote to respondent on November 22, 1991, requesting that respondent call his office within ten days to discuss the matter and that he supply the investigator with specific documents from the Mercado file. The investigator sent a follow-up letter on December 3, 1991, asking respondent to call his office within ten days. The investigator advised respondent that the failure to comply with his request would be deemed a separate ethics violation. The investigator also informed respondent that he would not be making any further efforts to communicate with respondent about that matter. Respondent did not reply to the investigator's letter.

At the DEC hearing, respondent explained that he was unable to keep the appointments with the investigator in connection with the Sanchez matter because of office problems and of a possible court appearance; respondent complained that the investigator had refused to set up another appointment to discuss the matter. Respondent also produced an unopened letter from the investigator, in an attempt to show that he had not ignored the investigator's request for information but, rather, that it was possible that some of the

investigator's letters had never reached him. Respondent explained that his office is in a crime-ridden neighborhood and that his mail was frequently stolen or mixed in with mail directed to a now disbarred attorney, with whom he shared space in the past. That attorney, according to respondent, still had not removed his files from the office or arranged for his mail to be addressed elsewhere. Respondent testified as follows:

I understand Mr. Feinberg being disturbed by the fact that I had to cancel several of the appointments, but that was not because I felt like just not responding or making myself a big shot by not being able to attend. I was having problems. For two months I was without a secretary. I had friends of mine -- as a matter of fact right now one of the help that I have doesn't speak English. I have a secretary two days a week. It hasn't been easy finding secretaries, especially lately when they want a lot of money and lawyers are not making -- it is more famine than feast lately for lawyers. As to the question when I questioned Mr. Feinberg as to whether he felt I was refusing to see him and he said yes, I disagree with that. . . .I thought I also mentioned -- and maybe he doesn't recall -- I said, 'you want me to make you a copy and to avoid these things since I'm far away from you? I am having problems here in the office with my help. I am not getting the secretary help that I need. If you wish, I could mail you this.' And he said, 'No, I didn't.' I did, I did. And then I wanted to see him the following Monday and I believe that conversation was the prior Friday or Thursday and he refused. He said, 'No.'

[T109-110]⁴

Respondent also testified that he had asked the investigator whether they could discuss the matter over the telephone and that the investigator had refused.

The DEC found that respondent had failed to cooperate with the investigation of both matters, in violation of RPC 8.1(b).

⁴ T denotes the transcript of the DEC hearing of June 17, 1991.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the DEC's conclusion that respondent's conduct was unethical is fully supported by clear and convincing evidence. The Board is unable to agree, however, with some of the ethics violations found by the DEC.

Indeed, the DEC's finding that respondent had been guilty of gross negligence and had failed to return unearned fees to clients in the Mercado matter is unsupported by the record. As stated in the hearing panel report, the DEC concluded that respondent had grossly neglected the Mercado matter solely on the basis of his statement to Judge Ackerman that he was incompetent to represent his client in that matter because of his failure to provide the names of all of the witnesses on the answers to interrogatories. There was no competent evidence to allow an independent conclusion, to a clear and convincing standard, that respondent's handling of the litigation was grossly negligent, just as there was no proof whatsoever that respondent did not return unearned fees to clients. Accordingly, the Board recommends that the DEC's findings in this regard be reversed and dismissed.

It is unquestionable, on the other hand, that respondent failed to keep Mrs. Sanchez apprised of the status of her divorce matter and, more egregiously, of the dismissal of her complaint. RPC 1.4(a). Respondent also exhibited gross neglect in the handling of her case, in violation of RPC 1.1(a); respondent did not serve Mr. Sanchez with the complaint until five or six months

of its filing, did not submit a written objection to the notice of dismissal and did not strictly comply with the mandates of R. 5:7-7. Respondent also failed to cooperate with the DEC investigator, in violation of RPC 8.1(b). The Board noted, however, that respondent filed an answer to the formal complaint and appeared at both the DEC and the Board hearings.

In view of the foregoing, a five-member majority of the Board recommends that he receive a public reprimand. See, e.g., In re Williams, 115 N.J. 667 (1989) (public reprimand for gross neglect and failure to communicate in one matter, as well as failure to cooperate with the disciplinary authorities). Two members dissented, believing a private reprimand to be sufficient discipline for respondent's infractions. Two members did not participate.

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

Dated: 2/7/1995

By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board