SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 92-280

IN THE MATTER OF

BEVERLY M. WURTH,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 16, 1992

Decided: November 5, 1992

Terry Paul Bottinelli appeared on behalf of the District IIB Ethics Committee.

Anthony J. Talarico 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 IIB Ethics Committee. (DEC) Respondent admitted the allegations in the formal complaint filed against her. A hearing was held before the DEC solely on the issue of mitigation. The testimony of respondent and an additional twelve witnesses focused on her difficulty with alcoholism and her rehabilitation.

Respondent was admitted to the New Jersey bar in 1981 and has been engaged in practice in East Rutherford, Bergen County.

The facts of the matters are as follows:

FIRST COUNT (The Miller Matter)

On or about May 23, 1989 respondent agreed to represent Charles Miller, by virtue of a substitution of attorney filed in a contract action which was then pending in the Special Civil Part of the Superior Court of New Jersey in Morris County.[1] Miller attempted to contact respondent on numerous occasions between May of 1989 and August of 1989. During that period of time, there was no communication from respondent regarding the status of the case and respondent failed to keep Miller reasonably informed about the status of the matter.

Respondent admitted that her conduct constituted violations of RPC 1.3 and RPC 1.4.

SECOND COUNT (The Vaichulis Matter)

On or about March 8, 1989, arrangements were made for respondent to substitute in as counsel in a personal injury matter. Respondent agreed to represent Gail Vaichulis, whose son, Jonathan, suffered injuries while at school.

In order to conclude a settlement on this case, it was necessary for a "Friendly" Hearing to take place. This hearing was scheduled in the Hudson County Superior court for March 22, 1989.

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[1]The Substitution of Attorney was a direct result of the election of Miller's prior attorney to governmental office and leaving her practice of law. This same factor is present in the Vaichulis, Rovere and Doyle matters.

Respondent appeared on that date and was informed by the Court that the "Friendly" had been postponed.

Respondent met with the grievant on or about April 27th in order to effectuate the settlement. A review of the papers submitted led the judge to request additional information as to the adequacy of the settlement. In addition, the judge requested further medical reports concerning the nature and extent of the injuries sustained by the infant plaintiff. Subsequent to that date, despite numerous attempts to contact her, respondent did not communication with Vaichulis, failing to keep her reasonably informed about the status of the personal injury proceeding. In addition, respondent failed to act with diligence and provide the additional information requested by the court, thereby requiring that Vaichulis obtain new counsel.

Respondent admitted that her conduct constituted violations of RPC 1.3 and RPC 1.4

THIRD COUNT (The Cocozzo Matter)

On or about April 1, 1989, respondent agreed to represent Anthony Cocozzo in a real estate transaction in which he and his wife were seeking to refinance the mortgage on their residence. The refinancing took place on June 29, 1989. Prior to that date, respondent had been informed that there was an existing first mortgage which had to be paid from the proceeds of the refinancing. Respondent forwarded an insufficient amount to the bank to satisfy the mortgage. On or about July 21, 1989, Cocozzo received two

statements from his bank indicating that his previous loan was past due and had not been paid and that interest was accruing at a per diem rate of $24.00/day. Cocozzo attempted to contact respondent on numerous occasions both by telephone and in writing without success. The line of credit mortgage was ultimately satisfied by respondent but the Cocozzos were compelled to expend additional sums of money for interest.

Respondent admitted that her conduct constituted violations of RPC 1.3 and RPC 1.4.

FOURTH COURT (The Rovere Matter)

On or about April 10, 1989, respondent agreed to represent Ralph A. Rovere in an application to increase child support payments to his daughter Susan DeStefano. The motion was to be filed against DeStefano's former husband. Respondent received a $200.00 retainer for the handling of this matter.

On several occasions Rovere attempted to contact respondent via telephone and mail. Mail was returned to Rovere after respondent refused to accept it. Due to respondent's inattention to the matter, Rovere was required to retain another attorney.

Respondent admitted that her conduct violated RPC 1.3 and RPC 1.4. She further admitted that her conduct violated RPC 1.5 in that no action was apparently taken by her in the representation of Rovere despite acceptance of an unearned retainer.

FIFTH COUNT (The Doyle Matter)

Respondent was contacted in order to represent John Doyle in a matrimonial action. On or about August 8, 1989, a substitution of attorney was filed and the matter was scheduled for hearing before the Honorable Stephen J. Schaeffer, P.J.F.P. On April 30, 1990, Judge Schaeffer advised the DEC that the defendant's counsel, Kathleen E. Kitson, Esq., had informed him that, despite many attempts by telephone and in writing, she had been unable to contact respondent at either her office or her home.

Respondent admitted that her failure to appear at hearings and failure to act with reasonable diligence and promptness violated RPC 1.3. Respondent further admitted that her conduct violated RPC 1.4.

SIXTH COUNT (The Faist Matter)

Respondent was retained by Lynne Anne Faist to represent her in a matrimonial action. A retainer was paid on June 16, 1989, in the amount of $250.00. Subsequently, in late January 1990, Faist wrote to respondent complaining that she neither answered telephone calls nor contacted her in regard to the status of the action. In correspondence dated January 31, 1990, respondent was requested to return the retainer which had been paid in this matter. When respondent failed to contact Faist or return the retainer, a request for fee arbitration was filed. On December 4, 1990, a hearing was conducted at which time respondent failed to appear. As a result, the arbitration committee entered a determination in

favor of Faist and ordered the return of the $250.00 retainer. On February 1, 1991, Faist complained of the respondent's failure to return the retainer. Respondent was notified on February 6, 1991, that payment must be made prior to February 25, 1991, or the OAE would file a petition with the Disciplinary Review Board seeking respondent's temporary suspension. Ultimately, the retainer was refunded.

Respondent admitted that her conduct constituted a violation of various aspects of Rule 1:20A in that she failed to respond to the request of the fee arbitration committee, failed to appear at a fee arbitration hearing and failed to comply with a determination of the fee arbitration committee contrary to Rule 1:20A-3(e). In addition, respondent admitted that she violated RPC 1.3, RPC 1.4, RPC 1.5 and RPC 1.16.

SEVENTH COUNT (Ineligible List)

As noted in the Faist, Rovere and Cocozzo matters, respondent was retained to act as attorney for the named individuals. During the time of those representations (1989) respondent had failed to contribute to the New Jersey Lawyers' Fund for Client Protection, contrary to Rule 1:28-2 and in violation of RPC 5.5(a), and was, therefore, ineligible to practice law.

EIGHTH COUNT (The Olszewski Matter)

Respondent was retained to represent Mr. and Mrs. John Olszewski in reference to a personal injury matter stemming from an

incident on June 1, 1987. On or about October 5, 1990, respondent was informed, in writing, by Robert J. Wertalik, Esq., that the Olszewskis' had contacted him and requested that he represent them. At that time, respondent was requested to forward the contents of her file. Respondent did not reply to that correspondence and Wertalik wrote again on October 19, 1990 and November 1, 1990 concerning the file. Respondent was requested to contact Wertalik or turn over the file. Subsequently, respondent was again notified on November 15, 1990 of the request of the Olszewskis to turn over the file but again failed to comply with that request.

Respondent admitted that she had violated RPC 1.16(d) in that she failed to surrender papers and property to which her client was entitled. She further admitted her violation of Opinion 554 of the Advisory Committee on Professional Ethics of the Supreme Court of New Jersey, relating to retention of client files.

NINTH COUNT (The Murphy Matter)

On or about November 21, 1990, respondent was informed in writing that her client, John J. Murphy had contacted Robert J. Wertalik, Esq. concerning a personal injury action arising out of an automobile collision that had occurred on July 8, 1989, as well as a subsequent premises fall down which occurred in or about August 1990. Murphy indicated that he previously contacted respondent and requested that she turn over the files to Wertalik. In or about December 1990, when respondent had not turned over the files, Wertalik contacted the OAE.

Respondent admitted that her conduct constituted a violation of RPC 1.16(d) and Opinion 554 of the New Jersey Supreme Court Advisory Committee on Professional Ethics.

TENTH COUNT (Failure to Answer)

Despite having received notice of all of the aforementioned counts of the complaint, respondent failed to file an answer. She admitted her violation of RPC 8.1 in that she failed to respond to a lawful demand for information in a disciplinary matter.

ELEVENTH COUNT (Conflict of Interest)

Respondent was, at one time, an employee of the law firm of Porro and Porro, Esq., of East Rutherford, New Jersey. During a period of employment with that law firm, respondent was named as attorney for the Planning Board of the Borough of East Rutherford. At that time, however, Alfred A. Porro, Jr., Esq. was the attorney for the Borough of East Rutherford and for the East Rutherford Sewerage Authority. At the time she was named as the attorney for the Planning Board, respondent was in the process of disassociating herself from the firm of Porro and Porro, Esq., but, as of the date of appointment she was, in fact, an associate of that law firm.

N.J.S.A. 40:55D-24 prohibits a municipal attorney from also representing a Planning Board and RPC 1.10(a) prohibits associates of law firms from representing a client when anyone else in the firm would be prohibited from doing so if practicing alone.

Respondent admitted that her acceptance of the appointment constituted a violation of RPC 1.10(a) in that there was a conflict of interest at the time that she accepted her position as Planning Board Attorney.

TWELFTH COUNT (The Castellano Matter)

In or about January, 1991, respondent agreed to represent Audra R. Castellano in a matrimonial matter. At the time of the initial appointment, Castellano paid respondent three hundred dollars which represented a two hundred dollar retainer plus one hundred dollars for the costs of filing and serving the complaint. Subsequent to retaining respondent, Castellano unsuccessfully tried to contact her on numerous occasions during the months of February, March, April, May, June and July. A grievance was filed on July 25, 1991.

Respondent's conduct constituted violations of RPC 1.4 and RPC 1.5.

DEC FINDINGS

The DEC found respondent guilty of the violations charged in the complaint and admitted by respondent: RPC 1.3, RPC 1.4, RPC 1.5, RPC 1.10, RPC 1.16, RPC 8.1, RPC 5.5, R.1:20A-3(e) and R.1:28-2.

The Hearing Panel recommended the imposition of a public reprimand. It was further recommended that respondent practice under supervisory conditions deemed appropriate by the OAE. In its

report, the panel noted that respondent: 1. voluntarily returned retainer fees in cases where matters were not diligently attended to; 2. sent written apologies to her clients; 3. was contrite regarding her conduct and 4. "was truly committed to her own recovery" (Hearing Panel Report at 2).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is of the opinion that the findings of the DEC are supported by clear and convincing evidence.

Respondent admitted that she was guilty of violations of RPC 1.3 in six matters, and RPC 1.4(a) in seven matters. She further admitted three instances of violation of RPC 1.5 (unearned retainer) and three instances of failure to turn over client property, in violation of RPC 1.16(d).

In addition to the above transgressions, respondent admitted several other violations of the Rules of Professional Conduct and Court rules.

For example, respondent was charged with practicing law while on the ineligible list (Count 7). Apparently, respondent learned of her ineligibility from one of her clients, the East Rutherford Sewerage Authority. With regard to her dereliction, respondent testified: "I didn't even know I didn't pay it. It wasn't intentional. I just didn't know" (T132).[2] Respondent explained

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[2]T refers to the transcript of the hearing before the DEC on January 27, 1992.

that she resigned from the Sewerage Authority position, rather than cause her client any harm. Regardless of respondent's intent, neither R.1:28-2 nor RPC 5.5(a) requires actual knowledge of ineligibility by the attorney. Regardless of her intent or lack thereof, respondent violated R.1:28-2 by failing to pay the annual assessment to the CPF. Consequently, she also violated RPC 5.5(a) when she practiced law while ineligible to do so.

The tenth count of the complaint charged respondent with failure to cooperate with the disciplinary system. In response to that charge, respondent testified as follows:

> My life was just totally immaginable [sic] when the complaints came and I -- I-- it wasn't an intent not to deal with the ethics committee. There was never an intent not to respond to my clients, not to answer their letters. The words "could not" can be used, I could tell you that I could not, it wasn't a matter of choice as far as I could see. It wasn't then and it isn't now.
>
> Today I have choices.
>
> I had no choices when I was drinking.
>
> I would very often tell myself, okay, you don't feel well today. You're hung over. You're not going to drink today, tomorrow I am going to be better. Tomorrow you would feel better. And you can try and deal with this stuff.
>
> I would call Al and he told me to call Joan and you to do what you need to do.
>
> The problem was I couldn't make it through the day without drinking, every day, because a tomorrow -- there was always another tomorrow.
>
> And before I knew it, it was one complaint and another, I couldn't even read them. I couldn't deal with them.
>
> I know people -- Dave Johnson, Tom Savage, Mike Corbett, they would call and leave messages on the answering machine. I didn't know who they were at the time, people that wanted to help me, I know it wasn't their intent to hurt me.
>
> I was just going to do it tomorrow. And it felt better. I don't know -- I couldn't -- now, looking back I can't tell you what I did wrong and how it [sic] did it wrong and I don't know what -- really know what happened.
>
> [T132-133]

Respondent admitted that she also violated R.1:20A, in that she failed to cooperate with the Fee Arbitration Committee, by not responding to their requests, appearing at the hearing and not adhering to the committee's determination. With regard to the failure to cooperate, the Board has noted that respondent, through her attorney, did answer the complaint and admitted each of the allegations. She was also cooperative at the DEC hearing and appeared to be contrite. In addition, respondent apologized to her clients and returned the unearned retainer fees.[3]

Respondent was also charged with a conflict of interest (Count 11). During the time of her employment with the law firm of Porro and Porro she represented the Planning Board of East Rutherford.[4] At that same time, Alfred A. Porro, Jr., Esq., was the attorney for the Borough of East Rutherford and for the East Rutherford Sewerage Authority. N.J.S.A. 40:55D-24 prohibits a municipal attorney from representation of a planning board. RPC 1.10(a) forbids an associate in a law firm from representing a client that another member of the firm would be prohibited from representing. Her acceptance of the Planning Board position created an impermissible conflict, in light of the other public positions held by the senior members of the firm.

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[3] As of the date of the DEC hearing, respondent had $1000 yet to be paid to a client. She testified that the money would be paid later that week (T166).

[4] At the time that respondent was named as the Planning Board attorney, she was disassociating herself from Porro and Porro. However, on the date of her appointment to that position, she was still associated with the firm.

The level of discipline imposed for misconduct similar to respondent's varies significantly. See In re Malfitano, 121 N.J. 194 (1990) (one year suspension for pattern of neglect, failure to cooperate and a misrepresentation to a client); In re Parker, 119 N.J. 398 (1990) (six-month suspension for neglect in a matrimonial matter and failure to cooperate); In re Marlowe, 121 N.J. 236 (1990) (three-month suspension for pattern of neglect, misrepresentations to his clients and failure to cooperate); In re Vaughn, 123 N.J. 576 (1991) (public reprimand for pattern of neglect and failure to cooperate); In re Martin, 120 N.J. 443 (1990) (public reprimand for pattern of neglect and misrepresentation to a client).

In the case at hand, many factors mitigate against a severe sanction. The DEC hearing consisted entirely of the testimony of respondent and of twelve witnesses about her psychological difficulties, her battle with alcoholism, and her efforts to remain sober. The witnesses testified about the changes in respondent and her competent performance as an attorney since she has been sober.

The Court has previously recognized alcoholism as a factor in a disciplinary proceeding. In In re Willis, 114 N.J. 42 (1989),[5] the Court stated:

> [i]n another context, we have recognized that alcoholism is a handicap and a disease. Cloves v.

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[5]In Willis, the attorney was suspended for six months after conviction of willful failure to file an income tax return. In addition, Willis was guilty of gross neglect in six matters, misrepresentation to one client by knowingly issuing a check on insufficient funds and a pattern of overreaching in eight matters.

> Terminix Int'l, Inc., 109 N.J. 575, 590-95 (1988). Thus, we are confronted with an apparent dilemma between our commitment to maintain public confidence in the bar and our belief that alcoholism can drastically affect the conduct of people, including lawyers. As this case illustrates, alcoholic lawyers are a threat not just to themselves, but to the clients who rely on them. We believe we best serve the public and the bar by rendering a decision that encourages lawyers to seek help to avoid inflicting continuing harm on their clients. With respect to alcoholic lawyers, the public may be best protected by a policy that encourages those lawyers to seek rehabilitation at the earliest possible moment. Such a policy would not only start afflicted lawyers on the road to recovery, but would contain the harm that they can inflict on their clients. We state that proposition tentatively and with the awareness that we have much to learn about chemical addiction, including alcoholism.
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> [Id. at 49]

Although psychological difficulties do not excuse misconduct, such difficulties may be considered in mitigation, if proven to be causally connected to the attorney's unethical actions. In In re Templeton, 99 N.J. 365 (1985), the Court held:

> In all disciplinary cases, we have felt constrained as a matter of fairness to the public, to the charged attorney, and to the justice system, to search diligently for some credible reason other than professional and personal immorality that could serve to explain and perhaps extenuate, egregious misconduct. We have always permitted a charged attorney to show, if at all possible, that the root of transgressions is not intractable dishonesty, venality, immorality or incompetence. We generally acknowledge the possibility that the determinative cause of wrongdoing might be some mental, emotional, or psychological state or medical condition that is not obvious and, if present, could be corrected through treatment.
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> [Id. at 373-4]

The Board has found a causal link between respondent's alcoholism and her misconduct, given the testimony before the DEC regarding respondent's character and abilities during the time she was an active alcoholic and since achieving sobriety.

One concern raised before the DEC was whether respondent would be able to deal with the stress connected with the practice of law. Respondent's treating therapist, Rita Kahane, testified regarding that issue:

> MR. URDANG: Okay. Now, what I am also concerned about is, I assume, the practice is not necessarily linear, that there can be ups and downs with this and I am concerned about how you would gauge the affects [sic] of a stressful practice.
>
> Practice of law is not the easiest thing in the world. It is adversarial in nature, very often.
>
> Could you form any opinion, knowing the respondent as you do, as to whether the stress of ordinary practice is going to impact on her recovery?
>
> MS. KAHANE: No, I don't -- really don't think so and that's my reason for -- that's what I said before, [respondent] has become and is coming [sic] more and more aware of just how much stress she is willing to take on.
>
> The normal practice of law, I think [respondent] can handle very well. I think she's able to talk, where at one time she wasn't able to do that, to perhaps talk to colleagues and review some of that stress.
>
> Do you know what I am saying, at one time when [respondent] saw herself stressed and she was in the role of the hero of the world, she wasn't able to communicate or share the stress with anyone.
>
> I don't think that that any longer exists. She is better able to talk about it, better able to look at it in a more realistic view.
>
> MR. URDANG: One other question, suppose the respondent would undertake what she would consider an ordinary manner [sic], well within her ability to handle it, and suppose something were to happen during the course of whatever matter she was handling that developed unusual stress, what sort of mechanism could she utilize to alleviate the stress?
>
> MS. KAHANE: Other than drinking, is that what you're asking?
>
> MR. URDANG: Well, yes.
>
> MS. KAHANE: I think I covered that, in that, I think that as all of us do, when we're in whatever profession we're in, when we're in a great deal of stress, we share and talk about it, sit with it and try

to look at it in a different way.
I don't think she would resort to alcohol again, she may call a collegue [sic] up. She may review what is going on and she would ask for help.

MR. URDANG: You're saying that these mechanisms are sufficient, in your mind, to enable her to deal with unusual stress, should it appear?

MS. KAHANE: Yes.

MR. URDANG: Thank you.

MR. TALARICO: Just based on your question I have one.

DIRECT EXAMINATION BY MR. TALARICO:

Q. The memories of [respondent's] sexual abuse, you said they just occurred recently, within the last three or four months?

A. The concsious [sic] working of it.

Q. Did the fact that she related those stressful events cause her to or would you consider that to be a stressful event.

A. The memory or latent memory, sure.

Q. Did she continue her sobriety?

A. Yes. Yes, she continued her sobriety with the pressure the appearing in court here; with some problems in the family; in separating from the relationship; in the awareness of the sexual abuse, the conscious awareness.
She has kept her sobriety over a lot of stressful periods in the last nine months.
[T34-36]

Dr. Irving B. Guller, Ph.D., who examined respondent on January 10, 1992, stated "...there is little likelihood of a repetition of the behavior which led to the complaints currently pending, as long as she maintains sobriety and participates in therapy as she has agreed to do." (Exhibit R-1).

In determining the appropriate quantum of discipline to be imposed, the Board has considered that respondent is apparently now functioning well as an attorney. In In re O'Reilly, ___ N.J. ___ (1991), the Court imposed a three-month suspension on an attorney who was guilty of neglect in fifty cases and an unknown number of misrepresentations to clients and to the partners in his law firm. O'Reilly put forth psychological difficulties in mitigation of his misconduct. In determining the appropriate quantum of discipline, the Board placed a great deal of weight on the fact that O'Reilly was functioning competently at the time of the hearing and had apparently found a niche for himself as an attorney. Similarly, in the matter currently before the Board, respondent seems to be functioning competently and, given the testimony before the DEC, no longer appears to be a danger to the public.[6]

Although respondent's psychological problems may mitigate the severity of discipline imposed, they do not excuse her from her repeated displays of unethical conduct. The Board has also noted that respondent has no history of previous discipline. Given that she no longer appears to be a danger to the public the Board unanimously recommends that a public reprimand be imposed in this matter.

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[6]Respondent testified: "... I have taken drastic steps to cut down on my practice and impose my own sort of supervision on myself." T163.

With regard to the imposition of a proctorship, the Board has noted Dr. Guller's report, wherein he stated that

> respondent is an individual who appears to work best either on her own, or in consultation with another attorney. She is not comfortable in a subordinate role wherein she must report to a direct supervisor. Nevertheless, she is capable of performing under such circumstances if required to do so.

The Board is of the opinion that the supervision of a proctor would be helpful to respondent and so recommends.[7] In addition, the Board recommends that respondent be required to continue her participation in Alcoholics Anonymous, and psychological treatment.

Three members did not participate.

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

Dated: 11/5/92

By: _____
Raymond R. Trombadore
Chair
Disciplinary Review Board

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[7]The Board has noted that Thomas A. Savage, Esq., of the law firm of Savage and Serio, testified that he and his partner are willing to offer full-time employment to respondent. He also indicated that they would be willing to serve as her proctor, should the Court impose that requirement. Savage's partner, Dawn Serio, who also testified on respondent's behalf, agreed that their firm would be willing to hire respondent and serve as her proctor.