SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 90-192

IN THE MATTER OF :
HARRY A. DELVENTHAL, :
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: September 26, 1990

Decided: October 23, 1990

John Ford Evans, Jr. appeared on behalf of the District I Ethics Committee.

Robert W. Delventhal appeared on behalf of respondent, who was also present.

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

This matter is before the Board based upon a presentment filed by the District I Ethics Committee.

Respondent, Harry A. Delventhal, Jr., was admitted to the New Jersey bar in 1973. He maintains a sole practice of law in Ocean City, with emphasis on general litigation.

In April 1988, respondent was retained by Wayne Batten, a building contractor, to represent him in a lawsuit filed by Scott and Alan Schwarz against Batten and others. At that time, Batten agreed to pay respondent a $3,500 lump sum as respondent's fixed legal fees. The basis for the lawsuit was defendants' alleged breach of contract to renovate real estate owned by plaintiffs.

Plaintiffs' attorney, A. Harold Kokes (the grievant herein), had obtained a writ of attachment over defendants' personal and real property (Exhibit P-20). In February 1988, two months before the writ was obtained, Batten signed a contract for the sale of his residence. In order to allow closing of title to proceed, respondent filed a motion to vacate the writ of attachment and levy. On May 27, 1988, the Honorable Gerald Weinstein signed an order directing that the closing on Batten's residence could take place, provided that the net proceeds of sale be held in escrow in an interest-bearing account, until further order of the court. The order also provided that, except as therein indicated, the writ and levy were to remain in full force and effect, and that $1,000 be released to respondent as legal fees in connection with the closing. The order further directed that an additional sum of $3,500, representing respondent's fixed legal fees, be held in escrow with the net proceeds of sale.

On May 27, 1988, the combined sum of $19,870.25 was placed in escrow with the Title Company of Jersey. The escrow agreement (P-28) recited that the funds were to be retained until "receipt of court order directing payment."

In early July 1988, respondent filed a second motion to vacate the writ, which motion was denied. By order dated July 5, 1988, the Honorable John F. Callinan ruled that the funds were to continue to be held in escrow, and that "no monies shall be released . . . until further order of this Court only after a duly filed Motion for release of funds for emergent purposes only . . .

or after a duly filed Motion by [respondent] . . . for release of attorney's fees, or under further order of this Court" (Exhibit P-7).

On July 7, 1988, respondent served forty-three interrogatories on Kokes. Answers were due on or about September 5, 1988.

In late July 1988, respondent filed yet another motion for the release of certain monies from the escrow account. On July 29, 1988, Judge Callinan signed an order authorizing the release of $4,703.78, including an additional $1,000 sum to respondent. The order further provided that the "Title Company of Jersey shall make the aforesaid payments upon presentation to them of a true copy of this Order by Harry A. Delventhal, Jr., Esquire" (Exhibit P-8).

By letter dated September 9, 1988, four days after plaintiffs' answers to interrogatories were due, respondent demanded that Kokes forward said answers within five days to avoid "the appropriate motion" (Exhibit R-17). Kokes received the above letter on September 12, 1988. On the next day, Tuesday, September 13, 1988, Kokes telephoned respondent to apologize for the failure to submit answers to interrogatories within the prescribed sixty-day period. Kokes explained to respondent that Scott Schwarz, the client who had more knowledge of the facts recited in the complaint, was an airline pilot; that, during the relevant sixty-day period, Scott Schwarz was undergoing retraining in several different states, including Ohio and Colorado; that the interrogatories called for very specific answers and for the production of numerous documents, including checks and invoices; and that Scott Schwarz was the

principal of the two plaintiffs, in charge of recordkeeping. Kokes promised respondent that the answers would be forthcoming.

Here, Kokes' recollection of the events sharply differs from respondent's. According to Kokes, he told respondent that the earliest he could supply the answers would be the end of that week (Friday, September 16), and the latest that he would provide them would be the end of the following week (Friday, September 23). According to Kokes, respondent "did not appear to have a problem with that" and made no mention that he would seek the dismissal of the complaint in the event that he did not receive the answers within that time.[1] Respondent, in turn, testified that Kokes promised to send him the answers "by the end of the week" (Friday, September 16).

On Tuesday, September 20, 1988, respondent prepared an ex parte application to dismiss the complaint for failure to serve answers to interrogatories, pursuant to R.4:23-5(a). That rule provides, in pertinent part:

> If timely answers to interrogatories are not served and no formal motion for an extension has been made pursuant to R. 4:17-4(b), the complaint . . . shall be dismissed . . . by the court upon the filing by the party entitled to the answers of an affidavit stating such failure within 60 days from the date on which said answers became due. Thereafter such relief may be granted only by motion. The affidavit shall have annexed thereto a form of order of dismissal . . . . A copy of all such orders with affidavits annexed shall be served upon the delinquent party within 7 days after the date thereof.

---

[1] Kokes did not file a motion to extend the time within which to submit answers to interrogatories.

> On formal motion made by the delinquent party within 30 days after service upon him of the order, the court may vacate it, provided fully responsive answers to the propounded interrogatories are presented and the delinquent party pays costs in the amount of $50.00 to the Clerk of the Superior Court.

In paragraphs four and five of the affidavit in support of his ex parte application, respondent represented to the court that he had "orally conferred with Kokes to try to resolve this matter of discovery" and that "to date, I have yet to receive answers to the propounded interrogatories" (Exhibit P-9). On September 22, 1988, Judge Callinan signed an order dismissing the complaint (Exhibit P-10). On the next day, September 23, 1988, unaware of respondent's application and of the dismissal of the complaint, Kokes submitted his clients' answers to interrogatories. Respondent was absent from his office on Monday, September 26. On September 27, respondent acknowledged service of the answers to interrogatories (Exhibit P-13). On that same day, respondent wrote a letter to Kokes (1) enclosing a copy of the dismissal order (but not of the affidavit, as prescribed by the Rules of Court)[2], (2) volunteering to sign a consent order to vacate the order of dismissal and to reinstate the complaint, and (3) informing Kokes that he had reviewed the answers to the interrogatories (Exhibit P-14). Nowhere in the letter was there any mention that the answers were insufficient.

---

[2] The affidavit was not sent to respondent until October 31, 1988, thirty-nine days after the signing of the order.

Kokes received respondent's letter on September 28, 1988. He immediately telephoned respondent to inquire about "what was going on."[3] According to Kokes, respondent replied in an apologetic tone that Kokes "need not worry about it," that he, respondent, would sign a consent order to vacate the dismissal. When Kokes asked whether respondent had sought the release of the escrow funds, respondent replied, still according to Kokes, that he could not do so for at least thirty days, the time allowed under R.4:23-5(a) for Kokes to file a motion for the reinstatement of the complaint.

Respondent's recollection of his answer, however, is at odds with Kokes'. Respondent testified that, when asked whether he had already invaded the escrow funds, he replied "no," meaning "not yet." Respondent went on to say that Kokes never asked him whether he planned to invade the funds in the future, and he made no assurances to Kokes on that score. As respondent testified at the ethics committee hearing,

> A. . . . my testimony was the question was "did you?" "I did not." There was never a question raised, "Would you?" There was never obviously a response, "I would not."
> [2T269.][4]

> Q. . . .you were sensitive to the fact that he was asking only, according to your testimony, as to whether or not you had

---

[3] Another reason why Kokes expressed shock at respondent's ex parte application was that respondent's client's answers to interrogatories were overdue by some twenty-five days.

[4] 2T denotes the transcript of the committee hearing on March 6, 1990.

invaded the funds but not whether or not you intended to invade the funds. You were sensitive to the fact, you made that distinction when you responded to him, correct?

A. I was.

Q. And that's what you believed to be what his question was to you, correct?

A. The single question, did you do something between the 22nd and my telephone conversation with you now to deplete the funds or the assets, yes.

Q. Did it appear to you, from the conversation that you had at that time and did it appear to you at that time, that he was concerned as to whether or not you would, as a practical matter, utilize that order of September 22 to invade the funds while he's trying to get the complaint restored? Did you believe that was, from the general conversation with him, a concern of his?

A. No, I didn't. Because his emphasis was on and I think he used the word, you know, "I made a mistake, Harry. Did you get the funds?" And I said -- I think I said to him, 'In response to what?' 'In response to your order, did you get the funds out of the account?' I said, 'No, I did not, Hal.' He was upset. I calmed him down. I wanted to talk to him about settlement. I said to him, 'Well, relax, I'm going to consent to the reinstatement. Let's talk about the dollars in this case.' And that was the sum and substance of the conversation I had with him on the 29th. We didn't go beyond that. Once he learned that I had not, I think he was satisfied. There was no further discussion relative to the fund. There was discussion at that point, I don't think he was concerned about the reinstatement after I told him I would consent to it.

[2T270, 271.]

Respondent testified further that, notwithstanding his answer to Kokes, at the time of that telephone exchange, he had already

conducted some legal research concerning the possibility of using the order dismissing the complaint to obtain the escrow funds.[5] Although he had not yet concluded that that would be his next course of action, he was

> . . . certainly leaning that [it] was going to be my intent . . . I did not make up my mind until my client came in my office that same evening, expressed his disappointment in me with reference to the consent and then when we discussed the various alternatives to him, I guess you could say the bell went off at that time, the light lit up, hey, here was a way of getting the funds out of the court.
> [2T281.]

Indeed, after respondent agreed to sign a consent order to vacate the dismissal, he had a conference with Batten on September 29, 1988. At that time, respondent told Batten that, in his opinion, the order of dismissal was a "termination of the plaintiff's day in court . . . and that they were legally permitted to go after the escrow funds" (2T171,172). Respondent also explained to Batten that, in all likelihood, Kokes would file a motion to vacate the dismissal and that "the court [might] or [might] not permit the reinstatement of the case" (2T171). In the event that the court ordered the restoration of the case, the funds would have to be returned to the escrow account. Respondent testified that, in spite of Batten's understanding that the complaint might be reinstated, Batten instructed him to retract the

---

[5] Respondent testified that he relied on Aujero v. Cirelli, 110 N.J. 566 (1988), fully explained infra.

promise to Kokes to sign the consent order and "to go get the funds" (2T171,172).

Respondent's testimony was corroborated by Batten's. At the ethics committee hearing, Batten testified that he directed respondent to revoke his consent to the reinstatement of the complaint and "to go get my settlement," notwithstanding his knowledge that the case could be restored and that he might have to return the monies. In response to a panel member's question of whether he would have had the funds to replenish the escrow account, Batten testified that he would not because "I was living on the street when I moved from my house with no money. I was living in [A.W.'s] driveway . . . and I just felt as if I had a chance to get the money. I shouldn't live on the street anymore . . . I had no other cash. That was my only money." (2T64,78). Batten testified further that respondent was aware of Batten's dire financial straits (2T90).

On September 30, 1988, the day after respondent's conference with Batten, respondent's secretary acknowledged receipt of the stipulation to vacate the order of dismissal and the consent order submitted for respondent's signature, which had been hand-delivered by Kokes' secretary (Exhibit P-15).

On October 4, 1988, however, respondent wrote the following letter to Kokes (Exhibit P-16):

Dear Hal:

I have been instructed by my client not to consent to an Order setting aside the dismissal. Be guided accordingly.

Very truly yours,
Harry A. Delventhal, Jr.

Respondent then called the title company on that same day, October 4. He informed the title company's bookkeeper, Francine Shimp, that he had an order dismissing the complaint for failure to answer interrogatories and requested the release of the escrow funds. Shimp replied that, because of the computation of interest on the account, the monies could not be released until the next day, October 5, 1988. On the afternoon of October 4, 1988, respondent went to the title company's office and presented the order to Shimp. According to respondent's testimony, he told Shimp that it was an order "dismissing the plaintiff's complaint for failure to provide [answers to] interrogatories" (2T176). On October 5, 1988, respondent picked up a check for the escrowed amount of $16,146.20 made payable both to him and to Batten. Respondent deposited the check in his trust account on that same day.

Shimp's testimony confirmed that respondent informed her that he had a court order dismissing the case. According to Shimp, respondent told her that "it was okay now to release the escrow" (1T233,238).[6] She testified that she had known respondent for a

[6] 1T denotes the transcript of the committee hearing on March 5, 1990.

very long time, both as county counsel and as a client of the title company. She testified further that she showed the order to the office manager, Sharon Smith, who approved the release of the funds after she explained who respondent was, and after she assured Smith that she had known respondent for a long time and that he enjoyed an impeccable reputation (1T239,241). Shimp clarified, however, that by "dismissed" she understood it to mean that "all debts had been paid . . . and the case was over, completely over" (1T239,241), and that if she ". . . knew that it meant that it wasn't over . . . neither one of us would have released the money. But we didn't know that" (1T241).

Smith, in turn, testified that she did not know what "failure to answer interrogatories" meant and that she would not have authorized the release of the escrow funds if she had known that the "case was not over" (1T247).

On the same day that respondent withdrew the escrow funds and deposited them in his trust account, October 5, 1988, Kokes received respondent's letter of October 4, retracting his consent to the reinstatement of the complaint. On October 6, 1988, Kokes served respondent with a notice of motion to vacate the dismissal, returnable on October 28, 1988 (Exhibits P-17, P-18, P-19).

On October 11, 1988, respondent disbursed all monies but $3,646.20 to Batten.[7]

---

[7] Respondent deposited the escrow monies in his trust account on October 5, 1988 (Wednesday). He disbursed the funds to Batten on October 11, 1988 (Tuesday). It may be logically inferred that respondent waited out the time required for the check to clear, three business days, to release the funds to Batten.

Now in possession of Kokes' motion papers, respondent filed an opposition thereto on October 18, 1988, on the grounds that (a) plaintiff's answers to the interrogatories, received on September 23, 1988, were not fully responsive,[8] and (b) the proposed form of order was inconsistent with the relief permitted by R.4:23-5(a) (Exhibit R-26).

Meanwhile, Kokes was unaware that respondent had caused the monies to be withdrawn from the escrow account, having relied, according to his testimony, on respondent's representation that respondent could not seek the release of the funds for at least thirty days, under R.4:23-5(a). On October 24, 1988, four days before the return date of Kokes' motion, respondent telephoned Kokes and informed him, for the first time, that he had disbursed the monies to Batten. Respondent told Kokes that he had put Kokes on notice that he intended to withdraw the funds by means of his letter of October 4, 1988, in which he had retracted his promise to sign a consent order and had advised Kokes to "be guided accordingly" (Exhibit P-16). Respondent testified that he thought the words "be guided accordingly" were a "tip off" to Kokes that he would seek the withdrawal of the escrow funds; they were meant to warn Kokes to "put your guard back up, we're back on track here, it's adversarial, I can't consent, be guided accordingly" (2T233).

Immediately upon discovering that the funds had been released, Kokes called the title company and obtained confirmation that they

---

[8] It must be remembered that, although respondent wrote to Kokes that he had reviewed the answers to the interrogatories, respondent did not mention that they were insufficient.

had been disbursed on the strength of the dismissal order presented by respondent. As a result of an emergent application by Kokes, Judge Callinan ruled, among other things, that (a) respondent was to provide an accounting and seek the return of the monies forthwith, and (b) the dismissal order was to be vacated and the complaint reinstated without costs to plaintiffs. The court's decision was embodied in a consent order signed on November 4, 1988 (Exhibit P-20).[9]

By letter dated November 23, 1988, respondent advised Kokes that, from the $16,146.20 released to Batten, only $3,646.20 remained in his trust account and that the balance of the funds disbursed, $12,500.00, could not be recovered (Exhibit R-11).

* * *

On December 23, 1988, Kokes left the employment of the law firm with which he was associated. He did not take the Schwarz v. Batten file with him. Kokes began his own practice of law on January 9, 1989.

On January 16, 1989, Kokes called respondent, prompted by a telephone call from a member of his former law firm concerning a letter by respondent that answers to supplemental interrogatories were overdue by some eight days and that they had to be provided "within the week." Kokes advised respondent that he had not

[9] At that proceeding, Judge Callinan ordered (according to Kokes) or recommended (according to respondent) that Kokes file a complaint against respondent with the district ethics committee.

retained the file and that, to the best of his knowledge, different counsel, attorney M.F., would be undertaking the representation of plaintiffs. According to Kokes' testimony, respondent "indicated . . . he understood and apparently had no problem with that." Still according to Kokes, respondent did not impose any deadlines or warn that he intended to make an application for the dismissal of the complaint (1T108,110).

Respondent's testimony in this regard is at sharp variance with Kokes'. Respondent testified that, although Kokes did advise him that he was no longer employed with the law firm and that it was likely that attorney M.F. might be substituted, Kokes assured him that the answers would be submitted "by the end of the week." By respondent's own admission, notwithstanding his knowledge that Kokes had not retained the file, respondent warned Kokes that he "would hold [Kokes] responsible for getting the answers to [him] by the date he promised . . . January 20th" (2T198). At the district ethics committee hearing, respondent conceded that the law firm, not Kokes, was the attorney of record and that, at that time, he had looked to Kokes, not the firm, as the attorney of record (2T211).

On January 26, 1989, M.F. was substituted as new counsel for plaintiffs. Respondent did not receive notification of the substitution until February 8, 1989, when he received a letter from the court clerk.

On January 26, 1989, respondent once again filed an ex parte application to dismiss the complaint (Exhibit P-21). On January

27, 1988, Judge Callinan signed an order granting respondent's motion (Exhibit P-22). On or about February 9, 1989, attorney M.F., then the new attorney of record, filed a motion to reinstate the complaint. By order of March 3, 1989, the court vacated the dismissal order.

* * *

At the conclusion of the committee hearings, the panel conducted extensive discussions on whether the practice permitted by R.4:23.5(a) — the filing of an ex parte affidavit seeking the dismissal of the complaint for failure to answer interrogatories — requires a R.1:6-2(c) certification that the party seeking the dismissal orally conferred with the delinquent party to resolve the matter, but was unsuccessful. As stated in the panel report,

> [i]t is not clear that the certification required by R. 1:6-2(c) ... is required by R. 4:23-5(a) 'non-motion' applications. It is, however, noted that the September 20, 1988 affidavit of respondent [P-9], in expressly stating that '4. I orally conferred with Mr. Kokes to try to resolve this matter of discovery' and '5. To date, I have yet to receive answers to the propounded interrogatories,' certainly created the inference without expressly making the statement that his 'efforts' in obtaining interrogatories answers from Kokes had been 'unsuccessful'.
>
> [panel report at 9.]

The panel, thus, deemed it critical to determine whether Kokes had promised to furnish the answers by Friday, September 16, or Friday, September 23, 1988.[10]

After considering the evidence, including the exhibits and the demeanor of Kokes and respondent, the panel found that Kokes had promised to supply the answers by September 23, 1988, and that, accordingly, respondent had violated RPC 3.3(d), by failing to disclose to the court that the telephone conference with Kokes on September 13 had successfully resolved the matter by Kokes' promise to provide the answers by September 23. The panel also found that respondent had not violated RPC 3.1 (Meritorious Claims and Contentions), 3.3(a) (Candor Toward the Tribunal), and 3.3(c).[11]

On the issue of the removal of the escrow funds, the panel concluded that, during a telephone conference with Kokes on September 29, 1988, respondent communicated to Kokes that, for a period of thirty days, he would refrain from using the September 22, 1988 dismissal order to withdraw the escrow funds. Furthermore, the panel found that, on October 4 and 5, 1988, respondent failed to advise the bookkeeper at the title company, Francine Shimp, whom he had known personally for a long time, that, notwithstanding the September 22, 1988 dismissal order, the lawsuit

---

[10] As noted above, respondent filed his ex parte affidavit on September 20, 1988.

[11] It appears that the committee's reference to RPC. 3.3(c) is a typographical error. Respondent was neither charged with violation of that rule, nor does the proscribed conduct fit respondent's actions.

might continue. The panel concluded that such conduct involved dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c). The panel did not find a violation of RPC 3.4 (Fairness to Opposing Party and Counsel), RPC 3.5 (Impartiality and Decorum of the Tribunal), and RPC 4.1 (Truthfulness in Statements to Others).

The panel did not find clear and convincing evidence that respondent had violated RPC 8.4(c) and (d), by filing an ex parte affidavit to dismiss the complaint after having allegedly represented to Kokes that he would allow a reasonable period of time for new counsel, as yet substituted, to supply answers to interrogatories.

Following conclusion of its review of the entire case, the panel recommended that respondent receive a public reprimand for the above ethical violations.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the committee that respondent's conduct was unethical are supported by clear and convincing evidence.

The Board,however, disagrees with the committee's findings that the evidence clearly and convincingly establishes that respondent violated the rules of professional conduct when he sought and obtained the ex parte dismissal of the complaint on

September 22, 1988. The record does not support the conclusion that respondent had understood that Kokes would supply the answers to interrogatories by September 23, not September 16, 1988. Indeed, as pointed out by respondent, nowhere in Kokes' affidavit in support of his motion to vacate the order of dismissal is there any reference to a September 23, 1988 date. Paragraph 9 of that affidavit reads as follows (Exhibit R-7):

> 9. On September 13, 1988, attorney for Plaintiff [Kokes] called attorney for Defendant [Respondent] explaining that there was a voluminous amount of documents to copy to fully answer Defendant's interrogatories and the earliest the answers could be transmitted would be September 16, 1988.

In addition, Kokes' handwritten notes, made contemporaneously with the September 13, 1988 telephone conversation with respondent, imply that the answers were to be provided by Friday, September 16, not Friday, September 23, 1988. Those notes read "answers end of week = O.K." (Exhibit R-18).

As to the second ex parte dismissal of the complaint, the Board agrees with the committee's conclusion that there is no clear and convincing proof that respondent agreed to wait a reasonable period of time for the submission of the answers to the supplemental interrogatories.

With regard to the removal of the escrow funds, however, the Board finds that respondent's conduct was unscrupulous and crafty. The evidence shows, to a clear and convincing standard, that (1) after reviewing plaintiff's answers to interrogatories, respondent forwarded a copy of the September 22, 1988 order of dismissal to Kokes by letter dated September 27, 1988; (2) in that same letter,

respondent volunteered to sign a consent order to vacate the dismissal; (3) on September 28, 1988, respondent quieted Kokes' fears that he would be seeking the withdrawal of the escrow funds, by assuring Kokes that he could not "touch the funds" for thirty days; (4) at the time of that conversation, respondent was already considering the withdrawal of the funds, notwithstanding his representation to Kokes and notwithstanding the fact that respondent was then in possession of the answers to interrogatories; (5) on October 4, 1988, respondent was instructed by Batten to revoke his consent to the restoration of the case and to "go after the funds;" (6) by letter dated October 4, 1988, respondent advised Kokes of the retraction of his promise to sign a consent order; (7) on October 4, 1988, respondent communicated by telephone with Francine Shimp, the bookkeeper at the title company, and informed her that he had an order dismissing the case and that the escrow account could be closed; (8) respondent did not inform Kokes of his intention to invade the escrow funds; (9) on October 5, 1988, respondent presented Shimp with the September 22, 1988 order of dismissal and advised her that it was "o.k. to release the funds;" (10) neither Shimp nor Smith would have released the funds, had they known that the "case was not completely over;" (11) Shimp relied on respondent's representation that the case was dismissed, having known respondent for many years as a reputable attorney, a client of the title company, and county counsel; (12) on October 5, 1988, respondent deposited the escrow funds in his trust account; (13) on October 6, 1988, he was served

with Kokes' motion to vacate the order of dismissal; (14) respondent was well aware of Batten's precarious financial situation; (15) on October 11, 1988, respondent disbursed the funds to Batten; (16) on October 18, 1988, respondent filed opposing papers to Kokes' motion; and (17) on October 24, 1988, for the first time, respondent advised Kokes that the monies had been released and disbursed to Batten.

Respondent argued vigorously that he did not mislead Kokes about his pending intent to seek the release of the funds; that he had been truthful to Kokes when he replied "no" to the question of whether he had obtained the funds; and that the words "be guided accordingly" should have provided Kokes with sufficient warning that he intended to invade the escrow funds, and should have alerted Kokes that "all bets were off."

It is clear that respondent's acts went well beyond either the art of advocacy or an aggressive approach to litigation strategy. Respondent disarmed Kokes by leading him to believe that he would not – in fact, could not, by rule – pursue the release of the escrow funds, only to do exactly that, in a surreptitious fashion, without notice to Kokes.

Even more reprehensible was respondent's conduct when he misrepresented to the title company that the funds could be withdrawn on the basis of the order dismissing the complaint for failure to answer interrogatories. Respondent's contention that the title company released the funds "based upon its own determination of the effect of the Order" (respondent's brief to

the Board, at 4) must be rejected. When respondent, a member of the legal profession, presented the order of dismissal to the non-attorney employee of the title company, it was to be expected that the employee would rely on respondent's legal training, knowledge, and experience, especially when respondent was well known to the employee, maintained a public position of confidence, and enjoyed a fine reputation as a member of the bar.

Here, respondent did not merely present the order to the title company employee and hope that the employee's interpretation of the order would be consistent with his – although even against this backdrop, respondent's conduct would have been unethical. Silence is no less a misrepresentation than words. But here respondent affirmatively assured the bookkeeper that the matter was dismissed and that the escrow funds could be released.

Respondent's explanation that he believed that the order was final is unpersuasive. He had extensive litigation experience, compared to Kokes' fewer than two years' private practice experience at the time of these events. Furthermore, Aujero v. Cirelli, 110 N.J. 566 (1988), the case upon which respondent relied, does not provide any support whatsoever to respondent's alleged understanding that the September 22 order of the dismissal ended the litigation.

Aujero involved the trial court's dismissal of a complaint for plaintiff's failure to answer interrogatories. Eleven months thereafter, plaintiff brought a motion to vacate the order of dismissal. The trial court denied the application. The Appellate

Division reversed. The Supreme Court granted certiorari, modified the judgment below and remanded the case to the trial court after ruling that relaxation of the thirty-day period for bringing a motion to restore is remitted to the sound discretion of the court. The Court explained that, in exercising that discretion, the trial court was to be guided by (1) the extent of the delay, (2) the underlying reason or cause, (3) the fault or blamelessness of the litigant, and (4) the prejudice that would occur to the other party.

As can be seen, Aujero does not stand for the proposition that a dismissal of a complaint for failure to answer interrogatories is a final disposition of the matter. To the contrary, the Supreme Court instructed the trial court to be guided, in restoration motions, by a careful and judicious balance of certain enumerated factors. Respondent's alleged reliance on Aujero is unreasonable and difficult to accept, especially in view of his considerable experience in litigation matters.

The conclusion is inescapable that respondent embarked on a carefully charted course of action to withdraw the escrow funds: he was well aware that his client was in desperate need of monies; the client wanted respondent to find a quick way to obtain the escrow funds and, in fact, instructed respondent to revoke his consent to the restoration of the case and to "go after the funds;" respondent realized that he might be able to use the September 22 dismissal order to obtain the release of the escrow funds; to that end, he first had to retract his promise to Kokes to sign a consent

order, lead Kokes into believing that he would not seek the funds, and then act fast without notice to Kokes. And that is precisely what he did. In view of the foregoing, the Board cannot but conclude that respondent knew that the September 22 order did not end the litigation, but used it anyway to draw out the escrow monies, while well aware that his client might quickly dissipate the funds. Indeed, respondent admitted that he had advised Batten that the case might be restored and that the monies might have to be returned.

To summarize respondent's improprieties: he misrepresented to Kokes that he would not — and could not — seek the release of the escrow funds for a period of thirty days, thus lulling Kokes into a false sense of security that kept him from seeking emergent relief from the court; notwithstanding his assurance to Kokes in that regard, respondent tricked him by furtively withdrawing the escrow funds; and respondent deceived the title company into believing that an order dismissing the complaint for failure to answer interrogatories entitled his client to the escrow funds. Respondent's conduct was violative of RPC 8.4(c) and (d) and indicative of respondent's "sharp practice" propensities, as argued by the presenter in this matter.

Having determined that respondent's conduct was unethical, the Board now must turn to the task of recommending discipline that is commensurate with the nature and seriousness of the offenses. The reported cases that deal with deliberate misrepresentations to the court, unaccompanied by other ethical violations, usually involve

acts more egregious in nature than respondent's. In Matter of Johnson, 102 N.J. 504(1986), the attorney received a three-month suspension for contriving an excuse to delay a trial when a judge's ruling drastically reduced the value of the client's claim. In that case, the attorney lied to the court that his associate was ill in order to obtain an adjournment of the trial. The case was ultimately dismissed with prejudice. Compounding his lie was the attorney's lack of candor in his attempt to avoid any responsibility for his conduct.

In Matter of Kushner, 101 N.J. 397(1986), the attorney pleaded guilty to a charge of false swearing. In a certification to the court, respondent lied that the signatures on two promissory notes were not his in order to avoid financial liability. The Court found that respondent's lie in a certification to induce a court to grant relief for his benefit and to intend to cause financial loss to the bank that lent him money was sufficiently grave to merit a three-year suspension.

Although respondent's acts included misrepresentations to the court by way of half-truths, they were not as serious as the ethical offenses committed by the attorneys in Johnson and Kushner. The severity of respondent's conduct is more analogous to that exhibited in Matter of Marlowe ___ N.J. ___ (1990), where the attorney was publicly reprimanded for authoring a letter to the court, signed by his associate, which letter falsely stated that he had the consent of all counsel to the adjournment of the matter.

Similarly, in another recent case, the Court imposed a public reprimand on an attorney who, in his capacity as a municipal prosecutor, failed to advise the court of the apparent motive for a police officer's absence from the court on the trial date, when the officer was to give testimony tending to incriminate the defendant. The officer's absence was the product of a corrupt agreement with another police officer not to testify against the defendant, in order to cause the dismissal of the prosecution. Matter of Whitmore, 117 N.J. 472 (1990).

Although respondent's misrepresentations were directed at his adversary and at the title company, not at the court, they were no less egregious in nature and were similarly intended to impede the administration of justice. In addition, the record is silent as to any plausible explanation tending to mitigate respondent's conduct. To the contrary, at the committee and the Board hearings, respondent steadfastly refused to admit any wrongdoing on his part.

Accordingly, the requisite majority of the Board recommends that respondent receive a public reprimand. One member recused himself. One member would have dismissed the ethics charges. One member would have imposed a private reprimand.

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

Dated: 10/23/98 By: Raymond R. Trombadore
Raymond R. Trombadore
Chair
Disciplinary Review Board