SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-294

IN THE MATTER OF	:
THEODORE FIESCHKO,	:
AN ATTORNEY AT LAW	:

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 20, 1991

Decided: January 8, 1992

Howard D. Cohen appeared on behalf of the District VB Ethics Committee.

Respondent waived his appearance before the Board.

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

This matter is before the Board based upon a recommendation for public discipline filed by the District VB Ethics Committee (DEC) in two matters.

Respondent was admitted to the practice of law in New Jersey in 1982. He maintains an office in Essex County. During his appearance before the DEC hearing panel, respondent admitted that the facts in these matters were as set forth in the investigative report and in the formal complaint.

The Mason Matter (District Docket No. VB-89-28E)

On June 10, 1987, Kenneth C. Mason retained respondent to represent him on a contingency basis in connection with an alleged breach of an agreement to purchase a condominium. A written retainer agreement was signed on that date. According to the agreement, costs were to be paid by Mason who, in fact, gave respondent a check for $100 dated December 23, 1987.

Mason periodically telephoned or wrote to respondent requesting information about the status of his matter. Respondent represented to Mason that he had filed suit on his behalf. In fact, respondent failed to take any action to pursue this matter. In his response to the committee investigator, dated January 29, 1990, respondent admitted that he had neglected Mason's matter and misrepresented its status.

The Flippen Matter (District Docket No. VB-89-63E)

On or about April 10, 1988, Harry and Lucinda Flippen retained respondent in connection with an encroachment problem created by a contiguous property owner. Respondent suggested to the Flippens that a survey be obtained to confirm the encroachment. On April 14, 1988, the Flippens advance $300 to respondent to cover the survey costs. Respondent did, in fact, obtain the survey, which confirmed that the neighbor was encroaching on the Flippens' property. By letter dated July 28, 1988, respondent advised Mr. Flippen of the survey's conclusions and requested that he set up an appointment with respondent. On or about August 4, 1988, Mr.

Flippen met with respondent, at which time respondent requested a $575.00 retainer to file suit. No written retainer agreement or written statement was provided to Mr. Flippen explaining the basis or rate of respondent's fee. On that date, Mr. Flippen paid respondent the requested $575.00. On September 26, 1988, respondent filed a complaint on the Flippens' behalf in Superior Court, Law Division, Essex County. The complaint was served on the defendant on February 2, 1989 and an answer to the complaint was file don February 21, 1989. Respondent thereafter served interrogatories on the defendant.[1] Respondent failed to inform the Flippens of the status of the matter or the steps that he had taken on their behalf.

On October 31, 1990, the Flippens filed a grievance against respondent. It was not until January 1991, after receiving a letter from the committee investigator, that the Flippens learned of the suit filed on their behalf.

Testimony at the committee hearing revealed that the Flippens wish to continue to be represented by respondent in the encroachment matter (T6/18/91 27-28).

The panel found that, in the Mason case, respondent had violated RPC 1.1(a), RPC 1.3, RPC 1.4(a) and (b), RPC 8.4(c) and RPC 4.1(a). The panel further found that, in the Flippen case, respondent had violated RPC 1.3 and RPC 1.4(a). In addition, the

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[1]As of the date of the hearing before the ethics committee, the interrogatories had not been answered.

panel found that respondent's failure to set forth in writing the basis or rate of his fee constituted a violation of RPC 1.5(b). A further finding was made of a violation of RPC 1.1(b).

The panel noted in its report that, but for the Supreme Court's decision in In re Kasdan, 115 N.J. 472 (1989) (intentional misrepresentation of lawsuit status warrants public reprimand), it would have recommended the imposition of a private reprimand. The panel recommended public discipline and a proctorship.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are supported by clear and convincing evidence. However, the Board disagrees with the committee's determination that a pattern of neglect was present in this case. The Board has previously expressed the belief that three cases of neglect (simple or gross) are necessary to find a violation of RPC 1.1(b). In addition, with respect to the panel's finding of a violation of RPC 4.1 in the Mason matter, the Board has noted that this disciplinary rule concerns misrepresentations to third parties. As there is no indication in the record that respondent misrepresented the status of the suit to anyone other than Mason, this disciplinary rule does not apply.

Of respondent's numerous violations in his handling of these two matters, the most serious is his misrepresentation to Mason

regarding the status of his case in violation of RPC 8.4(c). As noted above, in In re Kasdan, supra, the Court addressed the issue of misrepresentation to a client, stating that "...intentionally misrepresenting the status of lawsuits warrants public reprimand." Id. at 488. Combined with respondent's violation of RPC 8.4(c) are clear violations of RPC 1.1(a), RPC 1.3, RPC 1.4(a) and RPC 1.5(b). Another case, In re Cervantes, 118 N.J. 557 (1990), is illustrative of an instance where an attorney was publicly reprimanded for conduct similar to that of respondent. In Cervantes the attorney was publicly reprimanded for lack of diligence, failure to keep clients reasonably informed in two matter, and misrepresentation of the status of a case to his client. Similarly, in In re Mahoney, 120 N.J. 155 (1990), the attorney lacked diligence in four matters, failed to communicate in four matters, exhibited a pattern of neglect, failed to maintain trust account records and misrepresented the status of one matter. Mahoney was publicly reprimanded.

Setting aside, for one moment, respondent's misrepresentation to Mason, the crux of respondent's violations is gross neglect in one matter and a failure to communicate in two matters. Absent respondent's misrepresentation to Mason, a private reprimand might have been sufficient discipline. However, given respondent's violation of RPC 8.4(c) at minimum a public reprimand is in order. In re Kasdan, supra. The Board so recommends.

With respect to the hearing panel's recommendation that a proctorship be imposed, the Board believes that such a measure is

necessary. Respondent was asked at the committee hearing why his misconduct had occurred. He replied:

> I did not know how to handle files properly, and a combination of that and anxiety over handling them simply snowballed and it resulted in my misrepresenting to Mr. Mason the status of his file and failing to keep the Flippens properly add [sic] advised of the status of their file.
> [T6/18/91 23-24]

The evidence before the Board reveals that respondent grossly neglected only one case. However, the Board is not convinced that respondent fully recognizes the impact of his misconduct on his clients. Accordingly, the Board recommends that respondent be required to practice under the supervision of a proctor for one year.

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

Dated: 11/8/1992

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