

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 92-100 and
92-101

IN THE MATTER OF :
:
KEVIN E. GILES, :
:
AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 20, 1992

Decided: June 26, 1992

Roger J. Desiderio appeared on behalf of the District VB Ethics Committee.

Respondent did not appear.¹

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

This matter was before the Board based upon two recommendations for public discipline filed by the District VB Ethics Committee (DEC).

Respondent was admitted to the practice of law in New Jersey in 1983 and has been in private practice in East Orange, Essex County. On April 22, 1991, the Office of Attorney Ethics (OAE) filed a petition for respondent's temporary suspension (Exhibit P-13). According to the petition, respondent failed to correct gross deficiencies in his trust account recordkeeping practices; was

¹A signed green card, dated April 4, 1992, indicating receipt of certified mail giving notice of the Board hearing, was returned to the Office of Board Counsel.

unable to identify those clients on whose behalf he was holding trust funds as well as the respective amounts, and failed to turn over the proceeds of a real estate transaction he had handled in December 1989, although apparently able to do so. After the petition was filed, a letter, dated April 29, 1991, was submitted to the Court from respondent's treating physician, indicating that respondent had been admitted to the Carrier Clinic in mid-April for treatment of a nervous disorder. By order dated April 30, 1991, the Court placed respondent on Disability Inactive Status (DIS). By order dated July 26, 1991, the Court directed that respondent remain on DIS.

The facts of the matters before the Board are as follows:

Docket No. DRB 92-100

The Gilles Matter (District Docket No. VB-90-02E)

At some time prior to September 26, 1989, respondent was retained to represent Joseph Gilles in a criminal matter.² On September 26, respondent and Gilles appeared before the Honorable John J. Dios, at which time Gilles pled guilty. On that date, Judge Dios advised Gilles and respondent to return to court on October 18, 1989, for sentencing. Although Gilles appeared, respondent did not.³ Judge Dios' secretary placed telephone calls

²Gilles did not respond to the presenter's attempts to contact him.

³Gilles waived respondent's appearance and a public defender was appointed to represent him in the sentencing proceeding. Allegedly, Gilles had paid respondent a fee for his services (T5/22/91 52).

to respondent, but did not speak directly with him. An order dated October 20, 1989 was then forwarded to respondent, directing him to appear on October 27, 1989 and, further, to show cause why sanctions should not be imposed against him. Respondent did not appear in court on that date. However, at 3:15 p.m., Judge Dios' secretary received a telephone call from an unidentified individual calling on respondent's behalf, stating that he was ill. By letter dated November 14, 1989, Judge Dios notified the DEC of respondent's misconduct. Three weeks later, Judge Dios received a letter from respondent, dated December 6, 1989, requesting a court date for Gilles' sentencing and explaining his failure to appear on October 18 because of a serious illness. In his letter, respondent offered "to produce a doctor's excuse" (Exhibit P-3).

The Samson Matter (District Docket No. VB-90-19E)

Respondent represented Gabriel Dambreville in the purchase of real estate. The sellers of the property, Malik and Shereelah Deen, were represented by Carl R. Samson. The closing took place on August 11, 1989. At the time of closing, the parties agreed that respondent would pay from the closing proceeds an existing first mortgage on the property, held by First Federal Savings and Loan Association of Rochester (First Federal). The amount of the pay-off at the time of closing and one day's interest was \$111,891.64. Respondent was to transmit that sum to the mortgagee via overnight mail. Three weeks after the closing, respondent sent

the check to First Federal by overnight mail. Respondent provided no explanation for the delay.

In addition, at closing respondent advised that there was an outstanding water bill owed to the Town of West Orange and retained \$891.52 in escrow. As it was late in the day, Samson was unable to confirm the amount due and agreed that the money would be held in escrow. Samson later learned that the water bill was \$25.24.

Samson made numerous attempts to contact respondent, by letter and telephone, about both the water bill and the mortgage payment. He was never able to speak with respondent directly.⁴ On September 19, 1989, respondent returned to the Deens the balance of the escrow money being held for the water bill.

After receiving the check from respondent, First Federal contacted Samson, complaining that the delay in payment had caused the pay-off amount to increase. First Federal agreed to use the money respondent had sent as a curtailment, to prevent the interest on the loan from accruing. As of October 10, 1989, \$641.75 was owed to First Federal. In order to prevent damage to their credit and to conclude the matter, the Deens paid the amount due First Federal.

Respondent wrote to Samson in response to one of the numerous letters the latter sent to him. In his letter of March 13, 1990, respondent stated that he had, in fact, paid off the mortgage and did not understand why Samson was suggesting that he owed any

⁴Respondent apparently did telephone Samson once and spoke with his brother.

money. Samson filed a complaint against respondent to recover the money the Deens had to pay First Federal. Respondent was served with the summons and complaint on March 26, 1990. Respondent never answered the complaint or appeared in court. A default judgment for \$860.64 was entered against him on April 23, 1990. However, as of the date of the DEC hearing, the judgment had not been collected.

The presenter in the Gilles and Samson matters was unable to communicate with respondent, as the latter's telephone was disconnected and no new number listed. Mail sent to respondent was left unclaimed. In addition, respondent's office was apparently closed, leading the DEC to conclude that respondent did not have a bona fide office. The complaint was provided to respondent when he appeared for the hearing of the matter under District Docket No. VB-89-16E (T5/22/91 56). At that time, respondent told the presenter that he would be in contact with him, which he failed to do.

The DEC determined that respondent's actions in the Gilles matter constituted violations of RPC 1.1(b) (when his misconduct was considered in light of his actions in other matters), RPC 1.3, RPC 3.5(c), RPC 8.1(b), R.1:20-3(f), RPC 8.4(d) and R.1:21-1(a). In the Samson matter, the DEC determined that respondent violated R.1:20-3(f), RPC 8.1(b), 1.1(b) and RPC 8.4(d).

Docket No. DRB 92-101

The Hodge Matters (District Docket No. VB-89-16E)

Bessie Hodge retained respondent to represent her in four matters. While testimony was given at the DEC hearing on each of the four, only two were at issue before the DEC: the Day and the Iverson matters.

The Day Matter

In May 1988, litigation was instituted against Hodge by Brian A. Day, a tenant of commercial property owned by Hodge.⁵ On July 11, 1988, Hodge filed an answer and counterclaim in the matter, acting pro se. Interrogatories, dated July 16, 1988, were sent to Hodge by the law firm of Unger and Unger. Hodge also received supplemental interrogatories, dated August 16, 1988, along with a motion to strike her counterclaim for failure to answer the interrogatories (T6/14/90 14).⁶ On September 2, 1988, Hodge retained respondent, paying him \$350 on that date.⁷ Respondent gave a letter to Hodge, dated September 2, 1988, confirming a trial

⁵The case was ultimately settled.

⁶Hodge apparently received the supplemental interrogatories after she had retained respondent and told him that she was concerned about still receiving communication from Unger. Respondent told her that he would take care of the problem (T6/14/90 81-82, 142).

⁷ A second payment of \$200 was made on December 10, 1988. According to Hodge's testimony, respondent did not request that the additional payment be made, although Hodge felt that, if she gave him more money, he would be more diligent about pursuing her case (T6/14/90 134, 155).

date of September 29.⁸ Hodge testified that, after she received that letter, she called respondent and expressed her apprehension about appearing in court with nothing having been done on her case. Respondent told her he would be in contact with Unger (T6/14/90 78). Hodge never received any documents from respondent indicating that he had entered an appearance in her case or had spoken with opposing counsel.⁹

Adrian M. Unger testified at the DEC hearing that, other than two telephone calls and letters from his office dated November 4, 1988, January 4 and March 28, 1989, there had been no communication with respondent.¹⁰ The January 4, 1989 letter contained an order dismissing Hodge's counterclaim and indicated that, if either settlement monies or her answers to interrogatories were not received, a motion would be made to strike her answer and a judgment sought (T6/14/90 26-27). Unger testified that the January 4, 1989 letter was addressed to Hodge and only copied to respondent because he never entered an appearance on Hodge's behalf. Unger noted that the Day file revealed that Wayne Cook of respondent's office had called to advise that respondent represented Hodge. Cook was informed, at that time, that a motion had been filed to dismiss Hodge's counterclaim for failure to answer the

⁸Respondent testified that he believed that the September 2 date on the letter was a typographical error.

⁹While several letters from respondent or his office were produced at the DEC hearing, they do not pertain to the Day and Iverson matters.

¹⁰The March 28, 1989 letter was addressed to the court clerk and copied to respondent.

interrogatories (T6/14/90 14).¹¹ On March 2, 1989, Hodge wrote to Judge Rosemary Higgins Cass explaining her difficulties in getting respondent to pursue her case. By letter dated March 23, 1989, Judge Higgins expressed her puzzlement at the allegations against respondent, since he was not the attorney of record in the case. The letter further informed Hodge that a hearing would be held on April 7. Respondent was copied on the letter (Exhibit P-3). Hodge sent a second letter to Judge Cass, dated April 4, concerned that she had not been able to contact respondent about the upcoming trial. According to Hodge, at the April 7 hearing, Judge Cass told her to obtain another attorney. The matter was adjourned until April 21, 1989. At that later hearing, Hodge informed Judge Cass that she had been unable to reach respondent. She also submitted a letter from Ned Rosenberg, Esq., indicating that, although he wished to represent Hodge, he had been unable to obtain her file. Judge Cass instructed the attorney from Unger and Unger present on that day to send the supplemental interrogatories directly to Hodge (T6/14/90 23-24).

Rosenberg testified that Hodge initially contacted him on or about February 27, 1989. She explained that respondent represented her, but that it was taking too long for him to resolve the matter;

¹¹Adrian M. Unger initially represented Day in the litigation. Frederick Unger, his son, subsequently took over the matter. Adrian M. Unger testified at the DEC hearing, due to his son's death. Another attorney in Unger's office also had some contact with the case.

she wanted Rosenberg to obtain her files.¹² Over the next two weeks, Hodge attempted to retrieve her files, but was unsuccessful. On March 13, Rosenberg telephoned respondent's office, leaving a message with an unknown individual for respondent to call him. Respondent did not return the call, which was followed by a letter to respondent on March 15. Hodge wrote a letter to Rosenberg dated March 18, stating that she had gone to respondent's office on March 17 for her files, at which time she had given him a written request for them. Respondent told her that he had been in court all day and had not had time to give her the files. Respondent asked her to return the following day, Saturday, when he would give her the files. Although Hodge appeared at respondent's office that Saturday, respondent was not there. Thereafter, Rosenberg made several other attempts to get Hodge's files. Despite several telephone calls, he was unable to speak with respondent directly.¹³ By letter dated March 27, Rosenberg requested the files, enclosing Hodge's letter of March 18. After receiving no response, Rosenberg again attempted to speak with respondent, who once more failed to return his telephone calls. In a letter to respondent, dated April 13, Rosenberg confirmed that Hodge had told him that her files had been mailed to her. Rosenberg added that, since they had not been

¹²Rosenberg was retained on May 18, 1989 and settled the matter. He was never retained in the Iverson matter (T6/14/90 55-58).

¹³The requests also included the file in the Iverson matter, infra.

received by Hodge, they must have been lost. There was no response to that letter.

With regard to his failure to turn over the files, respondent testified that, initially, the files had been misplaced in his office; he had then telephoned Rosenberg's office to inform him that the files had been lost and that they would be forwarded to him, if found.¹⁴ According to respondent, three of the four files were eventually located;¹⁵ however, in the summer 1989, before he was able to mail the files to Hodge or Rosenberg, they were purloined. Respondent contended that the files were in his automobile when it was stolen and that, although the automobile had been ultimately recovered, the files were missing (T6/14/90 200). This second loss of the files was never communicated to Hodge or Rosenberg.

Respondent testified that he failed to enter an appearance in the Day matter because, after speaking with Unger, he believed the matter had been settled (T6/14/90 171).

Respondent admitted, and the DEC found, that in connection with his representation of Hodge in the Day matter:

- A. Respondent failed to notify the Court and opposing counsel in writing of his retainer in the Day matter;
- B. Respondent failed to appear before the Court for motions, trial or any adjournments thereof regarding the Day matter;

¹⁴Rosenberg's file had no reference to that telephone call.

¹⁵Respondent testified that the Day file was never found (T6/14/90 199).

C. Respondent did not answer the Interrogatories and Supplemental Interrogatories propounded by Mr. Day's attorney;

D. Respondent failed to surrender Mrs. Hodge's documents, pleadings and other property following termination of his retainer by Mrs. Hodge; and also, Respondent failed to cooperate with Mrs. Hodge's newly-designated successor attorney, not only by failing to deliver documents (or copies thereof) but also by his lack of responses to the numerous requests from Mr. Rosenberg, the successor attorney, for delivery of pleadings, documents, records and to discuss the situation in any meaningful regard to facilitate the transition between attorneys pursuant to the client's expressed wishes and instructions;

E. Respondent did not prepare and submit a written retainer agreement to Mrs. Hodge when retained by her and he failed to account to Mrs. Hodge for advance payment of retainer fees made by her to him;¹⁶

F. Respondent did not place retainer fees advanced by Mrs. Hodge in his attorney trust account until earned and instead, Respondent co-mingled the retainer advances with his other funds in his attorney business account;

G. Respondent's explanations as to his handling (or more accurately mishandling and non-handling) of the Hodge-Day matter served to emphasize Respondent's lack of knowledge of his obligations as a practicing attorney of this State, both under the Rules Governing the Courts of the State of New Jersey and under the Rules of Professional Conduct.

[Hearing Panel Report at 4-5]

The Iverson Matter

On October 3, 1988, Hodge retained respondent to represent her in connection with a dispute with George Iverson, a tenant in a commercial property owned by Hodge. She paid respondent \$100 at

¹⁶Although a retainer agreement between Hodge and respondent was produced before the DEC (Exhibit C-10), it refers to another matter in which respondent represented Hodge, not the Day or Iverson matters.

that time. Respondent apparently did perform some work on Hodge's behalf, including attending a settlement conference.¹⁷ Thereafter, Hodge telephoned respondent and went to his office several times, twice having an appointment (T6/14/90 88). She was unable to see him. According to Hodge's testimony, a potential witness in the matter was supposed to bring a statement to respondent. When the witness failed to provide it, Hodge obtained the statement and gave it to respondent, who still took no action. On November 25, 1988, Hodge wrote to respondent and requested that he pursue the matter expeditiously.

On January 26, 1989, Hodge sent a letter to respondent indicating that a meeting had been scheduled for January 31, 1989 on the Iverson matter and requesting copies of the answers to interrogatories sent to Unger in the Day matter. The answers were never sent to her and the meeting never took place, apparently because Hodge was never able to reach respondent to confirm it with him. Thereafter, on or about February 9, 1989, Hodge and her son, Louis, made an appointment to see respondent. Although Hodge and her son appeared at respondent's office, respondent did not see them. On February 10, 1989, Louis Hodge sent a letter to respondent expressing displeasure at the way his mother's matters were being handled. Subsequently, requests for the file from Hodge

¹⁷Respondent failed to appear at the settlement conference the first time it was scheduled. Respondent's and Hodge's testimonies differed as to how much time passed before the conference took place.

and Rosenberg were sent to respondent. Respondent never furnished the file to either.¹⁸

On May 2, 1989, Sheldon Schiffman, the DEC investigator, wrote to respondent. Respondent testified that he recalled receiving the letter and admitted that he did not reply to it. Schiffman sent the formal complaint to respondent on August 11, 1989. Although the post office left three notices at respondent's office, on August 14, August 19 and September 29, 1989, the complaint was never claimed by respondent or by a member of his staff. When asked why he had not answered the complaint after he received it, respondent asserted that he was "overly intimidated by the committee" (T6/14/90 224).

Respondent admitted his neglect in the Day and Iverson matters (T6/14/90 194-5, 216-221) and testified before the DEC about the difficulties he was having in his personal and professional life. He explained that, in the Day matter, his paralegal did not do all the work that was supposed to be done. He also testified that, because of his financial straits, he had been locked out of his office, his telephone had been turned off and his staff had quit, leaving him with "three times the caseload" (T6/14/90 176). Respondent further indicated to the DEC that he had lost his fiancée because of the pressure under which he was operating. With regard to his failure to appear before Judge Cass, respondent

¹⁸Shortly before the DEC hearing, Hodge filed suit, pro se, against Iverson (T6/14/90 113).

testified that, although he was aware of the hearing date, he was too embarrassed to appear. He also testified that he believed that Rosenberg would be there to represent Hodge (T6/14/90 177). Respondent added that Hodge had been abusive to him and to his staff (T6/14/90 172).

In its report, the DEC determined that, in the Iverson matter, in addition to the above conduct, respondent failed to turn over the requested Iverson file, failed to maintain time records in this matter, failed to provide a written retainer agreement to Hodge and deposited the retainer fee he was given directly into his business account.

With regard to both of the above matters, the DEC found that respondent failed to communicate with Hodge, with his adversaries, with Rosenberg, with the DEC investigator and his successor, with the presenter in this matter and with the hearing panel. The DEC further noted that respondent displayed a "less than adequate knowledge of the Rules Governing the Superior Court of New Jersey and of the Rules of Professional Conduct" and found violations of RPC 1.1(a) and (b), RPC 1.3, RPC 1.4(a) and (b), RPC 1.5(b), RPC 1.15(a), RPC 1.16(d), RPC 5.3(a), (b) and (c), RPC 8.4(a), RPC 8.1(b) and R.1:20-3(f).

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the record, the Board agrees with the findings of the DEC that respondent is guilty of unethical conduct. However, in the Day and Iverson matters, the DEC determined that respondent violated RPC 5.3(a), (b) and (c), by failing to exercise proper supervisory authority over his employees. The Board is of the opinion that there is insufficient evidence of this violation. The Board is also of the opinion that there is insufficient evidence in the record of a violation of RPC 8.4(d) (conduct prejudicial to the administration of justice). Further, the Board disagrees with the DEC's finding that respondent commingled funds by placing his retainer fees in his business accounts. In In re Stern, 92 N.J. 611 (1983), the Court held that "absent an explicit understanding that the retainer fee be separately maintained, a general retainer need not be deposited in an attorney's trust account." Id. at 619.

The DEC found that respondent was guilty of a pattern of neglect in the Day and Iverson matters, in violation of RPC 1.1(b). The Board has previously determined that three matters are necessary to make such a finding. However, when those matters are taken in concert with the Gilles and Samson matters, a finding of a violation of RPC 1.1(b) is proper.

The Board has noted that a finding of gross neglect was not made in the Gilles or Samson matter. As there is no doubt that the pay-off of the first mortgage was entrusted to respondent and that he failed to do so, causing harm to the Deens, the Board finds a

violation of RPC 1.1(a) in the Samson matter. In addition, the Board has determined that respondent's failure to appear with his client before Judge Dios constituted gross neglect.

The DEC determined that respondent violated R.1:20-1(a), in that he failed to maintain a bona fide office. While it is possible that respondent opened an office for the practice of law at a different location and failed to inform the Court of his new address, given his conduct and his testimony that he was attempting to close his office (T6/14/90 189), it is more likely that he did just that and no longer maintained an office. Accordingly, the Board agrees with the DEC and finds a violation of R.1:20-1(a).

Respondent was initially contacted by the DEC investigator in May 1989, with regard to the Day and Iverson matters. Respondent testified that he recalled receiving that letter and admitted that he did not reply thereto. The complaint in this matter was mailed to respondent on August 11, 1989. Although notices were left at respondent's office on August 14, August 19 and September 29, 1989, the letter was never claimed by respondent or a member of his staff. Apparently, respondent did finally receive a copy of the complaint in May 1990 and, again, failed to answer. When asked by the panel chair if he had an explanation for his failure to answer the complaint, respondent replied:

No, except that I was afraid. I believe I was overly intimidated by the committee and by the fact that I didn't pick up the complaint and answer as I should have. Sometimes a rolling stone gathers a lot of moss. I believe that's actually, honestly, what happened, Mr. Steinberg.

[T6/1/4/90 224]

In the Gilles and Samson matters, respondent failed to communicate with the investigator or file an answer to the complaint filed against him, in violation of RPC 8.1(b) and R.1:20-3(f).

In the Day and Iverson matters, respondent testified that, ultimately, his failure to return Hodge's files was due to the fact that they had been in his automobile, which was stolen. According to his testimony, when his vehicle was returned to him, his files were missing. At the conclusion of the DEC hearing, the panel chair indicated that respondent should either provide the panel with a copy of the police report or advise the panel if there was no report (T6/14/90 227). No report or explanatory letter was provided. The DEC indicated that that fact, coupled with respondent's failure to tell Rosenberg or Hodge about the theft of the files, led to the conclusion that respondent's explanation was "in all likelihood a fabrication" (Hearing Panel Report at 9). Given these factors, the Board disregards respondent's explanation on this issue and considers his testimony as a misrepresentation to the DEC, in violation of RPC 8.4(c).

Respondent is guilty of numerous violations of the Rules of Professional Conduct, including gross neglect, pattern of neglect, lack of diligence, failure to communicate, failure to cooperate with the DEC, failure to maintain a bona fide office, failure to provide a written retainer, failure to return client property, misrepresentation and abandonment of his clients.

There is a great deal of latitude in the quantum of discipline imposed for violations similar to respondent's. In In re Ashley, 122 N.J. 52 (1990), the attorney was guilty of neglect in ten matters, misrepresentations to clients, refusal to return files, refusal to return retainer fees, failure to cooperate with the ethics system and forgery of clients' signatures on bankruptcy petitions without their knowledge. Ashley was suspended for two years. Her reinstatement was to be conditioned on proof of fitness to practice and completion of the Skills and Methods course. In addition, Ashley was ordered to practice under a proctorship for one year.

In In re Rogovoy, 100 N.J. 556 (1985), the attorney neglected a matter, failed to communicate with another client and failed to cooperate with the ethics system, including failing to appear before the Court on an Order to Show Cause. Rogovoy testified that he was rebelling against the ethics committee. He was suspended for two years, retroactive to the date of his temporary suspension.

Recently, an attorney was found guilty of gross neglect in four matters, lack of diligence, failure to communicate, pattern of neglect, failure to cooperate and failure to maintain a bona fide office. In re Mintz, 126 N.J. 484 (1992). The Court held that the attorney's conduct warranted the imposition of a two-year suspension.

In In re Malfitano, 121 N.J. 194 (1990), the attorney was guilty of a pattern of neglect in three matters, failure to communicate, misrepresentation to a client and failure to cooperate

with the disciplinary system. Malfitano was suspended for one year.

An attorney was suspended for one year after he was found guilty of gross neglect in four matters, misrepresentation to clients, failure to return a retainer fee and lack of cooperation with the disciplinary system, by failing to reply to the investigator's requests for information, failing to file an answer and failing to appear before the Board, although he appeared before the DEC. In re Rosenthal, 118 N.J. 454 (1990).

As noted above, respondent is currently on Disability Inactive Status. (DIS) R.1:20-9(b) provides that disciplinary proceedings shall go forward even after an attorney is transferred to DIS, except where the attorney is incapable of assisting counsel in defense of the charges. In In re Ashley, supra, the attorney was also on DIS at the time that the Board considered the recommendations for public discipline filed against her. The Board questioned her counsel as to whether he believed his client was competent to assist him and determined to go forward with the proceeding. Respondent has chosen not to cooperate with or communicate in any way with the Board. He has not submitted any evidence questioning his competence to prepare his own defense. The Board, therefore, assumed his competence in this regard.

In determining the appropriate quantum of discipline, the Board has taken into consideration respondent's previous private reprimand in 1988 for conduct similar to that now under review. Respondent was guilty of lack of diligence and misrepresentation to

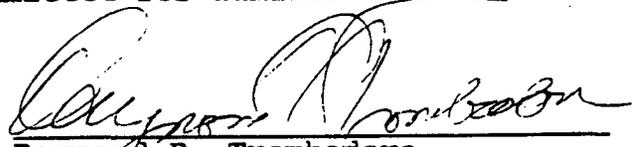
a client in connection with an action arising from an automobile accident. Further, in that matter, respondent failed to cooperate with the DEC investigator and failed to file an answer to the complaint.

Given respondent's numerous violations, the Board's majority recommends the imposition of a one-year suspension, at the end of which respondent should be transferred back to DIS. Accordingly, he will be required to prove his fitness as an attorney before returning to practice. The Board also recommends that, at such time as respondent shall return to the practice of law, he be required to practice under a proctorship for two years. Further, the Board recommends that respondent be required to take the Skills and Methods Course offered by the Institute for Continuing Legal Education.

One member voted for disbarment. Two members did not participate.

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

Dated: June 26th 1992

By: 

Raymond R. Trombadore
Chair
Disciplinary Review Board