SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 91-318

IN THE MATTER OF :

STEPHEN R. MILLS, :

AN ATTORNEY AT LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: November 20, 1991

Decided: January 22, 1992

Richard J. Engelhardt appeared on behalf of the Office of Attorney Ethics.

Respondent waived appearance before the Board.

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

This matter was before the Board on a Motion for Reciprocal Discipline filed by the Office of Attorney Ethics (OAE) based on a public reprimand issued to respondent by the United States District Court for the District of New Jersey (USDC).

Respondent was admitted to the New Jersey bar in 1972. He is also admitted to practice in New York and before the United States Supreme Court. Following a federal judicial clerkship, respondent served for nine years as an Assistant United States Attorney for the District of New Jersey. Thereafter, he practiced for approximately six years with a New York City firm. In 1985, he began his own practice as a sole practitioner, currently located in Livingston, New Jersey. He is primarily engaged in federal civil

litigation, specializing in complex commercial disputes and employment law.

The USDC, in its opinion dated June 24, 1991, recited the factual underpinnings of the case as follows:

> The disciplinary proceeding arose from respondent's representation of Roger Davis Deutsch in a federal civil action in this Court against Deutsch's two former business partners, Bradley S. Jacobs and P. Angus Lansing. In August 1988, respondent filed the action, Deutsch v. Jacobs and Lansing, Civil No. 89-3798, which involved claims of fraud, breach of fiduciary duty and conversion. One allegation in the complaint charged that defendants had improperly diverted corporate funds to Sidha Corporation International (SCI).
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> The case was assigned to the Hon. Dickinson R. Debevoise. Clyde A. Szuch, of Pitney, Hardin, Kipp & Szuch, represented both defendants. In November 1989, after trial, the jury returned a verdict in favor of respondent's client on two of three counts, including Deutsch's claim of an improper diversion of funds to SCI. The total amount of the jury verdict, including prejudgment interest, was $510,247.57.
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> On November 27, 1989, respondent sent a letter to Szuch advising him that Deutsch would refrain from reporting "tax irregularities" disclosed in evidence at the trial to "appropriate authorities" and would be willing to confidentially settle the matter if the judgment on the jury verdict was paid within five days. The relevant portion of the letter declares:
>
> > By now, the judgment in the above-captioned Civil Action has been entered by the Clerk.
> >
> > As you know, the evidence at the trial of the above-captioned matter disclosed possible irregularities concerning the $481,000.00 "deduction" to SCI, which I believe, might be a [sic] attributable to your clients as taxable income. In addition, the evidence at trial disclosed that Mr. Lansing understated his 1983 taxable income by approximately $360,000.00. I believe that your clients' potential liability on these matters, with interest and penalties may exceed the amount of our judgment.

The letter also states that if Szuch did not respond to the offer or filed a post-trial motion or appeal, respondent would assume that he was not interested in 'confidentially resolving this matter' and that respondent's client would 'feel free to report this matter as he deems appropriate.'

Szuch filed a motion for judgment notwithstanding the verdict (JNOV) on December 4, 1989 and included respondent's November 27 letter in his moving papers, as an example of plaintiff's 'recent attempt at intimidation.' On January 8, 1990 Judge Debevoise granted defense counsel's motion for a new trial on the SCI improper donation claim. In February 1990, on the retrial of that claim, the jury returned a verdict in favor of Deutsch in the amount of $120,000. Although defendants filed an appeal from the judgment, the appeal was withdrawn by agreement and the parties reached a settlement.

On December 26, 1989 Judge Debevoise initiated a disciplinary investigation, pursuant to Local Rule 7.E.1, by informing the Hon. John Gerry, Chief Judge for this District, about respondent's November 27 letter. In his letter to Judge Gerry, Judge Debevoise expressed the concern that respondent's letter might constitute extortion under N.J.S.A. § 2C:20-5 and blackmail under 18 U.S.C. § 873, as well as professional misconduct under Rule 1.2 (d) (assisting client in illegal conduct) and Rule 8.4(b) (committing a crime). Judge Debevoise also referred the matter to the United States Attorney, Samuel Alito, who later concluded that criminal prosecution was not warranted.

In January 1990, the Clerk of this Court, according to Rule 7.E.1, referred this matter to Joseph Hayden, Esq., a member of the Lawyers' Advisory Committee, for investigation and possible prosecution of a formal disciplinary action. Hayden conducted a comprehensive investigation and interviewed all parties connected with the letter. In March 1990, Judge Debevoise informed Hayden and the United State Attorney about a second incident of possible misconduct by respondent. Respondent cooperated fully with this investigation.

The second incident occurred shortly after the conclusion of the retrial of the SCI claim. On March 8, 1990, Lansing, one of the defendants in the Deutsch case, received a message on his answering machine that stated:

> Mr. Lansing, this is Revenue Officer Hooker, H-O-O-K-E-R, IRS in Fort Lauderdale, Florida. Please telephone me on Monday. My telephone number is area code 305-536-5225. Thank you.

Clyde Szuch, believing that the caller was respondent, reported the telephone call to Judge Debevoise. Respondent made this call after he knew that an investigation was being done with regard to the November 1989 letter. In October 1990 Acting United States Attorney Michael Chertoff concluded his office's investigation of this incident and determined that criminal prosecution was not warranted. Hayden interviewed respondent about this call.

Hayden submitted to the Court a detailed report which described the information that he obtained through his investigation and explained his recommendations. Hayden determined that no response was necessary for respondent's conduct in drafting the letter. However, he recommended that respondent be reprimanded for the telephone call, since it represented a violation of Rule 8.4(c). An order was issued on February 4, 1991 requiring respondent to show cause why this Court should not take disciplinary action. Respondent appeared before a member of this Court. In April, 1991 Thomas Weisenbeck, Esq. was appointed to represent respondent. Counsel for respondent filed a brief in response to Hayden's report and respondent filed a certification stating that he accepted responsibility for the conduct discussed in the report and that he waived his right to an evidentiary hearing and oral argument.

By a per curiam opinion dated June 24, 1991, the USDC concluded that respondent should be publicly reprimanded only for his false statement, left on Lansing's answering machine, that he was IRS Agent Hooker and that Lansing should return his call. The court determined that this constituted a false statement of fact, in violation of RPC 4.1(a)(1), and, further, that respondent violated RPC 4.2 by directly contacting a person who he knew was represented by counsel. Moreover, although his misconduct did not

rise to the level of a criminal violation, it did constitute a misrepresentation, in violation of RPC 8.4(c).

The USDC did not find clear and convincing evidence of unethical conduct with regard to respondent's letter of November 27, 1989. The USDC noted the determination by the United States Attorney that criminal prosecution was not warranted. The USDC found that respondent's letter did not expressly threaten criminal prosecution to obtain a civil advantage and that the matters that might be disclosed were already part of the public record. The USDC analyzed the history of former DR 7-105, as follows:

> Former Disciplinary Rule DR 7-105 stated that it was an ethical violation for a lawyer to 'present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.' This provision or its equivalent, was not adopted when the Disciplinary Rules were replaced with the Rules of Professional Conduct in 1984. Recently, Rule 3.4, 'Fairness to Opposing Party and Counsel,' has been modified to include the principle of DR 7-105 through the addition of paragraph (g), which states that a lawyer shall not 'present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.' The amendment was adopted on July 18, 1990 and became effective on September 4, 1990. Thus, at the time that respondent drafted the letter in November 1989, this rule was not applicable and respondent could not have violated it. [Footnote Omitted].

But see Opinion 595, 118 NJLJ 875 (December 18, 1986), where the Advisory Committee on Professional Ethics (ACPE) held that the principle espoused in former DR 7-105 continued in effect "... notwithstanding that it was not explicitly adopted as a portion of the Rules of Professional Conduct." In so doing, the ACPE stated:

4) the procedure followed in the foreign disciplinary matter was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

5) the misconduct established warrants substantially different discipline.

None of these factors is present in this case. Indeed, as to R:20-7(d)(5), it is clear that "substantially different discipline" is not warranted. To the contrary, a public reprimand is, in the Board's view, the appropriate sanction. Respondent's conduct here is similar to that referenced in In re Cohen, 118 N.J. 420 (1990), where Cohen, who represented a plaintiff in a lawsuit, sent a letter to defendant that purported to come from defendant's counsel. Cohen was publicly reprimanded for that misrepresentation.

The Board notes that mitigating factors are present here. Respondent has not previously been the subject of disciplinary action. He fully admitted his wrongdoing to the USDC and cooperated fully with the disciplinary investigation. Moreover, as noted in the June 24, 1991 opinion of the USDC, respondent acted on behalf of his client, and not for personal gain.

The Board, therefore, unanimously recommends that reciprocal discipline be imposed, and that respondent be publicly reprimanded.

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

Dated: 1/22/1992 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board