SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 96-460

IN THE MATTER OF

THEODORE KOZLOWSKI

AN ATTORNEY AT LAW

Decision

Argued: January 23, 1997

Decided: June 3, 1997

Barry N. Shinberg appeared on behalf of the District X Ethics Committee.

Gerard E. Hanlon 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 on a recommendation for discipline filed by the District X Ethics Committee ("DEC") arising out of respondent's handling of two bankruptcy matters and a real

estate closing. The specific allegations are set forth in the recitation of facts for each matter.

Respondent was admitted to the New Jersey bar in 1979. During the time relevant to the within matters, he maintained offices in Morristown, Morris County, and Clifton, Passaic County.

Respondent was privately reprimanded, by letter dated May 28, 1992, for failure to execute and return a warrant to satisfy judgment for over a year and for failure to cooperate with the DEC.

The facts in these matters are as follows:

The Marakovitz Matter (District Docket No. X-93-40E)

In December 1992, Lynn and Charles Marakovitz retained respondent in connection with a bankruptcy proceeding. On February 4, 1993, the Marakovitzes signed a Chapter 7 petition, which respondent filed the following day. This matter arose out of three aspects of respondent's handling of the bankruptcy proceeding.

I. The Automobile

The Marakovitzes had a secured automobile loan from Valley National Bank ("VNB"). The record contains a letter from respondent to VNB dated February 5, 1993, advising of the bankruptcy proceeding and of the automatic stay of all creditor actions. At first, the Marakovitzes wanted to reaffirm their

automobile loan. Respondent and counsel for VNB negotiated an agreement to that end. When the Marakovitzes were unable to make the payments on the car, on or about March 26, 1993 VNB filed a motion for relief from the stay. Respondent notified the Marakovitzes of the motion. Indeed, both respondent and Lynn Marakovitz agreed that they had a conversation on March 29, 1993 about the car. Their recollections of the conversation differed, however.

Respondent testified that he spoke at length with Lynn Marakovitz on that date and advised her how to turn over the car and also that she could choose to do nothing and wait for VNB to repossess the car in the event that the court granted relief from the stay. A notation on respondent's copy of the cover letter accompanying the motion reads that, on March 29, 1993, Lynn Marakovitz told him that she and her husband wanted to surrender the car. The note goes on to say that respondent would not oppose VNB's motion. Respondent did not advise VNB that the Marakovitzes wished to relinquish the car.

Contrarily, Lynn Marakovitz testified that their March 29, 1993 conversation had been brief because respondent was leaving his office and that she had told respondent that she wanted to turn over the car and would call back for information on the proper

procedure. According to Lynn Marakovitz, during April 1993, she made a number of calls to respondent seeking instruction on how to voluntarily relinquish the car. Respondent did not reply.

The car was ultimately repossessed during the early morning hours of May 4, 1993, without notice to the Marakovitzes.

II. The Student Loans

Lynn Marakovitz' debts included two student loans. During the initial meeting with respondent, she asked if the loans were dischargeable in bankruptcy. She testified that they discussed the age of the loans and that respondent stated that he would have to ascertain whether they were dischargeable. Thereafter, between March and August 1993, Lynn Marakovitz left numerous messages for respondent and sent three letters seeking information on the bankruptcy proceeding and a copy of the petition. Respondent did not contact her.

By letter dated August 30, 1993, respondent forwarded a copy of the bankruptcy petition and discharge to the Marakovitzes.[1] Respondent's cover letter stated that "[o]nly those debts listed on Schedules D, E and F are legally discharged." Respondent added

[1] By letter dated August 25, 1993, Lynn Marakovitz had alerted respondent that she planned to call the bar association about his conduct.

that, if the Marakovitzes had debts that were not listed, they should notify him. The student loans were listed on schedule F (Exhibit P-41). After receipt of the petition, Lynn Marakovitz thought the loans were dischargeable and, therefore, stopped making the relevant payments. She was later advised by letter dated September 20, 1993 from the loan servicing center that that office had been notified of the bankruptcy proceeding and that the loans were not dischargeable. Lynn Marakovitz did not recall if she tried to contact respondent after receiving that letter. She added that, had she and her husband known that the student loans were not dischargeable, they would still have gone ahead with the Chapter 7 proceeding.

Respondent conceded that his August 30, 1993 letter may have confused the Marakovitzes. He argued, however, that, based on the Marakovitzes' conversations with him, they should have understood that the loans were not dischargeable.[2] Respondent asserted that, at his first meeting with the Marakovitzes, in December 1992, he advised them that the loans were not dischargeable because of the age of the loans. In support of his contentions, respondent

[2] According to respondent, there may have been some confusion because the law in this area had changed. He insisted, however, that he had made clear to the Marakovitzes that, despite the change in the law, their loans did not qualify for a discharge.

pointed to the back cover of his file in this matter, which reflected a notation from the December meeting: "no lawsuits or judgments, no cash advances, less than seven years old, luxury purchases." Respondent contended that this writing proved that the issue had been discussed with the Marakovitzes. Respondent also pointed to a notation on the Marakovitzes' creditor list about the age of the loans. Respondent claimed that, contrary to Lynn Marakovitz' testimony, this was not an issue that he would have had to research. Respondent believed that they also discussed the loans at the first meeting of creditors on March 11, 1993 and that he again advised the Marakovitzes that the loans were not dischargeable.

Lynn Marakovitz could not recall if they had discussed the loans or the car during the meeting of creditors.

III. The Petition/Communication

As noted above, between March and August 1993 the Marakovitzes made numerous requests to respondent, via telephone and letters, for information on their bankruptcy proceeding and for a copy of the petition. Respondent neither returned their calls nor supplied the petition until August 30, 1993.

By way of explanation for his dereliction, respondent stated that it was customary for his staff to handle as many routine inquiries by clients as possible. Respondent related that, prior to February 6, 1993, his wife worked as his secretary/office manager. On February 6, 1993, she stopped working due to the birth of their child. Subsequently, according to respondent, there was "chaos and disorder" in his office.

* * *

The complaint charged respondent with a violation of RPC 1.3 (lack of diligence) and RPC 1.4(a) (failure to communicate).

The DEC did not find clear and convincing evidence of misconduct in connection with the student loans. With regard to the car, however, the DEC concluded that respondent never advised the Marakovitzes of the procedure for relinquishing possession of their car. The DEC also found that respondent had failed to adequately communicate with the Marakovitzes. Accordingly, the DEC determined that respondent had violated RPC 1.3 and RPC 1.4(a).

The Poole-Yozsa Matter (District Docket No. X-94-71E)

In September 1989, respondent represented Dawn Poole-Yozsa and her husband in the purchase of their residence. Poole-Yozsa's grievance stemmed only from respondent's failure to timely deliver to her the closing documents.

From the time of the closing until September 1994, five years later, Poole-Yozsa sent several letters and made numerous calls to respondent, asking for the closing documents. Exhibit P-12, Poole-Yozsa's phone log, reflects thirty-eight attempts by telephone or letter to respondent to get her documents, between July 20, 1993 and September 9, 1994. Poole-Yozsa estimated that she made approximately nine calls to respondent prior to keeping her log. Most of her calls went unreturned. Indeed, according to Poole-Yozsa, for the first three and one-half years after the closing, respondent did not reply to her messages. It is undisputed, however, that respondent did communicate with Poole-Yozsa on several occasions by phone and in writing to let her know that he had misplaced the closing file and that he was attempting to either locate or recreate it.

Respondent conceded that, by calling various offices, he could have recreated the closing file.[3] He explained, however, that Poole-Yozsa was not "pressing" him and that he anticipated that he would eventually find his file. (Indeed, according to respondent, Poole-Yozsa did not request the file until 1993).

In August 1994, respondent informed Poole-Yozsa that he had located the file. In September 1994, Poole-Yozsa filed a grievance against respondent. Respondent ultimately forwarded copies of the closing documents to Poole-Yozsa on October 6, 1994. Respondent was unable to locate the RESPA statement. After receiving the file, Poole-Yozsa attempted to withdraw her grievance. Indeed, despite respondent's derelictions, Poole-Yozsa testified that she would hire him again to represent her in a closing.

In addition to delaying sending the closing documents to Poole-Yozsa, respondent failed to forward the seller's mortgage endorsed for cancellation to the Morris County Clerk's office until September 26, 1994. The title insurance policy was ultimately issued on or about October 6, 1994. There does not appear to have been any harm to Poole-Yozsa arising out of respondent's ethics infractions.

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[3] By letter dated February 9, 1994, a copy of which was sent to Poole-Yozsa, respondent asked the title agency to make its file available for his review. Exhibit R-3.

* * *

The complaint charged respondent with a violation of RPC 1.3 and RPC 1.4(a). The DEC determined that respondent's failure to communicate with Poole-Yozsa had violated RPC 1.4(a) and that his failure to discharge the mortgage for five years had violated RPC 1.3.

The Kern Matter (District Docket No. X-94-01E)

In December 1991, respondent filed a Chapter 13 bankruptcy petition in behalf of Bruce and Marcia Kern. That petition was voluntarily dismissed in July 1992 after the Kerns failed to make their mortgage payments.

In or about June 1992, Marcia Kern approached respondent about filing a Chapter 11 petition in behalf of her corporation, M & S Designs, Inc ("M & S"). Respondent filed the petition in June 1992. According to both respondent and Marcia Kern, it was her objective to remain in possession of the commercial premises leased by M & S for as long as possible. The lease was due to expire on November 30, 1992.

Because of her role in M & S, now a debtor-in-possession, after the filing of the Chapter 11 petition Marcia Kern was

required to forward monthly financial statements and pay a quarterly fee to the United States Trustee's Office. She discussed this requirement with respondent. Although Marcia Kern prepared financial statements for July, August and September 1992, she failed to mail them, allegedly because she did not know where to send them. (The proper address was on the Chapter 11 operating guidelines, which Marcia Kern admitted receiving).

In October 1992, Bruce Kern took the three reports and the quarterly fee to respondent's office intending that respondent forward them to the trustee. It is unclear if respondent agreed that he would send the reports and check to the trustee. In any event, he did not do so. According to respondent, it was "not [his] responsibility" to forward the documents and, furthermore, he had "more pressing" concerns in this matter. Specifically, Marcia Kern, who owed over $28,000 in rent when the bankruptcy petition was filed, had failed to pay post-petition rents. (Marcia Kern testified that she had been unaware that she had to pay the rent). In or about July 1992, Ernest R. Nuzzo, Esq., counsel for the landlord, filed a motion to lift the stay, returnable on August 25, 1992. On August 14, 1992, respondent and Nuzzo reached an agreement whereby M & S would pay a reduced rent. Subsequently, when rents were not forthcoming, Nuzzo contacted the court and his

motion was rescheduled for October 6, 1992. Respondent testified that he notified Marcia Kern of Nuzzo's motion, a contention Marcia Kern denied.

On October 6, 1992, the bankruptcy court entered an order sua sponte appointing a Chapter 11 trustee to oversee the M & S proceeding. The order stated that M & S had failed to file monthly operating reports or to appear in opposition to the motion. The court adjourned to October 13, 1992 the landlord's motion to lift the stay. Respondent advised Nuzzo that, because he had no basis to oppose the motion, he would not appear. Respondent testified that he had told Marcia Kern that he would not oppose the motion. Contrarily, she testified that she knew nothing about the motion. Thereafter, by order dated October 14, 1992, the court converted the matter from a Chapter 11 to a Chapter 7 (liquidation) proceeding.

The complaint alleged that respondent's failure to forward the monthly reports and quarterly fee to the trustee caused the conversion of the case to a Chapter 7 proceeding.[4] Respondent testified, and the DEC found, that the matter was not converted

[4] The DEC determined that respondent received the court's order converting the filing to a Chapter 7 proceeding simultaneously with his receipt of the M & S monthly reports and quarterly fee. Indeed, Marcia Kern's check for the quarterly fee is dated October 8, 1992. Therefore, respondent must have received that check after at least the court's first order appointing the Chapter 11 trustee.

solely for respondent's failure to file monthly reports and pay the quarterly fee but, rather, primarily because of the landlord's motion to be relieved from the stay. The DEC agreed with respondent's testimony that he could not oppose the landlord's motion.

Respondent did not forward the court's October 6 and October 14, 1992 orders to Marcia Kern. The Kerns and respondent disagreed about whether respondent had advised them that a trustee had been appointed and of the conversion to a Chapter 7 proceeding. It appears that, at a minimum, respondent and the Kerns had discussed the possibility of a conversion to Chapter 7 if Marcia Kern did not pay the rent.

According to the Kerns, they learned of the conversion and of the appointment of the trustee in late November 1992, when they drove by M & S and saw an auction sign in the window. Indeed, respondent admitted that neither he nor the court advised the Kerns about the Chapter 7 liquidation sale. (It appears, however, that the Kerns had to know about the appointment of the trustee prior to late November).

In or about October 1992, the Kerns asked respondent to file a Chapter 13 petition in their behalf. The Kerns signed the petition on October 30, 1993, which was filed on November 16, 1992.

According to the Kerns, when the petition was filed, they did not know yet about the conversion of their petition to a Chapter 7 proceeding. (The locks on the store had, however, already been changed). After the Kerns learned of the conversion, they did not terminate respondent's representation.

The Chapter 13 petition was dismissed on June 8, 1993 after the Kerns failed to make the required payments.

In or about early 1993, prior to the dismissal of their petition, the Kerns delivered to respondent copies of four Superior Court-Law Division suits naming M & S and Marcia Kern personally as defendants. Because respondent failed to take any action in these matters, default judgments were entered against Marcia Kern.

Respondent testified that he had explained to Marcia Kern that the Law Division matters should be properly addressed through the bankruptcy proceeding, as is the customary practice; if the creditor had not been named on the bankruptcy petition, as was the case, the creditor would not receive notice of the proceeding from the court, but, because of the automatic stay, default judgments entered after the filing of the petition would be void ab initio and of no consequence. Respondent went on to say that he planned to attend the confirmation hearing and amend the petition at a later date to include the unscheduled creditors. Respondent added

that the petition, however, had been dismissed on June 8, 1993, before he had amended it. Respondent testified that he did not deem the amendment urgent and that at that time, as noted above, he was dealing with the birth of his child and problems in his office.

Marcia Kern denied that respondent's "game plan" was explained to her. The DEC found respondent credible in this regard and determined that he had advised Marcia Kern of his intended plan for the civil actions.[5]

* * *

The complaint charged respondent with violations of RPC 1.1(a) (gross neglect), RPC 1.3 and RPC 1.4(a).

The DEC did not find clear and convincing evidence of gross neglect in respondent's representation of the Kerns and M & S. The DEC stated that

> both Mr. and Mrs. Kern have testified to circumstances that the panel finds impossible to believe. They have testified that they did not know the rents to the corporate landlord had to be maintained current. They admitted that they did not pay the mortgage on their home for four years. Mrs. Kern testified that her objective was to stay in the commercial premises until the end of

[5] In October 1993, respondent sent a letter to the Kerns offering his advice about how to proceed. The Kerns already had new counsel. (The record contains two almost identical versions of this letter; one may have been a draft).

> the lease (November 13, [sic] 1992) and the Panel concludes that she never had any intention of attempting to construct and abide a plan under Chapter 11 or otherwise.
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> * * *
>
> The panel, as stated above, has concern as to the credibility of Mr. and Mrs. Kern. The panel is constrained to apply the maxim falsus in uno, falsus in omnibus. Mr. and Mrs. Kern give the impression that they knew exactly what they were trying to accomplish with reference to their creditors and now that they have reached the end of the line in that regard, for reasons that have never been articulated, they seek to blame the Respondent for the circumstances in which they find themselves and which were of their own making.
>
> [Hearing panel report at 11-12]

Although the DEC believed that respondent informed the Kerns about various aspects of this case, the DEC noted that it would have been more prudent for respondent to write to the Kerns.

Respondent was also charged with a violation of RPC 1.1(b) (pattern of neglect) for failure to communicate in Marakovitz, Poole-Yozsa and Kern. The DEC determined that respondent was guilty of a pattern of neglect for his failure to communicate in Marakovitz and Poole-Yozsa.

The DEC recommended that respondent be reprimanded.

* * *

Upon a de novo review of the record, the Board is satisfied that the conclusion of the DEC that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

The DEC's findings in the Poole-Yozsa matter are sound. Respondent's argument that his client was not "pressing" him for her closing documents is troubling. A client need not "press" an attorney to obtain results. In addition, the language in Poole-Yozsa's letters makes it quite clear that she wanted her documentation with speed. In addition, respondent's failure to forward the seller's mortgage for cancellation until five years after the closing clearly evidenced a lack of diligence. Here, respondent's conduct violated RPC 1.3 and RPC 1.4(a).

The Board also concurred with the DEC's findings in the Marakovitz matter. Both respondent and Lynn Marakovitz agreed that they had discussed the car issue on March 29, 1993. Even accepting as true respondent's contentions that he told Lynn Marakovitz the proper procedure to follow to voluntarily relinquish the car, the fact that she continued to call during the following month meant that she still had questions of respondent. Those questions should have been answered. Here, as in the Poole-Yozsa matter, respondent violated RPC 1.3 and RPC 1.4(a).

The Board agreed with the DEC's finding that respondent was not guilty of misconduct in connection with the student loans.

In the Kern matter, the DEC, which was in a better position to judge the witnesses' credibility, did not believe the Kerns' contentions and dismissed the matter. The Board agreed.

The Board could not agree, however, with the DEC's conclusion that respondent was guilty of a pattern of neglect, in violation of RPC 1.1(b). Ordinarily, neglect in at least three cases is required for a finding of a pattern of neglect - cases of simple neglect were involved here. Thus, the Board dismissed that charge.

Respondent's misconduct in these matters boiled down to lack of diligence and failure to communicate in two matters. Although, as noted above, respondent was privately reprimanded on May 28, 1992 for lack of diligence and failure to cooperate with the DEC, the Board is of the opinion that, even in light of that earlier misconduct, the within infractions do not warrant the imposition of discipline more serious than an admonition. See In the Matter of James A. Key, Jr., Docket No. DRB 95-418 (1996) (admonition imposed where the attorney was guilty of a lack of diligence and failure to communicate in two matters for the same client) and In the Matter of Dexter B. Blake, Docket No. DRB 95-223 (1996) (admonition imposed with the approval of the Court where the attorney was

guilty of lack of diligence and failure to communicate in one matter). Accordingly, the Board unanimously determined to admonish respondent for his conduct in these matters.

One member recused himself.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 6/3/97

By: _____
Lee M. Hymerling
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Theodore Kozlowski
Docket No. 96-460

Hearing Held: January 23, 1997

Decided: June 3, 1997

Disposition: Admonition

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling				x			
Zazzali				x			
Huot				x			
Cole						x	
Lolla				x			
Maudsley				x			
Peterson				x			
Schwartz				x			
Thompson				x			
Total:				8		1	

Robyn M. Hill 6/25/97
Robyn M. Hill
Chief Counsel