SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 93-459

IN THE MATTER OF

KEVIN P. BOSIES,

AN ATTORNEY AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: March 9, 1994

Decided: September 27, 1994

John F. DeBartolo appeared on behalf of the District IX Ethics Committee (DEC).

Respondent appeared pro se.

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

This matter was before the Board based upon a recommendation for public discipline filed by the District IX Ethics Committee (DEC). The formal complaint charged respondent with misconduct in the handling of four matters. Specifically, he was charged with violation of RPC 1.1(a) (gross neglect), RPC 1.1(b) (pattern of neglect), RPC 1.2(a) (scope of representation), RPC 1.3 (lack of diligence), RPC 1.4 (failure to communicate), RPC 1.5 (improper fees), RPC 8.1 (failure to cooperate with the DEC), RPC 8.4 generally and R.1:20-3(f) (failure to cooperate with the DEC). During the DEC hearing, the presenter withdrew the allegation of a violation of RPC 1.5.

Respondent was admitted to the practice of law in New Jersey in 1984 and has been engaged in private practice in Englishtown, Monmouth County. At the time of the within misconduct, respondent was employed by the law firm of Strauss and Hall in Princeton, Mercer County. Respondent left Strauss and Hall in September or October 1991, the approximate time when the firm broke up (T268-269).[1] He has no history of discipline.

The Beyer Matter

In 1990, Shiela Joan Beyer retained Strauss and Hall to represent her, her brothers and her sister in litigation against First Fidelity Bank. The matter arose out of exceptions filed to an accounting for a trust established by Charles H. Rosskam, Beyer's grandfather. First Fidelity Bank was the trustee. The issue was whether the trustee had wrongfully liquidated stocks belonging to the trust after the death of the last life beneficiary, thereby incurring capital gains taxes that would not have been due, if the trustee had made distribution in kind (Exhibit P-15). Beyer, who sought to have the bank repurchase the stocks, was unhappy with the bank's monetary offer (T193-194). Respondent explained that the remaindermen "had almost an emotional attachment to the stocks" purchased by their grandfather (T256-257).

[1] T refers to the transcript of the hearing before the DEC on October 21, 1993.

Respondent undertook discovery in connection with the litigation. Beyer and her siblings provided respondent with sufficient information to comply with discovery requests. Nevertheless, respondent failed to comply with the timeframe set down by a court order entered before he was retained (T196). Accordingly, on December 7, 1990, respondent was sanctioned $300 by the court. The trial, which had been scheduled for November 29, 1990, was rescheduled for February 4, 1991 (Exhibit P-9). The court's letter was never provided to Beyer. Respondent testified that he did not think that he had to disclose to Beyer the sanctions against him (T262). Respondent did inform Beyer, however, that he had not completed discovery. Beyer believed this to mean that depositions had not been completed. She was unaware that respondent had failed to provide complete answers to interrogatories (T224-225).

A settlement conference was held on December 17, 1990. Although Beyer accompanied respondent to the courthouse, she was not present at the conference (T214-215). By letter dated December 20, 1990, respondent informed Beyer of what had transpired (Exhibit P-5).

The record reveals that respondent and Beyer disagreed over whether it was necessary to depose Palmer M. Way Jr., Esq., the scrivener of Rosskam's will (T199). Respondent testified that he attempted to convince Beyer that there was no reason to depose Way, but that she was insistent that he do so (T263). In order to placate Beyer, respondent engaged in an elaborate scheme to mislead

Beyer that, although he was attempting to depose Way, Way was not cooperating. Specifically, respondent prepared a subpoena, dated August 14, 1990, for Way to appear on September 12, 1990, and provided Beyer with a copy (Exhibit P-4). The subpoena, however, was never served on Way. Respondent then prepared a motion requesting sanctions for Way's failure to produce certain documents, which motion he showed to Beyer (Exhibit P-13). Respondent admitted that the motion was never filed and that he was attempting to "stall" Beyer (T251). Respondent went on to advise Beyer that the judge would not sign the order imposing sanctions because the judge did not want to be too hard on Way (T233). Respondent went so far as to have Beyer meet him at a restaurant, on January 17, 1991, for the purpose of accompanying him to Way's deposition. It was Beyer's belief that she, respondent and defense counsel, William J. Thompson, Esq., would meet with the judge at the courthouse and that thereafter Way would be deposed. Thompson was present at the restaurant because he had agreed to meet respondent to give him a copy of the prior will of Charles Rosskam. Respondent and Thompson spoke privately for a few minutes and then Thompson left. Respondent told Beyer that Thompson was returning to his office for additional documents (T206). Respondent further told Beyer that the location for the deposition had been changed to Way's office. The two then traveled one and one-half hours each way to Way's office (T206). Way, of course, did not appear, at which respondent feigned surprise. Beyer and respondent then traveled to the courthouse, ostensibly to advise the trial judge

that Way had not appeared. Upon arrival at the courthouse, Beyer excused herself for a moment. When she returned, respondent told her that the judge would not speak with them because of the ex parte nature of the communication.

Beyer obtained a letter from Thompson to respondent and copied to the court, dated January 22, 1991, outlining respondent's strange behavior on the date of the "deposition" (Exhibit P-11). Beyer learned from the letter that the proceeding had been a sham. When Beyer discovered the truth about the deposition of Way, she contacted respondent's supervising partner, Jeffrey M. Hall, Esq.. The two met on January 25, 1991 (T225). By letter dated January 29, 1991, Hall confirmed that there were problems in the case and asked Beyer if she wanted the firm to continue the representation (Exhibit P-10). Beyer was of the belief that respondent would be taken off her case and that Hall would handle it. Respondent testified that there was a meeting with Hall present, during which he explained his problems to Beyer (T254).

As a result of the transfer of responsibility for the file and lack of discovery, the trial, which had been scheduled for January 4, 1991, was continued at Hall's request until March 14, 1991 (Exhibit P-12). Respondent continued to work on Beyer's case, with the knowledge of and at the behest of Hall. Specifically, respondent prepared the trial brief and also the proposed findings of fact, as relayed to him by Hall during telephone conferences in the middle of the trial (T258-259). Beyer testified that she was unaware that respondent was still working on the case until she saw

the firm's bill later on (T235-236). (The judge ruled against Beyer. An appeal of the decision was handled by another law firm. T236.)

With regard to communication between respondent and Beyer, she testified that occasionally she was unable to reach him, but that it was not often enough to concern her. She stated that "that's to be expected" (T241).

The complaint charged respondent with a violation of RPC 1.1, RPC 1.2(a), RPC 1.3 and RPC 1.4. The DEC was unable to conclude that respondent's misconduct adversely affected the outcome of the trial. The DEC also remarked that it could not be determined whether respondent's behavior adversely affected settlement options. The DEC found that respondent violated RPC 1.2(a), RPC 1.3 and RPC 1.4. The DEC was unable to find that a violation of RPC 1.1(a) had been proven by clear and convincing evidence. Further, the DEC found violations of RPC 8.4(c) and (d), albeit noting that that RPC had not been charged in the complaint.

The Smith Matter

In or about May 1990, Estelle Smith retained respondent to represent her in an appellate matter. Respondent's law firm was paid $2,600 in two installments: $2,300 on May 24, 1990 and $300 in August 1990. Although respondent filed a notice of appeal, he failed to file transcripts with the Appellate Division and to timely file a brief. As a result, Smith's appeal was dismissed.

Respondent failed to so advise Smith. Smith learned of the dismissal in February 1992, when she contacted the court.

Respondent testified that Smith was unable to have the order vacated. He has been assisting her in that endeavor at no fee (T282-283).

The complaint charged respondent with a violation of RPC 1.1(a), RPC 1.3 and RPC 1.5. In his answer, respondent admitted that he violated RPC 1.1 and RPC 1.3, but denied a violation of RPC 1.5. During the DEC hearing, the presenter noted that this matter had been the subject of a fee arbitration determination and withdrew the alleged RPC 1.5 violation. The DEC determined that respondent violated the two remaining RPCs, RPC 1.1(a) and RPC 1.3.

The Commins Matter

Kathleen Commins retained respondent in 1989 to represent her in connection with an employment discrimination/harassment matter, arising from an alleged sexual assault at her place of employment, in New York (T11-12, 45). Respondent also represented Kathleen Commins' sister and mother in unrelated matters.

At the time respondent was retained, Kathleen Commins had already filed a complaint with the Human Rights Agency (HRA) in New York, approximately four years earlier, and had already appeared at an evidentiary hearing, without counsel (T12, 72). Respondent contacted the HRA and was advised by Roslyn Spriggs, the HRA employee before whom Commins appeared, that they were awaiting a determination from the commissioners. Respondent subsequently

contacted Spriggs' supervisor for further information and permission to examine the file. Respondent and Commins went to the HRA on one occasion, in 1989, to review the file, at which time respondent spoke with Spriggs (T113-115).

Respondent verbally advised Commins that he could not file a suit in her behalf until there had been a determination from the HRA. During the first six weeks of his representation of Commins, respondent contacted the HRA approximately six times. Over the course of the next two years, he telephoned the HRA only on one or two occasions (T135-136).

In or about January 1992, Commins received a determination letter from the HRA, informing her that there was no probable cause to proceed (T21, 46). Following respondent's communication with Commins as to her options at that time, he had the case transferred to the EEOC. In late 1992, Commins received a Declination-to-Proceed letter from the EEOC. Accordingly, on February 26, 1993, respondent filed suit in federal court (Exhibit P-1).

Thereafter, respondent received a copy of the summons from the clerk's office. Respondent failed to have the summons served. Respondent contended that he learned that Commins had filed a grievance against him on October 12, 1992, and contacted her to determine if she still wanted him to proceed. She instructed him to file the complaint. Although the record is not clear, it appears that respondent proceeded at that time to file the complaint, only to protect her rights under the statute of limitations. Respondent explained that, on March 1, 1993, he sent

Commins a copy of the complaint and a letter stating that she had to retain a new attorney. Respondent claimed that Commins had informed him by telephone that she would do so (T117-118). Commins, in turn, denied that respondent had told her to obtain new counsel (T40).

Respondent did not notify the court that he was withdrawing from the case (T137). Respondent explained that Commins "fired" him at least three times during the course of the representation and that her mother would then ask him to continue (T118-119). The last "firing" was on or about the day that respondent filed the complaint (T122). In fact, Commins testified that, in 1990, she informed respondent that she no longer wished him to represent her, but then elected to continue to be represented by respondent because she was unable to find another attorney and because respondent wanted to go on representing her (T52-53, 57).

Marie Commins, who testified via telephone before the DEC, explained that her daughter was under a lot of stress and that she did not mean it when she discharged respondent (T94). Marie Commins added that she had offered to find another attorney, but that respondent wanted to proceed with the representation (T79). Respondent testified that he expected that Commins would obtain new counsel.

Commins did not obtain new counsel. She received a notice from the court that her case was on the dismissal list for October 25, 1993, for failure to prosecute (Exhibit P-2). Respondent also received a copy of the notice. He testified that he attempted to

call Commins, but that her telephone had been disconnected. Respondent then contacted the court and was told to appear on that day (four days after the DEC hearing) and to file a motion to be relieved (T121). Marie Commins also contacted the court in an effort to prevent the matter from being dismissed. She testified that her daughter has been unable to obtain a new attorney (T103-104).

Commins testified that she made 200 telephone calls to respondent's office and home between 1989 and the time of the DEC hearing. Respondent did not return her calls. She also stated that she was forced to telephone the HRA for information, when respondent failed to communicate with her (T47-48, 161). Respondent, in turn, testified that Commins would frequently telephone him several times within a short period of time, even though she was aware that he was not in the office or at home. Respondent denied that the numerous calls from Commins to his law firm went unreturned, as she alleged (T119). He admitted that he did not return each of her calls, but claimed that he returned a sufficient number to keep her sufficiently apprised of the status of her case. Commins did not produce her telephone bills.

Marie Commins claimed that she often accompanied her daughter to meetings with respondent and also would telephone him to obtain information on the matter. She testified that, since February 1993, she telephoned respondent two to three times per week between 6:00 p.m. and 10:00 p.m., and that Kathleen called him during the day and evenings (T82-83). She stated that respondent did not

return any of those calls (T73). She did not know if the number she was calling was respondent's home or office (T102-103).

Respondent testified that there were times during his representation of Kathleen Commins when she had asked that he not discuss the matter with her mother. He stated that he honored that request and explained the situation to Marie (T133-134, 139). Respondent never billed Kathleen Commins for his work (T139).

The complaint charged respondent with a violation of RPC 1.1 and RPC 1.3. The DEC found insufficient evidence to establish a violation of RPC 1.3, reasoning that the excessive delay at the HRA was beyond respondent's control and that he had acted promptly to transfer the matter to the EEOC and to file suit in Commins' behalf. The DEC also found a lack of clear and convincing evidence of a violation of RPC 1.4 (a charge not contained in the complaint). However, the DEC determined that respondent's failure to serve the summons and complaint in the federal suit or to file appropriate documents to be relieved as counsel constituted a violation of RPC 1.1(a).

The Williams Matter

In or about January 1990, John C. Williams met with respondent regarding a post-judgment matrimonial matter involving child support. Respondent explained that, because Williams had been seriously ill, child support arrearages had grown to approximately $9,800 (T174, 180). After Williams' ex-wife obtained a default judgment against him in a Texas court and he was charged with

contempt, Williams contacted the law firm of Strauss and Hall, which had previously represented him. Hall had the immediate problem resolved and referred the matter to respondent (T155).

Williams wanted respondent to insure that he was in compliance with court orders and to have the arrearages matter finally settled. Respondent filed a notice of motion and appeared in court on William's behalf (T157-158). In April or May 1990, the court instructed counsel to attempt to agree on the amount of the arrearages and to negotiate a resolution of the outstanding issues. Williams, who had provided respondent with specific instructions as to the relief he desired, believed that negotiations were ongoing (T160-161). In February 1991, while in respondent's office, Williams saw a court order that did not bear "any resemblance to the offer [he] was prepared to accept" (T161-162). Williams discussed the problems with respondent, who assured him that he would take care of it (T162-163). While in respondent's office, Williams gave him a check for $300 for partial payment of the arrearages, which check was to be delivered to the attorney of Williams' ex-wife. Approximately one year later, however, Hall found the check in the file. By letter dated January 14, 1992, Hall sent the check back to Williams (Exhibit P-3). Respondent testified that he must have misplaced the check (T178).

In March 1991, Williams received a notice from the Probation Department, containing provisions that were contrary to his stated wishes to respondent. The notice also threatened to report the arrearages to credit bureaus, which ultimately did occur (T163-

164). Williams was unable to contact respondent via telephone or letter until May 1991 (T164).

When Williams was notified that an enforcement hearing was to be held on May 21, 1991, he contacted respondent. Respondent then contacted the court, at which time he was told that there was no hearing scheduled (T177). Respondent so advised Williams (T168-169). In fact, a hearing did take place, of which respondent was unaware, whereupon a default judgment was entered against Williams. Further, a bench warrant was issued for Williams' arrest. Williams was so advised, on or about June 1, 1991, and notified respondent, who was able to have the warrant vacated (T169).

In or about August 1991, Williams received a second notice of potential incarceration. He contacted respondent, who advised him that he had obtained an order vacating the judgment (T171). Although Williams requested a copy of the order, it was never provided to him. Respondent testified that he had no recollection of the August arrest order, speculating that it might have been signed after he left Strauss and Hall (T177).

Respondent testified that there were difficulties in this case, in that he or Williams would not receive notices of the proceedings (T177). He admitted, however, that he should have been more diligent in having the February order corrected (T177). Further, respondent failed to advise Williams that a court appearance was continued, thereby causing Williams to fly unnecessarily to New Jersey from South Carolina. To his credit,

however, respondent reimbursed Williams for that expense (T172, 179).

The complaint charged respondent with a violation of RPC 1.2(a), RPC 1.3 and RPC 8.4. Respondent admitted the violations. The DEC noted that the record would not have clearly and convincingly supported a finding of violation of RPC 8.4, if not for respondent's admission. The DEC also found a violation of RPC 1.1(a), which was not specifically charged in the complaint.

The DEC also concluded that respondent had exhibited a pattern of neglect in the handling of matters generally, in violation of RPC 1.1(b).

Failure to Cooperate with the DEC

Respondent was charged with violation of RPC 8.1 and R.1:20-3(f) for failure to cooperate with the DEC investigator, John F. DeBartolo, Esq. By letter dated August 28, 1992, DeBartolo requested information from respondent about the Williams matter. Respondent did not reply to that letter. On December 21, 1992, DeBartolo again requested information about Williams and also enclosed the grievances in Commins and Smith (T275, Exhibits P-18 and P-19). This time, respondent contacted DeBartolo, by letter dated December 30, 1992, contending that he did not have the Williams file. Respondent requested an extension for a reply until January 8, 1993 (Exhibit P-20). DeBartolo assumed that respondent meant that he would be providing a response in all three matters. No response was forthcoming, however. In his answer, respondent

explained that he believed that Commins was withdrawing her grievance and that, therefore, no response was necessary (T278). With regard to the other matters, respondent claimed that he misunderstood DeBartolo's letter to mean that he did not need to reply and that DeBartolo would complete his investigation without respondent's input (T279). Respondent believed that that amounted to an admission on his part of the allegations in Smith (T281). Respondent did reply to the investigator's requests for information about the Beyer matter.

The DEC found that respondent violated R.1:20-3(f), but, curiously, not RPC 8.1(b).

* * *

In sum, the DEC found that respondent had violated RPC 1.1(a) and (b), RPC 1.2(a), RPC 1.3, RPC 1.4, RPC 8.4(c) and (d) and R.1:20-3(f). The DEC expressed concern that respondent's supervisors did not decrease his workload, despite their awareness that respondent had been diagnosed as suffering from an anxiety disorder. Although respondent could not recall if his employers had lightened his workload (T261), in its report the DEC expressed concern for the supervisors' actions:

> Finally, the Panel respectfully refers to this Board its concern regarding the role of Respondent's supervisory attorneys at his former law firm, Strauss and Hall.
>
> The grievances which are the subject of this matter relate to legal matters handled by Respondent while he was an associate in the law firm known as Strauss & Hall, Princeton, New Jersey.

Respondent's supervisory attorneys (Messrs. Strauss and Hall) were aware of Respondent's diagnosis of anxiety neurosis in September or October of 1990. Respondent testified that one day, he could not get off the elevator to enter the office. He immediately sought treatment from a psychiatrist and Mr. Hall spoke to his psychiatrist at that time.

It is, of course, not known what was told to Mr. Hall. However, it appears that no effort was taken to review Respondent's files or lighten his case load despite the supervisors' knowledge of Respondent's disability.

Indeed, when Mr. Hall became fully aware of the charade involved in the Beyer matter, Respondent continued to work on said file and in fact prepared the trial brief and findings of fact.

RPC 5.1 provides that every law firm authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to insure that member lawyers or lawyers otherwise participating in the organization's work, undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct. Furthermore, a lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

There appears to be little doubt but that Respondent's difficulties became known in the fall of 1990, at a time when the consequences of Respondent's unchecked actions could easily have been avoided or mitigated. Although there is absolutely no indication that any client of Respondent has been deprived of any appropriate judicial remedies as a result of the actions of Respondent, it is clear that the clients herein were forced to be subjected to delay in the legal process, embarrassment, temporary harm, and a loss of confidence and respect for the profession, all of which most likely could have been mitigated had Respondent's workload been lightened or otherwise supervised. Further investigation appears warranted.

[Panel Report at 18-19]

CONCLUSION AND RECOMMENDATION

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 Board, however, disagrees with the DEC's finding of a violation of R.1:20-3(f). Respondent ultimately cooperated with the DEC, was candid and admitted much of his misconduct. Moreover, it is possible that respondent misunderstood the meaning of DeBartolo's letter. Accordingly, the Board recommends the dismissal of this charge.

The DEC found, and the Board agrees, that respondent violated RPC 1.1(a) and (b), RPC 1.2(a), RPC 1.3, RPC 1.4, RPC 8.4(c) and (d). The most disturbing aspect of respondent's misconduct was the charade he played-out with Beyer regarding Way's deposition. This violation of RPC 8.4(c) is troubling, as respondent perpetuated his misconduct by continuing to build on his initial misrepresentation. It further appears that respondent, in his attempts to continue to "stall" Beyer, was caught in a web created by his false statements to his client, from which he was unable to free himself. This level of deceit perpetrated on a client is unacceptable.

Respondent testified that, in 1990, he was diagnosed with an anxiety disorder. Respondent explained to the DEC that he currently handles his problem by prioritizing his responsibilities, maintaining a light case load and utilizing breathing exercises. Respondent also explained that he was planning to begin employment with a corporation, in early 1994, which would require some legal

work and would also utilize his background in accounting. Respondent anticipated that considerably less than half of each day would be spent on legal work (T290).

Respondent produced no evidence to support the claim that he suffers from a psychological problem. As the DEC noted, this difficulty was allegedly the cause of his neglect of cases in 1990 and 1991. Yet, his unethical conduct continued: he failed to reply to grievances in 1992 and failed to follow through in the Commins matter in 1993. In fact, respondent was asked if he thought that his condition had affected his handling of the Commins matter. He replied "I don't believe so" (T137).

There is little in this record to link respondent's alleged psychological problem to his unethical conduct. It cannot, thus, be considered as a mitigating factor in determining the proper quantum of discipline.

In light of respondent's serious misconduct, particularly in the Beyer matter, a six-month suspension is the appropriate discipline. The Board unanimously so recommends. See In re Martin, 118 N.J. 239 (1990) (six-month suspension for a pattern of neglect in seven matters, failure to keep clients informed of case status and entering into settlement agreements without authorization from clients in two matters) and In re Restaino, 127 N.J. 403 (1992) (six-month suspension for gross neglect in one case, compounded by misrepresentation of the status of that matter to the client for a two-year period. The attorney had previously been privately reprimanded).

In addition, the Board recommends that, prior to reinstatement, respondent submit a psychological report attesting to his fitness to practice law. The Board further recommends that, upon reinstatement, respondent be required to practice under the supervision of a proctor for a one-year period.

One member recused himself. One member did not participate.

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

Dated: 9/27/1994 By: Raymond R. Trombadore

Raymond R. Trombadore
Chair
Disciplinary Review Board